

APPEAL, CASREF, PAW

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:09-cv-20936-MGC**

Brown v. Passmore et al
Assigned to: Judge Marcia G. Cooke
Referred to: Magistrate Judge Patrick A. White
Case in other court: USCA, 11-11242-DD
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 05/13/2009
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil
Rights
Jurisdiction: Federal Question

Plaintiff**Eldrick Brown**

represented by **Eldrick Brown**
DC #407730
Wakulla Correctional Institution -
Annex
110 Melaleuca Drive
Crawfordville, FL 32327
PRO SE

V.

Defendant**Roderick Passmore**
Pin # 5532

represented by **Kevin Renard Jones**
City of Miami
444 SW 2nd Ave
Suite Ste. 945
Miami, FL 33130
305-416-1800
Fax: 305-416-1801
Email: krjones@miamigov.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brent John Chudachek
Ronald J Cohen PA
8100 Oak Lane
Suite 403
Miami Lakes, FL 33013
305-823-1212
Fax: 305-823-7778
Email: bchudachek@roncohenlaw.com
ATTORNEY TO BE NOTICED

Defendant**William Goins**
Pin# 2372

represented by **Kevin Renard Jones**
(See above for address)

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Brent John Chudachek
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Dairon Williams
Pin# 7647

represented by **Kevin Renard Jones**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Brent John Chudachek
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

William Cook
Pin# 1184

represented by **Kevin Renard Jones**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Brent John Chudachek
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Reginald Kinchen
*Sgt., Pin# 3622
TERMINATED: 01/19/2010*

represented by **Kevin Renard Jones**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
04/09/2009	<u>1</u>	COMPLAINT (42 USC 1983) against all defendants, filed by Eldrick Brown. (nc) Modified MJSTAR event on 1/6/2011 (yc). (Entered: 04/09/2009)
04/09/2009	<u>2</u>	MOTION for Leave to Proceed in forma pauperis by Eldrick Brown with Inmate's Account Statement attached (nc) (Entered: 04/09/2009)
04/09/2009	<u>3</u>	Clerks Notice Referring Case to Magistrate Judge Patrick A. White. (nc) (Entered: 04/09/2009)
05/04/2009	<u>4</u>	NOTICE of Change of Address by Eldrick Brown (system updated) (tas) (Entered: 05/06/2009)
05/13/2009	<u>5</u>	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT OF CLERK OF \$350.00 and Granting <u>2</u> Motion for Leave to Proceed in forma pauperis.

		Signed by Magistrate Judge Patrick A. White on 5/12/2009. (tw) (Entered: 05/13/2009)
05/13/2009	<u>6</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 5/12/2009. (tw) (Entered: 05/13/2009)
05/13/2009	<u>7</u>	PRELIMINARY REPORT OF MAGISTRATE JUDGE. Recommending that the Complaint raising claims of false arrest remain pending against OfficersP assmore, Williams, Cook, Goins and Kinchen, in their individual capacities. Objections to R&R due by 6/1/2009. Signed by Magistrate Judge Patrick A. White on 5/12/2009. (tw) (Entered: 05/13/2009)
05/13/2009	<u>8</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: 1.City of Miami Police Officer Roderick Passmore (#5532), 2. City of Miami Police Officer Dairon Williams (#7647), 3. City of Miami Police Officer William Cook (#1184), 4. City of Miami Police Officer William Goins (#2372)and 5. City of Miami Police Sergeant Reginald Kinchen (#3622) located at:City of Miami Police Department, 400 N.W. 2nd Avenue, Miami, FL 33128. Signed by Magistrate Judge Patrick A. White on 5/12/2009. (tw) (Entered: 05/13/2009)
05/13/2009	<u>9</u>	Summons Issued as to Roderick Passmore. (br) (Entered: 05/13/2009)
05/13/2009	<u>10</u>	Summons Issued as to Dairon Williams. (br) (Entered: 05/13/2009)
05/13/2009	<u>11</u>	Summons Issued as to William Cook. (br) (Entered: 05/13/2009)
05/13/2009	<u>12</u>	Summons Issued as to William Goins. (br) (Entered: 05/13/2009)
05/13/2009	<u>13</u>	Summons Issued as to Reginald Kinchen. (br) (Entered: 05/13/2009)
05/22/2009	<u>14</u>	SUMMONS (Affidavit) Returned Executed by Eldrick Brown. Roderick Passmore served on 5/20/2009, answer due 6/9/2009. (tas) (Entered: 05/26/2009)
06/02/2009	<u>15</u>	MOTION to Appoint Counsel by Eldrick Brown. Responses due by 6/19/2009 (tas) (Entered: 06/03/2009)
06/03/2009	<u>17</u>	SUMMONS (Affidavit) Returned Executed Dairon Williams served on 5/28/2009, answer due 6/17/2009. (asl) (Entered: 06/04/2009)
06/03/2009	<u>18</u>	SUMMONS (Affidavit) Returned Executed William Goins served on 5/28/2009, answer due 6/17/2009. (asl) (Entered: 06/04/2009)
06/03/2009	<u>19</u>	SUMMONS (Affidavit) Returned Executed Reginald Kinchen served on 6/2/2009, answer due 6/22/2009. (asl) (Entered: 06/04/2009)
06/03/2009	<u>20</u>	SUMMONS (Affidavit) Returned Executed William Cook served on 6/2/2009, answer due 6/22/2009. (asl) (Entered: 06/04/2009)
06/04/2009	<u>16</u>	ORDER denying <u>15</u> Motion to Appoint Counsel. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 6/4/2009. (cz) (Entered: 06/04/2009)

06/15/2009	<u>21</u>	MOTION for More Definite Statement by Roderick Passmore. (Attachments: # <u>1</u> Exhibit clerks page, # <u>2</u> Exhibit alias list, # <u>3</u> Text of Proposed Order proposed order)(Jones, Kevin) (Entered: 06/15/2009)
06/17/2009	<u>22</u>	MOTION for More Definite Statement by William Goins, Dairon Williams. (Attachments: # <u>1</u> Exhibit clerks docket list, # <u>2</u> Exhibit alias list, # <u>3</u> Text of Proposed Order)(Jones, Kevin) Modified on 6/19/2009 (ls). (Entered: 06/17/2009)
06/22/2009	<u>23</u>	MOTION for More Definite Statement by William Cook, Reginald Kinchen. (Attachments: # <u>1</u> Exhibit prior arrest history, # <u>2</u> Exhibit alias list)(Jones, Kevin) (Entered: 06/22/2009)
06/23/2009	<u>24</u>	NOTICE of Attorney Appearance by Brent John Chudachek on behalf of Roderick Passmore, William Cook (Chudachek, Brent) (Entered: 06/23/2009)
07/10/2009	<u>25</u>	MOTION for Leave to Proceed in forma pauperis by Eldrick Brown. (tas) (Entered: 07/13/2009)
07/10/2009		Clerks Notice of Docket Correction re <u>25</u> MOTION for Leave to Proceed in forma pauperis. Error(s): Document Filed in Wrong Case ; Correction - Original document restricted, docket text modified, refiled in correct case # 08cv20936. (tas) (Entered: 07/13/2009)
07/21/2009	<u>26</u>	ORDER OF MAGISTRATE JUDGE granting <u>21</u> Motion for More Definite Statement; granting <u>22</u> Motion for More Definite Statement and granting <u>23</u> Motion for More Definite Statement. Signed by Magistrate Judge Patrick A. White on 7/21/2009. (tw) (Entered: 07/21/2009)
07/28/2009	<u>27</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS. The Complaint remains pending against Officers Passmore, Williams, Cook, Goins and Kinchen, in their individual capacities. Signed by Judge Marcia G. Cooke on 7/28/09. (tm) (Entered: 07/28/2009)
08/13/2009	<u>28</u>	AMENDED COMPLAINT, filed by Eldrick Brown.(asl) (Entered: 08/13/2009)
08/13/2009	<u>29</u>	MOTION to Supplement the Record re <u>28</u> Amended Complaint by Eldrick Brown. (asl) (Entered: 08/13/2009)
08/20/2009	<u>30</u>	MOTION to Dismiss <u>28</u> Amended Complaint, <u>29</u> MOTION to Supplement the Record re <u>28</u> Amended Complaint by Roderick Passmore, William Goins, Dairon Williams, William Cook, Reginald Kinchen. Responses due by 9/8/2009 (Attachments: # <u>1</u> Exhibit Exhibit A, # <u>2</u> Exhibit Exhibit B, # <u>3</u> Exhibit Exhibit C, # <u>4</u> Exhibit Exhibit D, # <u>5</u> Exhibit Exhibit e, # <u>6</u> Exhibit Comp Exhibit F, # <u>7</u> Exhibit comp exhibit f)(Jones, Kevin) (Entered: 08/20/2009)
08/28/2009	<u>31</u>	ORDER OF MAGISTRATE JUDGE denying <u>29</u> Motion to Supplement the Record. Signed by Magistrate Judge Patrick A. White on 8/28/2009. (tw) (Entered: 08/28/2009)
08/31/2009	<u>32</u>	REPORT AND RECOMMENDATIONS, Recommending that the Motion to Dismiss [DE# 30]be denied, and the alternative Motion for More Definite

		Statement be denied, as the plaintiff has sufficiently set forth facts to state a Fourth Amendment claim. Objections to R&R due by 9/18/2009. Signed by Magistrate Judge Patrick A. White on 8/31/2009. (tw) (Entered: 08/31/2009)
08/31/2009	<u>33</u>	REPORT AND RECOMMENDATIONS Recommending that this case proceed on the Amended Complaint [DE# 31] on a claim that the defendants Kinchen, Passmore, Williams, Goins and Cook conducted an unconstitutional search and effectuated a false arrest on July 28, 2006. It is further recommended that the Motion to Dismiss [DE# 33] be denied. Objections to R&R due by 9/18/2009. Signed by Magistrate Judge Patrick A. White on 8/31/2009. (tw) Document restricted due to error. Modified on 11/24/2009 (dg). (Entered: 08/31/2009)
09/08/2009	<u>34</u>	OBJECTION to <u>32</u> , <u>33</u> Report and Recommendations by Roderick Passmore, William Goins, Dairon Williams, William Cook, Reginald Kinchen. (Jones, Kevin) (Entered: 09/08/2009)
11/20/2009	<u>35</u>	SHORTENED SCHEDULING ORDER: Amended Pleadings due by 2/26/2010. Discovery due by 2/12/2010. Joinder of Parties due by 2/26/2010. Motions due by 3/9/2010.. Signed by Magistrate Judge Patrick A. White on 11/20/2009. (tw) (Entered: 11/20/2009)
11/24/2009	<u>36</u>	Clerks Notice of Docket Correction re <u>33</u> REPORT AND RECOMMENDATIONS. Document Restricted Due to Error. (dg) (Entered: 11/24/2009)
12/10/2009	<u>37</u>	MOTION to Take Deposition from Eldrick Brown by William Cook, William Goins, Reginald Kinchen, Roderick Passmore, Dairon Williams. (Jones, Kevin) (Entered: 12/10/2009)
12/14/2009	<u>38</u>	ORDER granting <u>37</u> Motion to Take Deposition from Eldrick Brown. This is an unrepresented plaintiff and the defendants shall govern themselves accordingly. The defendants shall provide the plaintiff with a copy of his deposition. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 12/14/2009. (cz) (Entered: 12/14/2009)
12/18/2009	<u>39</u>	MOTION for Production of Documents by Eldrick Brown. (jua) (Entered: 12/18/2009)
12/21/2009	<u>40</u>	ORDER dismissing <u>39</u> Motion to Produce. This discovery request must be made directly to the defendants. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 12/21/2009. (cz) (Entered: 12/21/2009)
01/12/2010	<u>41</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS denying <u>30</u> Motion to Dismiss, filed by Reginald Kinchen, Dairon Williams, Roderick Passmore, William Cook, William Goins. Plaintiff's claims for false arrest are DISMISSED;Plaintiffs Amended Complaint shall proceed on the claim that Defendants Roderick Passmore, Dairon Williams, William Goins, and William Cook violated Plaintiffs civil rights;Defendant Reginald Kinchen is DISMISSED as a party to this action.. Signed by Judge Marcia G. Cooke on 1/12/10. (tm) (Entered: 01/12/2010)
01/15/2010	<u>42</u>	MOTION for Extension of Time to Complete Discovery by William Cook,

		William Goins, Reginald Kinchen, Roderick Passmore, Dairon Williams. (Attachments: # 1 Text of Proposed Order)(Jones, Kevin) (Entered: 01/15/2010)
01/20/2010	<u>43</u>	ANSWER and Affirmative Defenses to Amended Complaint with Jury Demand by William Cook, William Goins, Roderick Passmore, Dairon Williams.(Jones, Kevin) (Entered: 01/20/2010)
01/22/2010	<u>44</u>	Interrogatories by Eldrick Brown (lbc) (Entered: 01/22/2010)
02/05/2010	<u>45</u>	MOTION to Compel <i>Answers</i> /Amended Request for Admission by Eldrick Brown. Responses due by 2/22/2010 (jua) (Entered: 02/08/2010)
02/09/2010	<u>46</u>	ORDER granting <u>42</u> Motion for Extension of Time to Complete Discovery to on or before 2/14/10, date requested ; dismissing <u>45</u> Motion to Compel, the plaintiff filed this pleading as a discovery request.. Signed by Magistrate Judge Patrick A. White on 2/9/2010. (cz) (Entered: 02/09/2010)
02/22/2010	<u>47</u>	MOTION for Extension of Time to Complete Discovery by Eldrick Brown. (jua) (Entered: 02/22/2010)
02/24/2010	<u>48</u>	ORDER granting <u>47</u> plaintiff's Motion for Extension of Time to Complete Discovery. All dates entered in the Pre-Trial Scheduling Order are extended for sixty days from the dates entered in that order. no further extensions will be granted. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 2/24/2010. (cz) (Entered: 02/24/2010)
03/02/2010	<u>49</u>	MOTION/REQUEST for Signed Subpoenas by Eldrick Brown. (jua) (Entered: 03/02/2010)
03/24/2010	<u>50</u>	ORDER dismissing <u>49</u> Motion for signed subpoenas. The plaintiff must make his arrangements with the Clerk's Office.. Signed by Magistrate Judge Patrick A. White on 3/24/2010. (cz) (Entered: 03/24/2010)
03/29/2010	<u>51</u>	NOTICE of Attorney Appearance by Brent John Chudachek on behalf of William Goins, Dairon Williams (Chudachek, Brent) Modified on 3/31/2010 (ls). [Filers modified by Clerk] (Entered: 03/29/2010)
04/05/2010	<u>52</u>	Pretrial Statement of Eldrick Brown (lbc) (Entered: 04/05/2010)
04/05/2010	<u>53</u>	MOTION for Extension of Time to File by Eldrick Brown. (tb) (Entered: 04/06/2010)
04/28/2010	<u>54</u>	ORDER granting <u>53</u> Motion for Extension of Time to File Response/Reply nunc pro tunc.. Signed by Magistrate Judge Patrick A. White on 4/28/2010. (cz) (Entered: 04/28/2010)
05/09/2010	<u>55</u>	MOTION for Summary Judgment by William Cook, William Goins, Roderick Passmore, Dairon Williams. Responses due by 6/2/2010 (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J)(Jones, Kevin) (Entered: 05/09/2010)
05/10/2010	<u>56</u>	MOTION for Summary Judgment by Eldrick Brown. Responses due by 6/3/2010 (ral) (Entered: 05/10/2010)

05/11/2010	<u>57</u>	ORDER INSTRUCTING PRO SE PLAINTIFF CONCERNING RESPONSE TO MOTION FOR SUMMARY JUDGMENT. (Responses due by 6/4/2010) Signed by Magistrate Judge Patrick A. White on 5/11/2010. (tw) (Entered: 05/11/2010)
05/18/2010	<u>58</u>	MOTION for Sanctions by Eldrick Brown. (ral) (Entered: 05/18/2010)
05/18/2010	<u>59</u>	RESPONSE to Motion re <u>58</u> MOTION for Sanctions filed by William Cook, William Goins, Roderick Passmore, Dairon Williams. Replies due by 5/28/2010. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B)(Jones, Kevin) (Entered: 05/18/2010)
05/20/2010	<u>60</u>	ORDER denying <u>58</u> Motion for Sanctions. Signed by Magistrate Judge Patrick A. White on 5/20/2010. (tw) (Entered: 05/20/2010)
06/01/2010	<u>61</u>	RESPONSE/Motion in Opposition re <u>55</u> MOTION for Summary Judgment filed by Eldrick Brown. (ral) (Entered: 06/01/2010)
06/02/2010	<u>62</u>	RESPONSE to Motion re <u>56</u> MOTION for Summary Judgment filed by William Cook, William Goins, Roderick Passmore, Dairon Williams. Replies due by 6/14/2010. (Jones, Kevin) Modified to remove incorrect filer (Reginald Kinchen) on 6/3/2010 (ral). (Entered: 06/02/2010)
06/03/2010	<u>63</u>	Clerks Notice to Filer re <u>62</u> Response to Motion. Wrong Filer Name(s) Selected; ERROR - The correction was made by the Clerk. It is not necessary to refile this document. (ral) (Entered: 06/03/2010)
06/14/2010	<u>64</u>	REPLY to Response to Motion re <u>55</u> MOTION for Summary Judgment filed by William Cook, William Goins, Reginald Kinchen, Roderick Passmore, Dairon Williams. (Jones, Kevin) (Entered: 06/14/2010)
06/17/2010	<u>65</u>	RESPONSE/REPLY to <u>64</u> Reply to Response to Motion by Eldrick Brown. (ral) (Entered: 06/17/2010)
06/17/2010	<u>66</u>	PRETRIAL MEMORANDUM by William Cook, William Goins, Reginald Kinchen, Roderick Passmore, Dairon Williams. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F)(Jones, Kevin) (Entered: 06/17/2010)
09/27/2010	<u>67</u>	Letter of Inquiry from Eldrick Brown (docket sheet sent) (ebs) (Entered: 09/27/2010)
01/03/2011	<u>68</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>56</u> MOTION for Summary Judgment filed by Eldrick Brown, <u>55</u> MOTION for Summary Judgment filed by Dairon Williams, Roderick Passmore, William Cook, William Goins Recommending that: 1) the joint motion for summary judgment by defendants Passmore, Goins, Williams, and Cook (DE#55) be DENIED; 2) the plaintiffs opposing motion for summary judgment (DE#56) be DENIED; and 3) the case remain pending as to the defendants Passmore, Goins, Williams, and Cook on the claim that an illegal warrantless entry and search of plaintiff Browns residence was conducted on 9/29/2005, in violation of his rights under the Fourth Amendment. Objections to R&R due by 1/20/2011. Signed by Magistrate Judge Patrick A. White on 1/3/2011. (br) (Entered: 01/03/2011)

01/03/2011	<u>69</u>	REPORT that case is ready for trial re; 42 USC 1983 case re 1 Complaint filed by Eldrick Brown Recommending that this case be placed on the trial calendar of the District Judge. Objections to R&R due by 1/20/2011. Signed by Magistrate Judge Patrick A. White on 1/3/2011. (br) Modified text to term R&R and convert to Order on 3/18/2011 (dm). (Entered: 01/03/2011)
01/17/2011	<u>70</u>	OBJECTIONS to Report and Recommendations by William Cook, William Goins, Roderick Passmore, Dairon Williams. (Jones, Kevin) (Entered: 01/17/2011)
02/04/2011	<u>71</u>	RESPONSE/REPLY/ Motion in Opposition of the Defendant's <u>70</u> Objections to Report and Recommendations by Eldrick Brown. (mg) (Entered: 02/04/2011)
02/04/2011	<u>72</u>	NOTICE by Eldrick Brown (mg) (Entered: 02/04/2011)
02/28/2011	<u>73</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS for <u>56</u> Motion for Summary Judgment filed by Eldrick Brown, <u>55</u> Motion for Summary Judgment, filed by Dairon Williams, Roderick Passmore, William Cook, William Goins. Signed by Judge Marcia G. Cooke on 2/28/2011. (tm) (Entered: 02/28/2011)
03/17/2011	<u>74</u>	NOTICE OF INTERLOCUTORY APPEAL as to <u>73</u> Order Adopting Report and Recommendations, by Roderick Passmore. Filing fee \$ 455.00.. 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. (Attachments: # <u>1</u> Exhibit) (Greco, John) (Entered: 03/17/2011)
03/18/2011		Transmission of Notice of Appeal, order, Report and Recommendation and Docket Sheet to US Court of Appeals re <u>74</u> Notice of Interlocutory Appeal, Fee- Not Paid (cqs) (Entered: 03/18/2011)
03/18/2011	<u>75</u>	USCA Appeal Fees received \$ 455.00 receipt number FLS100015914 re <u>74</u> Notice of Interlocutory Appeal, filed by Roderick Passmore (cqs) (Entered: 03/21/2011)
03/30/2011	<u>76</u>	Acknowledgment of Receipt of NOA from USCA re <u>74</u> Notice of Interlocutory Appeal, filed by Roderick Passmore. Date received by USCA: 3/30/2011. USCA Case Number: 11-11242-DD. (cqs) (Entered: 03/30/2011)
04/01/2011	<u>77</u>	TRANSCRIPT INFORMATION FORM by Roderick Passmore re <u>74</u> Notice of Interlocutory Appeal,. No Transcript Requested. (Greco, John) (Entered: 04/01/2011)
04/08/2011	<u>78</u>	MOTION to Appoint Counsel by Eldrick Brown. Responses due by 4/25/2011 (ls) (Entered: 04/11/2011)

PACER Service Center

Transaction Receipt

04/18/2011 15:17:56			
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Billable Pages:	6	Cost:	0.48

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-20936-CIV-COOKE
MAGISTRATE JUDGE P.A. WHITE

ELDRICK BROWN, :
 :
Plaintiff, :
 :
v. :
 :
RODERICK PASSMORE, et al., :
 :
Defendants. :

REPORT OF
MAGISTRATE JUDGE

I INTRODUCTION

In this case, plaintiff Brown filed a *pro se* civil rights complaint pursuant to 42 U.S.C. §1983 (DE#1) with claims focused on events surrounding entry of police officers into his home in Miami-Dade County, search of the premises, and his arrest on September 29, 2005, from which charges in state criminal case F05-030997 arose. He named five City of Miami Police Officers as defendants: 1) Roderick Passmore, #5532; 2) Dairon Williams, #7647; 3) William Cook, #1184; 4) William Goins, #2372; and 5) Reginald Kinchen, #3622. Brown thereafter filed a superseding amended complaint (DE#28) naming only against Passmore, Williams, Cook, and Goins.

After the Amended Complaint was filed (DE#28), and Defendants moved to dismiss or for a more definite statement (DE#30), defendant Kinchen was dismissed from this case, Brown's claim of false arrest was dismissed as to all defendants for reasons discussed in the Report of Magistrate Judge (DE#32) and in the Court's Order adopting the Report (DE#41). The complaints as amended remains pending against Passmore, Williams, Cook, and Goins solely the claim that officers unlawfully entered and searched Brown's home on September 29, 2005, in violation of his Fourth Amendment rights.

This Cause is before the Court upon Motions for Summary Judgment by the Defendants (DE#55), and by the Plaintiff (DE#56). As a *pro se* litigant, plaintiff Brown was advised his right to oppose the defendants' summary judgment motion, and was instructed

regarding the standard of review for such motions. (See Order of Instructions, DE#57).¹

¹ Rule 56(c) of the Federal Rules of Civil Procedure 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 (1986), the 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. (citations omitted)

Thus, in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the 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. (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 nonmoving 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 nonmoving 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 pre-

II BACKGROUND

A brief background discussion concerning plaintiff Brown's allegations, and his relevant criminal history, will serve to place the amended complaint and Brown's surviving claim in context.

In pertinent part, the Prior Report (DE#32, at p.2) noted the following. The initial complaint contained general allegations about a September 2005 arrest made by Officers Passmore, Williams, Cook and Goins, whom plaintiff alleged engaged in false arrest after they entered and searched his apartment without a warrant. (Id.). Plaintiff also stated that a few weeks later the four officers returned to his apartment with Officer Kinchen, who arrested him again on false charges, but the pleading [DE#1] provided no details about those events. As noted in the Report (DE#32, p.2), Plaintiff Brown submitted with the initial \$1983 complaint [DE#1] a copy of a police Internal Affairs Complaint ["Complaint Form," and "Complaint Narrative," at DE#1, pp. 10-11] from which it appeared Brown had complained the second arrest was for stealing electricity; and that there was a third arrest for selling drugs. (Report, DE#32, p.2).

The Report (DE#32, at p.2, footnote 1, and related text) noted that plaintiff Brown's Amended Complaint [DE#28 in this case] "raises claims solely concerning his September 29, 2005 arrest," and observed that Brown's reference in the amended pleading to an arrest date of September 30, 2005, was "apparently an error" as his state court documents reflect his arrest on the 29th of September.

sented by the nonmoving 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. Puller 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 v. Liberty Lobby, Inc., supra).

Pursuant to Brown v. Shinbaum, 828 F.2d 707 (11 Cir. 1987), the Order of Instructions (DE#57) was entered to inform the *pro se* plaintiff Brown of his right to respond to the defendants' motion for summary judgment, and to instruct him regarding requirements under Fed.R.Civ.P. 56 for a proper response to such a motion.

(Report, DE#32, p.2, n.1). The Report (DE#32) further noted that, in Case 09-Civ-20945-Seitz, Brown was separately litigating claims concerning his arrest on July 28, 2006. (Id., at n.2)

Taking judicial notice of public records from state court pertaining to plaintiff Brown (see Report, DE#32 at footnote 3), the following relevant criminal history pertaining to Brown was outlined in Section II of the prior Report (DE#32, at pp. 5-7), which read in pertinent part, as follows, *verbatim*:

The Plaintiff's Relevant Criminal History

According to court dockets maintained by the Miami-Dade Count Clerk of Courts, the plaintiff has the following relevant criminal history:

1. The plaintiff was arrested on August 17, 2005 for possession of cannabis and battery on an elderly person. (Case Number F05026197). The plaintiff was released on bond.
2. While out on bond, he was arrested on September 29, 2005 for possession with intent to sell marijuana and cocaine and resisting arrest without violence. (Case No. F05030997). Bond was revoked and the plaintiff remained in custody for ten months. This arrest is the subject of the instant complaint.
3. The charge for possession with intent to sell marijuana and cocaine was "no actioned" and the misdemeanor resisting arrest charge was bounded down to county court. On November 29, 2005 the plaintiff pled no contest to the misdemeanor and was sentenced to time served.
4. On July 5, 2006 the plaintiff pled guilty to possession of marijuana and was sentenced to time served (10 months). He also pled guilty to battery on an elderly person and was sentenced to one year probation.
5. On July 28, 2006, the plaintiff was arrested for theft of electricity and sanitary nuisance. The theft charge was no actioned and the plaintiff pled guilty to the nuisance charge and received a suspended sentence. This arrest is the subject of Case No. 09-20945-CIV-SEITZ.
6. On October 13, 2006, while serving his probation, the plaintiff was arrested for possession with intent to sell cocaine. (Case No. F06034364A). The plaintiff was

sentenced to six years imprisonment, which he is currently serving.

The plaintiff is in custody pursuant to the conviction relating to the charges from the October 13, 2006 arrest. He is no longer in custody for the charges relating to the July 28, 2006 arrest.

(Report, DE#32, pp. 5-7).

III DISCUSSION

As discussed above, this case is presently pending against defendant Officers Passmore, Williams, Goins, and Cook on plaintiff Brown's claim that on September 29, 2005, they illegally entered his residence and therein conducted an unlawful warrantless search.

A. Law Pertaining to Claims of Illegal Entry and Search

The Supreme Court has held that in cases where probable cause exists, no warrant is required to apprehend a suspected felon in a public place. See United States v. Watson, 423 U.S. 411 (1976). Except in special circumstances, however, a line is drawn at the doorway of a person's residence, and the entry into a home to conduct a search or make an arrest is presumed to be unreasonable under the Fourth Amendment unless it is done pursuant to a warrant. See Payton v. New York, 445 U.S. 573, 583-90 (1980); Johnson v. United States, 333 U.S. 10, 13-15 (1948). There are two exceptions, exigent circumstances, and consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show...the presence of exigent circumstances"); Swint v. City of Wadley, Alabama, 5 F.3d 1435, 1443 (11 Cir. 1993) ("[a]bsent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant") (quoting Donvan v. Dewey, 452 U.S. 594, 598, n.6 (1981)). Where consent has not been given, then, as the

Court stated in Payton, the Fourth Amendment draws "a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton, supra, at 590.

With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See Illinois v. Rodriguez, 497 U.S. 177, 181 (1990); Payton, supra, 445 U.S. at 586. A warrant requirement clearly places a burden on the police, and "impedes to some extent the vigor with which the Government can seek to enforce its laws," Steagald v. United States, 451 U.S. 204, 222 (1981); however, the Fourth Amendment right protected [i.e., the right of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the government] is, in contrast, "weighty," Id., at 222, and the "additional burden imposed on police by a warrant requirement is minimal." Id. As the Supreme Court noted in Steagald, police, attempting to arrest a suspect, may avoid altogether the need to obtain a search warrant simply by waiting for a suspect to step out of the home, and effecting the individual's arrest, in a public place. Id. at p. 221, n.14, and related text. Alternatively, the relatively short time required to obtain a warrant from a judge who is on duty, or telephonically if a judge is not nearby, means that the warrant requirement will seldom hinder efforts to apprehend a felon. Id. at p. 222.

The exigency exception applies only when "the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." United States v. Santa, 236 F.3d 662, 669 (11 Cir. 2000) (quoting United States v. Burgos, 720 F.2d 1520, 1526 (11 Cir. 1983)). The exigent circumstances doctrine would, for example, justify a warrantless entry into a home if the police were in "hot pursuit" of a fleeing felon. See United States v. Santana, 427 U.S. 38, 42-43 (1976); United States v. Blasco, 702 F.2d 1315, 1325 (11 Cir. 1983). In addition to "hot pursuit," the Courts have recognized other situations in which "exigent circumstances" would justify a warrantless intrusion. These include situations in which

the facts would lead a reasonable, experienced officer to believe that if time were taken to obtain a warrant, there would be danger that the suspect would flee or escape, there would be a risk of harm to police officers or the general public, or there would be a risk of loss, destruction, removal, or concealment of evidence. See Santa, supra, 236 F.2d at 669; Blasco, supra, 702 F.2d at 1325.

B. Analysis

As discussed below, the record contains sworn versions of the facts given by the defendants and by the plaintiff.

With their motion for summary judgment (DE#55), the defendants have submitted a copy of Brown's 2/1/2010 deposition taken in this case (Exhibit A, DE55-1); an Arrest Report/Probable Cause Affidavit in police case 050929023606 also bearing Court Case F05-30977, signed and dated by D. Williams #7647 on 9/29/05, and filed on 9/30/05 in Miami-Dade Circuit Court, naming "Defendant" Eldrick Brown and "Co-Defendant" Giordano Rolle as being arrested on 9/29/05 at 16:15 p.m., and listing two charges: "Poss. Marijuana w/intent sell, and "Poss. Cocaine w/intent sell" (Exhibit B, DE#55-2); and a copy of a Miami Police Department Property Unit *Property Receipt* in police Case 05023606, with Eldrick Brown's name, and address [5918 NW 13 Av, Miami, FL], prepared on 9/28/2005, naming Eldrick Brown as the only defendant, listing Darion Williams as the "Responsible Officer" and Stanley Jean-Poix as the "Submitting Officer," and stating that on 9/28/2005 Property Officer Michael Ali received 3 items, all with "Status HOLD," listed as: Item 1 [described as 6 "PLASTIC BAGS W/SUSP MARIJUANA EST GRAMS 7.6"]; Item 2 [described as 1 "GRN PLASTIC BAGS W/SUSP ROCK/POWDER COCAINE EST GRAMS 5.5"]; and Item 3 [described as 31 "PLASTIC BAGS W/SUSP ROCK/POWDER COCAINE TW 47.3 GMS EST GRAMS 4.3"] (Exhibit C, DE#55-3). In addition, the defendants have submitted seven additional exhibits. These are: Affidavits by defendants Passmore, Goins, Williams and Cook Exhibits (filed respectively as Exhibits "D" to "G" at DE#s 55-4 to 55-7); an Affidavit by Officer Stanley Jean-Poix (Exhibit H, at DE55-8); an Affidavit by Officer Michael Braddy (Exhibit I at DE#55-9); and a Composite Exhibit consisting of

documents relating to Miami-Dade Misdemeanor Case M05-53483, and Miami-Dade Felony Case F05-030997 (Exhibit J at DE#55-10).

Officer Darion Williams' Arrest Report/Affidavit (Ex. B) indicates that on 9/29/2005 officers were engaged in narcotics surveillance outside 5918 N.W. 13th Avenue, in Miami; that the "Co def" [i.e., Co-defendant Giordano Rolle] was observed standing in front of the address and being approached by unknown subjects, who would give him unknown quantities of U.S. currency, and that, in exchange, he [Co def Rolle] would direct the subjects to the "def" [defendant Eldrick Brown] who "would take a clear bag from his left front pocket * removing narcotics giving them to the subjects." The Report/Affidavit further stated that "Ofc. Passmore was advised via radio of the transaction and moved into the location," that "Co def" [Rolle] observed Passmore and "yelled over to the def [Brown] causing him to run inside the location." The Report/Affidavit further states that "Ofc. Braddy and Ofc. Jean-Poix followed def [Brown] into the location stopping the def." The Report/Affidavit states that "search of the location revealed inside the location the clear bag containing 6 clear baggies of marijuana, 15 green baggies of powder cocaine, 16 baggies of rock cocaine with clovers, and 15 green baggies of rock cocaine." Last, the Report/Affidavit states, "Def. arrested." (Ex.B, DE55-2).

In their Affidavits, City of Miami Officers Passmore, Goins and Cook [Exs. D, E, and G, respectively] state that they were "working patrol" in Liberty City as part of the Model City Problem Solving Team ("MCPST") "on or about September 30, 2005;" and in their Affidavits Officers Williams, Jean-Poix and Braddy [Exs. F, H, and I, respectively] state they were doing the same "on or about September 29, 2005." Passmore, Goins and Williams state that there were "constant complaints of narcotics activity at 5918 NW 13th avenue," and that "on or about September 29, 2005" the MCPST "was conducting a narcotic surveillance at that location." (Exs. D-F).

Passmore, Williams, and Goins state that Williams and Goins sat across the street in an unmarked car, as an "eye ball,"

watching for narcotics sales. (Exs. D-F). Goins and Williams state that they saw people approach Rolle and hand him money, and saw Rolle direct the individuals to Brown, who had a clear sandwich bag in his hand, containing suspect narcotics, and that they saw Brown hand small objects from the sandwich bag to at least 4 suspected purchasers. Rolle was on the sidewalk, outside a chain link fence, and Brown was inside the fence, next to the door of the residence at 5918 NW 13th Avenue. Goins and Williams decided to call in take down teams. (Exs. E and F).

Passmore states that when Williams called out the take down over the radio, he [Passmore] moved in to take down Rolle and arrested him for "intent to sale [sic] marijuana and cocaine." Passmore states that he did not enter the residence to search for drugs or to arrest Brown, and that his sole responsibility in the operation was to arrest and secure Giordano Rolle. (Ex.D).

Jean-Poix and Braddy state that they were "tasked" to intercept Eldrick Brown, whose description was given over the radio. They each state that they approached Rolle, and that as they passed him he yelled "9" to Brown, that they each identified themselves to Brown as police officers, that Brown began to run inside the residence at 5918 NW 13th Avenue, and that they gave chase, never losing sight of Brown; that they arrested Brown inside, and that "Officer Passmore did not participate in the apprehension of Mr. Brown nor did he search the house." (Exs. H and I). Jean-Poix states: "I recall the drugs being in plain sight on a table near the kitchen area," and that the drugs were turned in to the Department's property unit. (Ex.H). Braddy states that "after Officer Jean-Poix and I arrested Mr. Brown and Jean-Poix impounded the narcotics this case was cleared by arrest." (Ex.I.).

Plaintiff Brown, in contrast, alleges in his complaint, as amended, and has indicated through his sworn testimony given at deposition (Ex.A, DE#55-1), that he was not outside when police came to his home on the date in question, that he was not engaged in conducting drug sales on that date with Mr. Rolle, and that no

drugs were found on him or in his residence that day. Brown testified that, without a lease, he rented the place from a relative, and that he, in turn, for about 3 months, had allowed Ms. Kerry Smith to live there. He charged Smith about \$70.00 to \$75.00 every two weeks, to reside there as a tenant/roommate. Brown testified that he had not seen Giordano Rolle since the day before the incident, and testified that he [Brown] was sound asleep in his own bed when Ms. Smith entered the room and awoke him to say that a police officer coming into the residence through his bedroom window. Brown testified that that officer was defendant Passmore. Brown testified that by the time he was fully awake Passmore had entered through the window with his gun drawn, had indicated that he was looking for somebody, asking "Where is he,?" and told Ms. Smith to step back. According to Brown, Officer Passmore looked in the bathroom, looked around his bedroom and around the bedroom occupied by Smith. Passmore walked Smith at gun point into the livingroom, and while standing in the hallway Passmore told him [Brown] to get up and go into the living room with Smith, and gave instructions for them not to move. Brown could hear other officers outside the house repeatedly saying, "Open the door." Brown testified that he heard Passmore tell them to go around to the back door, and that he believes they did not hear Passmore. Brown testified that after Passmore had been inside for a few [perhaps 5] minutes, Officers Goins and Williams kicked in his front door and entered the premises. Officer Cook entered after them. Brown testified that Goins asked, "Where is he?...Where is the drugs?," and Goins and Williams then engaged in a search, causing damage as they went, ripping the covers off of Brown's speakers and kicking a hole in his stereo; tipping over his couch and chairs, and ripping open the liners; and rummaging through the bedrooms and kitchen. According to Brown, after Officer Cook had followed Goins and Williams into the residence, a call was made for K-9 backup, and Cook went along with the unidentified K-9 Officer as the officer entered and conducted a search with help of the dog, which failed to result in the discovery of any drugs. Brown testified that only 5 officers were inside the house, Passmore who came through the window, Goins and Williams who broke down the front

door, Cook, and the unnamed K-9 officer who was accompanied by Cook during the k-9 assisted search of the premises. Eventually, officers took Brown and Smith outside, where Brown saw that the police had Rolle in custody.

It is undisputed that, although Brown was arrested by the police on 9/29/2005 at 16:15 p.m. for "possession with intent to sell" marijuana and cocaine [see Arrest Report/Affidavit, Ex.B, DE#55-2], the State Attorney chose not to pursue drug charges against Brown in relation to events of September 29, 2005. As reflected in the defendants' Composite Exhibit J, in relation to Brown and Case F05-030997, the State Attorney for the Eleventh Judicial Circuit of Florida filed an Information dated October 20, 2005, which charged in Count 1 that Eldrick Brown, "on or about September 29, 2005 [in Miami-Dade County] did unlawfully resist, obstruct, or oppose OFFICER R. PASSMORE" without violence, in violation of Fla.Stat. §843.02. (See Ex. J, DE#55-10 at pp. 4-7). As also reflected in Court Documents, the felony case F05-030997 against Brown was "Reduced and transfer[red] to County Ct" on Oct 20, 2005 (see Clerk's Minutes, at DE#55-10, p. 16), and the matter was pursued in Misdemeanor Case M05-053483, in which Brown took a plea to the 1st Degree Misdemeanor Charge of Resisting an Officer without Violence, and on 11/29/2005 was adjudicated guilty and was apparently sentenced to a term of 62 Days [DCJ 62], with 62 Days credit for time served [CTS 62]. (See Exhibit J, at DE#55-10, pp. 1-3, 15, and 19).

It is clear from the record, and the defendants acknowledge, that facts in this case are in dispute.

The defendants cite Scott v. Harris, 127 S.Ct. 1769, 1776 (2007) for the proposition that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." At page 9 of their motion [DE#55], the defendants argue that in this case, "the record evidence attached

to this motion irrefutably demonstrates that crack cocaine, powder cocaine, and marijuana were recovered and placed into the Miami Police Department's property unit by Officer Stanley Jean-Poix." They argue, in addition, that "[t]he arrest report, also attached hereto as an exhibit, supports the information contained within the property receipt because it indicates that Brown was arrested inside his apartment by Officer Jean-Poix." The officers also argue that "[w]hen considering the arrest report and affidavits of the Officers, they had at least arguable probable cause to arrest Mr. Brown for sale of narcotics." (Motion, DE#55, p.9). They further argue, based on the officers' personal affidavits stating that Brown was observed engaged with Rolle in conducting drug sales outside the house, that when Brown saw officers moving in he fled into his house closely followed by Braddy and Jean-Poix, and that Brown was arrested and the narcotics were discovered in plain view close to where Mr. Brown was apprehended, "it was imminently reasonable for the Officers to believe that Mr. Brown were selling illegal drugs"... and that "[i]t was equally reasonable for the officers to chase Brown in order to apprehend him." The defendants argue that to the extent the complaint as amended embodies a claim of false arrest, they are entitled to qualified immunity, and summary judgment in their favor. (Motion, DE#55 at p.10).

The defendants, in regard to the claim for improper search, argue that they are entitled to qualified immunity (Motion, DE#55 at p.11), where the Officers' affidavits state that Brown and Rolle were seen engaged in suspected drug sales on the street outside the residence, where Braddy and Jean-Poix chased Brown never losing sight of him, and where they apprehended Brown inside his home and found "the drugs inside his apartment in plain view." The defendants argue that they did not need a warrant to enter Brown's home "because they had exigent circumstances given the nature of the circumstances." (Id.).

The defendants invoke Heck v. Humphrey, 512 U.S. 477, 478 (1994) for the proposition that a state prisoner may not bring a claim for damages under 42 U.S.C. §1983 if judgment in his favor

would necessarily imply the validity of his conviction. They argue that, in Brown's case, despite the state's decision to take no action on the drug charges listed in the Police Report against him, the fact that Brown later was charged with and plead guilty or no contest to Resisting Without Violence [a misdemeanor] means that Brown cannot prevail on his complaint for damages in this case because doing so would necessarily undermine his conviction on the misdemeanor. [As noted supra, Brown is not in custody on his conviction in case M05-053483, and he was sentenced to time served for the misdemeanor. The defendants correctly observe that the record does not reflect that Brown's conviction and sentence in that case have been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus].

If their version of the facts were taken as true, it could stand to reason that the named defendants against whom the case is pending (i.e., Passmore, Goins, Williams, and Cook) would be entitled to qualified immunity, and summary disposition in their favor of the amended complaint alleging unlawful entry and search of Plaintiff Brown's abode on 9/29/2005. [The defendants' Affidavits state that Passmore did not interact with Brown, did not enter his home, and was only involved in the take down and arrest of Rolle, outside of the residence. They state that Goins and Williams neither participated in Brown's arrest nor entered in or participated in search of the residence, and that they merely watched from an unmarked car across the street, and alerted other officers via radio to do a "take down" after Rolle was seen accepting money from people, outside the fence, and Brown was seen inside the fence handing the individuals small objects from a sandwich bag. The defendants' Affidavits state that Officer Cook had "no involvement in this case." According to the defendants, two officers (Jean-Poix and Braddy) did enter and search the residence on 9/29/2005, did observe and impound drugs that were in plain view

on a table near the kitchen, and did arrest Brown. Jean-Poix and Braddy, however, are not named as defendants in this lawsuit.

Despite the defendants' reliance on Scott v. Harris, it is apparent that there are in this case numerous genuine issues of material fact, the existence of which precludes summary disposition of the plaintiff's claims. Celotex Corp. v. Catrett, supra.

As discussed supra, the parties' sworn versions of the facts in this case stand in stark contrast to each other. The officers named as defendants [Passmore, Williams, Goins, and Cook] state, on one hand, that they had no involvement in entry and search of Brown's home on 9/29/2005 or in his arrest on that date, but that Brown and Rolle were seen on the street engaged in suspected drug sales, and that Officers Jean-Poix and Braddy, relying on exigent circumstances, lawfully followed Brown into his home without losing sight of him, and observed in plain sight on a table drugs which they impounded, which were sent to the Police Property Room for safe keeping, and which they state are documented on the police Property Receipt filed in this case at DE#55-3 as Exhibit C. They further argue that Brown's complaint should be barred under Heck because he ultimately was convicted of resisting an officer on 9/29/2005 without violence. Plaintiff Brown, on the other hand, has sworn that Passmore, Williams, Goins, and Cook did indeed enter and search his residence on the day of his arrest, and that they along with an unnamed K-9 officer were the only officers present inside his home that day. Brown has sworn that he was not on the street selling drugs with Rolle on the date in question when the police claim he was doing so, but instead was sound asleep in his bed. Brown also has sworn that on the date of his arrest he did not have drugs on him or in his home, and claims the defendant officers' warrantless entry into and the search of his home was unlawful.

The existence of disputed material facts is compounded by close examination of the Property Receipt (Defendants' Ex.C) listing the drugs which defendants claim were found in Brown's home in plain view on 9/29/2005, the day of his arrest (see Defendants'

Ex.B, Arrest Report/Affidavit, showing 5918 NW 13th Ave as the "arrest location," 9/29/2005 as the "arrest date," and 1615 as the "arrest time"). The Property Receipt for the impounded drugs clearly indicates on its face that the date on which the drugs were "received" at the Miami Police Department Property Unit was 9/28/2005, and the date on which the Property Receipt was "prepared" was 9/28/2005. It is unexplained how drugs stored in evidence at the Police Department on 9/28/2005 could have been found in plain view a day later at Brown's home, and how [as defendants have contended] those drugs could serve as a basis for Brown's 9/29/2005 arrest, as evidence that he was engaged in drug sales on 9/29, and as evidence that officers who did enter and search the home on 9/29 without a warrant had exigent circumstances on 9/29 for doing so.

The existence of disputed material facts is further compounded by consideration of the Information pursuant to which Brown was charged with Resisting Without Violence. The defendants argue that by virtue of Brown's plea, on the charge that he resisted an officer without violence on 9/29/2005, his complaint for damages, as amended, should be barred under Heck v. Humphrey. In the prior Report (DE#32) which was adopted (Order, DE#41), reasons for dismissal of Brown's false arrest claim were discussed (DE#32, at pp.7-8) as were reasons for non-applicability of Heck (DE#32, at pp.9-13). It remains unexplained how the offense of Resisting Without Violence on 9/29/2005, as charged against Brown by Information on 10/20/2005, to which Brown took a plea, relates to the events which the police claim occurred on 9/29/2005. The 10/20/2005 Information charging Brown with the First Degree Misdemeanor (Defendants' Ex. J, at DE#55-10, pp.4-7) specifically states that Brown was charged with resisting "Officer R. Passmore" without violence on 9/29/2005; yet in the present summary judgment proceedings, the defendants contend that Passmore had no interaction whatsoever with Brown on 9/29/2005, that he did not arrest Brown on that date or participate in his arrest, and that Passmore did not enter or search Brown's residence on 9/29/2005.

IV CONCLUSION AND RECOMMENDATION

Summary judgment is not a procedure for resolving a swearing contest. Chandler v. Baird, 926 F.2d 1057 (11 Cir. 1991). In this case, resolution of the issues and facts that are in dispute, based on the parties' opposing and conflicting Affidavits/Testimony would require the Court to step outside its assigned role, and invade the province of the jury. As the Supreme Court stated in Anderson v. Liberty Lobby, Inc., supra, "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] 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." Anderson, supra, 477 U.S. at 255 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

In the light of existing disputed material facts, the pending claim of illegal entry and search of plaintiff Brown's home on 9/29/2005 in alleged violation of his Fourth Amendment rights is therefore not subject to summary disposition. See Celotex, supra.

It is therefore recommended that: 1) the joint motion for summary judgment by defendants Passmore, Goins, Williams, and Cook (DE#55) be DENIED; 2) the plaintiff's opposing motion for summary judgment (DE#56) be DENIED; and 3) the case remain pending as to the defendants Passmore, Goins, Williams, and Cook on the claim that an illegal warrantless entry and search of plaintiff Brown's residence was conducted on 9/29/2005, in violation of his rights under the Fourth Amendment.

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

Dated: January 3rd, 2011.



UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-20936-CIV-COOKE
MAGISTRATE JUDGE P.A. WHITE

ELDRICK BROWN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	<u>REPORT THAT CASE IS</u>
	:	<u>READY FOR TRIAL</u>
RODERICK PASSMORE, et al.,	:	
	:	
Defendants.	:	

In this *pro se* civil rights action pursuant to 42 U.S.C. §1983, a separate Report has been entered this date recommending, for reasons stated therein, that the defendants' motion for summary judgment (DE#55) and plaintiff's motion for summary judgment (DE# 56) be DENIED, and that the case remain pending against defendants Passmore, Goins, Williams, and Cook, on plaintiff's claim of unlawful entry and search of his residence on September 29, 2005.

The plaintiff and defendants have filed their respective unilateral pretrial statements (DE#s 52, 66). The case is otherwise now at issue; and the parties have not consented to trial before a Magistrate Judge pursuant to 28 U.S.C. §636(c). The undersigned respectfully recommends that this case be placed on the trial calendar of the District Judge.

Dated: January 3rd, 2011.



UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Marcia G. Cooke,
United States District Judge

Eldrick Brown, Pro Se
DC# 407730
Wakulla C.I. Annex
110 Melaleuca Drive
Crawfordville, FL 32327

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 09-20936-Civ-COOKE/WHITE

ELDRICK BROWN,

Plaintiff

vs.

ROBERT PASSMORE, *et al.*,

Defendants.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, pursuant to Administrative Order 2003-10 of this Court, for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. On January 3, 2011, Judge White issued a Report recommending that (i) the Defendants', Officers Passmore, Goins, Williams and Cook, Motion for Summary Judgment (ECF No. 55) be denied, and (ii) the Plaintiff's Motion for Summary Judgment (ECF No. 56) be denied. Defendants filed objections to the Report, and Plaintiff filed a response to Defendants' objections. I have considered Judge White's Report and Recommendation, as well as objections and responses thereto, and have made a *de novo* review of the record. I find Judge White's Report and Recommendation clear, cogent, and compelling.

It is **ORDERED and ADJUDGED** that Judge White's Report and Recommendation (ECF No. 68) is **AFFIRMED and ADOPTED**. Accordingly,

1. Defendants', Officers Passmore, Goins, Williams and Cook, Motion for Summary Judgment (ECF No. 55) is **DENIED**.

2. Plaintiff's Motion for Summary Judgment (ECF No. 56) is **DENIED**.

DONE and ORDERED in chambers, at Miami, Florida, this 28th day of February 2011.

Marcia G. Cooke

MARCIA G. COOKE

United States District Judge

Copies furnished to:

Patrick A. White, U.S. Magistrate Judge

Eldrick Brown, pro se

Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-20936-CIV-COOKE/WHITE

ELDRICK BROWN,

Plaintiff,

vs.

RODERICK PASSMORE, CITY OF
MIAMI POLICE DEPARTMENT, et al.,

Defendants.

NOTICE OF INTERLOCUTORY APPEAL

Notice is hereby given that Officers Roderick Passmore, William Goins, Dairon Williams, and William Cook, Defendants in the above named case, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the order of the district court denying Defendants' motion for summary judgment based on qualified immunity entered in this action on the 28th day of February, 2011 [D.E. 73], a copy of which is attached.

JULIE O. BRU, City Attorney
KEVIN R. JONES, Assistant City Attorney
JOHN A. GRECO, Assistant City Attorney
Attorneys for **Defendants**
444 S.W. 2nd Avenue, Suite 945
Miami, FL 33130-1910
Tel.: (305) 416-1800
Fax: (305) 416-1801
Email: KRJONES@miamigov.com

By: s/ John A. Greco
John A. Greco, Assistant City Attorney
Florida Bar No. 991236

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on March 17, 2011, 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.

By: s/John A. Greco
John A. Greco, Assistant City Attorney
Florida Bar No. 991236

SERVICE LIST

Eldrick L. Brown vs. Officer Roderick Passmore, et. al.
Case No. 09-20936-CIV-COOKE/WHITE
United States District Court, Southern District of Florida

Eldrick L. Brown, pro se
DC # 407730
Wakulla Correctional Institution Annex
110 Melaleuca Drive
Crawfordville, Florida 32327-4963
Via U.S. Mail

Kevin R. Jones, Esq.
Assistant City Attorney
Counsel for Defendants
City of Miami City Attorney's Office
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Miami, Florida 33130
KRJones@miamigov.com
(305) 416-1800 Telephone
(305) 416-1801 Fax
Via Notice of Electronic Filing

Brent J. Chudachek, Esq.
Cohen & Rind, P.A.
Additional Counsel for Defendants
Losa, Maloney, Merced and Seigle
8100 Oak Lane, Suite 403
Miami Lakes, Fl 33016
bchudachek@roncohenlaw.com
(305) 823-1212 Telephone
(305) 823-7778 Facsimile
Via Notice of Electronic Filing

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 09-20936-Civ-COOKE/WHITE

ELDRICK BROWN,

Plaintiff

vs.

ROBERT PASSMORE, *et al.*,

Defendants.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, pursuant to Administrative Order 2003-10 of this Court, for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. On January 3, 2011, Judge White issued a Report recommending that (i) the Defendants', Officers Passmore, Goins, Williams and Cook, Motion for Summary Judgment (ECF No. 55) be denied, and (ii) the Plaintiff's Motion for Summary Judgment (ECF No. 56) be denied. Defendants filed objections to the Report, and Plaintiff filed a response to Defendants' objections. I have considered Judge White's Report and Recommendation, as well as objections and responses thereto, and have made a *de novo* review of the record. I find Judge White's Report and Recommendation clear, cogent, and compelling.

It is **ORDERED** and **ADJUDGED** that Judge White's Report and Recommendation (ECF No. 68) is **AFFIRMED** and **ADOPTED**. Accordingly,

1. Defendants', Officers Passmore, Goins, Williams and Cook, Motion for Summary Judgment (ECF No. 55) is **DENIED**.

2. Plaintiff's Motion for Summary Judgment (ECF No. 56) is **DENIED**.

DONE and ORDERED in chambers, at Miami, Florida, this 28th day of February 2011.



MARCIA G. COOKE
United States District Judge

Copies furnished to:
Patrick A. White, U.S. Magistrate Judge
Eldrick Brown, pro se
Counsel of record

If you view the Full Docket you will be charged for 1 Pages \$0.08

General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 11-11242	Docketed: 03/21/2011
Nature of Suit: 3550 Prisoner-Civil Rights Eldrick Brown v. Roderick Passmore, et al	
Appeal From: Southern District of Florida	
Fee Status: Fee Paid	Case Handler: Richardson, Tonya L., DD
Case Type Information: 1) Private Civil - Prisoner 2) State Civil Rights 3) -	
Originating Court Information: District: 113C-1 : 1:09-cv-20936-MGC Civil Proceeding: Marcia G. Cooke, -, U.S. District Judge Secondary Judge: Patrick A. White, -, - Date Filed: 05/13/2009 Date NOA Filed: 03/17/2011	

03/21/2011		PRISONER (PLRA) APPEAL DOCKETED. Notice of appeal filed by Appellant Roderick Passmore on 03/17/2011 Appellant brief due 40 days from 03/21/2011. Fee Status: Fee Not Paid.
03/25/2011		Appellate fee was paid on 03/18/2011 as to Appellant Roderick Passmore.
03/30/2011		APPEARANCE of Counsel filed by Attorney Brent J. Chudachek for Appellant Roderick Passmore in 11-11242.--[Edited 04/14/2011 by TLR] APPEARANCE of Counsel filed by Attorney Brent J. Chudachek for Appellant Darion Williams in 11-11242, Attorney Brent J. Chudachek for Appellant William Goins in 11-11242, Attorney Brent J. Chudachek for Appellant William Cook in 11-11242.
04/04/2011		APPEARANCE of Counsel filed by Attorney John A. Greco for Appellant Darion Williams in 11-11242.
04/04/2011		Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney John A. Greco for Appellants Roderick Passmore, William Goins, Darion Williams and William Cook.
04/11/2011		Civil Appeal Statement returned to Attorney John A. Greco for Appellants Roderick Passmore, William Goins, Darion Williams and William Cook. See 11th Cir R. 33-1(a)(3) appeals, Civil Appeal Statements are not required to be filed in an appeal involving a pro se party.

PACER Service Center			
Transaction Receipt			
04/18/2011 15:10:01			
PACER Login:	vi0006	Client Code:	
Description:	Case Summary	Search Criteria:	11-11242
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

March 25, 2011

Julie O. Bru
Office of the City Attorney
444 SW 2ND AVE STE 945
MIAMI, FL 33130-1910

Brent J. Chudachek
Cohen & Rind, P.A.
8100 OAK LN STE 403
Miami Lakes, FL 33016-5876

John A. Greco
Office of the City Attorney
444 SW 2ND AVE STE 945
MIAMI, FL 33130-1910

Kevin Renard Jones
Office of the City Attorney
444 SW 2ND AVE STE 945
MIAMI, FL 33130-1910

Appeal Number: 11-11242-D
Case Style: Eldrick Brown v. Roderick Passmore, et al
District Court Docket No: 1:09-cv-20936-MGC

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.CA11.USCOURTS.GOV

The referenced case was docketed in this court on March 21, 2011. 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 May 2, 2011.

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 assigned to your case. 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 the date the appeal is docketed in this court, 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

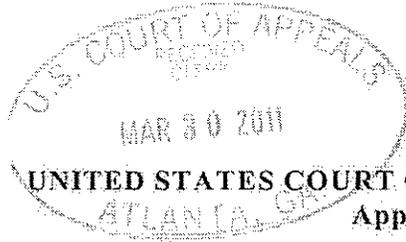
from this date. In addition, all attorneys (except court-appointed counsel) who wish to participate in this appeal must complete and return an appearance form within fourteen (14) days. Application for Admission to the Bar and Appearance of Counsel Form are available on the Internet at www.ca11.uscourts.gov. 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: Mildred Norwood, D
Phone #: (404) 335-6185

DKT-7CIV Civil-ND Crim Early Briefing



UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Appearance of Counsel Form

Attorneys who wish to participate in an appeal must be properly admitted either to the bar of this court or for the particular proceeding pursuant to 11th Cir. R. 46-1, et seq. An attorney not yet properly admitted must file an appropriate application. In addition, all attorneys (except court-appointed counsel) who wish to participate in an appeal must file an appearance form within fourteen (14) days after notice is mailed by the clerk, or upon filing a motion or brief, whichever occurs first. Application forms and appearance forms are available on the Internet at www.ca11.uscourts.gov.

Please Type or Print

Court of Appeals No. 11-11242-DD

Eldrick Brown vs. Roderick Passmore et al.

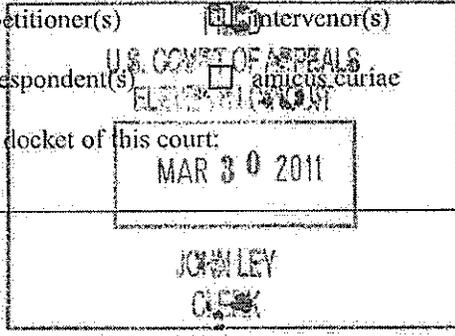
The Clerk will enter my appearance for these named parties: Roderick Passmore, William Cook, William Goins and

Dairon Williams

In this court these parties are: appellant(s) petitioner(s) intervenor(s)
 appellee(s) respondent(s) amicus curiae

The following related or similar cases are pending on the docket of this court:

Check here if you are lead counsel.



I hereby certify that I am an active member in good standing of the state bar or the bar of the highest court of the state (including the District of Columbia) named below, and that my license to practice law in the named state is not currently lapsed for any reason, including but not limited to retirement, placement in inactive status, failure to pay bar membership fees or failure to complete continuing education requirements. I understand that I am required to notify the clerk of this court within 14 days of any changes in the status of my state bar memberships. See 11th Cir. R. 46-7.

State Bar: Florida Bar State Bar No.: 25825

Signature:

Name (type or print): Brent J. Chudachek Phone: 305-823-1212

Firm/Govt. Office: Ronald J. Cohen, P.A. E-mail: bchudachek@roncohenlaw.com

Street Address: 8100 Oak Lane, Suite 403 Fax: 305-823-7778

City: Miami State: Florida Zip: 33016

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Appearance of Counsel Form

Attorneys who wish to participate in an appeal must be properly admitted either to the bar of this court or for the particular proceeding pursuant to 11th Cir. R. 46-1, et seq. An attorney not yet properly admitted must file an appropriate application. In addition, all attorneys (except court-appointed counsel) who wish to participate in an appeal must file an appearance form within fourteen (14) days after notice is mailed by the clerk, or upon filing a motion or brief, whichever occurs first. Application forms and appearance forms are available on the Internet at www.ca11.uscourts.gov.

Please Type or Print

Court of Appeals No. 11-11242-D

RODERICK PASSMORE, ET AL. vs. ELDRICK BROWN

The Clerk will enter my appearance for these named parties: OFFICERS RODERICK PASSMORE, WILLIAM GOINS,

DAIRON WILLIAMS, AND WILLIAM COOK

In this court these parties are: appellant(s) petitioner(s) intervenor(s)
 appellee(s) respondent(s)

The following related or similar cases are pending on the docket of this court:
 N/A

Check here if you are lead counsel.

FILED
 U.S. COURT OF APPEALS
 ELEVENTH CIRCUIT
 APR 04 2011
 JOHN LEY
 CLERK

I hereby certify that I am an active member in good standing of the state bar or the bar of the highest court of the state (including the District of Columbia) named below, and that my license to practice law in the named state is not currently lapsed for any reason, including but not limited to retirement, placement in inactive status, failure to pay bar membership fees or failure to complete continuing education requirements. I understand that I am required to notify the clerk of this court within 14 days of any changes in the status of my state bar memberships. See 11th Cir. R. 46-7.

State Bar: FLORIDA State Bar No.: 991236

Signature: [Handwritten Signature]

Name (type or print): JOHN A. GRECO Phone: 305-416-1800

Firm/Govt. Office: City of Miami, Office of the City Attorney E-mail: jagreco@miamigov.com

Street Address: 444 SW 2nd Ave., Ste. 945 Fax: 305-416-1801

City: Miami State: FL Zip: 33130-1910

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appearance of Counsel Form has been furnished by U.S. mail to the individuals on the following service list, this 1st day of APRIL, 2011.

By: 

JOHN A. GRECO, Asst. City Attorney
Fla. Bar No. 991236

SERVICE LIST

Roderick Passmore, et al. v. Eldrick Brown
Case No. 11-11242
L.T. Case No. 09-20936-CIV-Cooke/White

Eldrick Brown, *pro se*

DC # 407730

Wakulla Correctional Inst. Annex

110 Meleleuca Drive

Crawfordville, FL 32327-4963

Brent Chudachek, Esq.

bchudachek@roncohenlaw.com

Cohen & Rind, P.A.

8100 Oak Lane, Suite 403

Miami Lakes, Florida 33016

305) 823-1212 Telephone

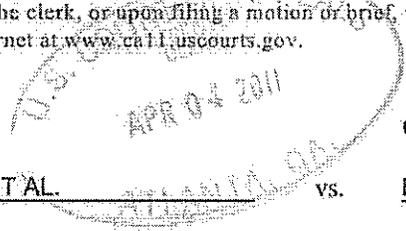
(305) 823-7778 Fax

JAG:db-269245.doc

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Appearance of Counsel Form

Attorneys who wish to participate in an appeal must be properly admitted either to the bar of this court or for the particular proceeding pursuant to 11th Cir. R. 46-1, et seq. An attorney not yet properly admitted must file an appropriate application. In addition, all attorneys (except court-appointed counsel) who wish to participate in an appeal must file an appearance form within fourteen (14) days after notice is mailed by the clerk, or upon filing a motion or brief, whichever occurs first. Application forms and appearance forms are available on the Internet at www.ca11.uscourts.gov.

Please Type or Print



Court of Appeals No. 11-11242-D

RODERICK PASSMORE, ET AL. vs. ELDRICK BROWN

The Clerk will enter my appearance for these named parties: OFFICERS RODERICK PASSMORE, WILLIAM GOINS, DAIRON WILLIAMS, AND WILLIAM COOK

In this court these parties are: appellant(s) petitioner(s) intervenor(s)
 appellee(s) respondent(s)

The following related or similar cases are pending on the docket of this court:
N/A

Check here if you are lead counsel.

FILED
 U.S. COURT OF APPEALS
 ELEVENTH CIRCUIT
 APR 04 2011
 JOHN L EY
 CLERK

I hereby certify that I am an active member in good standing of the state bar or the bar of the highest court of the state (including the District of Columbia) named below, and that my license to practice law in the named state is not currently lapsed for any reason, including but not limited to retirement, placement in inactive status, failure to pay bar membership fees or failure to complete continuing education requirements. I understand that I am required to notify the clerk of this court within 14 days of any changes in the status of my state bar memberships. See 11th Cir. R. 46-7.

State Bar: FLORIDA State Bar No.: 991236

Signature: [Handwritten Signature]

Name (type or print): JOHN A. GRECO Phone: 305-416-1800

Firm/Govt. Office: City of Miami, Office of the City Attorney E-mail: jagreco@miamigov.com

Street Address: 444 SW 2nd Ave., Ste. 945 Fax: 305-416-1801

City: Miami State: FL Zip: 33130-1910

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appearance of Counsel Form has been furnished by U.S. mail to the individuals on the following service list, this 1st day of APRIL, 2011.

By: 

JOHN A. GRECO, Asst. City Attorney
Fla. Bar No. 991236

SERVICE LIST

Roderick Passmore, et al. v. Eldrick Brown
Case No. 11-11242
L.T. Case No. 09-20936-CIV-Cooke/White

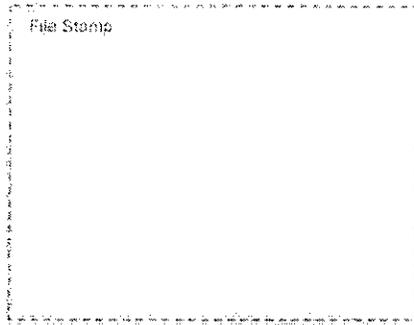
Eldrick Brown, *pro se*

DC # 407730
Wakulla Correctional Inst. Annex
110 Meleleuca Drive
Crawfordville, FL 32327-4963

Brent Chudachek, Esq.

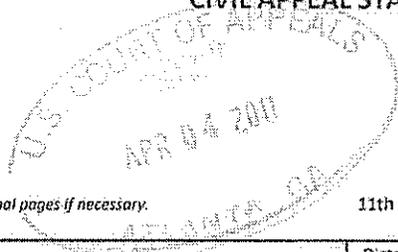
bchudachek@roncohenlaw.com
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8100 Oak Lane, Suite 403
Miami Lakes, Florida 33016
305) 823-1212 Telephone
(305) 823-7778 Fax

JAG:db-269245.doc



Rev. 2/11

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



Please TYPE. Attach additional pages if necessary.

11th Circuit Docket Number: 11-11242-D

Caption: RODERICK PASSMORE, WILLIAM GOINS, DAIRON WILLIAMS, and WILLIAM COOK, Defendants/Appellants, vs. ELDRICK BROWN, Plaintiff/Appellee.	District and Division: SOUTHERN DIST, MIAMI DIV.
	Name of Judge: COOKE/WHITE
	Nature of Suit: CIVIL RIGHTS
	Date Complaint Filed: 4/9/09
	District Court Docket Number: 09-20936
Date Notice of Appeal Filed: 3/17/11	
<input type="checkbox"/> Cross Appeal <input type="checkbox"/> Class Action	
Has this matter previously been before this court?	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If Yes, provide	
(a) Caption:	
(b) Citation:	
(c) Docket Number:	

Attorney Name	Mailing Address	Telephone, Fax, and Email
For Appellant: <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant <input type="checkbox"/> Other (Specify)	JOHN A. GRECO Asst. City Atty. City of Miami Office of the City Attorney 444 SW 2nd Ave. Suite 945 Miami, FL 33130	Tel.: 305/416-1800 Fax.: 305-416-1801 jagreco@miamigov.com
For Appellee: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Other (Specify)	ELDRICK BROWN, pro se DC#407730 Wakulla Correctional Inst. Annex. 110 Melaleuca Drive Crawfordville, FL 32327-4963	

Please CIRCLE/CHECK/COMPLETE the 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	Amount Sought by Plaintiff: \$ <u>excess of \$500K</u>
<input type="checkbox"/> Diversity	Interlocutory Order, 28 USC 1292(a)(1)	Default Judgment	Amount Sought by Defendant: \$ <u>n/a</u>
<input type="checkbox"/> US Plaintiff	Interlocutory Order Certified, 28 USC 1292(b)	<input checked="" type="checkbox"/> Summary Judgment	Awarded: \$ _____ to _____
<input type="checkbox"/> US Defendant	<input checked="" type="checkbox"/> Interlocutory Order, Qualified Immunity	Judgment/Bench Trial	Injunctions: <input type="checkbox"/> TRO <input type="checkbox"/> Granted <input type="checkbox"/> Preliminary <input type="checkbox"/> Permanent <input type="checkbox"/> Denied <input type="checkbox"/> Permanent <input type="checkbox"/> Denied
	Final Agency Action (Review) 54(b)	Judgment/Jury Verdict	
		Judgment/Directed Verdict/NOV	
		Injunction	
		Other _____	

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? see below

(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 42 USC § 1983 and Fla. Stat. §§ 843.02 and 893.13

(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:

(5) Issues proposed to be raised on appeal, including jurisdictional challenges:
 WHETHER, UNDER CIRCUMSTANCES OF THIS CASE, THERE WAS PROBABLE CAUSE FOR SEARCH AND WHETHER PLAINTIFF COULD SEEK DAMAGES UNDER SECTION 1983 WHERE PLAINTIFF WAS CONVICTED OF RESISTING ARREST WITHOUT VIOLENCE.

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 18TH DAY OF APRIL, 2011

JOHN A. GRECO, ASST. CITY ATTY.

NAME OF COUNSEL (Print)


SIGNATURE OF COUNSEL

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 09-20936-Civ-COOKE/WHITE

ELDRICK BROWN,

Plaintiff

vs.

ROBERT PASSMORE, *et al.*,

Defendants.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

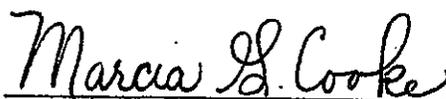
THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, pursuant to Administrative Order 2003-10 of this Court, for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. On January 3, 2011, Judge White issued a Report recommending that (i) the Defendants', Officers Passmore, Goins, Williams and Cook, Motion for Summary Judgment (ECF No. 55) be denied, and (ii) the Plaintiff's Motion for Summary Judgment (ECF No. 56) be denied. Defendants filed objections to the Report, and Plaintiff filed a response to Defendants' objections. I have considered Judge White's Report and Recommendation, as well as objections and responses thereto, and have made a *de novo* review of the record. I find Judge White's Report and Recommendation clear, cogent, and compelling.

It is **ORDERED and ADJUDGED** that Judge White's Report and Recommendation (ECF No. 68) is **AFFIRMED and ADOPTED**. Accordingly,

1. Defendants', Officers Passmore, Goins, Williams and Cook, Motion for Summary Judgment (ECF No. 55) is **DENIED**.

2. Plaintiff's Motion for Summary Judgment (ECF No. 56) is **DENIED**.

DONE and ORDERED in chambers, at Miami, Florida, this 28th day of February 2011.



MARCIA G. COOKE
United States District Judge

Copies furnished to:
Patrick A. White, U.S. Magistrate Judge
Eldrick Brown, pro se
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-20936-CIV-COOKE
MAGISTRATE JUDGE P.A. WHITE

ELDRICK BROWN, :
 :
 Plaintiff, :
 :
 v. :
 :
 RODERICK PASSMORE, et al., :
 :
 Defendants. :

REPORT OF
MAGISTRATE JUDGE

I INTRODUCTION

In this case, plaintiff Brown filed a *pro se* civil rights complaint pursuant to 42 U.S.C. §1983 (DE#1) with claims focused on events surrounding entry of police officers into his home in Miami-Dade County, search of the premises, and his arrest on September 29, 2005, from which charges in state criminal case F05-030997 arose. He named five City of Miami Police Officers as defendants: 1) Roderick Passmore, #5532; 2) Dairon Williams, #7647; 3) William Cook, #1184; 4) William Goins, #2372; and 5) Reginald Kinchen, #3622. Brown thereafter filed a superseding amended complaint (DE#28) naming only against Passmore, Williams, Cook, and Goins.

After the Amended Complaint was filed (DE#28), and Defendants moved to dismiss or for a more definite statement (DE#30), defendant Kinchen was dismissed from this case, Brown's claim of false arrest was dismissed as to all defendants for reasons discussed in the Report of Magistrate Judge (DE#32) and in the Court's Order adopting the Report (DE#41). The complaints as amended remains pending against Passmore, Williams, Cook, and Goins solely the claim that officers unlawfully entered and searched Brown's home on September 29, 2005, in violation of his Fourth Amendment rights.

This Cause is before the Court upon Motions for Summary Judgment by the Defendants (DE#55), and by the Plaintiff (DE#56). As a *pro se* litigant, plaintiff Brown was advised his right to oppose the defendants' summary judgment motion, and was instructed

regarding the standard of review for such motions. (See Order of Instructions, DE#57).¹

¹ Rule 56(c) of the Federal Rules of Civil Procedure 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 (1986), the 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. (citations omitted)

Thus, in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the 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. (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 nonmoving 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 nonmoving 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 pre-

II BACKGROUND

A brief background discussion concerning plaintiff Brown's allegations, and his relevant criminal history, will serve to place the amended complaint and Brown's surviving claim in context.

In pertinent part, the Prior Report (DE#32, at p.2) noted the following. The initial complaint contained general allegations about a September 2005 arrest made by Officers Passmore, Williams, Cook and Goins, whom plaintiff alleged engaged in false arrest after they entered and searched his apartment without a warrant. (*Id.*). Plaintiff also stated that a few weeks later the four officers returned to his apartment with Officer Kinchen, who arrested him again on false charges, but the pleading [DE#1] provided no details about those events. As noted in the Report (DE#32, p.2), Plaintiff Brown submitted with the initial \$1983 complaint [DE#1] a copy of a police Internal Affairs Complaint ["Complaint Form," and "Complaint Narrative," at DE#1, pp. 10-11] from which it appeared Brown had complained the second arrest was for stealing electricity; and that there was a third arrest for selling drugs. (Report, DE#32, p.2).

The Report (DE#32, at p.2, footnote 1, and related text) noted that plaintiff Brown's Amended Complaint [DE#28 in this case] "raises claims solely concerning his September 29, 2005 arrest," and observed that Brown's reference in the amended pleading to an arrest date of September 30, 2005, was "apparently an error" as his state court documents reflect his arrest on the 29th of September.

sented by the nonmoving 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. Puller 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 v. Liberty Lobby, Inc., *supra*).

Pursuant to Brown v. Shinbaum, 828 F.2d 707 (11 Cir. 1987), the Order of Instructions (DE#57) was entered to inform the *pro se* plaintiff Brown of his right to respond to the defendants' motion for summary judgment, and to instruct him regarding requirements under Fed.R.Civ.P. 56 for a proper response to such a motion.

(Report, DE#32, p.2, n.1). The Report (DE#32) further noted that, in Case 09-Civ-20945-Seitz, Brown was separately litigating claims concerning his arrest on July 28, 2006. (Id., at n.2)

Taking judicial notice of public records from state court pertaining to plaintiff Brown (see Report, DE#32 at footnote 3), the following relevant criminal history pertaining to Brown was outlined in Section II of the prior Report (DE#32, at pp. 5-7), which read in pertinent part, as follows, verbatim:

The Plaintiff's Relevant Criminal History

According to court dockets maintained by the Miami-Dade Court Clerk of Courts, the plaintiff has the following relevant criminal history:

1. The plaintiff was arrested on August 17, 2005 for possession of cannabis and battery on an elderly person. (Case Number F05026197). The plaintiff was released on bond.
2. While out on bond, he was arrested on September 29, 2005 for possession with intent to sell marijuana and cocaine and resisting arrest without violence. (Case No. F05030997). Bond was revoked and the plaintiff remained in custody for ten months. This arrest is the subject of the instant complaint.
3. The charge for possession with intent to sell marijuana and cocaine was "no actioned" and the misdemeanor resisting arrest charge was bounded down to county court. On November 29, 2005 the plaintiff pled no contest to the misdemeanor and was sentenced to time served.
4. On July 5, 2006 the plaintiff pled guilty to possession of marijuana and was sentenced to time served (10 months). He also pled guilty to battery on an elderly person and was sentenced to one year probation.
5. On July 28, 2006, the plaintiff was arrested for theft of electricity and sanitary nuisance. The theft charge was no actioned and the plaintiff pled guilty to the nuisance charge and received a suspended sentence. This arrest is the subject of Case No. 09-20945-CIV-SEITZ.
6. On October 13, 2006, while serving his probation, the plaintiff was arrested for possession with intent to sell cocaine. (Case No. F06034364A). The plaintiff was

sentenced to six years imprisonment, which he is currently serving.

The plaintiff is in custody pursuant to the conviction relating to the charges from the October 13, 2006 arrest. He is no longer in custody for the charges relating to the July 28, 2006 arrest.

(Report, DE#32, pp. 5-7).

III DISCUSSION

As discussed above, this case is presently pending against defendant Officers Passmore, Williams, Goins, and Cook on plaintiff Brown's claim that on September 29, 2005, they illegally entered his residence and therein conducted an unlawful warrantless search.

A. Law Pertaining to Claims of Illegal Entry and Search

The Supreme Court has held that in cases where probable cause exists, no warrant is required to apprehend a suspected felon in a public place. See United States v. Watson, 423 U.S. 411 (1976). Except in special circumstances, however, a line is drawn at the doorway of a person's residence, and the entry into a home to conduct a search or make an arrest is presumed to be unreasonable under the Fourth Amendment unless it is done pursuant to a warrant. See Payton v. New York, 445 U.S. 573, 583-90 (1980); Johnson v. United States, 333 U.S. 10, 13-15 (1948). There are two exceptions, exigent circumstances, and consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show...the presence of exigent circumstances"); Swint v. City of Wadley, Alabama, 5 F.3d 1435, 1443 (11 Cir. 1993) ("[a]bsent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant") (quoting Donvan v. Dewey, 452 U.S. 594, 598, n.6 (1981)). Where consent has not been given, then, as the

Court stated in Payton, the Fourth Amendment draws "a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton, supra, at 590.

With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See Illinois v. Rodriguez, 497 U.S. 177, 181 (1990); Payton, supra, 445 U.S. at 586. A warrant requirement clearly places a burden on the police, and "impedes to some extent the vigor with which the Government can seek to enforce its laws," Steagald v. United States, 451 U.S. 204, 222 (1981); however, the Fourth Amendment right protected [i.e., the right of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the government] is, in contrast, "weighty," Id., at 222, and the "additional burden imposed on police by a warrant requirement is minimal." Id. As the Supreme Court noted in Steagald, police, attempting to arrest a suspect, may avoid altogether the need to obtain a search warrant simply by waiting for a suspect to step out of the home, and effecting the individual's arrest, in a public place. Id. at p. 221, n.14, and related text. Alternatively, the relatively short time required to obtain a warrant from a judge who is on duty, or telephonically if a judge is not nearby, means that the warrant requirement will seldom hinder efforts to apprehend a felon. Id. at p. 222.

The exigency exception applies only when "the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." United States v. Santa, 236 F.3d 662, 669 (11 Cir. 2000) (quoting United States v. Burgos, 720 F.2d 1520, 1526 (11 Cir. 1983)). The exigent circumstances doctrine would, for example, justify a warrantless entry into a home if the police were in "hot pursuit" of a fleeing felon. See United States v. Santana, 427 U.S. 38, 42-43 (1976); United States v. Blasco, 702 F.2d 1315, 1325 (11 Cir. 1983). In addition to "hot pursuit," the Courts have recognized other situations in which "exigent circumstances" would justify a warrantless intrusion. These include situations in which

the facts would lead a reasonable, experienced officer to believe that if time were taken to obtain a warrant, there would be danger that the suspect would flee or escape, there would be a risk of harm to police officers or the general public, or there would be a risk of loss, destruction, removal, or concealment of evidence. See Santa, supra, 236 F.2d at 669; Blasco, supra, 702 F.2d at 1325.

B. Analysis

As discussed below, the record contains sworn versions of the facts given by the defendants and by the plaintiff.

With their motion for summary judgment (DE#55), the defendants have submitted a copy of Brown's 2/1/2010 deposition taken in this case (Exhibit A, DE55-1); an Arrest Report/Probable Cause Affidavit in police case 050929023606 also bearing Court Case F05-30977, signed and dated by D. Williams #7647 on 9/29/05, and filed on 9/30/05 in Miami-Dade Circuit Court, naming "Defendant" Eldrick Brown and "Co-Defendant" Giordano Rolle as being arrested on 9/29/05 at 16:15 p.m., and listing two charges: "Poss. Marijuana w/intent sell, and "Poss. Cocaine w/intent sell" (Exhibit B, DE#55-2); and a copy of a Miami Police Department Property Unit *Property Receipt* in police Case 05023606, with Eldrick Brown's name, and address [5918 NW 13 Av, Miami, FL], prepared on 9/28/2005, naming Eldrick Brown as the only defendant, listing Darion Williams as the "Responsible Officer" and Stanley Jean-Poix as the "Submitting Officer," and stating that on 9/28/2005 Property Officer Michael Ali received 3 items, all with "Status HOLD," listed as: Item 1 [described as 6 "PLASTIC BAGS W/SUSP MARIJUANA EST GRAMS 7.6"]; Item 2 [described as 1 "GRN PLASTIC BAGS W/SUSP ROCK/POWDER COCAINE EST GRAMS 5.5"]; and Item 3 [described as 31 "PLASTIC BAGS W/SUSP ROCK/POWDER COCAINE TW 47.3 GMS EST GRAMS 4.3"] (Exhibit C, DE#55-3). In addition, the defendants have submitted seven additional exhibits. These are: Affidavits by defendants Passmore, Goins, Williams and Cook Exhibits (filed respectively as Exhibits "D" to "G" at DE#s 55-4 to 55-7); an Affidavit by Officer Stanley Jean-Poix (Exhibit H, at DE55-8); an Affidavit by Officer Michael Braddy (Exhibit I at DE#55-9); and a Composite Exhibit consisting of

documents relating to Miami-Dade Misdemeanor Case M05-53483, and Miami-Dade Felony Case F05-030997 (Exhibit J at DE#55-10).

Officer Darion Williams' Arrest Report/Affidavit (Ex. B) indicates that on 9/29/2005 officers were engaged in narcotics surveillance outside 5918 N.W. 13th Avenue, in Miami; that the "Co def" [i.e., Co-defendant Giordano Rolle] was observed standing in front of the address and being approached by unknown subjects, who would give him unknown quantities of U.S. currency, and that, in exchange, he [Co def Rolle] would direct the subjects to the "def" [defendant Eldrick Brown] who "would take a clear bag from his left front pocket * removing narcotics giving them to the subjects." The Report/Affidavit further stated that "Ofc. Passmore was advised via radio of the transaction and moved into the location," that "Co def" [Rolle] observed Passmore and "yelled over to the def [Brown] causing him to run inside the location." The Report/Affidavit further states that "Ofc. Braddy and Ofc. Jean-Poix followed def [Brown] into the location stopping the def." The Report/Affidavit states that "search of the location revealed inside the location the clear bag containing 6 clear baggies of marijuana, 15 green baggies of powder cocaine, 16 baggies of rock cocaine with clovers, and 15 green baggies of rock cocaine." Last, the Report/Affidavit states, "Def. arrested." (Ex.B, DE55-2).

In their Affidavits, City of Miami Officers Passmore, Goins and Cook [Exs. D, E, and G, respectively] state that they were "working patrol" in Liberty City as part of the Model City Problem Solving Team ("MCPST") "on or about September 30, 2005;" and in their Affidavits Officers Williams, Jean-Poix and Braddy [Exs. F, H, and I, respectively] state they were doing the same "on or about September 29, 2005." Passmore, Goins and Williams state that there were "constant complaints of narcotics activity at 5918 NW 13th avenue," and that "on or about September 29, 2005" the MCPST "was conducting a narcotic surveillance at that location." (Exs. D-F).

Passmore, Williams, and Goins state that Williams and Goins sat across the street in an unmarked car, as an "eye ball,"

watching for narcotics sales. (Exs. D-F). Goins and Williams state that they saw people approach Rolle and hand him money, and saw Rolle direct the individuals to Brown, who had a clear sandwich bag in his hand, containing suspect narcotics, and that they saw Brown hand small objects from the sandwich bag to at least 4 suspected purchasers. Rolle was on the sidewalk, outside a chain link fence, and Brown was inside the fence, next to the door of the residence at 5918 NW 13th Avenue. Goins and Williams decided to call in take down teams. (Exs. E and F).

Passmore states that when Williams called out the take down over the radio, he [Passmore] moved in to take down Rolle and arrested him for "intent to sale [sic] marijuana and cocaine." Passmore states that he did not enter the residence to search for drugs or to arrest Brown, and that his sole responsibility in the operation was to arrest and secure Giordano Rolle. (Ex.D).

Jean-Poix and Braddy state that they were "tasked" to intercept Eldrick Brown, whose description was given over the radio. They each state that they approached Rolle, and that as they passed him he yelled "9" to Brown, that they each identified themselves to Brown as police officers, that Brown began to run inside the residence at 5918 NW 13th Avenue, and that they gave chase, never losing sight of Brown; that they arrested Brown inside, and that "Officer Passmore did not participate in the apprehension of Mr. Brown nor did he search the house." (Exs. H and I). Jean-Poix states: "I recall the drugs being in plain sight on a table near the kitchen area," and that the drugs were turned in to the Department's property unit. (Ex.H). Braddy states that "after Officer Jean-Poix and I arrested Mr. Brown and Jean-Poix impounded the narcotics this case was cleared by arrest." (Ex.I.).

Plaintiff Brown, in contrast, alleges in his complaint, as amended, and has indicated through his sworn testimony given at deposition (Ex.A, DE#55-1), that he was not outside when police came to his home on the date in question, that he was not engaged in conducting drug sales on that date with Mr. Rolle, and that no

drugs were found on him or in his residence that day. Brown testified that, without a lease, he rented the place from a relative, and that he, in turn, for about 3 months, had allowed Ms. Kerry Smith to live there. He charged Smith about \$70.00 to \$75.00 every two weeks, to reside there as a tenant/roommate. Brown testified that he had not seen Giordano Rolle since the day before the incident, and testified that he [Brown] was sound asleep in his own bed when Ms. Smith entered the room and awoke him to say that a police officer coming into the residence through his bedroom window. Brown testified that that officer was defendant Passmore. Brown testified that by the time he was fully awake Passmore had entered through the window with his gun drawn, had indicated that he was looking for somebody, asking "Where is he,?" and told Ms. Smith to step back. According to Brown, Officer Passmore looked in the bathroom, looked around his bedroom and around the bedroom occupied by Smith. Passmore walked Smith at gun point into the livingroom, and while standing in the hallway Passmore told him [Brown] to get up and go into the living room with Smith, and gave instructions for them not to move. Brown could hear other officers outside the house repeatedly saying, "Open the door." Brown testified that he heard Passmore tell them to go around to the back door, and that he believes they did not hear Passmore. Brown testified that after Passmore had been inside for a few [perhaps 5] minutes, Officers Goins and Williams kicked in his front door and entered the premises. Officer Cook entered after them. Brown testified that Goins asked, "Where is he?...Where is the drugs?," and Goins and Williams then engaged in a search, causing damage as they went, ripping the covers off of Brown's speakers and kicking a hole in his stereo; tipping over his couch and chairs, and ripping open the liners; and rummaging through the bedrooms and kitchen. According to Brown, after Officer Cook had followed Goins and Williams into the residence, a call was made for K-9 backup, and Cook went along with the unidentified K-9 Officer as the officer entered and conducted a search with help of the dog, which failed to result in the discovery of any drugs. Brown testified that only 5 officers were inside the house, Passmore who came through the window, Goins and Williams who broke down the front

door, Cook, and the unnamed K-9 officer who was accompanied by Cook during the k-9 assisted search of the premises. Eventually, officers took Brown and Smith outside, where Brown saw that the police had Rolle in custody.

It is undisputed that, although Brown was arrested by the police on 9/29/2005 at 16:15 p.m. for "possession with intent to sell" marijuana and cocaine [see Arrest Report/Affidavit, Ex.B, DE#55-2], the State Attorney chose not to pursue drug charges against Brown in relation to events of September 29, 2005. As reflected in the defendants' Composite Exhibit J, in relation to Brown and Case F05-030997, the State Attorney for the Eleventh Judicial Circuit of Florida filed an Information dated October 20, 2005, which charged in Count 1 that Eldrick Brown, "on or about September 29, 2005 [in Miami-Dade County] did unlawfully resist, obstruct, or oppose OFFICER R. PASSMORE" without violence, in violation of Fla.Stat. §843.02. (See Ex. J, DE#55-10 at pp. 4-7). As also reflected in Court Documents, the felony case F05-030997 against Brown was "Reduced and transfer[red] to County Ct" on Oct 20, 2005 (see Clerk's Minutes, at DE#55-10, p. 16), and the matter was pursued in Misdemeanor Case M05-053483, in which Brown took a plea to the 1st Degree Misdemeanor Charge of Resisting an Officer without Violence, and on 11/29/2005 was adjudicated guilty and was apparently sentenced to a term of 62 Days [DCJ 62], with 62 Days credit for time served [CTS 62]. (See Exhibit J, at DE#55-10, pp. 1-3, 15, and 19).

It is clear from the record, and the defendants acknowledge, that facts in this case are in dispute.

The defendants cite Scott v. Harris, 127 S.Ct. 1769, 1776 (2007) for the proposition that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." At page 9 of their motion [DE#55], the defendants argue that in this case, "the record evidence attached

to this motion irrefutably demonstrates that crack cocaine, powder cocaine, and marijuana were recovered and placed into the Miami Police Department's property unit by Officer Stanley Jean-Poix." They argue, in addition, that "[t]he arrest report, also attached hereto as an exhibit, supports the information contained within the property receipt because it indicates that Brown was arrested inside his apartment by Officer Jean-Poix." The officers also argue that "[w]hen considering the arrest report and affidavits of the Officers, they had at least arguable probable cause to arrest Mr. Brown for sale of narcotics." (Motion, DE#55, p.9). They further argue, based on the officers' personal affidavits stating that Brown was observed engaged with Rolle in conducting drug sales outside the house, that when Brown saw officers moving in he fled into his house closely followed by Braddy and Jean-Poix, and that Brown was arrested and the narcotics were discovered in plain view close to where Mr. Brown was apprehended, "it was imminently reasonable for the Officers to believe that Mr. Brown were selling illegal drugs"... and that "[i]t was equally reasonable for the officers to chase Brown in order to apprehend him." The defendants argue that to the extent the complaint as amended embodies a claim of false arrest, they are entitled to qualified immunity, and summary judgment in their favor. (Motion, DE#55 at p.10).

The defendants, in regard to the claim for improper search, argue that they are entitled to qualified immunity (Motion, DE#55 at p.11), where the Officers' affidavits state that Brown and Rolle were seen engaged in suspected drug sales on the street outside the residence, where Braddy and Jean-Poix chased Brown never losing sight of him, and where they apprehended Brown inside his home and found "the drugs inside his apartment in plain view." The defendants argue that they did not need a warrant to enter Brown's home "because they had exigent circumstances given the nature of the circumstances." (*Id.*).

The defendants invoke Heck v. Humphrey, 512 U.S. 477, 478 (1994) for the proposition that a state prisoner may not bring a claim for damages under 42 U.S.C. §1983 if judgment in his favor

would necessarily imply the validity of his conviction. They argue that, in Brown's case, despite the state's decision to take no action on the drug charges listed in the Police Report against him, the fact that Brown later was charged with and plead guilty or no contest to Resisting Without Violence [a misdemeanor] means that Brown cannot prevail on his complaint for damages in this case because doing so would necessarily undermine his conviction on the misdemeanor. [As noted supra, Brown is not in custody on his conviction in case M05-053483, and he was sentenced to time served for the misdemeanor. The defendants correctly observe that the record does not reflect that Brown's conviction and sentence in that case have been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus].

If their version of the facts were taken as true, it could stand to reason that the named defendants against whom the case is pending (i.e., Passmore, Goins, Williams, and Cook) would be entitled to qualified immunity, and summary disposition in their favor of the amended complaint alleging unlawful entry and search of Plaintiff Brown's abode on 9/29/2005. [The defendants' Affidavits state that Passmore did not interact with Brown, did not enter his home, and was only involved in the take down and arrest of Rolle, outside of the residence. They state that Goins and Williams neither participated in Brown's arrest nor entered in or participated in search of the residence, and that they merely watched from an unmarked car across the street, and alerted other officers via radio to do a "take down" after Rolle was seen accepting money from people, outside the fence, and Brown was seen inside the fence handing the individuals small objects from a sandwich bag. The defendants' Affidavits state that Officer Cook had "no involvement in this case." According to the defendants, two officers (Jean-Poix and Braddy) did enter and search the residence on 9/29/2005, did observe and impound drugs that were in plain view

on a table near the kitchen, and did arrest Brown. Jean-Poix and Braddy, however, are not named as defendants in this lawsuit.

Despite the defendants' reliance on Scott v. Harris, it is apparent that there are in this case numerous genuine issues of material fact, the existence of which precludes summary disposition of the plaintiff's claims. Celotex Corp. v. Catrett, supra.

As discussed supra, the parties' sworn versions of the facts in this case stand in stark contrast to each other. The officers named as defendants [Passmore, Williams, Goins, and Cook] state, on one hand, that they had no involvement in entry and search of Brown's home on 9/29/2005 or in his arrest on that date, but that Brown and Rolle were seen on the street engaged in suspected drug sales, and that Officers Jean-Poix and Braddy, relying on exigent circumstances, lawfully followed Brown into his home without losing sight of him, and observed in plain sight on a table drugs which they impounded, which were sent to the Police Property Room for safe keeping, and which they state are documented on the police Property Receipt filed in this case at DE#55-3 as Exhibit C. They further argue that Brown's complaint should be barred under Heck because he ultimately was convicted of resisting an officer on 9/29/2005 without violence. Plaintiff Brown, on the other hand, has sworn that Passmore, Williams, Goins, and Cook did indeed enter and search his residence on the day of his arrest, and that they along with an unnamed K-9 officer were the only officers present inside his home that day. Brown has sworn that he was not on the street selling drugs with Rolle on the date in question when the police claim he was doing so, but instead was sound asleep in his bed. Brown also has sworn that on the date of his arrest he did not have drugs on him or in his home, and claims the defendant officers' warrantless entry into and the search of his home was unlawful.

The existence of disputed material facts is compounded by close examination of the Property Receipt (Defendants' Ex.C) listing the drugs which defendants claim were found in Brown's home in plain view on 9/29/2005, the day of his arrest (see Defendants'

Ex.B, Arrest Report/Affidavit, showing 5918 NW 13th Ave as the "arrest location," 9/29/2005 as the "arrest date," and 1615 as the "arrest time"). The Property Receipt for the impounded drugs clearly indicates on its face that the date on which the drugs were "received" at the Miami Police Department Property Unit was 9/28/2005, and the date on which the Property Receipt was "prepared" was 9/28/2005. It is unexplained how drugs stored in evidence at the Police Department on 9/28/2005 could have been found in plain view a day later at Brown's home, and how [as defendants have contended] those drugs could serve as a basis for Brown's 9/29/2005 arrest, as evidence that he was engaged in drug sales on 9/29, and as evidence that officers who did enter and search the home on 9/29 without a warrant had exigent circumstances on 9/29 for doing so.

The existence of disputed material facts is further compounded by consideration of the Information pursuant to which Brown was charged with Resisting Without Violence. The defendants argue that by virtue of Brown's plea, on the charge that he resisted an officer without violence on 9/29/2005, his complaint for damages, as amended, should be barred under Heck v. Humphrey. In the prior Report (DE#32) which was adopted (Order, DE#41), reasons for dismissal of Brown's false arrest claim were discussed (DE#32, at pp.7-8) as were reasons for non-applicability of Heck (DE#32, at pp.9-13). It remains unexplained how the offense of Resisting Without Violence on 9/29/2005, as charged against Brown by Information on 10/20/2005, to which Brown took a plea, relates to the events which the police claim occurred on 9/29/2005. The 10/20/2005 Information charging Brown with the First Degree Misdemeanor (Defendants' Ex. J, at DE#55-10, pp.4-7) specifically states that Brown was charged with resisting "Officer R. Passmore" without violence on 9/29/2005; yet in the present summary judgment proceedings, the defendants contend that Passmore had no interaction whatsoever with Brown on 9/29/2005, that he did not arrest Brown on that date or participate in his arrest, and that Passmore did not enter or search Brown's residence on 9/29/2005.

IV CONCLUSION AND RECOMMENDATION

Summary judgment is not a procedure for resolving a swearing contest. Chandler v. Baird, 926 F.2d 1057 (11 Cir. 1991). In this case, resolution of the issues and facts that are in dispute, based on the parties' opposing and conflicting Affidavits/Testimony would require the Court to step outside its assigned role, and invade the province of the jury. As the Supreme Court stated in Anderson v. Liberty Lobby, Inc., *supra*, "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] 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." Anderson, supra, 477 U.S. at 255 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

In the light of existing disputed material facts, the pending claim of illegal entry and search of plaintiff Brown's home on 9/29/2005 in alleged violation of his Fourth Amendment rights is therefore not subject to summary disposition. See Celotex, supra.

It is therefore recommended that: 1) the joint motion for summary judgment by defendants Passmore, Goins, Williams, and Cook (DE#55) be DENIED; 2) the plaintiff's opposing motion for summary judgment (DE#56) be DENIED; and 3) the case remain pending as to the defendants Passmore, Goins, Williams, and Cook on the claim that an illegal warrantless entry and search of plaintiff Brown's residence was conducted on 9/29/2005, in violation of his rights under the Fourth Amendment.

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

Dated: January 3rd, 2011.



UNITED STATES MAGISTRATE JUDGE

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**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

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April 11, 2011

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Appeal Number: 11-11242-DD
Case Style: Eldrick Brown v. Roderick Passmore, et al
District Court Docket No: 1:09-cv-20936-MGC

Civil Appeal Statement Received: April 11, 2011, returned unfiled. See 11th Cir R. 33-1(a)(3) appeals, Civil Appeal Statements are not required to be filed in an appeal involving a pro se party.

Sincerely,

JOHN LEY, Clerk of Court

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