

CASREF, FJL, MEDREQ, REF_DISCOV

**U.S. District Court
Southern District of Florida (Ft. Pierce)
CIVIL DOCKET FOR CASE #: 2:09-cv-14255-DLG**

Thomas v. Pieniozek et al
Assigned to: Judge Donald L. Graham
Referred to: Magistrate Judge Frank J. Lynch, Jr
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 07/29/2009
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil
Rights
Jurisdiction: Federal Question

Plaintiff

Raymond Thomas

represented by **Raymond Thomas**
DC #126007
Florida State Prison
7819 N.W 228th Street
Raiford, FL 32026
PRO SE

V.

Defendant

Sgt. Pieniozek
TERMINATED: 02/28/2011

Defendant

Sgt. Durrance

represented by **Monica Galindo Stinson**
Office of Attorney General
110 S.E. 6th Street
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Genny Xiaoya Zhu
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ATTORNEY TO BE NOTICED

Defendant**c/o Officer J. Vidal**

represented by **Monica Galindo Stinson**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Genny Xiaoya Zhu
 (See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/29/2009	<u>1</u>	COMPLAINT against all defendants.. IFP Filed, filed by Raymond Thomas. (lh) Modified event on 7/15/2010 (yc). (Entered: 07/29/2009)
07/29/2009	<u>2</u>	Clerks Notice Referring Case to Magistrate Judge Patrick A. White. (lh) (Entered: 07/29/2009)
07/29/2009	<u>3</u>	MOTION for Leave to Proceed in forma pauperis by Raymond Thomas. (lh) (Entered: 07/29/2009)
08/05/2009	<u>4</u>	ORDER RE: SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON INDIVIDUALS. That the United States Marshal shall serve a copy of the complaint and appropriate summons upon: Sergeant Pieniozek, Charlotte Correctional Institution, 33123 Oilwell Road, Punta Gorda, FL 33955; Sergeant Durrance, Charlotte Correctional Institution, 33123 Oilwell Road, Punta Gorda, FL 33955 and Officer Vidal, Charlotte Correctional Institution, 33123 Oilwell Road, Punta Gorda, FL 33955. Signed by Magistrate Judge Patrick A. White on 8/5/2009. (tw) (Entered: 08/05/2009)
08/06/2009	<u>5</u>	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF \$350.00 and Granting <u>3</u> Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 8/5/2009. (tw) (Entered: 08/06/2009)
08/06/2009	<u>6</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 8/5/2009. (tw) (Entered: 08/06/2009)
08/06/2009	<u>7</u>	PRELIMINARY REPORT AND RECOMMENDATIONS. Recommending the claims against the three defendants remain pending. Objections to R&R due by 8/24/2009. Signed by Magistrate Judge Patrick A. White on 8/5/2009. (tw) (Entered: 08/06/2009)
08/11/2009	<u>8</u>	Summons Issued as to Pieniozek. (br) (Entered: 08/11/2009)
08/11/2009	<u>9</u>	Summons Issued as to Durrance. (br) (Entered: 08/11/2009)
08/11/2009	<u>10</u>	Summons Issued as to J. Vidal. (br) (Entered: 08/11/2009)
08/26/2009	<u>11</u>	NOTICE of Change of Address by Raymond Thomas (asl) (system updated)

		(Entered: 08/27/2009)
09/23/2009	<u>12</u>	NOTICE of Change of Address by Raymond Thomas (lh)(system updated) (Entered: 09/25/2009)
11/09/2009	<u>13</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS for <u>7</u> Report and Recommendations Plaintiff's complaint <u>1</u> shall proceed against all Defendants. Signed by Judge Donald L. Graham on 11/9/2009. (cqs) (Entered: 11/09/2009)
11/12/2009	<u>14</u>	MOTION to Appoint Counsel by Raymond Thomas. Responses due by 11/30/2009 (rgs) (Entered: 11/12/2009)
11/16/2009	<u>15</u>	ORDER denying <u>14</u> Motion to Appoint Counsel. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 11/16/2009. (cz) (Entered: 11/16/2009)
11/18/2009	<u>16</u>	MOTION for Clerks Entry of Default as to Durrance, Pieniozek, J. Vidal by Raymond Thomas. (rgs) (Entered: 11/19/2009)
11/19/2009	<u>17</u>	ORDER by Clerk of Non-Entry of Default re <u>16</u> Motion for Clerks Entry of Default. Reason: Summons (Affidavit) Returned Executed OR Waiver of Service Executed - has NOT been entered on docket. Signed by DEPUTY CLERK on 11/19/2009. (rgs) (Entered: 11/19/2009)
11/20/2009	<u>18</u>	ORDER OF DIRECTIONS TO MARSHAL TO FILE RETURNS FOR ALL DEFENDANTS. The United States Marshal shall file returns of service as to the defendants named above, forthwith. Signed by Magistrate Judge Patrick A. White on 11/20/2009. (tw) (Entered: 11/20/2009)
11/30/2009	<u>19</u>	MOTION for Default Judgment by Raymond Thomas. (rgs) (Entered: 11/30/2009)
12/15/2009	<u>20</u>	Summons (Affidavit) Returned Unexecuted as to Sgt. Durrance. (rgs) Modified Text on 12/16/2009 (asl). (Entered: 12/16/2009)
12/15/2009	<u>21</u>	Summons (Affidavit) Returned Unexecuted as to Durrance. (rgs) (Entered: 12/16/2009)
12/15/2009	<u>22</u>	Summons (Affidavit) Returned Unexecuted as to J. Vidal. (rgs) (Entered: 12/16/2009)
12/18/2009	<u>23</u>	ORDER that the plaintiff shall supply with a current address for defendants Durrance, Pieniozek and Officer Vidal or this case shall be dismissed. Signed by Magistrate Judge Patrick A. White on 12/17/2009. (br) (Entered: 12/18/2009)
12/21/2009	<u>24</u>	NOTICE of Compliance by Raymond Thomas re <u>23</u> Order (tb) (Entered: 12/22/2009)
12/30/2009	<u>25</u>	NOTICE of Compliance by Raymond Thomas re <u>23</u> Order (tb) (Entered: 12/31/2009)
01/12/2010	<u>26</u>	SECOND ORDER that the United States Marshal shall serve a copy of the complaint and appropriate summons upon: Sergeant Pieniozek; Sergeant

		Durrance & Officer Vidal. Signed by Magistrate Judge Patrick A. White on 1/11/2010. (br) (Entered: 01/12/2010)
01/12/2010	<u>27</u>	Summons Issued as to Pieniozek. (br) (Entered: 01/13/2010)
01/12/2010	<u>28</u>	Summons Issued as to Durrance. (br) (Entered: 01/13/2010)
01/12/2010	<u>29</u>	Summons Issued as to J. Vidal. (br) (Entered: 01/13/2010)
01/21/2010	<u>30</u>	ORDER denying <u>19</u> Motion for Default Judgment. Corrected summonses have been issued 1/12/10. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 1/21/2010. (cz) (Entered: 01/21/2010)
01/28/2010	<u>31</u>	NOTICE of inquiry by Raymond Thomas re 30 Order on Motion for Default Judgment (tb) (Entered: 02/01/2010)
01/28/2010	<u>32</u>	REQUEST for production of documents by Raymond Thomas (tb) (Entered: 02/01/2010)
02/01/2010	<u>33</u>	Mailed Copy of Docket Sheet to petitioner per request of status of motion. (tb) (Entered: 02/01/2010)
03/17/2010	<u>34</u>	ANSWER and Affirmative Defenses to Complaint with Jury Demand by Durrance, J. Vidal.(Stinson, Monica) (Entered: 03/17/2010)
03/19/2010	<u>35</u>	SCHEDULING ORDER: Amended Pleadings due by 7/21/2010. Discovery due by 7/7/2010. Joinder of Parties due by 7/21/2010. Motions due by 8/10/2010.. Signed by Magistrate Judge Patrick A. White on 3/18/2010. (tw) (Entered: 03/19/2010)
03/29/2010	<u>36</u>	MOTION to Appoint Counsel by Raymond Thomas. Responses due by 4/15/2010 (tb) (Entered: 03/30/2010)
03/29/2010	<u>37</u>	Summons (Affidavit) Returned Unexecuted by Raymond Thomas as to Pieniozek. (tb) (Entered: 03/30/2010)
03/29/2010	<u>38</u>	SUMMONS (Affidavit) Returned Executed by Raymond Thomas. J. Vidal served on 2/25/2010, answer due 3/18/2010. (tb) (Entered: 03/30/2010)
03/29/2010	<u>39</u>	SUMMONS (Affidavit) Returned Executed by Raymond Thomas. Durrance served on 2/25/2010, answer due 3/18/2010. (tb) (Entered: 03/30/2010)
04/01/2010	<u>40</u>	ORDER denying <u>36</u> Motion to Appoint Counsel without prejudice. The summons sent to Defendant Sgt. Pieniozek at Okeechobee CI was returned unexecuted, nothing that the defendant no longer is employed there. It is the responsibility of the plaintiff to provide the Court with an updated address for this defendant or he will be dismissed. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 4/1/2010. (cz) (Entered: 04/01/2010)
04/01/2010	<u>41</u>	NOTICE of inquiry regarding pretrial exhibits by Raymond Thomas (tb) (Entered: 04/02/2010)
04/02/2010	<u>42</u>	Mailed copy of docket sheet to petitioner (tb) (Entered: 04/02/2010)
05/10/2010	<u>43</u>	Defendant's MOTION to Take Deposition from Raymond Thomas by Durrance, J. Vidal. (Stinson, Monica) (Entered: 05/10/2010)

05/11/2010	<u>44</u>	ORDER granting <u>43</u> Motion to Take Deposition from Raymond Thomas. This is a pro se plaintiff and the defendants shall govern themselves accordingly. They shall provide the plaintiff with a copy of his deposition.. Signed by Magistrate Judge Patrick A. White on 5/11/2010. (cz) (Entered: 05/11/2010)
05/26/2010	<u>45</u>	MEMORANDUM OF LAW by Raymond Thomas. (ebs) (Entered: 05/26/2010)
05/26/2010	<u>46</u>	MOTION for Leave to File an Amended Complaint by Raymond Thomas. Responses due by 6/14/2010 (ebs) (Entered: 05/26/2010)
05/26/2010	<u>47</u>	NOTICE of Filing Discovery: First Set of Interrogatories to Defendants by Raymond Thomas.(ebs) (Entered: 05/26/2010)
05/26/2010	<u>48</u>	MEMORANDUM OF LAW re <u>47</u> Notice of Filing Discovery by Raymond Thomas. (ebs) (Entered: 05/26/2010)
05/26/2010	<u>49</u>	MOTION for Appointment of Counsel by Raymond Thomas. Responses due by 6/14/2010 (ebs) (Entered: 05/26/2010)
05/28/2010	<u>50</u>	ORDER granting in part and denying in part <u>46</u> Motion to Amend/Correct; The plaintiff's complaint is proceeding on the claim of unlawful force. The plaintiff may file a PROPOSED Amended complaint stating clearly additional claims he wishes to add, and how each defendant denied him his constitutional rights. However, the plaintiff is cautioned that these new claims need to relate to the initial claims as raised, or the amendment will be stricken. This complaint was filed a year ago, and any new and unrelated claims must be filed as a separate civil rights complaint; denying <u>49</u> Motion to Appoint Counsel. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 5/28/2010. (cz) (Entered: 05/28/2010)
06/21/2010	<u>51</u>	MOTION for Leave to File to an Amended Complaint by Raymond Thomas. (ebs) (Entered: 06/22/2010)
06/25/2010	<u>52</u>	REPORT AND RECOMMENDATIONS re <u>1</u> Complaint filed by Raymond Thomas, <u>51</u> MOTION for Leave to File filed by Raymond Thomas. Recommending denying without prejudice so that the plaintiff may attempt to provide the Court with more specific information. Objections to R&R due by 7/12/2010. Signed by Magistrate Judge Patrick A. White on 6/24/2010. (tw) (Entered: 06/25/2010)
06/28/2010	<u>53</u>	OBJECTIONS to <u>52</u> Report and Recommendations by Raymond Thomas. (ebs) (Entered: 06/29/2010)
06/28/2010	<u>54</u>	MEMORANDUM OF LAW re <u>53</u> Objections to Report and Recommendations by Raymond Thomas. (ebs) (Entered: 06/29/2010)
07/08/2010	<u>55</u>	MOTION for Leave to File an Amended Complaint by Raymond Thomas. (ebs) (Entered: 07/08/2010)
07/14/2010	<u>56</u>	MOTION to Compel <i>discovery</i> by Raymond Thomas. Responses due by 8/2/2010 (tb) (Entered: 07/15/2010)

07/26/2010	<u>57</u>	RESPONSE to Motion re <u>56</u> MOTION to Compel <i>discovery and Objection to Plaintiff's Untimely Discovery Request</i> filed by Durrance. Replies due by 8/5/2010. (Stinson, Monica) (Entered: 07/26/2010)
07/26/2010	<u>58</u>	RESPONSE to Motion re <u>56</u> MOTION to Compel <i>discovery</i> filed by Durrance. Replies due by 8/5/2010. (Stinson, Monica) (Entered: 07/26/2010)
07/28/2010	<u>59</u>	ORDER granting <u>51</u> Motion for Leave to File ; granting <u>55</u> Motion for Leave to File ; the plaintiff may file a PROPOSED AMENDED COMPLAINT stating specifically the names of the proposed additional defendants and a paragraph as to the actions of each defendant, dismissing <u>56</u> Motion to Compel without prejudice, as untimely. If the plaintiff is granted leave to amend, he may file a motion for extension of time of the pre-trial dates at that time.. Signed by Magistrate Judge Patrick A. White on 7/27/2010. (cz) (Entered: 07/28/2010)
07/28/2010	<u>60</u>	Pretrial Statement by Raymond Thomas (Attachments: # <u>1</u> Memorandum of Law)(ebs) (Entered: 07/28/2010)
07/28/2010	<u>61</u>	Defendant's MOTION for Extension of Time to File <i>Defendants' Motion for Summary Judgment</i> by Durrance, J. Vidal. (Stinson, Monica) (Entered: 07/28/2010)
07/29/2010	<u>62</u>	ORDER granting <u>61</u> Motion for Extension of Time to File summary judgment. The plaintiff shall file the proposed amended complaint on or before August 20, 2010. ALL DATES ENTERED IN THE PRE-TRIAL SCHEDULING ORDER ARE EXTENDED FOR THIRTY DAYS FROM THE DATES ENTERED IN THAT ORDER.. Signed by Magistrate Judge Patrick A. White on 7/29/2010. (cz) (Entered: 07/29/2010)
07/30/2010	<u>63</u>	ORDER adopting <u>52</u> Report and Recommendations; Denying Motion. Signed by Judge Donald L. Graham on 7/30/2010. (ebs) (Entered: 07/30/2010)
08/04/2010	<u>64</u>	RESPONSE/REPLY to defendant's untimely answer to interrogatories by Raymond Thomas. (tb) (Entered: 08/05/2010)
08/26/2010	<u>65</u>	MOTION to Compel by Raymond Thomas. Responses due by 9/13/2010 (ebs) (Entered: 08/26/2010)
09/08/2010	<u>66</u>	ORDER deferring ruling on <u>65</u> Motion to Compel, defendants shall file a response. Further, the plaintiff has failed to file an amended complaint. No further extensions will be granted. Therefore the defendants motion for summary judgment is now due on or before September 30, 2010.. Signed by Magistrate Judge Patrick A. White on 9/8/2010. (cz) (Entered: 09/08/2010)
09/09/2010	<u>67</u>	RESPONSE to Motion re <u>65</u> MOTION to Compel filed by Durrance, J. Vidal. Replies due by 9/20/2010. (Stinson, Monica) (Entered: 09/09/2010)
09/17/2010	<u>68</u>	ORDER denying <u>65</u> Motion to Compel for the reasons stated in the defendants response.. Signed by Magistrate Judge Patrick A. White on 9/17/2010. (cz) (Entered: 09/17/2010)
09/30/2010	<u>69</u>	Defendant's MOTION for Summary Judgment by Durrance, J. Vidal. Responses due by 10/25/2010 (Stinson, Monica) (Entered: 09/30/2010)

09/30/2010	<u>70</u>	NOTICE by Durrance, J. Vidal <i>of Statement of Uncontested Facts in Support of Motion for Summary Judgment</i> (Savor, Kathleen) (Entered: 09/30/2010)
09/30/2010	<u>71</u>	AFFIDAVIT in Support re <u>69</u> Defendant's MOTION for Summary Judgment by Durrance, J. Vidal. (Savor, Kathleen) (Entered: 09/30/2010)
09/30/2010	<u>72</u>	AFFIDAVIT in Support re <u>69</u> Defendant's MOTION for Summary Judgment by Durrance, J. Vidal. (Savor, Kathleen) (Entered: 09/30/2010)
09/30/2010	<u>73</u>	NOTICE by Durrance, J. Vidal re <u>72</u> Affidavit in Support, <u>71</u> Affidavit in Support (Savor, Kathleen) (Entered: 09/30/2010)
09/30/2010	<u>74</u>	NOTICE by Durrance, J. Vidal re <u>72</u> Affidavit in Support <i>Additional documents for Exhibit "G"</i> (Attachments: # <u>1</u> Exhibit)(Savor, Kathleen) (Entered: 09/30/2010)
09/30/2010	<u>75</u>	Statement of: uncontested facts by Durrance, J. Vidal re <u>69</u> Defendant's MOTION for Summary Judgment. See image at DE <u>70</u> (lk) (Entered: 10/04/2010)
09/30/2010	<u>77</u>	NOTICE of Striking <u>71</u> Affidavit in Support filed by J. Vidal, Durrance by Durrance, J. Vidal. See image at DE <u>73</u> (lk) (Entered: 10/04/2010)
10/04/2010	<u>76</u>	Clerks Notice to Filer re <u>70</u> Notice (Other). Wrong Event Selected; ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see [de#75]. It is not necessary to refile this document. (lk) (Entered: 10/04/2010)
10/04/2010	<u>78</u>	Clerks Notice to Filer re <u>73</u> Notice (Other). Wrong Event Selected; ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see [de#77]. It is not necessary to refile this document. (lk) (Entered: 10/04/2010)
10/05/2010	<u>79</u>	NOTICE by Durrance, J. Vidal re <u>69</u> Defendant's MOTION for Summary Judgment <i>Notice of Serving Plaintiff with Copy of Unpublished Case Law</i> (Stinson, Monica) (Entered: 10/05/2010)
10/06/2010	<u>80</u>	Motion to Hold Defendants in Contempt by Raymond Thomas. Responses due by 10/25/2010 (jcy) (Entered: 10/06/2010)
10/07/2010	<u>81</u>	ORDER INSTRUCTING PRO SE PLAINTIFF CONCERNING RESPONSE TO MOTION FOR SUMMARY JUDGMENT <u>69</u> . (Responses due by 11/2/2010). Signed by Magistrate Judge Patrick A. White on 10/6/2010. (tw) Modified linkage/text on 10/8/2010 (dgj). (Entered: 10/07/2010)
10/07/2010	<u>82</u>	PRETRIAL STIPULATION by Durrance, J. Vidal (Stinson, Monica) (Entered: 10/07/2010)
10/07/2010	<u>83</u>	Pretrial Statement by Durrance, J. Vidal re 62 Order on Motion for Extension of Time to File, (ls)(See Image at DE # <u>82</u>) (Entered: 10/08/2010)
10/08/2010	<u>84</u>	Clerks Notice to Filer re <u>82</u> Pretrial Stipulation. Wrong Event Selected; ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see [de#83]. It is not necessary to refile this document. (ls) (Entered: 10/08/2010)

10/12/2010	<u>85</u>	ORDER denying <u>80</u> Motion to hold defendants in Contempt. Signed by Magistrate Judge Patrick A. White on 10/12/2010. (cz) (Entered: 10/12/2010)
11/01/2010	<u>86</u>	Summons Issued as to Pieniozek. (ots) (Entered: 11/01/2010)
11/02/2010	<u>87</u>	RESPONSE/REPLY to <u>75</u> Statement by Raymond Thomas. (ots) (Entered: 11/02/2010)
11/02/2010	<u>88</u>	AFFIDAVIT in Opposition re <u>79</u> Notice (Other) by Raymond Thomas. (ots) (Entered: 11/02/2010)
11/02/2010	<u>90</u>	RESPONSE to Motion re <u>69</u> Defendant's MOTION for Summary Judgment filed by Raymond Thomas.Replies due by 11/12/2010. (ots) (Entered: 11/03/2010)
11/03/2010	<u>89</u>	NOTICE of Inquiry (docket sheet/summons mailed) by Raymond Thomas (ots) (Entered: 11/03/2010)
11/12/2010	<u>91</u>	REPLY to Response to Motion re <u>69</u> Defendant's MOTION for Summary Judgment <i>with attached Affidavit</i> filed by Durrance, J. Vidal. (Stinson, Monica) (Entered: 11/12/2010)
11/24/2010	<u>92</u>	REPLY to Motion re <u>69</u> Defendant's MOTION for Summary Judgment filed by Raymond Thomas. Replies due by 12/6/2010. (dj) (Entered: 11/24/2010)
12/01/2010	<u>93</u>	RESPONSE to <u>91</u> Reply to Response to Motion by Raymond Thomas. (ots) (Entered: 12/01/2010)
02/01/2011	<u>94</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint/Petition filed by Raymond Thomas. Recommending that:(1) Defendant Piezonek be dismissed for lack of service; and(2)Defendant Durrances and Vidals motion for summary judgment be denied. Objections to R&R due by 2/18/2011. Signed by Magistrate Judge Patrick A. White on 1/31/2011. (tw) (Entered: 02/01/2011)
02/01/2011	<u>95</u>	ORDER/REPORT CASE IS READY FOR TRIAL. Signed by Magistrate Judge Patrick A. White on 1/31/2011. (tw) (Entered: 02/01/2011)
02/09/2011	<u>96</u>	SCHEDULING ORDER: Telephonic Status Conference set for 4/6/2011 01:30 PM before Judge Donald L. Graham..Signed by Judge Donald L. Graham on 2/9/2011. (ots) (Entered: 02/09/2011)
02/17/2011	<u>97</u>	NOTICE of Attorney Appearance by Genny Xiaoya Zhu on behalf of Durrance, J. Vidal (Zhu, Genny) (Entered: 02/17/2011)
02/18/2011	<u>98</u>	ORDER Granted Conditionally re <u>97</u> Notice of Attorney Appearance filed by J. Vidal, Durrance. Signed by Judge Donald L. Graham on 2/18/2011. (ots) (Entered: 02/18/2011)
02/28/2011	<u>99</u>	ORDER denying <u>69</u> Motion for Summary Judgment; adopting Report and Recommendations re <u>94</u> Report and Recommendations..Signed by Judge Donald L. Graham on 2/28/2011. (ots) (Entered: 03/01/2011)
03/22/2011	<u>100</u>	Statement of: Pretrial - <i>Amendment to Defendants' Pretrial Statement/Witness List</i> by Durrance, J. Vidal re <u>82</u> Pretrial Stipulation (Stinson, Monica)

		(Entered: 03/22/2011)
04/06/2011	<u>101</u>	Minute Entry for proceedings held before Judge Donald L. Graham: Status Conference held on 4/6/2011. Court Reporter: Carly Horenkamp, 305-523-5138 / Carleen_Horenkamp@flsd.uscourts.gov (cf) (Entered: 04/07/2011)
04/14/2011	<u>102</u>	SCHEDULING ORDER: Telephonic Pretrial Conference set for 8/24/2011 01:30 PM before Judge Donald L. Graham. Jury Trial set for 9/26/2011 before Judge Donald L. Graham. Telephonic Calendar Call set for 9/21/2011 01:30 PM before Judge Donald L. Graham. Amended Pleadings due by 4/25/2011. Discovery due by 7/11/2011. Joinder of Parties due by 4/25/2011. Motions due by 7/18/2011. Pretrial Stipulation due by 8/19/2011.. Signed by Judge Donald L. Graham on 4/14/2011. (ls) (Entered: 04/15/2011)
04/14/2011	<u>103</u>	ORDER REFERRING CASE to Mediation.. Signed by Judge Donald L. Graham on 4/14/2011. (ls) (Entered: 04/15/2011)
04/14/2011	<u>104</u>	ORDER REFERRING CASE to Magistrate Judge Frank J. Lynch, Jr for Discovery Proceedings.. Signed by Judge Donald L. Graham on 4/14/2011. (ls) (Entered: 04/15/2011)
04/19/2011	<u>105</u>	NOTICE of Change of Address (System Updated) by Raymond Thomas (ots) (Entered: 04/20/2011)
04/19/2011	<u>106</u>	Letter from John Edwards (ots) (Entered: 04/20/2011)
04/19/2011	<u>107</u>	Letter from Marie Sacco (ots) (Entered: 04/20/2011)
04/19/2011	<u>108</u>	Letter from Gayle C. Ford (ots) (Entered: 04/20/2011)
04/20/2011	<u>109</u>	Clerks Notice of Docket Correction re <u>107</u> Letter, <u>106</u> Letter, <u>108</u> Letter. Document Filed in Wrong Case ; Document restricted and docket text modified. Document refiled in correct case #10CV23235. (ots) (Entered: 04/20/2011)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-14255-CIV-GRAHAM
MAGISTRATE JUDGE P.A. WHITE

RAYMOND THOMAS, :
 :
Plaintiff, :
 :
v. :
 :
SGT. K. PIENIOZEK, et al., :
 :
Defendant. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

Plaintiff Raymond Thomas, who is confined at Charlotte Correctional Institution, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 for damages and other relief concerning events that occurred when he was confined at Okeechobee C.I. ("OCI") in 2008. After an Order affirming the Preliminary Report, the case has remained pending on Thomas's claim that on December 23, 2008, OCI Sergeant Pieniozek, Officer Jeffrey Vidal and Officer Dennis Durrance, used excessive force during a search of his cell.

This Cause is before the Court upon Defendant Durrance's and Vidal's motion for summary judgment (DE# 69), as to which plaintiff Thomas was advised of his right to respond (DE# 81).¹ In support

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

of their motion, the Defendants have submitted a Statement of Uncontested Facts (DE# 70), along with multiple exhibits: Exhibit A, Affidavit of Jeffrey Vidal (DE# 72, pp. 4-5); Exhibit B, Affidavit of Dustin Durrance (DE# 72, pp. 6-7); Exhibit C, Affidavit of Timothy Galas (DE# 72, pp. 8-10); Exhibit D, Affidavit of Paul Gray (DE# 72, pp. 11-13); Exhibit E, Affidavit of Douglas Bain (DE# 72, pp. 14-15); Exhibit F, Affidavit of Tim Sheffield (DE# 72, pp. 16-18); and Exhibit G, Deposition of Plaintiff Thomas Thomas and attached documentation of disciplinary infractions and grievances (DE# 72, pp. 19-139, DE# 74).

In response, Plaintiff Thomas submitted an answer to the

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 presented 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. Purcell Corp., 971 F.2d 1558 (11 Cir. 1992). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11 Cir. 1990) (citing Anderson v. Liberty Lobby, Inc., supra).

Pursuant to Brown v. Shinbaum, 828 F.2d 707 (11 Cir.1987), an Order of Instruction (DE# 81) was entered, informing Plaintiff, as a *pro se* litigant, of his right to respond to the defendant's motion for summary judgment. The Order specifically instructed Plaintiff regarding the requirements under Fed.R.Civ.P. 56 for a proper response to such a motion.

Defendants' uncontested facts (DE# 87) and an answer to the motion for summary judgment (DE# 88). Defendants Vidal and Durrance have filed a Reply in Support of Motion for Summary Judgment. (DE# 91).

II. Discussion

Defendant Pieniozek-Lack of Service of Process

An unexecuted Process Receipt and Return was filed for defendant Pieniozek with the explanation: "No longer employed here." (DE# 37). The Plaintiff had been previously advised that failure to provide an accurate address for a Defendant would result in dismissal of the complaint as to that Defendant. (DE# 23). Thereafter, on November 1, 2010 a new summons was issued listing a new address for Defendant Pieniozek.² (DE# 86). The Plaintiff sought this summons without motion to the court. No return of service has yet been filed on this summons. It is now a year and a half since the complaint was received and docketed by the Clerk of Court [DE# 1], and it appears that, as to the unserved defendant, Pieniozek, the complaint should be dismissed pursuant to Fed.R.Civ.P. 4(m), which provides for dismissal of a complaint which could not be served within 120 days of its filing. The Plaintiff was previously advised of this consequence of failure to timely provide an accurate address for Defendant Piezionek.

Law Pertaining to Eighth Amendment Excessive Use of Force Claims

The Supreme Court has held that application of the deliberate indifference standard is inappropriate in the prison context when authorities use force to put down a disturbance by inmates. Hudson v. McMillian, 503 U.S. 1 (1992) (citing Whitley v. Albers, 475 U.S. 312 (1986)). Instead, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Whitley, supra, 475 U.S. at

²This address matches the address provided for Pieniozek in Defendants' witness list.

320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2 Cir.)).

Whether the prison disturbance is a riot or a lesser disruption, the corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates; but the Courts have acknowledged that "both situations may require prison officials to act quickly and decisively...[and] should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Hudson v. McMillian, supra, (quoting Whitley, supra, at 321-22); Brown v. Smith, 813 F.2d 1187 (11 Cir. 1987).

The test to determine whether a claim of excessive force rises to a constitutional level of cruel and unusual punishment involves both subjective and objective components.

The subjective component relates to whether a defendant possessed a wanton state of mind while applying force, and requires the claimant to show that the prison officers' actions were malicious and sadistic, and for the purpose of causing harm, or unnecessary and wanton pain and suffering upon the prisoner. Hudson v. McMillian, supra, 503 U.S. at 6-7; Rhodes v. Chapman, 452 U.S. 337 (1981); Gregg v. Georgia, 428 U.S. 153 (1976); Stanley v. Hejirika, 134 F.3d 629, 634 (4 Cir. 1998); Branham v. Meachum, 77 F.3d 626, 630 (2 Cir. 1996); Bennett v. Parker, supra, 898 F.2d at 1532-33.

Thus, under the Eighth Amendment, force may be employed in a custodial setting as long as it is not done "maliciously and sadistically to cause harm," but applied in a good faith effort to maintain or restore discipline. Brown v. Smith, 813 F.2d 1187, 1188 (11 Cir. 1987); Skritch v. Thornton, 280 F.3d 1295, 1300 (11 Cir. 2002), citing Whitley v. Albers, 475 U.S. 312 (1986) (quotations omitted). The factors relevant to the determination of whether the force was used maliciously and sadistically with the purpose of causing harm include: 1) the extent of the injury inflicted; 2) the need for force; 3) the relationship between the

need for force and the amount of force used; 4) any efforts made to temper the severity of a forceful response; and 5) the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of facts known to them. Campbell v. Sikes, 169 F.3d 1353, 1375 (11 Cir. 1999); Redd v. Conway, 160 Fed.Appx. 858, 860 (11 Cir. 2005), citing Carr v. Tatangelo, 338 F.3d 1259, 1271 (11 Cir. 2003); Bennett v. Parker, 898 F.2d 1530, 1532-33 (11 Cir. 1990); Stanley v. Hejirika, *supra*, 134 F.3d at 634; Branham v. Meachum, *supra*, 77 F.3d at 630; Lunsford v. Bennet, 17 F.3d 1574, 1581 (7 Cir. 1994).

Courts have held that even simple inmate recalcitrance, in the form of refusal of verbal orders, may in appropriate circumstances justify the use of force (e.g., the application of mace, in non-dangerous amounts), to obtain inmate compliance so as to maintain institutional order, even when the inmate is in handcuffs, or locked in his cell when the chemical agent is used. *See e.g.* Williams v. Benjamin, 77 F.3d 756, 762-63 (4 Cir. 1996); Soto v. Dickey, 744 F.2d 1260, 1270-71 (7 Cir. 1984); Spain v. Proconier, 600 F.2d 189, 195 (9 Cir. 1979); Williams v. Scott, No. 96-2184, 1997 WL 312273, at *1 (7 Cir., June 5, 1997); Barr v. Williamsburg Co. Sheriff's Dept., No. C/A2:02-0167-22AJ, 2002 WL 32333152, at *4-5 (D.S.C., Dec. 27, 2002); *but see* Vinyard v. Wilson, 311 F.3d 1340, 1348-49, n.13 (11 Cir. 2002).³

In short, for an inmate to prevail on a claim of excessive force he must satisfy not only the subjective component that the

³ In Vinyard, *supra*, the Eleventh Circuit, reviewing its own decisions where force and injury were held to be de minimis and not excessive, and affirming summary judgment for defendant police officer Stanfield as to uses of force against Vinyard at an arrest scene, and after arrival at the police station, and as to any resulting injuries at those two points; but reversing, in part, the district court's judgment which had granted summary judgment to officer Stanfield with regard to force used against Vinyard during the ride to jail [when Stanfield stopped the police vehicle en route, grabbed Vinyard causing bruising of her arm and breast, and sprayed her with mace in order to try to stop the intoxicated arrestee Vinyard from screaming obscenities and insults], finding that although there existed "a strong argument" that the act of grabbing and bruising Vinyard constituted de minimis force and injury, "[w]hat distinguishes Stanfield's force during the jail ride from the de minimis force and injury cases is the use of pepper spray".

corrections officials acted with a sufficiently culpable state of mind, but also the objective component that he suffered some injury which was sufficiently serious in relation to the need for the application of force to establish constitutionally excessive force.

It is well settled that the "unnecessary and wanton infliction of pain...constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley v. Albers, 475 U.S. 312, 319 (1986). Although an unjustified, brutal beating of an inmate by a guard is sufficient to state a claim under §1983, Haines v. Kerner, 404 U.S. 519 (1983); Perry v. Thompson, 786 F.2d 1093 (11 Cir. 1986); Aulds v. Foster, 484 F.2d 945 (5 Cir. 1973), not every push and shove, striking, or other use of force against a prisoner, even if it may later seem unnecessary in the peace of a judge's chambers, gives rise to an action in federal court for a deprivation of civil rights. Hudson v. McMillian, 503 U.S. 1, 9 (1992); Graham v. Connor, 490 U.S. 386 (1989); Johnson v. Glick, 481 F.2d 1028, 1033 (2 Cir.), cert. denied, 414 U.S. 1033 (1973); Bennett v. Parker, 898 F.2d 1530, 1533 (11 Cir. 1990); Spicer v. Collins, 9 F.Supp. 2d 673, 686 (E.D.Tex. 1998).

On April 26, 1996, the Prison Litigation Reform Act [PLRA] was enacted. The PLRA significantly altered a prisoner's right to bring civil actions *in forma pauperis*, and in pertinent part placed new restrictions on a prisoner's ability to seek federal redress concerning the conditions of his confinement.

Section 1997e(e) of the PLRA provides as follows.

No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

With the enactment of the Prison Litigation Reform Act [PLRA] the requirements relating to injury for various kinds of inmate civil rights claims, including claims relating to use of force against inmates by corrections officials, have changed.

The Eleventh Circuit has interpreted this provision of the PLRA to mean that if due to the defendant's actions, a prisoner has not suffered some physical injury which is sufficient to satisfy the statutory provision in question, and the prisoner therefore cannot show anything more than mental or emotional suffering, the prisoner is foreclosed from obtaining compensatory or punitive damages even if there has been some violation of his constitutional rights.⁴ The Eleventh Circuit, however, did not hold that a viable claim for nominal damages would necessarily be foreclosed under §1997e(e), even if entitlement to other damages were barred under the statute.⁵

In the absence of any definition of "physical injury" in the PLRA, it has been left to the Courts to interpret the nature of the injury required. See Watts v. Gaston, No. 97-0114-CB-M, 1999 U.S.

⁴ When a prisoner files a complaint without a showing of more than *de minimis* physical injury, Section 1997e(e) operates to bar recovery of compensatory and punitive damages for mental and emotional injury suffered while the plaintiff was incarcerated; and in the Eleventh Circuit the §1997e(e) bar precluding recovery compensatory and punitive damages has been held to apply to constitutional claims other than those involving physical injury. Harris v. Garner, 190 F.3d 1279, 1286-87 (11 Cir. 1999), vacated in part and reinstated in part, Harris v. Garner, 216 F.3d 970, 984-85 (11 Cir. 2000) (en banc). The Court in Harris, while holding that §1997e(e) is a limitation on the damages which are recoverable, found that it does not preclude a prisoner's right to seek declaratory and injunctive relief. Harris, supra, 190 F.3d at 1287-88.

⁵ The Court in Harris, expressed no view on whether §1997e(e) would bar nominal damages which normally are available for the violation of certain "absolute" constitutional rights, without a showing of actual injury, Harris, 190 F.3d at 1288 n.9 (citing Carey v. Piphus, 435 U.S. 247, 266 (1978)), and thus Harris does not stand for the proposition that all actions for redress of alleged abridgement of constitutional rights are barred if there is no physical injury. The Court left open the question whether, upon a prisoner's showing that he or she had suffered the violation of some absolute constitutional right, the prisoner/plaintiff might be entitled to nominal damages (in addition to declaratory and/or injunctive relief) for redress of the constitutional tort even in the absence of physical injury. Several other circuits have reached the question regarding availability of nominal damages, and have held that [apart from any unavailability of punitive and/or compensatory damages resulting from the statutory language of §1997e(e)] prisoner plaintiffs may sue on constitutional claims and if they prevail may at least recover nominal damages. See Thompson v. Carter, 284 F.3d 411, 418 (2 Cir. 2002) (declaratory and injunctive relief, and nominal damages not barred); Searles v. Van Bebber, 251 F.3d 869, 878-80 (10 Cir. 2001) (compensatory damages barred, but nominal damages and punitive damages are not); Allah v. Al-Hafeez, 226 F.3d 247, 251-52 (3 Cir. 2000) (compensatory damages are barred, but nominal and punitive damages are recoverable); Rowe v. Shake, 196 F.3d 778, 781-82 (7 Cir. 1999) (declaratory and injunctive relief, and nominal damages not barred).

Dist. LEXIS 6593 (S.D.ALA. April 1, 1999).

In conducting inquiries relating to Eighth Amendment use of force claims the Courts have interpreted the language of §1997e(e) to require actual physical injury that is something more than *de minimis* injury in order to sustain a claim for relief.⁶ Gomez v. Chandler, 163 F.2d 921, 924 (5 Cir. 1999) ("to support an Eighth Amendment excessive force claim a prisoner must have suffered from the excessive force a more than *de minimis* physical injury"); Spicer v. Collins, 9 F.Supp. 2d 673, 686-87 (E.D.Tex. 1998) (in case where the plaintiff failed to allege any physical injury when defendant officer grabbed him by arm, and alleged pain in neck, arms, and hands from handcuffing, the Court held that "In addition to establishing that force was applied maliciously and sadistically to cause harm, a plaintiff must show that he suffered some injury in order to prevail on an Eighth Amendment excessive force claim," and ruled that the force used was not the sort of force "repugnant to the conscience of mankind"); Siqlar v. Hightower, 112 F.3d 191, 193 (5 Cir. 1997) (inmate's alleged injury at hand of prison guards was *de minimis*, and thus he did not raise a valid Eighth Amendment claim for excessive use of force, nor did he show a prerequisite "physical injury" under the PLRA to support a claim for emotional or mental suffering). See: Luong v. Hatt, 979 F.Supp. 481, 485-6 (N.D. Texas 1997) (in case involving use of force against inmate by other inmates, the District Court interpreted §1997e(e) to require a specific physical injury, i.e., an injury which is an "observable or diagnosable medical condition requiring treatment by a medical care professional," in order to assert a claim for which relief

⁶ Prior to the PLRA the absence of injuries, or evidence of only minor injuries were held by the Courts to be suggestive of *de minimis* uses of force not rising to the level of cruel and unusual punishment. See: Norman v. Taylor, 25 F.3d 1259, 1262-64 (4 Cir. 1994) (swinging keys at inmate's face which struck his thumb did not amount to cruel and unusual punishment); White v. Holmes, 21 F.3d 277, 280-81 (8 Cir. 1994) (keys swung at inmate which slashed his ear did not rise to Eighth Amendment violation); DeArmas v. Jaycox, No. 92 Civ. 6139(LMM), 1993 WL 37501, *4 (S.D.N.Y. Feb. 8, 1993) (punching inmate in arm and kicking him in leg constituted *de minimis* force), *aff'd*, 14 F.3d 591 (2 Cir. 1993); Gabai v. Jacoby, 800 F.Supp. 1149, 1154-55 (S.D.N.Y. 1992) (shoving chair at inmate causing bruise not actionable); Neil v. Miller, 778 F.Supp. 378, 384 (W.D. Mich 1991) (backhand blow to groin not actionable).

could be granted for a claim of this kind).⁷

Gomez, Spicer, Siqlar, and Luong notwithstanding, it is noted that, post-PLRA, in 2002, the Supreme Court, in Hudson v. McMillian, *supra*, held that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury. Hudson, 503 U.S. at 5-12. It is further noted that this Circuit has held, in the Eighth Amendment context, both before and after enactment of the PLRA, that use of unnecessary or gratuitous force against a prisoner is cognizable in a prisoner civil rights suit for damages. See Bruce v. Wade, 537 F.2d 850, 853 (5 Cir. 1976) (a violation of §1983 is clearly stated by the unjustified beating of an inmate at the hands of prison officials); Skrnich v. Thornton, 280 F.3d 1295, 1303 (11 Cir. 2002) (stating: "By 1998, our precedent clearly established that government officials may not use gratuitous force against a prisoner who has already been subdued, or, as in this case, is incapacitated") (citing cases).⁸

⁷ The Court in Luong defined "de minimis" injuries to include injuries such as "scrapes, scratches, cuts, abrasions, bruises, pulled muscles, back aches, leg aches, etc., which are suffered by free people in just every day living for which they never seek medical professional care," which may last "even up to two or three weeks," and which can be treated by "home remedy care," with "over-the-counter drugs, heating pads, rest, etc., and the Court held that such injuries are excluded from constitutional recognition under §1997e(e). Luong, *supra*, 979 F.Supp. at 485-6.

⁸ The Skrnich Court cited Harris v. Chapman, 97 F.3d 499, 505-06 (11 Cir. 1996) (where prisoner, who had resisted haircut and threatened to kill the barber, was forcibly removed from his cell and beaten and restrained by a group of officers, a sixth officer's actions of snapping the prisoner's head back with a towel, slapping him in the face, and uttering racial epithets and other taunts were a constitutional deprivation, meriting award of damages by jury); Davis v. Locke, 936 F.2d 1208, 1212-13 (11 Cir. 1991) (where prisoner who attempted escape and was recaptured and placed in a dog box on a truck with his hands shackled behind his back, the action of pulling him by the ankles from the box, causing him to land on his head, causing him to suffer psychological injuries, the court held that the ongoing violation of escape had been terminated, and a jury could reasonably conclude that he posed no continuing risk of threat to the guards); Williams v. Cash - C.O.I., 836 F.2d 1318, 1320 (11 Cir. 1988) (where prisoner refused to comply with a prison guard's order to return to his cell, and prisoner alleged he was subdued and his arm was broken, summary judgment for the guard was no appropriate where the prisoner alleged that the guard purposefully broke his arm after he had ceased to resist); and Perry v. Thompson, 786 F.2d 1093, 1095 (11 Cir. 1986) (Appellate Court, finding a "square, head-on dispute of material facts," reversed grant of summary judgment in prisoner haircut case, where prisoner whose hands were cuffed in front of him, alleged he was thrown to the floor

Parties Versions of Events

In this case, the December 23, 2008 event which gave rise to the lawsuit occurred at OCI on in Cell C1113 located in Wing 1 of Dormitory C. On that day, corrections officers were conducting random cell searches in that area. Defendant Vidal, requested that Plaintiff exit his cell for a search. This much is undisputed.

Plaintiff's initial account of the events is found in his complaint. (DE# 1). He initially alleged that on December 23, 2008 he was in his cell reading when a random cell search was announced. As he left his cell Plaintiff was carrying a book. Officer Vidal took the book from his hand. Plaintiff tried to grab the book back, but it fell to the floor. Plaintiff alleges that, as he bent down to get the book, Vidal grabbed him in a headlock and started choking him. According to Plaintiff, Officer Durrance then grabbed his arms and told Vidal to release him. At this point, Plaintiff alleges that Vidal punched him in the face several times while Durrance "rammed his face into the wall" as he took him down and placed hand cuffs on him. After Plaintiff was on the ground, Officer Piezionek came in and started kicking and spitting on him. Piezionek then sprayed Plaintiff with chemical agent. Plaintiff alleges that the beating continued as he was taken to confinement where he was promptly put in a shower. He was taken to medical and transported by ambulance to a hospital.

Alternatively, the Defendants have filed several affidavits that contest the facts as alleged by Plaintiff. These affidavits provide a different version of the events that occurred on December 23, 2008.

Vidal's affidavit alleges that Plaintiff failed to comply with an initial order to exit his cell. Upon the second order, Plaintiff exited the cell and struck Vidal in the mouth. Vidal then grabbed

and beaten, the defendant officers' evidence was that the prisoner was shaved without incident and that medical records showed no complaint of injury on the day of the alleged beating).

Plaintiff and took him to the floor at which point Plaintiff struck his head on the floor. Plaintiff continued to fight and got on top of Vidal. While atop Vidal, Plaintiff was punching him in the ribs. Durrance then entered the cell and forced Plaintiff off Vidal. Despite orders to stop fighting, Plaintiff continued fighting with Durrance. Durrance then forced Plaintiff to the floor. Pieniozek arrived and also ordered Plaintiff to stop fighting. Despite the orders to cease fighting, Plaintiff continued fighting. Pieniozek applied chemical agent to the head and chest area of the Plaintiff. Plaintiff continued to struggle until restraints were applied. Vidal suffered a cut on his mouth and bruised ribs.

Durrance's affidavit corroborates Vidal's statement.

Officer Timothy Galas was searching a different cell with Officer Douglas Bain when he was alerted him to an incident taking place in Plaintiff's cell. He responded to the area and saw the Plaintiff on top of Vidal. He saw Durrance and Pieniozek arrive at the scene. Galas grabbed the Plaintiff's leg because he was kicking. Although overcome by the chemical agent, Galas continued to hold Plaintiff's leg until restraints were applied. Galas alleges that all force ceased once restraints were applied. Galas and Officer Paul Gray escorted the Plaintiff to B Dorm and placed him in the shower.

Officer Paul Gray received a call for assistance. When he arrived at the scene he saw Galas, Pieniozek, Bain and Vidal struggling with the Plaintiff. Vidal was bleeding from the mouth. The Plaintiff was hitting Durrance and Galas. Gray fell and injured his knee as he attempted to assist in restraining the Plaintiff. Despite the fall, he was able to help in restraining the Plaintiff. Gray alleges that the Plaintiff was aggressive and fighting and had refused all orders to stop fighting.

Officer Douglas Bain was present and assisted Vidal in getting out from under the Plaintiff. Vidal was bleeding from the mouth and had a swollen lip. Bain put the handcuffs on the Plaintiff.

Colonel Tim Sheffield was employed at OCI on the date of the incident. His affidavit addresses the procedures for the use of force to defend oneself or other corrections personnel. He also addressed the use of force to overcome an inmate's physical resistance to a lawful command. He states that during the time that the incident occurred other inmates were walking around freely in the dorm wing. He states that this is a dangerous situation.

The Plaintiff has filed a statement of uncontested facts. (DE# 87). Although titled a statement of uncontested facts this document actually is a rebuttal to the Defendants' motion and affidavits. The undersigned discerns certain facts which could truly be described as uncontested: (1) The date of the incident and the fact that a random cell search was in progress; (2) the Plaintiff and Vidal became involved in a physical confrontation; (3) Vidal grabbed Plaintiff and Plaintiff struggled with Vidal; (4) Durrance became involved in the struggle; and (4) at some point in the altercation Plaintiff was taken down and struck his head on the floor. The remainder of this statement is argument and makes reference to his deposition testimony. This document is not signed under penalty of perjury.

The Plaintiff has also filed a response to the affidavits that includes medical records, rules on force, the amended complaint, his **sworn deposition**⁹ and documentation regarding his attempts to exhaust his administrative remedies. (DE# 88). In this document he, for the first time, alleges that he was in and out of consciousness during the incident and that he "can't remember a lot that went on on 12/23/08". The Plaintiff also provides legal argument that the motion for summary judgment should not be granted because there are genuine disputed issues of material fact. He has also filed a reply to the motion for summary judgment. (DE# 92). This statement is not signed under penalty of perjury.

⁹This sworn deposition meets the requirement of providing evidentiary material beyond that provided in his initial pleadings as required by Fed.R.Civ.P. 56(e).

The medical records submitted by Plaintiff indicate that he was treated for injuries sustained on December 23, 2008. A form titled Health Information Summary for Emergency Transfer to Outside Hospital was prepared by a health care provider on December 23, 2008 at 8:50 p.m. This document reflects that the Plaintiff was in a physical altercation at 7:40 p.m. The Plaintiff complained of dizziness and unsteady gait. The form notes that the Plaintiff had a laceration under his left eye, his left eye was swollen shut and he had a two small bumps on his head. The Plaintiff also had a small amount of blood on his left ear and a small abrasion on a finger. The form notes that the Plaintiff was transferred to Raulerson Hospital at 8:50 p.m.

The medical reports from Raulerson Hospital show that the Plaintiff was seen on December 23, 2008. The Plaintiff described his condition as injuries to his head, face, neck and groin. He claimed he was assaulted with fists and kicked. A CT scan was performed on the Plaintiff's cervical spine and revealed no fracture. A CT scan was also performed on the Plaintiff's facial bones. This scan revealed a depressed fracture of the orbital floor. A CT scan was also performed on the Plaintiff's brain. This scan reflected some soft tissue swelling but no intracranial injury. The discharge papers indicate a diagnosis of left orbital and sinus fracture. The Plaintiff was prescribed antibiotics as well as medication for pain. The medical reports from Larkin Hospital show that the Plaintiff was seen on December 25, 2008 and also reflect that he sustained an orbital fracture.

Undisputed Facts

There exist a number of uncontested facts. The parties agree to the date of the incident. The parties agree that Vidal was the first officer to become engaged in a physical confrontation with the Plaintiff and that Durrance became involved shortly thereafter. The parties agree that the Plaintiff was offering some level of resistance and that this resistance continued at least until the Plaintiff was restrained. Both parties agree that Plaintiff at some point struck his head on the floor and was sprayed with a chemical

agent. The parties also agree that after the incident the Plaintiff was promptly taken to a shower and then seen by a medical care provider. The medical records are undisputed and show that the Plaintiff suffered a fractured orbital bone.

Disputed Material Facts

There remain a number of disputed material facts. The parties disagree on how the incident began; about the amount of force used by the Plaintiff; and about the amount of force used by the Defendants against the Plaintiff.

The Defendants contend that the incident was begun when Plaintiff refused an order to exit his cell and then struck Officer Vidal in the mouth. The Plaintiff contends that the incident began when Vidal grabbed a book out of his hand and when Plaintiff tried to retrieve the book Vidal grabbed him in a headlock and began choking him.

This disputed issue is material in that it provides context to the entire incident. If the Plaintiff began the incident by punching a corrections officer then the level of force legitimately utilized to restore order might be greater than if the Plaintiff merely was attempting to retrieve his book. Although both actions by Plaintiff show a disregard for orders from a corrections officer, the magnitude of the Plaintiff's disregard is distinguishable depending on the nature of his actions. This material issue cannot be decided without an evaluation of the credibility of both the Plaintiff and the officers who witnessed the incident. As of now this question of fact remains disputed.

The parties disagree on the extent and nature of the force used by each party. The Defendants, through affidavits, claim that the Plaintiff was kicking and punching throughout the altercation. They allege that the Plaintiff refused all orders to stop fighting and continued fighting until restraints were applied. They allege that the force used was commensurate with the level of resistance being offered by the Plaintiff. No Defendant acknowledges punching

or kicking the Plaintiff. The Defendants further allege that the chemical agent was used before restraints were applied. On the other hand, the Plaintiff acknowledges that he did struggle, but describes his struggles as an attempt to breathe and to avoid the beating he claims was being inflicted. He claims that he was repeatedly punched in the face and kicked in the groin. He also claims that after he was handcuffed he was sprayed with a chemical agent and that the beating continued despite the restraints.

This disputed issue is material in that it goes to the amount of force used in relation to the resistance offered by the Plaintiff. The amount of force used and the reason for that force is a critical issue in an excessive use of force claim. See Brown v. Smith, 813 F.2d 1187, 1188 (11 Cir. 1987); Skritch v. Thornton, 280 F.3d 1295, 1300 (11 Cir. 2002), citing Whitley v. Albers, 475 U.S. 312 (1986) (quotations omitted). The question is whether the force was used in a good faith attempt to restore or maintain order, or maliciously to cause harm. Id. In addressing this question the undersigned must assess the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury, the threat that was reasonably perceived by the officer, and extent to which the officers tempered the severity of the force. Whitley 475 U.S. at 321.

If, as he claims, the Plaintiff he offered little resistance and was merely trying to breathe or avoid an unwarranted beating, the level of force he claims was used against him might be excessive, in that it went beyond the mere need to restore order or maintain discipline. If however, he was violently kicking and punching the officers, then even the level of force he claims might not have been excessive. On the other hand, if the Defendants are to be believed the Plaintiff was violently resisting all attempts to restrain him. The force used, as reflected in the affidavits, was limited to attempting to restrain the Plaintiff and all force ceased once he was adequately restrained. Thus if the Defendants are to be believed, there existed a need to restore order and the level of force used was commensurate with that need. The factual

disputes identified above go directly to the factors, as identified in Whitley, which are critical to a determination of whether the force used was excessive.

Based on the facts as presented at this summary judgment stage, any attempt to resolve the issues and facts in dispute pertaining to the use of force during the encounter between the Plaintiff and the Defendants would require the Court to step outside its assigned role, and invade the province of the jury. As the Supreme Court stated in its opinion in Anderson v. Liberty Lobby, Inc., supra, "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, supra, 477 U.S. at 255 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)). Thus, in the instant case if the plaintiff is to be believed and all inferences are to be drawn in his favor, he has presented sufficient evidence to overcome the grant of the Defendant's motion for summary judgment.

The Defendant's have also sought summary judgment on the issue of qualified immunity. In determining whether a corrections officer is entitled to qualified immunity it is necessary to consider whether the officers violated a clearly established constitutional right. See Pearson v. Callahan, 555 U.S. 223 (2009). The question of whether the Defendants employed excessive force is intertwined with the question of whether they violated the Plaintiff's constitutional right to be free from cruel and unusual punishment. As discussed above, the facts necessary to the determination of this issue are in dispute. Thus due to the nature of the factual dispute, summary judgment on this issue is not appropriate.

III. Conclusion

Due to the existence of the identified genuine issues of material fact, summary disposition of the \$1983 excessive force

claim against Defendant is not appropriate. Celotex Corp. v. Catrett, supra.

It is therefore recommended that:

- (1) Defendant Piezionek be dismissed for lack of service;
and
- (2) Defendant Durrance's and Vidal's motion for summary judgment be denied.

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

Dated: January 31st, 2011.


UNITED STATES MAGISTRATE JUDGE

cc: Raymond Thomas, Pro Se
DC No. 126007
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, FL 33955

Monica Galindo Stinson, AAG
Office of the Attorney General
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, FL 33301

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-14255-CIV-GRAHAM
MAGISTRATE JUDGE P.A. WHITE

RAYMOND THOMAS, :
Plaintiff, :
v. : REPORT THAT CASE IS
SGT. K. PIENIOZEK, et al., : READY FOR TRIAL
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#69) be DENIED, that the case be dismissed as to defendant Pieniozek for lack of service, and that the case remain pending against defendants Durrance and Vidal on plaintiff's excessive force claim.

The plaintiff and defendants have filed their respective unilateral pretrial statements (DE#s 60, 82). 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 31st, 2011.


UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Donald Graham,
United States District Judge

Raymond Thomas, Pro Se
DC No. 126007
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, FL 33955

Monica Galindo Stinson, AAG
Office of the Attorney General
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, FL 33301

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 09-14255-CIV-GRAHAM/WHITE

RAYMOND THOMAS

Plaintiff,

vs.

SGT. K. PIENIOZEK, et al.

Defendants.

ORDER

THIS CAUSE came before the Court upon Defendant Durrance's and Vidal's motion for summary judgment [D.E. 69].

THE MATTER was assigned to the Honorable United States Magistrate Judge Patrick A. White. The Magistrate Judge issued a Report [D.E. 94] recommending that Defendant Durrance's and Vidal's motion for summary judgment be denied. The Magistrate Judge also recommended that Defendant Piezionic be dismissed for lack of service. The parties did not file objections to the Magistrate Judge's Report.

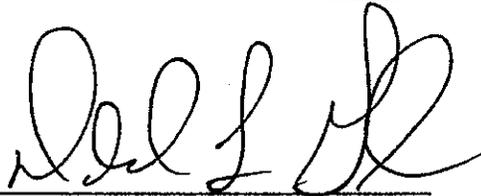
THE COURT has conducted an independent review of the file and is otherwise fully advised in the premises. Accordingly, it is hereby

ORDERED AND ADJUDGED that United States Magistrate Judge White's Report [D.E. 94] is **RATIFIED, AFFIRMED** and **APPROVED** in its entirety. It is further

ORDERED AND ADJUDGED that Plaintiff's claim against Defendant Piezionek is DISMISSED. It is further

ORDERED AND ADJUDGED that Defendant Durrance's and Vidal's motion for summary judgment [D.E. 69] is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of February, 2011.



DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge White
Raymond Thomas, pro se
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION
Case No. 09-14255-CIV-GRAHAM/LYNCH

RAYMOND THOMAS,
Plaintiff,

vs.

SGT. K. PIENIOZEK, et al.,
Defendants.

SCHEDULING ORDER
SETTING PRETRIAL CONFERENCE AND TRIAL DATES

This cause came before the Court sua sponte. It is hereby

ORDERED AND ADJUDGED as follows:

1. The trial of this cause is set and placed on the two-week trial calendar beginning **September 26, 2011**.

2. The pretrial conference will be held **telephonically** at **1:30 p.m.** on **August 24, 2011**.

3. The call of the calendar will be held **telephonically** at **1:30 p.m.** on **September 21, 2011**.

4. The pretrial conference and calendar call will be held telephonically. No counsel shall appear in person. Instead, all counsel shall appear via telephone. The parties shall contact the Court as follows:

At 2:00 P.M. on the dates referenced above for the pretrial conference and calendar call, the Court will initiate the telephone call to the parties at 1:30 P.M. The parties shall call the Court

one day prior to the pretrial conference and calendar call at (305) 523-5130 with a contact phone number.

5. The trial will be held at the **United States District Courthouse, 300 South Sixth Street, First Floor, Room 106, Fort Pierce, FL.**

6. Counsel must meet prior to the pretrial conference to confer on the preparation of a **Joint** Pretrial Stipulation. With respect to Pretrial Stipulation submissions regarding expert witnesses, the parties are referred to Local Rule 16.1(K). **Failure to file a Joint Pretrial Stipulation on or before the date set forth below shall be grounds for dismissal.**

7. The Joint Pretrial Stipulation must be filed on or before the date set forth below and shall conform to Local Rule 16.1(E). **The Court will not allow Unilateral Pretrial Stipulations.**

8. In cases tried before a jury, each party shall file a copy of the proposed voir dire questions on or before the date set forth below. In addition, the parties shall file jury instructions and verdict forms on or before the date set forth below. In order to file jury instructions and verdict forms, the parties must do the following:

- (1) They shall meet to confer on the preparation of Joint Jury Instructions and a Joint Verdict Form. From their conference, the parties shall timely file a set of Proposed Joint Jury Instructions and a Proposed Joint

Verdict Form; and

(2) To the extent that the parties cannot agree on certain instructions or certain portions of the verdict form, they may file their own set of Proposed Jury Instructions or a Proposed Verdict Form.

All proposed joint and separate jury instructions and joint and separate verdict forms must be filed with the Court on or before the date set forth below.

Each jury instruction shall be typed on a separate sheet and shall be drafted from the U.S. Eleventh Circuit Pattern Jury Instructions - Civil Cases (West) or Devitt, Blackmar's Federal Jury Practice and Instructions - Civil (West).

Failure to timely file jury instructions and verdict forms as directed above shall be grounds for sanctions, including dismissal.

9. In cases tried before the Court, each party shall file Proposed Findings of Fact and Conclusions of Law on or before the date set forth below.

In order to file Proposed Findings of Fact and Conclusions of Law, the parties must do the following:

(1) They shall meet to confer on the preparation of Joint Proposed Findings of Fact and Conclusions of Law. From their conference, the parties shall timely file a set of Proposed Joint Findings of Fact and Conclusions of Law; and

(2) To the extent that the parties cannot agree on certain Findings of Fact and Conclusions of Law, they may file their own set of proposed Findings of Fact and Conclusions of Law.

All proposed joint and separate Findings of Fact and Conclusions of Law must be filed with the Court on or before the date set forth below.

Proposed Conclusions of Law shall be supported by citations of authority.

Failure to timely file Findings of Fact and Conclusions of Law as directed above shall be grounds for sanctions, including dismissal.

10. Each counsel shall provide the Court with a copy of the following motions and responses in Wordperfect or Word format: (1) dispositive motions; (2) proposed jury instructions and verdict forms; (3) proposed findings of fact and conclusions of law; and (4) proposed substantive orders. The motions and responses shall be forwarded **separately** to this Division's NEF (Notice of Electronic Filing) Account. The e-mail subject line and the name of the attachment should include the case number, reference the docket entry number, followed by a short description of the attachment (e.g., xx-CV-xxxxx Order on D.E. #__) to graham@flsd.uscourts.gov. Additionally, the Parties are reminded that all proposed orders must comply with the following format

requirements:

- a. 12 pt. Courier New font;
- b. One inch margins on all sides;
- c. 1/2 inch tab settings;
- d. Filed electronically with the relevant motion; and
- e. The proposed order must be e-mailed as a Word Perfect 12 or Word document to graham@flsd.uscourts.gov. The subject line of the e-mail shall include the *case number*, *case name*, and *docket entry number* of the motion to which the order refers.

Moreover, the formatting of the Parties' proposed orders should mirror this Court's previous Orders. Finally, the Parties are forewarned that failure to comply with the foregoing requirements will result in the relevant motion being denied without prejudice.

11. A Motion for Continuance shall not stay the requirement for the filing of a Joint Pretrial Stipulation and, unless an emergency situation arises, a Motion for Continuance will not be considered unless it is filed at least twenty (20) days prior to the date on which the trial calendar is scheduled to commence. The pretrial conference and trial will not be continued except upon a showing of exceptional need.

12. All Notices of Conflict shall include a statement detailing the dates the cases were scheduled for trial. Under existing policies and agreements between the state and federal courts of Florida, the judge who enters the first written order scheduling a case for trial on a date set, has priority over the service of the attorney so scheduled for the date set. See Krasnow

v. Navarro, 909 F.2d 451 (11th Cir. 1990).

It shall be the duty of the attorneys herein to ensure that no other judge schedules them for a trial that impacts upon or conflicts with the date set forth above. If any counsel receives a written notice of a trial from another judge, in either state or federal court, that in any way conflicts with this trial scheduled setting, it is the obligation of that attorney to notify that judge immediately so that the judge may reschedule his or her calendar, thus leaving counsel conflict free for this case.

13. All motions for extensions of time shall be accompanied by a proposed order. Counsel are reminded to comply with Local Rule 7.1(a)(3) and CM/ECF Administrative Procedures. The proposed Order shall be forwarded **separately** to this Division's NEF (Notice of Electronic Filing) Account. The e-mail subject line and the name of the attachment should include the case number, followed by a short description of the attachment (e.g., xx-CV-xxxxx Order on D.E. #_____) to graham@flsd.uscourts.gov.

14. **A PENDING MOTION TO DISMISS SHALL NOT STAY DISCOVERY UNLESS THE COURT GRANTS A STAY OF RELIEF.**

15. Non-compliance with any provision of this Order may subject the offending party to sanctions or dismissal. It is the duty of all counsel to enforce the timetable set forth herein in order to insure an expeditious resolution of this cause.

16. Use of Depositions as Substantive Evidence. If a deposition is to be used as substantive evidence, the party wishing

to do so must designate by line and page reference those portions in writing. The designations must be served on opposing counsel at least 10 days prior to the pretrial conference. The adverse party shall serve and file, within three days thereafter, his objections, if any, to the designations, including "any other part which ought in fairness to be considered with the part introduced." See Fed R. Civ. P. 32(a)(4).

17. All exhibits must be pre-marked. The Plaintiff shall mark its exhibits designated with a "P" and numerically. Defendant shall mark its exhibits with a "D" and numerically. A typewritten exhibit list setting forth the applicable letter and number, and description of each exhibit must be submitted at the time of trial. The exhibit list must be set forth in the form of the Exhibit List found on this Court's website, under Forms, AO-187 and AO-187A.

18. The following timetable shall govern the pretrial procedure in this case. This schedule shall not be modified absent compelling circumstances.

April 25, 2011

Deadline for Amended pleadings and deadline to effectuate service on joined parties.

May 9, 2011

Deadline to exchange expert witness information pursuant to Local Rule 16.1(K). Only those expert witnesses who have been properly identified and who have exchanged information in compliance with Local Rule 16.1(K) shall be permitted to testify.

May 31, 2011	Deadline to exchange rebuttal expert witness information pursuant to Local Rule 16.1(K). Only those rebuttal expert witnesses who have been properly identified and who have exchanged information in compliance with Local Rule 16.1(K) shall be permitted to testify.
July 11, 2011	All discovery must be completed.
July 18, 2011	All Pretrial Motions and Memoranda of Law must be filed.
July 29, 2011	Deadline for all responses to motions (including responses to motions for summary judgment).
August 12, 2011	Deadline for replies to motions (including replies to motions for summary judgment).
August 19, 2011	Joint Pretrial Stipulation must be filed.
September 16, 2011	Jury Instructions and Verdict Forms or Proposed Findings of Fact and Conclusions of Law and Proposed voir dire questions.

19. All pretrial Motions in Limine shall be filed not later than twelve (12) days prior to the scheduled Calendar Call. All oppositions to Motions in Limine must be filed seven (7) days prior to the scheduled Calendar Call.

20. In order to facilitate the accurate transcription of the trial proceeding, the parties shall provide via e-mail to Carleen Horenkamp, the Court's Official Court Reporter, at

carleen_horenkamp@flsd.uscourts.gov, a copy of (1) the witness and exhibit lists and (2) a designation of unique proper nouns/names which may be raised at trial, to be received no later than five (5) days prior to the scheduled trial period.

21. If the case is settled, counsel are directed to inform the Court promptly at (305) 523-5130 and to submit an appropriate Order for Dismissal, pursuant to Fed.R.Civ.P. 41(a)(1). Such Order must be filed within ten (10) days of notification of settlement to the Court.

DONE AND ORDERED at Miami, Florida, this 14th day of April, 2011.



DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION
Case No. 09-14255-CIV-GRAHAM/LYNCH

RAYMOND THOMAS,

Plaintiff,

vs.

SGT. K. PIENIOZEK, et al.,

Defendants.

ORDER OF REFERRAL TO MEDIATION

Trial having been set in this matter for September 26, 2011, pursuant to Federal Rule of Civil Procedure 16 and Southern District Local Rule 16.2, it is hereby

ORDERED AND ADJUDGED as follows:

1. All parties are required to participate in mediation. The mediation shall be completed no later than 40 days before the scheduled trial date.

2. Plaintiff's counsel, or another attorney agreed upon by all counsel of record and any unrepresented parties, shall be responsible for scheduling the mediation conference. The parties are encouraged to avail themselves of the services of any mediator on the List of Certified Mediators, maintained in the office of the Clerk of this Court but may select any other mediator. The parties shall agree upon a mediator within fifteen (15) days from the date hereof. If there is no agreement, lead counsel shall promptly notify the Clerk in writing and the Clerk shall designate a

mediator from the List of Certified Mediators, which designation shall be made on a blind rotation basis.

3. A place, date and time for mediation convenient to the mediator, counsel of record, and unrepresented parties shall be established. The lead attorney shall complete the form order attached and submit it to the Court within thirty (30) days of the date of this Order.

4. The appearance of counsel and each party or representatives of each party with full authority to enter into a full and complete compromise and settlement is mandatory. If insurance is involved, an adjuster with authority up to the policy limits or the most recent demand, whichever is lower, shall attend.

5. All discussions, representations and statements made at the mediation conference shall be confidential and privileged.

6. At least ten (10) days prior to the mediation date, all parties shall present to the mediator a brief written summary of the case identifying issues to be resolved. Copies of these summaries shall be served on all other parties.

7. The Court may impose sanctions against parties and/or counsel who do not comply with the attendance or settlement authority requirements herein or who otherwise violate the terms of this Order. The mediator shall report non-attendance and may recommend imposition of sanctions by the Court for non-attendance.

8. The mediator shall be compensated in accordance with the

standing order of the Court entered pursuant to Rule 16.2.B.6, or on such basis as may be agreed to in writing by the parties and the mediator selected by the parties. The cost of mediation shall be shared equally by the parties unless otherwise ordered by the Court. All payments shall be remitted to the mediator within 30 days of the date of the bill. Notice to the mediator of cancellation or settlement prior to the scheduled mediation conference must be given at least two (2) full business days in advance. Failure to do so will result in imposition of a fee for one hour.

9. If a full or partial settlement is reached in this case, counsel shall promptly notify the Court of the settlement in accordance with Local Rule 16.2.F, by the filing of a notice of settlement signed by counsel of record within ten (10) days of the mediation conference. Thereafter the parties shall forthwith submit an appropriate pleading concluding the case.

10. Within five (5) days following the mediation conference, the mediator shall file a Mediation Report indicating whether all required parties were present. The report shall also indicate whether the case settled (in full or in part), was continued with the consent of the parties, or whether the mediator declared an impasse.

11. If mediation is not conducted, the case may be stricken

from the trial calendar, and other sanctions may be imposed.

DONE AND ORDERED at Miami, Florida, this 14th day of April,
2011.

A handwritten signature in black ink, appearing to read "Donald L. Graham", written over a horizontal line.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION
Case No. 09-14255-CIV-GRAHAM/LYNCH

RAYMOND THOMAS,

Plaintiff,

vs.

SGT. K. PIENIOZEK, et al.,

Defendants.

_____ /

ORDER SCHEDULING MEDIATION

The Mediation conference in this matter shall be held with

_____ on _____ at _____

A.M./P.M., at _____.

DONE AND ORDERED in Chambers at Miami, Florida, this _____
day of _____, 20__.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION
Case No. 09-14255-CIV-GRAHAM/LYNCH

RAYMOND THOMAS,

Plaintiff,

vs.

SGT. K. PIENIOZEK, et al.,

Defendants.

ORDER OF REFERENCE OF MOTIONS

PURSUANT to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules of the Southern District of Florida, the following motions in the above-captioned cause are hereby referred to United States Magistrate Judge **Lynch** to take all necessary and proper action as required by law:

1. Motions for Costs;
2. Motions for Attorney's Fees;
3. Motions for Sanctions; and
4. All Discovery Motions.

ORDERED AND ADJUDGED that the parties shall follow the attached discovery and sanctions procedures for Magistrate Judge Frank J. Lynch.

DONE AND ORDERED at Miami, Florida, this 14th day of April, 2011.



DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Lynch
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

**DISCOVERY AND SANCTIONS PROCEDURE FOR
MAGISTRATE JUDGE FRANK J. LYNCH, JR.**

The following discovery and sanctions procedures apply to all civil cases assigned to United States District Judge Donald L. Graham.

If parties are unable to resolve their discovery disputes without Court intervention or wish to seek sanctions, Magistrate Judge Frank J. Lynch, Jr. will hold a regular discovery and sanctions calendar every Thursday afternoon, from 1:00 p.m. to 3:00 p.m. in Courtroom 108, United States Courthouse, 300 South Sixth Street, Fort Pierce, Florida.

If a discovery dispute arises, the moving party must seek relief within fifteen (15) days after the occurrence of the grounds for relief, by contacting Magistrate Judge Lynch's Chambers and placing the matter on the next available discovery calendar.

A matter must be placed on the calendar by contacting Magistrate Judge Lynch's Chambers no later than three (3) days prior to the calendar. Magistrate Judge Lynch's telephone number is (772) 467-2320.

After a matter is placed on the calendar, the movant shall provide notice to all relevant parties by filing a Notice of Hearing. The Notice of Hearing shall briefly specify the substance of the discovery or sanctions matter to be heard. No more than ten (10) minutes per side will be permitted.

No written discovery motions, including motions to compel and motions for protective order or motions for sanctions shall be filed unless the parties are unable to resolve their disputes at the motion calendar, or unless requested by Magistrate Judge Lynch. It is the intent of this procedure to minimize the necessity of motions.

The Court expects all parties to act courteously and professionally in the resolution of their discovery disputes. The Court may impose sanctions, monetary or otherwise, if the Court determines discovery is being improperly sought or is not being provided in good faith, or if otherwise warranted.