

APPEAL, CASREF, PAW

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:07-cv-22617-UU**

Williams v. Scott et al
Assigned to: Judge Ursula Ungaro
Referred to: Magistrate Judge Patrick A. White
Case: 1:05-cv-21271-UU
Case in other court: 10-12075-BB
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 10/04/2007
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil
Rights
Jurisdiction: Federal Question

Plaintiff

Craig Williams

represented by **Craig Williams**
No. 990650
Florida Civil Commitment Center
13619 SE Highway 70
Arcadia, FL 34266
ppp
PRO SE

V.

Defendant

Jeff Scott
Officer

represented by **Bernard Pastor**
Dade County Attorney's Office
111 NW 1st Street
Suite 2810
Miami, FL 33128-1993
305-375-5151
Fax: 375-5634
Email: pastor@miamidade.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Patrick Byrd
Officer

represented by **Bernard Pastor**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

John Doe
Officer
TERMINATED: 10/26/2009

Defendant

John Doe*Sgt.**TERMINATED: 10/26/2009***Defendant****Miami-Dade County Correction &
Rehabilitation Department***TERMINATED: 01/16/2008***Defendant****Humberto Jimenez***Officer*

represented by **Bernard Pastor**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**Jose M. Rios***C/O**TERMINATED: 10/19/2009*

represented by **Kathleen Mary Savor**
Office of the Attorney General
110 SE 6 Street
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(954) 712-4600
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kathleen.savor@myfloridalegal.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**David B. Abbott***C/O**TERMINATED: 10/19/2009*

represented by **Kathleen Mary Savor**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**Spissinger***Captain**TERMINATED: 10/26/2009*

represented by **Adriana Mihaela Jisa**
Purdy Jolly Giuffreda & Barranco PA
2455 E Sunrise Boulevard
Suite 1216
Fort Lauderdale, FL 33304
954-462-3200X109
Fax: 462-3861
Email: Adriana@purdylaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**John Brosnihan***Captain**TERMINATED: 10/26/2009*

represented by **Adriana Mihaela Jisa**
(See above for address)
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Defendant

Flores
C/O
 TERMINATED: 10/26/2009

represented by **Adriana Mihaela Jisa**
 (See above for address)
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

Defendant

Rick Harry
 TERMINATED: 10/26/2009

Defendant

Teion L. Wells Harrison
PhD
 TERMINATED: 10/23/2009

Defendant

Roderick L. Hall
PhD
 TERMINATED: 10/19/2009

represented by **Kathleen Mary Savor**
 (See above for address)
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

Defendant

Lucy D. Hadi
 TERMINATED: 10/23/2009

Date Filed	#	Docket Text
10/04/2007	<u>1</u>	RE-FILED COMPLAINT Under The Civil Rights Act, 42 USC 1983, against all defendants, filed by Craig Williams. (Ifp motion pending.)(caw) (Entered: 10/04/2007)
10/04/2007	<u>2</u>	AFFIDAVIT of Indigency, signed by Craig Williams. (caw) (Entered: 10/04/2007)
10/04/2007	<u>3</u>	Clerks Notice Referring Case to Magistrate Judge Patrick A. White. (caw) (Entered: 10/04/2007)
10/16/2007	<u>4</u>	ORDER permitting plaintiff to proceed without prepayment of filing fee but establishing debt to clker of \$350.00 and granting <u>2</u> plaintiff's motion to proceed in forma pauperis.Signed by Magistrate Judge Patrick A. White on 10/11/07.(tw) (Entered: 10/16/2007)
10/16/2007	<u>5</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANT.Signed by Magistrate Judge Patrick A. White on 10/11/07.(tw) (Entered: 10/16/2007)
11/19/2007	<u>6</u>	PRELIMINARY REPORT OF MAGISTRATE JUDGE re <u>1</u> Complaint filed by Craig Williams. Recommending 1) the defendants Scott, Sergeant Doe and

		PTDC be dismissed as parties to this action pursuant to 28 U.S.C. 1915(e)(2)(B)(ii), for failure to state a claim upon which relief can be granted; 2)the claims of denial of the free exercise of religion and the Fourteenth Amendment claims be dismissed pursuant to 28 U.S.C. 1915(e)(2)(B)(ii), for failure to state a claim upon which relief can be granted; and 3)the claims concerning excessive use of force against the defendants Byrd and Officer Doe remain pending, in their individual capacities. Objections to R&R due by 12/4/2007.Signed by Magistrate Judge Patrick A. White on 11/15/07.(tw) (Entered: 11/19/2007)
11/19/2007	<u>7</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL.The United States Marshal shall serve a copy of the complaoy and appropriate summons upon: Officer Byrd, Pretrial Detention Cewnter, 1321 N.W. 13TH Street, Miami, Florida 33125.Signed by Magistrate Judge Patrick A. White on 11/15/07.(tw) (Entered: 11/19/2007)
11/21/2007	<u>8</u>	MOTION Request for Service of Summons on Defendants at corrected Address or Motion to refile Complaint by Craig Williams. (ail) (Entered: 11/26/2007)
11/30/2007	<u>9</u>	Summons Issued as to Byrd. (br) (Entered: 11/30/2007)
12/03/2007	<u>10</u>	AMENDED ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon: Officer Byrd, Miami-Dade County Corrections & Rehabilitation Department, 8660 West Flagler Street, Miami, FL 33144-2036.Signed by Magistrate Judge Patrick A. White on 11/30/07.(tw) (Entered: 12/03/2007)
12/04/2007	<u>11</u>	MOTION for Demand for Discovery of Internal Affairs Investigation Disposition and Official Records by Craig Williams. Responses due by 12/18/2007 (ail) (Entered: 12/04/2007)
12/04/2007	<u>12</u>	Plaintiff's Objection to <u>6</u> Preliminary Report and MOTION for Leave to File Amended Civil Rights Complaint by Craig Williams. (ail) (Entered: 12/04/2007)
12/04/2007	<u>13</u>	FIRST AMENDED COMPLAINT , filed by Craig Williams.(ail) (Entered: 12/04/2007)
12/06/2007	<u>14</u>	ORDER deferring ruling on <u>11</u> Motion for Discovery of internal affairs investigation, deposition and official records. (DE#11). It appears highly unlikely that the plaintiff is entitled to this discovery. The defendants shall file a response on or before December 17,2007. This is a paperless order. Signed by Magistrate Judge Patrick A. White on 12/07/07. (cz) (Entered: 12/06/2007)
12/06/2007		Set/Reset Deadlines as to <u>11</u> MOTION for Discovery. Responses due by 12/17/2007. (Per 14) (wc) (Entered: 12/07/2007)
12/20/2007	<u>15</u>	MOTION for clarification <u>14</u> Order on Motion for Discovery, by Craig Williams. Responses due by 1/7/2008 (ail) (Entered: 12/21/2007)
12/21/2007	<u>16</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE

		UPON AN INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summon upon: Signed by Magistrate Judge Patrick A. White on 12/20/07.(tw) (Entered: 12/21/2007)
12/21/2007	<u>17</u>	SUPPLEMENTAL REPORT OF MAGISTRATE JUDGE. Objections to R&R due by 1/8/2008. Signed by Magistrate Judge Patrick A. White on 12/20/07.(tw) (Entered: 12/21/2007)
12/27/2007	<u>18</u>	ORDER granting in part <u>15</u> Motion for Clarification, the defendants were ordered to respond to the plaintiff's discovery motion on or before December 17, 2007. No response has been filed. The time is extended to on or before January 4, 2008. Failure to respond to the Court Order may result in a telephonic conference. This is a paperless order. Signed by Magistrate Judge Patrick A. White on 12/27/07. (cz) (Entered: 12/27/2007)
12/27/2007		Set/Reset Deadlines as to <u>11</u> MOTION for Discovery. Responses due by 1/4/2008. (Per <u>15</u>) (wc) (Entered: 12/28/2007)
01/07/2008	<u>19</u>	WRITTEN OBJECTIONS to <u>17</u> Supplemental Report and Recommendations by Craig Williams. (lk) (Entered: 01/08/2008)
01/11/2008	<u>20</u>	SCHEDULING ORDER: Final Pretrial Conference set for 9/5/2008 09:30 AM in Miami Division before Senior Judge James Lawrence King. Jury Trial set for 10/20/2008 09:30 AM in Miami Division before Senior Judge James Lawrence King. Calendar Call set for 10/16/2008 02:00 PM in Miami Division before Senior Judge James Lawrence King. Motions due by 7/7/2008. Signed by Judge James Lawrence King on 1/11/08.(ch1) (Entered: 01/11/2008)
01/11/2008	<u>21</u>	NOTICE of Filing Discovery: First Interrogatories and Request for Production of Documents by Craig Williams.(ls) (Entered: 01/14/2008)
01/11/2008	<u>22</u>	NOTICE of Filing Discovery: First Request for Production of Documents by Craig Williams.(ls) (Entered: 01/14/2008)
01/11/2008		Set/Reset Deadlines: Discovery due by 7/2/2008. Pretrial Stipulation due by 8/29/2008. (See <u>20</u>) (wc) (Entered: 01/14/2008)
01/14/2008	<u>23</u>	SCHEDULING ORDER: Final Pretrial Conference set for 9/5/2008 09:30 AM in Miami Division before Senior Judge James Lawrence King. Jury Trial set for 10/20/2008 09:00 AM in Miami Division before Senior Judge James Lawrence King. Calendar Call set for 10/16/2008 02:00 PM in Miami Division before Senior Judge James Lawrence King. All hearings are held in Courtroom II, Eleventh Floor. Discovery due by 7/2/2008. Motions due by 7/7/2008. Pretrial Stipulation due by 8/29/2008. Signed by Judge James Lawrence King on 1/14/2008.(jw) (Entered: 01/14/2008)
01/14/2008	<u>24</u>	ORDER denying as moot <u>11</u> Motion for Discovery. Review of this case reveals service has not yet been accomplished upon any of the named defendants. Therefore all discovery requests are premature at this time. The US Marshal has been ordered to complete and file returns of service upon defendants Scott and Byrd by separate order. This is a paperless order. Signed by Magistrate Judge Patrick A. White on 1/15/08. (cz) (Entered: 01/14/2008)

01/15/2008	<u>25</u>	ORDER TO U.S. MARSHAL TO COMPLETE SERVICE INCLUDING FILING OF RETURNS IN AN EXPEDITED FASHION. The Marshal shall forthwith comply with the order regrding service previously entered in this case.Signed by Magistrate Judge Patrick A. White on 01/15/08.(tw) (Entered: 01/15/2008)
01/16/2008	<u>26</u>	SUMMONS Returned Executed by Craig Williams. Byrd served on 1/14/2008, answer due 2/4/2008. (tb) (Entered: 01/16/2008)
01/16/2008	<u>27</u>	ORDER AFFIRMING REPORT AND RECOMMENDATIONS re: <u>17</u> Report and Recommendations and dismissing defendant Miami-Dade County Corrections and Rehabilitation department.Signed by Judge James Lawrence King on 1/15/08.(lk) (Entered: 01/16/2008)
01/18/2008	<u>28</u>	Summons Returned Unexecuted as to Officer Byrd. (ail) (Entered: 01/18/2008)
01/22/2008	<u>29</u>	ORDER OF PLAINTIFF. The plaintiff shall file and address for Defendant Byrd, and/or more specific information to identify him, including his first name, or risk his dismissal from this case.Signed by Magistrate Judge Patrick A. White on 01/22/08.(tw) (Entered: 01/22/2008)
01/28/2008		Notice of Undeliverable Mail re <u>20</u> Scheduling Order,, <u>24</u> Order on Motion for Discovery, US Mail returned for: Officer Byrd (jw) (Entered: 01/28/2008)
01/30/2008	<u>30</u>	MOTION for Extension of Time to provide the full names and address of the defendants by Craig Williams. (tb) (Entered: 01/31/2008)
01/30/2008	<u>31</u>	NOTICE of filing subpoena duces tecum by Craig Williams (tb) (Entered: 01/31/2008)
01/31/2008	<u>32</u>	SECOND ORDER TO U.S. MARSHAL TO COMPLETE SERVICE INCLUDING FILING OF RETURNS IN AND EXPEDITED FASHION. Signed by Magistrate Judge Patrick A. White on 1/31/08.(tw) (Entered: 01/31/2008)
02/01/2008	<u>33</u>	ORDER granting <u>30</u> Motion for Extension of Time to File more specific addresses to on or before 2/25/08, or risk dismissal. This is a paperless order. Signed by Magistrate Judge Patrick A. White on 2/1/08. (cz) Modified text on 2/4/2008 (wc). (Entered: 02/01/2008)
02/11/2008	<u>34</u>	Summons Issued as to Scott. (br) (Entered: 02/11/2008)
02/25/2008	<u>35</u>	MOTION to request Extension of Time on motion for enlargement of time to provide the full names and address of the defendants by Craig Williams. (tb) (Entered: 02/27/2008)
02/28/2008	<u>36</u>	ORDER granting <u>35</u> Motion for Extension of Time to File names and addresses of defendants to on or before March 17, 2008. This is a paperless order. Signed by Magistrate Judge Patrick A. White on 02/28/08. (cz) (Entered: 02/28/2008)
03/12/2008	<u>37</u>	Summons Returned Unexecuted by Craig Williams as to Scott. (tb) (Entered: 03/13/2008)

03/17/2008	<u>38</u>	MOTION for Leave to File/Issue Subpoena Duces Tecum by Craig Williams. (ls) (Entered: 03/18/2008)
03/20/2008	<u>39</u>	ORDER denying <u>38</u> Motion for Leave to File subpoenas duces tecum to obtain the investigative file from internal affairs, based upon the plaintiff's complaint. It is the responsibility of the plaintiff to obtain subpoenas and arrange for the payment and service of these subpoenas. This is a paperless order. Signed by Magistrate Judge Patrick A. White on 03/20/08. (cz) (Entered: 03/20/2008)
03/21/2008	<u>40</u>	SUPPLEMENTAL ORDER TO PLAINTIFF. Signed by Magistrate Judge Patrick A. White on 03/20/08.(tw) (Entered: 03/21/2008)
04/10/2008	<u>41</u>	MOTION for an Order Directing the Clerk to Issue Subpoena Duces Tecum and for Service of Process of said Subpoena Duces Tecum by U.S. Marshal by Craig Williams. (ls) Additional attachment(s) added on 4/15/2008 (ls). (Entered: 04/11/2008)
04/10/2008	<u>42</u>	EXHIBITS by Craig Williams re: <u>41</u> MOTION for an Order Directing the Clerk to Issue Subpoena Duces Tecum and for Service of Process of said Subpoena Duces Tecum by U.S. Marshal filed by Craig Williams., Related document: <u>41</u> MOTION for an Order Directing the Clerk to Issue Subpoena Duces Tecum and for Service of Process of said Subpoena Duces Tecum by U.S. Marshal filed by Craig Williams.,(ls) (Entered: 04/11/2008)
04/14/2008	<u>43</u>	SUPPLEMENT to <u>41</u> MOTION for an Order Directing the Clerk to Issue Subpoena Duces Tecum and for Service of Process of said Subpoena Duces Tecum by U.S. Marshal by Craig Williams. (ls) (Entered: 04/15/2008)
04/18/2008	<u>44</u>	SWORN AFFIDAVIT of Indigency signed by : Craig Williams. re <u>41</u> MOTION for an Order Directing the Clerk to Issue Subpoena Duces Tecum and for Service of Process of said Subpoena Duces Tecum by U.S. Marshal by Craig Williams. (ls) (Entered: 04/21/2008)
04/22/2008	<u>45</u>	ORDER granting in part and denying in part <u>41</u> Motion; The motion for subpoenas is granted; The Clerk Shall forthwith send the plaintiff two blank subpoenas signed by the Clerk of Court; the motion for Marshal service is denied. Signed by Magistrate Judge Patrick A. White on 4/22/08. (br) (Entered: 04/23/2008)
04/29/2008	<u>46</u>	ORDER OF TRANSFER to the calendar of the Honorable Ursula Ungaro-Benages for all further proceedings. Signed by Judge James Lawrence King on 4/3/2008 and by Judge Ursula Ungaro on 4/28/2008.(ls) (Entered: 04/30/2008)
04/29/2008	<u>47</u>	Case Assigned to Judge Ursula Ungaro. Judge James Lawrence King no longer assigned to the case. (ls) (Entered: 04/30/2008)
07/21/2008	<u>48</u>	(VACATED PER DE 55) REPORT OF MAGISTRATE JUDGE. Recommending It now appears that the plaintiff has abandoned this lawsuit and it is therefore recommended that the case be dismissed for lack of prosecution. Objections to R&R due by 8/7/2008. Signed by Magistrate Judge Patrick A. White on 07/19/08. (tw) Modified text on 11/14/2008 (dm).

		(Entered: 07/21/2008)
07/29/2008	<u>49</u>	ORDER denying <u>12</u> Motion for Leave to File an amended complaint to add back in defendants for whom it has been recommended that they be dismissed. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 07/29/08. (cz) (Entered: 07/29/2008)
08/04/2008	<u>50</u>	MOTION for Reconsideration re <u>48</u> REPORT AND RECOMMENDATIONS Recommending It now appears that the plaintiff has abandoned this lawsuit and it is therefore recommended that the case be dismissed for lack of prosecution. by Craig Williams. (ls) (Entered: 08/04/2008)
08/04/2008	<u>51</u>	ALTERNATIVE OBJECTION to <u>48</u> Report and Recommendations by Craig Williams. (ls) (Entered: 08/04/2008)
08/04/2008	<u>52</u>	SECOND AMENDED COMPLAINT, filed by Craig Williams.(ls) (Entered: 08/05/2008)
08/15/2008	<u>53</u>	MOTION for Leave to File Third Amended Complaint by Craig Williams. (ls) (Entered: 08/20/2008)
10/09/2008	<u>54</u>	ORDER REFERRING MOTION: <u>53</u> MOTION for Leave to File filed by Craig Williams, <u>52</u> Second Amended Complaint. Motions referred to Magistrate Judge Patrick A. White. Signed by Judge Ursula Ungaro on 10/9/2008. (ls) (Entered: 10/10/2008)
11/13/2008	<u>55</u>	ORDER OF MAGISTRATE JUDGE vacating <u>48</u> Report and Recommendations.; denying as moot <u>50</u> Motion for Reconsideration. Signed by Magistrate Judge Patrick A. White on 11/13/2008. (tw) (Entered: 11/13/2008)
11/13/2008	<u>56</u>	REPORT OF MAGISTRATE JUDGE. Recommending that the Motion for Leave 1) the Second Amended Complaint [DE# 52] be the Operative Complaint; 2)Count 1 proceed against the defendants Scott, Byrd, Doe,Brosnihan, Spissinger and Flores in their individual capacities; 3)Count 2 proceed only as to the claim of retaliation in violation of the First Amendment against the defendants Hall and Harry, in their individual capacities; 4) The claim in Count 2 alleging denial of the free exercise of religion be dismissed pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), for failure to state a claim upon which relief can be granted; 5)Count 3 proceed against the defendants Rios, Abbott and Jimenez, in their individual capacities; 6) The remaining counts, claims not specifically enumerated in any count and the defendants Miami-Dade County, PTDC, Harrison and Hadi7 be dismissed pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), for failure to state a claim upon which relief can be granted to File Third Amended Complaint [DE# 53] be denied. Objections to R&R due by 12/1/2008. Signed by Magistrate Judge Patrick A. White on 11/13/2008. (tw) (Entered: 11/13/2008)
11/13/2008	<u>57</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON INDIVIDUALS. The United States Marshal shall serve a copy of the complaint and appropriate summons upon: Officer Jeff Scott, Officer Patrick Byrd and Officer Humberto Jimenez located at: Pretrial Detention Center,

		1321 N.W. 13th Street, Miami, FL 33125; Officer Jose M. Rios and Officer David B. Abbott located at: DeSoto Correctional Institution, 13617 SE Highway 70, Arcadia, FL 34266-7800; Captain Spissinger, Captain John Brosnihan and Officer Flores located at: Florida Civil Commitment Center, 13613 S.E. Highway 70, Arcadia, FL 34266-7829; Rick Harry, Liberty Behavioral Healthcare Corporation, 401 E. City Avenue, Suite 820 Bala Cynwd, PA 19004-1155 and Roderick L. Hall, Ph.D., Florida Department of Children and Families, 1317 Winewood Boulevard, Tallahassee, FL 32399-0700. Signed by Magistrate Judge Patrick A. White on 11/13/2008. (tw) (Entered: 11/13/2008)
11/20/2008	<u>58</u>	Summons Issued as to David B. Abbott. (br) (Entered: 11/21/2008)
11/20/2008	<u>59</u>	Summons Issued as to John Brosnihan. (br) (Entered: 11/21/2008)
11/20/2008	<u>60</u>	Summons Issued as to Patrick Byrd. (br) (Entered: 11/21/2008)
11/20/2008	<u>61</u>	Summons Issued as to Flores. (br) (Entered: 11/21/2008)
11/20/2008	<u>62</u>	Summons Issued as to Roderick L. Hall. (br) (Entered: 11/21/2008)
11/20/2008	<u>63</u>	Summons Issued as to Rick Harry. (br) (Entered: 11/21/2008)
11/20/2008	<u>64</u>	Summons Issued as to Humberto Jimenez. (br) (Entered: 11/21/2008)
11/20/2008	<u>65</u>	Summons Issued as to Jose M. Rios. (br) (Entered: 11/21/2008)
11/20/2008	<u>66</u>	Summons Issued as to Jeff Scott. (br) (Entered: 11/21/2008)
11/20/2008	<u>67</u>	Summons Issued as to Spissinger. (br) (Entered: 11/21/2008)
11/26/2008	<u>68</u>	MOTION for Extension of Time to File Response <u>56</u> Magistrate Report by Craig Williams. (cqs) (Entered: 12/01/2008)
12/01/2008	<u>69</u>	ORDER Affirming Magistrate Judge's Report,ADOPTING REPORT AND RECOMMENDATIONS. Signed by Judge Ursula Ungaro on 11/30/2008. (cqs) (Entered: 12/01/2008)
12/01/2008		Case Reopened (Case was terminated in error.) (wc) (Entered: 01/05/2009)
12/10/2008	<u>70</u>	Process Receipt and Return, SUMMONS (Affidavit) Returned Executed by Craig Williams. Patrick Byrd served on 12/4/2008, answer due 12/24/2008. (cqs) (Entered: 12/10/2008)
12/10/2008	<u>71</u>	Process Receipt and Return, SUMMONS (Affidavit) Returned Executed by Craig Williams. Jeff Scott served on 12/4/2008, answer due 12/24/2008. (cqs) (Entered: 12/10/2008)
12/15/2008	<u>72</u>	SUMMONS (Affidavit) Returned Executed by Craig Williams. Humberto Jimenez served on 12/10/2008, answer due 12/30/2008. (tb) (Entered: 12/15/2008)
12/17/2008	<u>73</u>	SUMMONS (Affidavit) Returned Executed by Craig Williams. Roderick L. Hall served on 12/9/2008, answer due 12/29/2008. (cqs) (Entered: 12/17/2008)

12/24/2008	<u>74</u>	MOTION for Extension of Time to File, MOTION for Extension of Time to File Response as to <u>52</u> Amended Complaint by Humberto Jimenez, Jeff Scott, Patrick Byrd. (Attachments: # <u>1</u> Text of Proposed Order)(Pastor, Bernard) (Entered: 12/24/2008)
12/26/2008	<u>75</u>	ORDER granting <u>74</u> Motion for Extension of Time to Respond to the second amended complaint. Responses due by 1/12/2009. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 12/26/2008. (cz) (Entered: 12/26/2008)
12/30/2008	<u>77</u>	Summons (Affidavit) Returned Unexecuted by Craig Williams as to Rick Harry. (ail) (Entered: 01/02/2009)
12/31/2008	<u>76</u>	<i>Defendant Hall's</i> ANSWER and Affirmative Defenses to Amended Complaint with Jury Demand by Roderick L. Hall.(Savor, Kathleen) (Entered: 12/31/2008)
01/05/2009	<u>78</u>	SCHEDULING ORDER: PRETRIAL PROCEEDINGS WHEN PLAINTIFF IS PROCEEDING PRO SE. Amended Pleadings due by 5/18/2009. Discovery due by 5/4/2009. Joinder of Parties due by 5/18/2009. Motions due by 6/8/2009.. Signed by Magistrate Judge Patrick A. White on 1/5/2009. (tw) (Entered: 01/05/2009)
01/06/2009	<u>79</u>	ORDER that the plaintiff shall supply the Court with a current address for defendant Rick Harry or risk dismissal of this defendant from the case. The plaintiff must obtain the defendants correct address through the discovery process as detailed in the Federal Rules of Civil Procedure.. Signed by Magistrate Judge Patrick A. White on 1/6/2009. (dm) (Entered: 01/07/2009)
01/12/2009	<u>80</u>	ANSWER and Affirmative Defenses to Amended Complaint with Jury Demand by Humberto Jimenez, Jeff Scott, Patrick Byrd.(Pastor, Bernard) (Entered: 01/12/2009)
01/13/2009	<u>81</u>	SUMMONS (Affidavit) Returned Executed by Craig Williams. David B. Abbott served on 12/30/2008, answer due 1/20/2009. (cqs) (Entered: 01/13/2009)
01/13/2009	<u>82</u>	SUMMONS (Affidavit) Returned Executed by Craig Williams. Jose M. Rios served on 12/30/2008, answer due 1/20/2009. (cqs) (Entered: 01/13/2009)
01/13/2009	<u>83</u>	SUMMONS (Affidavit) Returned Executed by Craig Williams. Spissinger served on 12/30/2008, answer due 1/20/2009. (cqs) (Entered: 01/13/2009)
01/13/2009	<u>84</u>	SUMMONS (Affidavit) Returned Executed by Craig Williams. John Brosnihan served on 12/30/2008, answer due 1/20/2009. (cqs) (Entered: 01/13/2009)
01/13/2009	<u>85</u>	SUMMONS (Affidavit) Returned Executed by Craig Williams. Flores served on 12/30/2008, answer due 1/20/2009. (cqs) (Entered: 01/13/2009)
01/15/2009	<u>86</u>	MOTION to Appoint Counsel Where Exceptional circumstances Exist. by Craig Williams. Responses due by 2/2/2009 (cqs) (Entered: 01/15/2009)
01/16/2009	<u>87</u>	ORDER granting <u>74</u> Motion for Extension of Time to File Answer to

		Amended complaint granted nunc pro tunc; the Answer is timely filed; denying <u>86</u> Motion to Appoint Counsel without prejudice. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 1/15/2009. (cz) (Entered: 01/16/2009)
01/20/2009	<u>88</u>	<i>Defendants Spissinger, Brosnihan and Flores'</i> ANSWER and Affirmative Defenses to Amended Complaint by Spissinger, John Brosnihan, Flores.(Jisa, Adriana) (Entered: 01/20/2009)
01/21/2009	<u>89</u>	NOTICE of Attorney Appearance by Adriana Mihaela Jisa on behalf of Spissinger, John Brosnihan, Flores (Jisa, Adriana) (Entered: 01/21/2009)
01/22/2009	<u>90</u>	Defendant's MOTION for Extension of Time to File Response as to <u>52</u> Amended Complaint by Jose M. Rios, David B. Abbott. (Savor, Kathleen) (Entered: 01/22/2009)
01/23/2009	<u>91</u>	ORDER granting <u>90</u> Motion for Extension of Time to Respond re <u>90</u> Defendant's MOTION for Extension of Time to File Response as to <u>52</u> Amended Complaint Responses due by 2/11/2009. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 1/23/2009. (cz) (Entered: 01/23/2009)
01/28/2009	<u>92</u>	ANSWER and Affirmative Defenses to Amended Complaint by David B. Abbott.(Savor, Kathleen) (Entered: 01/28/2009)
01/28/2009	<u>93</u>	ANSWER and Affirmative Defenses to Amended Complaint by Jose M. Rios.(Savor, Kathleen) (Entered: 01/28/2009)
02/25/2009	<u>94</u>	MOTION to Take Deposition from Craig Williams by Jose M. Rios, David B. Abbott, Roderick L. Hall. (Savor, Kathleen) (Entered: 02/25/2009)
02/26/2009	<u>95</u>	ORDER granting <u>94</u> Motion to Take Deposition from Craig Williams. This is an unrepresented plaintiff, and the defendants shall govern themselves accordingly. The plaintiff shall be provided with a copy of the deposition. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 2/26/2009. (cz) (Entered: 02/26/2009)
03/04/2009	<u>96</u>	NOTICE to Take Deposition of Craig Williams by Jose M. Rios, David B. Abbott, Roderick L. Hall.(Savor, Kathleen) (Entered: 03/04/2009)
03/04/2009	<u>97</u>	Re-NOTICE to Take Deposition of Craig Williams by Jose M. Rios, David B. Abbott, Roderick L. Hall.(Savor, Kathleen) Modified text on 3/5/2009 (tas). (Entered: 03/04/2009)
03/25/2009	<u>98</u>	ORDER denying as moot <u>68</u> Motion for Extension of Time to Respond. Signed by Judge Ursula Ungaro on 3/25/2009. (tas) (Entered: 03/26/2009)
04/15/2009	<u>99</u>	NOTICE of Change of Address by Craig Williams (tas) (Entered: 04/16/2009)
05/01/2009	<u>100</u>	MOTION for Extension of Time to File Response to <i>Discovery Requests</i> by Humberto Jimenez, Jeff Scott, Patrick Byrd. (Attachments: # <u>1</u> Text of Proposed Order)(Pastor, Bernard) (Entered: 05/01/2009)
05/04/2009	<u>101</u>	ORDER granting <u>100</u> Motion for Extension of Time to Respond to discovery

		to on or before 5/18. FURTHERMORE all dates in the pre-trial scheduling order are extended for thirty days from the dates entered in that order. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 5/4/2009. (cz) (Entered: 05/04/2009)
06/15/2009	<u>102</u>	MOTION to Modify or Extend Pretrial Scheduling Order by Craig Williams. (mg) (Entered: 06/16/2009)
06/24/2009	<u>103</u>	ORDER OF MAGISTRATE JUDGE granting <u>102</u> Motion for Extension of Time to Complete Discovery. All dates in the Scheduling Order [DE# 78] are extended an additional 60 days from the extended dates set forth in the May 4, 2009 order [DE# 101]. Signed by Magistrate Judge Patrick A. White on 6/24/2009. (tw) (Entered: 06/24/2009)
07/01/2009	<u>104</u>	ORDER AFFIRMING the Magistrate Judges PRELIMINARY REPORT 6 . Signed by Judge Ursula Ungaro on 7/1/09. (mr1) (Entered: 07/02/2009)
07/27/2009	<u>105</u>	EMERGENCY MOTION for Service of Process of Pro Se Subpoena Duces Tecum by Craig Williams. Responses due by 8/13/2009 (dj) (Entered: 07/28/2009)
07/29/2009	<u>106</u>	ORDER denying <u>105</u> Motion to Appoint Special Process Server. It is the plaintiff's responsibility to obtain service of subpoenas. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 7/29/2009. (cz) (Entered: 07/29/2009)
08/12/2009	<u>107</u>	MOTION for Extension of Time by Craig Williams. (dj) (Entered: 08/12/2009)
08/13/2009	<u>108</u>	ORDER REFERRING MOTION: <u>107</u> MOTION for Extension of Time to File filed by Craig Williams Motions referred to Magistrate Judge Patrick A. White. Signed by Judge Ursula Ungaro on 8/13/2009. (cqs) (Entered: 08/14/2009)
08/17/2009	<u>109</u>	ORDER denying <u>107</u> Motion for Extension of Time to File objections. The plaintiff had time to file his objections and any objections filed would be without merit. The parties are cautioned that the dates in the pre-trial scheduling order have passed and the case does not appear ready for trial. The Court will entertain motions for extensions of time if necessary and if cause is demonstrated. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 8/17/2009. (cz) (Entered: 08/17/2009)
08/20/2009	<u>110</u>	OBJECTION to Magistrate Judge's <u>106</u> Order for Appointment of Special Process Server by Craig Williams. (dj) (Entered: 08/24/2009)
08/27/2009	<u>111</u>	ORDER extending Discovery due by 9/15/2009, extending Dispositive Motions due by 9/21/2009 and Pre-trial due by 09/28/09. Signed by Magistrate Judge Patrick A. White on 8/27/2009. (tw) (Entered: 08/27/2009)
09/15/2009	<u>112</u>	Defendant's MOTION for Summary Judgment by Jose M. Rios, David B. Abbott. Responses due by 10/2/2009 (Attachments: # <u>1</u> Exhibit)(Savor, Kathleen) (Entered: 09/15/2009)
09/15/2009	<u>113</u>	Defendant's MOTION for Summary Judgment by Roderick L. Hall.

		Responses due by 10/2/2009 (Attachments: # <u>1</u> Exhibit)(Savor, Kathleen) (Entered: 09/15/2009)
09/17/2009	<u>114</u>	ORDER OF INSTRUCTIONS TO PRO SE PLAINTIFF CONCERNING RESPONSE TO MOTION FOR SUMMARY JUDGMENT. Signed by Magistrate Judge Patrick A. White on 9/17/2009. (tw) (Entered: 09/17/2009)
09/17/2009		Set Deadlines as to <u>113</u> Defendant's MOTION for Summary Judgment, <u>112</u> Defendant's MOTION for Summary Judgment. Responses due by 10/6/2009 (dm) (Entered: 09/18/2009)
09/18/2009	<u>115</u>	MOTION for Extension of Time to File <i>Motions for Summary Judgment</i> by Humberto Jimenez, Jeff Scott, Patrick Byrd. (Attachments: # <u>1</u> Text of Proposed Order)(Pastor, Bernard) (Entered: 09/18/2009)
09/21/2009	<u>116</u>	ORDER granting <u>115</u> Motion for Extension of Time to File summary judgment to on or before 9/25/09. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 9/21/2009. (cz) (Entered: 09/21/2009)
09/21/2009	<u>117</u>	SUGGESTION OF DEATH as to Patrick Byrd by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 09/21/2009)
09/21/2009		Set Deadline: Dispositive Motion due by 9/25/2009. (dm) (Entered: 09/22/2009)
09/24/2009	<u>118</u>	MOTION to Compel <i>Defendant's Patrick Bryd, Jeff Scott and Humberto Jimenez to Respond to Discovery Requests</i> by Craig Williams. Responses due by 10/13/2009 (mg) (Entered: 09/24/2009)
09/24/2009	<u>119</u>	MOTION for Extension of Time to File <i>Motions for Summary Judgment</i> by Humberto Jimenez, Jeff Scott. (Attachments: # <u>1</u> Text of Proposed Order) (Pastor, Bernard) (Entered: 09/24/2009)
09/25/2009	<u>120</u>	ORDER denying, as untimely <u>118</u> Motion to Compel; granting <u>119</u> Motion for Extension of Time to File up to and to and including September 30, 2009. Signed by Magistrate Judge Patrick A. White on 9/25/2009. (tw) (Entered: 09/25/2009)
09/25/2009	<u>121</u>	ORDER OF INSTRUCTIONS TO PRO SE PLAINTIFF CONCERNING RESPONSE(S) TO MOTION(S) FOR SUMMARY JUDGMENT. (Responses due by 10/16/2009). Signed by Magistrate Judge Patrick A. White on 9/25/2009. (tw) (Entered: 09/25/2009)
09/25/2009	<u>122</u>	MOTION For Voluntary Dismissal With Prejudice Regarding Defendants Roderick Hall, Jose Rios and David Abbottt by Craig Williams. (dj) (Entered: 09/25/2009)
09/29/2009	<u>123</u>	STIPULATION of Dismissal <i>With Prejudice to Defendants Brosnihan, Spissinger and Flores</i> by Spissinger, John Brosnihan, Flores, Craig Williams. (Jisa, Adriana) (Entered: 09/29/2009)
09/30/2009	<u>124</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case dismissing as moot <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall; dismissing as moot <u>112</u> Defendant's MOTION for Summary Judgment

		filed by David B. Abbott, Jose M. Rios and granting <u>122</u> MOTION For Voluntary Dismissal With Prejudice Regarding Defendants Roderick Hall, Jose Rios and David Abbott filed by Craig Williams. Objections to R&R due by 10/19/2009. Signed by Magistrate Judge Patrick A. White on 9/29/2009. (tw) (Entered: 09/30/2009)
09/30/2009	<u>125</u>	Narrative Pre-trial Statement of by Craig Williams. (mg) (Entered: 09/30/2009)
09/30/2009	<u>126</u>	MOTION for Summary Judgment and Incorporated Memorandum of Law by Humberto Jimenez, Jeff Scott. Responses due by 10/19/2009 (Attachments: # <u>1</u> Exhibit Exhibit A, # <u>2</u> Exhibit Exhibit B, # <u>3</u> Exhibit Exhibit C)(Pastor, Bernard) Modified text on 10/1/2009 (tas). (Entered: 09/30/2009)
10/02/2009	<u>127</u>	ORDER OF INSTRUCTIONS TO PLAINTIFF RE DECEASED DEFENDANT. Signed by Magistrate Judge Patrick A. White on 10/1/2009. (tw) (Entered: 10/02/2009)
10/02/2009	<u>128</u>	SUPPLEMENTAL REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>124</u> REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. Abbott, Jose M. Rios, <u>122</u> MOTION For Voluntary DismissREPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. Abbott, Jose M. Rios, <u>122</u> MOTION For Voluntary DismissREPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. Abbott, Jose M. Rios, <u>122</u> MOTION For Voluntary Dismiss. Objections to R&R due by 10/22/2009. Signed by Magistrate Judge Patrick A. White on 10/1/2009. (tw) (Entered: 10/02/2009)
10/02/2009	<u>129</u>	ORDER vacating <u>128</u> Report and Recommendations. Signed by Magistrate Judge Patrick A. White on 10/2/2009. (tw) (Entered: 10/02/2009)
10/02/2009	<u>130</u>	ORDER STRIKING <u>127</u> Order. Signed by Magistrate Judge Patrick A. White on 10/2/2009. (tw) (Entered: 10/02/2009)
10/05/2009	<u>131</u>	AMENDED ORDER OF INSTRUCTIONS TO PLAINTIFF RE: DECEASED DEFENDANT, AMENDED PRETRIAL STATEMENT, AND RESPONSE. Signed by Magistrate Judge Patrick A. White on 10/5/2009. (tw) (Entered: 10/05/2009)
10/05/2009	<u>132</u>	AMENDED SUPPLEMENTAL REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>124</u> REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. Abbott, Jose M. Rios, <u>122</u> MOTION For Voluntary DismissREPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. Abbott, Jose M. Rios, <u>122</u> MOTION For Voluntary DismissREPORT AND

		RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. Abbott, Jose M. Rios, <u>122</u> MOTION For Voluntary Dismiss. Objections to R&R due by 10/23/2009. Signed by Magistrate Judge Patrick A. White on 10/5/2009. (tw) (Entered: 10/05/2009)
10/13/2009	<u>133</u>	MOTION for Order Compelling <i>Service Copies of Motions for Summary Judgment and Notice of Suggestion of Death</i> by Craig Williams. Responses due by 10/30/2009 (mg) (Entered: 10/14/2009)
10/15/2009	<u>134</u>	ORDER denying <u>133</u> Motion to Compel and Instructions to Plaintiff. Signed by Magistrate Judge Patrick A. White on 10/15/2009. (tw) (Entered: 10/15/2009)
10/15/2009	<u>135</u>	Amended Pre-Trial Statement by Craig Williams. (mg) (Entered: 10/15/2009)
10/20/2009	<u>136</u>	ORDER AFFIRMING MAGISTRATE JUDGE'S REPORT for <u>124</u> and <u>132</u> Report and Recommendations. The Plaintiff's Motion for Voluntary Dismissal of Defendants Hall, Rios, and Abbott is GRANTED. The Motions for Summary Judgment by Rios and Abbott D.E. <u>112</u> and by Hall D.E. <u>113</u> shall be dismissed as moot. The suit shall remain pending as to the other defendants in the case who were not previously dismissed. Signed by Judge Ursula Ungaro on 10/19/09. (jc) (Entered: 10/20/2009)
10/26/2009	<u>137</u>	ORDER Affirming Magistrate Judge's <u>132</u> REPORT on 42 USC 1983 case re <u>124</u> REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>124</u> REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>124</u> REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B. REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>124</u> REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>113</u> Defendant's MOTION for Summary Judgment filed by Roderick L. Hall, <u>112</u> Defendant's MOTION for Summary Judgment filed by David B., <u>123</u> Stipulation of Dismissal filed by John Brosnihan, Spissinger, Craig Williams, Flores, John Doe, Flores, Rick Harry, Spissinger, John Brosnihan and John Doe terminated.. Signed by Judge Ursula Ungaro on 10/23/2009. (mg) (Entered: 10/26/2009)
10/27/2009	<u>138</u>	ORDER Affirming <u>132</u> Magistrate Judge's REPORT. Signed by Judge Ursula Ungaro on 10/27/2009. (mg) (Entered: 10/27/2009)
10/28/2009	<u>139</u>	NOTICE of Filing Discovery: Request for Admissions for Defendant Patrick Byrd by Craig Williams.(mg) (Entered: 10/28/2009)
10/28/2009	<u>140</u>	MOTION to Compel <i>Defendant Patrick Bryd to Respond to Requests for Admissions</i> (Responses due by 11/16/2009),Alternatively MOTION for

		Order Deeming the Requests Admitted by Craig Williams. (mg) (Entered: 10/28/2009)
10/29/2009	<u>141</u>	ORDER denying <u>140</u> Motion to Compel; denying <u>140</u> Motion. It appears that plaintiff's request for admissions was served on the same day. The request must go directly to the defendants and time allowed to respond. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 10/29/2009. (cz) (Entered: 10/29/2009)
10/30/2009	<u>142</u>	RESPONSE to <u>117</u> Suggestion of Death by Craig Williams. (mg) (Entered: 11/02/2009)
11/12/2009	<u>143</u>	Supplemental MOTION to Compel <i>Defendants Byrd, Jimenez and Scott to Produce Pre-trial Statement</i> by Craig Williams. Responses due by 11/30/2009 (mg) (Entered: 11/12/2009)
11/12/2009	<u>144</u>	MOTION to Compel <i>Defendant Patrick Bryd to Respond to Requests for Admissions</i> (Responses due by 11/30/2009), MOTION for Reconsideration by Craig Williams. (mg) (Entered: 11/12/2009)
11/16/2009	<u>145</u>	ORDER deferring ruling on <u>143</u> Motion to Compel; deferring ruling on <u>144</u> Motion to Compel; deferring ruling on <u>144</u> Motion for Reconsideration, the defendants shall file a response to the plaintiff's motions. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 11/16/2009. (cz) (Entered: 11/16/2009)
11/16/2009	<u>147</u>	MOTION for Extension of Time to File Response as to <u>126</u> MOTION for Summary Judgment by Craig Williams. (tb) (Entered: 11/17/2009)
11/17/2009	<u>146</u>	RESPONSE in Opposition re <u>144</u> MOTION to Compel <i>Defendant Patrick Bryd to Respond to Requests for Admissions</i> MOTION for Reconsideration filed by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 11/17/2009)
11/19/2009	<u>148</u>	ORDER granting <u>143</u> Motion to Compel the timely filing of pre-trial statements; denying <u>144</u> Motion to Compel of Byrd who is deceased for the reasons stated in the defendants response in opposition ; denying <u>144</u> Motion for Reconsideration ; granting <u>147</u> plaintiff's Motion for Extension of Time to Respond to motion for summary judgment re <u>144</u> (Responses due by 12/3/2009). This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 11/19/2009. (cz) (Entered: 11/19/2009)
11/20/2009	<u>149</u>	MOTION for Continuance to Allow Rule 56 (f) Discovery by Craig Williams. Responses due by 12/10/2009 (mg) (Entered: 11/20/2009)
11/20/2009	<u>150</u>	Declaration of: Craig Williams by Craig Williams in Support <u>149</u> MOTION to Continue. (mg) (Entered: 11/20/2009)
11/23/2009	<u>151</u>	RESPONSE in Opposition re <u>149</u> MOTION to Continue filed by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 11/23/2009)
11/24/2009	<u>152</u>	ORDER denying <u>149</u> Motion to Continue discovery for the reasons stated in defendants response (DE#151). This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 11/24/2009. (cz) (Entered: 11/24/2009)

12/10/2009	<u>153</u>	Declaration of Craig Williams in Opposition to <u>126</u> MOTION for Summary Judgment by Craig Williams. (Attachments: # 1 attachment Index to Affidavit)(mg) (Entered: 12/10/2009)
12/14/2009	<u>154</u>	Statement of: of Undisputed and Disputed Genuine Issues of Material Fact in Opposition to <u>126</u> MOTION for Summary Judgment by Craig Williams. (mg) (Entered: 12/14/2009)
12/21/2009	<u>155</u>	Defendant's MOTION for Extension of Time to File Reply as to <u>126</u> MOTION for Summary Judgment, <u>154</u> Statement, <u>153</u> Affidavit in Opposition by Humberto Jimenez, Jeff Scott. (Attachments: # <u>1</u> Text of Proposed Order Granting Motion for Extension of Time to File Reply) (Kerbel, Dennis) (Entered: 12/21/2009)
12/22/2009	<u>156</u>	ORDER granting <u>155</u> Motion for Extension of Time to Respond re <u>155</u> Defendant's MOTION for Extension of Time to File Reply as to <u>126</u> MOTION for Summary Judgment, <u>154</u> Statement, <u>153</u> Affidavit in Opposition Defendant's MOTION for Extension of Time to File Reply as to <u>126</u> MOTION for Summary Judgment, <u>154</u> Statement, <u>153</u> Affidavit in Opposition Responses due by 1/11/2010. Signed by Magistrate Judge Patrick A. White on 12/22/2009. (cz) (Entered: 12/22/2009)
12/23/2009	<u>157</u>	MOTION for Sanctions by Craig Williams. (ls) (Entered: 12/23/2009)
12/28/2009	<u>158</u>	ORDER deferring ruling on <u>157</u> Motion for Sanctions; Defendant shall file a response. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 12/28/2009. (cz) (Entered: 12/28/2009)
12/30/2009	<u>159</u>	MOTION to Compel <i>Service of Process of the Suggestion of Death Notice Upon the Legal Representative or Administrator, Executor and or Distributee of Defendant Patrick Byrd's ("Decedent") Estate</i> by Craig Williams. Responses due by 1/19/2010 (mg) (Entered: 12/30/2009)
01/11/2010	<u>160</u>	Defendant's MOTION for Extension of Time to File Reply as to <u>126</u> MOTION for Summary Judgment <i>and response to motion for sanctions (DE 157)</i> by Humberto Jimenez, Jeff Scott. (Attachments: # <u>1</u> Text of Proposed Order granting motion for an additional one week extension of time to file replies in support of motions for summary judgment and in response to motion for sanctions)(Pastor, Bernard) (Entered: 01/11/2010)
01/14/2010	<u>161</u>	ORDER granting <u>160</u> Motion for Extension of Time to Respond re <u>160</u> Defendant's MOTION for Extension of Time to File Reply as to <u>126</u> MOTION for Summary Judgment <i>and response to motion for sanctions (DE 157)</i> Defendant's MOTION for Extension of Time to File Reply as to <u>126</u> MOTION for Summary Judgment <i>and response to motion for sanctions (DE 157)</i> Responses due by 1/21/2010. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 1/14/2010. (cz) (Entered: 01/14/2010)
01/19/2010	<u>162</u>	MOTION to rule on <u>159</u> MOTION to Compel Personal Service of Process of the Suggestion of Death Notice Upon proper non-parties by Craig Williams. (lbc) (Entered: 01/20/2010)
01/19/2010	<u>163</u>	Supplemental MOTION for Sanctions by Craig Williams. (lbc) (Entered:

		01/20/2010)
01/20/2010	<u>164</u>	ORDER deferring ruling on <u>157</u> Motion for Sanctions; deferring ruling on <u>163</u> Motion for Sanctions, defendants shall file a response to the plaintiff's motions for sanctions on or before 1/29/10. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 1/20/2010. (cz) (Entered: 01/20/2010)
01/20/2010	<u>165</u>	RESPONSE in Opposition re <u>159</u> MOTION to Compel <i>Service of Process of the Suggestion of Death Notice Upon the Legal Representative or Administrator, Executor and or Distributee of Defendant Patrick Byrd's ("Decedent") Estate</i> MOTION to Compel <i>Service of Process of the Suggestion of Death Notice Upon the Legal Representative or Administrator, Executor and or Distributee of Defendant Patrick Byrd's ("Decedent") Estate</i> filed by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 01/20/2010)
01/21/2010	<u>166</u>	REPLY to Response to Motion re <u>126</u> MOTION for Summary Judgment filed by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 01/21/2010)
01/26/2010	<u>167</u>	Statement of: Pretrial Statement by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 01/26/2010)
01/29/2010	<u>168</u>	RESPONSE in Opposition re <u>157</u> MOTION for Sanctions filed by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 01/29/2010)
02/01/2010	<u>169</u>	ORDER denying <u>157</u> Motion for Sanctions; denying <u>163</u> Motion for Sanctions for the reasons stated in defendants' response. The defendants pre-trial statement has now been filed. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 2/1/2010. (cz) (Entered: 02/01/2010)
02/01/2010	<u>170</u>	MOTION for Extension of Time to File a Limited Rebuttal to Defendants' Reply to Plaintiff's Response to Summary Judgment by Craig Williams. (mg) (Entered: 02/01/2010)
02/03/2010	<u>171</u>	ORDER denying <u>170</u> Motion for Extension of Time to File rebuttal to defendants reply to plaintiff's resp to sj.. Signed by Magistrate Judge Patrick A. White on 2/3/2010. (cz) (Entered: 02/03/2010)
02/03/2010	<u>172</u>	REPLY to Response to Motion re <u>162</u> MOTION to rule re <u>159</u> MOTION to Compel <i>Service of Process of the Suggestion of Death Notice Upon the Legal Representative or Administrator, Executor and or Distributee of Defendant Patrick Byrd's ("Decedent") Estate</i> MOTION to C filed by Craig Williams. (mg) (Entered: 02/03/2010)
02/08/2010	<u>173</u>	MOTION to Strike Scott & Jimenez's Pretrial <u>167</u> Statements as Inadequate by Craig Williams. Responses due by 2/25/2010 (mg) (Entered: 02/09/2010)
02/18/2010	<u>174</u>	RESPONSE/REPLY to <u>166</u> Reply to Response to Motion for Summary Judgment by Craig Williams. (mg) (Entered: 02/18/2010)
02/24/2010	<u>175</u>	REPORT AND RECOMMENDATIONS. Recommending 1. The Motion for Summary Judgment (DE# 126) be denied as to Scott on the use of excessive force claim and be denied as to Jimenez on the failure to intervene claim. 2.

		Williams,s motion for substitution, captioned a reply to the suggestion of death (DE# 142), be granted. 3. Williams's motion to compel the defendants to effectuate service of process of the suggestion of death on the substitute party (DE# 159) be granted, only to the extent that the defendants must serve Byrd's former wife with the suggestion of death pursuant to Rule 4. 4. Williams's motion requesting a ruling on his prior motion to compel (DE# 162) be denied as moot. Objections to R&R due by 3/15/2010. Signed by Magistrate Judge Patrick A. White on 2/24/2010. (tw) (Entered: 02/24/2010)
02/24/2010	<u>176</u>	REPORT AND RECOMMENDATION that this case is ready for trial. Objections to R&R due by 3/15/2010. Signed by Magistrate Judge Patrick A. White on 2/24/2010. (tw) (Entered: 02/24/2010)
02/25/2010	<u>177</u>	RESPONSE in Opposition re <u>173</u> MOTION to Strike <u>167</u> Statement filed by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 02/25/2010)
03/10/2010	<u>178</u>	Defendant's MOTION for Extension of Time to File Response/Reply as to <u>176</u> REPORT AND RECOMMENDATIONS by Humberto Jimenez, Jeff Scott. (Attachments: # 1 Text of Proposed Order Granting Scott's and Jimenez' Motion for a Two-Week Extension of Time to File Objections to the Report of Magistrate Judge)(Pastor, Bernard) (Entered: 03/10/2010)
03/11/2010	<u>179</u>	ORDER granting <u>178</u> Motion for Extension of Time to File Response/Reply re <u>175</u> REPORT AND RECOMMENDATIONS Recommending 1. The Motion for Summary Judgment (DE# 126) be denied as to Scotton the use of excessive force claim and be denied as to Jimenez onthe failure to intervene claim.2. Williamss motion for substitution, capti, <u>176</u> REPORT AND RECOMMENDATIONS Responses due by 3/12/2010. Signed by Judge Ursula Ungaro on 3/24/10. (mg) (Entered: 03/12/2010)
03/12/2010	<u>180</u>	MOTION to Strike <u>167</u> Pretrial Statement, and <u>177</u> Response in Opposition to the Motion to strike by Craig Williams. Responses due by 3/29/2010 (lbc) (Entered: 03/15/2010)
03/22/2010	<u>181</u>	MOTION for Order Directing the Clerk to Forward a Service Copy of the Report of the Magistrate Judge Issued on February 24, 2010 (DE# 175) by Craig Williams. (lh) (Entered: 03/22/2010)
03/22/2010	<u>182</u>	ORDER granting <u>181</u> Motion for Service Copy. Signed by Judge Ursula Ungaro on 3/22/2010. (lh) (Entered: 03/23/2010)
03/24/2010	<u>183</u>	OBJECTIONS to <u>175</u> Report and Recommendations by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 03/24/2010)
04/02/2010	<u>184</u>	ORDER ON MAGISTRATE JUDGE'S REPORT: Denying <u>126</u> MOTION for Summary Judgment filed by Humberto Jimenez, Jeff Scott., ORDER REFERRING MOTION: <u>159</u> MOTION to Compel <i>Service of Process of the Suggestion of Death Notice Upon the Legal Representative or Administrator, Executor and or Distributee of Defendant Patrick Byrd's ("Decedent") Estate</i> MOTION to Compel <i>Service of Process of the Suggestion of Death Notice Upon the Legal Representative or Administrator, Executor and or Distributee of Defendant Patrick Byrd's ("Decedent") Estate</i> filed by Craig Williams Motions referred to Patrick A. White. Signed by Judge Ursula Ungaro on

		4/2/2010. (lh) (Entered: 04/05/2010)
04/07/2010	<u>185</u>	MOTION to Compel <i>a service copy of the Report of the Magistrate Judge (DE#175) and for order Deferring Ruling on Defendants' Objections by Craig Williams. (lh) (Entered: 04/07/2010)</i>
04/09/2010	<u>187</u>	ORDER granting in part and denying in part <u>185</u> Motion for service copy and to Defer Ruling on Objections. Signed by Judge Ursula Ungaro on 4/9/2010. (lh) (Entered: 04/09/2010)
04/26/2010	<u>188</u>	MOTION to Strike <u>167</u> Statement and Reply to Response in Opposition to the Motion to Strike by Craig Williams. Responses due by 5/13/2010 (lbc) (Entered: 04/26/2010)
04/28/2010	<u>189</u>	ORDER denying <u>159</u> Motion to Compel service of process; denying as moot <u>162</u> Motion compelling service of process. The plaintiff shall supply the Court with a current address for the successors or representatives of the deceased party within thirty (30) days or risk dismissal of this defendant from the case. The plaintiff must obtain the defendant's correct address through the discovery process as detailed in the Federal Rules of Civil Procedure. Signed by Magistrate Judge Patrick A. White on 4/28/2010. (lr) (Entered: 04/28/2010)
04/29/2010	<u>190</u>	NOTICE OF INTERLOCUTORY APPEAL by Humberto Jimenez, Jeff Scott as to <u>184</u> Order Adopting Report and Recommendations, Terminate Motions, Order Referring Motion. Filing Fee \$ 455.00, receipt number 1021536.. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (hh) (Entered: 04/30/2010)
04/30/2010		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re <u>190</u> Notice of Interlocutory Appeal, (hh) (Entered: 04/30/2010)
05/03/2010	<u>191</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>173</u> MOTION to Strike <u>167</u> Statement filed by Craig Williams, <u>188</u> MOTION to Strike <u>167</u> Statement filed by Craig Williams, <u>180</u> MOTION to Strike <u>167</u> Statement, <u>177</u> Response in Opposition to Motion filed by Craig Williams. Recommending denying. Objections to R&R due by 5/20/2010. Signed by Magistrate Judge Patrick A. White on 5/3/2010. (tw) (Entered: 05/03/2010)
05/04/2010	<u>192</u>	DESIGNATION of Record on Appeal by Humberto Jimenez, Jeff Scott re <u>190</u> Notice of Interlocutory Appeal, (Attachments: # <u>1</u> Docket Sheet)(Pastor, Bernard) (Entered: 05/04/2010)
05/11/2010	<u>193</u>	TRANSCRIPT INFORMATION FORM by Humberto Jimenez, Jeff Scott re <u>190</u> Notice of Interlocutory Appeal,. No Transcript Requested. (Pastor, Bernard) (Entered: 05/11/2010)
05/14/2010	<u>194</u>	Acknowledgment of Receipt re <u>190</u> Notice of Interlocutory Appeal, filed by Humberto Jimenez, Jeff Scott. Date received by USCA: 5/6/10. USCA Case Number: 10-12075-BB. (hh) (Entered: 05/14/2010)

05/18/2010	<u>195</u>	MOTION for Order Directing the Clerk to Process the Subpoena Duces Tecum and Appointment of Special Process Server (US Marshal for Service) by Craig Williams. (lh) (Entered: 05/18/2010)
05/18/2010	<u>196</u>	MOTION to Compel <i>Defendants to provide a service copy of their designation of record on appeal [DE# 192]</i> by Craig Williams. (hh) (Entered: 05/19/2010)
05/28/2010	<u>197</u>	ORDER AFFIRMING MAGISTRATE JUDGE'S REPORT: denying <u>173</u> Motion to Strike ; denying <u>180</u> Motion to Strike ; denying <u>188</u> Motion to Strike ; re <u>191</u> Report and Recommendations. Signed by Judge Ursula Ungaro on 5/28/2010. (lh) (Entered: 05/28/2010)
06/24/2010	<u>198</u>	MOTION/WITHDRAWAL of Motion by Craig Williams re <u>195</u> MOTION for Appointment of Special Process Server filed by Craig Williams; filed by Craig Williams. (lh) (Entered: 06/25/2010)
06/28/2010	<u>199</u>	ORDER granting <u>196</u> Motion for service copy of Defendants designation of record on appeal <u>195</u> . The Clerk of the Court shall forward a copy of <u>192</u> to Plaintiff.. Signed by Magistrate Judge Patrick A. White on 6/28/2010. (erd) (Entered: 06/28/2010)
06/30/2010	<u>200</u>	MOTION for a Final 60 Day Extension of Time to Substitute Parties (Responses due by 7/19/2010), MOTION for Extension of Time to File/Reissue Subpoena Duces Tecum by Craig Williams. (ls) (Entered: 07/01/2010)
07/07/2010	<u>201</u>	ORDER of Dismissal from USCA (certified copy) dismissed for want of prosecution because the appellant Humberto Jimenez and Jeff Scott failed to file the record excerpts within the time fixed by the rules as to <u>190</u> Notice of Interlocutory Appeal, filed by Humberto Jimenez, Jeff Scott, USCA # 10-12075-BB (hh)(APPEAL REINSTATED BY USCA ON 8/2/10) Text Modified on 8/5/2010 (hh). (Entered: 07/07/2010)
07/08/2010	<u>202</u>	ORDER granting <u>200</u> Motion to the extent the motion requests an extension of time to supply the Court with a current address for the successors or representatives of the deceased party. The plaintiff shall supply the Court with a current address for the successors or representatives of the deceased party within thirty (30) days or risk dismissal of this defendant from the case. Signed by Magistrate Judge Patrick A. White on 7/8/2010. (br) (Entered: 07/08/2010)
08/02/2010	<u>203</u>	MOTION for Extension of Time to Substitute Parties by Craig Williams. (lh) (Entered: 08/03/2010)
08/04/2010	<u>204</u>	ORDER granting plaintiff's Motion for Extension of Time to File a notice substituting deceased defendant Byrd [#203] pursuant to Fed.R.Civ.P. 25. Pursuant to Fed.R.Civ.P. 6(b), the plaintiff's shall file his motion identifying the party to be substituted for the decedent no later than August 20, 2010. At this juncture, the plaintiff has been provided with multiple extensions to comply with substitution. NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED. Failure to supply this court with the successor for the decedent Byrd will result in dismissal of this 1983 action against that

		defendant. Signed by Magistrate Judge Patrick A. White on 8/4/2010. (nn) (Entered: 08/04/2010)
08/05/2010	<u>205</u>	Appeal Reinstated USCA Case Number:10-12075-BB for <u>190</u> Notice of Interlocutory Appeal, filed by Humberto Jimenez, Jeff Scott. (hh) (Entered: 08/05/2010)
08/23/2010	<u>206</u>	MOTION to Compel <i>Rule 45 Production of Documents</i> and MOTION for Telephonic Conference by Craig Williams. (lh) (Entered: 08/24/2010)
08/24/2010	<u>207</u>	MOTION to Dismiss for Lack of Prosecution <u>52</u> Amended Complaint by Patrick Byrd, Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 08/24/2010)
09/03/2010	<u>208</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case Recommending 1.Defendants' Joint Motion to Dismiss (DE#207) be DENIED; 2.Defendants effectuate service of the Suggestion of Deathon the proper the decedent's successor(s) or personal representative(s) in accordance with Fed.R.Civ.P. 25 and 4; and, 3.Plaintiff's Motions to Compel (DE#s159,206) be granted, solely to the extent that defendants shall cause service of the suggestion to be executed as previously recommended, and proof thereof filed with the court; in addition to, filing a copy of decedent Byrds Death Certificate. Objections to R&R due by 9/20/2010. Signed by Magistrate Judge Patrick A. White on 9/2/2010. (tw) (Entered: 09/03/2010)
09/16/2010	<u>209</u>	MOTION for Extension of Time to File Response/Reply as to <u>208</u> REPORT AND RECOMMENDATIONS on 42 USC 1983 case Recommending 1.Defendants Joint Motion to Dismiss (DE#207) be DENIED;2.Defendants effectuate service of the Suggestion of Deathon the proper the decedents successor(s) or personalrepresentative(s) in aREPORT AND RECOMMENDATIONS on 42 USC 1983 case Recommending 1.Defendants Joint Motion to Dismiss (DE#207) be DENIED;2.Defendants effectuate service of the Suggestion of Deathon the proper the decedents successor(s) or personalrepresentative(s) in aREPORT AND RECOMMENDATIONS on 42 USC 1983 case Recommending 1.Defendants Joint Motion to Dismiss (DE#207) be DENIED;2.Defendants effectuate service of the Suggestion of Deathon the proper the decedents successor(s) or personalrepresentative(s) in a by Patrick Byrd, Humberto Jimenez, Jeff Scott. (Attachments: # <u>1</u> Text of Proposed Order)(Pastor, Bernard) (Entered: 09/16/2010)
09/17/2010	<u>210</u>	PAPERLESS ORDER granting <u>209</u> Motion for Extension of Time to File Response/Reply. Defendants shall file their objections to the Magistrate Judge's Report by September 24, 2010. No further extensions shall be granted. Signed by Judge Ursula Ungaro on 9/17/2008. (apt) (Entered: 09/17/2010)
09/23/2010	<u>211</u>	Plaintiff's MOTION to Compel <i>Counsel to Provide Service of Copies</i> by Craig Williams. Responses due by 10/12/2010 (Attachments: # <u>1</u> Delcation of Craig Williams in Support of Motion to Compel)(ebs) (Entered: 09/23/2010)
09/24/2010	<u>212</u>	OBJECTIONS to <u>208</u> Report and Recommendations by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 09/24/2010)

09/27/2010	213	ORDER granting <u>211</u> Motion to Compel solely to the extent that the defendants shall make reasonable efforts to ensure that copies of all pleadings are mailed to the movant at the time they are electronically filed. In all other respects, the motion is hereby denied. Signed by Magistrate Judge Patrick A. White on 9/27/2010. (nn) (Entered: 09/27/2010)
09/27/2010	<u>214</u>	MOTION to Compel <i>Defense Counsel to provide Service Copies via United States Mail Certified MReturn Receipt</i> by Craig Williams. Responses due by 10/14/2010 (Attachments: # <u>1</u> Declaration of Craig Williams in Support of Supplemental Motion to Compel)(ebs) (Entered: 09/27/2010)
09/28/2010	215	ORDER granting <u>214</u> Motion to Compel, a copy of pleadings filed by defense counsel should be sent to the plaintiff.. Signed by Magistrate Judge Patrick A. White on 9/28/2010. (cz) (Entered: 09/28/2010)
10/15/2010	<u>216</u>	MOTION for Sanctions by Craig Williams. (ls) (Entered: 10/15/2010)
10/18/2010	217	ORDER deferring ruling on <u>216</u> Motion for Sanctions, defendants shall file a response.. Signed by Magistrate Judge Patrick A. White on 10/18/2010. (cz) (Entered: 10/18/2010)
10/18/2010	<u>218</u>	RESPONSE in Opposition re <u>216</u> MOTION for Sanctions filed by Humberto Jimenez, Jeff Scott. (Pastor, Bernard) (Entered: 10/18/2010)
10/20/2010	219	ORDER granting in part and denying in part <u>216</u> Motion for Sanctions, the motion for sanctions is denied for the reasons stated in the defendants response and there is no requirement to send the mail certified with a return receipt, however, the defendants must mail a copy of their pleadings to the plaintiff, and provide him with copies of pleadings that he is missing.. Signed by Magistrate Judge Patrick A. White on 10/20/2010. (cz) (Entered: 10/20/2010)
10/27/2010	<u>220</u>	NOTICE of Compliance by Humberto Jimenez, Jeff Scott re 219 Order on Motion for Sanctions, (Pastor, Bernard) (Entered: 10/27/2010)
10/27/2010	<u>221</u>	REPLY to Defendants' Answer to <u>216</u> MOTION for Sanctions by Craig Williams. (lh) (Entered: 10/28/2010)
11/04/2010	222	ORDER denying <u>206</u> Motion to Compel, it is the plaintiff's responsibility to properly serve the subpoenas; denying <u>206</u> Motion for Hearing; deferring ruling on <u>207</u> Motion to Dismiss for Lack of Prosecution, a Report and Recommendation has been entered on this motion.. Signed by Magistrate Judge Patrick A. White on 11/4/2010. (cz) (Entered: 11/04/2010)

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Billable Pages:	16	Cost:	1.28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 07-22617-CIV-UNGARO

CRAIG WILLIAMS,
Plaintiff,

v.

OFFICER SCOTT, et al,
Defendants.

ORDER AFFIRMING MAGISTRATE JUDGE'S REPORT

THIS CAUSE is before the Court upon Plaintiff's Motion For Voluntary Dismissal With Prejudice Regarding Defendants Roderick Hall, Jose Rios, and David Abbott, filed on September 25, 2009. (D.E. 122.) Defendants Hall, Rios, and Abbott filed Motions for Summary Judgment that remained pending at the time Plaintiff filed this motion. (D.E. 112, 113.) Plaintiff's motion was referred to Magistrate Judge Patrick A. White, who on September 30, 2009, filed a report recommending that Plaintiff's motion be granted and that the pending motions for summary judgment be dismissed, as moot. No objections were filed to the Magistrate Judge's report; the matter is ripe for review.

The Court has reviewed the motion, the pertinent portions of the record, and is otherwise fully advised in the premises. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Plaintiff's Motion for Voluntary Dismissal of Defendants Hall, Rios, and Abbott is **GRANTED**;

2. The pending Motions for Summary Judgment by Rios and Abbott (D.E. 112) and by Hall (D. E. 113) shall be dismissed, as moot;

3. The suit shall remain pending as to the other defendants in the case who were not previously dismissed.

DONE AND ORDERED in Chambers at Miami, Florida, this ^{19th} day of October, 2009.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record
Craig Williams, *pro se*

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 07-22617-CIV-UNGARO

CRAIG WILLIAMS,
Plaintiff,

v.

OFFICER SCOTT, et al,
Defendants.

ORDER AFFIRMING MAGISTRATE JUDGE'S REPORT

THIS CAUSE is before the Court upon a Stipulation for Dismissal with Prejudice as to Defendants Brosnihan, Spissinger, and Flores, signed by counsel for those defendants on September 14, 2009, signed by the Plaintiff on September 23, 2009, and filed on September 29, 2009. (D.E. 123.) Plaintiff's petition was referred to Magistrate Judge Patrick A. White, who on October 5, 2009, filed a report recommending that Defendants Brosnihan, Spissinger, and Flores be dismissed from the case. (D.E. 132.) The Magistrate Judge also recommended that the two Defendants Doe and the Defendant Harry, who could not be served with process, be dismissed from the case pursuant to Fed. R. Civ. P. 4(m). Finally, the Magistrate Judge recommended that the clerk be instructed to modify the docket to reflect that Defendants Hadi and Harrison were previously dismissed from the case. No objections were filed to the Magistrate Judge's report; the matter is ripe for review.

The Court has reviewed the stipulation, the pertinent portions of the record, and is otherwise fully advised in the premises. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. The two Defendants Doe and Defendant Harry are dismissed from the case;

2. Pursuant to the Stipulated Dismissal, Defendants Brosnihan, Spissinger, and Flores are DISMISSED from the case;

3. The clerk is instructed to modify the docket to reflect that Defendants Hadi and Harrison were previously dismissed from the case;

4. The case is to remain pending solely as to Defendants Scott, Jimenez, and Byrd.

DONE AND ORDERED in Chambers at Miami, Florida, this 23d day of October, 2009.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record
Craig Williams, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22617-CIV-UNGARO
MAGISTRATE JUDGE P.A. WHITE

CRAIG WILLIAMS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	<u>REPORT OF</u>
	:	<u>MAGISTRATE JUDGE</u>
OFFICER SCOTT, ET AL.,	:	
	:	
Defendants.	:	

I. Introduction

The plaintiff Craig Williams, currently housed at the Florida Civil Commitment Center ("FCCC"), filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 for monetary damages and other relief concerning events that occurred at the Miami-Dade Pretrial Detention Center ("PTDC"). (DE# 52). Williams named as defendants PTDC officers Jeff Scott, Patrick Byrd, and Humberto Jimenez. (DE# 132, 137-38).¹ In a November 13, 2008 Report, the Undersigned provided a description of the claims, contained in the operative complaint, against these defendants:

Counts 1 and 3 - Excessive Force and Failure to Intervene

The plaintiff raises the following allegations of excessive force and failure to intervene.

On October 6, 2004 at the FCCC the plaintiff was placed in full restraints by [officers] Rios and Abbott² to be

¹ In a complaint (DE# 1), first amended complaint (DE# 13), and second amended complaint (DE# 52)-which this Court deemed operative (DE# 56, 69)-Williams named several other defendants who are no longer parties in this action due to Williams's motion for voluntary dismissal with prejudice (DE# 122) and a stipulation of dismissal with prejudice (DE# 123). In two Reports (DE# 124, 132), subsequently adopted by the District Court (DE# 136-38), the Undersigned recommended the motion be granted and the stipulation be adopted. In the Report regarding the stipulation, the Undersigned further recommended that the case remain pending against Scott, Jimenez, and Byrd. (DE# 132).

² Williams named Rios and Abbot as defendants in the complaint, but later moved to voluntarily dismiss them from the lawsuit. (DE# 122).

transported to the state court in Miami-Dade County. [DE# 52, ¶¶24-26]. Upon his arrival at the PTDC for temporary detention prior to the scheduled state court appearance at 9:10 a.m., Defendants Scott and Byrd approached him and demanded that he remove his religious diadem (hat). [Id. ¶28]. When the plaintiff refused, advising Scott and Byrd that he had a First Amendment right to wear the diadem, Scott confiscated it. [Id.]. Five minutes later, at 9:15 a.m., the diadem was returned and he placed it back on his head. [Id. ¶29]. After the court appearance, at around 9:40 a.m., Byrd violently snatched the diadem from the plaintiff's head. [Id. ¶30]. When the plaintiff protested, Byrd and Officer Doe physically attacked him, while he was in full restraints, by grabbing his neck from behind and slamming his head and back into the iron bars near the PTDC exit door, and then choking and threatening to kill him and slamming his head into a booking desk. [Id. ¶¶31-33]. The plaintiff alleges that Rios, Abbott, and Jimenez witnessed the attack but stood by and failed to intervene to assist him. [Id. ¶32]. He also alleges that Jimenez encouraged Byrd and Doe to attack the plaintiff, and later followed the plaintiff to the escort van and threatened him. [Id. ¶34]. The plaintiff states that the attack lasted about 15 minutes, and it took eight to ten officers to restrain Byrd and stop the attack. [Id. ¶33].

(DE# 56, p. 10-12). As a result of these incidents, Williams alleged that he suffered permanent physical injuries. (DE# 56, p. 2). He requested compensatory and punitive damages and equitable relief. (DE# 52, p. 23; 56, p. 2). The Undersigned concluded that Williams raised sufficient facts to state a claim that Scott and Byrd engaged in excessive force which resulted in physical injury and a claim that Jimenez failed to intervene and/or incited other officers to injure Williams further. (DE# 56, p. 18-19). The District Court entered an order adopting the Report in its entirety. (DE# 69).

Scott and Jimenez jointly filed a **motion for summary judgment** (DE# 126), with supporting exhibits,³ wherein they argued that (1) Williams failed to present evidence that Scott's use of force was malicious or sadistic, (2) Williams failed to establish that he suffered physical injuries as a result of Scott's actions, (3)

³ The exhibits include: 9/30/09 Declaration of Jeff Scott (DE# 126-1); 9/25/09 Declaration of Humberto Jimenez (DE# 126-3); Excerpt of the report drafted as a result of an internal affairs investigation of the 10/06/04 incident (DE# 126-3); excerpts of Williams's 3/25/09 deposition (DE# 126-4), a complete copy of which is located elsewhere in the record (DE# 112-1).

Williams failed to present evidence that Jimenez had an opportunity to intervene, and (4) Scott and Jimenez are entitled to qualified immunity. This court issued an amended order of instructions informing Williams of his right to respond. (DE# 131). Williams filed a declaration in opposition to the defendants' motion (DE# 153), several exhibits in support thereof (DE# 153-1),⁴ and a sworn statement of undisputed and disputed facts (DE# 154). Scott and Jimenez reiterated the arguments contained in their motion for summary judgment in a subsequent reply. (DE# 166). Williams filed a limited response to the defendants' reply. (DE# 174).

II. Analysis

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

In Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), the Supreme Court held that summary judgment should be entered only 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. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

⁴ Williams attached excerpts from his 3/25/09 deposition, portions of the internal affairs report, and Scott's answers to Williams's interrogatories. (DE# 153-1).

(citations omitted). Thus, pursuant to Celotex and its progeny, a movant for summary judgment bears the initial responsibility of informing the court of the basis for his motion by identifying those parts of the record that demonstrate the nonexistence of a genuine issue of material fact. This demonstration need not be accompanied by affidavits. Hoffman v. Allied Corp., 912 F.2d 1379, 1382 (11 Cir. 1990). If the party seeking summary judgment meets the initial burden of demonstrating the absence of a genuine issue of material fact, the burden then shifts to the non-moving party, to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. Avirgan v. Hull, 932 F.2d 1572, 1577 (11 Cir.), cert. denied, 112 S.Ct. 913 (1992). It is the non-moving party's burden to come forward with evidence on each essential element of his claim sufficient to sustain a jury verdict. Earley v. Champion International Corp., 907 F.2d 1077, 1080 (11 Cir.1990). The non-moving party cannot rely solely on his complaint and other initial pleadings to contest a motion for summary judgment supported by evidentiary material, but must respond with affidavits, depositions, or otherwise to show that there are material issues of fact which require a trial Fed.R.Civ.P. 56(e); Coleman v. Smith, 828 F.2d 714, 717 (11 Cir. 1987). If the evidence presented by the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Baldwin County, Alabama v. Purcell Corp., 971 F.2d 1558 (11 Cir. 1992). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11 Cir. 1990) (citing Anderson, 477 U.S. 242).

B. Motion for Summary Judgment by Defendants Scott and Jiminez

1. Excessive Use of Force as to Scott

Although Williams's rights as a civil detainee arise from the Fourteenth Amendment, the case law developed with regard to Eighth Amendment prohibitions against cruel and unusual punishment is

analogous. Cook ex. rel Estate of Tessier v. Sheriff of Monroe County, Fla., 402 F.3d 1092, 1115 (11 Cir. 2005); see also Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11 Cir. 1985).

The Supreme Court has held that the question of whether a prison guard "inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2 Cir. 1973)).

Whether the prison disturbance is a riot or a lesser disruption, the corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates; but the courts have acknowledged that "both situations may require prison officials to act quickly and decisively . . . [and] should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting Whitley, 475 U.S. at 321-22); Brown v. Smith, 813 F.2d 1187 (11 Cir. 1987).⁵ The test to determine whether a claim of excessive force rises to a constitutional level of cruel and unusual punishment involves both subjective and objective components.

The subjective component relates to whether a defendant possessed a wanton state of mind while applying force, and requires the claimant to show that the prison officers' actions were malicious and sadistic, and for the purpose of causing harm, or unnecessary

⁵ Courts have held that even simple inmate recalcitrance, in the form of refusal of verbal orders, may in appropriate circumstances justify the use of force (e.g., the application of mace in non-dangerous amounts), to obtain inmate compliance so as to maintain institutional order, even when the inmate is in handcuffs, or locked in his cell when the chemical agent is used. See, e.g., Williams v. Benjamin, 77 F.3d 756, 762-63 (4 Cir. 1996); Soto v. Dickey, 744 F.2d 1260, 1270-71 (7 Cir. 1984); Spain v. Procunier, 600 F.2d 189, 195 (9 Cir. 1979); Williams v. Scott, 116 F.3d 1483 (7 Cir. 1997); Barr v. Williamsburg Co. Sheriff's Dept., No. C/A2:02-0167-22AJ, 2002 WL 32333152, at *4-5 (D.S.C., Dec. 27, 2002); but see Vinyard v. Wilson, 311 F.3d 1340, 1348-49, n.13 (11 Cir. 2002).

and wanton pain and suffering upon the prisoner. Hudson, 503 U.S. at 6-7; Rhodes v. Chapman, 452 U.S. 337 (1981); Gregg v. Georgia, 428 U.S. 153 (1976); Stanley v. Hejirika, 134 F.3d 629, 634 (4 Cir. 1998); Branham v. Meachum, 77 F.3d 626, 630 (2 Cir. 1996); Bennett v. Parker, 898 F.2d 1530, 1532-33 (11 Cir. 1990).

The factors relevant to the determination of whether the force was used maliciously and sadistically with the purpose of causing harm include: 1) the extent of the injury inflicted; 2) the need for force; 3) the relationship between the need for force and the amount of force used; 4) any efforts made to temper the severity of a forceful response; and 5) the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of facts known to them. Campbell v. Sikes, 169 F.3d 1353, 1375 (11 Cir. 1999); Redd v. Conway, 160 Fed.Appx. 858, 860 (11 Cir. 2005) (citing Carr v. Tatangelo, 338 F.3d 1259, 1271 (11 Cir. 2003)); Bennett, 898 F.2d at 1532-33; Stanley, 134 F.3d at 634; Branham, 77 F.3d at 630; Lunsford v. Bennet, 17 F.3d 1574, 1581 (7 Cir. 1994).

The objective component requires evidence that the plaintiff suffered some injury which was sufficiently serious in relation to the need for the application of force. Hudson, 503 U.S. at 8.⁶ In Hudson, 503 U.S. at 5-12, the Supreme Court held that the use of excessive physical force against a prisoner may under certain

⁶ Although not raised as an affirmative defense by the defendants in this case, section 1997e(e) of the Prison Litigation Reform Act of 1995 ["PLRA"] limits the type of recovery available when the plaintiff fails to establish physical injury. This section 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." §1997(e)e. The Eleventh Circuit has interpreted this provision to mean that if due to the defendant's actions, a prisoner has not suffered some physical injury which is sufficient to satisfy the statutory provision in question, and the prisoner therefore cannot show anything more than mental or emotional suffering, the prisoner is foreclosed from obtaining compensatory or punitive damages even if there has been some violation of his constitutional rights. Harris v. Garner, 190 F.3d 1279, 1286-87 (11 Cir. 1999), vacated in part and reinstated in part, Harris v. Garner, 216 F.3d 970, 984-85 (11 Cir. 2000) (en banc). However, §1997e(e) does not bar suits by prisoners who failed to allege a physical injury if they seek nominal damages. See Hughes v. Lott, 350 F.3d 1157, 1162 (11 Cir. 2003). The defendants incorrectly argue in their motion for summary judgment that nominal damages are not recoverable in a §1983 action. (DE# 126, 115). In his response thereto, Williams correctly asserts that even if this Court finds no evidence of physical injury, he is entitled to seek nominal damages. See Hughes, 350 F.3d at 1162.

circumstances constitute cruel and unusual punishment even though the inmate does not suffer serious injury. However, the Court noted that not "every malevolent touch by a prison guard gives rise to a federal cause of action." Id. at 9. Instead, "The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" Id. at 9-10. See also Gomez v. Chandler, 163 F.3d 921, 924 (5 Cir. 1999) (holding that "for purposes of Eighth Amendment excessive force claims-as well as for purposes of section 1997e(e)-'the injury must be more than *de minimis*, but need not be significant.'" (quoting Siglar v. Hightower, 112 F.3d 191, 193 (5 Cir. 1997))).

In this case, the parties dispute whether Williams presented evidence that Scott acted maliciously or sadistically (the subjective element) and whether Williams established that Scott's actions resulted in something more than *de minimis* injury (the objective element).

Scott provided his version of events in a declaration attached to his motion for summary judgment. (DE# 126-1). He stated that Williams entered the PTDC wearing a homemade hat. Williams was informed he could not wear his hat and was asked to remove the hat. Williams made some smart remarks and refused to comply with the order. "Either Officer Byrd or [Scott] removed the hat." Scott placed it in a property bag and gave the bag to the officers escorting Williams. Scott stressed that "at no point that day did I use or see any force being used against plaintiff." (DE# 126-1).

Williams's version of events is contained in his declaration in opposition to the summary judgment (DE# 153) and deposition testimony (DE# 112-1). In the former, Williams stated that Scott directed Williams to remove his diadem, Williams responded calmly that he was wearing the hat for religious reasons and was at the PTDC on a civil matter. (DE# 153, ¶9-10). He did not refuse to remove the hat, but could not comply because he was in full restraints. (DE# 153, ¶13). Scott "became very angry, maliciously and without any regard for my safety or civil status, although I was fully restrained; violently with great force snatched my

religious diadem, causing my neck to be knocked, hit and twisted, which left me confused and injured in excruciating pain." (DE# 153, ¶11). During his deposition, Williams testified that Scott grabbed his hat, "at the same time his hand came over and hit my neck like that and I twisted aside like that, and he took the hat and he walked away, and he returned about a minute-and-a-half later with the hat, and he had it placed in a bag." (DE# 112-1, p. 18). During his deposition, Williams explained that when he left the PTDC he was experiencing pain in his head, back, ankles and neck. (DE# 112-1, p. 43). He expressly attributed his neck pain to Scott. (DE# 112-1, p. 139). When he returned to the FCCC, he went to the infirmary to be examined, and the nurse provided him with Tylenol. (DE# 112-1, p. 43). Subsequently, he has been treated by various doctors who have prescribed a variety of prescription pain medications. (DE# 112-1, p. 45-46). He still has pain in his neck, which causes him headaches. (DE# 112-1, p. 44).

Williams's deposition testimony and sworn statement, which must be believed, establish that Scott possessed a wanton state of mind and maliciously applied force against Williams when Scott violently removed Williams's diadem, while Williams was in full restraints. See Hudson, 503 U.S. at 6-7. There was no need for force as Williams posed no threat to the safety Scott or anyone else. See Campbell, 169 F.3d at 1375. Furthermore, Williams was physically incapable of complying with Scott's order as Williams's hands were handcuffed and attached to a chain around his waist. With respect to the subjective element, Scott presents a version of events which contradicts Williams's testimony. Namely, that Scott calmly removed Williams's hat, in response to Williams's disorderly conduct, in a good faith effort to maintain and restore discipline.

With respect to the objective element/injury issue, Williams's declaration and deposition testimony include sufficient evidence that he suffered an injury which admittedly might not be significant, but is more than *de minimis*. See Hudson, 503 U.S. 5-12; Gomez, 163 F.3d at 924. Williams's sworn statement asserts that Scott's actions left him injured and in excruciating pain. (DE# 153, ¶11). During his deposition he testified at length about his neck injury and the medical treatment he has undergone. Scott

counters that Williams established only that Scott grazed his neck and did not cause any short-term or permanent injury. (DE# 126, p. 15).

Here, the parties present conflicting evidence with respect to both the subjective and objective elements. Accordingly, an attempt to resolve at summary judgment the issues and facts in dispute pertaining to the use of force during the encounter between Williams and Scott would require the Court to step outside its assigned role, and invade the province of the jury. As the Supreme Court stated in its opinion in Anderson v. Liberty Lobby, Inc., "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. 242, 255 (1986) (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

Due to the existence of genuine issues of material fact, summary disposition of the §1983 excessive force claim against defendant Scott is not appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

2. Failure to Intervene as to Jiminez

In a case in which excessive force is used, it is not necessary for police officers to actually participate in its use in order to be held liable under §1983. Rather, they can be held liable for their nonfeasance if they are present at the scene and fail to take steps to protect a victim from a fellow officer's use of excessive force. Fundiller v. City of Cooper City, 777 F.2d 1436, 1441-42 (11 Cir. 1985), and cases cited therein.

In an excessive force case such as this one, in which an officer is being sued, not because he was directly involved in applying the alleged force, but rather on the ground that he failed to protect the plaintiff from the use of excessive force, the Courts have held that the following is required for an officer to be held liable on that theory: (1) he or she must have observed or had reason to know that excessive force would be or was being used,

and (2) must have had both the opportunity and the means to prevent the harm from occurring. Carr v. Tatangelo, 338 F.3d 1259, 1274, n.27 (11 Cir. 2003) (observing, with regard to defendant officer Mercer, that "it is not credible to event postulate that he [Officer Mercer] had a reasonable opportunity to prevent the shooting," where Mercer did not see the "rapidly escalating" situation, and Mercer was some distance away when his fellow officer shot the plaintiff/appellant Carr); Riley v. Newton, 94 F.3d 632, 635 (11 Cir. 1996) (holding, with regard to officer Gisson who was sued on the ground that he failed to intervene to protect plaintiff Riley from another officer's use of excessive force, Gisson had no reason to suspect the use of excessive force until after it occurred, and the obligation for him to take steps to protect the plaintiff never arose) (quoting O'Neill v. Kreminski, 839 F.2d 9, 11-12 (2 Cir. 1988) for its holding that "The three blows were struck in such rapid succession that Connors had no realistic opportunity to prevent them. This was not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator."); Turner v. Scott, 119 F.3d 425, 429 (6 Cir. 1997). Cf. Anderson v. Branen, 17 F.3d 552, 557 (2 Cir. 1994) (holding that in order for liability to attach there must have been a realistic opportunity to intervene to prevent the harm; and that the question whether an officer had sufficient time to intervene or was capable of preventing the harm being caused by another officer is an issue of fact for the jury, unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise) (citing O'Neill, 839 F.2d at 11-12); Byrd, 783 F.2d at 1007 (vacating entry of summary judgment for a defendant officer, where there was evidence that the officer was present during the encounter in which the plaintiff was allegedly subjected to an unprovoked beating by another officer).

In this case, the parties dispute whether Williams presented evidence that Jimenez was present during the altercation between Williams and Byrd and/or had an opportunity to intervene.

Jimenez provided his version of events in a sworn declaration attached to the motion for summary judgment. (DE# 126-2). Jimenez

stated, "During the relevant times alleged in the complaint, I may have been inside the PTDC while plaintiff was there. However, at no time during alleged incident involving plaintiff and Officers Scott and/or Byrd was I present to see any altercation or witness any application of force." (DE# 126-2, ¶9). Because Jimenez "did not see any altercation" he was "never in a position to intervene on behalf of" Williams. (DE# 126-2, ¶9).

According to Williams's sworn declaration and deposition testimony, Byrd used excessive force against Williams in Jimenez's presence.⁷ Specifically, after the incident with Scott, Williams went before a judge and obtained permission to put his diadem back on. (DE# 112-1, p. 19). After the court appearance, Williams was reshackled and lead by Rios and Abbott towards the PTDC exit when Byrd approached and violently snatched Williams's diadem off his head. (DE# 153, ¶15; 112-1, p. 24-26). Byrd suddenly lost his temper, grabbed Williams by the neck from behind, slammed him into some iron bars, pulled him back from the bars and slammed him face-down onto a table, and choked him with both hands wrapped around Williams's neck. (DE# 153, ¶16-17; 112-1, p. 27-31). Byrd's actions caused excruciating pain and Williams almost lost consciousness. (DE# 153, ¶17; 112-1, p. 29-31). During the altercation, Williams "could hear and see . . . Jimenez" who "was inciting Byrd and others to commit other acts of violence" against Williams. (DE# 153, ¶18; 112-1, p. 31). Byrd ignored the order of a fellow officer to release Williams and had to be forcibly restrained by other guards. (DE# 153, ¶17-19; 112-1, p. 31). Williams estimated during his deposition that the attack lasted around fifteen minutes. (DE# 112-1, p. 33).

Here, each party presents a distinct version of events. If Williams's version is accurate, Jimenez is liable for failing to intervene. As a preliminary matter, Williams's testimony establishes that Byrd engaged in excessive force. Without provocation, and when Williams was securely shackled and posed no threat, Byrd subjected Williams to a severe attack, which resulted

⁷ Williams does not argue that Jimenez failed to intervene when Scott used excessive force.

in injuries to Williams's back, head, and ankle. See Hudson, 503 U.S. at 6-7; Campbell, 169 F.3d at 1375. Williams testified that Jimenez observed Byrd's actions and actually encouraged Byrd with taunts and that Jimenez had an opportunity to intervene in light of the length and extent of Byrd's attack. See Carr, 338 F.3d 1259, n.27. Meanwhile, Jimenez denies these allegations in his sworn declaration.

In light of the foregoing, an attempt to resolve at summary judgment the facts in dispute would require the Court to step outside its assigned role, and invade the province of the jury. As the Supreme Court stated in its opinion in Anderson v. Liberty Lobby, Inc., "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. 242, 255 (1986) (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

Due to the existence of genuine issues of material fact, summary disposition of the \$1983 failure to intervene claim against defendant Jimenez is not appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

3. Qualified Immunity

Jimenez and Scott both argue that they are entitled to qualified immunity. When engaging in an analysis at the summary judgment stage as to whether a defendant may be entitled to qualified immunity, the court must take the facts in the light most favorable to the party asserting the injury. Saucier v. Katz, 533 U.S. 194, 201 (2001); Robinson v. Arrugeta, 415 F.3d 1252, 1257 (11 Cir. 2005); Pace v. Capbianco, 283 F.3d 1275, 1285 (11 Cir. 2002). Qualified immunity, under appropriate circumstances, serves to insulate governmental officials from personal liability for actions taken pursuant to their discretionary authority, if their conduct does not violate clearly established statutory and constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Vinyard v. Wilson, 311 F.3d 1340,

1346 (11 Cir. 2002). See also Lee v. Ferraro, 284 F.3d 1188, 1195 (11 Cir. 2002); Flores v. Satz, 137 F.3d 1275 (11 Cir. 1998); Foy v. Holston, 94 F.3d 1528 (11 Cir. 1996).

In this case, the defendants have overcome the initial burden as they were acting within the scope of their discretionary authority, namely, the authority to oversee the flow of detainees in and out of the PTDC, when the allegedly wrongful acts occurred. See McCullough v. Antolini, 559 F.3d 1201, 1205 (11 Cir. 2009).

Once the defendant has satisfied the initial burden, the plaintiff bears the burden of proving the existence of a clearly established right at the time of the alleged impermissible conduct. See Foy, 94 F.3d at 1532. This does not mean that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see Mitchell v. Forsyth, 472 U.S. 511, 535, n. 12 (1985); "but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 639 (1987). In order to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Saucier v. Katz, 533 U.S. 194, 201-02 (2001).

The Eleventh Circuit, in the Eighth Amendment context, has noted, "By 1998, our precedent clearly established that government officials may not use gratuitous force against a prisoner who has already been subdued, or, as in this case, is incapacitated," Skrnich v. Thornton, 280 F.3d 1295, 1303 (11 Cir. 2002) (citing cases⁸). The Skrnich Court, upon finding that the facts of the

⁸ The Skrnich Court cited: Harris v. Chapman, 97 F.3d 499, 505-06 (11 Cir. 1996) (where prisoner, who had resisted haircut and threatened to kill the barber, was forcibly removed from his cell and beaten and restrained by a group of officers, a sixth officer's actions of snapping the prisoner's head back with a towel, slapping him in the face, and uttering racial epithets and other taunts were a constitutional deprivation, meriting award of damages by jury); Davis v. Locke, 936 F.2d 1208, 1212-13 (11 Cir. 1991) (where prisoner who attempted escape and was recaptured and placed in a dog box on a truck with his hands shackled behind his back, the action of pulling him by the ankles from the box, causing him to land on his head, causing him to suffer psychological injuries, the court held that the ongoing violation of escape had been terminated, and a jury could reasonably conclude that he posed no continuing risk of threat to the guards); Williams v. Cash - C.O.I., 836 F.2d 1318, 1320 (11 Cir. 1988) (where prisoner refused to comply with a prison guard's order to return to his cell, and prisoner

earlier cases were very similar to those before it on the unlawful infliction of force on nonresisting prisoners, determined that where the circumstances facing the prison guards (specifically, a non-compliant inmate who had been restrained by the guards and no longer posed a threat) "were enough like the facts in precedent that no reasonable, similarly situated official could believe that the factual differences between this line of precedent [i.e. Harris, Davis, Williams, and Perry] and the circumstances here might make a difference to the conclusion about whether the official's conduct was lawful and we find no merit to the defendant officers' arguments claiming entitlement to qualified immunity." Skrtich, 280 F.3d at 1303-04.

In this case, the defendants do not claim that a prisoner's right to be free from unnecessary infliction of pain by prison guards is a right that a reasonable officer would not understand. Federal courts have repeatedly held that an officer who uses excessive force or fails to intervene violates the prisoner's constitutional rights. Instead, Jimenez and Scott deny in their respective declarations that they engaged in behavior which constituted a violation of Williams's constitutional rights. Meanwhile, Williams's sworn testimony, which must be accepted as true, established that Scott violated his constitutional rights by engaging in excessive force and that Jimenez violated his constitutional rights by failing to intervene during Byrd's attack. Accordingly, a genuine issue of material fact is in dispute and summary judgment in the defendants favor as to the qualified immunity defense is not appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

alleged he was subdued and his arm was broken, summary judgment for the guard was not appropriate where the prisoner alleged that the guard purposefully broke his arm after he had ceased to resist); and Perry v. Thompson, 786 F.2d 1093, 1095 (11 Cir. 1986) (Appellate Court, finding a "square, head-on dispute of material facts," reversed grant of summary judgment in prisoner haircut case, where prisoner whose hands were cuffed in front of him, alleged he was thrown to the floor and beaten, the defendant officers' evidence was that the prisoner was shaved without incident and that medical records showed no complaint of injury on the day of the alleged beating).

C. Suggestion of Death as to Byrd

On September 21, 2009, Scott and Jimenez filed a suggestion of death as to Byrd (DE# 117) pursuant to Federal Rule of Civil Procedure 25(a), which provides:

(1) *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) *Continuation Among the Remaining Parties.* After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) *Service.* A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

In an October 5, 2009 amended order of instructions to plaintiff re: deceased defendant, the Undersigned directed Williams to "file a Notice for the Court's consideration, stating whether he intends to pursue or dismiss his complaint against Byrd, who is deceased." (DE# 131).

On October 30, 2009, Williams filed a document captioned "reply to defendant Patrick Byrd's notice of suggestion of death" wherein he stated: "It is the plaintiff's decision to continue this case and all claims instituted against" the deceased defendant. (DE# 142, ¶3). Williams also sought "to substitute this defendant with either the legal representative of the deceased [party's] estate, or alternatively the executor, administrator, and/or distributee of the estate of defendant Patrick Byrd," (hereinafter, "the substitute party") (DE# 142, ¶5).

In a response, Scott and Jimenez argued that the claim against Byrd must be dismissed as Williams failed to file a motion for substitution within 90 days after service of the suggestion of death (on or before December 21, 2009), as required by Rule

25(a)(1). (DE# 165). In his reply to the defendants' response, Williams argued that he satisfied Rule 25(a)(1) with his October 30, 2009 reply. (DE# 172, ¶3).

Defendants' argument that the claim against Byrd must be dismissed due to Williams's failure to timely move for substitution is without merit. Although a document captioned "motion for substitution" has not been filed by any party, Williams's October 30, 2009 reply to the September 21, 2009 suggestion of death constitutes a timely motion for substitution as it included an express request for an order substituting Byrd with the proper party. (DE# 142, ¶5). This Court has not yet ruled on Williams's motion, accordingly, a determination at this point is appropriate.

Rule 25(a)(1) provides courts with the authority to order substitution of the proper party when a party dies and the claim against the deceased party is not extinguished. "The decision whether to allow substitution is discretionary." National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 610 (11 Cir. 1984). When determining whether a claim is extinguished, in a situation where the claim is brought under a federal law which does not specifically address the survival issue, the courts apply state law "if it is 'not inconsistent with the Constitution and the laws of the United States.'" Nguyen v. U.S. D.E.A., 2005 WL 2143970, 4 (N.D. Fla. 2005) (quoting 42 U.S.C. § 1988; Robertson v. Wegman, 436 U.S. 584, 588 (1978)). Because Fla. Stat. § 46.021 provides that "no cause of action dies with the person," the §1983 claim against Byrd, in his individual capacity, is not extinguished by his death.

Because the claim is not extinguished with Byrd's death and because Williams timely moved for substitution, his motion for substitution (captioned a reply to the suggestion of death) should be granted.

At this point in the proceedings, the identity of the substitute party is unknown. The parties dispute whether it is the responsibility of the remaining defendants to provide Williams with this information. In an attempt to obtain the information, Williams included in his reply to the suggestion of death a request for an order directing defense counsel to provide Williams with

identifying information regarding the substitute party. (DE# 142). This Court did not rule on Williams's request, presumably because it was contained in a reply to the suggestion of death rather than a motion. In a second attempt to place the burden of identifying the substitute party on the defendants, Williams filed a December 30, 2009 motion to compel the defendants to effectuate service of process of the suggestion of death on the substitute party. (DE# 159). On January 19, 2010, Williams filed a motion requesting a ruling on his December 30, 2009 motion (DE# 162).

In a response to Williams's December 30, 2009 motion, Scott and Jimenez argued that Rule 25 does not render them responsible for determining the identity of the substitute party. The motion noted, "When the suggestion of death was filed, and in an abundance of caution, the undersigned," namely, Assistant County Attorney Bernard Pastor,⁹ "sent a courtesy copy of the document to Mr. Byrd's former spouse, who has not contacted the undersigned." (DE# 165, n.1).

Williams interprets Rule 25(a)(3) as providing, "nonparty successors or representatives of the deceased party must be served with the suggestion of death in the manner provided by Rule 4 for the service of a summons." (DE# 159, p. 2). Relying on this interpretation, Williams argues that the defendants should have formally served Byrd's former wife with the suggestion of death. However, this subsection of the rule does not require that a suggestion of death be served on the deceased's successors/representatives. Instead, the rule states that in a situation where a nonparty is served with a copy of the suggestion of death, the party effectuating service must comply with Rule 4.

Williams also relies on Barlow v. Ground, 39 F.3d 231 (9 Cir. 1994) to support his reading of Rule 25. In Barlow, 39 F.3d at 233, the Ninth Circuit held:

Although Rule 25(a)(1) could be clearer, a careful reading of the rule coupled with an understanding of its function leads to the conclusion that the rule requires two affirmative steps

⁹ Pastor has represented Jimenez, Scott, and Byrd throughout these proceedings.

in order to trigger the running of the 90 day period. First, a party must formally suggest the death of the party upon the record. Second, the suggesting party must serve other parties and nonparty successors or representatives of the deceased with a suggestion of death in the same manner as required for service of the motion to substitute. Thus, a party may be served the suggestion of death by service on his or her attorney, Fed.R.Civ.P. 5(b), while non-party successors or representatives of the deceased party must be served the suggestion of death in the manner provided by Rule 4 for the service of a summons.

(citations omitted).

In Atkins v. City of Chicago, 547 F.3d 869 (7 Cir. 2008), the Seventh Circuit addressed the issue of which nonparties must be served with the suggestion of death.¹⁰ In Atkins, the plaintiff sued several defendants under to §1983. The Court first noted that Rule 25(a), "does not specify any criteria for determining which nonparties must be served." Id. at 871. The Court held, "nonparties with a significant financial interest in the case, namely the decedent's successors (if his estate has been distributed) or personal representative (it has not been), should certainly be served." Id. at 873 (citing Barlow, 39 F.3d at 233-34). The Seventh Circuit concluded that the deceased party's widow was "an obviously interested nonparty." Id.

In this case, Byrd's former spouse, whose identity and address is known by the defendants, constitutes a nonparty. Accordingly, Williams's motion to compel the defendants to serve the suggestion of death, pursuant to Rule 4, on Byrd's former spouse should be granted.

III. Conclusion

Based on the foregoing, it is recommended that:

1. The Motion for Summary Judgment (DE# 126) be denied as to Scott on the use of excessive force claim and be denied as to Jimenez on the failure to intervene claim.

¹⁰ The Eleventh Circuit has not addressed this issue.

2. Williams's motion for substitution, captioned a reply to the suggestion of death (DE# 142), be granted.

3. Williams's motion to compel the defendants to effectuate service of process of the suggestion of death on the substitute party (DE# 159) be granted, only to the extent that the defendants must serve Byrd's former wife with the suggestion of death pursuant to Rule 4.

4. Williams's motion requesting a ruling on his prior motion to compel (DE# 162) be denied as moot.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

It is so recommended at Miami, Florida, this 24th day of February, 2010.



UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22617-CIV-UNGARO

CRAIG WILLIAMS,

Plaintiff,

v.

OFFICER SCOTT, *et al.*,

Defendants.

ORDER ON MAGISTRATE JUDGE'S REPORT AND ORDER OF REFERENCE

THIS CAUSE is before the Court upon Defendants Scott and Jimenez's Joint Motion for Summary Judgment and Incorporated Memorandum of Law ("Defendants' Motion"), filed September 30, 2009. (D.E. 126.) Also before the Court is Plaintiff's Motion to Compel Service of Process of the Suggestion of Death Notice upon the Legal Representative or Administrator, Executor and/or Distributee of Defendant Byrd's Estate, filed December 30, 2009. (D.E. 159.) The matter was referred to Magistrate Judge Patrick A. White, who on February 24, 2010, issued a Report recommending that Defendants' Motion be denied and that Plaintiff's Motion to Compel Service be granted. (D.E. 175.) On the same day, Magistrate Judge White issued an additional Report stating that this cause is ready for trial. (D.E. 176.) The parties were afforded the opportunity to respond to the Magistrate Judge's Reports. On March 24, 2010, Defendants filed objections to the Magistrate Judge's Report, in which they reiterated the arguments made in support of their Motion and argued that Plaintiff's Motion to Compel Service should be denied. (D.E. 183.)

THE COURT has conducted a *de novo* review of the record and is otherwise fully

advised in the premises.

By way of background, on August 4, 2008, Plaintiff filed a Second Amended Complaint pursuant to 42 U.S.C. § 1983 for monetary damages and other relief as a result of events that occurred at the Miami-Dade Pretrial Detention Center in October, 2004.¹ (D.E. 52, hereinafter “2d Am. Compl.”) In Count 1 of his Second Amended Complaint, Plaintiff asserts that Defendants Scott and Byrd employed excessive force against him, which resulted in physical injury to Plaintiff in violation of his rights under the Fourteenth Amendment. (2d Am. Compl. ¶¶ 28, 31, 32, 54.) In Count 3, Plaintiff claims that Defendant Jimenez failed to intervene and/or incited other officers to injure Plaintiff during Byrd’s alleged attack on Plaintiff in violation of his rights under the Fourteenth Amendment. (2d Am. Compl. ¶¶ 32, 56.)

Defendants’ Motion for Summary Judgment

In their Motion, Defendants Scott and Jimenez argue that they are entitled to qualified immunity with respect to each of Plaintiff’s claims.² (D.E. 126, at 1–2.) In the alternative, Defendants argue that, even should the Court find that Defendants are not entitled to qualified immunity, they are nonetheless entitled to summary judgment because Plaintiff’s claims are factually frivolous and Plaintiff has failed to present any evidence in support thereof. (*Id.* at 2.)

¹ In his Second Amended Complaint, Plaintiff asserted various claims against Defendants Byrd, Jimenez, Scott, and others, arising out of the incidents in question. (D.E. 52.) Upon the recommendations of the Magistrate Judge (D.E. 56, 124, 132), this Court dismissed all but Counts 1 and 3 of the Second Amended Complaint against the above-named Defendants. (D.E. 69, 136, 137.)

² As discussed more fully below, Defendants Scott and Jimenez filed a Suggestion of Death on September 21, 2009, in which they provided notice that Defendant Byrd had died during the pendency of the action. Accordingly, Defendants Scott and Jimenez’s Motion for Summary Judgment, filed after the Suggestion of Death, addresses only Plaintiff’s claims against Scott and Jimenez.

In his Report, the Magistrate Judge reviewed Defendants' Motion with respect to each of the counts in Plaintiff's Second Amended Complaint and recommended that Defendants' Motion be denied. (D.E. 175.) As noted in the Report, Plaintiff has offered deposition testimony and a sworn statement in response to Defendants' Motion, in which Plaintiff presents evidence which, if taken as true, raises a genuine issue of material fact with respect to each of the remaining counts against Defendants Scott and Jimenez and a genuine issue of material fact with respect to whether Defendants Scott and Jimenez are entitled to qualified immunity. (See D.E. 112-1, 153.)

In their Objections to the Magistrate Judge's Report, Defendants reiterate the arguments made in support of their Motion and present some additional caselaw in support thereof. (D.E. 183.) The Court has considered the Defendants' objections but ultimately agrees with the analysis in the Magistrate Judge's Report. Accordingly, Defendants' Motion for Summary Judgment must be denied.

Suggestion of Death

On September 21, 2009, Defendants Scott and Jimenez filed a Suggestion of Death, indicating that co-Defendant Byrd had died during the pendency of the action; the Suggestion of Death was served on Plaintiff. (D.E. 117.) The Magistrate Judge then issued an Amended Order of Instructions to Plaintiff, which required Plaintiff to file a Notice for the Court's consideration, stating whether he intended to pursue or dismiss his claim against Defendant Byrd. (D.E. 131.) On October 30, 2009, Plaintiff filed a document entitled Reply to Defendant Patrick Byrd's Notice of Suggestion of Death ("Reply to Suggestion of Death"), in which he indicated that he wished to continue his claim against Defendant Byrd and sought to "substitute this defendant with either the legal representative of the deceased [party's] estate, or alternatively the executor,

administrator, and/or distributee of the estate of defendant Patrick Byrd.” (D.E. 142.) Plaintiff also requested in that filing that “defense counsel forward identifying information regarding the legal representative(s), executor(s), administrator(s) and or distributee(s) of the deceased estate.” (*Id.* at 2.)

Then, on December 30, 2009, Plaintiff filed a Motion to Compel Service of Process of the Suggestion of Death Notice upon the Legal Representative of Administrator, Executor and/or Distributee of Defendant Byrd’s Estate (“Motion to Compel Service”). (D.E. 159.) In that motion, Plaintiff argued that Defendants Scott and Jimenez were required to serve the Suggestion of Death upon the non-party successor or legal representative of the deceased in the manner provided by Rule 4 for the service of a summons. (D.E. 159, at 2) (citing *Grandbouche v. Lovell*, 913 F.2d 835 (10th Cir. 1990)).

In response to Plaintiff’s Motion to Compel Service, Defendants Scott and Jimenez stated that they were “unaware of any estate that was created on behalf of Mr. Byrd.” (D.E. 165.) However, Scott and Jimenez stated that, in an abundance of caution, defense counsel had sent a courtesy copy of the Suggestion of Death to Defendant Byrd’s former spouse, Mrs. Byrd. (D.E. 165, at 1.) Scott and Jimenez further argued that Plaintiff’s claim against Byrd must be dismissed due to Plaintiff’s failure to file a motion for substitution within the 90-day period following the filing of the Suggestion of Death, as provided for in Federal Rule of Civil Procedure 25(a). (*Id.* at 2.)

In his Report, the Magistrate Judge states that Defendants’ argument that Plaintiff failed to timely file a motion for substitution is meritless. (D.E. 175, at 16.) The Magistrate Judge notes that, while no document captioned a “motion for substitution” has been filed, Plaintiff’s

October 30, 2009 Reply to the Suggestion of Death should be construed as such, “as it included an express request for an order substituting Byrd with the proper party.” (*Id.*) Accordingly, the Magistrate Judge finds that Plaintiff’s motion for substitution was timely filed within 90 days of the filing of the Suggestion of Death and recommends that Plaintiff’s motion for substitution be granted. (*Id.* at 19.) The Report further recommends that Plaintiff’s Motion to Compel Service (D.E. 159) be granted to the extent that Defendants Scott and Jimenez should serve Mrs. Byrd with the Suggestion of Death in the manner required by Federal Rule of Civil Procedure 4. (D.E. 175, at 19.)

In their Objections to the Magistrate Judge’s Report, Defendants Scott and Jimenez object to the Magistrate Judge’s recommendation that they serve the Suggestion of Death on Mrs. Byrd, arguing that they are unaware of the identity of Defendant Byrd’s successor or legal representative and that it is the responsibility of the Plaintiff, alone, to ascertain the identity of the appropriate substitute party if he wishes to pursue his claim against Defendant Byrd. (D.E. 183, at 20.) Scott and Jimenez further argue that Mrs. Byrd is protected by statutory confidentiality provisions and that her personal information, including her full name and home address, is thus protected from disclosure pursuant to Florida Statute § 119.071(4)(d)(3). (D.E. 183, at 19–20.)

As noted, the Magistrate Judge recommends in his Report that Plaintiff’s October 30, 2009 Reply to Defendant Patrick Byrd’s Notice of Suggestion of Death be construed as a motion for substitution pursuant to Federal Rule of Civil Procedure 25(a)(1) and that such motion be granted. (D.E. 175, at 16.) The Court has considered the Magistrate Judge’s recommendation regarding the substitution of parties but finds that Plaintiff’s October 30, 2009 filing does not

constitute a motion for substitution because it does not identify the proper substitute party. Accordingly, without a party to name as a substitute, the Court cannot grant substitution at this time. Further, though Plaintiff has expressed his desire to continue his claim against Defendant Byrd's successor, there remain outstanding the related issues of which party bears the burden of ascertaining the identity of the appropriate successor and the requirement of service of the Suggestion of Death on that party and how process is to be served on the appropriate successor once the successor is identified..

Thus, contrary to the Magistrate Judge's recommendation in his Report that Case is Ready for Trial (D.E. 176), the undersigned finds that, due to the pending issues regarding the substitution of Defendant Byrd and the service of the Suggestion of Death, this case is not ready for trial. The undersigned further finds it appropriate to refer the outstanding issues regarding substitution and service to Magistrate Judge Patrick A. White to be resolved in accordance with the requirements of the law.

Conclusion

Upon a *de novo* review of the record, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Magistrate Judge's Report (D.E. 175) is AFFIRMED, ADOPTED, AND RATIFIED IN PART AND REVERSED IN PART.
2. Defendants Scott and Jimenez's Motion for Summary Judgment (D.E. 126) is DENIED.
3. The Magistrate Judge's recommendations that Plaintiff's Reply to Suggestion of Death (D.E. 142) be construed as a motion for substitution and that such motion be granted is

REJECTED.

4. The Magistrate Judge's recommendation that Plaintiff's Motion to Compel Service (D.E. 159) is REJECTED as premature.

5. Pursuant to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules of the Southern District of Florida, the above-captioned Cause is referred to United States Magistrate Judge White to take all necessary and proper action as required by law with respect to Plaintiff's Motion to Compel Service (D.E. 159), and any motions for extension or enlargement of time that relate to such documents.

6. It shall be the responsibility of the respective parties in this case to note that courtesy copies of all materials necessary to the resolution of the referred matters shall be directed to the Magistrate Judge's chambers.

7. The Magistrate Judge's Report that Case Is Ready for Trial (D.E. 176) is REVERSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 2d day of April, 2010.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
Counsel of record
Craig Williams, *pro se*
Magistrate Judge White

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22617-CIV-UNGARO
MAGISTRATE JUDGE P.A. WHITE

CRAIG WILLIAMS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	<u>ORDER</u>
	:	
OFFICER SCOTT, ET AL.,	:	
	:	
Defendants.	:	

In an April 2, 2010 Order on the Undersigned's February 24, 2010 Report, the District Court noted that the "Plaintiff has expressed his desire to continue his claim against Defendant Byrd's successor, there remain outstanding the related issues of which party bears the burden of ascertaining the identity of the appropriate successor and the requirement of service of the Suggestion of Death on that party and how process is to be served on the appropriate successor once . . . identified." (DE# 184). Federal law places the burden of identifying the name and addresses of the defendant in a §1983 claim on the plaintiff. See Smith v. Belle, 321 F. App'x 838, 845 (11 Cir. 2009) (failure of prisoner, proceeding in forma pauperis in § 1983 action, to provide current address for defendant so that process could be served, despite being warned that failure to do so would result in dismissal, warranted dismissal of the prisoner's claims against defendant for lack of service of process).

In the same vein, the burden is on the plaintiff to identify the name and address of the proper substitute party when the defendant dies during the pendency of the action. See Simmons v. Prison Health Services Inc., 2009 WL 2914103 (S.D. Ga. 2009) (stating in a §1983 claim in which the defendant died while the action was pending, "[the plaintiff] may find the legal issues (how to effectuate service against [the deceased defendant]'s estate, and

whether he can even proceed against it) more complex than an inmate plaintiff faced with the task of merely locating a defendant's proper address. That is of no moment here, however, for Courts cannot litigate the case on his behalf.") (footnote omitted).

It is thereupon ORDERED AND ADJUDGED that the plaintiff shall supply the Court with a current address for the successors or representatives of the deceased party within **thirty (30) days** or risk dismissal of this defendant from the case. The plaintiff must obtain the defendant's correct address through the discovery process as detailed in the Federal Rules of Civil Procedure.

DONE AND ORDERED at Miami, Florida this 28th day of April, 2010.



UNITED STATES MAGISTRATE JUDGE

cc: Craig Williams, Pro Se
No. 990650
Florida Civil Commitment Center
13613 S.E. Highway 70
Arcadia, FL 34266-7829

FILING FEE	
PAID	\$ 455.00
1021536	
Appeal Steven M. Larimore, Clerk	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22617 Civ-Ungaro/White

FILED by <u>EB</u> D.C.
APR 29 2010
STEVEN M. LARIMORE CLERK U. S. DIST. CT. S. D. of FLA. - MIAMI

CRAIG WILLIAMS,

Plaintiff,

v.

JEFF SCOTT, *et al.*,

Defendants..

NOTICE OF APPEAL BY DEFENDANTS SCOTT AND JIMENEZ

Notice is hereby given that Miami-Dade County Corrections Officers Jeff Scott and Humberto Jimenez ("Defendants"), hereby appeal to the United States Court of Appeals for the Eleventh Circuit, this Court's *Order on Magistrate Judge's Report* (DE 184), entered on April 2, 2010, which denied Defendants' motion for summary judgment and expressly denied qualified immunity for Defendants as a matter of law.

Respectfully submitted,

R.A. CUEVAS, JR.
Miami-Dade County Attorney

By: B. Pastor

Bernard Pastor
Assistant County Attorney
Florida Bar No. 0046582
Email: pastor@miamidade.gov
Miami-Dade County Attorney's Office
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128-1993
Tel: (305) 375-5151
Fax: (305) 375-5634

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2010, the foregoing document was served by U.S. Mail on the *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.



Bernard Pastor

SERVICE LIST

CASE NO.: 07-22617 Civ-Ungaro

Craig Williams, *pro se*
No. 990650
Florida Civil Commitment Center
13619 SE Highway 70
Arcadia, FL 34266
Service via U.S. mail

Bernard Pastor, Esq.
email: pastor@miamidade.gov
Miami-Dade County Attorney's Office
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Tel: 305-375-5151
Fax: 305-375-5634
Attorney for Defendants

FILED by *ROY* D.C.
MAY 18 2010
STEVEN M. LARIMORE
CLERK U. S. DIST. CT
S. D. of FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CRAIG WILLIAMS,

Case NO: 07-22617-CIV-UNGRO-WHITE

Plaintiff,

Magistrate Judge Patrick White

v.

OFFICER JEFF SCOTT, *et.al.*,

Defendants.

WILLIAMS MOTION FOR ORDER DIRECTING THE CLERK TO PROCESS THE
SUPOBOENA DUCES TECUM -TO BE FORWARDED TO THE UNITED STATES
MARSHAL FOR SERVICE

COMES NOW, the undersigned plaintiff, CRAIG WILLIAMS (the "PLAINTIFF") pursuant to Rule 45 of the Federal Rules of Civil Procedure and moves the court for an order directing the United States Marshal to serve plaintiff's pro se subpoena duces tecum or in the alternative grant an extension of time: In support of this motion, Plaintiff alleges the following:

FACTS

1. On January 20, 2010, Scott and Jimenez filed a response to Williams Motion to compel service of process of the suggestion of death [DE# 165].
2. In their respective motion they argued that Rule 25, Fed.R.Civ.P., does not specifically require the person suggesting the death of a party to determine whether there be such an estate created. However, in foot note #1, the defendants

indicated that they sent a courtesy copy of the suggestion of death to the former spouse of defendant Patrick Byrd. Motion at p.1 [DE#165].

3. In the Magistrate Court's report dated February 24th, 2010 [DE#175], the court took note of the fact that Scott and Jimenez indicated that they served a copy of the suggestion of death on the former spouse and recommended that Williams motion to compel service of process of the suggestion of death in the wife finding that the former spouse was a non-party to this action.
4. On April 5th, 2010, the District Court entered an order indicated that Williams reply to the suggestion of death did not constitute a motion for substitution because it failed to indentify the proper substitute party [DE#184]. Consequently, the District Court entered an order rejecting that Williams reply be construed as a motion for substitution and also rejected Williams motion to compel service as premature.
5. On April 28th, 2010 the Magistrate Court entered an order directing Williams to supply the court with a current address for the successors or representatives of the deceased party with in thirty days from this Order [DE#189].
6. The case is currently pending against SCOTT, JIMENEZ & BYRD. The Magistrate Court previously recommended that the case was ready for trial. The District Court by order reversed this recommendation and directed the Magistrate Court to take necessary and proper action as required by law in respect to Williams motion to compel service including motions for extension of time.

7. As previously stated, it was and remains Williams position that Scott and Jimenez assertion that they served the former spouse with a copy of the suggestion of death makes the former spouse a non-party to this action.
8. Consequently, pursuant to this court recent order, Williams seeks an order directing the United States Marshal to effect service of process of the enclosed subpoena duces tecum upon Bernard Pastor, Esq. located at Miami Dade County Attorney's Office, 111 N.W. 1st Street, Suite 2810, Miami, Florida 33128, Phone: 305-375-5151.
9. As previously stated Mr. Pastor has served the former wife with a copy of the suggestion of death and therefore, has in his possession information which identifies the name and address of the former spouse, a non-party to this action.
10. Additionally, since defendant Patrick Byrd is a former employee of Miami Dade County Corrections, it is presumed that Mr. Pastor also has information in his possession regarding defendant Byrd's former employee insurance policies obtained through his employer (e.g. Miami Dade Corrections). As such, the subpoena duces tecum also seeks to direct Mr. Pastor to provide these documents as well.
11. Alternatively, should the court deny this request Williams seeks a reasonable extension of time to substitute the deceased party in this action.
12. Recently Williams has been contacted by the Volunteer Lawyers' Project (e.g. Ms. Yolanda Siders-Lewis), which indicated that Williams was found eligible for

assistance from their program and would contact him as soon as an attorney was located. Additionally, Williams spoke with Ms. Siders-Lewis by phone on May 12th, 2010 regarding the suggestion of death matter; Ms. Siders-Lewis indicated that she would research and see if she could locate an estate or representative to substitute the deceased in this matter. Finally, she indicated that she would shortly follow-up with Williams regarding her research results.

13. Pursuant to Rule 45 and applicable law this Court has discretion to direct the United States Marshal to effect service of process of the subpoena duces tecum upon Bernard Pastor, Esq.

14. The subpoena duces tecum in question has been attached to this motion for the court's consideration in this matter.

WHEREFORE, the undersigned plaintiff moves this court for an order directing the Clerk to process the instant rule 45 subpoena duces tecum, a further order directing the United States Marshal to effect service of process of the said subpoena duces tecum; alternatively, a further order granting Williams an extension of time to consult with the Volunteer Lawyers' Project who has agreed to assist Williams with resolving this matter.

Respectfully Submitted,



Craig Williams, Pro Se #990650
Florida Civil Commitment Center
13619 S.E. Highway 70
Arcadia, Florida 34266

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail this 12th day of May, 2010 on all parties of record on the attached service list.



CRAIG WILLIAMS

SERVICE LIST

CASE NO. 07-22617 Civ-Ungaro/White

Bernard Pastor
Email: pastor @ miamidade.gov
Miami-Dade County Attorney's Office
111N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: 305-375-5151
Fax: 305-375-5634
Attorney for defendants

Blessed is He, and May the Name of Thee EL-SHADDAI

ISRAEL ELOHIM, be hodah forever and ever!

EL-SHADDAI ISRAEL ELOHIM



AO88 (Rev. 12/06) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT

DISTRICT OF _____

CRAIG WILLIAMS
 v.

SUBPOENA IN A CIVIL CASE

JEFF SCOTT, ET, AL.,

Case Number: **07-22617-**
CIV-UNGARO/WHITE

TO: **BERNARD PASTOR, ESQ.**
MIAMI DADE COUNTY ATTY. OFFICE
111 N.W. 1ST STREET, SUITE 2810
MIAMI, FL 33128

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
---------------------	---------------

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **ALL DOCUMENTS PERTAINING TO DEFENDANT PATRICK BYRD'S FORMER WIFE, INCLUDING ALL DOCUMENTS WHICH IDENTIFIES THE FORMER WIFE'S NAME AND LAST KNOWN ADDRESS, ALL DOCUMENTS RELATING DEFENDANT PATRICK BYRD'S FORMER INSURANCE POLICIES WITH MIAMI DADE COUNTY.**

PLACE	DATE AND TIME
13619 SE HWY 70 FLORIDA CIVIL COMMITMENT CENTER ARCADIA, FL 34266	6/30/10 9:AM

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

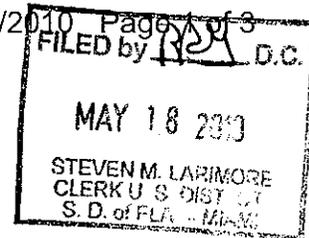
Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
-----------------------------------------------------------------------------------------	------

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CRAIG WILLIAMS,

Case NO: 07-22617-CIV-UNGRO-WHITE

Plaintiff,

Magistrate Judge Patrick White

v.

OFFICER JEFF SCOTT, *et.al.*,

Defendants.

_____ /

WILLIAMS MOTION FOR ORDER COMPELLING DEFENDANTS TO PROVIDE A SERVICE COPY OF THEIR DESIGNATION OF RECORD ON APPEAL [DE# 192]

COMES NOW, the undersigned plaintiff, CRAIG WILLIAMS (the "PLAINTIFF"), pursuant to Rule 5 of the Federal Rules of Civil Procedure and moves the Court for an order compelling defendants Scott and Jimenez to provide a service copy of their designation of the record on appeal [DE#192]. In support thereof would allege:

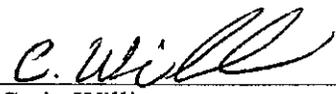
FACTS

1. On February 24th, 2010 the Magistrate Court entered a report recommending that the respective defendants' joint motion for summary judgment be denied [DE# 175].
2. On March 24th 2010 the respective defendants filed objections to the report of the Magistrate Court [DE#183].
3. On April 5th, 2010, the District Court overruled defendants' objections and adopted the Magistrate Court's recommendation & report; consequently, the District Court entered an order denying Defendants Scott and Jimenez's joint motion for summary judgment [DE#184].
4. On April 29th, 2010, the respective defendants filed a notice of appeal [DE#190].

5. On May 4th , 2010 the respective defendants filed a document entitled "Notice Of Filing And Service Of Designation Of Record On Appeal By defendants Scott And Jimenez" [DE#192]. However, Williams for some unknown reason **never** received a copy of the aforementioned.
6. Consequently, Williams seeks an order by the Court directing the defendants to provide him with a service copy of the aforementioned.
7. This request is made in **good faith** and not to cause any **unnecessary delay** and **prejudice** to the respective defendants.

WHEREFORE, based on the aforementioned, the undersigned Plaintiff respectfully moves the Court for an order compelling the respective defendants to provide Williams with a service copy of their designation of record on appeal apparently filed on or about May 4th, 2010 [DE#192].

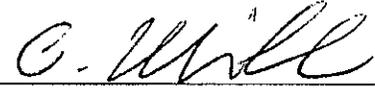
Respectfully Submitted,

By: 

Craig Williams
Florida Civil Commitment Center
13619 S.E. Hwy. 70
Arcadia, Florida 34266

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail this 12th day of May, 2010 on all parties of record on the attached service list.


Craig Williams

SERVICE LIST

CASE NO. 07-22617 Civ-Ungaro/White

Bernard Pastor, Esq.
Email: pastor@maimdade.gov
Dade County Attorney's Office
111 NW 1st Street
Suite 2810
Miami, Florida 33128-1993

Blessed is He, and May the Name of Thee EL-SHADDAI

ISRAEL ELOHIM, be hodah forever and ever!

EL-SHADDAI ISRAEL ELOHIM



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 07-22617-CIV-UNGARO

CRAIG WILLIAMS,
Plaintiff,

v.

OFFICER SCOTT, et al,
Defendants.

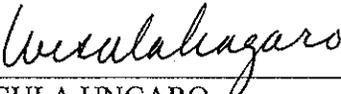
ORDER AFFIRMING MAGISTRATE JUDGE'S REPORT

THIS CAUSE is before the Court upon Plaintiff's Motion to Strike Scott and Jimenez's Pretrial Statement as Inadequate, filed February 8, 2010 (D.E. 173) and upon Plaintiff's Supplemental Motions to Strike, filed March 12, 2010 (D.E. 180) and April 26, 2010 (D.E. 188), respectively. This matter was referred to Magistrate Judge Patrick A. White, who, on May 3, 2010, issued a Report recommending that Plaintiff's Motions to Strike be denied because the Defendants' Pretrial Statement adequately complied with the Court's Order Scheduling Pretrial Proceedings. (D.E. 191.) The parties were afforded the opportunity to file objections to the Magistrate Judge's Report; however, no objections were filed. The matter is now ripe for review.

THE COURT has considered the Plaintiff's Motions to Strike and the pertinent portions of the record and is otherwise fully advised in the premises. Accordingly, it is hereby

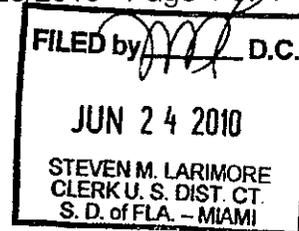
ORDERED AND ADJUDGED that the Magistrate Judge's Report (D.E. 191) is RATIFIED, ADOPTED and AFFIRMED. Plaintiff's Motion to Strike (D.E. 173) and Supplemental Motions to Strike (D.E. 180, 188) are DENIED.

DONE and ORDERED in Chambers, at Miami, Florida this 28th day of May, 2010.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
Craig Williams, *pro se*
Counsel of record



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CRAIG WILLIAMS,

Case NO: 07-22617-CIV-UNGRO-WHITE

Plaintiff,

Magistrate Judge Patrick White

v.

OFFICER JEFF SCOTT, *et.al.*,

Defendants.

WILLIAMS MOTION FOR -ORDER WITHDRAWING PREVIOUSLY FILED MOTION

COMES NOW, the undersigned plaintiff, CRAIG WILLIAMS (the "PLAINTIFF"), moves the Court for an Order withdrawing -Williams Motion for Order Directing the Clerk to Process the Subpoena Duces Tecum – to be Forwarded to the United States Marshal for Service. In support thereof would allege:

FACTS

1. On April 28th, 2010, the Court issued an Order which directed WILLIAMS to supply the court with a current address for the successors or representatives of the deceased party within 30 days from the date of this particular Order. See [DE# 189].
2. In response to this order, WILLIAMS filed with the clerk a document entitled, "Williams Motion for Order Directing the Clerk to Process the Subpoena Duces Tecum-To Be forwarded To the United States Marshal for Service."
3. The motion reflected a service date of May 12th, 2010.
4. A copy of the Rule 45, Fed.R.Civ.P., subpoena duces tecum was attached to the motion for the court's and clerk's consideration.

5. The said subpoena duces tecum commanded Bernard Pastor, Esq. (“non-party”) and attorney for the defendants to produce certain documents in his possession, custody and control pertaining to Rule 25, Fed.R.Civ.P. Substitution of Defendant Patrick Byrd (“the deceased”).
6. A review of the subpoena duces tecum reflects that Mr. Pastor was commanded to produce via United States Mail certain documents by June 30th, 2010 no later than 9:00 a.m.
7. Rule 45 states in relevant part, “Every subpoena must... command each person to whom it is directed to do the following at a specified time and place... produce designated documents... in that person’s possession, custody, or control... the rule further provides, “A person commanded to produce documents... may serve on the party... a written objection... the objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served...”
8. In the motion, which reflected a service date of May 12th, 2010; WILLIAMS requested the court for an order directing the clerk to process and forward the subpoena duces tecum to the United States Marshal to effectuate service upon Mr. Pastor at the enclosed address reflected inside the said subpoena.
9. Because the Court has failed to date to rule on this motion, Mr. Pastor is unable to produce the said documents in the amount of time allowed by the subpoena and or to file any written objections in a timely manner, assuming the Court had ruled and WILLIAMS advanced proper notice.
10. Consequently, WILLIAMS request the Court to issue an Order withdrawing the said motion.

11. In lieu of this motion WILLIAMS is in the process of preparing and submitting a motion for a final extension of time to substitute parties. This motion is **imminent** and forthcoming.

12. This request is made in **good faith** and not to cause any **unnecessary delay** and **prejudice** to the respective defendants.

WHEREFORE, based on the aforementioned, the undersigned Plaintiff respectfully moves the Court for an order specifically withdrawing the motion in question.

Respectfully Submitted,

By: 
Craig Williams
Florida Civil Commitment Center
13619 S.E. Hwy. 70
Arcadia, Florida 34266

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been served via U.S. Mail this 22nd day of June, 2010 on all parties of record on the attached service list.


Craig Williams

SERVICE LIST

CASE NO. 07-22617 Civ-Ungaro/White

Bernard Pastor, Esq.
Email: pastor@maimdade.gov
Dade County Attorney's Office
111 NW 1st Street
Suite 2810
Miami, Florida 33128-1993

Blessed is **He**, and May the **Name of Thee EL-SHADDAI**

ISRAEL ELOHIM, be hodah forever and ever!

EL-SHADDAI ISRAEL ELOHIM



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CRAIG WILLIAMS,

Case NO: 07-22617-CIV-UNGRO-WHITE

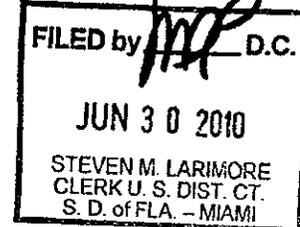
Plaintiff,

Magistrate Judge Patrick White

v.

OFFICER JEFF SCOTT, *et al.*,

Defendants.



WILLIAMS MOTION FOR A FINAL 60 DAY- EXTENSION OF TIME TO
SUBSTITUTE PARTIES AND REISSUE RULE 45 SUBPOENA DUCES TECUM

COMES NOW, the undersigned plaintiff, CRAIG WILLIAMS (the "PLAINTIFF"), pursuant to Rule 6 (b) (1)(B) of the Federal Rules of Civil Procedure and moves the Court for an order for a **final 60 day** extension of time to substitute parties and re-issue Rule 45 subpoena duces tecum. In support of this motion, Plaintiff alleges the following:

A. INTRODUCTION

1. On April 28th, 2010, the Magistrate Court issued an Order, which stated in relevant part, "the plaintiff shall supply the Court with a current address for the successors or representatives of the deceased party within thirty (30) days...the plaintiff must obtain the defendants' correct address through the discovery process as detailed in the Federal Rules of Ciivl Procedure..." [DE#189].
2. Pursuant to this Order, May 28th, 2010 was thc deadline.

The Motion for Service of the Subpoena Duces Tecum by United States Marshal

3. In response to this court order, Williams served and filed a document entitled, "Williams Motion for Order Directing the Clerk to Process the Subpoena Duces Tecum – To be forwarded to the United States Marshal for Service..."
4. The motion had a service date of May 12th, 2010.
5. Meanwhile, on May 25th, 2010, Williams served on Bernard Pastor, Esq., (e.g. attorney for defendants), a Rule 45 Subpoena Duces Tecum via Certified Mail via the United States Mail. See Williams Exhibits A-C.
6. On June 17th, 2010, Williams received from Mr. Pastor, a letter dated June 14th, 2010, wherein Mr. Pastor **objected** to the aforementioned subpoena for various reasons stated within his letter. See Williams Exhibit D.
7. Moreover, on June 22nd, 2010, Mr. Williams served and filed a document entitled, "Williams-Motion for Order Withdrawing Previously Filed Motion."
8. In response, to Mr. Pastor's **objections**, Williams forwarded Mr. Pastor, a letter dated June 22nd, 2010 which withdrew the Subpoena. See Williams Exhibit E.
9. As stated, in response to this Court's order, Williams submitted a motion requesting the Court to direct service of process of a subpoena duces tecum upon Mr. Bernard Pastor.

10. The subpoena in question commanded Mr. Pastor to provide Williams with certain documents in his **possession, custody, or control**; these documents if produced, would have identified a proper substitution party.
11. This contention is based in part, on a previous filing wherein Mr. Pastor indicated that he forwarded a courtesy copy of the suggestion of death to defendant Patrick Byrd's former spouse. The former spouse is **presumed** to be the legal representative of Defendant Patrick Byrd's estate.
12. The Court failed to timely rule on this motion; consequently, Williams had to file a motion to withdraw it, because the time specified for the production of documents had neared. In other words, at this juncture, Mr. Pastor would **not** be able to **timely obey** the command to produce.
13. The subpoena is **not processed** i.e., neither "issued nor signed by the clerk".

The Subpoena Duces Tecum served via Certified U.S. Mail

14. Additionally, the subpoena duces tecum forwarded on May 25th, 2010 to Mr. Bernard Pastor via certified mail by the United States Mail, has the following deficiencies: (1) the subpoena was incorrectly issued and signed by Williams contrary to Rule 45, which states in relevant part, "the **clerk must issue** a subpoena, **signed** but otherwise in **blank**, to a party who requests it. That party must complete it before service..." See Rule 45 (a) (3), Fed.R.Civ.P.

15. The subpoena was incorrectly served by Williams a party to the action, contrary to Rule 45, which states in relevant part, “any person who is at least **18 years old** and **not a party** may serve a subpoena...” See Rule 45 (b) (1), Fed.R.Civ.P.

16. Williams, incorrectly certified and declared that the information contained in the proof of service was true and correct contrary to Rule 45 (b)(4), which states in relevant part, “proving service, where necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. **The statement must be certified by the server...**” See Rule 45, (b) (4).

17. Williams failed to provide prior or advance notice, contrary to Rule 45 (b)(1), which states in relevant part, “if the subpoena commands the production of documents, electronically stored information... then before it is served a notice must be served on each party...” See Rule 45 (b) (1), Fed.R.Civ.P.

18. Consequently, although federal precedent recognizes the difficulty with substituting a party under Rule 25, Williams having conducting additional research of this matter do believe that he is able to now provide the proper parties with adequate notice and subpoena duces tecum (s).

Inadequate Law Library & Settlement Negotiations

19. Another basis for an extension: Williams does not have access to a traditional law library but have to contend with a computer lab that has only 7 legal computers which contains Premise Legal Research Software for approximately 700 residents at the Florida Civil Commitment Center.
20. This Premise software is inadequate to the extent that it does not contain a basic range of needed research tools to effectively research.
21. Unfortunately, access to these 7 legal computers are determined on a first come – first served basis. This process has at times impeded plaintiff's access to the courts and at other times caused unreasonable delays.
22. On June 22, 2010, Williams received from Mr. Pastor, a letter dated June 17th, 2010. In this letter, Mr. Pastor has begun Settlement Negotiations. Although, no settlement has been formally reached, they are ongoing.
23. Williams pursuant to **excusable neglect**, seeks a **final 60 day** extension to substitute parties and to reissue two (2) Subpoena Duces Tecum, one subpoena to be served on **Mr. Bernard Pastor** and the second on the **Record Custodian-Miami Dade County**.
24. Finally, this request for enlargement of time was made as soon as it became apparent that the motion for service of the subpoena duces tecum and the

subpoena duces tecum served by certified U.S. Mail were untimely and contained deficiencies which negated their legal effect.

25. Additionally, the defendants will not be prejudiced by this request and the impact of this request is minuscule on these proceedings, especially where the defendants initiated an appeal of this court's denial of their joint motion for summary judgment to the 11th Circuit U.S. Court of Appeal.

26. Consequently, since the defendants thus far have caused a delay of these proceedings, they cannot be heard to complain about Williams request for an extension to substitute parties.

27. This request is made in **good faith** and not to cause unnecessary delay or prejudice to the defendants.

B. ARGUMENT

A court may grant a motion to extend time filed **after the deadline** if the motion shows proof of good cause and if the failure to act timely was the result of **excusable neglect**. See Rule 6 (b) (1) (B); *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 195-56 (3d Cir. 2000). Here, Williams seeks a **final 60 day extension** to substitute parties pursuant to Rule 25 of the Federal Rules of Civil Procedure. On April 28th, 2010, the Court issued an order directing Williams to supply the court with a correct address of the successors or representatives of Defendant Patrick Byrd's estate within 30 days from the Order. See [DE#189]. Although, Rule 25 requires substitution within 90 days after the

deceased party's death has been noted on the record, extension of this 90 day requirement is not precluded by law.

For example, Cf. *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293 (7th Cir. 1993) (“while in mandatory terms, the advisory committee notes to rule 25 indicate that the 90 day requirement may be extended by federal rule of civil procedure (6)(b)... the history of Rule 25 (a) and Rule 6 (b) makes it clear that the 90 day period was **not** intended to as a bar to otherwise **meritorious actions**, and **extensions of the period may be liberally granted...**” See *Tatterson v. Kopper*, 104 F.R.D. 19-20 (W.D. Pa. 1984); *Jones Inlet Marina, Inc. v. Inghima*, F.R.D. 238, 240 (E.D.N.Y. 2001); (*George v. U.S.*, 208 F.R.D. 29 (D.Conn. 2001) (holding that relief be granted from 90 day restriction on motion to substitute, if the delay is the result of **excusable neglect** and the opposing party fails to demonstrate that the relief would result in **undue prejudice**).

As the case has been, Williams has been diligent in his efforts to substitute parties in this case. As stated, he has forwarded the court a motion requesting the court to direct the clerk to process and forward a subpoena duces tecum to the United States Marshal to effectuate service on Mr. Bernard Pastor, Esq. The Court has failed to rule on this motion in a timely manner and Williams sought an order withdrawing this motion. Additionally, Williams also forwarded via certified mail a subpoena duces tecum to Mr. Pastor, again, in an effort to obtain relevant documents as it relates to the identity of a substitution party. Finally, Williams has entered **settlement negotiations** with the defendants; therefore, this case may potentially be settled in the near future.

However, after conducting additional research, Williams realized that this subpoena duces tecum was contrary to Rule 25 procedures and contained several deficiencies undermining its legal effect. Consequently, Williams forwarded a letter to Mr. Pastor specifically withdrawing this subpoena duces tecum. Nevertheless, due to a more thorough research of this matter, Williams now believe he has identified two proper parties in which to forward a subpoena duces tecum in compliance with Rule 25, Fed.R.Civ.P.

As the Court is aware, the substitution in this case has been a challenge but this is expected and federal precedent recognizes the challenges to substitute under rule 25. In fact, the present rule together with present rule 6 (b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time the death is noted.

The hardships and inequities of this unyielding requirement plainly appear from federal precedent. See e.g. *Anderson v. Yungkau*, 329 U.S. 482 (1947); *Lovino v. Waterson*, 274 F.2d 41 (1959), cert.denied; *Carlin v. Savino*, 362 U.S. 949 (1960); *Perry v. Allen*, 239 F.2d 107 (5th Cir. 1956); *Starnes v. Pennsylvania R.R.*, 26 F.R.D. 625 (E.D.N.Y.), aff'd per curiam, 295 F.2d 704 (2d Cir. 1961), cert. denied, 369 U.S. 813 (1962); *Zdanok v. Glidden Co.*, 28 F.R.D. 346 (S.D. N.Y. 1961).

Williams asserts that the grounds asserted in support of a final 60 day extension is based on excusable neglect pursuant to Rule 6(b), of the Federal Rules of Civil Procedure. In determining whether there is excusable neglect, the Court should consider the following: (1) the prejudice to the nonmovant, (2) the length of the delay and its

potential on the judicial proceedings, (3) the reason for the delay and whether it was within reasonable control of the movant, and (4) whether the movant acted in good faith.

See *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993).

In addressing each of the elements in *Pioneer*, the Court should grant Williams request for a final 60 day extension of time because: (a) the defendants will not be prejudiced as discussed more fully in the motion; (b) As soon as William became aware of the need for additional time he filed the instant motion and impact on these proceedings would be minimum if that, (c) federal precedent treats pro se pleadings liberally and with leniency; as stated, federal precedent recognizes the difficulty with substituting parties under rule 25 and when it became apparent that Williams needed to take immediate action he did as fully discussed in this motion , (d) if any delay has been caused in these proceedings, this would have to be contributed to the defendants as evidenced by their appeal to the 11th Circuit U.S. Court of Appeal; thus, Williams act of seeking an extension was taken in good faith.

CONCLUSION

WHEREFORE, Williams for the foregoing reasons ask the court for a **final 60 day extension** of time to substitute parties under Rule 25, Fed.R.Civ.P.

Respectfully Submitted,



Craig Williams, Pro Se #990650
Florida Civil Commitment Center
13619 S.E. Highway 70
Arcadia, Florida 34266

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail this 26th day of June, 2010 on all parties of record on the attached service list.


CRAIG WILLIAMS

SERVICE LIST

CASE NO. 07-22617 Civ-Ungaro/White

Bernard Pastor
Email: pastor @ miamidade.gov
Miami-Dade County Attorney's Office
111N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: 305-375-5151
Fax: 305-375-5634
Attorney for defendants

Blessed is He, and May the Name of Thee EL-SHADDAI

ISRAEL ELOHIM, be hodah forever and ever!

EL-SHADDAI ISRAEL ELOHIM



AO88 (Rev. 12/06) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT

SOUTHERN

DISTRICT OF FLORIDA

CRAIG WILLIAMS

SUBPOENA IN A CIVIL CASE

v.

JEFF SCOTT, ET, AL.,

Case Number: 07-22617
CIV-UNGARO / WHITE

TO: BERNARD PASTOR, ESQ.

MIAMI DADE COUNTY ATTY. OFFICE
111 NW 1ST STREET, SUITE 2810
MIAMI FLORIDA 33128

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): ALL SUGGESTION OF DEATH DOCUMENTS FORWARDED TO DEFENDENT PATRICK BYRD'S FORMER SPOUSE, INCLUDING ALL OTHER DOCUMENTS PERTAINING TO HIS DEATH; ALL DOCUMENTS WHICH IDENTIFIES THE FORMER WIFE'S NAME AND LAST KNOWN ADDRESS, ALL DOCUMENTS RELATING TO DEFENDET PATRICK BYRD'S FORMER INSURANCE POLICIES WITH MIAMI DADE COUNTY. DOCUMENT MUST BE SENT VIA US MAIL TO:

PLACE 13619 SE HWY 70

DATE AND TIME

FLORIDA CIVIL COMMITMENT CENTER ARCADIA, FL 34266

6/30/10 9:00 AM

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE

C. Williams

May 25, 2010

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

CRAIG WILLIAMS

13619 SE HWY. 70

FLORIDA CIVIL COMMITMENT CENTER

ARCADIA, FLORIDA 34266

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

EX. A

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Signature <input checked="" type="checkbox"/> Addressee	
1. Article Addressed to: BERNARD PASTOR, ESQ. MIAMI DADE COUNTY ATTY. OFFICE 111 NW 1 ST STREET, SUITE 2810 MIAMI, FLORIDA 33128	B. Received by (Printed Name)	C. Date of Delivery 5-27-10
2. Article Number (Transfer from service label)	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, February 2004	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D. 4. Restricted Delivery? (Extra Fee) <input checked="" type="checkbox"/> Yes	
7008 1830 0004 6003 5607		
Domestic Return Receipt		

102595-02-M-1540

EX. B

7008 1830 0004 6001 5607
PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS, FOLD AT DOTTED LINE
CERTIFIED MAIL
7008 1830 0004 6001 5607
7008 1830 0004 6001 5607

CERTIFIED MAIL RECEIPT
Domestic Mail Only; No Insurance Coverage Provided
For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark: Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To: **BERNARD PASTOR ESC.**
Street, Apt. No.,
or PO Box No. **111 NW 1ST STREET, SUITE 2810**
City, State, ZIP+4
MIAMI FLORIDA 33128

PS Form 3800, August 2006 See Reverse for Instructions

EX.C



**COUNTY ATTORNEY
MIAMI-DADE COUNTY, FLORIDA**

111 N.W. 1 ST., SUITE 2810
MIAMI, FLORIDA 33128-1993
TEL. (305) 375-5151
FAX (305) 375-5634

June 14, 2010

VIA U.S. MAIL

Craig Williams
No. 990650
Florida Civil Commitment Center
13619 SE Highway 70
Arcadia, FL 34266

Re: Williams v. Scott, et al., Case No. 07-Civ-22617-UU—Objections to
Subpoena

Dear Mr. Williams:

I am in receipt of your subpoena dated May 25, 2010, which was directed to me personally, and not received by me until June 1, 2010. For several reasons, some of which are discussed below, we object to the subpoena, its contents, and the manner in which it was served. Accordingly, we will not produce any records in response to your subpoena.

First, the subpoena is erroneously directed to me. Such a subpoena, assuming it is proper in the first instance, should be directed to Miami-Dade County. Second, the means by which you, a party, personally attempted to serve the subpoena, sending it by U.S. Mail, and failing to serve on the other parties, all are improper and contrary to the applicable federal and local rules. See, e.g., Fed. R. Civ. P. 5, 45. Third, you have improperly issued/signed the subpoena, which also violates the Rules. See Rule 45 (a)(3). Fourth, the information you request is confidential and protected by applicable confidentiality statutes. See Fla. Stat. § 119.071(4)(d)(3). Fifth, the issuance of the subpoena violates the Court's April 28, 2010 Order, which required you to provide the Court with the information you seek by no later than May 28, 2010; the deadline to present such information to the Court has passed.

Sincerely,

A handwritten signature in black ink that reads "B. Pastor".

Bernard Pastor
Assistant County Attorney

EX.D

Craig Williams #990650
Florida Civil Commitment Center
13619 S.E. HWY. 70, Arcadia, Florida 34266
Phone: 863-491-4970 (free-line)

June 22, 2010

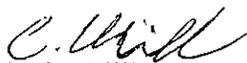
Bernard Pastor, Esq.
Asst. County Attorney
111 N.W. 1st Street
Suite 2810
Miami, Florida 33128-1993

Re: Withdrawal of Subpoena Duces Tecum issued in *Williams v. Scott, et.al.*, Case No:
07-Civ-22617

Dear Pastor:

Please be advised that I am in receipt of your written objections in the form of a letter dated June 14th, 2010, in which you specifically objected to my Rule 45 Subpoena Duces Tecum. Having reviewed the applicable law, including your objections and the subpoena duces tecum itself, I am officially withdrawing my command to you to produce certain documents by June 30th, 2010 at 9:00 a.m. Consequently, any motion you may file registering your objections to the aforementioned will be **unnecessary** and **mooted** by this formal withdrawal. In closing, should you have any additional concerns regarding this withdrawal; please do not hesitate to write me at the enclosed address. In the interim, if and until I hear from you regarding this matter, I remain,

Sincerely!


Craig Williams
cw

enc: Williams Motion For Order Withdrawing Previously Filed Motion.

cc: *Hon. Patrick A. White*
U.S. Magistrate Judge/Miami Division
Southern District of Florida

E X . E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22617-CIV-UNGARO
MAGISTRATE JUDGE P.A. WHITE

CRAIG WILLIAMS, :
 :
 Plaintiff, :
 :
 v. : ORDER
 :
 OFFICER SCOTT, ET AL., :
 :
 Defendants. :

In an April 2, 2010 Order on the Undersigned's February 24, 2010 Report, the District Court noted that the "Plaintiff has expressed his desire to continue his claim against Defendant Byrd's successor, there remain outstanding the related issues of which party bears the burden of ascertaining the identity of the appropriate successor and the requirement of service of Suggestion of Death on that party and how process is to be served on the appropriate successor once . . . identified." (DE# 184). In an April 28, 2010 order, this Court explained that federal law places the burden is on the plaintiff to identify the name and addresses of the defendant in a §1983 claim and also to identify the name and address of the proper substitute party when the defendant dies during the pendency of the action. See Smith v. Belle, 321 F. App'x 838, 845 (11 Cir. 2009); Simmons v. Prison Health Services, Inc., 2009 WL 2914103 (S.D. Ga. 2009). Accordingly, this Court directed the plaintiff to supply it with a current address for the successors or representatives of the deceased party within thirty days or risk dismissal of this defendant from the case. This court expressly ordered the plaintiff to obtain the defendant's correct

address through the discovery process as detailed in the Federal Rules of Civil Procedure. (DE# 189).

Williams now moves for a final sixty-day extension to issue two subpoenas duces tecum, one on the deceased defendant's former counsel, Bernard Pastor, and one on the record custodian of Miami-Dade County. (DE# 200). This Court will provide Williams with a final **thirty-day** extension.

ORDERED AND ADJUDGED as follows:

The plaintiff's motion (DE# 200) is GRANTED to the extent the motion requests an extension of time to supply the Court with a current address for the successors or representatives of the deceased party. No additional motions for extension of time will be granted to the plaintiff.

The plaintiff shall supply the Court with a current address for the successors or representatives of the deceased party within thirty (30) days or risk dismissal of this defendant from the case. The plaintiff must obtain the defendant's correct address through the discovery process as detailed in the Federal Rules of Civil Procedure.

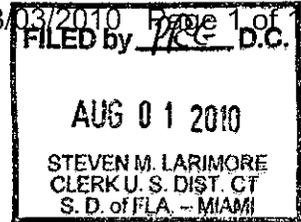
It is so recommended at Miami, Florida, this 8th day of July, 2010.



UNITED STATES MAGISTRATE JUDGE

cc: Craig Williams, Pro Se
No. 990650
Florida Civil Commitment Center
13613 S.E. Highway 70
Arcadia, FL 34266-7829

Bernard Pastor
Dade County Attorney's Office
111 NW 1st Street
Suite 2810
Miami, FL 33128-1993



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CRAIG WILLIAMS,

Case NO: 07-22617-CIV-UNGRO-WHITE

Plaintiff,

Magistrate Judge Patrick White

v.

OFFICER JEFF SCOTT, *et al.*,

Defendants.

WILLIAMS MOTION FOR A FINAL 10 DAY- EXTENSION OF TIME TO
SUBSTITUTE PARTIES

COMES NOW, the undersigned plaintiff, CRAIG WILLIAMS (the "PLAINTIFF"), pursuant to Rule 6 (b) (1)(B) of the Federal Rules of Civil Procedure and moves the Court for an order for a **final 10 day** extension of time to substitute parties.

In support of this motion, Plaintiff alleges the following:

A. INTRODUCTION

1. On July 8th, 2010, the Court granted Williams a final 30 day extension to substitute parties pursuant to Rule 25 of the Federal Rules of Civil Procedure. See [DE#202].
2. Although, the Court granted Williams a final 30 day extension, an **additional 10 day extension** is need for the following reasons:
3. First, having received this Order on July 18, 2010; Williams pursuant to the Order hastened as required by Rule 25 to forward the clerk a letter directing the clerk to sign and issue two subpoena duces tecum. See Exhibit. A.

4. Second, on this same date, Williams also hastened as required by Rule 25 to forward the non-parties **advance notice** of the impending subpoena duces tecum. See Exhibits. B-C.
5. Third, on July 22, 2010, **Deputy Clerk, Y. Herrera**, signed and issued the two subpoenas and returned them via the United States Mail to Williams. See Exhibit D.
6. Fourth, on July 27, 2010, Williams received from **Y. Herrera**, the two subpoena duces tecum via United States Mail. The envelope, the two subpoena duces tecum were enclosed had a **post mark date of July 23, 2010**. See Exhibit D.
7. Finally, on July 28th, 2010, Williams' process server **Frank R. Enriquez** served the two subpoena duces tecum on the intended non-parties and served them via *United States Mail Certified Return Receipt Requested*. See Exhibit E.
8. As such, additional time is needed because; the subpoenas were recently forwarded and served on the non-parties. Once the non-parties receive the subpoenas they will need adequate time to respond accordingly.
9. For instance, the subpoenas commanded that the requested documents be received no later than **August 6, 2010**. Assuming the non-parties receives the subpoenas by July 30, 2010; they will have at least **7 days** to respond.
10. Moreover, the non-parties then will be required to produce via U.S. Mail the requested documents to Williams. However, assuming Williams receives these

documents by August 6, 2010; he will only have approximately **5 days** to provide the Court with a correct address regarding substitution.

11. Consequently, it becomes **legally necessary** in the **interest of justice** for the Court to grant Williams a **final 10 day extension** to substitute parties in this cause of action.

12. This request is made in **good faith** and not to cause unnecessary delay or prejudice to the defendants.

B. ARGUMENT

A court may grant a motion to extend time filed **after the deadline** if the motion shows proof of good cause and if the failure to act timely was the result of **excusable neglect**. See Rule 6 (b) (1) (B); *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 195-56 (3d Cir. 2000). Here, Williams seeks a **final 60 day extension** to substitute parties pursuant to Rule 25 of the Federal Rules of Civil Procedure. On April 28th, 2010, the Court issued an order directing Williams to supply the court with a correct address of the successors or representatives of Defendant Patrick Byrd's estate within 30 days from the Order. See [DE#189]. Although, Rule 25 requires substitution within 90 days after the deceased party's death has been noted on the record, extension of this 90 day requirement is not precluded by law.

For example, Cf. *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293 (7th Cir. 1993) ("while in mandatory terms, the advisory committee notes to rule 25 indicate that the 90 day requirement may be extended by federal rule of civil procedure (6)(b)... the history of

Rule 25 (a) and Rule 6 (b) makes it clear that the 90 day period was **not** intended to as a bar to otherwise **meritorious actions**, and **extensions of the period may be liberally granted...**" See *Tatterson v. Kopper*, 104 F.R.D. 19-20 (W.D. Pa. 1984); *Jones Inlet Marina, Inc. v. Inghima*, F.R.D. 238, 240 (E.D.N.Y. 2001); (*George v. U.S.*, 208 F.R.D. 29 (D.Conn. 2001) (holding that relief be granted from 90 day restriction on motion to substitute, if the delay is the result of **excusable neglect** and the opposing party fails to demonstrate that the relief would result in **undue prejudice**).

As the Court is aware, the substitution in this case has been a challenge but this is expected and federal precedent recognizes the challenges to substitute under rule 25. In fact, the present rule together with present rule 6 (b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time the death is noted.

The hardships and inequities of this unyielding requirement plainly appear from federal precedent. See e.g. *Anderson v. Yungkau*, 329 U.S. 482 (1947); *Lovino v. Waterson*, 274 F.2d 41 (1959), cert.denied; *Carlin v. Savino*, 362 U.S. 949 (1960); *Perry v. Allen*, 239 F.2d 107 (5th Cir. 1956); *Starnes v. Pennsylvania R.R.*, 26 F.R.D. 625 (E.D.N.Y.), aff'd per curiam, 295 F.2d 704 (2d Cir. 1961), cert. denied, 369 U.S. 813 (1962); *Zdanok v. Glidden Co.*, 28 F.R.D. 346 (S.D. N.Y. 1961).

Williams asserts that the grounds asserted in support of a **final 10 day extension** is based on excusable neglect pursuant to Rule 6(b), of the Federal Rules of Civil Procedure. In determining whether there is excusable neglect, the Court should consider the following: (1) the prejudice to the nonmovant, (2) the length of the delay and its

potential on the judicial proceedings, (3) the reason for the delay and whether it was within reasonable control of the movant, and (4) whether the movant acted in good faith.

See Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 395 (1993).

CONCLUSION

WHEREFORE, Williams for the foregoing reasons ask the court for a **final 10 day extension** of time to substitute parties under Rule 25, Fed.R.Civ.P.

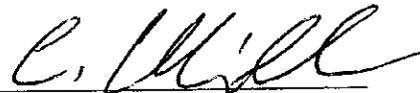
Respectfully Submitted,



Craig Williams, Pro Se #990650
Florida Civil Commitment Center
13619 S.E. Highway 70
Arcadia, Florida 34266

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail this 29th day of JULY, 2010 on all parties of record on the attached service list.



CRAIG WILLIAMS

SERVICE LIST

CASE NO. 07-22617 Civ-Ungaro/White

Bernard Pastor
Email: pastor @ miamidade.gov
Miami-Dade County Attorney's Office
111N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: 305-375-5151
Fax: 305-375-5634
Attorney for defendants

Blessed is **He**, and May the Name of Thee **EL-SHADDAI**

ISRAEL ELOHIM, be hodah forever and ever!

EL-SHADDAI ISRAEL ELOHIM



Craig Williams # 990650
Florida Civil Commitment Center
13619 S.E. Hwy. 70
Arcadia, Florida 34266

July 18th, 2010

Clerk of Court-Office of Clerk
United States District Court
Room 8N09
400 North Miami Avenue
Miami, Florida 33128-7716

Re: Case No: 07-22617-Civ-Ungaro/White
**Urgent- Request for Clerk to Sign & Process (2) Enclosed Subpoena Duces
Tecum**

Dear Clerk of Court:

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, which provides in relevant part, **“the clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it...”** Consequently, I am requesting that the clerk of the *court sign* (i.e. affix court’s seal if necessary) and *resend* (i.e. via U.S. Mail) to me, the two enclosed subpoena duces tecum in the most expedited manner. Additionally, I am requesting that the Clerk also send to me at the enclosed address, two additional sign subpoena duces tecum for future use. In closing, it is important to re-emphasize that the enclosed subpoenas must be processed as quickly as possible due to a court order deadline. Should the clerk’s office have any additional concerns and questions please do not hesitate to write me at the enclosed address. In the interim until I hear from your office, I remain,

Sincerely,



Craig J. Williams
cjw

Exhibit A

Date:

Blessed is **He**, and May the Name of Thee **EL-SHADDAI**

ISRAEL ELOHIM, be hodah forever and ever!

EL-SHADDAI ISRAEL ELOHIM



Craig J. Williams #990650
Florida Civil Commitment Center
13619 S.E. HWY. 70, Arcadia, Florida 34266

July 18th 2010

Bernard Pastor, Esq.
Miami Dade County Attorney Office
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128

Re: Case No: 07-22617-CIV-Ungaro/White
Advance Notice of Subpoena Duces Tecum

Dear Mr. Pastor:

Please be pursuant to **Rule 45** of the Federal Rules of Civil Procedure, I am forthwith providing you **advance notice** that I have submitted a subpoena duces tecum to the clerk of the court for processing. Consequently, you are hereby notified as a **non-party** to this action, that once the clerk sign and affix the court's seal, the enclosed subpoena duces tecum will then be served upon you in accordance to law. More specifically, the subpoena duces tecum commands you as a **non-party** to forward within a specified period via the United States Mail-Certified Return Receipt Requested, the following documents believe to be under your control, possession and custody:

"Any and all suggestion of death documents forwarded by Bernard Pastor, Esq. to Defendant Patrick Byrd's former spouse, including but not limited to any other documents pertaining to his death; all documents identifying the former spouse's full name and last known address; all documents indentifying Defendant Patrick Byrd's insurance policy, the number of the policy and the limits of coverage..."

The subpoena duces tecum further commands that once these documents are retrieved they must be forwarded to my attention via United States Mail within **14 -days** from receipt to the Florida Civil Commitment Center, 13619 S.E. Hwy. 70th, Arcadia, Florida 34266. As a courtesy, I have enclosed a copy of the subpoena duces tecum that has been forwarded to the clerk of the court for processing; this copy is for your perusal and further consideration. Although, I am required to serve a subpoena duces tecum by Rule 45 procedures; please note that you do not have to wait until you are served with the subpoena duces tecum before sending these documents. In other words, pursuant to this advance notice, you may chose to forward the requested documents without receiving the actual subpoena!

Exhibit B

Craig J. Williams #990650

Date: July 18th, 2010

Finally, as stated, I have provided you with a courtesy copy of the subpoena duces tecum in advance. As a consequence, you are strongly encouraged to review this subpoena and respond accordingly! However, in any event, should you have any additional concerns and or need any additional information regarding this subpoena, do not hesitate to write me at your earliest convenience at the enclosed address. In the interim, until I hear from you regarding this advance notice, I remain,

Sincerely!



Craig J. Williams
cjw

Enc: subpoena duces tecum

Blessed is He, and May the Name of Thee **EL-SHADDAI**

ISRAEL ELOHIM, be hodah forever and ever!

EL-SHADDAI ISRAEL ELOHIM



Craig J. Williams #990650
Florida Civil Commitment Center
13619 S.E. HWY. 70, Arcadia, Florida 34266

July 18th 2010

Custodian of Record
Miami Dade County Corrections & Rehabilitation Dept.
7855 N.W. 12th Street
Miami, Florida 33126

Re: Case No: 07-22617-CIV-Ungaro/White
Advance Notice of Subpoena Duces Tecum

Dear Record Custodian:

Please be pursuant to **Rule 45** of the Federal Rules of Civil Procedure, I am forthwith providing you **advance notice** that I have submitted a subpoena duces tecum to the clerk of the court for processing. Consequently, you are hereby notified as a **non-party** to this action, that once the clerk sign and affix the court's seal, the enclosed subpoena duces tecum will then be served upon you in accordance to law. More specifically, the subpoena duces tecum commands you as a **non-party** (i.e., Record Custodian) to forward within a specified period via the United States Mail-Certified Return Receipt Requested, the following documents believe to be under your control, possession and custody:

"All documents which identify the legal representatives, the estate of former coorectional officer, Patrick Byrd; all documents pertaining to Patrick Byrd's death; all insurance documents regarding Patrick Byrd; all financial records regarding Patrick Byrd's credit union accounts, bank accounts, insurance policies and any other financial records/documents in the state of Florida or out of state ..."

The subpoena duces tecum further commands that once these documents are retrieved they must be forwarded to my attention via United States Mail within **14 -days** from receipt to the Florida Civil Commitment Center, 13619 S.E. Hwy. 70th, Arcadia, Florida 34266. As a courtesy, I have enclosed a copy of the subpoena duces tecum that has been forwarded to the clerk of the court for processing; this copy is for your perusal and further consideration. Although, I am required to serve a subpoena duces tecum by Rule 45 procedures; please note that you do not have to wait until you are served with the subpoena duces tecum before sending these documents. In other words, pursuant to this advance notice, you may chose to forward the requested documents without receiving the actual subpoena!

Exhibit C

Craig J. Williams #990650

Date: July 18th, 2010

Finally, as stated, I have provided you with a courtesy copy of the subpoena duces tecum in advance. As a consequence, you are strongly encouraged to review this subpoena and respond accordingly! However, in any event, should you have any additional concerns and or need any additional information regarding this subpoena, do not hesitate to write me at your earliest convenience at the enclosed address. In the interim, until I hear from you regarding this advance notice, I remain,

Sincerely!

C. Williams
Craig J. Williams
cjw

Enc: subpoena duces tecum

Blessed is He, and May the Name of Thee EL-SHADDAI

ISRAEL ELOHIM, be hodah forever and ever!

EL-SHADDAI ISRAEL ELOHIM



AO88 (Rev. 12/06) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT

Southern

DISTRICT OF FLORIDA

RAIG Williams

SUBPOENA IN A CIVIL CASE

Jeff Scott, et al.

Case Number: 07-22617
CIV - UNGARO/White

TO: Bernard Pastor, Esq.
Miami Dade County Atty. Office
111 N.W. 1st Street Suite - 2810
Miami, FL 33128

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): Any AND ALL "Suggestion of Death Documents" awarded by Bernard Pastor, Esq. to Defendant Patrick Byrd's former spouse, including, but not limited to ANY other documents pertaining to his death; all documents identifying the former wife's name and last known address; all documents identifying Defendant Patrick Byrd's Insurance Policy, the number of the policy and the limits of coverage.

PLACE Florida Civil Commitment Center, 13619 S.E. Hwy.
90, Arcadia, Florida 34266

DATE AND TIME

AUGUST 6, 2010

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE

[Signature]
Deputy Clerk

7/22/10

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Y. Herrera, 400 N. Miami Ave, 305-523-5200

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

Exhibit D

AO88 (Rev. 12/06) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT

Southern

DISTRICT OF

FLORIDA

STATE OF WILLIAMS

SUBPOENA IN A CIVIL CASE

v.

Jeff Scott, et., AL.

Case Number: 07-22617

CIV-UNGARO/White

TO: RECORDS CUSTODIAN,
MIAMI DADE COUNTY/Corrections & Rehabilitation Dept.
7855 N.W. 12th Street
MIAMI, FLORIDA 33126

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): All documents which identify the legal representatives, the Estate of Former Correctional Officer, Patrick Byrd; All Documents relating to Patrick Byrd's Death; All Insurance Documents Regarding Patrick Byrd; All Financial Records Regarding Patrick Byrd's Credit Union, Bank Accounts, Insurance Policies, and any other Financial Records/Documents in the State of Florida or out of State.

PLACE Florida Civil Commitment Center, 13619 S.E. Hwy. 70,
ARCADIA, FL., 34266

DATE AND TIME

AUGUST 6, 2010

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEPENDANT)

DATE

[Signature] Deputy Clerk

7/22/10

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Y. Herrera / 400 N. Miami Ave, 305-523-5200

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

Exhibit D

WILKIE D. FERGUSON, JR.
UNITED STATES COURTHOUSE
400 North Miami Avenue, Room 8N09
Miami, Florida 33128 - 7716

MIAMI FL 331

2008 JUL 20 10 04 44

Craig Williams #990650
Florida Civil Commitment Center
13619 S.E. HWY. 70
Arcadia, FL 34266



34266+7881



Exhibit D

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
BERNARD PASTER, Esq.
MIAMI DADE County Atty office
111 N.W. 1st Street
Ste - 2810

MIAMI, Florida 33128

2. Article Number
 (Transfer from service label)

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Addressee
X

B. Received by (*Printed Name*) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (*Extra Fee*) Yes

7008 1830 0004 6148 7700

Exhibit E

SENDER: COMPLETE THIS SECTION

COMPLETE THIS SECTION ON DELIVERY

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
*RECORDS CUSTODIAN,
 MIAMI DADE COUNTY/Corrections
 & Rehabilitation Dept.,
 9855 N.W. 12th Street
 MIAMI, FLORIDA 33126*

A. Signature Agent
 Addressee
X

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number 7008 1830 0004 6148 7694
 (Transfer from service label)

Exhibit E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22617 Civ-Ungaro/White

CRAIG WILLIAMS,

Plaintiff,

v.

JEFF SCOTT, *et al.*,

Defendants.

MOTION TO DISMISS OFFICER PATRICK BYRD

Over *eleven* months after the filing of a Suggestion of Death (DE 117), which notified the Court of the death of co-defendant Patrick Byrd, and despite several extensions of time, Plaintiff has failed to file a proper and timely motion to substitute parties pursuant to Federal Rule of Civil Procedure 25. Obviously mindful of the considerable amount of time that has elapsed since the filing of the Suggestion of Death on September 21, 2009—and the multiple extensions provided to Plaintiff—on August 4, 2010, this Court ordered that Plaintiff file a motion for substitution by no later than August 20, 2010 (DE 204). Specifically, the Court unambiguously ordered that Plaintiff:

shall file his motion identifying the party to be substituted for the decedent *no later than August 20, 2010*. At this juncture, the plaintiff has been provided with multiple extensions to comply with substitution. ***NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED.*** Failure to supply this court with the successor for the decedent Byrd *will result* in dismissal of this 1983 action against that defendant.

Id. (emphasis added; caps in original). To date, no such motion has been filed.

As originally argued on January 20, 2010, Plaintiff's claim against Defendant Byrd must be dismissed because Plaintiff failed to file a timely motion to substitute parties in accordance with Fed. R. Civ. P. 25. (See DE 165 at pp. 1-2). Rule 25 states, in relevant part, that “[i]f the

motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent *must be dismissed.*” Fed. R. Civ. P. 25(a)(1) (emphasis added). Allowing Plaintiff to file his motion almost 250 days after the deadline would turn Rule 25 on its head and render it meaningless.

As noted above, the Suggestion of Death in this case was filed on September 21, 2009. The time within which Plaintiff had to file a motion for substitution of parties was December 21, 2009. Over eight months have now elapsed since that deadline imposed by the Rules, and no motion has been filed, despite several extensions of time. As such, consistent with the Court’s August 4, 2010 Order warning Plaintiff of the consequences of his failure to act, all claims against Defendant Byrd must be dismissed with prejudice.

Respectfully submitted,

R.A. CUEVAS, JR.
MIAMI-DADE COUNTY ATTORNEY

By: *s/ Bernard Pastor*

Bernard Pastor (Florida Bar No. 0046582)
Assistant County Attorney
email: pastor@miamidade.gov
Miami-Dade County Attorney’s Office
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: 305-375-5151
Fax: 305-375-5634
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by

CASE NO. 07-22617 Civ-Ungaro/White

CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Bernard Pastor

Bernard Pastor

SERVICE LIST

CASE NO.: 07-22617 Civ-Ungaro

Bernard Pastor, Esq.
email: pastor@miamidade.gov
Miami-Dade County Attorney's Office
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: (305) 375-5151
Facsimile: (305) 375-5634
Counsel for Defendants Scott and Jimenez
No Service Made

CRAIG WILLIAMS, *pro se* #990650
Craig Williams, *pro se*
13613 S.E. Hwy. 70
Arcadia, FL 34266
Service via U.S. mail

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22617-Civ-UNGARO-BENAGES
MAGISTRATE JUDGE P.A. WHITE

CRAIG WILLIAMS, :
 :
 Plaintiff, :
 :
 v. : REPORT OF
 : MAGISTRATE JUDGE
 OFFICER SCOTT, ET AL., :
 :
 Defendants. :

Introduction

The plaintiff, Craig Williams, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 against numerous employees, and more pertinent to the discussion in this Report, against Defendant, Officer Patrick Byrd.

By way of background, on August 4, 2008, the plaintiff filed a Second Amended Complaint pursuant to 42 U.S.C. §1983. He seeks money damages and other relief resulting from events which occurred at the Miami-Dade Pretrial Detention Center in October 2004. (DE#52). Specifically, in Count 1, the plaintiff alleged that Byrd used excessive force against him, which resulted in physical injuries, in violation of his rights under the Fourteenth Amendment. (Id.:28,31-32,54).

Meanwhile, during the pendency of this case, codefendants, Jeff Scott and Humberto Jimenez, by and through their undersigned counsel, Assistant County Attorney Bernard Pastor, filed a "Suggestion of Death" indicating that codefendant Byrd had died. (DE#117).

An amended Order was issued by the undersigned instructing the plaintiff to notify the court whether he intended to pursue or dismiss his claim against the deceased Byrd. (DE#131). Thereafter, the plaintiff filed a reply to the Suggestion of Death and this court's order, indicating that he wished to continue with his claim against Byrd, and requested defense counsel to provide information regarding the proper substitution party. (DE#142).

The plaintiff next filed a motion to compel service of process. (DE#159). Construing the arguments raised therein liberally, as afforded *pro se* prisoners, pursuant to Haines v. Kerner, 404 U.S. 419 (1972), the plaintiff appeared to argue that the codefendants' Suggestion of Death was deficient because it had not been served on the non-party successor or legal representative of the deceased Byrd in the manner provided for under Fed.R.Civ.P. 4, citing Grandbouche v. Lovell, 913 F.2d 835 (10th Cir. 1990). (Id.:2).

In response thereto, defendants Scott and Jimenez indicate that they were "unaware of any estate created on behalf of Mr. Byrd," but "in an abundance of caution," a courtesy copy of the Suggestion of Death" was sent to Byrd's former spouse. (DE#165:1). The defendants also argue that the complaint should be dismissed against defendant Byrd because the plaintiff has failed to file a timely motion for substitution of party pursuant to Fed.R.Civ.P. 25. (Id.:2).

Thereafter, a Report was entered recommending that plaintiff's reply to Byrd's suggestion of death be construed as a motion for substitution of party, and then granted. (DE#175:16). On April 2, 2010, the district court rejected the recommendation, finding that the reply did not constitute a proper motion for substitution

because it did not identify the proper substitute party. (DE#184). The court further rejected yet another Report (DE#176) recommending that the case was ready for trial because of the issues regarding the substitution of defendant Byrd and the service of the Suggestion of Death remained unresolved. (DE#184). This matter was then re-referred to the undersigned for further Report and Recommendation regarding the Suggestion of Death and substitution of the decedent Byrd. (Id.).

On April 28, 2010, the undersigned entered an order directing the plaintiff to identify and serve the proper substitute party, without first considering whether the Suggestion of Death was proper and therefore triggered the 90-day notice pursuant to Rule 26.¹ (DE#189). Meanwhile, extensions of time have been granted, and the plaintiff has attempted to elicit from the defense the identity of Byrd's heirs, successors, or assigns, to no avail.

Thus, this cause is now before the Court for consideration of the Suggestion of Death and the plaintiff's reply thereto (DE#159), as well as, plaintiff's Motion to Compel (DE#206), and the defendants'² Motion to Dismiss (DE#207). For reasons set forth below, the defendants' motion to dismiss (DE#207) is due to be denied.

Defendants request dismissal pursuant to Fed.R.Civ.P. 25(a) because the plaintiff has not filed a motion for substitution after receiving the defendants' purportedly properly filed Suggestion of

¹In that order, the court mistakenly placed the burden on the plaintiff to name and serve the proper substitute party before considering the validity of the suggestion of death.

²It is unclear from the motion if all defendants, or only Byrd, have filed the motion.

Death as to Byrd.

The law is clear that, despite the mandatory language in Rule 25(a),³ the Court has substantial discretion to interpret the rule liberally so as to effectuate its underlying purpose.⁴ The Rule, however, was amended in 1963 with the express intent "to dispel unwarranted rigidity and [to] allow more flexibility in substitution." Rule 25(a) is not meant to be used as a procedural mechanism to "bar ... otherwise meritorious actions."⁵ Instead, its driving purpose is to ensure that all those having a legal interest in the pending suit are aware of the party's death and are alerted to act to preserve their respective rights.⁶

As a threshold matter, defendants' motion depends upon the existence of a valid suggestion of death on the record.⁷ In the

³"If the motion [for substitution] is not made within 90 days after service of a statement noting the death, the action by ... the decedent must be dismissed." Fed.R.Civ.P. 25(a)(1).

⁴See Fed.R.Civ.P. 25(a) advisory committee's note; Kasting v. Am. Family Mut. Ins. Co., 196 F.R.D. 595, 601 (D.Kan. 2000); see also, Bessent v. Nat'l Hous. P'ship, No. 1:06-cv-008-SPM, 2008 WL 1744925, at *2 (N.D. Fla. Apr. 11, 2008) (citing with approval Rende v. Kay, 415 F.2d 983 (D.C.Cir. 1969); Roscoe v. Roscoe, 379 F.2d 94, 99 (D.C. Cir. 1967); Staggers v. Otto Gerdau Co., 359 F.2d 292, 296 (2d Cir. 1966); Al-Jundi v. Rockefeller, 757 F.Supp. 206 (W.D.N.Y. 1990)).

⁵Staggers v. Otto Gerdau Co., 359 F.2d at 296; see also, Hall v. Infirmary Health Sys., No. 06-0791-WS-B, 2008 WL 1774164, at *1 (S.D. Ala. Apr. 15, 2008) ("[T]he Court declines to adopt defendants' mechanical reasoning that dismissal must inevitably follow from plaintiff's failure to file a motion for substitution within the 90-day period prescribed by Rule 25(a).").

⁶Rende v. Kay, 415 F.2d at 985.

⁷3B Moore's Federal Practice §25.13[2] (3d ed. 2007). "The 90 days period for filing the motion for substitution begins only 'after service of a statement noting the death.'" Id. (quoting Fed.R.Civ.P. 25(a)(1)); see also, Broyles v. McCane, 2006 WL 2452486, at *1 (M.D. Ga. Aug. 23 2006) (90 day deadline does not commence until suggestion of death is properly filed and served); Barlow v. Ground, 39 F.3d 231, 233 (9th Cir. 1994) (formal statement of death on the record is a prerequisite for application of Rule 25(a)); Int'l Cablevision, Inc. v. Sykes, 172 F.R.D. 63, 66 (W.D.N.Y. 1997) (requiring strict adherence to procedural formalities imposed by Rule 25(a)).

absence of a legally sufficient statement of death on the record, the 90-day deadline in Rule 25(a) does not begin to run.⁸ A valid Suggestion of Death under Rule 25(a) requires two conditions.⁹ First, a formal statement of death must be placed "on the record" by one with the authority to do so. See Rende v. Kay, 415 F.2d 983, 985 (D.C. Cir. 1969). Second, the statement of death must be properly served pursuant to Rule 25(a)(3).¹⁰ Until such time as both of these conditions are satisfied, dismissal under Rule 25(a) is not triggered.

The Suggestion of Death filed by defendants, Jeff Scott and Humberto Jimenez, by and through their undersigned counsel, who is also counsel for the deceased Byrd, does not attach a copy of the Death Certificate or other qualifying information to support the suggestion. Although it is true that this is not a requirement for proper filing, the law is clear that defendants must file and then serve other parties and nonparty successors or representatives of the deceased with the suggestion of death in the same manner as required for service of a motion to substitute. see Fed.R.Civ.P. 25(a)(1); Inglis v. Buena Vista University, 235 F.Supp.2d 1009 (N.D. Iowa 2002); Atkins v. City of Chicago, 547 F.3d 869 (7th Cir. 2008). This was not done by the defendants here.

Filing a Suggestion of Death on the record has a very narrow role. The filing commences the 90-day period within which a motion

⁸Id.

⁹Id.

¹⁰Pursuant to that rule, a Suggestion of Death must be served in the same manner as a motion to substitute, to-wit, on the parties as provided in Fed.R.Civ.P. 5 and on nonparties as provided in Fed.R.Civ.P. 4. See Fed.R.Civ.P. 25(a)(3).

for substitution must be filed.¹¹ As such, it serves the adversarial function of expediting the substitution of deceased parties. "In practice, it is not unusual for a defendant to suggest death upon the record to impose upon the plaintiff's side the obligation to move for the substitution of a party, as a tactical maneuver of an adversary premised upon expediting the action or getting it dismissed." See Kasting v. Am. Family, Mut. Ins. Co., 196 F.R.D. 595, 599 (D.Kan. 2000) (citing Boggs v. Dravo Corp., 532 F.2d 897, 898-99 (3d Cir. 1976); Rende v. Kay, 415 F.2d 983, 984 (D.C. Cir. 1969); Al-Jundi v. Rockefeller, 88 F.R.D. 244, 246-47 (W.D.N.Y., Oct. 27, 1980); Ten v. Svenska Orient Linen, 87 F.R.D. 551, 552 (S.D.N.Y.1980); National Equipment Rental Ltd. v. Whitecraft Unlimited Inc., 75 F.R.D. 507, 509 (E.D.N.Y. 1977); Yonofsky v. Wernick, 362 F.Supp. 1005, 1011 (S.D.N.Y. 1973). Accordingly, because the act of filing a statement of the death on the record has the potential to have a dispositive impact on the underlying litigation, only properly filed statements of death should be given effect under Rule 25(a).

While Rule 25(a) does not explicitly specify who may properly serve the Suggestion of Death, courts have construed the rule so as to allow the suggestion to be filed by any of the same persons who are permitted to move for substitution.¹² Thus, pursuant to Rule 25(a), the suggestion must be filed by either a party, or by a representative of the deceased party. See Fed.R.Civ.P. 25(a)(1).

In this case, it would be inequitable to construe and be contrary to the purpose of Rule 25 to find that the Suggestion of Death triggered the 90-day deadline because it was never personally

¹¹3B Moore's Federal Practice, §25.13[1].

¹²Id. §25.13[2].

served on the personal representative or successor of the deceased defendant Byrd.

Strict adherence to the procedural formalities is required under Rule 25(a). See, e.g., Nat'l Equip. Rental, Ltd. v. Whitecraft Unlimited, Inc., 75 F.R.D. 507, 510 (E.D.N.Y. 1977) (requiring strict adherence to formalities set forth in Rule 25(a) as a condition precedent to commencement of 90-day period). "It is ... the service, not the mere filing, of the statement noting the death that triggers the 90-day period."¹³ Therefore, the 90-day period does not begin to run until the Suggestion of Death has been served on all persons pursuant to Rule 25(a)(3). See Kasting v. Am. Family Mut. Ins. Co. 196 F.R.D. at 600-01.

A deceased party's personal representative is a "nonparty" who must be personally served pursuant to Fed.R.Civ.P. 4 before the 90-day deadline is triggered. See Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 (4th Cir. 1985); Sanders v. Neubarth, 2006 WL 3780873, at *1 (E.D. Cal. 2006). Requiring personal service on the successor or representative of a decedent's estate ensures that those with the legally cognizable interest in the ongoing litigation: (1) receive actual notice of the lawsuit; and (2) are made aware of the corresponding substitution requirement. See Farris, 769 F.2d at 962; Barlow v. Ground, 39 F.3d 231, 233 (9th Cir. 1994); Grandbouche v. Lovell, 913 F.2d 835, 837 (10th Cir. 1990).

As there is no guarantee that the deceased party's attorney will act to protect the legal interests of the decedent's successor(s) or representative(s), decedent's attorney cannot accept service on behalf of the legal successors or

¹³B Moore's Federal Practice §25.13[1]; Kasting v. Am. Family Mut. Ins. Co., 196 F.R.D. 595, 601 n.5 (D.Kan. 2000).

representatives. Id. Here, there is no evidence that the Suggestion of Death was ever served on the decedent's successor(s) or personal representative(s). Therefore, in the absence of such proof, the 90-day deadline has yet to begin for purposes of Rule 25(a). See Kasting, 196 F.R.D. at 600-601. Consequently, dismissal of defendant Byrd is not warranted at this time.

Even if the Court assumes, without deciding, that the 90-day deadline set forth in Rule 25(a) was triggered and has elapsed, dismissal of the action would not be mandatory. See Kasting v. Am. Family Mut. Ins. Co., 196 F.R.D. 595, 601 (D.Kan. 2000). Pursuant to Fed.R.Civ.P. 6(b)(1)(B), the Court is authorized to extend the period within which substitution of a party may be made, even after the 90-day deadline has expired. See Fed.R.Civ.P. 6(b)(1)(B); Kasting v. Am. Family Mut. Ins. Co., 196 F.R.D. at 595, 602. The plaintiff here has sought the defendants' compliance with the requirements of Rule 25, and has further attempted to ascertain the personal representative of the decedent in order to effectuate substitution properly. The defendants' representation that "in an abundance of caution," they "sent a courtesy copy of the document to Mr. Byrd's former spouse," does not establish compliance with Rule 25. The defendants do not state that the ex-wife is the representative, nor has the service been in accordance with the Federal Rules of Civil Procedure. Service of a suggestion of death should be treated as a service of summons, as Rules 25 and 4 require. No such showing has been made here.

Conclusion

Based on the foregoing, it is therefore recommended as follows:

1. Defendants' Joint Motion to Dismiss (DE#207) be DENIED;
2. Defendants effectuate service of the Suggestion of Death on the proper the decedent's successor(s) or personal representative(s) in accordancé with Fed.R.Civ.P. 25 and 4; and,
3. Plaintiff's Motions to Compel (DE#s159,206) be granted, solely to the extent that defendants shall cause service of the suggestion to be executed as previously recommended, and proof thereof filed with the court; in addition to, filing a copy of decedent Byrd's Death Certificate.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 2nd day of September, 2010.



UNITED STATES MAGISTRATE JUDGE

cc: Craig Williams, Pro Se
DC#990650
Florida Civil Commitment Center
13613 S.E. Highway 70
Arcadia, FL 34266-7829

Bernard Pastor, Ass't County Atty
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Suite 2810
Miami, FL 33128-1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22617 Civ-Ungaro/White

CRAIG WILLIAMS,

Plaintiff,

v.

JEFF SCOTT, *et al.*,

Defendants.

OBJECTIONS TO MAGISTRATE JUDGE'S REPORT

Defendants, pursuant to Local Magistrate Rule 4(b), object to the Report of the Magistrate Judge (the "Report"), entered by Magistrate Judge White on September 3, 2010 (DE 208), and which denied Defendants' Motion to Dismiss (DE 207).

I. Introduction

Almost *one year* after the filing of a Suggestion of Death of co-Defendant Patrick Byrd, despite Plaintiff's failure to file a motion to substitute parties after several extensions of time, the Magistrate Court—in addressing a motion to dismiss to which Plaintiff filed no response—now for the first time concludes that the Suggestion of Death was improper. As discussed below, the Report should be overruled for several reasons, and the Court should grant the Motion to Dismiss.

II. Procedural History

1. Plaintiff is a convicted sexual predator/offender, who remains (and appears to be indefinitely) civilly committed under the Jimmy Ryce Civil Commitment Act. Specifically, Plaintiff was convicted of sexual battery with weapon or force, and completed his ten-year term

of imprisonment on or about November 15, 2003. It appears that he has been civilly committed by the Department of Children and Family Services for almost seven (7) years.

2. On September 21, 2009, Defendants filed a Suggestion of Death (DE 117), which notified the Court and all parties, including Plaintiff, of the death of co-defendant Patrick Byrd.

3. The time within which Plaintiff had to file a motion for substitution of parties was December 21, 2009. See Fed. R. Civ. P. 25.

4. Plaintiff failed to file a motion to substitution of parties by December 21, 2009.

5. Plaintiff has been granted several extensions of time to file a motion for substitution of parties, but has yet to do so.

6. On August 4, 2010, the Magistrate Court ordered that Plaintiff file a motion for substitution by no later than August 20, 2010 (DE 204). Specifically, the Court unambiguously ordered that Plaintiff:

shall file his motion identifying the party to be substituted for the decedent no later than August 20, 2010. At this juncture, the plaintiff has been provided with *multiple* extensions to comply with substitution. **NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED.** Failure to supply this court with the successor for the decedent Byrd *will result in dismissal* of this 1983 action against that defendant.

Id. (emphasis added; caps in original).

7. After the expiration of the Court-imposed deadline of September 4, 2010, defendants filed a Motion to Dismiss. The motion, consistent with the Court's order and unambiguous admonitions, moved to dismiss the claims against Defendant Byrd for Plaintiff's failure to comply with the order and file a timely motion for substitution of parties.

8. On September 3, 2010, the Magistrate Court entered its Report; Plaintiff did not file a response to the Motion to Dismiss

9. As argued as early as January 20, 2010, Plaintiff's claim against Defendant Byrd should be dismissed because Plaintiff failed to file a timely motion to substitute parties in accordance with Fed. R. Civ. P. 25. (See DE 165 at pp. 1-2).

III. Memorandum of Law

The Report must be overturned, and the Motion to Dismiss granted, for the reasons stated below.

a. *Defendants are unaware of a personal representative or successor to Byrd.*

The Magistrate Court ordered that "Defendants effectuate service of the Suggestion of Death on the proper the [sic] decedent's successor(s) or personal representative(s)" in accordance with Rules 25 and 4. Report at p. 9. The Report states that "the law is clear that defendants must file and then serve on other parties and nonparty successors or representatives of the suggestion of death in the same manner as required for service on a motion to substitute." Id. at p. 5. The Report finds that "there is no evidence that the Suggestion of Death was ever served on the decedent's successor(s) or personal representative(s). Therefore, in the absence of such proof, the 90-day deadline has yet to begin for purposed of Rule 25(a)." Id. at p. 8 (citing Kasting v. American Family Mutual Insurance Co., 196 F.R.D. 595, 600-601 (D. Kansas 2000)).

There is, however, a fundamental problem with this order and its underlying reasoning and assumptions: Defendants and the undersigned were, and remain, unaware of whether a successor or personal representative was ever appointed in the wake of Defendant Byrd's death. The Report appears to assume the naming and existence of a successor or personal representative in the first instance, and further assumes that Defendants are aware of the identity of such persons. These assumptions are incorrect.

As discussed in Kasting, “Rule 25(a)(1) is designed to prevent a situation in which a case is dismissed because a *party* never learned of the death of an opposing party.” Id. at 599 (emphasis added). Here, Plaintiff was obviously aware of the death of Defendant Byrd since the filing of the Suggestion of Death one year ago. In Kasting, it was uncontested that the plaintiff/decedent’s widow was the proper person to receive the suggestion of death. Id. at p. 600 n.3. Notably, and applicable to the facts here, the Kasting court opined that Rule 25:

does not require that the non-party be named in the suggestion of death, or that the certificate of service reflect the service of a non-party. Although inclusion of such information is desirable *when it is known to the party suggesting death*, the court finds *the imposition of such a requirement unreasonable where*, as here, the opposing party suggests death soon after death occurs, *and has no personal knowledge at the time of who the successors or representatives of the decedent may be*.

Id. at 600 (emphasis added).

Here, as consistently pointed out several times throughout the past year, Defendants are not aware of the appointment of any personal representatives or successors. Indeed, in most of the cases cited in the Report that required service of a suggestion of death to the decedent/party’s representative or successors, there was the *existence* of a personal representative or successor, which does not appear to be the case here. As such, Defendants simply cannot comply with the Magistrate Court’s order requiring them to serve those individuals.

More problematic is the Magistrate Court’s placing the burden of researching and determining such facts on *Defendants*, instead of on Plaintiff, where it squarely belongs. No controlling case cited in the Report holds that it is Defendants’ burden here to investigate and determine whether an estate has been created, or whether or successor or personal representative (however those terms are defined under applicable state law), has been named. This is, after all, Plaintiff’s claim; it is his responsibility to determine the existence of a party that potentially can

be substituted for Defendant Byrd. It has now been over a year since the filing of the Suggestion of Death, and despite several extensions and an abundance of latitude by the Magistrate Court, Plaintiff has failed to pursue his claim against Defendant Byrd in compliance with the law. Given the complexity and thoroughness of Plaintiff's pleading and legal memoranda of law filed in the past few years, it is apparent that he is very capable of doing the necessary research to ascertain the identity of the appropriate successor or personal representative.

b. *Information potentially disclosed is protected by state confidentially statutes*

The Report also notes that "extensions of time have been granted, and the plaintiff has attempted to elicit from the defense the identity of Byrd's heirs, successors, or assigns, to no avail." Report at p. 3. The Magistrate Court seems to imply that because the undersigned informed Defendant Byrd's spouse of the filing of the Suggestion of Death via certified letter she then is her former husband's personal representative or successor under Florida law. As noted above, Defendants are unaware whether Defendant Byrd's spouse has been appointed to act in any of these capacities. Nevertheless, Defendant Byrd's former spouse's information relating to her identity and address, and those of their children (which, incidentally, comprise only a small portion of Plaintiff's objectionable and improper discovery requests) are confidential under Florida law.

Section 119.071(4)(d)(1) – (4) and 119.071(11)(b) of the Florida Statutes protects the personal information of law enforcement officers, prosecutors, and judges from public disclosure for reasons of personal safety. These exemptions have been interpreted by federal and state courts to constitute privileges from litigation discovery as well. See Dasher v. Williams, 2007 U.S. Dist. LEXIS 86598, at *2 (S.D. Fla. Nov. 26, 2007) ; Crews v. Hensley, 2006 WL 1679596, at *1-2 (M.D. Fla. June 13, 2006); Allen v. City of Miami, 2003 U.S. Dist. LEXIS 21778, at *8

(S.D. Fla. Nov. 14, 2003) (Altonaga, J.); see also Henderson v. Perez, 835 So. 2d 390, 392 (Fla. Dist. Ct. App. 2003); Fla. Dept. of Highway Safety & Motor Vehicles v. Krejci Co., 570 So. 2d 1322, 1323-25 (Fla. Dist. Ct. App. 1990).

The information requested by Plaintiff on Officer Byrd's family is confidential and protected by applicable state confidentiality statutes. See Fla. Stat. § 119.071(4)(d)(1)(a). For example, the personal financial records Plaintiff requested on Officer Byrd and his family, such as bank account numbers and debit, charge and credit card numbers, are exempt from public disclosure. See Fla. Stat. § 119.01(5). Likewise, all medical records and or claims, the personal identifying information of a dependent child or children, are confidential and exempt. See Fla. Stat. § 112.08(7) and Fla. Stat. 119.071(4) (b) (1) and (b) (2) (a).

Chapter 119 of the Florida Statutes requires the MDCD Custodian to redact certain personal information from public records. For example, the MDCD Custodian is required to redact the home addresses and social security numbers of certain public officials, such as police officers, prosecutors, and judges. These redactions protect the safety of these individuals and are authorized under both federal and state case law. See Fla. Stat. §§ 119.071(4)(d)(1), (2), (3), and (4); see generally Fla. State Conf. of the NAACP v. Browning, 2007 WL 4380060, at *1, Case No. 07-22919-CIV-MORENO (S.D. Fla. Dec. 11, 2007) (denying request for voter information, including voter social security numbers, that was exempt from disclosure).

The Court must be mindful of these applicable confidentiality statutes in resolving the objections and issues here. Those statutory confidentiality safeguards are especially important considering Plaintiff's criminal history, the circumstances under which he is currently detained, and the decedent's family.

c. *There is no requirement that a death certificate be filed with suggestion of death.*

The Report notes that the Suggestion of Death “does not attach a copy of the Death Certificate or other qualifying information to support” the Suggestion of Death (Report at p. 5), and thus, orders Defendants to also file a copy of Byrd’s death certificate. *Id.* at p. 9. However, there is nothing in the Rules requiring a party making a suggestion of death to obtain and/provide attach such information. Indeed, Rule 25 references a “statement noting the death” but no requirement that any supporting documentation be filed. This court-imposed requirement is also erroneous.

d. *Plaintiff’s delay has been excessive.*

The cases cited in the Report all generally state that the 90-day requirement to file a motion for substitute parties should be construed and extensions be granted. While this may be true, none of those cases, however, hold that extensions of over one year after the filing of a suggestion of death are acceptable.

WHEREFORE, Defendants respectfully request that the Court enter an order overruling and reversing the Magistrate Court’s Report, granting the Motion to Dismiss, and for any other relief this Court deems to be necessary.

REQUEST FOR ORAL ARGUMENT

Defendants also request oral argument to fully address all of the issues raised in the motion and Report.

CASE NO. 07-22617 Civ-Ungaro/White

Respectfully submitted,

R.A. CUEVAS, JR.
MIAMI-DADE COUNTY ATTORNEY

By: *s/ Bernard Pastor*
Bernard Pastor (Florida Bar No. 0046582)
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Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Bernard Pastor
Bernard Pastor

SERVICE LIST

CASE NO.: 07-22617 Civ-Ungaro

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Counsel for Defendants
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Craig Williams, *pro se*
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Arcadia, FL 34266
Service via U.S. mail

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**General Docket
United States Court of Appeals for the Eleventh Circuit**

Court of Appeals Docket #: 10-12075 Nature of Suit: 3550 Prisoner-Civil Rights Craig Williams v. Jeff Scott, et al Appeal From: Southern District of Florida Fee Status: Fee Paid	Docketed: 05/06/2010
Case Type Information: 1) Private Civil 2) Federal Question - PLRA 3) -	
Originating Court Information: District: 113C-1 : 1:07-cv-22617-UU Civil Proceeding: Ursula Ungaro, -, U.S. District Judge Secondary Judge: Patrick A. White, -, - Date Filed: 10/04/2007 Date NOA Filed: 04/29/2010	

06/23/2010		E-Brief Tendered: Appellant brief for Appellants Humberto Jimenez and Jeff Scott.
06/23/2010		Appellant's Brief filed by Appellants Humberto Jimenez and Jeff Scott. Service date: 06/22/2010 by US mail - Appellee Williams.
06/30/2010		ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R. 42-2(c), this appeal is DISMISSED for want of prosecution because the appellant Humberto Jimenez and Jeff Scott failed to file record excerpts within the time fixed by the rules
07/09/2010		MOTION to reinstate appeal filed by Bernard Pastor for Jeff Scott and Humberto Jimenez. Opposition to Motion is Unknown [6096049-1]
08/02/2010		ORDER: Motion to reinstate appeal filed by Attorney Bernard Pastor for Appellants Jeff Scott and Humberto Jimenez is GRANTED. SFB and CRW
08/02/2010		Record Excerpts filed by Appellant Humberto Jimenez. Service date: 07/08/2010 US mail - Appellee Williams.
08/31/2010		MOTION for extension of time to file appellee's brief to 10/01/2010 filed by Craig Williams. Opposition to Motion is Unknown [6129544-1]
09/07/2010		ORDER: Motion for extension to file appellee brief filed by Appellee Craig Williams is GRANTED. Appellees brief due on 10/07/2010. GBT
09/29/2010		2nd MOTION for extension of time to file appellee's brief to 11/01/2010 filed by Craig Williams. Opposition to Motion is Unknown [6148948-1]
10/07/2010		ORDER: 2nd Motion for extension to file appellee brief filed by Appellee Craig Williams is GRANTED. Appellees brief due on 10/22/2010. GBT

PACER Service Center			
Transaction Receipt			
11/04/2010 15:35:11			
PACER Login:	v10006	Client Code:	
Description:	Case Summary	Search Criteria:	10-12075
Billable Pages:	1	Cost:	0.08

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 10, 2010

Bernard Pastor
Miami-Dade County Attorney's Office
111 NW 1ST ST STE 2810
MIAMI, FL 33128-1930

Appeal Number: 10-12075-B
Case Style: Craig Williams v. Jeff Scott, et al
District Court Docket No: 1:07-cv-22617-UU

CIVIL APPEALS ARE GOVERNED BY STRINGENT PROCEDURES FOR REQUESTING EXTENSIONS OF TIME TO FILE BRIEFS AND RECORD EXCERPTS. RULES PROVIDE FOR DISMISSAL WITHOUT FURTHER NOTICE WHEN A BRIEF OR RECORD EXCERPTS IS NOT FILED OR CORRECTED WITHIN THE TIME PERMITTED. PLEASE SEE THE CIRCUIT RULES AT WWW.CA11USCOURTS.GOV

The referenced case was docketed in this court on May 6, 2010. Please use the appellate docket number noted above when making inquiries. Motions for extensions of time to file a brief are frowned upon by the court.

Pursuant to 11th Cir. R. 12-1, the record in this appeal was deemed completed and filed on the date the appeal was docketed in this court.

Eleventh Circuit Rule 31-1 requires that APPELLANT'S BRIEF AND RECORD EXCERPTS BE SERVED AND FILED ON OR BEFORE June 15, 2010.

This is the only notice you will receive concerning the due date for filing briefs and record excerpts. (In cross-appeals pursuant to Fed.R.App.P. 28(h), the party who first files a notice of appeal is the appellant unless the parties otherwise agree.) See Fed.R.App.P. 28, 30, 31 and 32, and the corresponding circuit rules, for further information on preparing briefs and record excerpts.

In addition to providing the required number of paper copies of briefs, all parties (except pro se parties) are required, additionally, to provide briefs in electronic format as described in 11th Cir. R. 31-5 and the instructions provided on the court's Web site. Electronic briefs must be in Adobe

Acrobat ® PDF file format. The electronic brief must be completely contained in one PDF file, i.e., cover page through and including the certificate of service. An EDF ID number is needed to upload your brief. If you don't already have an EDF number, PLEASE CONTACT THE CLERK'S OFFICE AT (404) 335-6399. When uploading a brief for the first time, you will be prompted to register and create a password known only by you for all future uploads.

We have not yet received the Certificate of Interested Persons and Corporate Disclosure Statement (CIP) required by FRAP 26.1 and the accompanying circuit rules. The rules provide that the certificate must be filed by every appellant [and cross-appellant] with this court within 14 days after filing the notice of appeal, or along with the filing in this court by any party of any motion, petition, or pleading, whichever occurs first. The rules further provide that on the same day a paper certificate is served, the party filing it must also complete the court's web-based certificate at the "Electronic Filing" link of the court's website, www.ca11.uscourts.gov, by electronically providing the information required for that form. Only the ticker symbols for publicly traded corporations that are listed on the paper CIP must be entered in the web-based system. If your CIP does not include any publicly traded corporations, you are required to go to the website and simply click the button indicating that you have no publicly traded corporations to report. Pro se parties are **not required or authorized** to complete the web-based certificate.

You are hereby notified that the clerk is not authorized to submit to the court any brief (except for the reply brief of an appellant or cross-appellant), petition, answer, motion or response that does not contain the certificate, but may receive and retain the papers pending supplementation of the papers with the required certificate. You are also hereby notified that failure to submit the required certificate will result in your document(s) being returned unfiled which may ultimately result in dismissal of your appeal.

Attorneys who wish to participate in this appeal must be properly admitted either to the bar of this court or for this particular proceeding pursuant to 11th Cir. R. 46-1. An attorney not yet properly admitted must file an appropriate application for admission within fourteen (14) days from this date. In addition, all attorneys (except court-appointed counsel) who wish to participate in this appeal must complete and return an appearance form within fourteen (14) days. Application for Admission to the Bar and Appearance of Counsel Form are available on the Internet at www.ca11.uscourts.gov. The clerk may not accept motions or other filings from an attorney until that attorney files an appearance form. See 11th Cir. R. 46-5.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Carolyn Magers
Phone #: (404) 335-6181

DKT-7CIV Civil-ND Crim Early Briefing

UNITED STATES COURT OF APPEAL
ELEVENTH CIRCUIT

CASE No. 10-12075

CRAIG WILLIAMS,

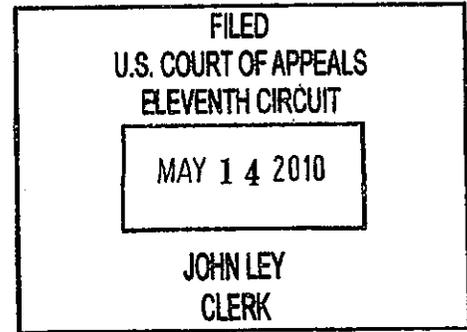
District Court No. 07-22617 Civ-Ungaro

Plaintiff/Appellee,

v.

JEFF SCOTT, *et al.*,

Defendants/Appellants.



**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Undersigned counsel for the Appellants, Miami-Dade Corrections Officers Jeff Scott and Humberto Jimenez, certify that the following persons and/or entities may have an interest in the outcome of this case:

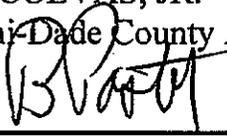
1. Alvarez, Carlos – Mayor
Miami-Dade County
2. Cuevas, R.A. – Miami-Dade County Attorney
3. Jimenez, Humberto – Appellant
4. Pastor, Bernard – Assistant County Attorney
5. Scott, Jeff – Appellant

Williams v. Jeff Scott et al.
Case No. 10-12075
Certificate of Interested Parties

6. Ungaro, Ursula – U.S. District Court Judge
7. Williams, Craig – Plaintiff
8. White, Patrick A. – U.S. District Court Magistrate Judge

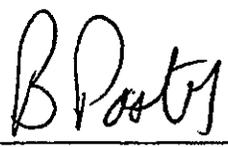
Respectfully submitted,

R.A. CUEVAS, JR.
Miami-Dade County Attorney

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2010, the original Certificate of Interested Persons was sent via U.S. Mail to the Court of Appeals, and a true and correct copy of the same was served by regular U.S. mail to Appellee, Craig Williams, *pro se*, No. 990650, Florida Civil Commitment Center, 13619 SE Highway 70, Arcadia, FL 34266.


Assistant County Attorney

Rev. 6/98

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CIVIL APPEAL STATEMENT**

Please TYPE. Attach additional pages if necessary.

11th Circuit Docket Number: 10-12075

TITLE IN FULL: Craig Williams, Plaintiff/Appellee v. Jeff Scott, et al., Defendants/Appellants	DISTRICT: Southern District of Florida NAME OF JUDGE: Ursula Ungaro
	DATE COMPLAINT FILED: 10-4-07 DISTRICT COURT DOCKET NUMBER: 07-22617
	DATE NOTICE OF APPEAL FILED: 4-29-10 IS THIS A CROSS-APPEAL? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
	HAS THIS MATTER BEEN BEFORE THIS COURT PREVIOUSLY? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No IF YES, PROVIDE: (A) CASE NAME (B) CITATION (C) DOCKET NUMBER

	ATTORNEY NAME	MAILING ADDRESS	TELEPHONE AND FAX
FOR APPELLANT: <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant <input type="checkbox"/> Other (Specify)	Bernard Pastor, Assistant County Attorney	111 N.W. 1st St., Suite 2810 Miami, FL 33128	305 375 5151 305 375 5634
FOR APPELLEE: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Other (Specify)	Craig Williams, pro se	No. 990650 Florida Civil Commitment Ctr. 13619 SE Highway 70 Arcadia, FL 34266	none

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 14 2010
JOHN LEY
CLERK

Circle/check/complete those items below and on page 2 that apply.

JURISDICTION	NATURE OF JUDGMENT	TYPE OF ORDER	RELIEF
<input checked="" type="checkbox"/> Federal Question	Final Judgment, 28 USC 1291	Dismissal/Jurisdiction	Damages: Amount Sought by Plaintiff: \$ _____ Amount Sought by Defendant: \$ _____ Awarded \$ _____ to _____ Injunctions: <input type="checkbox"/> TRO <input type="checkbox"/> Preliminary <input type="checkbox"/> Permanent <input type="checkbox"/> Granted <input type="checkbox"/> Denied
Diversity	Interlocutory Order, 28 USC 1292(a)(1)	Default Judgment	
US Plaintiff	Interlocutory Order Certified, 28 USC 1292(b)	Summary Judgment <input checked="" type="checkbox"/>	
US Defendant	Interlocutory Order, Qualified Immunity <input checked="" type="checkbox"/>	Judgment/Bench Trial	
	Final Agency Action (Review)	Judgment/Jury Verdict	
	54(b)	Judgment/Directed Verdict/NOV	
		Injunction	
		Other _____	

NATURE OF SUIT (• Class Action)

- | | | | | | |
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| Admiralty-Maritime
Antitrust
Arbitration
Assault
Attorney Disqualification
Banking
Bankruptcy | Civil Rights
• Title VII
• ADA
• ADEA
• IDEA
• Harassment
• 1983
• Other | Commercial Contract
Commodities
Communications
Consumer
Copyright/TM/Patent
Counsel Fee
Election
Employment Contract
Energy | Environment
ERISA
FELA
FINRA
FOI
Forfeiture
Fraud
FTCA
Indemnity | Insurance
Negotiable Instrument
Personal Injury
Privacy
Real Property
Review Agency Action
Securities
Stockholder
Slander/Libel | Social Security
Tax
TILA
US Constitution
Warranty
Other Contract
Other Tort
Other Statutory Action |
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GENERAL

BASED ON YOUR PRESENT KNOWLEDGE:

- (1) DOES THIS APPEAL INVOLVE A QUESTION OF FIRST IMPRESSION? Yes No
WHAT IS THE ISSUE YOU CLAIM IS ONE OF FIRST IMPRESSION?

- (2) WILL THE DETERMINATION OF THIS APPEAL TURN ON THE INTERPRETATION OR APPLICATION OF A PARTICULAR CASE OR STATUTE? Yes No
IF YES, PROVIDE:
(A) CASE NAME/STATUTE
(B) CITATION
(C) DOCKET NUMBER, IF UNREPORTED

- (3) IS THERE ANY CASE NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT OR ANY OTHER COURT OR ADMINISTRATIVE AGENCY THAT:
(A) ARISES FROM SUBSTANTIALLY THE SAME CASE OR CONTROVERSY AS THIS APPEAL? Yes No
(B) INVOLVES AN ISSUE THAT IS SUBSTANTIALLY THE SAME, SIMILAR, OR RELATED TO AN ISSUE IN THIS APPEAL? Yes No
IF YES, PROVIDE:
(A) CASE NAME
(B) CITATION
(C) DOCKET NUMBER, IF UNREPORTED
(D) COURT OR AGENCY

- (4) WILL THIS APPEAL INVOLVE A CONFLICT OF LAW:
(A) WITHIN THE ELEVENTH CIRCUIT? Yes No
(B) AMONG CIRCUITS? Yes No
IF YES, EXPLAIN BRIEFLY:

ISSUES PROPOSED TO BE RAISED ON APPEAL, INCLUDING JURISDICTIONAL CHALLENGES:

whether the defendant officers are entitled to qualified immunity.

I CERTIFY THAT I SERVED THIS CIVIL APPEAL STATEMENT ON THE CLERK OF THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND SERVED A COPY ON EACH PARTY OR THEIR COUNSEL OF RECORD, THIS 10 DAY OF May, 2010.

Bernard Pastor, Assistant County Attorney
NAME OF COUNSEL (TYPE)

[Handwritten Signature]
SIGNATURE OF COUNSEL

ATTACH portion of district court, tax court, or agency record described in 11th Cir. R. 33-1(b) (judgments and orders appealed from or sought to be reviewed; any supporting opinion, findings of fact, and conclusions of law filed by the court or the agency, board, commission, or officer; any report and recommendation adopted by an order; findings and conclusions of an administrative law judge when appealing a court order reviewing an agency determination; any agency docket sheet or record index).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 10-12075-B

CRAIG WILLIAMS

Plaintiff-Appellee,

- versus -

OFFICERS JEFF SCOTT AND HUMBERTO JIMENEZ

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

INITIAL BRIEF FOR DEFENDANTS-APPELLANTS

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CRAIG WILLIAMS

CASE NO. 10-12075-B

v.

JEFF SCOTT, *et al.*

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Appellants certify that the following persons and entities may have an interest in the outcome of this case:

1. Byrd Patrick, Defendant
2. Cuevas, R.A., Jr., Miami-Dade County Attorney
3. Jimenez, Humberto, Defendant/Appellant
4. Miami-Dade County
5. Pastor, Bernard, Assistant County Attorney
6. Scott, Jeff, Defendant/Appellant
7. Ungaro, Ursula Honorable, U.S. District Court
8. White, Patrick Honorable, U.S. Magistrate Judge
9. Williams, Craig, Plaintiff/Appellee

Bernard Pastor
Assistant County Attorney
Counsel for Appellants

Statement Regarding Oral Argument

Appellants respectfully request an oral argument. Appellants have raised qualified immunity from suit as the basis for their motion for summary judgment and this subsequent appeal. This immunity is based, in part, on the Appellants acting in an objectively reasonable manner throughout the incident, and that Appellee failed to demonstrate that Appellants' actions violated clearly established law in this Circuit. Given these circumstances, Appellants believe an oral argument is necessary to address these issues.

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Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291. The Court has jurisdiction to review an order denying qualified immunity as it operates as a final order denying immunity from suit. Williams v. Ala. State Univ., 102 F.3d 1179, 1182 n.4 (11th Cir. 1997); see also Mitchell v. Forsyth, 472 U.S. 511, 525-30, 105 S. Ct. 2806, 2814-18 (1985) (“We emphasize at this point that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law.”).

Statement of the Issues

(1) Whether the district court erred in denying qualified immunity from suit to Officer Scott where Plaintiff failed to show that Officer Scott acted maliciously and sadistically.

(2) Whether the district court erred in denying qualified immunity from suit to Officer Scott where Officer Scott's alleged use or force was *de minimis*.

(3) Whether the district court erred in denying qualified immunity from suit to Officer Jimenez where Plaintiff failed to show that Officer Jimenez had the duty or opportunity to intervene in Plaintiff's alleged incident.

(4) Whether the actions of Officers Scott and Jimenez violated a constitutional right that was clearly established under binding authority at the time.

Statement of the Case

The case involves an appeal by Officers Scott and Jimenez from the district court's order denying their motion for summary judgment based on qualified immunity from suit.

1. Course of Proceedings and Disposition in the Court Below

On August 4, 2008, Plaintiff filed a Second Amended Complaint (the “Complaint”) against, among others, Officers Scott and Jimenez.¹ (DE 52).² Count 1 is against Officer Scott for excessive force and Count 3 is against Officer Jimenez for failure to intervene.

Officers Scott and Jimenez moved for summary judgment based on the doctrine of qualified immunity. (DE 126, 166). Specifically, Officer Scott argued that he was entitled to qualified immunity because Plaintiff failed to show Officer Scott employed excessive force and that there was no factual basis showing that Officer Scott had a sadistic and malicious motive. Additionally, Officer Scott argued that the alleged touching of Plaintiff, which can only be fairly characterized as a minimal amount of force used to deal with a noncompliant inmate, was objectively reasonable and violated no clearly established law. Officer Jimenez argued that he was entitled to qualified immunity because he did not have the duty or opportunity to intervene on behalf of Plaintiff during the incident alleged in the Complaint.

¹ Officer Patrick Byrd was also named as a co-defendant, but passed away during the case below. See DE 117 (Suggestion of Death). He is not a party to this appeal. Other co-defendants named in the Complaint have since been voluntarily dismissed by Appellant. (See DE 122, 132, 138).

² Citations to “DE ___” refer to the district court’s docket entry for the cited document.

On February 24, 2010, the magistrate court entered a Report and Recommendation, recommending that the motions for summary judgment be denied. (DE 175). On March 24, 2010, Officers Scott and Jimenez filed objections to the Report and Recommendation. (DE 183). The district court entered an order affirming the Report and Recommendation and denied the officers' qualified immunity from suit on April 2, 2010. (DE 184). On April 29, 2010, Officers Scott and Jimenez filed a Notice of Appeal from the district court's Order denying their qualified immunity from suit. (DE 190).

2. Statement of the Facts

On October 6, 2004, Plaintiff, a detainee housed in the Florida Civil Commitment Center in Arcadia, Florida, was being transported by State correctional officers to a Miami-Dade County courthouse through the rear lobby of the Miami-Dade County Pretrial Detention Center ("PTDC") (DE 112, Exh. "A" at pp. 15-16, hereinafter referred to as "Williams Depo.") After Plaintiff entered the PTDC facility through the rear lobby, Officer Scott noticed that Plaintiff was wearing what appeared to be a homemade or prison-made hat. (DE 126, Exh. "A" ¶ 9).

For safety and security purposes, the Department's policies and procedures prohibit an inmate, detainee or prisoner from wearing anything on his head (i.e., hats). (Id. ¶ 10). As a result, Plaintiff was informed that prisoners or inmates are not allowed to wear hats inside the PTDC facility and was asked to remove the hat. (Id.;

Williams depo. at p. 151:3-10; Affidavit of David Abbott ¶ 10, attached as Exh. “B” to DE 112; Affidavit of Jose Rios ¶ 10, attached as Exhibit “C” to DE 122).

Plaintiff, after making some rude remarks, refused to remove his hat. At that point, either Officer Byrd or Officer Scott removed the hat from Plaintiff, placed it in a property bag, and the bag with the hat inside was given to the State correctional officers who were escorting Plaintiff to the courthouse. (Scott Decl. ¶ 11; Williams Depo. at p. 18:9-14). Plaintiff claims that Officer Scott’s forearm touched his neck as Officer Scott tried to remove Plaintiff’s hat off his head. (Id. at p. 162:17-22).

Despite being advised and ordered not to wear a hat inside the County facility, Plaintiff made a conscious decision to keep the hat on upon his return from the courtroom to the PTDC rear lobby. (Id. at p. 167:2-8). Plaintiff alleges that Officer Byrd, when he saw Plaintiff with the hat, and without provocation or reason, attacked Plaintiff. Plaintiff claims that Officer Jimenez failed to intervene in the incident involving Officer Byrd. Plaintiff admits that another County officer tried to intervene to stop the altercation between Officer Byrd and Plaintiff. (Id. at p. 172:1-16). In addition, there were approximately 12 other officers in the area where the altercation took place. (Id. at p. 29:8-16). The alleged altercation between Officer Byrd and Plaintiff lasted a few seconds. (Abbott Aff. ¶ 14). Plaintiff’s alleged back and ankle injuries were not the result of Officer Scott’s alleged actions. (Id. at pp. 138:17-25; 139:1).

3. **Standard of Review.**

This Court reviews de novo the district court's Order denying the officers' qualified immunity from suit. See Jones v. Cannon, 174 F.3d 1271, 1280 (11th Cir. 1999); Williams, 102 F.3d at 1182; Cottrell v. Caldwell, 85 F.3d 1480, 1486 (11th Cir. 1996).

Summary of the Argument

Officer Scott is entitled to qualified immunity for the excessive force claim. Plaintiff must show not only excessive force, but also a sadistic and malicious motive on the part of Officer Scott. The lack of any factual basis to show malice or sadistic motive by Officer Scott should have resulted in qualified immunity being granted. There is no record evidence showing that Officer Scott used force in a malicious or sadistic manner. Additionally, Officer Scott's alleged touching of Plaintiff, which can only be fairly characterized as *de minimis* amount of force, was objectively reasonable. Further, there is no clearly established law forbidding a corrections officer from removing a hat from an inmate to enforce prison facility rules and regulations, particularly after the inmate has refused to obey a correctional officer's commands. The district court erred when it did not consider Plaintiff's failure to identify such any cases, and instead, declined to grant qualified immunity solely because of the existence of a disputed, but immaterial, issue of fact. The district court also erred when it failed

to engage in any analysis to determine whether Officer Scott's actions were objectively reasonable.

Likewise, Officer Jimenez is entitled to qualified immunity for the failure to intervene claim. Given the record evidence and Plaintiff's own admissions, Officer Jimenez, assuming he was present during the incident, was not in a position to intervene and had no duty to intervene because other officers had already intervened on Plaintiff's behalf. The district court failed to consider these undisputed facts and Plaintiff's own testimony and admissions.

In sum, the district court's decision to deny Officers Scott and Jimenez immunity from suit, and to allow the claims against them to proceed to trial, was erroneous and should be overturned.

Argument

The District Court Erred In Denying Officer Scott's Qualified Immunity From Suit.

Qualified immunity protects government officials sued in their individual capacities by offering not simply a defense, but immunity from suit, and "like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Scott v. Harris, 127 S. Ct. 1769, 1774 n.2 (2007) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Thus, it is a "complete protection for government officials sued in their individual capacities as long as 'their conduct violates no clearly

established statutory or constitutional rights of which a reasonable person would have known.” Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002) (citations omitted); Dalrymple v. Reno, 334 F.3d 991, 994 (11th Cir. 2003) (quoting Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)); Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (“The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation,” by ensuring that only those individuals who are either plainly incompetent, or who knowingly violate the law are subjected to liability.); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). An officer is entitled to qualified immunity if his actions were objectively reasonable. See Anderson v. Creighton, 483 U.S. 635, 638 (1987). Qualified immunity “represents the rule, rather than the exception.” GJR Inv., Inc. v. County of Escambia, 132 F.3d 1359, 1366 (11th Cir. 1998).

In determining whether a public official is entitled to qualified immunity, “the public official must show that he was acting within the scope of his discretionary authority at the time the allegedly wrongful acts occurred.” Durruthy v. Pastor, 351 F.3d 1080, 1087 (11th Cir. 2003) (citing Lee, 284 F.3d at 1194); Vinyard, 311 F.3d at 1345. Once that is established, “the burden shifts to the plaintiff to show that qualified immunity is not appropriate.” Durruthy, F.3d at 1087 (quoting Lee, 284 F.3d at 1194). Here, it is undisputed that Officers Scott and Jimenez were on duty on behalf of the Department of Corrections and acting within the course and scope of

their discretionary authority during the relevant time period. (DE 126 at p. 7). Having established that Officers Scott and Jimenez were acting within their discretionary authority, “the burden shifts to the plaintiff to show that qualified immunity is not appropriate.” Lee, 284 F.3d at 1194.

A federal court applies a two-part test when considering whether qualified immunity is appropriate: (1) whether the facts as alleged show that the officer’s conduct violated a constitutional right; and, if so, (2) whether such a right was clearly established. Scott, 127 S. Ct. at 1774. In evaluating these two prongs, a district court need not follow any rigid sequence; in other words, “judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

a. Officer Scott did not violate Plaintiff’s constitutional rights.

In an excessive force case, “qualified immunity applies unless application of the standard would inevitably lead every reasonable officer . . . to conclude the force was unlawful.” See Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993) (quotation omitted). Additionally, under the Eighth Amendment, “whether or not a prison guard’s application of force is actionable turns on whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or

sadistically for the very purpose of causing harm.” Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (quoting Brown v. Smith, 813 F.2d 1187, 1188 (11th Cir. 1987)).

“Whether a jailer’s use of force is excessive, and thus violates the inmate’s Fourteenth Amendment right to be free from cruel and unusual punishment, depends on whether the jailer’s act “shocks the conscience[.]” Danley v. Allen, 540 F.3d 1298, 1307 (11th Cir. 2008) (quoting Cockrell v. Sparks, 510 F.3d 1307, 1311 (11th Cir. 2007)). Such a claim will necessarily apply if “the force ““was applied . . . maliciously and sadistically for the very purpose of causing harm.”” Danley, 540 F.3d at 1307 (quoting Cockrell, 510 F.3d at 1311, quoting Whitley v. Albers, 475 U.S. 312, 320-21, 106 S.Ct. 1078, 1085 (1986)); Campbell v. Sikes, 169 F.3d 1353 (11th Cir. 1999) (holding that the force used in order to violate the Eighth Amendment must be such that there is a malicious and sadistic intent on the part of an officer for the very purpose of causing harm in order to succeed on an excessive force claim under the Eighth Amendment).

The United States Supreme Court held in Whitley that a plaintiff must prove that the force was applied “maliciously and sadistically for the very purpose of causing harm.” 475 U.S. 312, 320-21 (1986). This requirement is a heightened specific-intent standard. As recognized by the Whitley court,

The infliction of pain in the course of a prison security measure . . . does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

Id. 475 U.S. at 319. The Supreme Court, reviewing the force used to quell a prison riot in Whitley, explained that “whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’” Id. at 320-21. The Supreme Court then extended the heightened intent requirement even beyond the prison riot situation and found that prison administrators must be accorded wide discretion in the adoption and execution of policies and procedures that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Hudson v. McMillian, 503 U.S. 1, 7 (1992).

In determining whether actions shock the conscience, the following factors must be considered: (1) the need for force; (2) the relationship between that need and the amount of force used; and (3) the extent of the resulting injury. Whitley, 475 U.S. at 321, 106 S.Ct. at 1085. When determining whether a whether the jailers’ use of force was excessive, courts must “give a wide range of deference to prison officials acting to preserve discipline and security.” Danley, 540 F.3d at 1307 (quoting Bennett v. Parker, 898 F.2d 1530, 1533 (11th Cir. 1990)).

Notably, not “every malevolent touch by a prison guard gives rise to a federal cause of action.” Hudson, 503 U.S. at 9-10. Rather, “[t]he Eighth Amendment's prohibition of ‘cruel and unusual’ punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.” Id. (quotation marks omitted). The Eleventh Circuit has applied a test consistent with the above Supreme Court precedent, holding in Johnson v. Breeden that an excessive force claim requires a showing of a “specific malevolent intent to cause harm.” 280 F.3d 1308, 1320 (11th Cir. 2002). This is a “subjective” element. Id.

Given Plaintiff’s allegations and admissions, it cannot be concluded that Officer Scott’s alleged touching Plaintiff was malicious, sadistic or “repugnant to the conscience of mankind.” Hudson, 503 U.S. at 9-10. The magistrate court, however, in a conclusory manner and without *any* analysis, found that “Williams’ deposition testimony and sworn statement, which must be believed, establish that Scott possessed a wanton state of mind and maliciously applied force against Williams when Scott violently removed” Plaintiff’s hat. (DE 175 at p. 8). The district court, also without any analysis, incorrectly adopted this conclusion, which is belied by the record evidence.

There is no evidence that Officer’s Scott’s actions were driven by any malevolent or sadistic intent to cause harm. Rather, Officer Scott’s alleged use of

minimal force was necessary in light of the prison facility's rules specifically prohibiting the use of hats inside the facility (DE 126, Ex. 1 ¶ 10), and was employed only in response to Plaintiff's refusal to remove his hat inside the jail facility. (Id. ¶ 11). Officer Scott asked Plaintiff to remove the hat while inside the County facility. (Williams Depo. at p. 151:3-10). Plaintiff refused, citing religious reasons. (Scott Decl. ¶ 11). Irrespective of whether Plaintiff refused to comply with Officer Scott's instructions, Plaintiff violated prison rules by wearing a hat inside the facility, thus, requiring that the hat be removed. The only reasonable explanation for the use of force was that Officer Scott used *minimal* force for security and safety purposes to enforce the prison facility's rules and regulations. Indeed, Plaintiff's own characterization and description of the alleged use of "force" supports this conclusion.

Plaintiff testified that Officer Scott's forearm made contact with or "grazed" the side of his neck simultaneously as Officer Scott was removing the hat. (Williams depo. at pp. 161:12-13; 162: 17-22; 163: 7-11). Significantly, Plaintiff admits that it was not a punch or other type of striking (e.g., karate chop). (Id. at 162:23-25; 163:1-6). Regardless of the label attached to the contact, Plaintiff admits that none of it caused any injuries. (Id. at 138:17-25; 139:1). Less than two minutes later, Officer Scott returned with the hat and returned it to Plaintiff in a plastic bag. (Id. 18:9-14).

Nowhere in the record is there any sworn testimony that this "touching" or

“grazing” was motivated by malice or a sadistic purpose. On the contrary, in describing how Officer Scott removed the hat, Plaintiff testified under oath that “that’s when he automatically grabbed it, at the same time his hand came over and hit my neck like that and I twisted aside like that, and he took the hat and walked away.” (Id. at pp. 18:5-9). Accordingly, only an unreasonable and wholly overstated interpretation of the facts, even viewed in the light most favorable to Plaintiff, could lead to the conclusion that Officer Scott had “specific malevolent intent” to cause harm, Johnson, 280 F.3d at 1320, or acted “maliciously and sadistically for the very purpose of causing harm.” Danley, 540 F.3d at 1307.

It appears Plaintiff may have led the court to error by persuading it to accept statements made in his response to the motion for summary judgment and disregarding his own sworn testimony. (See DE 153). In his response, despite his unambiguous deposition testimony, Plaintiff conveniently claimed that Officer Scott “violently with great force snatched my religious diadem, causing my neck to be knocked, hit and twisted, which left me confused and injured in excruciating pain.” (Id. at 3). There are two problems with this assertion. First, as shown above, it is inconsistent with his sworn deposition testimony. (Compare Williams depo. at p. 18:5-9 with DE 153 at p. 3). Plaintiff cannot cherry-pick which parts of the testimony and evidence he feels best advances his case when it directly conflicts with his own version of events. See Evans v. Stephens, 407 F.3d 1272, 1278 (11th Cir. 2005) (en

banc) (“When the nonmovant has testified to events, we do not (as urged by Plaintiffs’ counsel) pick and choose bits from other witnesses’ essentially incompatible accounts (in effect, declining to credit some of the nonmovant’s own testimony) and then string together those portions of the record to form the story that we deem most helpful to the nonmovant.”). The Evans court held that:

when conflicts arise between the facts evidenced by the parties, we credit the nonmoving party’s version. Our duty to read the record in the nonmovant’s favor stops short of not crediting the nonmovant’s testimony in whole or part: *the courts owe a nonmovant no duty to disbelieve his sworn testimony which he chooses to submit for use in the case to be decided.*

Id. (emphasis added). It was error for the courts below to disregard this authority and accept Plaintiff’s version in the response to the motion, as opposed to Plaintiff’s deposition testimony. Second, the record citations supporting this statement actually do not support his version of the facts. Compare DE 153 ¶ 11 with Williams depo. at 18:1-9.

There is simply no evidence on which to deny qualified immunity to Officer Scott because he acted objectively reasonable under the circumstances and in accordance with the policies and procedures of Miami-Dade County, and because he used *de minimis* force in a manner that was intended to maintain order and not for any malicious or sadistic purpose. That there may have been minor, incidental contact as Officer Scott was trying to remove Plaintiff’s hat to comply with the facility’s security

and safety rules and regulations can hardly be characterized as a malicious or sadistic act. The mere act of removing a hat off an inmate, and grazing his neck while removing the hat, does not amount to a constitutional violation. Given these facts, it is clear that Officer Scott's actions were not malicious or sadistic with any intent to cause harm, and would "shock" no reasonable person's conscience. Danley, 540 F.3d at 1307.

Two Eleventh Circuit case, both which were not addressed by courts below, are instructive in illustrating that there was no constitutional violation here. See McBride v. Rivers, 170 Fed. Appx. 648, 656-58 (11th Cir. March 14, 2006); Butler v. Hutson, 147 Fed. Appx. 62, 64 (11th Cir. Aug. 12, 2005), cert. denied, 547 U.S. 1079 (2006). Although these cases are unpublished, they constitute persuasive authority demonstrating that Officer Scott's use of force was not a constitutional violation. See 11th Cir. R. 36-2. Indeed, any force used by Officer Scott, even as alleged by Plaintiff, was much less than the force at issue in these cases.

In McBride, the Eleventh Circuit held that the alleged use of repeated punches by a corrections officer (including punches to the inmate's head) did not rise to the level of a constitutional violation even where the inmate was already subdued and handcuffed. McBride, 170 Fed. Appx. at 656. Likewise, Butler involved an inmate who was "moving" towards another inmate after disobeying a correction officer's order to sit down. Butler, 147 Fed. Appx. at 64-65. The corrections officer believed

that the inmate posed a danger and struck the inmate in the head with a walkie talkie. Id. This strike broke the plaintiff's jaw. Id. The Eleventh Circuit, however, found that this strike did not rise to the level of a constitutional violation. Even under Plaintiff's version of the facts, Officer Scott acted in a manner that was far less severe than the facts at issue in McBride and Butler. Yet, the district and magistrate courts here failed to address or apply the reasoning of those cases here.

The magistrate court also concluded that under the "objective" component of the analysis, which requires evidence that Plaintiff suffer some injury which was sufficiently serious in relation to the need for application of the force, the alleged force used was "more than de minimis." (DE 175 at 8). This conclusion is also erroneous and not supported by the facts of the case. As shown above, Plaintiff testified that Officer Scott's forearm "touched" his neck as Officer Scott tried to remove Plaintiff's hat off his head—there was no punching or other type of striking of the body. Moreover, Plaintiff has failed to present any evidence of any medical treatment or diagnosis of neck injuries due to Officer's Scott's alleged touching. As such, Officer Scott's alleged actions likely constituted, at most, *de minimis* force. Cf. Durruthy, 351 F.3d at 1094 (holding *de minimis* officers' "forcing Durruthy down to the ground and placing him in handcuffs"); Nolin v. Isbell, 207 F.3d 1253, 1255 (11th Cir. 2000) (holding force to be *de minimis* when an officer grabbed the plaintiff "from behind by the shoulder and wrist, threw him against a van three or four feet away, kned him in

the back and pushed his head into the side of the van, searched his groin area in an uncomfortable manner, and handcuffed him”); Jones v. City of Dothan, 121 F.3d 1456, 1460 (11th Cir. 1997) (holding force to be *de minimis* when officers, knowing the plaintiff had recently suffered a stroke, “‘slammed’ [the plaintiff] against the wall, kicked his legs apart, required him to raise his arms above his head, and pulled his wallet from his pants,” causing the plaintiff to experience pain); see also Post, 7 F.3d at 1556 (finding force lawful where officer “spun [plaintiff] around, placed him against a display case, applied a choke hold, and handcuffed him” and, after handcuffing him, pushed him against a wall). These cases show how the courts’ conclusion that the alleged force here was more than *de minimis* was erroneous.

The courts also failed to consider that this Circuit has deemed lawful conduct that is similar to that allegedly engaged in by Officer Scott. In Rodriguez v. Farrell, 280 F.3d 1341 (11th Cir. 2002), the Eleventh Circuit found that an officer was entitled to qualified immunity where he allegedly “grabbed plaintiff’s arm, twisted it around plaintiff’s back, jerking it up high to the shoulder and then handcuffed plaintiff as plaintiff fell to his knees screaming that [the officer] was hurting him.” 280 F.3d at 1351. The panel in Rodriguez concluded that such conduct was lawful even though a preexisting injury resulted in the plaintiff undergoing “twenty-five subsequent surgeries and ultimately amputation of the arm below the elbow.” Id. Notably, the court reached that conclusion because “[w]e do not use hindsight to judge the acts of

police officers; we look at what they knew (or reasonably should have known) at the time of the act.” Id. at 1351-52. Similarly here, Officer Scott’s alleged conduct, viewed at the time of the incident and under the circumstances facing Officer Scott, was lawful even accepting as true the injuries Plaintiff claims to have suffered.

b. Officer Scott violated no clearly established law in this Circuit.

Even if Plaintiff were to demonstrate a constitutional violation, which he cannot, he is unable to show a violation of clearly established law. Plaintiff bears the burden of demonstrating that Officer Scott violated clearly established law. Jackson v. Sauls, 206 F.3d 1156, 1164 (11th Cir. 2000). Officer Scott is entitled to qualified immunity because his actions did not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow, 457 at 818. For a constitutional right to be clearly established, its contours “must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.” Saucier, 533 U.S. at 202, 121 S.Ct. at 2156 (emphasis added). Specifically, Saucier instructs that “[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” Id. at 1251. Thus, it is Plaintiff’s burden to show that binding case law existed before October 6, 2004, that placed Officer Scott on notice that his alleged actions violated clearly established law in this Circuit. See Sanders v. Howze, 177 F.3d 1245, 1250 (11th Cir. 1999); Thomas ex rel. Thomas v. Roberts, 323

F.3d 950, 955 (11th Cir. 2003) (“only Supreme Court cases, Eleventh Circuit caselaw, and [the applicable state’s] Supreme Court caselaw can ‘clearly establish’ law in this circuit.”); Marsh v. Butler County, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001) (en banc) (same).

Plaintiff, however, remains unable to meet this burden and fails to identify *any* binding, factually analogous case from before the date of the incident placing Officer Scott on notice that his conduct was impermissible or violated the Constitution. As discussed above, the Whitley case, which was decided in 1986, states that an officer can only violate the Constitution when he or she acts in a malicious and sadistic manner. 475 U.S. at 320-21. This means that as long as Officer Scott was acting to maintain order, as opposed for a sadistic reason, he is immune as a matter of law. Likewise, given the circumstances as alleged in the Complaint and based on the record evidence, Officer Scott’s alleged use of force while removing Plaintiff’s hat was objectively reasonable. Therefore, Plaintiff cannot meet his heavy burden of showing that such conduct had been clearly established as unlawful at the time of the incident in question. Accordingly, qualified immunity applies as a matter of law.

The only time that a plaintiff can avoid the requirement of identifying binding precedent is “when the conduct in question is so egregious that the government actor must be aware that he is acting illegally.” Id. Here, it can hardly be said that Officer Scott’s conduct was so egregious that he must have been aware that he was acting

illegally. See, e.g., Priester v. City of Riviera Beach, 208 F.3d 919, 927 (11th Cir. 2000) (denying qualified immunity on basis of narrow exception in excessive force case in which defendant police officer “ordered and allowed his dog to attack and bite Plaintiff; threatened to kill Plaintiff when Plaintiff kicked the dog in an effort to resist the unprovoked attack; and let the dog attack Plaintiff for at least two minutes”); Thomas, 323 F.3d at 955 (“If the plaintiff in a § 1983 action can show that ‘the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law, then the official is not entitled to qualified immunity.’”) (citations omitted). The alleged conduct here is radically different than the situations in Priester and Thomas. Rather, an objective evaluation of Officer Scott’s actions reveals he acted reasonably under the circumstances he confronted. See Saucier, 533 U.S. at 202, 121 S. Ct. at 2156 (“The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”) (emphasis added).

In light of record facts, it cannot be concluded that it would be clear to a reasonable officer that Officer Scott’s conduct was unlawful in the situation he confronted. Any reasonable officer would do exactly what Officer Scott did in that situation: remove the hat in accordance with prison rules and regulations.

Lastly, Plaintiff never argued, and the district court likewise never found, that Officer Scott was “plainly incompetent” or that he “knowingly” violated federal law, as required by Malley v. Briggs, 475 U.S. 335, 341 (1986). Instead, the district court based its denial of qualified immunity simply on the existence of disputed material facts. (DE 184 at p. 3. In sum, Officer Scott is entitled to qualified immunity.

c. *Officer Jimenez is entitled to qualified immunity.*

Plaintiff claims that Officer Jimenez violated his civil rights by failing to intervene and stopping other officers from allegedly using excessive force against him. This claim should have been rejected by the district court for several reasons. Under binding Eleventh Circuit precedent, Officer Jimenez was not required to intervene in this use of force because: (i) there is no allegation that he even observed the use of force; (ii) he had no opportunity to intervene; and (iii) Plaintiff claims that other Miami-Dade officers did intervene on his behalf.

In his motion for summary judgment, Officer Jimenez admitted that it was not until over a year after the incident, and only after reviewing a report, that he even identified Officer Jimenez and place him at the scene. Specifically, it was during an internal affairs investigation, 13 months after the incident (see DE 153 at pp. 7-9), that Plaintiff—who admitted that he had *never* seen Officer Jimenez before or after the incident (Williams depo. at 193:5-9)—was *unable* to correctly identify Officer Jimenez in a photo lineup. (See “Investigator’s Note” from excerpt of the Internal

Affairs report, attached as Exhibit "C" to DE 126). Plaintiff admits that the only reason he was even able to identify Officer Jimenez was based on reviewing the Internal Affairs investigative report, and not his own recollection, well over a year after the incident took place. (DE 153 at pp. 7-9.) This is consistent with Officer Jimenez's recollection of the events of that day that he did not observe any altercation between Plaintiff and anyone else that day. (DE 126, Exh. "B"). This fact alone, mindful of the heightened pleading requirement in cases where qualified immunity is invoked, should have resulted in the entry of summary judgment on behalf of Officer Jimenez.

Even if Officer Jimenez was present during the altercation, Plaintiff's conclusory allegation, that Officer Jimenez unconstitutionally failed to intervene, is unsubstantiated by any specific factual allegations, and even contradicted by Plaintiff's own version of the events. Based on Plaintiff's own sworn testimony and admissions, it was established that Officer Jimenez had no duty to intervene because other officers had already intervened as soon as the incident took place, thus obviating the need for Officer Jimenez to intervene. (See DE 126 at pp. 9-10; DE 166 at pp. 3-4). The facts showing the immediate intervention of other officers, who were in a better position to intervene of Plaintiff's behalf, and the speed with which the events occurred, were un rebutted by Plaintiff.

In Ensley v. Soper, the Eleventh Circuit held that a police officer can only be

liable for failing to intervene in an act of police brutality if the officer was “in a position to intervene.” 142 F.3d 1402, 1407 (11th Cir. 1998) (citation omitted).

Because the officer in Ensley was “actively involved in the arrest” of another suspect, the officer was not in a “position to intervene” and could not be liable. *Id.* at 1407-08.

Likewise, the Eleventh Circuit is equally clear that an officer cannot be held liable for failing to intervene unless he actually observed the purported use of excessive force by his fellow officer. Priester, 208 F.3d at 927 (recognizing that a duty to intervene is only clearly established when an officer has observed a use of excessive force and has the time and ability to intervene).

Here, the record devoid of any evidence establishing that Officer Jimenez observed the alleged use of excessive force or that he had a reasonable opportunity to intervene on Plaintiff’s behalf. Plaintiff remains unable to rebut Officer Jimenez’s argument that is no record evidence: 1) showing exactly where or how close Officer Jimenez was standing to the alleged incident and whether other officers were closer in proximity to Plaintiff; 2) establishing that Officer Jimenez even had a clear view of the alleged beating; 3) that there was sufficient time to intervene because the incident took place so quickly (see DE 112-2, ¶ 14); or 4) that Officer Jimenez had an opportunity to intervene because his colleagues (who may have been closer to the incident) had already intervened.

Plaintiff conveniently ignores his own deposition testimony proving that another officer tried to intervene to stop the altercation between himself and Officer Byrd, which lasted only a few seconds. Plaintiff admits in his response that a female

officer actually intervened and ordered Officer Byrd to release him, all while approximately 12 other officers were present in the area where the altercation took place. (DE 153 at p. 4). Specifically, Plaintiff admits that several County officers intervened during the altercation. Plaintiff testified that it “took about eight (8) to ten (10) Miami-Dade County, PTDC employees, that were also present, *who intervened to stop* their co-worker defendants” from allegedly continuing to batter him. (DE 52 ¶ 33) (emphasis added). This fact was confirmed by Plaintiff during his deposition: “I knowed [sic] some officers intervened—intervened, and they were pulling him [Byrd] off of me.” (Williams Depo. at 37:15-17, referring to Miami-Dade County Corrections officers, *id.* at 38:5-9). In fact, he specifically identified one of the many officers who intervened on his behalf (*id.* at p. 172:1-16), and testified that there were approximately 12 other officers in the area where the altercation took place. (*Id.* at p. 29:8-16). Additionally, he testified that at least one corrections officer whom he identified (Officer House), and several other officers, actually stood between him and where he *assumes* Officer Jimenez was standing. (*Id.* at pp. 177-79). Indeed, Plaintiff admits that he is unable to determine where Officer Jimenez was standing (“I could just hear him. I didn’t (sic) never pinpoint his location.”) (*Id.* at 179:7-10).

Given the facts in the record, Officer Jimenez was not in a position to observe or had the opportunity to intervene at the time of Plaintiff’s alleged altercation with Officer Byrd, and accordingly, he cannot be held liable for failing to intervene in that

attack. McCray v. City of Dothan, No. 01-15756-DD, 2003 WL 23518420, at *5 n. 6 (11th Cir. Apr. 24, 2003) (finding that an officer who was outside a building where the unlawful use of force was applied could not be held liable for failing to intervene). It is clear that Officer Jimenez is entitled to summary judgment based on qualified immunity because the record facts fail to show that Officer Jimenez violated Plaintiff's clearly-established constitutional rights.

In sum, Plaintiff cannot defeat Officer Jimenez's qualified immunity because he has not established that Officer Jimenez was in a position to intervene or even had a duty to intervene when others officers had already done so, and because the record facts fail to show that Officer Jimenez violated Plaintiff's clearly-established constitutional rights.

d. *Plaintiff has suffered no damages.*

Plaintiff's claim not only fails to establish a constitutional violation but also fails to show more than a *de minimis* injury. The Eighth Amendment's Prohibition of Cruel and Unusual Punishment excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind. Hudson, 503 U.S. at 7. As to the alleged damages here, and as discussed above, the overwhelming evidence shows is that, at best, they are *de minimis*. All that was shown from the competent, credible evidence is that Plaintiff's neck was grazed, resulting in no short term or permanent injury. Such an injury is *de*

minimis. In dicta, the Eleventh Circuit, in Oliver v. Falla, 258 F.3d 1277, 1282 (11th Cir. 2001), indicated that nominal damages are probably not awardable in an Eighth Amendment case. Here, Plaintiff has provided no medical bills or similar evidence showing any damages attributable to Officers Scott or Jimenez. Not only has Plaintiff failed to show more than a *de minimis* injury or *de minimis* use of force, but also he has failed to show actual damages.

Insofar as Plaintiff is seeking punitive damages, such a request should be summarily denied because Plaintiff has neither pled nor presented any credible evidence that Defendants' conduct was motivated by evil motive or intent. See Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640 (1983); Anderson v. City of Atlanta, 778 F.2d 678, 688 (11th Cir. 1985); and cases cited in DE 112 at p. 12.

Conclusion

For the foregoing reasons, the decision of the district court should be reversed and the matter remanded with instructions to enter judgment on behalf Officers Scott and Jimenez based on qualified immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because the brief contains 6,543, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally based typeface using Microsoft Office Word 2003, 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of June, 2010, an original and 6 copies of the foregoing Initial Brief for Defendants-Appellants were sent by Federal Express to the Court of Appeals; a true and correct copy of the same was served by Federal Express to Craig Williams, No. 990650, Florida Civil Commitment Center, 13619 SE Highway 70, Arcadia, FL 34266; and the foregoing brief was electronically uploaded to the Eleventh Circuit Court of Appeals' Internet web site at www.ca11.uscourts.gov.

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