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The Role of "De Minimis" Injury in the Excessive Force Determination: *Taylor v. McDuffie* and the Fourth Circuit Stand Alone

Troy J. Aramburu

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I. INTRODUCTION

The United States occupies a unique position with regard to those who are suspected of having committed a crime or who have actually been convicted and incarcerated. On one hand, there is an obvious need to punish those who have committed crimes; yet, on the other, the Constitution affords both suspected and convicted criminals such basic protections as the right "against unreasonable searches and seizures,"[1] the right to "a speedy and public trial, by an impartial jury,"[2] and the right to be free from "cruel and unusual punishments."[3]

While not every push or shove inflicted on an inmate or pretrial detainee amounts to cruel and unusual punishment, there is a fine line to be drawn between the amount of force necessary to maintain order in an institutional setting and force so excessive that it amounts to punishment. Likewise, there must be a balance between protecting the constitutional rights of inmates or pretrial detainees, and furnishing the security that the corrections officers or police officers must provide while the inmate or detainee is in custody, especially during a disturbance. One court has held, "[w]hether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates."[4] Furthermore, "'[t]he management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women,' accurately depicts the tensions inherent in custodial settings, be they pre-trial or post-conviction."[5]

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1. U.S. Const. amend IV.

2. U.S. Const. amend VI.

3. U.S. Const. amend VIII.

4. Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 321-22 (1986)).

5. Riley v. Dorton, 115 F.3d 1159, 1166 (4th Cir. 1997) (en banc) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1973)).

The Eighth Amendment provides that prisoners and pretrial detainees will be protected against "cruel and unusual punishment,"[6] while the Due Process Clause of the Fourteenth Amendment establishes that prisoners and pretrial detainees can bring claims for excessive force that amount to "punishment."[7] Further, 42 U.S.C.A. § 1983 provides a means by which victims of cruel and unusual punishment or excessive force can litigate their claims against the offending party or parties:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .[8]

However, the crux of most "excessive force" or "cruel and unusual punishment" cases boil down to whether an inmate can prove, typically only with his own affidavit,[9] that he or she was subjected to an illegal amount of force for the sake of punishment. One way this has emerged in the case law is for the plaintiff to put on evidence as to the extent of any injury sustained as proof of the force used to produce the injury,[10] the argument being that if the injuries are horrific, surely the amount of force used to give the injury was excessive. But what if the inmate or pretrial detainee who is claiming he or she has been the victim of excessive force has only slight or de minimis injury?[11] At least one court, the Fourth Circuit,[12] has held that de minimis injuries are conclusive evidence of de minimis force and thus no excessive force claim can stand. This is the issue presented in this note: should the existence of de minimis injury be only *one* factor in the determination of excessive force claims under the Fourteenth Amendment and section 1983, or should it be the *conclusive* factor? This issue stands at the heart of the Fourth Circuit's decision in *Taylor v. McDuffie*.[13]

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6. U.S. Const. amend VIII.

7. *See* U.S. Const. amend XIV; *see also Riley*, 115 F.3d at 1166 (4th Cir. 1997) (en banc) ("We conclude[d] that the excessive force claims of pretrial detainees are governed by the Due Process Clause of the Fourteenth Amendment.").

8. 42 U.S.C.A. § 1983 (1994) (emphasis added).

9. *See* Norman v. Taylor, 25 F.3d 1259, 1265 (4th Cir. 1994) (Hall, J., dissenting).

10. *See* Hudson v. McMillian, 503 U.S. 1 (1992).

11. De minimis means: "The law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles. Provision is made under certain criminal statutes for dismissing offenses which are 'de minimis.'" BLACK'S LAW DICTIONARY 431 (6th ed. 1990).

12. *See* Taylor v. McDuffie, 155 F.3d 479 (4th Cir. 1998).

13. *See id.*

II. BACKGROUND

The Fourth Circuit's decision in *Taylor* stands alone among the circuit courts in holding that if a plaintiff under section 1983 can only show that he or she has suffered a de minimis injury, it is conclusive evidence that the plaintiff was subjected to de minimis rather than excessive force, and thus the judicial inquiry need not go further.[14] To fully understand the Fourth Circuit's position, it is necessary to examine the cases upon which the Fourth Circuit relied.

In *Hudson v. McMillian*,[15] the Supreme Court addressed the issue of whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury.[16] The Court held that it may.[17] The facts of *Hudson* maintain that one morning, Hudson, an inmate at a state penitentiary, and one of the defendants, McMillian, a corrections officer, got into an argument. After the argument, McMillian and several other officers handcuffed and shackled the inmate, took the prisoner from his cell and began walking him to the administrative lockdown area.[18] Hudson testified that on the way to the lockdown area, McMillian punched Hudson in the mouth, around the head, and in the stomach while another officer held Hudson in place and kicked and hit him from behind.[19] As a result of the alleged beating, Hudson sustained minor bruises and swelling of his face and mouth, loosened teeth and a cracked partial dental plate.[20]

Hudson sued the corrections officers under section 1983 alleging a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.[21] The district court found for Hudson, but the Fifth Circuit, on appeal, held that Hudson could not prevail on his Eighth Amendment claim because his injuries were minor and required no medical attention.[22]

To determine whether or not the actions allegedly perpetrated by the officers rise to the level of excessive force, the Supreme Court in *Hudson* sets out an "either/or" test to classify the force used. Courts must ask whether the force was applied (1) "in a good-faith effort to maintain or

14. *See id.* at 486 (pointing out that "our circuit stands alone among all other courts of appeal in holding that de minimis injury, without more, is dispositive of an excessive force claim").

15. 503 U.S. 1 (1992).

16. *See id.* at 4.

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* at 5.

restore discipline," or (2) "maliciously and sadistically to cause harm."[23] If the court finds that the force used by the officers was a "good-faith effort to maintain" discipline, the force will not be deemed to be excessive or to fall under cruel and unusual punishment. However, if the force was propagated to "maliciously and sadistically" cause harm, the victim's constitutional right to be free from excessive force and cruel and unusual punishment was violated. The extent of the injury becomes relevant because the court must decide whether the force used was in good faith or used to cause harm.

The Court in *Hudson* held that the extent of the plaintiff's injury is merely a factor used in the determination of whether the prisoner has an excessive force claim and stated "the extent of injury suffered by an inmate is *one factor* that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation."[24] Thus, the absence of serious injury, while relevant in determining whether or not excessive force had been used, is not dispositive and thus does not end the inquiry.

In 1994, the Fourth Circuit had an opportunity to adopt the Supreme Court's reasoning from *Hudson*. However, instead of repeating the *Hudson* rule that evidence of de minimis injury is only one factor in the court's analysis of an excessive force claim, the Fourth Circuit adopted a modified *Hudson* rule stating that de minimis injury will be evidence of de minimis force.[25]

In *Norman v. Taylor*,[26] an inmate at the Norfolk City Jail brought a section 1983 action against Deputy Taylor alleging excessive force in violation of the Eighth Amendment.[27] Norman insists that while he was incarcerated at the city jail, Taylor first threatened to stab Norman in the chest with a set of cell keys, and then swung the keys at the inmate's face striking him once on the thumb as the inmate tried to protect himself.[28] The only evidence submitted at trial that Norman's thumb was even injured was a report filed by the prison doctor in which the doctor stated that, in his opinion, Norman was faking an injury.[29] The Fourth Circuit found that since the district court held that Norman did not produce any evidence "from which one could reasonably infer that Norman was injured, if at all, in more than a de minimis way when Sergeant Taylor

23. *Id.* at 7.
24. *Id.* at 7 (emphasis added) (quoting Whitley v. Albers, 475 U.S. 312, 321 (1986)).
25. *See* Norman v. Taylor, 25 F.3d 1259, 1262 (4th Cir. 1994).
26. *See generally id.*
27. *See id.* at 1260.
28. *See id.* at 1260-61.
29. *See id.* at 1261.

swung his keys at him, we conclude that any force used by Sergeant Taylor was de minimis and thus could not have violated the Eighth Amendment."[30]

The rule that comes out of *Norman* is that a plaintiff cannot maintain a section 1983 action for the use of excessive force where the plaintiff's injuries are de minimis.[31] *Norman* interprets *Hudson* as holding that while the Eighth Amendment does not require a prisoner to prove he has suffered "'significant injury' at the hands of prison officials," de minimis uses of force "are beyond 'constitutional recognition'" as long as "'the use of force is not of a sort repugnant to the conscience of mankind.'"[32] Furthermore, the *Norman* court read *Hudson* as providing that while the Supreme Court "excepted from the Eighth Amendment only de minimis uses of force, it seemed to affirm by negative implication . . . that de minimis injury can serve as conclusive evidence that de minimis force was used."[33]

In 1997, the Fourth Circuit handed down yet another excessive force opinion in *Riley v. Dorton*.[34] A pretrial detainee, Charles Riley sued a Henrico County detective James Dorton, asserting that Dorton had used excessive force against Riley while he was awaiting booking.[35] Riley alleges that after he verbally insulted Dorton, the detective "became angry at Riley's insult, came over from the desk where he had been filling out papers, and inserted the tip of his pen a quarter of an inch into Riley's nose, threatening to rip it open" after which he slapped Riley across the face.[36] The district court granted Dorton's summary judgment motion stating that any injuries that Riley may have received were de minimis, and, therefore, conclusive proof that only de minimis force was used by Dorton.[37] The Fourth Circuit, following its reasoning in *Norman*, affirmed.

The court held that Riley's excessive force claims did not fall under the Eighth Amendment's protection against cruel and unusual punishment since the amendment does not apply until after conviction and sentencing and Riley had not been convicted or sentenced at the time of the incident with Dorton.[38] However, the court did hold that the analysis by which de minimis injury proves only de minimis force applies equally to

30. *Id.* at 1262.
31. *See id.*
32. *Id.* at 1262 (quoting Whitley v. Albers, 475 U.S. 312, 327 (1986)).
33. *Id.* at 1262.
34. 115 F.3d 1159 (4th Cir. 1997).
35. *See id.* at 1160.
36. *Id.* at 1161.
37. *See id.* at 1160.
38. *See id.* at 1166.

claims of excessive force brought by pretrial detainees under the Fourteenth Amendment, thus covering the claim by Riley.[39] The *Riley* court firmly established that, at least in the Fourth Circuit, "[a]n injury need not be severe or permanent to be actionable under the Eighth Amendment, but it must be more than de minimis. We think this same rule applies to excessive force claims brought by pre-trial detainees."[40]

Thus, the stage was set for the Fourth Circuit's next excessive force case, *Taylor v. McDuffie*. Even though *Hudson* had explicitly stated "the extent of injury suffered by an inmate is one factor" in the excessive force determination,[41] the rule in the Fourth Circuit after *Norman* and *Riley* was that the extent of injury factor was dispositive to an excessive force claim if the plaintiff's injury was only de minimis.[42]

III. TAYLOR V. MCDUFFIE

A. Facts

On July 4, 1990, John R. Taylor, Jr. and his girlfriend Darsilene Cabbagestalk were arrested for drunk and disorderly conduct and driving while under the influence of alcohol, respectively. Cabbagestalk was taken to the State Highway Patrol Office and Taylor was transported to the Craven County Jail for booking and appearance before a magistrate. Once at the jail, Officer Ronnie Lovick, one of the defendants in the case, seized two identification cards from Taylor and placed them on the counter in the lobby of the magistrate's office. One of the cards belonged to Taylor and the other to Cabbagestalk.[43]

During this time, at the State Highway Patrol Office, another officer was trying to give Cabbagestalk a breathalyzer test, to which she refused to cooperate. In an effort to determine Cabbagestalk's identity, the officer conducting the test telephoned Officer Lovick to see if he knew her name. When Officer Lovick questioned Taylor as to his girlfriend's identity, Taylor not only refused to give the officer Cabbagestalk's name, but snatched her identification card from the counter and stuck it in his mouth. A struggle ensued during which the officers forced Taylor to "cough up" the card.[44]

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39. *See id.*
40. *Id.* at 1167 (citations omitted).
41. 503 U.S. at 7.
42. *See Norman*, 25 F.3d at 1262; *Riley*, 115 F.3d at 1166.
43. *See* Taylor v. McDuffie, 155 F.3d 479, 480-81 (4th Cir. 1998).
44. *See id.* at 481.

The amount of force used by the officers while restraining Taylor is the crucial point in the case, thus it is not surprising that this is the point of the most contention between the parties. According to Taylor, and another detainee who claims to have witnessed the altercation while also housed at the station,[45] Officer Lovick "grabbed [Taylor] by the collar, pointed his gun at him, and demanded that he turn over his girlfriend's license or he would 'blow [his] brains out.'"[46] Taylor still refused.[47] At this point, Taylor alleges that Officer Lovick, joined now by the other defendant in the case, Deputy Ernest McDuffie, began to repeatedly punch and kick him about the head and ribs.[48] In particular, Taylor claims that Deputy McDuffie, still in an effort to retrieve the license, "placed his knee in the lower part of Taylor's back and at the same time grabbed Taylor by the head and started pulling his head backwards until his back popped."[49] Taylor also alleges that McDuffie jabbed a small wooden baton inside his nose and mouth with sufficient force to cause his nose to hemorrhage and to crack a tooth.[50]

The officers, on the other hand, maintain that they used the appropriate amount of force that was necessary to obtain Cabbagestalk's identification card from Taylor.[51] In fact, Lovick asserts that not only did Taylor swipe his girlfriend's license from the counter, but that he also grabbed a file blade as well.[52] When Taylor allegedly used the blade to threaten the officer, Lovick drew his weapon, prompting Taylor to drop the file blade and to stick the license in his mouth.[53] The officers quickly restrained Taylor by placing leg irons and handcuffs on him and taking him to the booking area. Once in the booking area, the officers contend that Taylor "violently resisted" their attempts to remove the license from his mouth.[54] It was only then, according to the defendants, that the officers used the baton to apply pressure under Taylor's nose to force him to release the card from his mouth.[55] Once the card was recovered, the defen-

45. There is indeed some question as to whether this other detainee, Nelson Bryant, was even at the Craven County Jail. In an affidavit submitted by Taylor, Bryant testifies that he was, yet according to the jail's records and the officers themselves, Bryant was not present at the altercation in dispute. *See id.* at 482.

46. *See id.* at 481.

47. *See id.*

48. *See id.*

49. *Id.*

50. *See id.* at 481 n.5 (noting that Officer Lovick admitted in an internal investigation report that it was he, and not McDuffie, who used the baton on Taylor).

51. *See id.*

52. *See id.* ("Officer Lovick claimed that Taylor fought with him to prevent Lovick from getting the license, grabbed the file blade from the counter, and threatened him.").

53. *See id.*

54. *Id.* at 481.

55. *See id.*

dants removed the handcuffs and leg irons and placed Taylor in a holding cell.[56]

Nine hours after Taylor was released, he went to Craven Regional Medical Center to receive medical care for the injuries he sustained at the jail.[57] Taylor's medical records show that he received "abrasions on his wrists and ankles, slight swelling in the jaw area, tenderness over some ribs, and some excoriation of the mucous membranes of the mouth. No scalp lesions, bone fractures, swelling in the tissue around the spinal column, cracked teeth, or injuries to his nose were found."[58]

Nonetheless, Taylor filed an action under 42 U.S.C.A. § 1983 alleging that Officer Lovick and Deputy McDuffie used excessive force against him while he awaited his initial appearance before the magistrate.[59] Taylor sought compensatory and punitive damages totaling $20 million.[60] The district court found that the affidavits submitted by the defendants supporting their version of the events, and opposing Taylor's allegations, carried the day.[61] The district court analyzed Taylor's section 1983 excessive force claim under the Fourth Amendment and granted the defendants' motion for summary judgment on qualified immunity grounds.[62]

B. The Court's Reasoning

On appeal, the Fourth Circuit started its analysis of Taylor's section 1983 excessive force claim by "identifying the specific constitutional right allegedly infringed by the challenged application of force."[63] The court acknowledged the fact that the district court analyzed Taylor's excessive force claim under the Fourth Amendment, even though the Fourth Circuit had recently joined several circuits in holding that the "Fourth Amendment 'does not extend to the alleged mistreatment of arrestees or *pretrial detainees* in custody.'"[64] Instead, the court stated that "the excessive force claims of *pretrial detainees* are governed by the Due Process Clause of the Fourteenth Amendment."[65] According to the court, for Taylor to succeed on a claim of excessive force under the Due Proc-

56. *See id.*
57. *See id.*
58. *Id.* at 482.
59. *See id.* at 480.
60. *See id.*
61. *See id.*
62. *See id.*
63. *Id.* at 482 (quoting Graham v. Connor, 490 U.S. 386, 394 (1989)).
64. *Id.* at 483 (emphasis added) (quoting Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997)).
65. *Id.* at 483 (emphasis added) (quoting Riley, 115 F.3d at 1166)).

ess Clause of the Fourteenth Amendment, he must show that the defendants "inflicted unnecessary and wanton pain and suffering."[66] Further, the court stated that the applicable test is whether "the force applied was 'in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"[67]

Taylor conceded that the defendants were entitled to use force to remove Cabbagestalk's license from his mouth,[68] so the real question for the court came down to whether or not the force was applied "maliciously and sadistically for the very purpose of causing harm" after Taylor released the identification card.[69] Since both parties have conflicting views on what happened at the Craven County Jail, the court relied on a combination of the district court's finding that Taylor's version of events was less credible than the accounting given by the defendants, and the fact that Taylor's medical report showed nothing more than de minimis injuries to find that the district court was justified in granting defendant's motion for summary judgment.[70]

In discussing to what degree the severity of Taylor's injuries related to his claim of excessive force, the court held that a failure to show more than a de minimis injury defeats an excessive force claim.[71] The court relied on its previous decision in *Norman v. Taylor*,[72] which held that "absent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is de minimis."[73] The court continued, "[e]xtraordinary circumstances are present when 'the force used [is] of a sort repugnant to the conscience of mankind . . . or the pain itself [is] such that it can properly be said to constitute more than de minimis injury.'"[74] While the language the court cites expressly applies to Eighth Amendment excessive force claims, the court acknowledges that the same standard is now applicable to excessive force claims brought by pretrial detainees such as Taylor under section 1983.[75] The court found that the injuries Taylor did receive, temporary irritation and swelling, were precisely the types of injuries that the Fourth Circuit considers de minimis. Further, the Court found that there were no

66. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

67. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)).

68. *See id.* at 483.

69. *Id.*

70. *See id.*

71. *See id.*

72. 25 F.3d 1259 (4th Cir. 1994) (en banc).

73. *Id.* at 1263.

74. *Id.* at 1263 n.4.

75. *See Taylor*, 155 F.3d at 484 ("In Riley, we extended the holding of Norman to excessive force claims brought by pretrial detainees.").

"extraordinary circumstances" since the force that Lovick and McDuffie used was not the "sort repugnant to the conscience of mankind," nor was it the kind of force that produced more than de minimis pain. Thus, since Taylor could show no more than de minimis injury or extraordinary circumstances, the court held that his excessive force claim must fail, and that the defendants' motion for summary judgment must be affirmed.[76]

On the other hand, the dissenting opinion,[77] along with the Second,[78] Fifth,[79] Seventh,[80] Eighth,[81] and Eleventh Circuits, [82] held that the severity of the injury sustained by the pretrial detainee is to be treated as only one among many factors in determining whether or not the force used by the officers was excessive. Additionally, the dissent points out that the medical records, which were heavily relied upon by the court, should not be weighted any heavier against the plaintiff than any other type of evidence.[83] This also accords with the circuits listed above. The dissent also indicates that there is an exception to the majority's "de minimis injury" rule: "even assuming for the sake of argument that Taylor's injuries were de minimis, we have previously held that the de minimis rule does not apply to conduct 'repugnant to the conscience of mankind . . . .'"[84] Thus, the majority not only went against the weight of other circuit courts in holding de minimis injuries are conclusive of de minimis force, but also refused to categorize the treatment Taylor received as falling under the "repugnant to the conscience of mankind" exception that they endorsed.

IV. ANALYSIS

What the Fourth Circuit has done in *Taylor v. McDuffie* is illuminate two problems relating to the standard applicable to excessive force claims by pretrial detainees under 42 U.S.C.A. § 1983. First, the *Taylor* court holds that the applicable standard for such claims is governed by the Fourteenth Amendment's Due Process Clause.[85] This holding is consistent with the Fifth, Seventh, and Eleventh Circuits' holdings.[86] The Second, Sixth, and Ninth Circuits, along with the district court, have ana-

76. *See id.* at 480.
77. *See id.* at 485.
78. *See* Davidson v. Flynn, 32 F.3d 27, 29 n.1 (2d Cir. 1994).
79. *See* Ikerd v. Blair, 101 F.3d 430, 434 (5th Cir. 1996).
80. *See* Lunsford v. Bennett, 17 F.3d 1574, 1582 (7th Cir. 1994).
81. *See* White v. Holmes, 21 F.3d 277, 281 (8th Cir. 1994).
82. *See* Harris v. Chapman, 97 F.3d 499, 505 (11th Cir. 1996).
83. *See Taylor*, 155 F.3d 487.
84. *Id.* (quoting *Norman*, 25 F.3d at 1263 n.4).
85. *See id.* at 483.
86. *See id.* at 482-83.

lyzed such claims under the Fourth Amendment.[87] Second, the *Taylor* court holds that a failure to show more than a de minimis injury will defeat an excessive force claim.[88] The Second, Fifth, Seventh, Eighth and Eleventh Circuits, along with the dissent in *Taylor*, have held that the severity of the injury sustained by the pretrial detainee should be treated as only one among many factors in determining whether or not the force used by the officers was excessive.[89] As stated previously, this note is concerned only with the severity of injury issue raised in the case.

A. De Minimis Injury: One Factor or the Conclusive Factor?

The Fourth Circuit has either misinterpreted or misunderstood the Supreme Court's decision in *Hudson*. The *Norman* court states:

> Finding ourselves in agreement with the Fifth and Eighth Circuits that an excessive force claim generally should not lie where an injury sustained by the plaintiff is de minimis,[90] and that *Hudson* does not foreclose and indeed is consistent with such a view,[91] we hold that, absent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is de minimis.[92]

Hudson explicitly states that de minimis injury will only be one factor in a determination of excessive force claims,[93] implying that there are other factors which are relevant to the discovery as well. Further, *Hudson* does not propose that the finding of only de minimis injury would foreclose the possibility of a finding that excessive force had been used.[94] To the contrary, *Hudson* declares that an inmate or pretrial detainee could very well have suffered "malicious and sadistic" force with only de minimis injury since "[o]therwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury."[95]

The de minimis injury inquiry is vital since it speaks to the larger issue of determining whether or not the pretrial detainee or inmate was subjected to excessive force. The *Norman* court holds that the best evidence for determining if a detainee has been subjected to more than de

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87. *See id.*

88. *See id.* at 483.

89. *See id.* at 486.

90. It is odd that the *Norman* court includes the Fifth Circuit here since the Fifth Circuit's opinion was actually reversed by *Hudson*. However, maybe this should not come as much of a surprise since, as the *Taylor* dissent points out, the *Norman* court misinterprets the *Hudson* holding.

91. See *infra* text accompanying note 101.

92. *Norman*, 25 F.3d at 1263.

93. *See Hudson*, 503 U.S. at 7.

94. *See id.* at 10.

95. *Id.* at 9.

minimis force is to look to his or her injuries. If the detainee's injuries are de minimis, the court reasons, then it will follow that the force used to inflict those injuries was also de minimis.[96] Is this really the standard that the Fourth Circuit wants its jurisdiction to promote? There are many methods, according to the dissent in *Taylor*, by which experienced officers can inflict great pain yet leave no readily evident trace of injury:

> [I]t is certainly not difficult to imagine circumstances where the excessive use of force might result in no serious, visible injury to the plaintiff. For example, imagine an inmate who, although thrown from a prison balcony, is fortunate to incur only minor scrapes and bruises. Or imagine an inmate who, although beaten intensely in the stomach, back, chest, or groin, displays no greater outward signs of physical injury than that which [the Fourth Circuit] terms 'temporary swelling.'[97]

This is precisely why *Hudson* correctly laid out the rule that de minimis injuries should be but one factor in determining excessive force claims.

Also, if the Fourth Circuit is going to focus on the extent of the plaintiff's injuries, the court should examine every aspect of those injuries. As the dissent in *Norman* points out, the determination of the extent of the plaintiff's injury should also be comprised of the accompanying "pain, fear, and possible psychological damage."[98] Nowhere in the *Taylor* opinion does the court bring out the psychological effects or trauma that may have ensued as a result of the alleged beating. These factors are obviously difficult to pick up by the de minimis injury test since they are not likely to manifest themselves as external injuries, but are injuries nonetheless.

Hudson's injuries were very similar to those suffered by Taylor, and the Supreme Court held that "the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not de minimis for Eighth Amendment purposes."[99] Also, Hudson held that an inmate or pretrial detainee could very well have suffered "malicious and sadistic" force with only de minimis injury: "this is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury."[100] By holding that the extent of the inmate's injury will constitute only one factor in discovering whether excessive force has been used, the *Hudson* court has left an avenue for relief open to those victims of "dia-

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96. *See Norman*, 25 F.3d at 1263.
97. *Taylor*, 155 F.3d at 486.
98. *Norman*, 25 F.3d at 1265.
99. *Hudson*, 503 U.S. at 10.
100. *Id.* at 9.

bolic or inhuman" acts that leave de minimis injuries.

The Fourth Circuit tries to rectify this problem by providing a similar safety valve for those victims who do not meet the de minimis injury threshold. The *Norman* court points out that:

> We recognize that there may be highly unusual circumstances in which a particular application of force will cause relatively little, or perhaps no, enduring injury, but nonetheless will result in an impermissible infliction of pain . . . . In these circumstances, we believe that either the force used will be 'of a sort repugnant to the conscience of mankind,' and thus expressly outside the de minimis force exception, or the pain itself will be such that it can properly be said to constitute more than de minimis injury.[101]

Thus, the Fourth Circuit has left itself an exception to the strict "de minimis injury" standard that has been articulated in both *Norman* and *Taylor*. Yet if the inquiry stops at de minimis injury, the plaintiff will be able to exercise the exception only in the very rarest of circumstances when both he or she and the accused officers testify similarly regarding the heinous beating or use of excessive force.

B. Surviving Summary Judgment and the Problem Medical Records Present as Evidence of De Minimis Injury.

In *Sanders-El v. Spielman*,[102] a case decided after *Taylor*, an inmate at the Roxbury Correctional Institution, brought a section 1983 action against several correctional officers alleging that he was the victim of an assault.[103] The plaintiff claims that after he had an argument with an officer over what type of food he wanted for lunch, "Officer Spielman came up behind him, grabbed him by the handcuffs, slammed his face into a glass partition, threw him to the ground, and then kicked and stomped on him."[104] As a result of the alleged beating, the plaintiff "suffered bruises, a black eye, and continuing pain in his left elbow for at least thirty days after the incident."[105] Of course, as was the case in *Taylor*, the defendants painted an entirely different picture. The defendants alleged that the plaintiff kicked at an officer and, in an attempt to flee, started to run away.[106] As the plaintiff was running around a curve, according to the of-

101. *Norman*, 25 F.3d at 1264 n.4 (citation omitted) (quoting Hudson, 503 U.S. at 10).
102. 38 F.Supp. 2d 438 (D. Md. 1999).
103. *See id.* at 438-39.
104. *Id.* at 439.
105. *Id.*
106. *See id.*

ficers, he slipped and fell. According to the defendants, this was all that occurred.[107]

Even though the injuries sustained by Sanders-El were no worse than those suffered by Taylor,[108] the *Sanders-El* court was not convinced that the defendants' motion for summary judgment in that case should be granted on the basis that the plaintiff's injuries were only "de minimis" and thus an insufficient basis for the section 1983 excessive force claim.[109] Sanders-El had injuries similar to the injuries sustained by Taylor (i.e., black eye, a swollen left elbow, and tenderness around his ribs, wrists and elbow),[110] yet the *Sanders-El* court did not stifle Sanders-El's claim of excessive force by granting the defendants' motion for summary judgment, as the Fourth Circuit had in *Taylor*.[111] Instead, the *Sanders-El* court determined that "[t]here clearly exists a genuine dispute of material fact on the issue of whether plaintiff was attacked and battered by the defendants or was the victim of a slip and fall accident of his own making."[112] Taylor's claim did not similarly survive McDuffie's motion for summary judgment since his medical records did not show more than a de minimis injury.[113]

The *Sanders-El* court calls into question the very reasoning of the *Taylor* court: "Taylor might be read as establishing the premise that if there is a discrepancy between a prisoner's description of his injuries and what is contained in the medical records, the contents of the records must be accepted as true for summary judgment purposes."[114] This is the same problem that the dissent in *Taylor* addressed with the Fourth Circuit's reasoning. The fact that the Fourth Circuit weighs the medical records heavier than a prisoner's affidavit regarding his or her treatment as a prisoner or pretrial detainee is "suspect."[115] According to the *Sanders-El* court, which agrees with the *Taylor* dissent, "medical records have no higher status than other evidence" in determining if a pretrial detainee has been subjected to excessive force.[116]

Also, the *Sanders-El* court addresses how the realities of working in a prison (or a county jail, or a processing center) setting may skew the

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107. *See id.*

108. *See id.* at 439 (recognizing that "these injuries are not substantially more severe than those suffered by the plaintiff in Taylor").

109. *See id.*

110. *See id.*

111. *See id.*

112. *Id.*

113. *See supra* text accompanying note 62.

114. *See Sanders-El*, 38 F.Supp. 2d at 439 n.1.

115. *Id.*

116. *Id.*

evidence in favor of those defending section 1983 excessive force actions. The court, in dicta, states:

> [I]t would seem that the law must entertain the possibility that health care providers in a prison setting might bring certain biases to their occupation, be they caused by continuous exposure to inmates who may overstate their maladies, the need to maintain good working relationships with correctional officers, pressures exerted and felt within the chain of command, or, where medical services are being provided by a private contractor, a conscious or subconscious motive not to create problems that might result in nonrenewal of the contract.[117]

Thus, the *Sanders-El* court posits the likelihood that the reason a greater number of medical records do not show more than de minimis injuries is because those records are usually produced by the co-workers of the defendant officers. Yet again, this is another problem that the Fourth Circuit could have avoided by adopting the correct *Hudson* position that de minimis injuries are only one factor in the excessive force determination.

Pretrial detainees or inmates, usually proceeding pro se, also have a very difficult time producing "record evidence" on behalf of their cause.[118] Much of what the inmate or detainee can produce from his or her position of incarceration is in the form of affidavits from fellow inmates and detainees. Needless to say, there is almost always going to be diametrically opposed evidence produced by the accused officers and their victims. The *Norman* dissent points out that there are special problems in generating objective "record evidence" in an excessive force claim.[119] It is very difficult for an inmate or detainee to seek evidentiary assistance from outside specialists or physicians while in the custody of corrections or police officers. Also, as the *Sanders-El* dicta points out, prison physicians and other institutional employees are not above reproach. Considering all of this, an inmate's or detainee's affidavit and the affidavits from his or her fellow inmates "are about the best [evidence] that can be expected."[120]

Nonetheless, pretrial detainees have the right, under the Eighth Amendment, not to be subjected to cruel and unusual punishment while in the custody of law enforcement officials.[121] Further, section 1983 allows detainees or inmates to seek damages for the "deprivation of any rights, privileges, or immunities secured by the Constitution" from those persons that deprive such rights under the color of authority of "any stat-

117. *Id.*
118. *See Norman*, 25 F.3d at 1265.
119. *Id.*
120. *Id.*
121. U.S. Const. amend VIII.

ute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia."[122] Such protections speak to the decency with which our society chooses to treat its prisoners and detainees since "when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated."[123]

On the other hand, it is obvious that activities that constitute a "deprivation of rights" or a "malicious and sadistic use of force to cause harm" are going to vary depending on who is being asked to define such terms. A pretrial detainee that is forcefully prohibited from smoking while in a detention center or holding cell is unquestioningly going to believe that he or she has been subjected to a deprivation of rights, and if the force is stiff enough, perhaps even a malicious use of force. Or perhaps an officer, in an effort to maintain discipline over an unruly detainee, believes that the force reasonable to accomplish his objective is several swings of the baton and a kick to the head. Instances such as these have provided courts with ample opportunity to draw the fine lines between state sponsored abuse and maintaining order and authority in the administration of public safety.[124] Thus, the extent of the victim's injury cannot and should not be the conclusive factor in a plaintiff's claim that he or she was subjected to excessive force that amounts to cruel and unusual punishment.

V. CONCLUSION

There is a reason that the Fourth Circuit is the only circuit to still hold that evidence of de minimis injury is conclusive evidence of de minimis force and thus no excessive force claim can stand. The reason is that the Fourth Circuit has misinterpreted and misapplied the Supreme Court's decision in *Hudson*. Judge Murnaghan, a member of the Fourth Circuit and the dissenting judge in *Taylor*, sums it up nicely: "I expect that soon the Supreme Court will place the Fourth Circuit back on the course intended by *Hudson*. Until that day, I fear for the injustice that awaits pretrial detainees in our nation's jails."[125]

Troy J. Aramburu

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122. 42 U.S.C.A. §1983 (1994).

123. *Hudson*, 503 U.S. 1, 9 (1992).

124. *See e.g.*, *Taylor*, 155 F.3d at 487 (citing numerous cases from other circuits that have already drawn this line).

125. *Id.* at 487.