

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

JAMES MONROE DAILEY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	NO. 4:22-CV-00008-CDL-MSH
	:	
CHARLES FLEMING, <i>et al.</i> ,	:	
	:	
Defendants.	:	
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**REPORT AND RECOMMENDATION**

Pending before the Court is Defendants’ motion for summary judgment (ECF No. 56). For the reasons explained below, it is recommended that Defendants’ motion be granted.

**PROCEDURAL BACKGROUND**

The present action is brought under 42 U.S.C. § 1983 and arises out of Plaintiff James Monroe Dailey’s confinement at Rutledge State Prison (“RSP”) in Columbus, Georgia. Compl. 4, ECF No. 1. Dailey contends that Defendants violated his Eighth Amendment rights by failing to protect him from an attack by two other inmates. Compl. 7; Objs. 6, 8-9, ECF No. 20. The Court received Dailey’s original complaint on January 12, 2022 (ECF No. 1). Although Dailey asserted various claims, only his Eighth Amendment failure to protect claim against Defendants was allowed to proceed for further factual development following preliminary screening. Order & R. 13, June 13, 2022, ECF No. 22; Order 1, Oct. 17, 2022, ECF No. 48 (adopting recommendation). Defendant

Fleming answered on July 22, 2022, and Defendants Spates and Bryant answered on August 15, 2022 (ECF Nos. 36, 44). Defendants moved for summary judgment on December 16, 2022 (ECF No. 56). After being granted an extension, Dailey timely responded to the summary judgment motion on February 7, 2023 (ECF No. 67). Defendants filed a reply brief, and the Court authorized Dailey's surreply (ECF Nos. 70, 73). Defendants' summary judgment motion is ripe for review.

## DISCUSSION

### I. Summary Judgment Standard

Summary judgment may be granted only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In determining whether a *genuine* dispute of *material* fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, drawing all justifiable inferences in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986). A fact is *material* if it is relevant or necessary to the outcome of the suit. *Id.* at 248. A factual dispute is *genuine* if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Id.*

The party seeking summary judgment “always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks

omitted). If the movant meets this burden, the burden shifts to the party opposing summary judgment to go beyond the pleadings and present specific evidence showing that there is a genuine issue of material fact, or that the movant is not entitled to judgment as a matter of law. *Id.* at 324-26. This evidence must consist of more than conclusory allegations. *See Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). In sum, summary judgment must be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

## II. Undisputed Material Facts

Dailey entered Georgia Department of Corrections (“GDC”) custody in 2005 and has been housed at RSP since 2009. Pl.’s Dep. 8:15-9:23, ECF No. 56-2. Inmate Jason Murdock arrived at RSP in 2019. Spates Ex. 4, at 2, ECF No. 56-22. Inmate Trevon Ellis arrived at RSP on March 4, 2021. Spates Ex. 3, at 2, ECF No. 56-21. On April 23, 2021, inmate Malcolm Marshall was in his cell in Building C-2.<sup>1</sup> Marshall Aff. ¶ 2, ECF No. 67-7. At approximately 3:00 a.m., Ellis and Murdock entered Marshall’s cell and began beating him, demanding that he open his “box.” *Id.* ¶¶ 3-4. They stole Marshall’s coffee and “store goods” and left him with multiple bruises to his head and body. *Id.* ¶¶ 5-6.

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<sup>1</sup> According to Dailey, there are six dormitory buildings at RSP. Pl.’s Dep. 12:25-13:2. Three are general population dorms and three are mental health dorms. *Id.* at 13:3-9. There are four “pods” to each dormitory, which are secured from each other, except there is a common courtyard where inmates from each pod may meet on the way to chow call or the gym. *Id.* at 13:19-24. Inmates may not freely walk from one pod to the other. *Id.* at 13:25-14:7. There are twelve cells within each pod, with two people assigned to each cell. *Id.* at 14:16-15:8. Therefore, Marshall was in Building C, pod 2.

After they left his cell, Marshall reported the attack to the dorm officer, but he states no action was taken to recover his property and Ellis and Murdock were never punished. *Id.* ¶¶ 7-9.

On April 25, 2021, at approximately 6:00 a.m., inmate Ronald Sutton was in his cell in Building C-2 when Ellis entered his cell, telling him he “gotta go right now,” began beating him “for no reason,” and took all of Sutton’s property, which consisted of food and his J-Pay tablet. Sutton Aff. ¶¶ 2-5, ECF No. 67-6. Ellis also used a sharpened piece of plexiglass to stab Sutton in the back of the head. *Id.* ¶ 12. It took a dorm officer thirty minutes to come to Sutton’s cell, after which he was taken to the hospital for treatment for his injuries. *Id.* ¶¶ 8-11. Sutton states he was never informed of what charges were brought against Ellis. *Id.* ¶ 14.

On May 19, 2021, at approximately 11:00 p.m., inmate Clarence Lewis was housed in Building C-2 when Ellis entered his cell, saying, “You know what time it is.” Lewis Aff. ¶¶ 2-3, ECF No. 67-8. Ellis began beating Lewis “for no reason,” stole his food items and J-Pay tablet, and left him with “multiple injuries to [his] head and body.” *Id.* ¶¶ 4-6. Lewis states that after he was finally able to break free from Ellis, he began beating on the dorm window until a guard arrived and opened the door to let him out. *Id.* ¶¶ 7-9. Lewis required several stitches to his head and never recovered his stolen property.<sup>2</sup> *Id.* ¶¶ 12-13.

Ellis’s movement history shows he was moved from Building C-2 for disciplinary

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<sup>2</sup> The affidavits of inmates Marshall, Sutton, and Lewis were attached to Dailey’s response to the summary judgment motion.

reasons on May 20, 2021, housed in Building G for three days, and then placed in Building C-1 on May 23, 2021. Spates Ex. 3, at 1-2. His disciplinary history shows a charge of assault with serious injury and obstructing the duties of staff with an offense date of April 27, 2021, and a charge of fighting with an offense date of May 19, 2021. Pl.'s Ex. 29, at 1, ECF No. 67-33. Murdock's movement history similarly shows he was moved from Building C-2 on May 20, 2021, for disciplinary reasons, housed in Building G for three days, and then placed in Building C-1 on May 23, 2021. Spates Ex. 4, at 1. His disciplinary history shows a charge of fighting with an offense date of May 19, 2021. Pl.'s Ex. 30, at 3, ECF No. 67-34.

In the meantime, Dailey had been housed in administrative segregation in Building G since April 12, 2021. Pl.'s Dep. Ex. 3, ECF No. 56-3. At first, he was placed in administrative segregation for protective custody, and then for disciplinary reasons when he refused to return to general population because he owed money to other inmates. Pl.'s Dep. Ex. 21, at 1, ECF No. 56-12; Pl.'s Dep. Ex. 9, at 1, 3, ECF No. 56-6; Pl.'s Dep. 41:21-25, 51:5-14. Following a disciplinary hearing on May 27, 2021, however, Fleming—the deputy warden of security at RSP—ordered Dailey's return to general population.<sup>3</sup> Pl.'s Dep. 53:17-54:1; Fleming Decl. ¶¶ 3, 18, ECF No. 56-13. He was ordered to be placed in Building C-1 because that was where bed space was available. Pl.'s Dep. 53:25-54:12. Prior to May 27, 2021, Dailey had never had contact with Ellis or Murdock. *Id.* at 36:15-

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<sup>3</sup> The Court dismissed any claim arising from the decision to release Dailey into general population because the inmates to whom he owed money and sought protection were not the ones who later assaulted him. Order & R. 7, June 13, 2022; Order 1, Oct. 17, 2022 (adopting recommendation).

19; 78:18-21.

After the hearing, Dailey was escorted to Building C. *Id.* at 54:13-22. When he arrived at around 6:30 p.m., Bryant, who was the dorm officer, opened the door to let him into pod 1. *Id.* at 102:8-16. She told him his assigned cell, closed the door, and then walked off to Building D without going inside the pod or to the cell door itself.<sup>4</sup> *Id.* at 102:18-20, 103:14-23. Dailey went to the designated cell and began to unpack his box of property when Ellis entered the cell and hit him in the back of the head with a brick. *Id.* at 56:24-57:2. Murdock then came in the cell and asked, “[D]o you know what time it is?” Pl.’s Dep. 57:2-3. Ellis and Murdock then began to assault and stab Dailey. *Id.* at 57:4-5. They would not let him leave, but eventually he was able to get to his feet, leave the cell, and get to the window of the pod looking out onto the courtyard. *Id.* at 57:4-6, 60:19-21, 106:4-6. He beat on the glass for about ten to fifteen minutes while Ellis and Murdock attempted to pull him from the window until Bryant came into the courtyard from Building D and saw him. *Id.* at 60:1-4, 60:19-61:1. She called for assistance and opened the door to let Dailey out. *Id.* at 107:7-9, 108:22-23. When Dailey came out, he pointed at Ellis and Murdock and told Bryant they had robbed him. *Id.* at 35:20-24. Bryant responded by saying, “[O]h, that’s Ellis and Murdock again.” Pl.’s Dep. 35:24-25. Other officers then arrived to assist. *Id.* at 108:22-24. In addition to assaulting him, Ellis and Murdock also robbed Dailey of

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<sup>4</sup> It is unclear whether Dailey was assigned to the same cell as one of his assailants. He testified officers told him after the assault that Ellis had been assigned to the same cell, but the movement history shows Ellis was assigned to C-1-7 and Dailey was assigned to C-1-4. Pl.’s Dep. 15:9-15, 59:6-15; Pl.’s Dep. Ex. 3; Spates Ex. 3, at 1. Murdock was assigned to C-1-19. Spates Ex. 4, at 1. Considering inmates apparently had free movement within the pods and the attack occurred shortly after Dailey arrived in Building C-1, the specific cell assignment within C-1 is immaterial.

a fan, radio, J-Pay tablet, and headphones. *Id.* at 97:24-98:11.

Following the attack, Dailey was taken to the prison medical unit and then transported to the hospital by prison van. *Id.* at 67:17-25, 74:4-6. Dailey had two black eyes, bruising on his arms and back, and required ten stitches in the back of his head. *Id.* at 69:7-9. He also underwent an MRI to see if he had a skull fracture, but it showed only a mild concussion. *Id.* at 69:10-12. Dailey was at the hospital for several hours before returning to RSP, where he was placed in Building J as part of a Covid-19 protocol. Pl.’s Dep. 68:19-25. While being treated at the hospital, Dailey spoke with Fleming and Spates, a member of RSP’s Correctional Emergency Response (“CERT”) Team, whose mission is to mobilize quickly to restore law and order in prisons. Pl.’s Dep. 28:24-29:3, 31:7-9; Spates Decl. ¶¶ 3, 7, 8. Dailey told both Fleming and Spates that he wanted “free-world” charges brought against Ellis and Murdock, meaning he wanted them criminally prosecuted as opposed to facing only prison discipline. Pl.’s Dep. 30:4-8, 78:1-17. Fleming responded, “Well, we’ll see.” *Id.* at 78:9.

According to Ellis’s movement history, he was removed from Building C-4 after the incident and placed in Building G, where he remained until May 31, 2021, when he was returned to Building C-1. Spates Ex. 3, at 1. He remained there until June 17, 2021, when he was transferred to another prison. *Id.* His disciplinary history shows he was charged for various offenses occurring on May 28, 2021, none of which involve assault on another inmate.<sup>5</sup> Pl.’s Ex. 29, at 1. Murdock’s movement history shows he was not

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<sup>5</sup> By “charged,” the Court refers to the prison’s internal disciplinary procedures.

removed from Building C-1 following the incident, but remained there until July. Spates Ex. 4, at 1. He also remained at RSP. *Id.*; Pl.’s Dep. 124:17-18. His disciplinary history shows no charges stemming from the May 27, 2021, incident. Pl.’s Ex. 30, at 3. Dailey was moved from Building J on June 9, 2021, and placed in Building C-4. Pl.’s Dep. 61:13-22; Pl.’s Dep. Ex. 3. Through the window, he could see Ellis and Murdock in Building C-1, and they would threaten and taunt him, causing Dailey to fear for his safety because although they were in separate secured pods, inmates would all gather in the common courtyard for gym and chow call. Pl.’s Dep. 61:23-62:2, 66:6-11, 123:16-124:3. However, no further attacks occurred. *Id.* at 124:6-12.

### **III. Failure to Protect Standard**

The Eleventh Circuit has held the Eighth Amendment “impose[s] a duty on prison officials to ‘take reasonable measures to guarantee the safety of the inmates.’” *Mosley v. Zachery*, 966 F.3d 1265, at 1270 (11th Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). This “includes ‘protecting prisoners from violence at the hands of other prisoners.’” *Id.* (quoting *Farmer*, 511 U.S. at 833). To establish a failure-to-protect claim, a prisoner must show (1) a substantial risk of serious harm; (2) the prison officials’ deliberate indifference to that risk; and (3) causation. *Marbury v. Warden*, 936 F.3d 1227, 1233 (11th Cir. 2019) (per curiam). “Merely negligent failure to protect an inmate from attack does not justify liability under Section 1983[.]” *Brown v. Hughes*, 894 F.2d 1533, 1537 (11th Cir.1990) (per curiam).

When examining the first element—a substantial risk of serious harm—courts use an objective standard. *See Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1028-29 (11th Cir.



2001) (en banc), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007). A plaintiff must “show conditions that were extreme and posed an unreasonable risk of serious injury to his future health or safety.” *Marbury*, 936 F.3d at 1233 (internal quotation marks omitted). “A substantial risk to a prisoner’s safety may arise not only out of his individual situation, but out of an environment of longstanding and pervasive attacks to which all prisoners in his situation are exposed, and it may come from single or multiple sources.” *Staley v. Owens*, 367 F. App’x 102, 107 (11th Cir. 2010) (per curiam) (citing *Farmer*, 511 U.S. at 842-43).

The second element—the defendant’s deliberate indifference to the risk—has two components: one subjective and one objective. *Marbury*, 936 F.3d at 1233. To satisfy the subjective component, a plaintiff must show that the defendant was “both [] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and also dr[ew] the inference.” *Id.* (internal quotation marks omitted). “Whether prison officials had the requisite awareness of the risk ‘is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.’” *Goodman v. Kimbrough*, 718 F.3d 1325, 1332 (11th Cir. 2013) (quoting *Farmer*, 511 U.S. at 842). Showing prison officials *should* have known of a substantial risk is insufficient because were the Court “to accept that theory of liability, the deliberate indifference standard would be silently metamorphosed into a font of tort law—a brand of negligence redux—which the Supreme Court has made abundantly clear it is not.” *Id.* at 1334 (citing *Farmer*, 511 U.S. at 838). “As such, imputed or collective

knowledge cannot serve as the basis for a claim of deliberate indifference. Each individual Defendant must be judged separately and on the basis of what that person knows.” *Burnette v. Taylor*, 533 F.3d 1325, 1331 (11th Cir. 2008) (internal citations omitted). Further, in cases relying on the threat posed by a particular inmate, “[g]eneral knowledge about [the] inmate’s violent tendencies, without more specific information about the risk, does not constitute deliberate indifference.” *Lavender v. Kearney*, 206 F. App’x 860, 863 (11th Cir. 2006) (per curiam) (citing *Carter v. Galloway*, 352 F.3d 1346, 1349-50 (11th Cir. 2003)). In a case relying on the threat of violence in a prison environment generally, the inmate must show “confinement in a prison where violence and terror reign.” *Harrison v. Culliver*, 746 F.3d 1288, 1299 (11th Cir. 2014).

To satisfy the objective component, a plaintiff must show that the defendant “responded to the known risk in an unreasonable manner, in that he or she knew of ways to reduce the harm but knowingly or recklessly declined to act.” *Marbury*, 936 F.3d at 1233 (internal quotation marks omitted).

Regarding causation, a “plaintiff must show a necessary causal link between the [defendant’s] failure to act reasonably and the plaintiff’s injury.” *Id.* (internal quotation marks omitted).

#### **IV. Plaintiff’s Allegations and Defendants’ Motion for Summary Judgment**

Dailey alleges Fleming and Spates violated his Eighth Amendment rights by failing to protect him from the attack by Ellis and Murdock.<sup>6</sup> Specifically, he alleges these

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<sup>6</sup> Dailey agrees summary judgment should be granted in favor of Bryant, so the Court will not discuss her further. Pl.’s Surreply 2-3, ECF No. 73.

Defendants were responsible “for maintaining law and order within the confines of the prison,” and that they failed to act against Ellis and Murdock despite their history of attacking and robbing inmates. Objs. 5, 8. To support his allegations, Dailey submitted the affidavits of Marshall, Sutton, and Lewis. Although the race and ages of these inmates were not included in the affidavits, Dailey testified Ellis and Murdock’s actions were part of a pattern of robbing “old white people like myself.” Pl.’s Dep. 32:6-7.

In their motion for summary judgment, Defendants argue there is no evidence they were aware of Ellis and Murdock’s violent nature.<sup>7</sup> Defs.’ Br. in Supp. of Summ. J. 15, ECF No. 57. Fleming avers he “was not aware that . . . Ellis and Murdock posed a danger to offender Dailey prior to or after May 27, 2021.” Fleming Decl. ¶ 25. Spates is even more specific, alleging he was not aware the Ellis and Murdock had allegedly robbed and assaulted other inmates prior to May 27, 2021, including those assigned to Building C, or that they posed any threat to Dailey. Spates Decl. ¶¶ 24-26.

In response, Dailey points to Fleming and Spates’s interrogatory responses to show their awareness of the danger posed by Ellis and Murdock. Specifically, he cites Fleming’s interrogatory response that he “was generally notified of serious security issues at [RSP] when he served there as Deputy Warden of Security.” Pl.’s Resp. to Mot. for Summ. J. 22, ECF No. 67; Pl.’s Ex. 41, at 4, ECF No. 67-39. Similarly, Spates responded in interrogatories that he would have been notified of serious issues regarding security at RSP.

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<sup>7</sup> Defendants raise other grounds for summary judgment, but because Dailey fails to show Defendants were subjectively aware of a substantial risk of serious harm, the Court declines to address them.

Pl.’s Ex. 42, at 4, ECF No. 67-40. Dailey contends Fleming and Spates “knew or should have known by their own admissions that inmates Ellis and Murdock were robbing and assaulting the inmates in Dorm C at [RSP].” Pl.’s Surreply 4.

The Court concludes that even assuming Dailey could show the other elements of deliberate indifference, he has failed to show Defendants were subjectively aware of a substantial risk posed by Ellis and Murdock. Regarding Fleming, the Court agrees that as warden of security at RSP, it is reasonable to infer that he might have some general awareness of the risk posed by Ellis and Murdock. But anything beyond that is pure speculation. Marshall, Sutton, and Lewis do not state they spoke with Fleming about their incidents, and while they apparently informed some guards, there is nothing in the record about exactly what they told those guards or what may have eventually been reported to Fleming. According to the disciplinary histories, prior to May 27, 2021, Ellis was charged with one offense of assault with serious injury and obstructing the duties of staff on April 27, 2021, and then one charge of fighting on May 19, 2021. Pl.’s Ex. 29, at 1. Murdock’s disciplinary history shows only one charge of fighting on May 19, 2021. Pl.’s Ex. 30, at 3. There is no evidence of what was said during the disciplinary proceedings, who participated, or even if they related to the allegations made by Marshall, Sutton, and Lewis. Again, while it is reasonable to infer that Fleming may have had some general awareness of disciplinary issues with Ellis and Murdock, there is nothing in the record to suggest awareness of the specific facts alleged by Dailey, i.e., a pattern of robbing and assaulting older, white inmates. *See Carter*, 352 F.3d at 1349 (“Even assuming the existence of a serious risk of harm and legal causation, the prison official must be aware of specific facts

from which an inference could be drawn that a substantial risk of serious harm exists—and the prison official must also ‘draw that inference.’” (quoting *Farmer*, 511 U.S. at 837)); cf. *Nelson v. CorrectHealth Muscogee, LLC*, --F. Supp. 3d--, 2022 WL 17417983, at \*6 (M.D. Ga. Dec. 5, 2022) (denying summary judgment arising from death of white inmate killed by his cellmate where the defendants knew the attacker had stabbed a store clerk without provocation solely because he was white, and his motivation was an irrational response to widespread publicity of whites killing blacks).

Further, although Fleming was the deputy warden of security, Dailey has not presented evidence of widespread violence to support a claim based on the prison environment generally or supervisory liability. “The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.” *Harrison*, 746 F.3d at 1298; see *Marbury*, 936 F.3d at 1234 (“To establish deliberate indifference based on a generalized risk, the plaintiff must show “that serious inmate-on-inmate violence was the norm or something close to it.”).

As for Spates, the evidence is even weaker. Dailey relies partly on his assumption that Spates was the lieutenant in charge of the CERT Team and thus, in a position to both be aware of Ellis and Murdock’s actions and to take action to stop them. Pl.’s Dep. 28: 2-19. Spates has presented evidence, however, that he was not promoted to lieutenant until January 1, 2022, and was not in supervisory position on the CERT Team on May 27, 2021. Spates Decl. ¶¶ 3-4, 10. Dailey does not rebut this evidence. Further, Dailey offers no specific facts showing Spates was aware of Ellis and Murdock’s prior assaults, only his

conclusory assertion that CERT Team members “know when incidents happen in prison.” Pl.’s Dep. 28:7-8. Therefore, Dailey fails to show that Spates would have anything more than a general awareness of Ellis and Murdock’s violent natures or that he was in a position to take corrective action.

Dailey was provided with the opportunity to conduct discovery and develop evidence showing Defendants’ subjective knowledge of the risk posed by Ellis and Murdock prior to May 27, 2021. Order & R. 15, June 13, 2022. In fact, as demonstrated by his attachment of Defendants’ discovery responses, he conducted discovery. Pl.’s Exs. 41-42. /Moreover, while he filed three motions to compel, the first (ECF No. 32) was filed prior to Defendants’ answers and addressed only his access to the prison law library, the second (ECF No. 43) concerned his desire that Defendants personally respond to interrogatories as opposed to doing so through their attorney, and the third (ECF No. 59) only addressed certain deposition exhibits and the movement histories for Ellis and Murdock, which he received (ECF No. 64). Thus, if Dailey was unable to obtain the documentation he needed to establish the specific knowledge Defendants had about Ellis and Murdock, he did not timely bring it to the Court’s attention. And based on the record before the Court, an inference that Defendants were subjectively aware of a substantial risk of serious harm would be based on “mere supposition,” which the Court cannot do. *Goodman*, 718 F.3d at 1334.

Finally, even assuming Fleming and Spates could be held responsible for Dailey’s placement in Building C following his return from Covid-19 isolation, he cannot establish an Eighth Amendment violation based on Ellis and Murdock’s threats and taunts. While

placement within earshot of his attackers may have been insensitive, the evidence does not show it placed him at substantial risk of serious harm. Dailey admits they were in a separate, secured pod, and although it was possible they could have had contact in the common courtyard during chow or gym call, that never happened. Pl.’s Dep. 13:20-14:7, 123:20-124:11. Moreover, “a plaintiff must present more than ‘verbal taunts . . . [h]owever distressing’ to allege an Eighth Amendment violation.” *Coleman v. McGhee*, No. 21-12557, 2022 WL 217578, at \*2 (11th Cir. Jan. 25, 2022) (per curiam) (quoting *Edwards v. Gilbert*, 867 F.2d 1271, 1273 n.1 (11th Cir. 1989)).<sup>8</sup>

### CONCLUSION

For the reasons explained above, it is recommended that Defendants’ motion for summary judgment (ECF No. 56) be granted. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within **FOURTEEN (14) DAYS** after being served with a copy hereof. Any objection should be no longer than **TWENTY (20) PAGES** in length. The district judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

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<sup>8</sup> Dailey also alleges Defendants failed to punish Ellis and Murdock, either through criminal charges or internal prison disciplinary procedures. Objs. 6; Pl.’s Resp. to Mot. for Summ. J. 24. He has no constitutional right, however, to the “prosecution or non-prosecution of another.” *Otero v. U.S. Att’y Gen.*, 832 F.2d 141, 141 (11th Cir. 1987); see *Frantz v. Phillips*, No. 92–3690, 1992 WL 164707, at \*1 (E.D. Pa. July 2, 1992) (noting the plaintiff’s constitutional rights were not violated by the defendants’ failure to punish an inmate who attacked him and commenting that the “Court does not sit to review disciplinary decisions of prison officials.”).

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, “[a] party failing to object to a magistrate judge’s findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court’s order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.”

**SO RECOMMENDED**, this 10th day of April, 2023.

/s/ Stephen Hyles

UNITED STATES MAGISTRATE JUDGE