

**ASSOCIATION OF THE BAR
OF THE
CITY OF NEW YORK**

COMMITTEE ON CORRECTIONS

**REPORT OF SUBCOMMITTEE
ON CONDITIONS OF CONFINEMENT
ON THE USE OF STUN SHIELDS
BY THE NEW YORK CITY
DEPARTMENT OF CORRECTION**

I. Stun Technology

Prison and police agencies use an array of electro-shock devices to control people through the application of disabling electric current. The technology includes stun guns (devices that apply high voltage electrical pulses), stun batons (a variant of stun guns, which allow users “to maintain more distance from your attacker”¹), Tasers (air guns that launch barb-tipped flexible wires to administer shocks from a distance), stun belts (worn by subjects in, for example, courtroom settings, capable of being activated

¹ “Stun Batons,” D&D Security Products Inc.(a stun technology vendor), <http://www.ddsp.com/baton.htm> (last visited June 25, 2001).

remotely) and stun shields (fashioned like police riot shields, but with electrodes that allow users to apply electric shock).²

² Stun devices “require little physical contact between the operation and the recipient of the shock.” One author noted that “one of the device’s major selling points is that provides guards with psychological dominance over prisoners because those prisoners can seldom be sure who is administering the shock or when or for what offense it might be delivered.” Therefore, the officer “need not look into the eyes of the victim.” William F. Schulz, Cruel and Unusual Punishment, The New York Review of Books, April 24, 1997, <http://web.syr.edu/~tckerr/cruel.html> (last visited January 16, 2001).

Stun devices rely on high voltage. Air Tasers are rated at 50,000 volts.³ Stun guns and batons typically use from 80,000 to 500,000 volts.⁴ An on-line vendor sells a 625,000-volt stun gun, “the flagship of the Stun Master line of quality stun guns.” Its website adds, “[a]ffectionately referred to as the ‘Stun Monster,’ this stun gun needs to be seen to be believed.”⁵

³ “Air Tasers, D&D Security Products Inc., <http://www.ddso.com/airtaser.htm> (last visited June 25, 2001).

⁴ One vendor calls its 500,000-volt product “the Extreme Stun Baton,” advertising that “[t]his is the Ultimate Stun Baton. 20” in length, 500,000 volts of stopping power, and weighs less than a pound,” <http://www.ddsp.com/baton.htm> (last visited July 8, 2001).

⁵ “625,000 volt Stun Gun - “The Stun Monster,” TBO-Tech Self-Defense Products, <http://www.tbotech.com/stunmaster625.htm> (last visited June 25, 2001).

Stun devices are intended to subdue people. According to one vendor, “high voltage pulses are applied to a person’s muscles causing them to be vigorously exercised,” resulting in “instant fatigue, weakness and loss of balance,” along with lethargy and disorientation for several minutes.⁶ Another vendor offers this description of the science involved: the device “dumps its energy into the muscles at a high pulse frequency that makes the muscles work very rapidly, but not efficiently.” This “depletes blood sugar by converting it to lactic acid all in just seconds,” making it difficult for the subject to move or function. “At the same time, the tiny neurological impulses that travel throughout the body to direct muscle movement are interrupted,” causing disorientation and loss of balance and leaving the subject “in a passive and confused condition for several minutes.”⁷

⁶ “Stun Gun,” D&D Security Products Inc., www.ddsp.com/prestun.htm (last visited June 25, 2001).

⁷ “How does a Stun Gun work?”, TBO-Tech Self-Defense Products, <http://www.tbotech.com/stun-gun.htm> (last visited June 25, 2001).

The New York City Department of Correction (“DOC”) uses electric technology to control inmates in its Central Punitive Segregation Unit (“CPSU”; colloquially, the “Bing”) at Rikers Island.⁸ The DOC Instructor’s Guide for use of the stun shield identifies its “physical effects” as “sending electricity through [the body] until the subject loses muscular control and can be controlled by staff.”⁹ The Guide also identifies non-recommended targets of the body as those upon which the use of the shield may cause serious injury:

The shock or arc may cause injury to the eyes; [the testicle and scrotum] area is extremely sensitive. The shock may cause intense pain and lead to serious injury; mere application of the shield to the spine may cause injury and as such should be avoided; Applying the shield and amperage against an open wound may cause intense and unnecessary pain to the subject

⁸ The Committee understands that the DOC also maintains stun shields as part of the “arsenal” at many other institutions, and that the Emergency Services Unit, which has responsibility in “Tactical Search Operations” (searches of large areas of institutions), has the shield available in case of the need for cell extractions. Although we have not been informed of the extent of shield use at other facilities or by the ESU, we understand that there have been some instances. It is unclear whether the effects of stun shield application differ from the consequences of the use of stun guns or other stun technology.

⁹ New York City, Department of Correction, Electronic Immobilization Shield, Instructor’s Guide at 11 (August 6, 1998).

because an open wound lacks skin which would act as a shock absorber for the exposed nerve endings.¹⁰

The Guide cautions correction staff to avoid allowing the shield to make contact with a woman's breasts or the stomach of a pregnant prisoner.¹¹

¹⁰ Id. at 21-22.

¹¹ Id.

The Department's adoption of stun technology was prompted by its interest in finding ways of reducing the likelihood of violent confrontation in the jails. Since stun shields can subdue an inmate who is behaving aggressively with minimal contact between the officer and the inmate, the likelihood of one or both becoming injured is significantly less than when an officer must use direct physical force in restraining the inmate. A demonstration of the activation of the shield, with its accompanying electrical sparking, may persuade the recalcitrant inmate to comply even without the need for direct application or other use of physical force. Former Commissioner Bernard B. Kerik, who was instrumental in the Department's acquisition of the shields in 1998, declared in 1999 that the devices had "really prevented a lot of injuries."¹² Indeed, the Department was particularly motivated to reduce injuries and violent incidents in its facilities at that time. The City of New York had recently settled a class action suit brought to challenge use of force in the CPSU, which had been a frequent site of use of force incidents.¹³ As part of

¹² Christopher Drew, An Iron Hand at Rikers Island Drastically Reduces Violence, The New York Times, November 8, 1999, at B6.

¹³ Between 1990 and 1996, 346 CPSU inmates suffered severe facial and head injuries in "use of force" incidents. Sheppard v. Phoenix, 1998 WL 397846, *3 n.4 (S.D.N.Y., July 16, 1998).

that settlement, the City stipulated to the adoption of a new “use of force” policy designed to minimize physical confrontations between inmates and correction staff and limit the degree of force used to restrain inmates.¹⁴

¹⁴ Id. at *3.

Not surprisingly, vendors contend that stun technology is safe. According to one vendor, “[M]edical studies have shown TASER technology leaves no long term injury. After several minutes, a suspect stunned with an AIR TASER recovers without any known long term effects.”¹⁵ Another claims that “there is no significant effect on the heart and other organs.”¹⁶

Other sources, as well as the experience of use, suggest that stun weapons cause loss of muscular control, pain and potentially serious injury.¹⁷ Stun guns have been found to be “inherently dangerous” weapons under the Federal Aviation Act of 1958. United States v. Wallace, 800 F.2d 1509 (9th Cir. 1986). According to the Second Circuit Court of Appeals, under the United States Sentencing Guidelines, Sections 1B1.1, comment (n.1), 2D1.1(b)(1), 18 U.S.C.A.App. (1990), stun guns are “dangerous weapons”:

¹⁵ <http://www.ddsp.com/airtaser.htm>

¹⁶ <http://www.tbotech.com/stun-gun.htm>

¹⁷ Amnesty International describes the effects of stun weapons, including shields, as follows: “Depending on the application and the individual, immediate effects include severe pain, loss of muscle control, nauseous feelings, convulsions, fainting, and involuntary defecation and urination. Longer-term effects from electric shock torture can reportedly include muscle stiffness, impotence, damage to teeth, scarring of skin, hair loss, as well as post-traumatic stress disorder, severe depression, chronic anxiety, memory loss and sleep disturbance. In cases where there are physical signs of electric shock torture such as skin reddening and scarring, these usually fade within some weeks.” Amnesty International, Arming the Torturers: Electro-Shock Torture and the Spread of Stun Technology, 2-3 (March 4, 1997, AI Index: ACT 40/01/97).

“Dangerous weapon” is defined as “an instrument capable of inflicting death or serious bodily injury.” “Serious bodily injury” is defined as “injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention.” . . . The incapacitation caused by a stun gun constitutes sufficient “impairment”

United States v. Agron, 921 F.2d 25, 26 (2d Cir. 1990) (alteration in original) (citations omitted). The devices have been treated as “dangerous weapons” under the statutes and regulations governing use of United States Postal Service property, 18 U.S.C.A. Section 930 (1990) and 39 C.F.R. Section 232.1 (1992). See Gordon v. Runyon, 1994 WL 139411, *2 (E.D. Pa. 1994).

Anecdotal evidence and commentary about the use of stun shields is sparse.¹⁸ In December 1995, a corrections employee of the Texas Department of Criminal Justice received two 45,000-volt stun shield shocks as part of a required training exercise. Shortly after the second shock, he collapsed and died. The judge who

¹⁸ A large number of incidents involving problems with other stun devices have been reported and are discussed infra.

conducted an inquiry reported that the autopsy showed the cause of death as cardiac dirhythmia due to coronary blockage following the shock.¹⁹

Stun shield abuse has been claimed at the Jackson County Correctional Facility in Florida between August 1997 and July 1998. The institution held INS detainees because INS facilities were full. The INS transferred all 34 detainees from this jail in July 1998. Several detainees gave descriptions of being attacked with a stun shield:

Officers came at me with an object about 3 feet high and about 1½ feet wide, it's got wavy lines running through it, it's like a shield. And they pushed that against my body and when they hit me with that I felt nothing but electricity running through my body. It made an electrical noise. They hit me with this twice, the first time they hit me with this I buckled, the second time I fell to the floor. I was hollering up a storm, screaming for help but nobody helped me.

....

We saw them shock the [Haitian] detainee on his body with an electric shield, also with an electric gun . . . The gun has sticks by which the electricity was released . . . The Haitian detainee was shocked about three times. While being shocked, the Haitian detainee was handcuffed, his hands to his legs, laying on his side on the floor.

¹⁹ Anne-Marie Cusac, Stunning Technology: Corrections Cowboys Get a Charge out of Their New Sci-Fi Weapons, The Progressive, July 1996, available at <http://www.progressive.org/stungun9607cusac.htm> (last visited June 25, 2001).

They told me to lay down on the concrete slab, it's a bed made out of concrete. There are four rings at each corner. . . They told me to lay on my stomach and when I asked what for, [an officer] pushed me down and put the shield on me and electrocuted me. I couldn't move my muscles. They handcuffed my hands to the rings and then they put shackles on my feet and put handcuffs around the shackles on my feet to insert them in the rings. They hit me with the shield one time and left it on. I thought I was being killed. Then they left me for about 17 hours. When I told them I need to urinate they told me "when you were a child did you never piss on yourself." And that's what I had to do.²⁰

²⁰ Amnesty International, Cruelty in Control? The Stun Belt and other Electro-Shock Equipment in Law Enforcement, 40-41 (June 8, 1999, AI-index: AMR 51/054/1999).

There is substantial anecdotal material showing problems with the use of other stun technology. Reports of the apparent misuse of stun technology are widespread. Perhaps the most publicized incident happened in Long Beach, California, in June 1998. A municipal court judge decided that a defendant, who had been required to wear a stun belt, was “being disruptive at the defense table. The judge issued an order to a court officer, and, by remote control, [Ronnie] Hawkins was zapped with 50,000 volts of electricity from a stun belt that guards had placed around his waist before he entered the courtroom.”²¹ Hawkins sued, and on January 25, 1999, a federal judge issued a preliminary injunction against the use of stun belts in Los Angeles County courts.²² The court found that the use of stun belts, especially where a defendant had chosen to represent himself, would have a “chilling effect” because the defendant “might be afraid to object to a judge’s ruling for fear of being shocked.” In response, Dennis Kaufman, the president of Stun-Tech, Inc., a large manufacturer of stun belts, said that “any use of a stun belt to punish a defendant would be inappropriate [because] the belt was intended only to stop escapes and assaults.” He said that: “The belt is not to be used for punishment. If it is, consequently it is clearly a violation of civil rights as well as a violation of what the belt was designed for.”²³

²¹ William Glaberson, Electric Restraint’s Use Stirs Charges of Cruelty to Inmates, The New York Times, June 8, 1999, <http://www.nytimes.com/search> (last visited July 11, 2001).

²² Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244 (C.D. Cal. 1999).

²³ Glaberson, supra note 21.

This incident drew national attention to the fact that local laws permit the use of stun belts “by corrections systems in 20 states, by local law enforcement officers in 30 states and by Government agencies including the Federal Bureau of Prisons.” In addition, stun belts and stun shields are “actually used rather than merely authorized” in “more than 130 jurisdictions across the country,” according to Amnesty International. As of 1999, only Massachusetts, Michigan and New Jersey explicitly prohibited the belt.²⁴

²⁴ Id.

Notwithstanding vendor claims that stun technology is benign, injuries due to stun technology are not uncommon. One study reported at least three deaths from cardiac arrest among 218 patients brought to a Los Angeles emergency clinic between 1980 and 1985 after being shot by police with Taser guns. The cause of death in these cases was heart failure caused by a sharp increase in the toxicity of the drug phencyclidine (PCP) which the patients had ingested.²⁵ In July 1996, a 29-year-old woman died of cardiac arrest after being shot with a Taser by Pomona, California police.²⁶

An inmate at the Kenton County Jail in Kentucky died under circumstances that indicate he may have been shocked just before his death. On January 29, 1999 a 48-year-old mentally ill inmate died after a confrontation with guards who were attempting to remove him from an isolation cell to take him to a hospital for a psychiatric evaluation. The original report of one of the officers involved (discovered after it had been thrown away) indicated that the inmate had been “tazed” with a stun gun during the attempted “cell extraction.”²⁷ The reports of the incident are contradictory -- several officers

²⁵ Arming the Torturers, *supra* note 17, at 21.

²⁶ Id. at 13.

²⁷ Amnesty International, Cruelty in Control, *supra* note 20, 37-38.

claimed that an inactivated shield was used -- and prison officials claimed that the inmate died because he was overweight and had a heart condition.²⁸

²⁸ Id.

In July 2000, an inmate at the Wallens Ridge State Prison in Virginia died “five days after being shocked repeatedly with a stun gun and then strapped to a bed.”²⁹ During the incident, the inmate was “shocked ‘more than once’ during a struggle with guard’s at the prison’s infirmary.”³⁰ The inmate was put in five-point restraints and left in a medical cell where he was later found unconscious. He died five days later. The device used was an Ultron II, “a hand-held stun gun capable of delivering 50,000 volts.”³¹ In May 2001, an autopsy report concluded that the inmate died of cardiac arrhythmia from stress while restrained after stunning. An earlier review by the Virginia Department of Corrections found that the stun gun had nothing to do with the inmate’s death. Following the autopsy report, however, Virginia prison officials declared a state-wide moratorium on the use of the Ultron II.³¹ The director of the State Department of

²⁹ Laurence Hammack, Connecticut Prisoner Dies at Wallens Ridge, The Roanoke Times, July 6, 2000, <http://www.supermaxed.com/wrtimes1.htm> (last visited January 15, 2001). Wallens Ridge is a “supermax” prison. These facilities have been criticized because of their “excessively harsh conditions and unnecessary [sic] stringent procedures,” including the use of electro-shock devices. See Press Release, United Nations, Committee Against Torture Considers Report of United States on Prevention of Torture: Urges U.S. Authorities to Suppress ‘Supermax’ High Security Prison Cells, May 10, 2000, <http://www.unog.ch/news2/documents/newsen/cat0013e.html> (last visited June 25, 2001).

³⁰ Hammack, supra note 29.

³¹ Id.

³¹ Va. Prisons Suspend Stun Guns Use, Pilot Online, attributed to Associated Press, May 17, 2001, <http://www.PilotOnline.com> (last visited July 8, 2001).

Corrections, Ron Angelone, told the Virginia Crime Commission that at Red Onion (another supermax facility in Virginia), “guards used [stun] devices 95 times last year” and had deployed them 35 times,” though early July 2000.³²

Another fatal incident involving stun technology occurred in Florida and resulted in the arrest of four prison guards. In July 1999, death row inmate Frank Valdes was fatally beaten when he “resisted being moved to a new cell” at Florida State Prison. “As many as nine prison guards, armed with chemical agents and stun shields, clashed with him in an area reserved for the meanest Death Row inmates, then known as the ‘X-Wing.’ An autopsy revealed Valdes’ ribs were broken, his testicles were swollen and he had boot marks on his body.” The officers claimed that after Valdes had kicked and punched them, they subdued him with chemical sprays, an electrified shield and their fists. Seven months later, four veteran corrections officers were charged with his murder.³³

³² Hammack, supra note 29.

³³ Phil Long and Steve Bousquet, Guards Charged with Murder: Inmate’s Beating on Death Row Leads to 4 Arrests, Miami Herald, February 3, 2000, <http://www.herald.com/content/archive/news/valdez/docs/035155.htm>. If the allegations are true, the case suggests that the use of the shield can render an

inmate defenseless to subsequent excessive use of force.

A Justice Department investigation found that the civil rights of an inmate in the Kenton County Jail in Kentucky were violated after he alleged that guards “had used excessive force in a confrontation with him in April 1998, including by electroshocking him more than a dozen times with a stun gun, including after he had been shackled.”³⁴ A juvenile in the jail alleged that in December 1998 he was beaten, kicked, verbally abused and shot twice with a stun gun after he refused to move from an isolation cell. In March 1999, another Kenton inmate filed a lawsuit alleging that he was shocked with a stun gun while hogtied in a cell. The inmate reported that he was yelling for help because he was in pain and having trouble breathing and officers repeatedly stunned him to make him stop yelling.³⁵

There are other reports of the use of stun technology in prisons. For example, in 1996 in Muncy Prison, Pennsylvania guards used a stun shield to control a woman who had become distraught after a warrant had been read for her execution.³⁶

³⁴ Amnesty International, Cruelty in Control, *supra* note 20, 37.

³⁵ Id. (As of 1999, the results of a Justice Department investigation were still pending.)

³⁶ Id.

Accidental shocks have also been reported. In 1993, “Edward Valdez walked out of [a] San Diego courtroom into the hallway where jurors were standing around waiting. Suddenly he screamed and crashed to the floor. ‘He was out for about a minute,’ said the prosecutor. ‘It was very effective.’”³⁷ The defendant’s collapse was caused by the accidental discharge of a stun belt that he had “chosen to wear under his clothing rather than appear in handcuffs and chains before the jury.”³⁸

It appears that stun technology is often used for punishment. A study by the Justice Department at the Daviess County Detention Center in Owensboro, Kentucky, found that the jail staff “misuse[d] and abuse[d] weapons such as pepper spray, stun shields, and stun guns, resorting to them early and often, for both management and punishment.” This report cited an incident in which a stun gun was used to awaken an

³⁷ Schulz, supra note 2.

³⁸ Id.

inmate who had “passed out.” The report also found that stun guns (and pepper spray) were used routinely to “control uncooperative youth and break up fights.”³⁹

II. Stun shield use in New York City

Any inmate in DOC custody who is found, after a hearing -- presided over by a captain assigned to a DOC-wide unit rather than an officer at the facility where the allegedly offending conduct occurred -- to have committed an infraction, as defined in the Inmate Rule Book, may be sent to the CPSU. Infractions include, among others, assaulting staff or other inmates (with or without weapons), starting fires, destroying City property, disobeying a direct order, and verbally abusing staff.

³⁹ Letter from the Justice Department to County Court Judge on the Daviess County Detention Center, Kentucky, April 10, 1998, quoted in Amnesty International, Cruelty in Control, supra note 20.

The DOC has acquired ninety 50,000-volt stun shields.⁴⁰ The DOC uses the stun shield for “cell extractions” at the CPSU. A cell extraction involves the use of force to remove a recalcitrant inmate from a cell. Cell extractions occur for a variety of reasons, including when an inmate refuses to come out of the cell (e.g., for a court appearance or when inmates are mandated to be out of their cells), when an inmate refuses to cooperate with a search, when an inmate starts a fire or otherwise destroys property within the cell, when institutional staff believe that an inmate has contraband in the cell, when an inmate refuses to return sanitary supplies, and, significantly, when an inmate refuses to allow the cell-door food slot to be closed.⁴¹ The DOC used the shield seventy-four times in the year and a half following its initial deployment.⁴²

⁴⁰ Drew, supra note 12.

⁴¹ Inmates in the CPSUs are fed on trays delivered by correction officers through horizontal slots in the cell door. DOC practice requires food slots to be closed to reduce the risk that inmates will throw feces, urine, or other noxious substances at officers. Sometimes, an inmate who wishes to have a superior officer come to the cell location, for real or perceived grievances, will place an arm through the door, making it impossible to close. A newspaper story reported that officers will permit no more than one cell food slot to be open: “The mantra for maintaining control in the Bing is ‘Two slots, everything stops.’” Jennifer Gonnerman, Roaming Rikers, Village Voice, December 19, 2000, <http://www.villagevoice.com/issues/0050/gonnerman1.shtml> (last visited July 9, 2001).

⁴² Drew, supra note 12.

DOC guidelines for the use of the stun shield permit its use in a number of enumerated situations. The relevant DOC Directive authorizes use in the following situations:

1. To defend oneself or another employee, inmate or visitor from a physical attack or from an imminent physical attack.
2. To prevent the commission of a crime, including escapes.
3. To effect an arrest when resistance is encountered.
4. To enforce Department/facility rules and Court Orders.
5. To prevent serious damage to property.
6. To prevent an inmate from inflicting self-harm.
7. To effect a cell extraction during any search operation when an inmate refuses to be escorted out of the area.⁴³

The Directive authorizes staff to use the shield for up to six seconds, with “[d]esired effects” of “possible unconsciousness” as well as “[f]ull takedown” and “state

⁴³ New York City DOC, Policy and Procedure Unit, Directive no. 4600, July 9, 1998 [hereinafter Directive], ¶ III(B).

of immobilization.” Under the Directive, the shield may not be applied more than twice.⁴⁴

The Directive declares that the following acts are “strictly prohibited”:

1. Stunning an inmate to discipline him/her for any reason.
2. Stunning an inmate when grasping the inmate to guide him/her, or a push, would achieve the desired result.
3. Stunning an inmate after he/she has ceased to offer resistance.

⁴⁴ Id. at ¶ IV(F).

4. Stunning an inmate restrained by a mechanical device, except as a last resort where there is no practical alternative available to prevent serious physical injury to staff, visitors or inmates.⁴⁵

The Directive warns staff to avoid contact with an inmate's head, but “should the shield inadvertently be pressed against the head, electronic use shall be immediately discontinued by releasing the trigger and repositioning the shield at a different angle.” The Directive cautions staff not to use the shield “in conjunction with or after chemical agents have been dispersed [because it] emits sparks which could, under the right circumstances, cause ignition of the chemical agent.” The Directive also prohibits the use of the shield when it might come into contact with water.⁴⁶

⁴⁵ Id. at ¶ III(D).

⁴⁶ Id. at ¶ IV(B), (E), (F).

The Directive prescribes that in “all anticipated situations and where circumstances allow,” medical staff will be asked before use whether the inmate has any medical contraindications. If so, the shield may not be employed unless a supervisor determines that use is “reasonable to prevent death, serious injury or a serious threat to the safety or security of the facility.”⁴⁷ Correctional Health Services, the arm of the New York City Health and Hospitals Corporation with authority over prison health, lists pregnancy, asthma, hypertension, cardiac disease, the presence of a pacemaker, seizure disorders, and diabetes as medical contraindications.⁴⁸ Any inmate on whom the shield is used “shall immediately be brought for medical attention.”⁴⁹ The Directive also

⁴⁷ Id. at ¶ IV(C).

⁴⁸ New York City Health and Hospitals Corporation, Correction Health Services, Policy and Procedure, Medical Constraints for the Use of the Stun Shield and Chemical Agents, June 29, 1997, Attachment “A.” See also Memorandum of Audrey Compton, M.D., Acting Executive Director, Correctional Health Services, July 2, 1997: The purpose of the policy and procedure “is to protect our patients.”

⁴⁹ Directive, ¶ IV(G).

prescribes that use of force with the shield be recorded with a hand-held video camera
“under all circumstances.”⁵⁰

⁵⁰ Id., ¶ III(E).

The correction consultants⁵¹ monitoring the use of force by DOC staff in the CPSU have made the following findings and observations with respect to the use of the shield in the CPSU to the United States District Court overseeing compliance with the court order following the settlement of Sheppard v. Phoenix⁵²:

- The consultants noted that most applications of force in the CPSU involve an inmate's refusal to close the food slot "as a means of protest."⁵³
- Many cell extractions in the CPSU, which are precipitated by an inmate's refusal to close his food slot to protest the failure to provide mandated services, could be avoided by appropriate supervisory intervention.⁵⁴

⁵¹ The consultants are experienced corrections professionals. One, Norman Carlson, for many years was Director of the Federal Bureau of Prisons.

⁵² 1998 WL 397846 (S.D.N.Y., July 16, 1998).

⁵³ 2d Report of the Joint Expert Consultants Prepared Pursuant to the Stipulation of Settlement (hereinafter 2d Report), September 28, 1999, at 10.

⁵⁴ 1st Report of the Joint Expert Consultants Prepared Pursuant to the Stipulation of Settlement (hereinafter 1st Report), February 4, 1999, at 27.

· Correction staff used both pepper spray and the stun shield on several prisoners, in violation of their own Directive; in one case a captain lost one compensation day as punishment, but in the other case there was no finding of wrongdoing or discipline imposed. 2d Report at 5, 12. In the incident in which no wrongdoing was found, the inmate was in handcuffs, on the ground, when he was struck with pepper spray and the stun shield.⁵⁵

⁵⁵ Id. at 20.

- Correction staff used the stun shield on a non-resisting inmate who can be seen on a videotape laying motionless on the cell floor, surrounded by five officers, when the captain directs staff to apply the shield to him, apparently to induce him to move his arm behind his back for cuffing. No wrongdoing was found.⁵⁶

- Correction staff used the stun shield to extract an inmate. When he was seen by medical personnel after the extraction, they noted that “patient found lying face down on a stretcher unconscious. Blood from mouth and bruise to right temporal area. Patient was awakened after twelve minutes. Also, tenderness and swelling to right third finger, decreased range of motion, headaches, dizziness and abrasion to right elbow.”⁵⁷

- The consultants identified two instances in which DOC officers used both the stun shield and a chemical agent (Oleoresin Capsicum/Pepper Formula, or “pepper spray”), in violation of the policy regarding chemical agents.⁵⁸

- The stun shield was used during the course of a cell extraction. Other than the officer who handled the shield, no other member of the team, including the supervising captain, reported the use, nor did anyone indicate whether medical personnel previously had been queried to determine if the inmate had any medical contraindications.⁵⁹

⁵⁶ Id. at 21.

⁵⁷ Id. at 25.

⁵⁸ 2d Report, supra, at 5.

⁵⁹ Fourth Report of the Joint Expert Consultants Prepared Pursuant to the

Members of the committee reviewed DOC videotapes of several cell extractions using the stun shield. In addition to some issues of the kinds addressed by the consultants, the committee noted at least one instance in which the required videotaping showed nothing of critical moments of the process because the videotaping officer, apparently volitionally, placed himself at an angle where the inmate could not be seen. In another videotape reviewed by the committee, the required post-use medical examination of the inmate, conducted at the institutional clinic, consisted of nothing more than a physician asking the inmate how he was. There was no physical examination nor checking of vital signs; there was no further discussion.

Under DOC procedures, a cell extraction is a “use of force” (“UOF”), therefore a reportable incident. The DOC Investigation Division, an internal DOC unit, reviews instances of UOF. It is unclear whether, and if so to what extent, its findings have affected the use of the stun shield by the DOC.

III. The Law

Stipulation of Settlement, September 27, 2000, at 3.

Incarceration creates a tension between the need to control and secure and accommodation for individual rights. The dilemma is especially sensitive in correctional systems such as in New York City, where the majority of the inmate population are pre-trial detainees who have not yet been convicted of the crimes for which they are incarcerated.⁶⁰ See generally Bell v. Wolfish, 441 U.S. 520, 536-41, 99 S.Ct. 1861, 60 L. Ed. 2d 447 (1979). As the following analysis demonstrates, stun shield use, like other applications of force, may create liability for the staff who administer it, their supervisors, and potentially the municipality.

A. The Eighth Amendment

⁶⁰ The DOC inmate census on May 29, 2001 was 14,612, 97.8% of currently open and available capacity. The average daily population for the first two months of 2001 was 14,533, with the following characteristics:

Pre-trial detainees	10,357 (71%)	
State prisoners (including, among others, sentenced to felony terms of more than a year and awaiting transfer to state prisons)	1,663 (11%)	City
sentenced prisoners	2,514 (17%)	

Conditions of confinement in a prison are subject to scrutiny under Eighth Amendment standards. Hutto v. Finney, 437 U.S. 678, 685, 98 S.Ct. 2565, 57 L.Ed. 2d 522 (1978). The “unnecessary and wanton infliction of pain” constitutes cruel and unusual punishment forbidden by the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed. 2d 251 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 670, 97 S.Ct. 1401, 1412, 51 L.Ed. 2d 711 [1977]).

The Eighth Amendment test involves both subjective and objective elements. Wilson v. Seiter, 501 U.S. 294, 298-99, 111 S.Ct. 2321, 115 L.Ed. 2d 271 (1991). A defendant must be shown to have had the requisite level of culpability, that is, to have engaged in actions characterized by “wantonness.” Id. To prove the use of excessive force in violation of the Eighth Amendment, a prisoner must establish that the force was used “maliciously and sadistically” for the purpose of inflicting pain, rather than in a “good faith effort to maintain or restore discipline.” Hudson v. McMillian, 503 U.S. 1, 4-5, 7, 112 S.Ct. 995, 117 L.Ed. 2d 156 (1992); see also Davidson v. Flynn, 32 F.3d 27, 30 (2d Cir. 1994) (“The key inquiry under Hudson and its precedents is whether the alleged conduct involved ‘unnecessary and wanton infliction of pain,’” quoting Hudson, 503 U.S. at 8). The objective component of the Eighth Amendment test turns upon whether the challenged conduct violates “contemporary standards of decency,” and

“[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated.” Hudson, 503 U.S. at 9.

The determination of whether a prison guard has crossed the constitutional line when force is used must focus on such factors as the need for the application of force, the relationship between the need for the application of force and the amount of force used, the threat reasonably perceived by prison officials, any efforts made to temper the severity of the forcible response and the extent of injury inflicted. Whitley, 475 U.S. at 321. Under the Hudson standard, a prisoner need not have sustained a “serious” or “significant” injury to establish an Eighth Amendment claim, Hudson, 503 U.S. at 7-9, provided that the force used was more than de minimis, or involved force that is “repugnant to the conscience of mankind.” Id. at 9-10.

Justice Blackmun’s concurrence in Hudson underscored the necessity to reject a “significant injury” test (“e.g. injury that requires medical attention or leaves permanent marks,” 503 U.S. at 13) in prison use of force cases, where the instruments of force (“various kinds of state-sponsored torture and abuse,” id.) are often chosen precisely to avoid leaving telltale injuries:

[The constitutional prohibition of “cruel and unusual punishments” then might not constrain prison officials from lashing prisoners with leather straps, whipping them with rubber hoses, beating them with naked fists, shocking them with electric currents, asphyxiating them short of death,

intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs. These techniques, commonly thought to be practiced only outside this Nation's borders, are hardly unknown within this Nation's prisons. See, e.g., Campbell v. Grammar, 889 F.2d 797, 802 (8th Cir. 1989) (uses of high-powered fire hoses); Jackson v. Bishop, 404 F.2d 571, 574-5 (8th Cir. 1968) (use of the "Tucker telephone," a hand-held cranked device that generated electric shocks to sensitive body parts, and flogging with leather strap).

503 U.S. at 14.

While the Eighth Amendment's protection does not apply "until after conviction and sentence," Graham v. Connor, 490 U.S. 386, 392, n.6, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989), pre-trial detainees are protected from excessive force amounting to punishment by the Due Process Clause of the Fourteenth Amendment. Id. at 395 n.10; Bell v. Wolfish, 441 U.S. at 535 (1979); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973). Nevertheless, the Hudson analysis has been applied to excessive force claims brought under the Fourteenth Amendment. United States v. Walsh, 194 F.3d 37 (2d Cir. 1999),⁶¹ Riley v. Dorton, 115 F.3d 1159 (4th Cir.1997), Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993).

⁶¹ Before the Court of Appeals' decision in Walsh, District Courts in this Circuit continued to apply the four-pronged test articulated by Judge Friendly in Johnson v. Glick in cases involving the application of force to pre-trial detainees: (1) the need for the application of force; (2) the relationship between the need and the amount of force used; (3) the extent of injury inflicted; and (4) whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of inflicting harm." Johnson, 481 F. 2d at 1033; see, e.g., Rahman v. Philip, 92 Civ. 5349, 1995 WL 679251 at *4 (S.D.N.Y. Nov. 15, 1995) (Stein, J.). Some version of this standard has also been applied by other courts in cases involving detainees. White v. Roper, 901 F.2d 1501, 1507

Under the Hudson standard, serious or even deadly force would not violate the Constitution if the force were necessary and the officers who applied it did not intend to cause needless harm. Whitley v. Albers, 475 U.S. 312, 322-26 (use of shotgun in riot situation); Williams v. Kelley, 624 F.2d 695, 698 (5th cir. 1980) (officers not liable for accidentally strangling prisoner while trying to subdue him); Hayes v. Wimberly, 625 F.Supp. 967, 969-70 (E.D. Ark. 1986) (officers not liable for using baton and gas to subdue prisoner armed with broken light bulb). But even when there is some need for force, the use of excessive force violates the Constitution. Martinez v. Rosado, 614 F.2d 829, 830-32 (2d Cir. 1980) (prisoner's refusal of orders did not justify assault by officers; "We certainly cannot conclude that [the prisoner's refusal to obey an order and surrender keys] alone would justify a physical assault absent some evidence of physical resistance or some other indication that the degree of force utilized by the officer was proper under the circumstances."); Hickey v. Reeder, 12 F.3d 754, 758-59 (8th Cir. 1993) (shooting prisoner with stun gun because he refused to clean cell violated Eighth Amendment); Lewis v. Downs, 774 F.2d 711, 714-15 (6th Cir. 1985) (some force justified but striking and kicking handcuffed prisoner was not).

(9th Cir. 1990); United States v. Cobb, 905 F.2d 784, 787 (4th Cir. 1990).

Courts have considered Eighth Amendment challenges to prison officers' utilization of dangerous weapons, including stun guns, shields, Tasers and fire hoses. The use of these weapons has consistently been found not to be a per se constitutional violation but justified when prisoners, by resisting an order, have presented a serious threat to prison security or have physically threatened prison employees. See, e.g., Spain v. Procunier, 600 F.2d 189, 196 (9th Cir. 1979) (tear gas reasonably necessary technique to extract prisoner from cell); Michenfelder v. Sumner, 860 F.2d 328, 335 (9th Cir. 1988) (Taser "used to enforce compliance with a search that had a reasonable security purpose, not as punishment"); Jasper v. Thalacker, 999 F.2d 353 (8th Cir. 1993) (stun gun used permissibly on an inmate who had threatened and lunged at a guard); Caldwell v. Moore, 968 F.2d 595, 602 (6th Cir. 1992) (plaintiff was subdued with a straitjacket and stun gun after having kicked the door of his cell and shouted for hours; "It is not unreasonable for the jail officials to conclude that the use of a stun gun is less dangerous for all involved than a hand to hand confrontation."); Rubins v. Roetker, 737 F. Supp. 1140 (D. Colo. 1990) (no constitutional violation when plaintiff was subdued with a stun gun after having resisted handcuffing and engaged in disruptive conduct); Collins v. Scott, 961 F. Supp. 1009 (E.D. Tex. 1997) (no constitutional violation when officers used stun shield when plaintiff refused to submit to strip search since the shield was the least restrictive means of maintaining control of the prisoner); Dennis v. Thurman, 959 F. Supp. 1253 (C. D. Cal. 1997) (no constitutional violation when plaintiff suffered broken leg from gas gun firing wooden blocks during cell extraction)

On the other hand, non-lethal weaponry, such as stun guns, Tasers, high-pressure hoses, gas and batons, “though legitimate forms of control in certain circumstances, become instruments of brutality when used indiscriminately against a defenseless prisoner. . . . [A prisoner’s abusive language] assuredly did not justify subjecting him to steady blasts of water from two high-pressure hoses or beating him savagely around the head and body with billy clubs.” Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984); see also Hickey v. Reeder, 12 F.3d 754, 757 (8th Cir. 1993) (use of force on inmate who refused to sweep his cell unconstitutional: “This is exactly the sort of torment without marks with which the Supreme Court was concerned in [Hudson] and which, if inflicted without legitimate reason, supports the Eighth Amendment’s objective component.”); United States v. Tines, 70 F.3d 891 (6th Cir. 1995) (affirming criminal convictions of jail guards for beating and stunning prisoners as punishment for stealing another prisoner’s shoes); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (Eighth Amendment violation found in staff use of force at Pelican Bay Security Housing Unit based on record of staff beatings, use of “fetal restraints,” use of firearms and use of batons, gas and Taser guns unnecessarily and sometimes recklessly in cell extractions where there was no imminent security risk.).⁶²

⁶² Challenges to the use of “pain compliance techniques” by police officers as violative of the Fourth Amendment have produced similarly mixed results. The Fourth Amendment prohibition against unreasonable seizures permits law enforcement offices to use only such force to effect an arrest as is “objectively

reasonable” under the circumstances. Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989). Under Graham, the reasonableness determination requires “a careful balancing of the ‘nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing government interests at stake.”490 U.S. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed. 2d 1 ([1985])). In these cases, the type and amount of force used must be weighed against such factors as the severity of the crime at issue, whether the suspect posed an immediate threat to the officers’ or others’ safety, and whether the suspect was actively resisting or about to flee. Headwaters Forest Defense v. County of Humboldt, 211 F.3d 1121, 1133 (9th Cir. 2000). The Court of Appeals in Headwaters reversed the District Court’s finding that as a matter of law rubbing pepper spray into the eyes of trespassing nonviolent protesters, and spraying others in the eyes from a distance of one foot, was not excessive. But see Passino v. State, 669 N.Y.S.2d 793, 175 Misc. 2d 733 (N.Y. Ct. Cl. 1998) (use of pepper spray to induce cooperation of belligerent drunk driving arrestee reasonable); Singleton v. City of Newburgh, 1 F. Supp. 2d 306 (S.D.N.Y. 1998) (severity of crime and threat of swallowing contraband sufficient to justify use of pepper spray).

B. Misuse of stun technology may create civil liability for correctional administrators.

1. Civil Rights Actions Under 42 U.S.C. § 1983

Section 1983 provides a private cause of action against any person who, acting under color of state law, causes another person to be subjected to the deprivation of rights under the Constitution or federal law. Section 1983 “contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.” Farmer v. Brennan, 511 U.S. 825, 841, 114 S.Ct. 1970, 128 L.Ed. 2d 811 (1994) (quoting Daniels v. Williams, 474 U.S. 327, 330, 106 S.Ct. 662, 88 L.Ed. 2d 662 ([1986])). Liability under Section 1983 can only be imposed, however, on those persons who actually cause a deprivation of rights, and “personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.” Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994).

2. Liability of Correction Supervisors

Supervisors may be liable under Section 1983 for their own actions and, under certain circumstances, for the actions of their subordinates. Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999). A supervisor’s personal involvement may be

established by proof of the supervisor’s direct involvement in the incident or by failing to avert the wrong after learning of the previous violations through report or appeal. In use of force cases, supervisory liability is most frequently premised on proof that the supervisor “created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue [A supervisor] may be personally liable if he was grossly negligent in managing subordinates who caused the unlawful condition or event. Wright v. Smith, 21 F.3d at 501.

Jail and prison supervisors can be liable for their “deliberate indifference” to violence by subordinate correction staff. Blyden, 186 F.3d at 265; Madrid v. Gomez, 889 F. Supp. 1146, 1249 (finding liability based on supervisors’ “abdicating their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist”); Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988) (“administrators’ indifference to brutal behavior by guards towards inmates [is] sufficient to state Eighth Amendment claim.”⁶³). But “a prison official cannot be found liable under

⁶³ The “deliberate indifference” required to establish Eighth Amendment liability of a prison official is analytically distinct from the “deliberate indifference” necessary to hold a municipality liable for a constitutional violation. While Farmer v. Brennan requires that an official can be liable only if he had actual knowledge of the danger to plaintiff and failed to act, the Supreme Court held in Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989), that the government entity can be found liable on proof that policy-making officials failed to take affirmative actions to cure a problem when the conditions or

the Eighth Amendment . . . unless the official knows of and disregards an excessive risk to inmate health or safety.” Farmer, 511 U.S. at 837.

Thus, a prisoner alleging in a § 1983 action that supervisors caused the violation of his constitutional rights need not plead or prove that these supervisors acted maliciously or sadistically, as he must in any action against the guards who actually applied force, but that the supervisors manifested “deliberate indifference” to his personal safety. Supervisory deliberate indifference, both in individual damage cases and class action injunctive proceedings, is often premised on proof of a pattern of staff’s use of excessive force, supported by evidence that administrators, who had knowledge of the pattern, failed to implement adequate use of force controls, such as meaningful and

practices objectively violated the Eighth Amendment: “it may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.” Canton, 489 U.S. at 390. See Farmer, 511 U.S. at 840 (“Canton’s objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases.”); see also Ricciuti v. New York City Transit Authority, 941 F.2d 119, 123 (2d Cir. 1991) (municipal policy of deliberate indifference may be shown by “evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had used excessive force”); Gentile v. County of Suffolk, 926 F.2d 142, 152-53 (2d Cir. 1991) (county liable based on policy of failure to discipline police officers).

effective investigative and staff disciplinary operations. Madrid v. Gomez, 889 F. Supp. at 1247-78, n.196; Fisher v. Koehler, 692 F. Supp. 1519, 1551 (S.D.N.Y. 1998), aff'd, 902 F.2d 2 (2d Cir. 1990) (New York City Department of Correction liable on a supervisory deliberate indifference theory).

Prison supervisors who become aware of the danger to a prisoner from records and reports and other evidence, but nevertheless fail to take adequate steps to protect the prisoner from injury, can be held liable. “Knowledge of a substantial risk of serious harm” may be established on proof that “the risk was obvious.” Farmer, 511 U.S. at 825. If prison officials turn a blind eye towards evidence of a pattern of brutality and cover up, or assert that they cannot “establish” what others--including injured prisoners--told them existed, they are nevertheless liable for the constitutional violation. See Vance v. Peters, 97 F.3d 987, 992-93 (7th Cir. 1996); Boyd v. Knox, 47 F.3d 966, 968 (8th Cir. 1995); Jones v. City of Chicago, 856 F.2d 985, 992-93 (7th Cir. 1988). Correction officials cannot “escape liability if the evidence showed that [they] merely refused to verify underlying facts that [they] strongly suspected to be true, or declined to confirm inferences of risk that [they] strongly suspected to exist.” Farmer, 511 U.S. at 843, n.8; see also Madrid, 889 F. Supp. at 1247; Coleman v. Wilson, 912 F. Supp. 1282, 1316-17 (E.D. Cal. 1995) (“Moreover, after five years of litigating, the claimed lack of awareness is not plausible”) (citations omitted); McGill v. Duckworth, 944 F.2d 344, 351 (7th Cir.

1991) (“Going out of your way to avoid acquiring unwelcome knowledge is a species of intent”). Supervisory officials’ failure to implement adequate systems in staff training, investigation and discipline to control and regulate staff use of force, despite their knowledge that such systems were necessary to ensure that staff force was controlled, is evidence of their deliberate indifference. Fisher, 692 F. Supp. at 1564, Madrid, 889 F. Supp. at 1251, Ruiz v. Estelle, 503 F. Supp. 1265, 1302 (S.D. Tex 1980) (prison officials encourage staff to indulge in excessive physical violence by rarely investigating reports of violence and failing to take disciplinary action), aff’d in part, 679 F.2d 1115 (5th Cir. 1982), amended in part, vacated in part on other grounds, 688 F.2d 266 (5th Cir. 1982); Estelle v. Johnson, 37 F. Supp. 2d 855, 940 (S.D. Tex. 1999) (denying motion to terminate judgment in Ruiz v. Estelle) (“The extent to which excessive force is used in TDCJ, combined with the inability or failure of the prison system to control use of force incidents, reflects what can only be described as an affirmative management strategy to permit the use of excessive force for both punishment and deterrence. It is clear that while IAD goes through the motions of filing paperwork on cases, it seldom finds officer misconduct. The result is to send a clear message to staff that excessive force will be tolerated.”).

3. Prison Litigation in New York City

For fifteen years, New York City jail inmates in a number of facilities have successfully pursued class action litigation that alleged systemic correction officer brutality. See Sheppard v. Phoenix, 1998 WL 397846 (S.D.N.Y., July 16, 1998) (Central Punitive Segregation Unit); Fisher v. Koehler, 692 F. Supp. 1519 (S.D.N.Y. 1988), injunction entered, 718 F. Supp. 1111 (1989), aff'd, 902 F.2d 2 (2d Cir. 1990) (Correctional Institution for Men); Jackson v. Montemagno, CV 85-2384 (Order Approving Stipulation for Entry of Judgment, November 26, 1991) (Brooklyn House of Detention); Reynolds v. Ward, 81 Civ. 101 (Order and Consent Judgment, October 1, 1990) (Bellevue Prison Psychiatric Ward).

The Sheppard case was settled with the entry of a judgment on consent which was acknowledged by the defendants to be “necessary to correct violations of the federal rights of the plaintiff class.” (Stipulation of Settlement, July 10, 1998). Sheppard led to federal and state criminal prosecutions of correction officers and supervisors, and documented a pattern of correction officer misconduct and cover-up in the unit. As noted above, two consultants, jointly retained by the parties - - former Director of the Federal Bureau of Prisons Norman A. Carlson and Steve J. Martin -- have been advising the court supervising compliance with the Sheppard order for the

past three years, monitoring and reporting on questionable use of force incidents, including some involving the stun shield.⁶⁴

4. The Prison Litigation Reform Act

⁶⁴ See n.52 and accompanying text.

In 1996, Congress passed and the President signed the Prison Litigation Reform Act of 1995 (“PLRA”).⁶⁵ The PLRA provides: “No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. § 1997e(e). The provision has been construed as applicable only to damage claims, and as so construed, its constitutionality has been upheld. Zehner v. Trigg, 133 F.3d 459, 461-3 (7th Cir. 1997); accord, Harris v. Garner, 190 F.3d 1279, 1288-89 (11th Cir. 1999), reinstated in pertinent part, 216 F.3d 970, 972, 985 (11th Cir. 2000) (en banc); Davis v. District of Columbia, 158 F.3d 1342, 1347 (D.C. Cir. 1998).

Some courts have held that in an Eighth Amendment case, physical injury “must be more than de minimis but need not be significant” (the same standard as the objective element of an Eighth Amendment use of force case) to meet the test of § 1997e(e). Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997); Cole v. Artuz, 2000 WL 760749 *4 and n.2 (S.D.N.Y. June 12, 2000) (holding that claim of painful untreated back injury, aggravated by contraindicated work assignment, met §

⁶⁵ Pub.L. 104-134, Title I, § 101(a), Title VIII, § 802(a), April 26, 1996, 110 Stat. 1321-66; renumbered Title I, Pub.L. 104-140, May 2, 1996, 110 Stat. 1327, and amended Pub.L. 105-119, Title I, § 123(a), Nov. 26, 1997, 111 Stat. 2470.

1997e[e] test); Luong v. Hatt, 979 F. Supp. 481 (N.D. Tex. 1997) (dismissing claim that guards failed to protect prisoner where there was no evidence of lasting disability or severe pain; cuts, scratches, lacerations and bruises insufficient to satisfy § 1997e[e] test).

The Second Circuit has adopted a more expansive definition of de minimis injury in these cases, and has held that a claim involving physical impact or intrusion is actionable if the allegations state an Eighth Amendment claim, independent of any evidence of physical harm. Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding that “alleged sexual assaults,” described as “intrusive body searches,” “qualify as physical injuries as a matter of common sense” and “would constitute more than de minimis injury.”). The District Court in Williams v. Goord, 111 F. Supp. 2d 280, 291 n.4 (S.D.N.Y. 2000) applied a particularly broad notion of physical injury, holding that an allegation of deprivation of exercise for 28 days was sufficient to plead physical injury because extended deprivation of exercise is potentially injurious to physical health. In Waters v. Andrews, 2000 WL 1611126 at *7 (W.D.N.Y. Oct. 16, 2000), the District Court cited the dictionary’s definition of “injury” as “an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm: wrong” to justify its conclusion that a reasonable jury could find that the statute was satisfied by exposure to noxious odors, including those of human wastes, and “dreadful” conditions of confinement (including inability to keep

clean while menstruating, denial of clothing except for a paper gown, and exposure to “prurient ogling by male prison staff and construction workers”).

IV. Conclusions and Recommendations.

A. We recognize that the DOC has an interest in assuring the safe and orderly operation of its facilities. We take no position on whether use of the shield should be prohibited absolutely. We believe, however, that significant modifications of stun shield use, and related procedures, appear appropriate and necessary.

B. We believe that the DOC should re-evaluate its position regarding cell extractions with a view to determining their necessity and immediacy in circumstances in which they now are undertaken routinely. Cell extractions consume staff resources and risk serious injury to staff as well as inmates, obviously and appropriately of major concern to administrators. Delay often defuses tension

and sometimes, waiting a brief period makes an inmate tractable.⁶⁶ An hour's wait often harms no one and may resolve the problem.⁶⁷

It is hard to understand how an inmate's refusal to close a food slot poses an immediate threat to the orderly operation of the institution. It is, however, an act of defiance in a tense environment that demands obedience and does not tolerate disrespect of authority. Change in jail culture is extraordinarily difficult and we harbor no illusions about its prospect. We urge, however, that in light of the potential for injury, as well as the diversion of manpower, DOC place less emphasis on compliance by inmates who are isolated in single cells and who pose no serious risks to others.

⁶⁶ DOC Directive no. 5006, ¶ V, requires that “[a]bsent circumstances requiring immediate physical intervention,” alternative methods to the use of force must be exhausted.

⁶⁷ The Sheppard consultants noted a case of three cell extractions on one inmate within two hours. 2d Report at 20. Although the report does not identify the reason for the multiple extractions, common sense suggests that the process may have been unnecessary.

Even when appropriate security concerns require compliance, common sense suggests the use of steps short of electro-shock to achieve results. Committee members saw a videotape of the use of a stun shield to compel an inmate to close a food slot, which he had kept open by putting his arm through it. Several times before the cell extraction, he withdrew his arm to the interior of his cell. Repeatedly, staff members had the opportunity simply to close the door. They did not, suggesting that issues of control and authority, if not a street culture of machismo, outweighed common logic.

C. In accordance with the Sheppard consultants' observations and as common sense suggests, the presence of an experienced supervisor in the CPSU often will ameliorate a difficult and potentially violent confrontation. Senior supervisors should be the rule in the CPSU. The Sheppard v. Phoenix consultants noted:

We have observed on a number of occasions where experienced supervisors and officers took time to listen to the inmates['] concerns and resolve them satisfactorily. When they succeeded, the incident was resolved without force being necessary. Other staff do not have the motivation or interpersonal communications skills needed to deal with these issues.

1st Report at 27.

Every decision to use the stun shield should be made by a senior high-ranking officer.

We are troubled by issues surrounding medical pre-clearance. Institutional records that reflect the absence of a disqualifying condition (for example, a predisposition to cardiac arrhythmia) may indicate that the inmate is unaware of the condition or has not communicated it adequately to the medical staff upon arrival at the facility, a reasonable proposition given the environment and circumstances that logically accompany admission to jail. The safest course may be to bar shield use on any inmate whose medical records do not state affirmatively that no disqualifying condition exists. But again, that entry may be as good as the information furnished by the inmate. While we see no easy solution to this issue, we believe it is vital for medical staff in any institution in which the shield may be used to be exceptionally diligent to identify inmates to whom shield use might pose special risks.

Separately, senior DOC officials should assure that line-level staff using the stun shield follow the procedure for videotape recording of each use, as well as full medical examination of each inmate to whom the shield has been applied. Videotapes provide no assistance when critical portions are blocked; cursory medical “examinations” that consist of nothing more than asking the inmate how he feels similarly do nothing to address the reasons for the requirements.

D. There should be fuller medical exploration of the risks of stun shield use. The documents furnished to us suggest that there has been little internal analysis by DOC medical personnel or New York City Correctional Health Services. It is unclear whether DOC officials rely upon manufacturer's medical claims for their comfort in using the stun shield. At minimum, a competent outside medical opinion should be sought, and recommended guidelines for use should take into account the practical reality that institutional medical records may not reflect adequately that stun shield use is contraindicated for some inmates.

E. The DOC should employ sufficient staff to enable it to conduct rigorous internal investigations of all use of force incidents, including those involving the stun shield. Investigations should include comprehensive identification, as far as possible, of all inmate and staff participants and witnesses; interviews of inmate participants and witnesses; interviews of staff participants and witnesses; full review of all relevant documents, including staff written reports and medical reports; a review of the relevant videotapes; explicit findings as to the sequence of each application of force that was used; and resolution, when possible, of disputed matters, with reference to particular evidence in the investigative file, including videotapes, statements of staff and inmates.

The DOC should conduct regular, periodic analyses of the utilization of the stun shield to in order to assess, among other issues, the frequency with which the shield is being used, its effectiveness, any injuries sustained by inmates and staff as a result of its use, and whether the shield is accomplishing the purposes for which it was intended.

F. Stun shield use, as well as other sensitive situations, also should be subject to independent oversight. We recognize that the DOC operates under supervision by several outside agencies, including the State Commission on Correction and the City Board of Correction. With the anticipated narrowing of the responsibilities of the Sheppard consultants, another agency, such as the Board of Correction, should take the lead role in reviewing use of the stun shield, including the reporting of shield use.

We recognize that such oversight runs counter, as do so many other aspects of the exposure of prison activities, to the adage that the walls serve equally to keep the public out and the inmates in. We recognize also that correctional administrators traditionally strive to avoid external scrutiny. Yet in this instance, we believe that special attention from the Board of Correction will improve the environment in the CPSU and, in the process, make correction officers' jobs easier.

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* Chair, Subcommittee on Conditions of Confinement

** Abstains

129518 v. 3