

APPEAL, CASREF, PAW, RECOUT

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:10-cv-22183-JLK**

Alsobrook v. Alvarado et al
Assigned to: Senior Judge James Lawrence King
Referred to: Magistrate Judge Patrick A. White
Case in other court: USCA, 11-11244-II
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 07/02/2010
Jury Demand: None
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Christopher Uriah Alsobrook

represented by **Christopher Uriah Alsobrook**
DC #D09876
Columbia Correctional Institution/Annex
253 SE Corrections Way
Lake City, FL 32025
PRO SE

V.

Defendant

Sergeant Alvarado

represented by **Ginger Barry Boyd**
Broad and Cassel
200 Grand Blvd, Suite 205A
Destin, FL 32550
850-269-0148
Fax: 850-521-1472
Email: gbarry@broadandcassel.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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Defendant

Sergeant E Medina

represented by **Lance Eric Neff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Nurse Harris

Date Filed	#	Docket Text
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07/02/2010	<u>1</u>	COMPLAINT Under the Civil Rights Act 42USC1983 against Alvarado, E Medina.. IFP Filed, filed by Christopher Uriah Alsobrook.(dj) Modified event on 7/30/2010 (yc). (Entered: 07/02/2010)
07/02/2010	<u>2</u>	Judge Assignment RE: Electronic Complaint to Senior Judge James Lawrence King (dj) (Entered: 07/02/2010)
07/02/2010	<u>3</u>	APPLICATION to Proceed in District Court Without Prepaying Fees or Costs by Christopher Uriah Alsobrook. (dj) (Entered: 07/02/2010)
07/02/2010	<u>4</u>	Clerks Notice of Magistrate Judge Assignment to Magistrate Judge Patrick A. White. Pursuant to Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. Motions referred to Patrick A. White. (dj) (Entered: 07/02/2010)
07/09/2010	<u>5</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 7/9/2010. (br) (Entered: 07/09/2010)
07/09/2010	<u>6</u>	ORDER Permitting Plaintiff to Proceed without Prepayment of Filing Fee but Establishing Debt to Clerk of \$350.00; granting <u>3</u> Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 7/9/2010. (br) (Entered: 07/09/2010)
07/28/2010	<u>7</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Christopher Uriah Alsobrook. Recommending 1. The plaintiff has stated a claim of endangerment against Office Alvarez, and a claim of failure to intervene against Officer Medina. 2. This case shall proceed against the named defendants. Objections to RRdue by 8/16/2010. Signed by Magistrate Judge Patrick A. White on 7/28/2010. (tw) (Entered: 07/28/2010)
08/11/2010	<u>8</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon:Sgt. Alvarado, South Florida Reception Center, 14000 N.W. 41st Street, Doral, FL 33178-3003 and Sgt. E. Medina, South Florida Reception Center, 14000 N.W. 41st Street, Doral, FL 33178-3003. Signed by Magistrate Judge Patrick A. White on 8/11/2010. (tw) (Entered: 08/11/2010)
08/19/2010	<u>9</u>	ORDER AFFIRMING & ADOPTING Report and Recommendations. Signed by Senior Judge James Lawrence King on 8/19/2010. (jw) (Entered: 08/19/2010)
08/20/2010	<u>10</u>	Summons Issued as to Alvarado. (br) (Entered: 08/20/2010)
08/20/2010	<u>11</u>	Summons Issued as to E Medina. (br) (Entered: 08/20/2010)
09/09/2010	<u>12</u>	SUMMONS (Affidavit) Returned Executed Alvarado served on 9/1/2010, answer due 9/22/2010. (lbc) (Entered: 09/09/2010)
09/10/2010	<u>13</u>	NOTICE of Attorney Appearance by Lance Eric Neff on behalf of Alvarado (Neff, Lance) (Entered: 09/10/2010)
09/16/2010	<u>14</u>	NOTICE of Attorney Appearance by Cedell Ian Garland on behalf of Alvarado (Garland, Cedell) (Entered: 09/16/2010)
09/21/2010	<u>15</u>	MOTION to Dismiss <u>1</u> Complaint/Petition by Alvarado. Responses due by 10/8/2010 (Attachments: # <u>1</u> Exhibit A-C)(Neff, Lance) (Entered: 09/21/2010)
09/22/2010	<u>16</u>	ORDER REFERRING MOTION: <u>15</u> MOTION to Dismiss <u>1</u> Complaint/Petition filed by Alvarado Motions referred to Patrick A. White. Signed by Senior Judge James Lawrence King on 9/22/2010. (jw) (Entered: 09/22/2010)
10/06/2010	<u>17</u>	MOTION for Leave to File Amended Complaint by Christopher Uriah Alsobrook. (asl) (Entered: 10/06/2010)
10/06/2010	<u>18</u>	AMENDED COMPLAINT against Alvarado, E Medina, filed by Christopher Uriah Alsobrook.(asl) (Entered: 10/06/2010)
10/08/2010	<u>19</u>	ORDER REFERRING MOTION: <u>17</u> MOTION for Leave to File Amended Complaint filed by Christopher Uriah Alsobrook. Motions referred to Patrick A. White. Signed by Senior Judge James Lawrence King on 10/8/10. (ch1) (Entered: 10/08/2010)

10/13/2010	<u>20</u>	MOTION to Dismiss <u>1</u> Complaint/Petition by E Medina. Responses due by 11/1/2010 (Attachments: # <u>1</u> Exhibit A-C)(Neff, Lance) (Entered: 10/13/2010)
10/13/2010	<u>21</u>	RESPONSE in Opposition re <u>17</u> MOTION for Leave to File an Amended Complaint filed by Alvarado, E Medina. (Attachments: # <u>1</u> Exhibit A-F)(Neff, Lance) Modified text on 10/14/2010 (asl). (Entered: 10/13/2010)
10/13/2010	<u>22</u>	SUMMONS (Affidavit) Returned Executed E Medina served on 9/28/2010, answer due 10/19/2010. (asl) (Entered: 10/13/2010)
10/14/2010	<u>23</u>	ORDER REFERRING MOTION: <u>20</u> MOTION to Dismiss <u>1</u> Complaint/Petition filed by E Medina. Motions referred to Patrick A. White. Signed by Senior Judge James Lawrence King on 10/14/2010. (jw) (Entered: 10/14/2010)
10/15/2010	<u>24</u>	NOTICE of Attorney Appearance by Ginger Lynne Barry on behalf of Alvarado (Barry, Ginger) (Entered: 10/15/2010)
11/01/2010	<u>25</u>	ORDER granting <u>17</u> Motion for Leave to File the amended complaint. (See Report and Recommendation of screening of this complaint).. Signed by Magistrate Judge Patrick A. White on 11/1/2010. (cz) (Entered: 11/01/2010)
11/02/2010	<u>26</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon: Ms. Harris, Registered Nurse, South Florida Reception Center, 1400 N.W 41st Street, Doral, FL 33178-3003. Signed by Magistrate Judge Patrick A. White on 11/2/2010. (tw) (Entered: 11/02/2010)
11/02/2010	<u>27</u>	SCHEDULING ORDER: Amended Pleadings due by 3/11/2011. Discovery due by 2/25/2011. Joinder of Parties due by 3/11/2011. Motions due by 4/1/2011.. Signed by Magistrate Judge Patrick A. White on 11/2/2010. (tw) (Entered: 11/02/2010)
11/03/2010	<u>28</u>	REPORT AND RECOMMENDATIONS. Recommending 1. The Amended Complaint (DE#18) is the operative complaint. 2. The plaintiff's claims of endangerment against Officer Alvarez, and a claim of failure to intervene against Officer Medina shall remain. 3. A claim of denial of providing medical aid shall proceed against Officer Medina, and Nurse Harris, who will be served by separate order. 4. Defendant Alvarado's Motion to Dismiss (DE#15) shall be denied, with the exception of any claims against him in his official capacity. 5. Defendant Medina's Motion to Dismiss (DE#20) shall be denied, with the exception of any claims against him in his official capacity. Objections to RR due by 11/22/2010. Signed by Magistrate Judge Patrick A. White on 11/2/2010. (tw) Modified linkage on 11/4/2010 (dgi). (Entered: 11/03/2010)
11/05/2010	<u>29</u>	Summons Issued as to Harris. (br) (Entered: 11/05/2010)
11/08/2010	<u>30</u>	REPLY to Response to Motion re <u>17</u> MOTION for Leave to File filed by Christopher Uriah Alsobrook. (rgs) (Entered: 11/09/2010)
11/18/2010	<u>31</u>	MOTION for First Request for Production of Documents by Christopher Uriah Alsobrook. (rgs) (Entered: 11/19/2010)
11/19/2010	<u>32</u>	OBJECTIONS to <u>28</u> Report and Recommendations by Alvarado, E Medina. (Attachments: # <u>1</u> Exhibit A-F)(Neff, Lance) (Entered: 11/19/2010)
11/23/2010	<u>33</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS and Denying <u>15</u> Motion to Dismiss filed by Alvarado, Denying (20) Motion to Dismiss filed by Alsobrook. Signed by Senior Judge James Lawrence King on 11/23/2010. (jw) (Entered: 11/23/2010)
11/30/2010	<u>34</u>	MOTION to Dismiss <u>18</u> Amended Complaint by Alvarado, E Medina. Responses due by 12/17/2010 (Attachments: # <u>1</u> Exhibit A-J)(Neff, Lance) (Entered: 11/30/2010)
12/01/2010	<u>35</u>	MOTION to Stay <i>Discovery</i> by Alvarado, E Medina. Responses due by 12/20/2010 (Attachments: # <u>1</u> Exhibit A)(Neff, Lance) (Entered: 12/01/2010)
12/01/2010	<u>36</u>	ORDER denying <u>31</u> Motion to Produce, this is a request for discovery and should be sent directly to the defendants; denying <u>35</u> Motion to Stay discovery.. Signed by Magistrate Judge Patrick A. White on 12/1/2010. (cz) (Entered: 12/01/2010)

12/01/2010	<u>37</u>	NOTICE by Alvarado, E Medina re 36 Order on Motion to Produce, Order on Motion to Stay <i>Seeking District Judge Review Pursuant to Rule 72(a), Fed.R.Civ.P.</i> (Attachments: # <u>1</u> Exhibit A)(Neff, Lance) Modified to re-docket, see 38 on 12/1/2010 (asl). (Entered: 12/01/2010)
12/01/2010	<u>38</u>	OBJECTIONS to 36 Order on Motion to Produce, Order on Motion to Stay by Alvarado, E Medina. See <u>37</u> for image. (asl) (Entered: 12/01/2010)
12/01/2010	<u>39</u>	Clerks Notice to Filer re <u>37</u> Notice (Other), Notice (Other). Wrong Event Selected; ERROR – The Filer selected the wrong event. The document was re-docketed by the Clerk, see 38 . It is not necessary to refile this document. (asl) (Entered: 12/01/2010)
12/02/2010	<u>40</u>	Summons (Affidavit) Returned Unexecuted as to Harris. (rgs) (Entered: 12/02/2010)
12/02/2010	<u>41</u>	SUPPLEMENT to 38 Response/Reply (Other) <i>TO OBJECTIONS</i> by Alvarado, E Medina (Attachments: # <u>1</u> Exhibit A)(Neff, Lance) (Entered: 12/02/2010)
12/20/2010	<u>42</u>	RESPONSE in Opposition re <u>34</u> MOTION to Dismiss <u>18</u> Amended Complaint filed by Christopher Uriah Alsobrook. (rgs) (Entered: 12/20/2010)
02/04/2011	<u>43</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case. Denying <u>34</u> MOTION to Dismiss <u>18</u> Amended Complaint filed by Alvarado, E Medina and denying as moot <u>35</u> MOTION to Stay <i>Discovery</i> filed by Alvarado, E Medina, <u>1</u> Complaint/Petition filed by Christopher Uriah Alsobrook. The claims of endangerment against Officer Alvarez, and failure to intervene against Officer Medina shall remain. A claim of denial of providing medical aid shall proceed against Officer Medina, and Nurse Harris. Objections to RRdue by 2/22/2011. Signed by Magistrate Judge Patrick A. White on 2/2/2011. (tw) (Entered: 02/04/2011)
02/18/2011	<u>44</u>	OBJECTIONS to <u>43</u> Report and Recommendations by Alvarado, E Medina. (Neff, Lance) (Entered: 02/18/2011)
02/28/2011	<u>45</u>	ORDER Granting Partial Dismissal of Amended Complaint. Signed by Senior Judge James Lawrence King on 2/28/2011. (jw) (Entered: 02/28/2011)
03/16/2011	<u>46</u>	NOTICE OF APPEAL as to <u>45</u> Order on Motion to Dismiss by E Medina 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 Order being Appealed)(Neff, Lance) (Entered: 03/16/2011)
03/16/2011		Transmission of Notice of Appeal, Order Under Appeal and Docket Sheet to US Court of Appeals re <u>46</u> Notice of Appeal, (amb) (Entered: 03/16/2011)
03/16/2011	<u>47</u>	TRANSCRIPT INFORMATION FORM by E Medina re <u>46</u> Notice of Appeal,. No Transcript Requested. (Neff, Lance) (Entered: 03/16/2011)
03/21/2011	<u>48</u>	USCA Appeal Fees received \$ 455.00 receipt number FLS100015920 re <u>46</u> Notice of Appeal, filed by E Medina (cqs) (Entered: 03/21/2011)
03/21/2011	<u>49</u>	MOTION for Reconsideration re <u>45</u> Order on Motion to Dismiss by Christopher Uriah Alsobrook. (ral) (Entered: 03/22/2011)
03/28/2011	<u>50</u>	Acknowledgment of Receipt of NOA from USCA re <u>46</u> Notice of Appeal, filed by E Medina. Date received by USCA: 03/21/2011. USCA Case Number: 11-11244-II. (amb) (Entered: 03/29/2011)
04/25/2011	<u>51</u>	VACATED PER <u>56</u> ORDER; ORDER Granting in Part <u>49</u> Motion for Reconsideration. Signed by Senior Judge James Lawrence King on 4/25/2011. (jw) Modified text to reflect entry has been VACATED on 5/19/2011 (ral). (Entered: 04/25/2011)
04/27/2011	<u>52</u>	MOTION for Reconsideration re <u>51</u> Order on Motion for Reconsideration by E Medina. (Neff, Lance) (Entered: 04/27/2011)

05/03/2011	<u>53</u>	ORDER deferring ruling on <u>52</u> Motion for Reconsideration, this motion is respectfully deferred for ruling to United States District Judge King.. Signed by Magistrate Judge Patrick A. White on 5/3/2011. (cz) (Entered: 05/03/2011)
05/13/2011	<u>54</u>	NOTICE of Change of Address (Address updated) by Christopher Uriah Alsobrook (ar2) (Entered: 05/16/2011)
05/13/2011	<u>55</u>	MOTION for Extension of Time to File Second Amended Complaint re <u>51</u> Order on Motion for Reconsideration by Christopher Uriah Alsobrook. Responses due by 5/31/2011 (ar2) (Entered: 05/16/2011)
05/18/2011	<u>56</u>	ORDER Vacating Earlier Order of Reconsideration, Staying Proceedings; granting <u>52</u> Motion for Reconsideration; Vacating <u>51</u> Order on Motion for Reconsideration ; denying as moot <u>55</u> Motion for Extension of Time; Stayed pending resolution of the underlying appeal. Signed by Senior Judge James Lawrence King on 5/18/2011. (ral) (Entered: 05/19/2011)
05/23/2011	<u>57</u>	SECOND AMENDED COMPLAINT against Alvarado, Harris, E Medina, filed by Christopher Uriah Alsobrook.(ar2) (Entered: 05/24/2011)
05/25/2011	<u>58</u>	CERTIFICATE of Readiness transmitted to USCA re <u>46</u> Notice of Appeal, filed by E Medina, USCA # 11-11244-II (hh) (Entered: 05/26/2011)
05/25/2011	59	Certified and Transmitted Record on Appeal to US Court of Appeals Consisting of (2) Volumes of Pleadings re <u>46</u> Notice of Appeal, (hh) (Entered: 05/26/2011)
06/09/2011	<u>60</u>	Acknowledgment of Receipt of COR/ROA from USCA re <u>46</u> Notice of Appeal, filed by E Medina. Date received by USCA: 5/31/11. USCA Case Number: 11-11244-II. (hh) (Entered: 06/09/2011)

cat/div SD/98/Dede
Case # _____
Judge _____ Mag White
Motn lfp YES Fee pd \$ 00
Receipt # _____

FILED by US D.C.
JUL 2 - 2010
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. - MIAMI

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

**UNITED STATES DISTRICT COURT
Southern District of Florida**

Case Number: _____

Christopher Uriah Alsobrook
(Enter the full name of the plaintiff in this action)

v.

Sergeant Alvarado;
Sergeant E. Medina.

(Above, enter the full name of the defendant(s) in this action)

A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

Instructions for Filing:

This packet includes four copies of the complaint form and two copies of the Application to Proceed without Prepayment of Fees and Affidavit. To start an action you must file an original and one copy of your complaint for the court and one copy for each defendant you name. For example, if you name two defendants, you must file the original and three copies of the complaint (a total of four) with the court. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

Your complaint must be legibly handwritten or typewritten. Please do not use pencil to complete these forms. The plaintiff must sign and swear to the complaint. If you need additional space to answer a question, use an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

There is a filing fee of \$350.00 for this complaint to be filed. If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis.

Two blank Applications to Proceed without Prepayment of Fees and Affidavit for this purpose are included in this packet. Both should be completed and filed with your complaint.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to the Clerk's Office of the United States District Court, Southern District of Florida, 400 North Miami Avenue, Room 8N09, Miami, Florida 33128-7788.

I. Parties

In Item A below, place your name in the first blank and place your present address in the third blank.

A. Name of plaintiff: Christopher Uriah Alsobrook
Inmate #: 009876
Address: Suwannee Correctional Institution
5964 U.S. Highway 90, Live Oak, FL 32060

In Item B below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use Item C for the names, positions, and places of employment for any additional defendants.

B. Defendant: Alvarado
is employed as Correctional officer/sergeant
at South Florida Reception Center

C. Additional Defendants: E. Medina;
Correctional officer/sergeant;
South Florida Reception Center

II

Statement of Claim

A.

Sergeant Alvarado and Sergeant E. Medina of the South Florida Reception Center both acted with deliberate indifference to my 8th Amendment right to be free from cruel and unusual punishment by their reckless and/or callous disregard of my right to be free from violent attack by a fellow inmate, failing to prevent my being assaulted by my roommate in the confinement dormitory despite an obvious notice of imminent danger, as well as additionally failing to intervene once this assault was taking place.

(2) On the morning of June 6th, 2009, I was housed in cell E-2109 in E-dormitory (confinement) of the South Florida Reception Center in Miami, Florida. I was on "close-management" status, (restrictive housing separate from the general inmate population,) awaiting transport to a close-management institution. Following the morning meal, at approximately 7:20 A.M., while I lay in the upper-bunk of cell E-2109, my roommate, Izell McCloud, DC # 588881, stopped Sgt. Alvarado, the E-dormitory 7 A.M.-to-8 A.M. dorm sergeant, as he made his rounds. McCloud told Sgt. Alvarado: "You need to separate me and my roomie. I don't like his character and we're going to have some problems if you don't get him out of here right now." He repeated this same message multiple times, varying only the wording. Sgt. Alvarado replied that they

were not allowed to move anyone on that shift and "... besides, it's 7:40 and I'm about to go home. Talk to the next sergeant." As stated above, it was actually 7:20 a.m. (I had checked my watch as he made this statement.)

McCloud responded to the sergeant's words in a much more animated and vehement nature, re-iterating his prior assertions, culminating in the statement that: "If you (Sgt. Alvarado) don't get him out, I'm gonna send him out." Communicating in no uncertain terms that, if I was not immediately removed from the cell, he would assault me.

At this point, concerned with the direction that the situation was clearly heading, I spoke up and told the sergeant: "Sarge, please, just get me out of here, dude's tripping. But Sgt. Alvarado only continued to shrug off any responsibility, passing the buck on to the following shift's sergeant. (see exhibit "A", sworn affidavit of Izell McCloud.) After approximately three minutes of this, Sgt. Alvarado continued on his rounds, turning his back on the brewing violence in the face of the substantial and obvious risk that harm would occur.

There was no speaking between my roommate and myself at this time. I lay back in my bunk and quietly awaited shift-change. I became aware of much moving around and mumbling by McCloud below me. After approximately 10-15 minutes of this, he (McCloud) raised his voice, commenting out of nowhere that, if his three

bottles of lotion were not under his bunk, he was going to beat the hell out of me. (There were no such bottles of lotion in our cell over the five week period that we had shared same.) I ignored this obviously deluded statement, not wanting to escalate the situation. (McCloud is approximately 6'2", 250 pounds to my 5'11", 175.) After a couple additional minutes, McCloud again spoke up, saying that if he found anything missing in his locker, he would "beat me down."

At this time I sat up on my bunk, (the upper bunk,) my feet hanging over the edge, and jumped to the floor, intent on going to the door and attracting the attention of an officer and making a renewed effort to be removed from the cell. The moment my feet touched the concrete, McCloud, who had been seated on top of his locker, sprung up and rushed me, tackling me, causing my upper-body to become lodged in between a metal locker and the wall, (a space of approx. 12 inches) and began to repeatedly strike my head and face with his fists. I am unable to estimate the duration of this beating but I can say that a minimum of 20 blows struck me before McCloud clamped his hands around my neck and began to choke me. I frantically fought to pry his fingers from my throat until, finally, his weight shifted and I was able to buck him off of me and gain my feet.

Unbeknownst to me, McCloud had already

placed the large battery from his state-issued tape-player, (he is legally blind,) into a sock and secreted it between our two lockers. He now retrieved this and began to beat me about the head, shoulders, and arms. Fortunately, after a handful of strikes, the sock tore and he subsequently lost the battery under the bunk.

At this time, atleast 10 minutes into the assault, I began to kick the door every chance I had in an attempt to attract the attention of the officers while I simultaneously attempted to fight McCloud off of me, bleeding profusely, panicked, and in a very real fear for my life.

Sgt. Alvarado clearly knew of the conditions that made it highly foreseeable that the above would occur and, rather than taking one of the usual preventive measures, such as seperating me and McCloud — McCloud, an inmate with a history of violence, who's very reason for placement on close-management status was violent in nature, and who had been a constant antagonizing presence during his time in the confinement unit, with a well-known explosive character — Sgt. Alvarado chose to disregard McCloud's threats to assault me. By doing this, Sgt. Alvarado, acting under the color of state law, in both his individual and official capacities, acted in reckless disregard of my rights when he did this.

(2)

Several minutes after I had begun to

strike the door Sergeant Medina, the E-dormitory 8 A.M. to 4 p.m. dorm sergeant, accompanied by Sgt. Alvarado and another officer unknown to myself, arrived at my cell door (approximately 7:50 A.M. according to Sgt. Medina's statement in my disciplinary report (see exhibit "B"). Looking over my shoulder and seeing Sgt. Medina watching in silence as McCloud attacked me, I yelled to him: "What are you looking at? You going to do something? Get me out of here!" (exhibit "C") to which Sgt. Medina replied: "Handle your business." (see exhibit "A"; sworn affidavit of Izell McCloud)

McCloud, seeing there would be no interference from the officers, renewed his assault until, too exhausted to continue, he relented, stepping back away from me. Sgt. Medina then instructed McCloud to "cuff up" which McCloud refused to do. Upon McCloud's refusal to be handcuffed, Sgt. Medina closed the tray flap in the door and him and the other two officers left, returning to the officer's station, leaving me in the cell with the man they had just witnessed assaulting me — who had only stopped that assault due to fatigue — for well over an hour, totally unsupervised, re-enacting Sgt. Alvarado's prior disregard for the potential for violence between this known violent inmate, (McCloud) and a known — not "likely" but actual — victim (myself.)

Sgt. Medina, acting under the color of state law, in both his individual and official capacities, showed deliberate indifference for my rights

to be free from attack when he, instead of intervening to stop the assault with any of the means available to him -- e.g. administering chemical agents or, along with his two fellow officers, intervening physically -- callously disregarded my rights and my safety, not only standing by, but actually encouraging the assault with his words to, "Handle your business."

B.

Sergeant E. Medina of the South Florida Reception Center acted with deliberate indifference to my 8th Amendment right to be free from cruel and unusual punishment when he intentionally delayed in providing me with necessary medical care.

(1.) Now the on duty sergeant for E-dormitory, Sgt. Medina left me in cell E2109 with my roommate, Zell McCloud, from approximately 7:50am - to - after 9:00am despite the fact that he could not have failed to notice my obvious need of medical attention. I was bleeding from a gash to the rear left side of my head, a cut under my right eye, a cut on my fore-head, near the hairline, and a bloody nose. My left eye and cheekbone were heavily swollen and rapidly blackening as well as my right eye. Blood stained 70% of the front of my t-shirt and the lap of my boxers. McCloud had sustained a cut, (approx. 6 inches in length) on his left forearm when he had tackled me at the

on set of the fight, either from the locker or the heater unit protruding from the back wall. His forearm was swelling rapidly. Both his and my blood covered the walls. In spite of this scene, however, Sgt. Medina left us there until Captain Green arrived after 9:00 A.M. and ordered us to be taken to the infirmary.

After I had been pulled from the cell, Sgt. Medina and myself were alone in the dorm's sally-port while I pulled on my "class-A" uniform before leaving the dorm. He made a comment to me that perhaps was indicative of the motivation for his callous behavior. He said to me: "I thought you and McCloud were buddies." I replied that that was hardly the case. To which Sgt. Medina said: "But you filled out that statement for him the other day."

(McCloud had been arguing with the A.M. shift nurse who was being escorted on her rounds by officer Rodriguez while Sgt. Medina was dorm sergeant. Officer Rodriguez suddenly became belligerent, screaming at McCloud as he slammed the tray-flap in McCloud's face. I wrote a statement to this effect.)

I explained to Sgt. Medina that I had filled out the statement because Officer Rodriguez was wrong, not because of any friendship with my roommate, to which Sgt. Medina rolled his eyes.

C.

(1.) In the days following my assault, I

experienced severe migraine headaches, sensations of vertigo, extreme nausea and vomiting. I filed for sick-call on Tuesday, the 9th of June, 2009, but was never seen. Five days after the assault, on Thursday, the 11th of June, 2009, I lost consciousness while brushing my teeth after having vomited my dinner, smacking my head against the metal bunk in my cell which opened a gash on my forehead. I was discovered unconscious on the floor in a puddle of blood by correctional officers and taken to the infirmary over night.

These symptoms have continued to plague me off and on over the past year and I am still receiving medical treatment for headaches, dizziness, and nausea a year later. My face also bears the scars of these injuries. And, unseen but no-less painful, damage to my right shoulder from the assault still plagues me.

(2) In addition to these physical injuries, I have had to deal with multiple mental and emotional injuries. A worsening of a previously diagnosed and ongoing case of depression followed on the heels of this assault and, where once I was prescribed one anti-depressant administered once daily, I now receive two separate medications twice daily. Anti-social inclinations and behavior have been a result of the anxiety I now feel when around other inmates. Fear of being locked in a cell with another inmate is a constant and unavoidable source of anxiety.

And much stress is produced by these vertigo spells that can last for days at a time, confining me to my bed, unable even to read without incurring violent waves of nausea. Worries about what could be wrong with me, how much longer will I have to endure such ailments, and if my life is actually in danger as a result of this head trauma constantly beset me.

III Relief

A. I respectfully pray the court grant me relief in this action in the form of compensatory damages to the amount of \$25,000 to compensate me for both past and future medical expenses stemming from injuries attained due to Sgt Alvarado, under the color of state law, in both his individual and official capacities, violating my right to be free of attack, failing to prevent said attack, as well as to compensate me for the pain and suffering derived from my physical, mental, and emotional injuries sustained as a result of this violation of my rights.

B. I respectfully pray the court grant me relief in this action in the form of compensatory damages to the amount of \$30,000 to compensate me for both past and future medical expenses stemming from injuries sustained due to Sgt. E. Medina, under the color of state law, in both his individual and official capacities, violating my rights to be free of attack, failing to intervene during said attack, and denying me access to medical care, as well as to compensate me for the pain and suffering derived from my physical, mental, and emotional injuries sustained as a result of this violation of my rights.

C. I respectfully pray the court grant me relief in this action in the form of punitive damages to the amount of \$5,000 to punish Sgt. Alvarado for his reckless disregard of my

federal rights while acting under the color of state law in both his individual and official capacities.

D. I respectfully pray the court grant me relief in this action in the form of punitive damages to the amount of \$8,000 to punish Sgt. E. Medina for acting with evil motive or intent and showing callous disregard for my federal rights while acting under the color of state law in both his individual and official capacities.

E. I respectfully pray the court grant me the above requested relief and such other and further relief as to the Court may seem proper and just.

V EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. On the 17th of June, 2009, I filed three informal grievances, log # 06-057-09, (exhibit "F.") log # 06-058-09, (exhibit "D.") log # 06-059-09, (exhibit "E.") to the colonel of the South Florida Reception Center in accordance with Chapter 33 of the Florida Administrative Code. All three of these grievances were returned without being processed due to non-compliance with the Inmate Grievance Procedure, 33-103.

B. On the 12th of July, 2009, I amended these grievances and refiled them after having been transferred to Santa Rosa Correctional Institution in Milton, Florida. I never received a receipt nor response for the three grievances.

C. Concurrent to this filing, my mother, Carolyn Alsobrook, beginning on the 29th of June, 2009, and continuing through August of same, continually made contact with various supervisory officials throughout the Department of Corrections; Warden Harris of the South Florida Reception Center; Mrs. Villacorta, the Region III Regional Director of F.D.O.C., the assistant warden at Lake Butler C.I. (RMC); as well as various medical personnel (see exhibit "L" sworn affidavit of Carolyn Alsobrook,) all in relation to what was, or was not being done to investigate this incident.

D. On the 26th of July, 2009, after receiving

no response to the 3 informal grievances filed on 7/12/09, I proceeded to the next step of the Inmate Grievance Procedure and filed formal grievances; log# 0907-119-424, (see exhibit "I"); log# 0907-119-423, (see exhibit "H") and log# 0907-119-422, (see exhibit "G").

E. Not having received any response to the above referenced formal grievances after the allotted 20 days given for such, on the 24th of August, 2009, I filed 3 informal grievances to the assistant warden of Santa Rosa C.I., log# 09-5193, (see exhibit "J"); log# 09-5194, (see exhibit "K"); and log# 09-5195, (this grievance was never returned,) for this violation of the Inmate Grievance Procedure.

F. On the 24th of August, 2009, the very same day on which I had just filed the above referenced informal grievances in paragraph "E", I received the belated responses to my formal grievances log# 0907-119-422 (see exhibit "G"); log# 0907-119-423, (see exhibit "H"); and log# 0907-119-424, (see exhibit "I"); that I filed on the 12th of July, 2009. I was told: "This grievance is being returned to you without further processing in accordance with Ch 33-103.014(1)(v) in that this issue was previously addressed and reported to the office of the Inspector General. These allegations against staff have been reported to the office of the Inspector General, incorporated in the same report as the above-listed approved

grievance. (again see exhibits "G," "H," and "I")

G. After being notified that my grievances had been approved and that the issue had been reported to the Office of the Inspector General, I concluded that I had exhausted my administrative remedies. Still, after nearly 2 months of awaiting the disposition of this investigation without either being spoken to by anyone from the office of the Inspector General or notified as to the conclusion of the investigation in any way, I wrote to the office of the Inspector General and inquired into the disposition of the investigation, the inspector designated to investigate, and the investigation number. (see exhibit "M"). I never received a response to this correspondence.

H. To this day there has been, to my knowledge, no disposition to this alleged investigation. I have exhausted every administrative remedy at my disposal.

VI PREVIOUS LAWSUITS

A. I have not initiated any other actions in state court dealing with the same or similar facts/issues involved in this action.

B. I have not initiated any other actions in federal court dealing with the same or similar facts/issues involved in this action.

C. I have not initiated any other actions in either state or federal court that relate to the fact or manner of my incarceration or the conditions of my confinement.

D. I have never had any actions in federal court dismissed as frivolous, malicious, failing to state a claim, or prior to service.

VII BASIS FOR INVOKING JURISDICTION

A. 28 USC § 1331 and § 1343(a)(3) give the federal district courts jurisdiction over Section 1983 cases. This violation of my constitutional rights by Sgt. Alvarado and Sgt. E. Medina, both acting under the color of state law in both their individual and official capacities, occurred at the South Florida Reception Center in Miami, Florida, where both of the defendants are employed by the Florida Department of Corrections and is therefore subject to the jurisdiction of the United States Court of the Southern District of Florida.

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

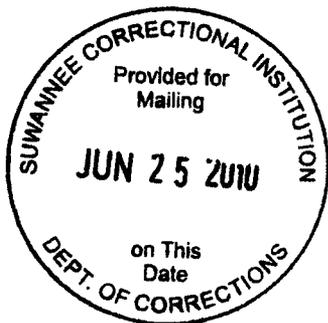
Signed this 24th day of June, 2010

Christopher Albrock
(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct. *(optional)*

Executed on: 6/24/10

Christopher Albrock
(Signature of Plaintiff)



United States District Court
Southern District of Florida

Christopher U. Alsobrook,

v.

Case No.:

Sergeant Alvarado;

Sergeant E. Medina.

Plaintiff's Appendix with Exhibits
To Plaintiff's 5/19/83 Civil Complaint.

Christopher Alsobrook,
Plaintiff, Pro Se

Christopher U. Alsobrook
D.O.C.# D09876
Suwannee Corr. Inst.
5964 U.S. Hwy 90
Live Oak, FL 32060

Index To Exhibits

Exhibit "A":

Swoon affidavit of one
Izell McCloud, D.O.C. #58887

Exhibit "B":

Disciplinary Report
Log # 402-090282.

Exhibit "C":

Disciplinary Report
Log # 402-090283

Exhibit "D":

Plaintiff's Informal Grievance
06-058-09

Exhibit "E":

Plaintiff's Informal Grievance
06-059-09

Exhibit "F":

Plaintiff's Informal Grievance
06-057-09

Exhibit "G":

Plaintiff's Formal Grievance
Filed at Institutional Level
And Institution's Response
Grievance # 07-119-422

Exhibit "H":

Plaintiff's Formal
Grievance at Institutional
Level And Institution's
Response. Grievance #
0907-119-423

Exhibit "I":

Plaintiff's Formal Grievance
at Institutional Level And
Institution's Response.
Grievance # 0907-119-424.

Exhibit "J":

Plaintiff's Informal Grievance
09-5193

Exhibit "K":

Plaintiff's Informal Grievance
09-5194

Exhibit "L":

Sworn Affidavit of one
Carolyn Alsobrook, Plaintiff's
Mother.

Exhibit "M":

Plaintiff's Letter to the
Office of the Inspector
General

EXHIBIT A

GENERAL AFFIDAVIT

STATE OF FLORIDA
COUNTY OF SANTA ROSA

I, Izell McClaud, do hereby swear that the following statement is true and correct and made of my own free will, from my own personal knowledge and do hereby state the following:

On June 6 2009, at approximately 7:20 am, am/pm

As Sgt Alvarado was doing round my roommate Christopher tall sgt that we was have A problem and need to be separate Sgt than stated he can't do know more on he's shift and then left, shift change and Sgt Alvarado on next shift ~~saga~~ Sgt Medina came to the cell Christopher stated the problem again than Sgt Medina stated to handle your business ~~by~~ this is a volated Ch rule and was very unprofessional about handled this situation

Lined area for text entry, currently blank.

UNDER PENALTIES OF PERJURY, I declare that I have read the foregoing General Affidavit and the facts stated in it are true and correct in accordance with section 92.525, Florida Statute (2009).

Executed on this 3 day of March, 2009.

Respectfully submitted by:

Zeel McCloud
Affiant Signature

Zeel McCloud 5888881
Printed Name DC #

~~_____~~
~~_____~~
~~_____~~

EXHIBIT B

FLORIDA DEPARTMENT OF CORRECTIONS
CHARGING DISCIPLINARY REPORT
LOG # 402-090282
06/12/2009

PAGE: 1

DC#: D09876 INMATE NAME: ALSOBROOK, CHRISTOPHER U. INFRACTION
VIOLATION CODE: 0024 TITLE: FIGHTING DATE: 06/06/09
FACILITY CODE: 402 NAME: S.F.R.C. TIME: 07:50

I. STATEMENT OF FACTS

ON JUNE 6, 2009 I WAS ASSIGNED TO CONFINEMENT AS THE HOUSING SERGEANT. AT APPROXIMATELY 0750 HRS I WAS IN THE OFFICER STATION GETTING BRIEFED BY MIDNIGHT SERGEANT WHEN HE HEARD A LOUD NOISE AND THE DOOR ON CELL E2109 WAS POUNDING. AS WE APPROACHED THE CELL DOOR I SAW INMATE ALSOBROOK, CHRISTOPHER DC#D09876 FIGHTING WITH INMATE MCCLOUD, IZELL DC#588881. BOTH INMATES WERE ORDERED TO CEASE THEIR ACTIONS AND THEY COMPLIED. SHORTLY, AFTER THEY STARTED FIGHTING AGAIN FOR APPROXIMATELY 15 SECONDS, THEY WERE AGAIN ORDERED TO CEASE AND THEY COMPLIED. INMATE ALSOBROOK AND INMATE MCCLOUD DID NOT RESUME FIGHTING AGAIN. THEY WERE TAKEN OUT OF THE CELL AND ESCORTED TO MEDICAL FOR ASSESSMENT. INMATE ALSOBROOK WILL REMAIN IN CONSTANT STATUS PENDING DISPOSITION OF THIS REPORT.

REPORT WRITTEN: 06/06/09, AT 10:34 BY: EMO2 - MEDINA, E.

II. INMATE NOTIFICATION OF CHARGES: DATE DELIVERED: 6/12/09, AT 4:30

NO HEARING SHALL COMMENCE PRIOR TO 24 HOURS OF DELIVERY OF CHARGES EXCEPT WHEN THE INMATE'S RELEASE DATE DOES NOT ALLOW TIME FOR SUCH NOTICE OR THE INMATE WAIVES THE 24 HOUR PERIOD AS AUTHORIZED IN RULE 33-601, FLORIDA ADMINISTRATIVE CODE.

DELIVERED BY: BS012 - Sgt B. Belmont

NOTICE TO INMATE:
AS AN INMATE BEING CHARGED WITH A VIOLATION OF THE RULES OF PROHIBITED CONDUCT, YOU ARE ADVISED THE FOLLOWING:

INVESTIGATION:
AN IMPARTIAL INVESTIGATION WILL BE CONDUCTED ON THIS DISCIPLINARY REPORT. DURING THE INVESTIGATION OF THE DISCIPLINARY REPORT, YOU WILL BE ADVISED OF THE CHARGES AGAINST YOU AND YOU MAY REQUEST STAFF ASSISTANCE. DURING THE INVESTIGATION YOU SHOULD MAKE KNOWN ANY WITNESSES TO THE INVESTIGATING OFFICER. THE TESTIMONY OF WITNESSES SHALL BE PRESENTED BY WRITTEN STATEMENTS. SEE RULE 33-601.307(3) FOR COMPLETE INFORMATION REGARDING WITNESSES. YOU WILL HAVE THE OPPORTUNITY TO MAKE A STATEMENT IN WRITING REGARDING THE CHARGE AND TO PROVIDE INFORMATION RELATING TO THE INVESTIGATION.

EXHIBIT C

FLORIDA DEPARTMENT OF CORRECTIONS
CHARGING DISCIPLINARY REPORT
ISSO150 (01) LOG # 402-090283 06/12/2009

PAGE: 1

DC#: D09876 INMATE NAME: ALSOBROOK, CHRISTOPHER U. INFRACTION
VIOLATION CODE: 0014 TITLE: DISRESP. TO OFFICIALS DATE: 06/06/09
FACILITY CODE: 402 NAME: S.F.R.C. TIME: 07:50

I. STATEMENT OF FACTS
ON JUNE 6, 2009 I WAS ASSIGNED TO CONFINEMENT AS THE HOUSING SERGEANT. AT APPROXIMATELY 0750 HRS I WAS IN THE OFFICER STATION GETTING BRIEFED BY MIDNIGHT SERGEANT WHEN WE HEARD A LOUD NOISE AND THE DOOR ON CELL E2109 WAS POUNDING. WHEN I APPROACHED CELL E2109 INMATE ALSOBROOK, CHRISTOPHER DC#D09876 LOOKED AT ME WHILE I WAS TRYING TO CONVINCE HIM AND HIS ROOMMATE TO STOP FIGHTING AND HE STATED " MAN WHAT THAT FUCK ARE YOU LOOKING AT, WHY DON'T YOU FUCKING COME IN HERE AND GET SOME TOO". INMATE ALSOBROOK IS GUILTY OF DISRESPECTING AN OFFICIAL AS PROHIBITED BY THE RULES OF INMATE CONDUCT. INMATE ALSOBROOK WILL REMAIN IN CURRENT STATUS PENDING DISPOSITION OF THIS REPORT.

REPORT WRITTEN: 06/06/09, AT 10:53 BY: EM02 - MEDINA, E.

II. INMATE NOTIFICATION OF CHARGES: DATE DELIVERED: 6/12/09, AT 2:29pm
NO HEARING SHALL COMMENCE PRIOR TO 24 HOURS OF DELIVERY OF CHARGES EXCEPT WHEN THE INMATE'S RELEASE DATE DOES NOT ALLOW TIME FOR SUCH NOTICE OR THE INMATE WAIVES THE 24 HOUR PERIOD AS AUTHORIZED IN RULE 33-601, FLORIDA ADMINISTRATIVE CODE.

DELIVERED BY: B6012 - Sgt. B. BENNETT

NOTICE TO INMATE:
AS AN INMATE BEING CHARGED WITH A VIOLATION OF THE RULES OF PROHIBITED CONDUCT, YOU ARE ADVISED THE FOLLOWING:

INVESTIGATION:
AN IMPARTIAL INVESTIGATION WILL BE CONDUCTED ON THIS DISCIPLINARY REPORT. DURING THE INVESTIGATION OF THE DISCIPLINARY REPORT, YOU WILL BE ADVISED OF THE CHARGES AGAINST YOU AND YOU MAY REQUEST STAFF ASSISTANCE. DURING THE INVESTIGATION YOU SHOULD MAKE KNOWN ANY WITNESSES TO THE INVESTIGATING OFFICER. THE TESTIMONY OF WITNESSES SHALL BE PRESENTED BY WRITTEN STATEMENTS. SEE RULE 33-601.307(3) FOR COMPLETE INFORMATION REGARDING WITNESSES. YOU WILL HAVE THE OPPORTUNITY TO MAKE A STATEMENT IN WRITING REGARDING THE CHARGE AND TO PROVIDE INFORMATION RELATING TO THE INVESTIGATION.

DELIVERY OF CHARGES:
A COPY OF THE CHARGES WILL BE PROVIDED TO YOU AT LEAST 24 HOURS PRIOR TO THE CONVENING OF THE DISCIPLINARY HEARING UNLESS YOU WAIVE THE WAITING PERIOD. THE HEARING MAY BEGIN ANY TIME AFTER THE 24 HOUR PERIOD UNLESS YOU SIGN THE WAIVER.

EXHIBIT D

STATE OF FLORIDA

DEPARTMENT OF CORRECTIONS

Mail Number: _____

Team Number: _____

Institution: S.F.R.C

~~INMATE REQUEST~~

(Instructions on Back)

Informal Grievance

#04-058-09

TO: (Check One) Warden Asst. Warden Classification Security Medical Dental Other

FROM:	Inmate Name <i>Christopher Alsobrook</i>	DC Number <i>009876</i>	Quarters <i>E3-201L</i>	Job Assignment <i>CM</i>	Date <i>6-17-09</i>
-------	---	----------------------------	----------------------------	-----------------------------	------------------------

REQUEST

On 6-6-09 I fought w/ my roommate I ~~was~~ received multiple cuts to my face & head, my roommate received a long gash to his forearm, we were both covered with each other's blood. We went to the infirmary at 9:30. I returned to E3orm at approx 11:20AM. My immediate request was to be permitted to take a shower, I had another human's blood on my body & was bleeding myself. Medical had left my cuts crusted over & oozing blood, uncovered or bandaged, & undisinfected in any way. I wanted to get this person's blood off of me. I was not allowed to shower. I requested multiple times, but Sgt Medina, the dorm sergeant would not allow me to shower. This is highly irresponsible & completely out of line.

Christophe Alsobrook 009876

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

SOUTH FLORIDA RECEPTION CENTER

JUN 18 2009

DO NOT WRITE BELOW THIS LINE

ASSISTANT WARDEN'S OFFICE

RESPONSE

DATE RECEIVED:

Your informal grievance has been received in non-compliance with Chapter 33-103, Inmate Grievance Procedure, as your grievance is so broad, general, and vague in nature that it cannot be clearly reviewed, evaluated and responded to; and/or your grievance is not written legibly and cannot be clearly understood. Your grievance should present only the specific facts and circumstances related to your complaint. If you do not understand the grievance procedure, you should seek the assistance of a law clerk or staff member.

[The following pertains to informal grievances only:

Based on the above information, your grievance is Returned (Returned, Denied, or Approved). If your informal grievance is denied, you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.]

Official (Signature):

[Signature]

Date: *6/18/09*

Distribution: White -Returned to Inmate Pink -Retained by official responding, or if the response is to an informal grievance then forward to be placed in inmate's file.
Canary -Returned to Inmate

3

EXHIBIT E

STATE OF FLORIDA

DEPARTMENT OF CORRECTIONS

Mail Number: _____

Team Number: _____

Institution: S.F.R.C

~~INMATE REQUEST~~

(Instructions on Back)

Informal Grievance # 010-059-09

TO:
(Check One)

Warden
 Asst. Warden

Classification
 Security

Medical
 Dental

Other

FROM:	Inmate Name	DC Number	Quarters	Job Assignment	Date
	Christopher Alsbrook	D09876	E3-201L	CM	6-17-09

REQUEST

At approx 7:20AM, 6-6-09, my roommate stopped Sgt Alvarado as he was doing his rounds. He explained to him that it was an emergency that him & I be separated. That we were on the verge of fighting. He said, quote "There's only 2 ways this can end, you split us up, or... I think you know what the other one is." Clearly imply that a fight was the ^{only} other possible outcome. I told Sgt Alvarado as well, "Sarge, please, just move me out of here." Sarge gave us a variety of excuses, explained he was about to go home, "holles at the 8-to-4 Sarge", etc. Me & my roommate stressed one last time we ~~needed~~ ^{needed} to be split up Sarge left. Within 10 mins, we were fighting. I was severely beaten, resulting in heavy swelling & multiple cuts to the head & face as my medical file will show. This shouldn't have been allowed to happen. Sgt Alvarado failed in his responsibility to call the dorm cameras as witness.

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

They will show that he stopped at our door E2109, for approx 3-4 mins with 3 men and 1 woman. Christoph Alsbrook

DO NOT WRITE BELOW THIS LINE

SOUTH FLORIDA RECEPTION CENTER
JUN 18 2009
ASSISTANT WARDEN'S OFFICE

RESPONSE

DATE RECEIVED:

Your informal grievance has been received in non-compliance with Chapter 33-103, Inmate Grievance Procedure, as your grievance is so broad, general, and vague in nature that it cannot be clearly reviewed, evaluated and responded to, and/or your grievance is not written legibly and cannot be clearly understood. Your grievance should present only the specific facts and circumstances related to your complaint. If you do not understand the grievance procedure, you should seek the assistance of a law clerk or staff member. Additionally, you have written outside the boundaries of the space provided on the grievance form. Content of this is only for those who write all over the form, not just a couple of letters out of the boundaries.

[The following pertains to informal grievances only:

Based on the above information, your grievance is Returned (Returned, Denied, or Approved). If your informal grievance is denied,

you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.]

Official (Signature):

Therese

Date:

6/19/09

Distribution:

White -Returned to Inmate
Canary -Returned to Inmate

Pink

-Retained by official responding, or if the response is to an informal grievance then forward to be placed in inmate's file.

EXHIBIT F

STATE OF FLORIDA

DEPARTMENT OF CORRECTIONS

Mail Number: _____

Team Number: _____

Institution: S.F.R.C

INMATE REQUEST

Informal Grievance

(Instructions on Back)

#06-057-09

TO: (Check One) Warden Asst. Warden Classification Security Medical Dental Other

FROM:	Inmate Name <i>Christopher Alsobrook</i>	DC Number <i>009876</i>	Quarters <i>63-2011</i>	Job Assignment <i>CM</i>	Date <i>6-17-09</i>
-------	---	----------------------------	----------------------------	-----------------------------	------------------------

REQUEST

~~At approx 7:40 AM, 6-6-09, I got into a fight w/ my roommate in E2-109. I received a high volume of blows to my head & face. I was bleeding from 4 different spots, 3 on my face & 1 cut on the back of my head and rapidly beginning to swell. In the latter stages of the fight, 7:50 AM according to Sgt Medina's statement, Sgt Medina, Sgt Alvarado (from 1st shift) & another officer arrived at my cell door. My back was to the door. The moment I looked back I saw Sgt Medina's face in the window, not saying anything, just watching. I asked him, "What are you looking at? You going to do something? Get me out of here." My emotions were running high, I'd just literally been fighting for my life. Sgt Medina responds: "Handle your business." Met my roommate resume the fight until we're both exhausted & bleeding. Thruout it all, Sgt Medina simply watches - He then leaves us in obvious need of medical care (as medical records will support). Presumably still at each other's throats, he leaves us in the cell from 7:50 AM till 9:00 AM not getting us to medical until 9:30 AM. He is in violation. I call down cameras & medical records to support me.~~

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

DO NOT WRITE BELOW THIS LINE

SOUTH FLORIDA RECEPTION CENTER
JUN 18 2009
ASSISTANT WARDEN'S OFFICE

RESPONSE

DATE RECEIVED:

Your informal grievance has been received in non-compliance with Chapter 33-103, Inmate Grievance Procedure, as your grievance is so broad, general, and vague in nature that it cannot be clearly reviewed, evaluated and responded to; and/or your grievance is not written leg. by and cannot be clearly understood. Your grievance should present only the specific facts and circumstances related to your complaint. If you do not understand the grievance procedure, you should seek the assistance of a law clerk or staff member. Additionally, you have written outside the boundaries of the space provided on the grievance form (Intent of this is only for those who write all over the form, not just a couple of letters out of the boundaries).

(The following pertains to informal grievances only:

Based on the above information, your grievance is Returned (Returned, Denied, or Approved). If your informal grievance is denied,

you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.

Official (Signature): *[Signature]* Date: *6/19/09*

Distribution: White -Returned to Inmate Pink -Retained by official responding, or if the response is to an informal grievance then forward to be placed in inmate's file.
Canary -Returned to Inmate

EXHIBIT G

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

REQUEST FOR ADMINISTRATIVE REMEDY OR APPEAL

JUL 27 2009

TO: Warden Assistant Warden Secretary, Florida Department of Corrections

From: Alsobrook, Christopher, U 009876 Santa Rosa
Last First Middle Initial Number Institution

Part A - Inmate Grievance

0907-119-422

I am filing this request for Administrative Remedy about a subsection that I filed first as an informal grievance per Ch. 33 on June 17. Due to non-compliance with grievance procedure my grievance was returned. By the time I received it it was early July and I was here at Santa Rosa. I re-filed the informal grievance, corrected, and placed it into the grievance box on the night of July 12th in D-dorm. Today is the 26th and I have as yet received no response nor even a receipt for my grievance, so I am proceeding to the next step without a response to my informal grievance, per Ch. 33.

My grievance is in regard to the negligent conduct of Sergeant Alvarado, S.F.R.C., E-dorm (confinement) 1st shift dorm Sgt. On the morning of 6-6-09, at approx 7:20 AM my roommate, Zell McCloud, in cell E2109 stopped Sgt Alvarado on his rounds and explained to him that he & I needed to be separated. He told Sgt Alvarado that if I wasn't taken out of the cell than he would "send me out." He continued to make it clear to Sgt Alvarado that if I was not immediately removed from that cell he was going to assault me. Sgt. Alvarado chose to ignore these threats to my person and went on his way. Shortly after I was beaten severely by my roommate, resulting in my being taken to the infirmary that morning as well as suffering lingering trauma to this day.

Sgt Alvarado was willfully negligent in his duties by leaving me in the cell with another inmate that made it clear he was about to assault me, allowing me to be harmed.

7-26-09
DATE

Christopher Alsobrook 009876
SIGNATURE OF GRIEVANT AND D.C. #

*BY SIGNATURE, INMATE AGREES TO THE FOLLOWING # OF 30-DAY EXTENSIONS: 0 / Christopher Alsobrook
Signature

ALSOBROOK,
CHRISTOPHER

D09876

0907-119-422

SANTA ROSA C.I.

F3212U

INMATE

NUMBER

GRIEVANCE LOG NUMBER

CURRENT INMATE LOCATION

HOUSING LOCATION

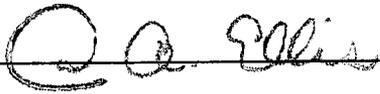
YOUR REQUEST FOR ADMINISTRATIVE REMEDY OR APPEAL HAS BEEN RECEIVED, REVIEWED AND EVALUATED.

THIS GRIEVANCE IS BEING RETURNED TO YOU WITHOUT FURTHER PROCESSING IN ACCORDANCE WITH CHAPTER 33-103.014(1)(N) IN THAT THIS ISSUE WAS PREVIOUSLY ADDRESSED AND REPORTED TO THE OFFICE OF THE INSPECTOR GENERAL.

THESE ALLEGATIONS AGAINST STAFF HAVE BEEN REPORTED TO THE OFFICE OF THE INSPECTOR GENERAL, INCORPORATED IN THE SAME REPORT AS THE ABOVE LISTED APPROVED GRIEVANCE..

G. DAVIS

D. ELLIS



8/24/09

SIGNATURE AND TYPED OR PRINTED NAME
OF EMPLOYEE RESPONDING

SIGNATURE OF WARDEN, ASST. WARDEN, OR
SECRETARY'S REPRESENTATIVE

DATE

COPY DISTRIBUTION -INSTITUTION / FACILITY

- (2 Copies) Inmate
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Grievance Mailed

AUG 21 2009

Santa Rosa C. I.

EXHIBIT H

REQUEST FOR ADMINISTRATIVE REMEDY OR APPEAL

JUL 27 2011

TO: Warden Assistant Warden Secretary, Florida Department of Corrections

From: Alsobrook, Christopher, U 009876 Santa Rosa
Last First Middle Initial Number Institution

Part A - Inmate Grievance

0902-119-423

I am filing this request for Administrative remedy about an incident that I first filed on as an informal grievance per Ch. 33 on 6.17.09. Due to non-compliance with grievance procedure my grievance was returned. By the time I received it it was early July and I was here at Santa Rosa. I re-filed the informal grievance, corrected, and placed it into the grievance box on the night of July 12th in D-dorm. Today is the 26th and I have as yet received no response nor even a receipt for my grievance, so I am proceeding to the next step of the grievance procedure without a response to my informal grievance per Ch. 33.

My grievance is in regard to the negligent conduct of Sergeant Medina, S.F.R.C, E-dorm (Confinement) 2nd shift dorm Sgt. on the morning of 6.6.09. At approx 7:50 AM (according to Sgt. Medina's statement) Sgt Medina responded to the sounds of fighting at my cell B2-109 and found me & my roommate, Izell McCloud, fighting. I was bleeding from my head and face. On finding us fighting, Sgt. Medina only watched. On seeing the sergeant at the door, my roommate briefly pined in his assault. I turned and called to Sgt. Medina, "Are you just going to watch or you going to do something? Get me out of here." Sgt. Medina responded by telling me to quote, "Handle my business." The fight resumed until my roommate had tired himself out. At no time did Sgt. Medina ever attempt to stop the fight.

Sgt. Medina was willfully negligent in his duties when he found me bloody & beaten, and still being attacked, and failed to intervene.

7.26.09
DATE

Christopher Alsobrook 009876
SIGNATURE OF GRIEVANT AND D.C. #

*BY SIGNATURE, INMATE AGREES TO THE FOLLOWING # OF 30-DAY EXTENSIONS: 0 / Christopher Alsobrook
Signature

PART B - RESPONSE

ALSOBROOK,
CHRISTOPHER

D09876

0907-119-423

SANTA ROSA C.I.

F3212U

INMATE

NUMBER

GRIEVANCE LOG NUMBER

CURRENT INMATE LOCATION

HOUSING LOCATION

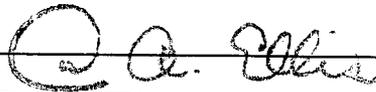
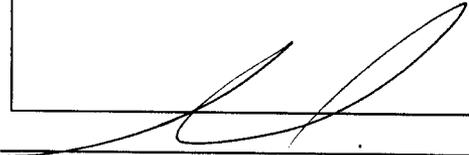
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G. DAVIS

D. ELLIS



8/21/09
DATE

SIGNATURE AND TYPED OR PRINTED NAME
OF EMPLOYEE RESPONDING

SIGNATURE OF WARDEN, ASST. WARDEN, OR
SECRETARY'S REPRESENTATIVE

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(1 Copy) Retained by Official Responding

Grievance Mailed

AUG 21 2009

Santa Rosa C. I.

EXHIBIT I

REQUEST FOR ADMINISTRATIVE REMEDY OR APPEAL

JUL 27 2010

TO: Warden Assistant Warden Secretary, Florida Department of Corrections

From: Albrock, Christopher, U 009876 Santa Rosa
Last First Middle Initial Number Institution

Part A - Inmate Grievance

8907-119-424

I am filing this request for Administrative Remedy about an incident that I first filed on as an informal grievance per Ch. 33, on 6.17.09. Due to non-compliance with grievance procedure my grievance was returned. By the time I received it it was early July and I was here at Santa Rosa I re-filed the informal grievance, corrected, and placed it into the grievance box on the night of July 12th in D-dorm Today is the 26th and I have as yet received no response nor even a receipt for my grievance. So I am proceeding to the next step of the grievance procedure without a response to my informal grievance, per Ch. 33.

My grievance is in regard to the negligent conduct of Sergeant Medina, S.F.R.C., E-dorm (Confinement) and shift Sgt on the morning of 6.6.09. At approx 7:50 AM, (according to Sgt Medina's statement) Sgt. Medina responded to sounds of fighting at cell E2-109 and found me & my roommate, Izell McCloud, fighting. After the fight ended Sgt. Medina simply left. Leaving me and my roommate both bleeding & in obvious need of medical attention and still with unresolved problems between us that could have re-flared at any moment in our cell together until after 9:00 AM. Over an hour we sat in need of medical attention without receiving it.

Sgt. Medina was willfully negligent in his duties by denying me medical treatment when, (as my injury sheet in my medical file & my D.R. will show), I was obviously in need of it.

7-26-09
DATE

Christopher Albrock 009876
SIGNATURE OF GRIEVANT AND D.C. #

*BY SIGNATURE, INMATE AGREES TO THE FOLLOWING # OF 30-DAY EXTENSIONS: 0 / Christopher Albrock
Signature

ALSOBROOK,
CHRISTOPHER

D09676

0007-15-424

SANTA ROSA C.I.

F33424

INMATE

NUMBER

GRIEVANCE LOG NUMBER

CURRENT INMATE LOCATION

HOUSING LOCATION

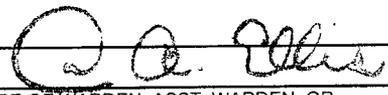
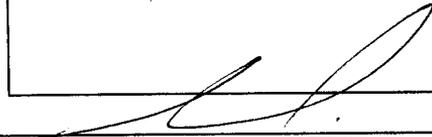
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THESE ALLEGATIONS AGAINST STAFF HAVE BEEN REPORTED TO THE OFFICE OF THE INSPECTOR GENERAL, INCORPORATED IN THE SAME REPORT AS THE ABOVE LISTED APPROVED GRIEVANCE..

G. DAVIS

D. ELLIS



8/21/09
DATE

SIGNATURE AND TYPED OR PRINTED NAME
OF EMPLOYEE RESPONDING

SIGNATURE OF WARDEN, ASST. WARDEN, OR
SECRETARY'S REPRESENTATIVE

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(1 Copy) Retained by Official Responding

Grievance Mailed
AUG 21 2009
Santa Rosa C. I.

EXHIBIT J

~~INFORMAL GRIEVANCE~~
~~INMATE REQUEST~~
DEPARTMENT OF CORRECTIONS

Matr Number: _____
Team Number: _____
Institution: _____

(Instructions on Back)

09-5193

TO: Warden Classification Medical Dental
 Asst. Warden Security Mental Health Other

FROM:	Inmate Name Christopher Alsobrook	DC Number DO9876	Quarters E3212U	Job Assignment CM2	Date 8-24-09
-------	---	----------------------------	---------------------------	------------------------------	------------------------

REQUEST

I filed a formal grievance, log# 0907-119-422, on 7.26.09. I received my receipt for it 7/27/09. The allotted time to respond to a formal grievance at the institutional level is 20 days, those 20 days expired on the 16th of this month, eight days ago, and I am yet to receive a response to my grievance. This is a violation of the inmate grievance procedure per Ch. 33.

Christopher Alsobrook
DO9876

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

Davis

DO NOT WRITE BELOW THIS LINE

AUG 24 2009

DATE RECEIVED: _____

RESPONSE

This formal grievance was returned to you on 8/21/09.

[The following pertains to informal grievances only:
Based on the above information, your grievance is *Returned* (Returned, Denied, or Approved). If your informal grievance is denied, you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.]
Official (Signature): *[Signature]* Date: **8/27/09**

EXHIBIT K

Informal Grievance

~~INMATE REQUEST~~

09-5194

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

(Instructions on Back)

Mail Number: _____
Team Number: _____
Institution: _____

TO:
(Check One)

Warden
 Asst. Warden

Classification
 Security

Medical
 Mental Health

Dental
 Other

FROM:	Inmate Name Christopher Alsobrook	DC Number D09876	Quarters F32124	Job Assignment CM2	Date 8/24/09
-------	--------------------------------------	---------------------	--------------------	-----------------------	-----------------

REQUEST

I filed a formal grievance, log # 0907-119-423, on 7/26/09. I received my receipt on 7/27/09. The allotted time to respond to a formal grievance at the institutional level is 20 days. Those 20 days expired on the 16th of this month, 8 days ago, and I am yet to receive a response to my grievance. This is a violation of the inmate grievance procedure per Ch 33.

Christopher Alsobrook
D09876

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

Davis

DO NOT WRITE BELOW THIS LINE

RESPONSE

DATE RECEIVED: 8/27/09

This formal grievance was returned to you on 8/21/09.

[The following pertains to informal grievances only:

Based on the above information, your grievance is Returned (Returned, Denied, or Approved). If your informal grievance is denied, you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.]

Official (Signature):

Date: 8/27/09

Distribution: White -Returned to Inmate Pink -Retained by official responding, or if the response is to an
Canary -Returned to Inmate informal grievance then forward to be placed in inmate's file.

EXHIBIT L

When all this happened back in June of 2009, I looked up the duties of Correctional Officers according to chapter 33 hand book and it states that,

- An Officer is to maintain control and discipline
- Observe for signs of disorder or tension and report such observation to higher authority, counsel with inmate regarding institutional, domestic, or emotional adjustment problems.
- Maintain proficiency .

Close Management criteria- The CM system requires the department to adhere (support) to certain due process protection requirements afforded inmates before placement in a restrictive status.

Per chapter 33 inmates have the same rights and even more so for CM,s in medical and clothing.

I received a letter from my son Christopher back in June 2009 in reference to an incident that happened between him and another inmate he was celled with at the South Florida Reception Center 14000 N.W. 41st street, Miami, Fl.. He actually first contacted his Aunt Catherine and asked her to relay this incident so I could help him get help for the negligence of the Officers and head nurse involved. Here below are the dates , times, and responses of my contacts with those I called or who called me to the best of my fast hand written notes.

This first is the statement of the occurrence I received from my son of what took place so I could relay it to warden Harris and Ms Villacorta.

On the 6th of June 2009, I (Christopher) got into a fight with my roommate Izel after I asked to be removed ,(both inmates) asking E-Dorm Sgt. Alvarado, on the 12 to 8 shift, at approximately 7:30, Sergeant puts it off because it's count time and his shift is getting ready to change, but he'll let the next Sergeant no and tell him to remove his roommate. The guy (Izell) is stressed out and says, no we need to immediately be separated. Right now, or there'll be problems. The Sergeant puts them both off and says he can't.

They fight really bad, the police show up, their both covered in blood.

The Sgt. they asked for help and his officers are there, plus the new shift Sgt. Medina (8 to 4 shift) just watching the fight. Christopher yells at Sgt. Medina asking him if he's going to do anything or just watch. He (Christopher) asks him to open the door and get him out. Sgt. Medina just

says, "Handle your business". According to St. Medina's statement, it was approximately 7:50 a.m., when he and the other officers arrived at the cell door.

Christopher had no choice but to try to defend himself, while the officers just stood and watched. Finally Sgt. Medina tells his roommate (McCloud) to cuff up first. The roommate refuses to cuff up, so the officers leave. Time passes. It's now approaching 9:00a.m., well over an hour since the fight started, Christopher is still in the cell with his roommate, in obvious need of medical attention. Two officers, Torrez and Diaz just walked by the cell to see what was happening, (routine security checks) and Christopher asked them both for help and to get him out of the cell. It took Captain Green to show up to get them to medical. They are finally taken to medical at about 9:30am.

Sgt. Medina just stood and watched when Christopher asked for help. They could have used force, pepper sprayed them or what ever possible to get them separated, but didn't. The fight only ended once McCloud was too exhausted to continue. Christopher bleeding profusely from head injuries.

Then the head nurse Ms. Harris on the 8 to 4 shift on June 6th 2009, didn't treat any of his cuts or do anything other than give Christopher four Motrin. Izell was cleaned with peroxide and wrapped up then sent to the hospital by Ms. Harris's request for x-rays of his forearm. While Christopher sits with blood crusting on him and still bleeding, which is a bio hazard danger with his blood and the other inmates.

Christopher was returned to his cell in the same manner he was taken out in. Still covered in blood and still bleeding. Leaving it up to himself to clean his wounds in severe pain. He could have a concussion, his shoulder ripped. Whether it was visible something was wrong or not he told Ms. Harris he was in severe pain and something was wrong. She did nothing.

Still on June 7th he remains in the same blood stained boxer underwear he fought in. No medical help received.

This whole incident should have never taken place and shows the indifference for inmate security. This incident was all on the dorm cameras as well as recorded in medical records.

On 6/9/09 Christopher put in for sick call explaining the headaches and dizziness and nausea he'd been suffering since the fight and he never got called for sick-call.

Christopher still was never seen till later two days after a fall when he was brushing his teeth due to migraines lasting nonstop, dizziness, seasick feelings and throwing up, especially when bending over. While in

his cell he fell and came to with blood again all over him from hitting his head, thought he was dying , he then was taken to the infirmary , but no x-rays or test were taken for internal damage that may have occurred from the fight.

* I called Warden Harris around or about on June 29th as soon as I received information on this fight ,at about 12:00 and again at 4:35 with no answers both times, he was suppose to call me back and never did. So I called Ms. Villacorta at 4:38 she wasn't in, will try tomorrow.

* Called Warden Harris on 6/30/09 @ 1:57pm, spoke to his secretary, she pulled up the case or tried to, after waiting on the phone she finally said there was one more thing they needed to look into and they'd call me back in about 30 minutes. An hour later about 3:30 the secretary called back stating that Warden Harris was very busy and would have to call me back later.

* Christopher is moved to Lake Butler C.I. Warden Harris informed me it was for him to be looked at, when in fact he was really in route to his next facility . I talked to Warden Harris again and he said Christopher was just a transit and is why he was celled where he was and was moved only for that reason. He went to Lake Butler cause all transits go there before going on to there next place, Christopher is on his way to another prison , they can't tell me where.

* On June 23, 2009 I talked to Asst. Warden of Lake Butler that afternoon, he said he'd check Christopher out and get back with me. Christopher will be moved some where else if he seems okay.

* On June 24,2009 I called Lake Butler to see how my son was doing still very concerned about his head injury. I then spoke to Ms. Cruz who helps the Asst. Warden @ about 3:10pm, with no help my son is being moved to another facility.

* At lake Butler because of my calls and concern that they may be involved with what happened at S.F.R.C. the Asst. Warden and the Colonel pulled my son out and talked to him about what happened at South Fl. And wanted to know what he had been telling me. They wanted to make sure they weren't involved.

* I talked to Warden Harris again and asked what was going to be done with the officers and Sgt., and head nurse who were responsible for this incident, he said he'd have it looked into and get back to me.

* Time passes, Warden Harris calls me after I spoke to Ms. Villacorta, region Director . He tells me he talked to his Chief Health physician and said Christopher seemed fine. And his report of the investigation will go to

the Inspector Generals office and they or someone would contact me.

* After a month gone by speaking to Ms Villacorta I e-mailed her and told her it had been a month since speaking to her of my sons incident at South Fl. Reception Center , I told her I still hadn't heard from Mr. Harris at the time had only spoke to his secretary . If this was all filmed like Close Management is suppose to be, why the delay. I went on to explain how they all should be punished just as my son was being punished for his crime, these officers and Sgt's. as well as the head nurse were all negligent and unprofessional. Later we again spoke and she said it was being looked in to.

* When I found out where my son was moved to I called the institution, Santa Rosa in Milton Fl. I spoke to Warden Ellis's secretary Ms. Hall. Ms. Katie Hall took down all my information and said they'll have Christopher looked at and look into his records. That Richard Fennel is the head nurse there and he will call me. My son was moved to Santa Rosa C.I. between the 24th to the 27th of June.

*7/16/09 Mr. Fennel called me back to tell me Christopher signed medical release forms and for me to talk to Ms. Ethridge , to call back tomorrow 7/17/09 @ 9:00 or 9:30 her direct # is 850-983-5956

* I called back 7/17 @ 9:15 our time, she said Christopher did put in a sick call and now he has an appointment to see the doctor.

* 7/31/09 @ 3:08 I called Ms. Villacorta again it's been about a week or more since I last called her about the investigation happenings on Christopher @ S.F.R.C. still no answers. Her secretary says she'll call me back.

* 7/31/09 @ 3:10 I called Santa Rosa to see how the nurse or Physian Asst. treated Christopher. Mr. Fennel wasn't in , he is Supervisor of Medical, I told them I'd call back.

* It's now 8/4/09 @ about 1:30 called Mr. Fennel about my son's complaint of the Doctor who last saw him. They still aren't taking x-rays or cat scans of his head to see if internal damage was done from the blows to his head. Mr. Fennel tells me Christopher needs to write a request to Health Services Administration telling them what he told me or he can write a grievance.

* 8/4/09 I call Ms. Villacorta @ 1:40 and talk to Mr. Olson, he tells me an investigation is being done and some one will contact me . He also told me if I call any institution and ask for the IG log on information concerning Christopher they can tell me what is going.

* When I found out my son won his grievances concerning action, (or

inaction) of the officers, I called Warden Harris to see what ever happened, that no one ever contacted me as told, no inspector etc.. He told me there was nothing he could tell me.

* To date we still have heard nothing of what ever happened to all involved with this incident that should have never taken place if the Sgt's and officers did their job as stated in chapter 33, as well as nurse Harris.

Garth F. Albrook
04/20/2010

EXHIBIT M

PROVIDED TO
SANTAROSA
OCT 15 2009
FORMAILING CA
INMATE INITIALS

Christopher Uriah Alsobrook
Santa Rosa Corr. Institution
5850 East Milton Rd.
Milton, FL 32583
DC# D09876

Office of the Inspector General
Florida Dept. of Corrections
2601 Blairstone Rd.
Tallahassee, FL 32399-2500

RE: Disposition of Investigation

Date: 10/15/09

To: Whom it may concern:

The purpose of this correspondence is to inquire as to the investigation which emanated from grievance log numbers - 0907-119-422, 0907-119-423, and 0907-119-424, in which I alleged willful negligence on behalf of the S. Florida Rec. Center correctional employees in an event where they allowed me to be assaulted and battered by inmate Izell McCloud #588881 on 6/6/09, at approximately 7:45 am, despite inmate McCloud informing Sgt. Alvarado of his intentions to do so if I was not immediately removed from the cell at approximately 7:20 am. Which resulted in inmate McCloud making good on his threat to assault ^{with} me, as aforementioned, at approximately 7:45 am.

At approximately 7:50 am Sgt. Medina, accompanied by Sgt. Alvarado, and another officer, responded to

the assault, at which time I asked him to intervene to stop the attack, (Sgt. Medina) to which he replied, "Handle your business," as he stood by as the assault continued, which is completely contrary to the procedures set forth by Departmental policy for such incidents.

After inmate McCloud stopped assaulting me of his own accord, due to exhaustion, the officers then walked away, leaving me in the cell with inmate McCloud for approximately an hour in spite of my obvious need of medical attention, as was evident by the multiple lacerations, ~~contusions~~^{C.U.A.} abrasions, and contusions about my head and facial area and the accompanying head trauma that has resulted in ongoing medical problems.

My returned grievances affirmed these allegations were forwarded to the office of the Inspector General for further review and investigation, ~~and~~^{C.U.A.} however, as of this date, I have as yet to be interviewed by any inspector regarding the incident. I wish to know the investigation number, the inspector designated to investigate, and the disposition of the investigation.

I thank you in advance for your time and assistance in this matter. I look forward to your timely response.

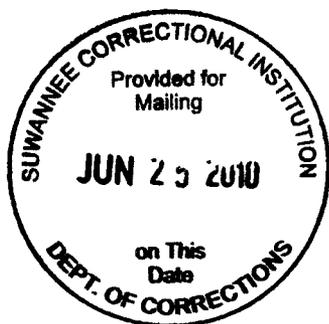
respectfully,
Christopher Ulrich Alaback.
Dct# 009876

Certificate of Service

I, Christopher U. Alsobrook, hereby certify, that a true and correct copy of the foregoing documents, Exhibits to Plaintiff's 3/1983 Civil Complaint, has been furnished by U.S. Mail to:

Clerk of the Court, United States
District Court Southern District of Florida, 400
N. Miami Avenue, Room 8N09, Miami, Florida 33128-
7788;

This document was placed into the hands of an institutional official or institutional mail box for mailing on this 24th day of June, 2010.



Christopher Alsobrook
plaintiff pro se

Christopher U. Alsobrook
D.O.C. # D09876
Suwannee Corr. Inst.
5864 U.S. Hwy 90
Live Oak, FL 32060

Christopher Alsobrook ID# D09876
Suwannee Correctional Institution
5964 U.S. Hwy 90.
Live Oak, FL 32060

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-22183-CIV-KING
MAGISTRATE P. A. WHITE

CHRISTOPHER URIAH ALSOBROOK, :

Plaintiff, :

v. :

REPORT OF
MAGISTRATE JUDGE

SGT. ALVARADO, et al., :

Defendants. :

I. Introduction

The pro-se plaintiff, Christopher Uriah Alsobrook, filed a civil rights complaint pursuant to 42 U.S.C. §1983.(De#1) The plaintiff alleges that officers at the South Florida Reception Center endangered him and failed to intervene when he was assaulted by another inmate. The plaintiff seeks monetary damages. The plaintiff is proceeding in forma pauperis.

This civil action is before the Court for an initial screening pursuant to 28 U.S.C. §1915.

II. Analysis

A. Applicable Law for Screening

As amended, 28 U.S.C. §1915 reads in pertinent part as follows:

Sec. 1915 Proceedings in Forma Pauperis

* * *

(e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -

* * *

(B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

This is a civil rights action Pursuant to 42 U.S.C. §1983. Such actions require the deprivation of a federally protected right by a person acting under color of state law. See 42 U.S.C. 1983; Polk County v Dodson, 454 U.S.312 (1981); Whitehorn v Harrelson, 758 F. 2d 1416, 1419 (11 Cir. 1985. The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v.

Hernandez, 504 U.S. 25, 31 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997) ("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

To determine whether a complaint fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Twombly applies to §1983 prisoner actions. See Douglas v. Yates, 535 F.3d 1316, 1321 (11 Cir. 2008). These include "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." The plaintiff is required to plead facts that show more than the "mere possibility of misconduct." The Court must review the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that

no misconduct occurred.¹

B. Factual Allegations

The plaintiff alleges that Officer Alvarado knowingly endangered him by failing to change his cell when the plaintiff's cell mate, a known violent felon, informed him that if he failed to remove the plaintiff, he would "send him out". He further alleges that when he was assaulted by the fellow inmate, Sgt. Medina viewed the assault, and when the plaintiff requested help, told him to "handle your business". The plaintiff includes a copy of the disciplinary report he received for fighting with another inmate. The plaintiff claims that since the assault he suffers from headaches, vertigo and extreme nausea and vomiting.

C. Analysis of Sufficiency of Complaint

1. Endangerment

It is well settled that the failure of prison officials to control or separate prisoners who endanger the physical safety of other prisoners may, under certain conditions, constitute an Eighth Amendment deprivation; however, the constitutional rights of inmates are not violated every time one inmate is injured as a result of another's actions.² Smith v. Wade, 461 U.S. 30 (1983);

¹ The application of the Twombly standard was clarified in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

² If the plaintiff was a pretrial detainee at the time of the events alleged, his claims must be analyzed under the Due Process Clause of the Fourteenth Amendment rather than the Cruel and Unusual Punishment Eighth Amendment standard. Bell v. Wolfish, 441 U.S. 520, 535 (1979); Hamm v. DeKalb County, 774 F.2d 1567, 1571-74 (11 Cir. 1985).

Redman v. County of San Diego, 896 F.2d 362, 364-66 (9 Cir. 1990) (pretrial detainee); Zatler v. Wainwright, 802 F.2d 397, 400 (11 Cir. 1986) (convicted prisoner); Stokes v. Delcambre, 710 F.2d 1120, 1124, (5 Cir. 1983); Jones v. Diamond, 636 F.2d 1364, 1374 (5 Cir. 1981); Gates v. Collier, 501 F.2d 1291, 1308-10 (5 Cir. 1974). The constitution requires officials to take all reasonable precautions to protect inmates from known dangers, see Davidson v. Cannon, 474 U.S. 344 (1986); Smith v. Wade, supra; Zatler v. Wainwright, supra; Harmon v. Berry, 728 F.2d 1407 (11 Cir. 1984); Saunders v. Chatham County Board of Commissioners, 728 F.2d 1367 (11 Cir. 1984); Abrams v. Hunter, 910 F.Supp. 620 (S.D.Fla. 1995); Gangloff v. Poccia, 888 F.Supp. 1549, 1555 (S.D.Fla. 1995). The known danger may arise either because there is a risk posed by one specific inmate against another, because there is a some other more general pervasive risk of harm because violence at the institution occurs with sufficient frequency that prisoners are put in reasonable fear for their safety and the problem and need for protective measures has been made known to prison officials, see Abrams v. Hunter, supra, at 624-25.

In this preliminary stage, the plaintiff has stated a claim for endangerment. His allegations that Officer Alvarado was put on notice as to the danger of an assault by the plaintiff's cell mate are sufficient to state a claim. Alvarado will be served by separate order.

Further, the plaintiff has stated a claim against Officer Medina for failure to intervene, once he allegedly viewed the assault taking place. It is not necessary for a prison or jail official to actually participate in the use of excessive force in

order to be held liable under §1983, he need only be present at the scene and fail to take steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance"); Fundiller v City of Cooper City, 777 F.2d 1436 (11 Cir. 1985); Harris v Chanclor, 537 F.2d 203, 206 (5 Cir. 1976) ("a supervisory officer is liable under [Section] 1983 if he refuses to intervene where his subordinates are beating an inmate in his presence"). In this case, the defendant had a duty to protect the inmate from his cell mates assault. Service will be ordered upon Officer Medina by separate order.

III. Conclusion

It is therefore recommended as follows:

1. The plaintiff has stated a claim of endangerment against Office Alvarez, and a claim of failure to intervene against Officer Medina.

2. This case shall proceed against the named defendants.

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

Dated this 28th day of July, 2010.


UNITED STATES MAGISTRATE JUDGE

cc: Christopher Uriah Alsobrook, Pro Se
D09876
Suwannee Correctional Institution
Address of Record

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

CASE NO. 10-22183-CV-KING/WHITE

CHRISTOPHER URIAH ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

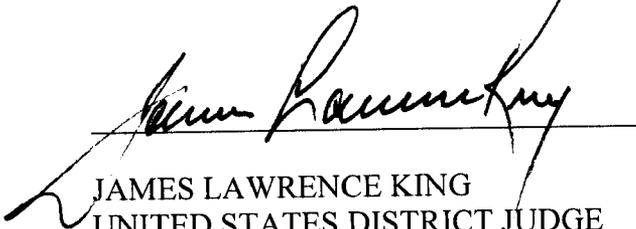
THIS CAUSE comes before the Court upon Magistrate Judge Patrick A. White's July 28, 2010 Report and Recommendation (DE #7) on Defendant's Complaint (DE #1) seeking relief for violations of the Civil Rights Act, 28 U.S.C. § 1983. Objections to the Report and Recommendation were due by August 16, 2010. No parties to this action filed any objections.

After a careful review of Magistrate Judge White's Report and Recommendation, the Court concludes that Magistrate Judge White's Report and Recommendation is a thorough and accurate reflection of both the record and the law at issue. Accordingly, it is **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. Magistrate Judge White's Report and Recommendation (DE #7) is hereby **AFFIRMED** and **ADOPTED** as an Order of this Court.
2. Plaintiff has stated a claim of endangerment against Officer Alvarado and a claim for failure to intervene against Officer Medina.
3. The above-styled action shall proceed against these named defendants.

DONE AND ORDERED in Chambers, at Miami, Miami-Dade County, Florida, this

19th day of August, 2010.



JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Cc:

Magistrate Judge Patrick A. White

Plaintiff, *pro se*

Christopher Uriah Alsobrook

DC #D09876

Suwannee Correctional Institution

5964 U.S. Highway 90

Live Oak, FL 32060

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

Case No. 10 CV 22183 JLK.

**The attached hand-written
document
has been scanned and is
also available in the
SUPPLEMENTAL
PAPER FILE**

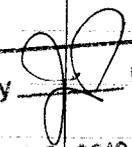
United States District Court
Southern District of Florida

Christopher Ulrich Alsobrook, Pro se
Plaintiff,

v.

CASE NO. 10-22183-CIV-KING

Sgt. Alvarado, et al.,
Defendants.

FILED by 	D.C.
OCT 06 2010	
STEVEN M. LARIMORE CLERK U.S. DIST. CT. S. D. of FLA. - MIAMI	

AMENDED COMPLAINT

CIVIL RIGHTS

COMPLAINT

Filed By:

Christopher Ulrich Alsobrook #009876
Suwannee Corr. Institution
5964 U.S. Hwy. 90
Live Oak, FL 32060

I. PARTIES

A. PLAINTIFF: Christopher Ulrich Alsobrook

Inmate #: D09876

Address: Suwannee Correctional Institution
5964 U.S. Highway 90
Live Oak, Florida 32060

B. Defendant: Alvarado,

employed as: Correctional Officer/Sergeant,
at: South Florida Reception Center.

C. Additional Defendants: E. Medina,

employed as: Police Officer
at: Hialeah Police Department.

D. Additional Defendants: Ms. Harris,

employed as: Nurse
at: South Florida Reception Center.

II. PREVIOUS LAWSUITS:

A. I have not initiated any other actions in state court dealing with the same or similar facts/issues involved in this action.

B. I have not initiated any other actions in federal court dealing with the same or similar facts/issues involved in this action.

C. I have not initiated any other actions

in either state or Federal court that relate to the fact or manner of my incarceration or the conditions of my confinement.

D. I have never had any actions in Federal court dismissed as frivolous, malicious, failing to state a claim, or prior to service.

III. Basis For Invoking Jurisdiction:

A. 28 USC § 1331 and § 1343(a)(3) give the federal district courts jurisdiction over Section 1983 cases.

B. This violation of the Plaintiff, Christopher Ulrich Alsobrook's, rights by Sgt. Alvarado, Sgt. E. Medina, and Nurse Harris occurred at the South Florida Reception Center in Miami, Florida, where the three defendants were all employed, placing this action under the jurisdiction of the United States District Court for the Southern District of Florida.

IV. COUNT ONE: Endangerment, 42 USC § 1983.

A. STATEMENT OF CLAIM:

(1) Defendant Alvarado and Defendant E. Medina both violated the Plaintiff's United States 8th Amendment to the Constitution when they knowingly and

deliberately were aware of the potential danger of physical bodily harm by assault of another prisoner and failed to intervene, resulting, and directly causing, the serious bodily injuries Plaintiff sustained and particularly violating 42 U.S.C. § 1983 when, while acting under the color of state law, Defendant Alvarado and Defendant Medina deliberately and intentionally, with malicious and sadistic intentions or otherwise were deliberate indifference to Plaintiff's Federally protected rights when Defendant Alvarado and Defendant Medina failed to intervene, resulting and causing Plaintiff pain and suffering in the form of the injuries sustained by the Plaintiff mentioned herein; including, but not limited to, severe pain, soft tissue damages, suffering, physical, mental, and emotional injuries, embarrassment, humiliation, degradation, mental anguish, chronic dizzy spells, bouts of nausea, and migraine headaches, loss of sleep, and fear.

B. STATEMENT OF FACTS:

- (2) On the morning of June 6, 2009, Plaintiff was housed in cell E2109 of Echo-Dormitory (Confinement), of the South Florida Reception Center, owned and operated by the Florida Department of Corrections (F.D.C.). Plaintiff was on "close-management" status (restrictive housing separate from the general inmate population), awaiting transport to a close-management (C.M.), institution.
- (3) Following the morning meal, at approximately

7:20 A.M., while Plaintiff lay on the upper bunk of cell E-2109, his roommate, Izell McCloud, OCA# 588881, stopped Sgt. Alvarado, the Echo Dorm Dorm-Sergeant from 12 A.M. to 8 A.M., as he made his rounds. McCloud told Sgt. Alvarado: "You need to separate me and my roomie. I don't like his character and were going to have some problems if you don't get him out of here right now." He repeated this same message multiple times, varying only the wording. Sgt. Alvarado replied that they were not allowed to move anyone on that shift and "... besides, it's 7:40 and I'm about to go home. Talk to the next sergeant." (As stated above, it was actually 7:20 A.M., Plaintiff having deliberately checked his watch as Alvarado made this statement.) McCloud responded to the sergeant's words in a much more animated and vehement nature, re-iterating his prior assertions, culminating in the statement that: "If you (Sgt. Alvarado) don't get him out, I'm gonna send him out." Communicating in no uncertain terms that, if Plaintiff was not immediately removed from the cells, he would assault Plaintiff. At this point, concerned with the direction that the situation was clearly heading, Plaintiff spoke up and told the sergeant (Alvarado): "Sarge, please, just get me out of here, dudes tripping." But Sgt. Alvarado only continued to shrug off any responsibility, passing the buck on to the next shift's sergeant. After approximately three minutes of this, Sgt. Alvarado continued on his rounds, turning his back on the brewing violence in the face of the substantial and obvious risk that

harm would occur.

(4.) There was no speaking between the Plaintiff and his roommate at this time. Plaintiff lay back on his bunk and quietly awaited shift-change. He (Plaintiff), became aware of much moving around and mumbling by McCloud below him. After approximately 10-15 minutes of this, McCloud raised his voice, commenting out of nowhere that, if his three bottles of lotion were not under his bunk, he was going to beat the hell out of the Plaintiff (There were no such bottles of lotion in the cell over the five week period that Plaintiff and inmate McCloud shared same as lotion is not allowed to C.M. inmates). The Plaintiff ignored this clearly deluded statement not wanting to escalate the situation. (McCloud is approximately 6'2", 250 pounds to the Plaintiff's 5'11", 175). After a couple additional minutes, McCloud again spoke up, saying that if he found anything missing in his locker, he would "beat (Plaintiff) down." At this point Plaintiff sat up on his bunk, his feet hanging over the edge, and jumped to the floor, intent on going to the door and attracting the attention of one of the officers and making a renewed effort to be removed from the cell. The moment Plaintiff's feet touched the concrete floor, McCloud, who had been seated on top of his locker, sprung up and rushed Plaintiff, tackling him, causing his upper-body to become lodged in between a metal locker and the wall, (a space of approximately 12 inches), and began to repeatedly strike Plaintiff's head and face with his clenched fists. After a minimum of 20 such blows to the Plaintiff's face and

head, McCloud clamped his hands around the plaintiff's neck and began to strangle plaintiff. Plaintiff frantically fought to pry McCloud's fingers from his throat, on the verge of blacking out into unconsciousness, until, finally, inmate McCloud's weight shifted enough for the plaintiff to bring his feet between them and kick McCloud off of him and gain his feet. Unbeknownst to plaintiff, McCloud had already placed the large battery from his state-issued tapeplayer into a sock and secreted it between the two lockers. As the plaintiff escaped from beneath him, inmate McCloud retrieved the sock and battery and began to beat the plaintiff about the head, shoulders, and arms. Fortunately, after a handful of strikes, the sock tore and McCloud subsequently lost the battery under the lower bunk.

(5) At this time, at least ten minutes into the assault, the plaintiff began to kick the cell door at every opportunity in an attempt to attract the attention of the officers while he simultaneously attempted to fight McCloud off of him, bleeding profusely, panicked, and in a very real fear for his life. Several minutes after the plaintiff had first begun to strike the door, Sergeant E. Medina, the Echo Dorm 8 A.M. to 4 p.m. dorm sergeant, accompanied by Sgt. Alvarado, and another, unidentified officer, arrived at the door of cell E2109 (approximately 7:50 a.m. according to Sgt. Medina's statement in the plaintiff's disciplinary report [previously submitted]). The plaintiff, looking over his shoulder and seeing Sgt. Medina watching there as McCloud attacked plaintiff, yelled to him: "What the f---k are you looking at? You going to do something?" and a spate of exclamations along the same lines; frustrated, scared, exhausted, and finding only apathy for his safety in the actions of the very people he had summoned to his cell with his kicks to the door, yelling all the while, emphatically, for them to:

Get me out of here!" to which Sgt. Medina replied: "Handle your business" McCloud, seeing there would be no interference from the officers, renewed his assault, continually striking the Plaintiff in plain view of Sgt. Medina until, too exhausted to continue, he relented of his own accord, stepping away from the Plaintiff.

COUNT TWO: DENIAL OF MEDICAL ATTENTION FOR SEVERE MEDICAL NEEDS, 42 USC § 1983.

A. STATEMENT OF CLAIM:

(6.) Defendant Medina violated the Plaintiff's United States 8th Amendment to the Constitution when he knowingly and deliberately with malicious and sadistic intentions of causing Plaintiff pain and suffering failed to summon emergency medical personnel to evaluate and treat Plaintiff's serious medical needs, and particularly violating 42 - USC § 1983 when, while acting under the color of State law, Defendant Medina deliberately and intentionally, with malicious and sadistic intentions, or otherwise, was deliberate indifference to Plaintiff's Federally protected rights when Defendant Medina failed to summon emergency medical personnel to evaluate and treat Plaintiff's serious medical needs, resulting and directly causing Plaintiff pain and suffering and the serious bodily injuries, including, but not limited to, severe pain, soft tissue damages, suffering, physical, mental, and emotional injuries, embarrassment, humiliation, degradation, mental an-

guish, chronic dizzy spells, bouts of nausea, migraine headaches, loss of sleep, and fear.

B. STATEMENT OF FACTS:

Incorporate by reference paragraphs (2.) thru (6.) with the following:

(7.) Once, due to extreme exhaustion, inmate McCloud had relented in his assault on Plaintiff, Sgt. Medina instructed inmate McCloud to "cuff-up" which McCloud refused to do. Upon McCloud's refusal to be handcuffed, Sgt. Medina, despite Plaintiff's repeated pleas to be taken from the cell, specifically stating as he looked Sgt. Medina square in the eye through the cell door window that "... I can't fight anymore. I'm through, Sarge... I can't breathe... I feel sick... like I'm about to throw-up. Don't leave me in here, man, I told Alvarado, goddamn, what do I gotta do? I'm done, man... I need medical attention right now... get some medical down here!" closed the tray flap in the door and said: "When y'all are ready to cuff up I'll get you to medical." He then walked away, accompanied by Sgt. Alvarado and the other officer, and returned to the officer station, leaving Plaintiff alone in the cell with the man they had just witnessed assaulting him — who had only stopped that assault due to fatigue — totally unsupervised for approximately an hour and forty minutes despite Plaintiff's pleas for medical attention and his obvious need of medical attention, exhibited by bleeding from a gash to the back of his head, a cut under his right eye, a bloody nose, a cut high

on his forehead by the hairline, and with 70% of the front of his shirt and the lap of his boxers covered in blood in addition to heavy-swelling and blackening of a large portion of the Plaintiff's face.

COUNT THREE: DENIAL OF MEDICAL ATTENTION FOR SEVERE MEDICAL NEEDS, 42 U.S.C. § 1983.

A. STATEMENT OF CLAIM:

(8.) Defendant Nurse Harris violated the Plaintiff's United States 8th Amendment and 14th Amendment of the Constitution when she knowingly and intentionally, with malicious and sadistic intentions of causing Plaintiff pain and suffering, failed to acquire emergency medical evaluation and treatment by licensed treating physician for Plaintiff's obvious, serious medical needs, particularly violating 42 U.S.C. § 1983 when, while acting under the color of state laws, Defendant Nurse Harris deliberately and intentionally with malicious and sadistic intentions, or otherwise, was deliberate indifference to Plaintiff's Federally protected rights when Defendant Nurse Harris treated Plaintiff different because his race is white, failed to acquire Plaintiff the same emergency medical evaluation and treatment that was rendered to another, african-american, citizen who was seeking medical treatment for serious bodily injuries at the same time as Plaintiff was seeking treatment for his serious medical injuries.

B. STATEMENT OF FACTS:

Incorporate by reference paragraphs (2) through (7) with the following:

(9.) At approximately 9:10 a.m. Captain Green arrived at Echo-Dorm. At this time Plaintiff and his roommate were removed from the cell and, after approximately 10-to-15 minutes of delay, escorted to the infirmary. Multiple times during the walk from Echo-Dorm to the infirmary the Plaintiff was forced to stop and be helped along by his escorting officer due to the dizziness and disorientation that he was suffering. Upon arrival at the infirmary both inmates were sat down to await the attention of Nurse Harris, the nurse on duty at that time. The Plaintiff was slumped forward with his head between his knees, his head still dripping blood onto the floor and his pants from cuts sustained during the assault yet, despite his obvious state of injury, pain, disorientation, and distress, he was left with his hands handcuffed behind his back. Inmate McCloud, however, was promptly released from his cuffs and re-handcuffed in the front to accommodate his injury. (Somewhere in the course of his assault on Plaintiff, inmate McCloud cut his left fore-arm on either the protruding metal heater or the locker). Overwhelmed by nausea at this time, the Plaintiff vomited down the leg of his pants. He called out to Nurse Harris, saying that he was dizzy and sick. He asked to lay down. He stated: "Something's wrong with my head, I think I've got a concussion." Nurse Harris ignored these statements, and the blood dripping from his head and face, and

the vomit down his leg, and his obvious distress. Instead, she administered to inmate McCloud, cleaning his cut with peroxide and placing some kind of clear tape bandage over it. Taking the time to roll out numerous charts and papers before finally turning her attention to the Plaintiff. This attention consisted of looking at his face and head and cataloging his cuts, abrasions, and contusions on a chart. The Plaintiff notified Nurse Harris, "My head's spinning, m'c'm... I'm sick. My head don't feel right... I think he gave me a concussion... Can I just lay down?... My head... I think somethings torn in my shoulder, too, it's hurting like crazy." The need to vomit came over the Plaintiff again and he dry-heaved between his legs, saliva dripping from his mouth to the floor as Nurse Harris stood next to him. She said nothing, soon after leaving the Plaintiff in the same state that she had found him. No treatment whatsoever was rendered to any of his cuts, no attempts to clean the bodily fluids, both his own and that of his cellmate, from his body. Shortly after, she notified one of the officers present that she wanted inmate McCloud transported to an outside hospital to take cautionary X-rays of his fore-arm and have him seen by a doctor. Maybe 15 to 20 minutes later she returned to the Plaintiff and gave him four Motrin. This was the full extent of the care that she administered to the Plaintiff in the approximately 2 hours he was in the infirmary. Sometime after 11:00 AM the Plaintiff was escorted back to Echo-Dorm, again needing to stop repeatedly and receive

physical assistance from the escorting officer to continue. Upon returning to Echo Dorm, the Plaintiff was placed in a different cell, still in clear and obvious distress, still covered in his own as well as his cellmate's blood, open wounds still exposed, suffering from severe dizziness and nausea. This is the state he was left in for days. On June 11, 2009, five days after the assault, the Plaintiff blacked out while standing at the sink in his cell after having vomited his dinner, smacking his head on the metal bunk and laying, unconscious, on the floor, bleeding, until subsequently discovered by staff. Upon regaining consciousness, Plaintiff was carried by Sergeant Lopez down the stairs from the top tier, placed in a wheel chair, and taken to the infirmary where this time the new laceration on his forehead was treated and he was placed under observation for 24 hours.

V Relief Sought:

Plaintiff, Christopher Ulrich Alsobrook, requests for this honorable Court to: 1.) enter judgement declaring that the acts and omissions of the Defendants, as set forth above, violated rights secured to Plaintiff - Alsobrook by the 8th and 14th Amendments of the United States Constitution; 2.) award compensatory and punitive damages to Plaintiff - Alsobrook, against individuals named as Defendants and in an amount to be determined at trial; 3.) require the Defendants to pay costs, legal fees, and attorney fees; 5.) grant such further relief deemed just and appropriate.

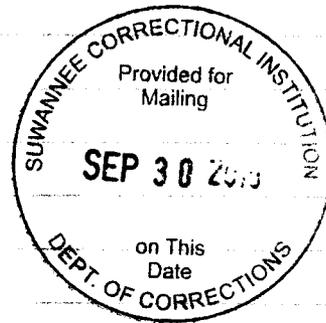
I, Christopher Uriah Alsobrook, swear that I have read the contents of this document titled: Amended Complaint and declare that all statements are true and correct under the penalty of perjury pursuant to the applicable laws of the United States of America.

sworn on this 30 day of September, 2010

/s/ Christopher Alsobrook
Christopher Alsobrook, *pres*

/s/ _____
NOTARY OF REPUBLIC

my commission expires: _____



V EXHAUSTION OF ADMINISTRATIVE REMEDIES:

A. On the 17th of June, 2009, Plaintiff filed three informal grievances, log# 06-057-09, log# 06-058-09, log# 06-059-09, (previously submitted in original complaint,) to the Colonel of the South Florida Reception Center (S.F.R.C.), and Plaintiff filed one informal grievance to Medical. All three of the informal grievances filed to the Colonel were returned without being processed due to non-compliance with the inmate grievance procedure, 33-103. The informal grievance filed to medical was never responded to.

B. On the 12th of July, 2009, Plaintiff, now housed at Santa Rosa Corr. Institution after being transferred from S.F.R.C., received the above-mentioned "returned" informal grievances (exhibits: previously submitted 6/25/09) and subsequently rewrote and re-filed all three grievances. The informal grievance filed to medical on 6/17/09 (see: above), had not been returned, denied, nor approved, therefore he did not refile it with the other three informal grievances.

C. On the 26th of July, 2009, after receiving no response to three re-filed informal grievances from 7/12/09 (see: above paragraph-B), Plaintiff proceeded to the next step of the grievance procedure and filed formal grievances, log# 0907-119-424 (exhibit pre-sub), log# 0907-119-423 (exhibit pre-sub), log# 0907-119-422 (exhibit pre-sub). A full month after am-

iving at Santa Rosa, Plaintiff had still not received one response concerning the informal grievance filed to medical on June 17, 2009. (Evidence will be provided upon Discovery and/or trial testimony).

D. On the 24th of August, 2009, Plaintiff received responses to the three formal grievances filed on 7/26/09 (see above, paragraph C), log# 0907-119-424, log# 0907-119-423, and log# 0907-119-422, stating: "This grievance is being returned to you without further processing in accordance with Ch 33-103.014(1)(M) in that this issue was previously addressed and reported to the office of the Inspector General. These allegations against staff have been reported to the office of the Inspector General, incorporated in the same report as the above-listed approved grievance." (again, see exhibits: previously submitted)

E. After being notified that his grievances had been approved, and that the issue had been forwarded to the office of the Inspector General, the Plaintiff concluded that he had exhausted all of his administrative remedies. Still, after nearly 2 months of awaiting the disposition of this investigation without either being spoken to by anyone from the office of the Inspector General or notified as to the conclusion of the investigation in anyway, the plaintiff wrote to the Office of the Inspector and inquired into the disposition of the investigation, the inspector designated to investigate, and the investigation number. (previously submitted)

mitted) The Plaintiff never received a response to this correspondence.

E. To this day, the Plaintiff is still unaware of any investigation by FDAC, concerning these issues. Nor did Plaintiff ever receive a response to his informal grievance to medical concerning Nurse Harris' violations of his rights from 6/17/09.

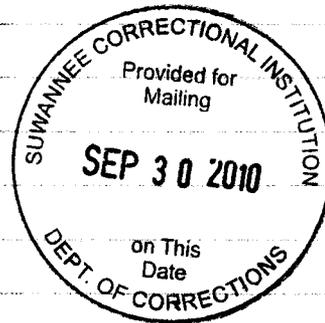
I declare under the penalty of perjury that the foregoing statements are true and correct.

Signed this 30th day of September, 2010

/s/ Christopher Alsbrook
Signature of Plaintiff.
Christopher Alsbrook, prose

Notary Republic: /s/ _____

my commission expires: _____



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

Case No.: 10-22183-CV-KING/WHITE

CHRISTOPHER ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

_____ /

DEFENDANT MEDINA'S MOTION TO DISMISS

Defendant **Medina**, through undersigned counsel, submits this Motion to Dismiss and requests the case be dismissed as Heck-barred. As grounds, Defendant Medina states the following:

Plaintiff is an inmate in the custody of the Florida Department of Corrections ("FDOC"). Defendant is an employee of the Department.

Plaintiff has filed a civil rights complaint essentially alleging that Defendant Medina failed to intervene and stop a fight between Plaintiff and another inmate. (Doc. 1: 7-8; Doc. 7: 5-6) Plaintiff seeks \$30,000 in compensatory damages from Defendant Medina for failing to intervene. (Doc. 1: 14) Plaintiff also seeks \$8,000 in punitive damages from Defendant Medina. (Doc. 1: 15)

MEMORANDUM OF LAW

I. Plaintiff's claims against Defendant Medina are Heck-barred.

Civil rights actions are not the proper method for challenging and overturning a finding of guilt to a DR. Preiser v. Rodriguez, 411 U.S. 475, 500, (1973), quoted in Harden v. Pataki, 320 F.3d 1289, 1294 (11th Cir. 2003). Preiser held that “when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.” 411 U.S. at 500. Subsequently, in Heck v. Humphrey, the Supreme Court made it clear that

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has 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. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

512 U.S. 477, 486-87 (1994) (footnote omitted). The Supreme Court extended Heck and made it explicitly applicable to claims surrounding prison disciplinary hearings. See Edwards v. Balisok, 520 U.S. 641, 648 (1997) (indicating that a claim attacking only procedure, not result, of a prison disciplinary hearing may still fail to be cognizable under section 1983 unless the prisoner can show that the

conviction or sentence has been previously invalidated). Most recently, the Supreme Court reiterated that “a state prisoner’s § 1983 action is barred (absent prior invalidation)-no matter the relief sought (damages or equitable relief), no matter the target of the prisoner’s suit (state conduct leading to conviction or internal prison proceedings)-if success in that action would necessarily demonstrate the invalidity of confinement or its duration.” Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005).

Here, Plaintiff is essentially seeking the overturning of two disciplinary reports: 1) a June 6, 2009 disciplinary report (“DR”) for Fighting and 2) a June 6, 2009 DR for Disrespect to Officials. Plaintiff was found guilty of the DRs. As a result of the findings of guilt, Plaintiff lost thirty days of gain time for the Fighting DR and sixty days of gain time for the Disrespect to Officials DR. (Exh. A)¹

The DR for Fighting stated:

On June 6, 2009 I was assigned to confinement as the housing sergeant. At approximately 0750 hrs I was in the officer station getting briefed by midnight sergeant when he heard a loud noise and the door on cell E2109 was ponding. As we approached the cell door I saw Inmate Alsobrook, Christopher DC# D09876 fighting with Inmate McCloud, Izell DC# 588881. Both inmates were ordered to cease their actions and they complied. Shortly, after they started fighting again for approximately 15 seconds, they were again ordered

¹ Even with the attached documentation, this motion is properly a motion to dismiss since the merits of the case – whether there was an Eighth Amendment violation – is not at issue. See Bryant v. Rich, 530 F.3d 1368, 1374-76 (11th Cir. 2008). See also 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1360 (3d ed. 2004); Rule 12(b)(6), Fed. R. Civ. P. The issues in this motion are whether the DRs have been overturned, whether gain time was taken as a result of the DRs, and whether the DRs necessitate dismissal of the action.

to cease and they complied. Inmate Alsobrook and Inmate McCloud did not resume fighting again. They were taken out of the cell and escorted to medical for assessment. Inmate Alsobrook will remain in constant status pending disposition of this report.

(Doc. 1: 29) (all errors in original).

The DR for Disrespect to Officials stated:

On June 6, 2009 I was assigned to confinement as the housing sergeant. At approximately 0750 hrs I was in the Officer Station getting briefed by midnight sergeant when we heard a loud noise and the door on cell E2109 was ponding. When I approached cell E2109 Inmate Alsobrook, Christopher DC# D09876 looked at me while I was trying to convince him and his roommate to stop fighting and he stated "Man what that f**k are you looking at, why don't you f**king come in here and get some too". Inmate Alsobrook is guilty of disrespecting an official as prohibited by the rules of inmate conduct. Inmate Alsobrook will remain in current status pending disposition of this report.

(Doc. 1: 31) (all errors in original). As of October 13, 2010, the DRs are active and have not been overturned. (Exh. A)

In his complaint, Plaintiff states that Defendant Medina did nothing to stop the attack and that Medina told Plaintiff to "handle his business." (Doc. 1: 8) However, the DR for fighting states that Officer Medina did intervene. (Doc. 1: 29) Thus, Plaintiff's complaint is incompatible with the DR statement of facts, facts found to be credible and true by the DR hearing team which led to the loss of gain time by Plaintiff. Granting Plaintiff relief in this case, under the specific allegations he makes, would call into question the validity of the June 6, 2009 DRs,

particularly the Fighting DR.² Wooten v. Law, 118 Fed. App'x 66 (7th Cir. 2004) (affirming dismissal of excessive force claim where the alleged facts, if proven true, would show that inmate was wrongly disciplined for assault) (Exh. B); Harris v. Truesdell, 79 Fed. App'x 756, 759 (6th Cir. 2003) (stating that inmate's Eighth Amendment claim is not cognizable under § 1983 since granting inmate his requested relief would call into question the validity of his disciplinary conviction) (Exh. C); Okoro v. Callaghan, 324 F.3d 488, 490 (7th Cir. 2003) (stating that if a plaintiff makes allegations that are inconsistent with the conviction having been valid, Heck kicks in and bars the civil suit). As such, Heck bars Plaintiff's suit and the case must be dismissed.

II. Plaintiff may not sue Defendant in his official capacity for monetary damages.

Plaintiff is suing Defendant Medina in his individual and official capacity. (Doc. 1: 7) Defendant Medina invokes Eleventh Amendment immunity. A suit against a state employee in an official capacity is a suit against the State for Eleventh Amendment purposes. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). In the absence of any waiver or express congressional authorization, which is not present in this case, the Eleventh Amendment prohibits a suit against a state in federal court. Kentucky v. Graham, 473 U.S. 159, 167 n.14

² Due to the specific factual allegations pleaded in Plaintiff's complaint, success in his § 1983 suit would necessarily negate the underlying DRs. Cf. Dyer v. Lee, 488 F.3d 876, 879-80 (11th Cir. 2007) (stating that as long as it is possible that a § 1983 suit would not negate the underlying conviction, then the suit is not Heck-barred).

(1985). Congress did not intend to abrogate a state's Eleventh Amendment immunity in § 1983 damage suits. Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation, 49 F.3d 1490 (11th Cir. 1995). Florida has not waived its sovereign immunity nor consented to be sued in damage suits brought pursuant to section 1983. See Gamble v. Florida Dep't of Health & Rehabilitative Servs., 779 F.2d 1509, 1513 (11th Cir. 1986). Florida has not waived its Eleventh Amendment immunity from suit in federal court. Fla. Stat. § 768.28(17). Therefore, to the extent that Plaintiff is attempting to sue Defendant Medina in his official capacity for damages, Plaintiff's complaint must be dismissed.

CONCLUSION

Defendant Medina requests the Motion to Dismiss be granted and Plaintiff's complaint against him be dismissed as Heck-barred. Additionally, Defendant Medina requests Plaintiff be given a "strike" under 28 U.S.C. § 1915(e)(2)(B) for failing to state a claim.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

s/ Lance Eric Neff

Lance Eric Neff

Assistant Attorney General

Florida Bar Number 26626

Office of the Attorney General

The Capitol, PL-01

Tallahassee, Florida 32399-1050

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Lance Eric Neff
LANCE ERIC NEFF

SERVICE LIST
CHRISTOPHER ALSOBROOK versus SGT. ALVARADO, et al.,
Case No.: 10-22183-CV-KING/WHITE
United States District Court, Southern District of Florida

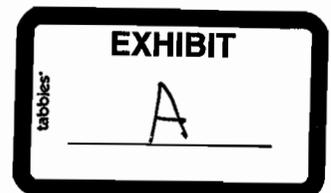
Christopher Alsobrook, DC# D09876
Suwannee C.I.
5964 U.S. Highway 90
Live Oak, FL 32060
PRO SE
Service by Mail

s/ Lance Eric Neff
LANCE ERIC NEFF

P/N 0 D09876 D YT 3 OATTCT1 PAGE: 02
 INMATE DISCIPLINARY ACTIONS AS OF 10/13/10 TIME: 09:47
 NAME: ALSOBROOK, CHRISTOPHER U. DOC NO: D09876 STATUS: ACTIVE

THE FOLLOWING ENTRIES REFLECT DISCIPLINARY ACTIONS AGAINST THE INMATE FOR VIOLATION OF THE RULE CITED AND INDICATE THE GAIN TIME DAYS LOST.

DATE	DAYS	--- CURRENT INCARCERATION --- VIOLATION	LOCATION
10/27/03	0	REFUSING TO WORK	LIBERTY C.I.
06/02/04	0	POSS OF CONTRABAND	LIBERTY C.I.
07/17/05	0	THEFT	LIBERTY C.I.
11/19/05	0	BEING IN UNAUTH AREA	LIBERTY C.I.
02/01/06	0	LYING TO STAFF	LIBERTY C.I.
08/30/06	0	ASSAULTS OR ATTEMP	LIBERTY C.I.
08/30/06	0	DISORDERLY CONDUCT	LIBERTY C.I.
03/25/09	0	POSS OF WEAPONS	MARTIN C.I.
03/25/09	0	DISORDERLY CONDUCT	MARTIN C.I.
03/25/09	0	DISOBEYING ORDER	MARTIN C.I.
06/06/09	30	FIGHTING	S.F.R.C.
06/06/09	60	DISRESP.TO OFFICIALS	S.F.R.C.
08/09/10	0	FIGHTING	SUWANNEE C.I
08/09/10	0	DISOBEYING ORDER	SUWANNEE C.I





118 Fed.Appx. 66, 2004 WL 2676624 (C.A.7 (Ill.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 118 Fed.Appx. 66, 2004 WL 2676624 (C.A.7 (Ill.)))

▶ This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Seventh Circuit Rule 32.1. (Find CTA7 Rule 32.1)

United States Court of Appeals,
Seventh Circuit.
Kenneth WOOTEN, Plaintiff-Appellant,
v.
Byron LAW, et. al., Defendants-Appellees.
No. 04-1159.

Submitted Nov. 12, 2004.^{FN*}

FN* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R.App. P. 34(a)(2).

Decided Nov. 12, 2004.

Background: State prisoner brought pro se § 1983 action against prison guards, alleging that guards beat him for making insolent remarks, in violation of the Eighth Amendment. The United States District Court for the Central District of Illinois, Harold A. Baker, J., entered summary judgment in favor of guards. Prisoner appealed.

Holding: The Court of Appeals held that action was barred by rule of *Heck v. Humphrey*. Affirmed.

West Headnotes

Civil Rights 78 ↪ 1092

78 Civil Rights
78I Rights Protected and Discrimination Prohib-

ited in General
78k1089 Prisons
78k1092 k. Discipline and Classification; Grievances. Most Cited Cases
State prisoner's pro se § 1983 action against prison guards, alleging that guards beat him for making insolent remarks, in violation of the Eighth Amendment, was barred by rule of *Heck v. Humphrey*, precluding civil claims which, if established, would necessarily imply the invalidity of an underlying conviction; prisoner was found guilty of assault and resisting the guards for same incident at a prison disciplinary hearing, and the § 1983 claim alleged that guards were not justified in using physical force against him, and did not admit that prisoner physically resisted guards, so that if prisoner prevailed in § 1983 claim, his disciplinary conviction would necessarily be called into doubt. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

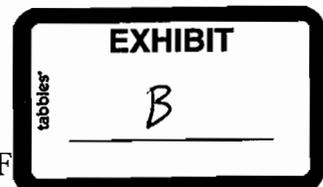
*67 Appeal from the United States District Court for the Central District of Illinois. No. 01-3280. Harold A. Baker, Judge.

Before COFFEY, ROVNER, and SYKES, Circuit Judges.

ORDER

**1 In this *pro se* action under 42 U.S.C. § 1983, Illinois inmate Kenneth Wooten alleges, as relevant here, that guards at Western Illinois Correctional Center beat him for making "insolent" remarks. The district court initially rejected the guards' argument that *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars Wooten's claim, but reversed itself and granted judgment for the guards after we decided *Okoro v. Callaghan*, 324 F.3d 488 (7th Cir.2003). We now affirm.

We start with the facts as Wooten tells them. See *Gil v. Reed*, 381 F.3d 649, 651 (7th Cir.2004). On the day of the incident, Wooten received word that



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his mother was critically ill with cancer. He asked two different guards if he could make an emergency telephone call, but both refused. One of them ordered him to leave the dining hall, which upset Wooten and prompted him to yell, "How the f[] would you feel if it was your Mother." Wooten "continued to express his disapproval" as the two guards escorted him away in handcuffs. When he then refused an order to "shut up," Wooten was slammed against the wall and pinned there with a forearm against his neck. Unable to breathe, he attempted to turn in order to relieve the pressure on his throat, resulting in "a bombardment of hostility" from the guards. A third guard arrived as the first two forced Wooten into a "bowed position." Wooten yelled: "You're hurting me. I'm not resisting, why are you trying to hurt me?" Warned that he better "shut your f[]ing mouth," Wooten enraged the guards by replying with a threat to sue. With that the guards rammed his face into a wall and door, dislodging a tooth and later causing a blind spot to develop in his right eye. Afterwards they denied Wooten's requests for medical attention. In his complaint, Wooten admits being "insolent" but avers that he never physically resisted, or tried to fight with the guards, or refused to go with them.

The guards' account, as memorialized in written reports, is very different. They reported that Wooten threatened and physically resisted them, and that he kicked one of them in the calf. An Adjustment Committee later credited the guards and found Wooten guilty of assault, intimidation, and disobeying. As a result Wooten lost one year of good time credits.

At initial screening, *see* 28 U.S.C. § 1915A, the district court concluded that Wooten stated Eighth Amendment claims for excessive force and deliberate indifference to his medical needs, as well as state-law claims for assault and battery. The *68 court later granted the guards' motion to dismiss Wooten's medical claim because he had not exhausted his administrative remedies, and he does

not challenge that dismissal. The guards also moved to dismiss Wooten's excessive-force claim as barred by *Heck*, but initially the court denied the guards' request on the theory that his lawsuit would not necessarily undermine his disciplinary conviction because the claim of unconstitutional force and the charges contained in the disciplinary report could coexist. After our subsequent decision in *Okoro*, however, the guards moved for reconsideration. They argued that *Okoro* clarifies that a claim is *Heck*-barred if it includes allegations that are inconsistent with a still-standing conviction, even if those allegations are not essential to support a judgment for the plaintiff. Treating the motion as one for summary judgment because it arguably referred to a document outside Wooten's complaint—the written decision rejecting his administrative appeal—the court read *Okoro* as teaching that "the plaintiff's own allegations control whether the claim is barred by *Heck*." Accepting Wooten's allegations as true, the court reasoned, his disciplinary conviction was almost certainly in error. Accordingly, the court dismissed his excessive force claim as barred by *Heck*.

**2 On appeal Wooten does not argue that the court misinterpreted *Okoro*. Rather, in his opening brief he simply suggests that *Okoro* will make for bad policy and, thus, the court should not have applied that case to bar his excessive force claim. We review a grant of summary judgment *de novo*. *Gil*, 381 F.3d at 658. In *Heck*, the Supreme Court held that a convicted criminal may not bring a civil suit questioning the validity of his conviction until he has gotten the conviction set aside. *See* 512 U.S. at 486-87, 114 S.Ct. 2364. The Court has extended *Heck* to bar claims that, if established, would necessarily imply the invalidity of a disciplinary conviction that was the basis for a deprivation of a prisoner's good time credits. *Edwards v. Balisok*, 520 U.S. 641, 646, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997); *see De Walt v. Carter*, 224 F.3d 607, 617 (7th Cir.2000).

In *Okoro*, a prisoner sued federal officers alleging

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that they had stolen gems when searching his home. 324 F.3d at 489. Incident to that search, the plaintiff was convicted of attempting to sell heroin to the officers, but in his civil suit he insisted that he never tried to sell heroin, only the gems. *Id.* The district court concluded that the claim was not *Heck*-barred because of the theoretical possibility that the officers had found heroin *and* the gems, stealing the gems and charging the plaintiff with heroin dealing. *Id.* at 489-90, 114 S.Ct. 2364. Thus, the court reasoned, the plaintiff's claim did not necessarily imply the invalidity of his drug conviction because he could be guilty of the drug charge despite the theft of his gems. *Id.* at 490, 114 S.Ct. 2364. We rejected this theoretical approach:

[Okoro] adhered steadfastly to his position that there were no drugs, that he was framed; in so arguing he was making a collateral attack on his conviction.... [I]f he makes allegations that are inconsistent with the conviction's having been valid, *Heck* kicks in and bars his civil suit. [Citations omitted.] He is the master of his ground. He could argue ... that the defendants had taken both drugs and gems, and then the fact that they had violated his civil rights in taking the gems (if they did take them) would cast no cloud over the conviction. Or he could simply argue that they took the gems and not say anything about the drugs, and then he wouldn't be actually challenging the validity of the guilty verdict. But since he *69 is challenging the validity of the guilty verdict by denying that there were any drugs and arguing that he was framed, he is barred by *Heck*.

Id. Thus, whether a claim is barred by *Heck* turns on the plaintiff's allegations. The theoretical possibility of a judgment for the plaintiff based on findings that do not call his conviction into question is irrelevant if the plaintiff's own allegations foreclose that possibility.

As the district court held, Wooten pleaded himself into *Heck*-barred territory. He insists that he did not physically resist the guards, but his disciplinary

punishment for assault rests on the guards' contrary account. Accepting Wooten's allegations as true, his disciplinary conviction for assault was "almost certainly ... in error, for that testimony was an essential part of the evidence against him." *See id.* at 489, 114 S.Ct. 2364. Wooten does not admit physically resisting the guards, but claims that their response was excessive. Nor did he choose to simply remain silent about his resistance. *Compare Robinson v. Doe*, 272 F.3d 921, 923 (7th Cir.2001). Rather, he has alleged facts that, if proven, would show that he was wrongly disciplined for assault.

****3 AFFIRMED.**

C.A.7 (Ill.),2004.
 Wooten v. Law
 118 Fed.Appx. 66, 2004 WL 2676624 (C.A.7 (Ill.))

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79 Fed.Appx. 756, 2003 WL 22435646 (C.A.6 (Mich.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 79 Fed.Appx. 756, 2003 WL 22435646 (C.A.6 (Mich.)))

C
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)

United States Court of Appeals,
Sixth Circuit.
Kevin HARRIS, Plaintiff-Appellant,
v.
K. TRUESDELL, et al., Defendants-Appellees.
No. 03-1440.
Oct. 23, 2003.

State inmate filed § 1983 action alleging that prison officials violated his constitutional rights in connection with altercation with corrections officers. The United States District Court for the District of Michigan dismissed complaint, and inmate appealed. The Court of Appeals held that: (1) inmate's disciplinary sentence did not give rise to protected Fourteenth Amendment liberty interest; (2) inmate had no constitutional right to be held in specific security classification; and (3) inmate's claim that corrections officers used excessive force by attacking him without provocation was not cognizable under § 1983.

Affirmed.

West Headnotes

[1] Civil Rights 78 ⚡1092

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1089 Prisons
78k1092 k. Discipline and Classification; Grievances. Most Cited Cases

State inmate's claim that he was convicted of false misconduct ticket of assault on corrections officers without hearing in violation of his due process rights was not cognizable under § 1983, where ruling on claim would have, if established, necessarily implied invalidity of his disciplinary conviction. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

[2] Constitutional Law 92 ⚡4826

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)11 Imprisonment and Incidents Thereof
92k4826 k. Segregation. Most Cited Cases
(Formerly 92k272(2))

Prisons 310 ⚡231

310 Prisons
310II Prisoners and Inmates
310II(E) Place or Mode of Confinement
310k229 Punitive, Disciplinary, or Administrative Confinement
310k231 k. Segregation. Most Cited Cases
(Formerly 310k13(5))

State inmate's punishment of more than 60 days of punitive segregation after he was convicted of false misconduct ticket of assault on corrections officers was not atypical and significant hardship on inmate in relation to ordinary incidents of prison life, and thus did not give rise to protected Fourteenth Amendment liberty interest. U.S.C.A. Const.Amend. 14.

[3] Prisons 310 ⚡223

310 Prisons
310II Prisoners and Inmates
310II(E) Place or Mode of Confinement
310k223 k. Classification; Security Status. Most Cited Cases



79 Fed.Appx. 756, 2003 WL 22435646 (C.A.6 (Mich.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 79 Fed.Appx. 756, 2003 WL 22435646 (C.A.6 (Mich.)))

(Formerly 310k13(5))
State inmate had no constitutional right to be held
in specific security classification.

[4] Constitutional Law 92 ↪ 4822

92 Constitutional Law
92XXXVII Due Process
92XXXVII(H) Criminal Law
92XXXVII(H)11 Imprisonment and Incidents
Thereof
92k4822 k. Property and Employment.
Most Cited Cases
(Formerly 92k272(2))

Prisons 310 ↪ 315

310 Prisons
310II Prisoners and Inmates
310II(H) Proceedings
310k315 k. Existence of Other Remedies;
Exclusivity. Most Cited Cases
(Formerly 98k3)
State inmate could not state due process claim for
alleged loss of his personal property, absent showing
that state remedies were inadequate to remedy
his loss. U.S.C.A. Const.Amend. 14.

[5] Civil Rights 78 ↪ 1093

78 Civil Rights
78I Rights Protected and Discrimination Prohibited
in General
78k1089 Prisons
78k1093 k. Use of Force; Protection from
Violence. Most Cited Cases
State inmate's claim that corrections officers used
excessive force by attacking him without provocation
was not cognizable under § 1983, where inmate
was found guilty of major misconduct violation
for assault and battery in connection with incident,
and ruling on claim would have, if established,
necessarily implied invalidity of his disciplinary
conviction. U.S.C.A. Const.Amend. 8; 42
U.S.C.A. § 1983.

*757 Before KENNEDY and GIBBONS, Circuit

Judges; and ALDRICH, District Judges.^{FN*}

FN* The Honorable Ann Aldrich, United
States District Judge for the Northern District
of Ohio, sitting by designation.

ORDER

**1 Kevin Harris, a Michigan prisoner proceeding
pro se, appeals a district court judgment dismissing
his civil rights complaint filed pursuant to 42
U.S.C. § 1983. This case has been referred to a panel
of the court pursuant to Rule 34(j)(1), Rules of
the Sixth Circuit. Upon examination, this panel
unanimously agrees that oral argument is not needed.
Fed. R.App. P. 34(a).

Harris is an inmate at the Baraga Maximum Correction
Facility ("BMCF") and filed this civil rights
action against defendants K. Truesdell, Tim Hares,
Julie L. Paquette, Unknown West, Unknown Reeder,
and Unknown Douglas, all of whom were employed
as corrections officers at BMCF during the pertinent
time period. In addition, Harris named as defendants
BMCF Warden George Pennell and BMCF Deputy
Warden Darlene Edlund. The facts underlying this
lawsuit are adequately set forth in the magistrate
judge's report and recommendation filed February
19, 2002 and February 12, 2003 and will not be
repeated herein. Harris primarily alleged that he
had been assaulted by the defendants in 2001. Harris
admitted that his claims involved his subsequent
conviction of a prison misconduct charge, which
*758 had resulted in the imposition of 60 days of
punitive detention. Harris claimed that he was
convicted of a false misconduct ticket of assault
on corrections officers without a hearing in violation
of his due process rights. He also claimed that he
was held in punitive segregation for a period
exceeding 60 days in violations of prison rules
and policies. He further claimed that he was
wrongly deprived of personal property, particularly
his eyeglasses. He also claimed that his Eighth
Amendment rights were violated when the defend-

79 Fed.Appx. 756, 2003 WL 22435646 (C.A.6 (Mich.))
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ants denied him medical care after an alleged assault by several of the defendants. Lastly, he claimed that the defendants used excessive force against him and failed to protect him from alleged assaults by corrections officers.

In the report and recommendation filed February 19, 2002, the magistrate judge recommended that all of Harris's claims, except his excessive force and failure to protect claims against defendants Truesdell, Hares, Paquette, West, Reeder, and Douglas, be dismissed as frivolous or for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2), 1915A(b) and 42 U.S.C. § 1997e. The magistrate judge recommended that the Eighth Amendment claim against defendant Edlund be dismissed because Harris failed to allege facts indicating that defendant Edlund was aware of Harris's particular situation, or that she was deliberately indifferent to any serious needs on the part of Harris. The magistrate judge recommended that the claims against defendant Pennell be dismissed because Harris failed to allege facts establishing that defendant Pennell was personally involved in the activity which formed the basis of his claims. The district court adopted the report and recommendation despite Harris's objections.

Thereafter, the remaining defendants filed a motion to dismiss or, in the alternative, motion for summary judgment on the excessive force and failure to protect claims. In the report and recommendation filed February 12, 2003, the magistrate judge recommended that summary judgment be granted for the defendants. The district court adopted the magistrate judge's report and recommendation over Harris's objections. Reconsideration was denied. This appeal followed.

**2 We review de novo a district court's decision to dismiss under 28 U.S.C. §§ 1915(e), 1915A, and 42 U.S.C. § 1997e. *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir.1997). A case is frivolous if it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). In determining

whether a complaint fails to state a claim, this court construes the complaint in the light most favorable to the plaintiff, accepts his factual allegations as true, and determines whether he can prove any set of facts in support of his claims that would entitle him to relief. *Turker v. Ohio Dep't of Rehab. and Corr.*, 157 F.3d 453, 456 (6th Cir.1998). Here, the district court properly dismissed Harris's due process and Eighth Amendment claims.

[1][2][3][4] First, the district court properly concluded that Harris's due process claim with respect to the misconduct ticket is not cognizable under 42 U.S.C. § 1983 because a ruling on this claim would, if established, necessarily imply the invalidity of his disciplinary conviction. *See Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997); *Heck v. Humphrey*, 512 U.S. 477, 486-87, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Harris's punishment of more than 60 days of punitive segregation does not give rise to a protected Fourteenth Amendment liberty interest because it is not an "atypical and significant hardship on the inmate in relation to the *759 ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Moreover, Harris has no constitutional right to be held in a specific security classification. *See Moody v. Daggett*, 429 U.S. 78, 88 n. 9, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976); *Meachum v. Fano*, 427 U.S. 215, 224, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Further, the district court correctly concluded that Harris cannot state a due process claim for the alleged loss of his personal property because he cannot show that state remedies are inadequate to remedy the loss. *See Hudson v. Palmer*, 468 U.S. 517, 530-36, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Copeland v. Machulis*, 57 F.3d 476, 479-80 (6th Cir.1995); *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir.1993). The district court correctly concluded that Harris alleged nothing that rises to the level of an Eighth Amendment violation. *See Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). Finally, Har-

79 Fed.Appx. 756, 2003 WL 22435646 (C.A.6 (Mich.))
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ris's claim against defendant Pennell is based upon a respondeat superior theory of liability, which cannot provide the basis for liability in § 1983 actions. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

The district court's award of summary judgment is reviewed *de novo* on appeal. See *Moore v. Holbrook*, 2 F.3d 697, 698 (6th Cir.1993). Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Moore*, 2 F.3d at 698.

Upon review, we conclude that summary judgment for the defendants on Harris's excessive force claim was proper for the reasons stated by the magistrate judge, and adopted by the district court. Harris plainly alleged that the defendants had attacked him without provocation and that he had not resisted their orders or fought against them. However, it is undisputed that Harris was charged with a major misconduct violation for assault and battery based on allegations that he had lunged at defendant Truesdell with his shoulder, twice striking defendant Truesdell's chest, and knocking defendant Truesdell into the wall. Harris was found guilty of the misconduct charge and sanctioned with sixty days of punitive detention.

**3 [5] Since granting Harris his requested relief would call into question the validity of his disciplinary conviction, his Eighth Amendment claim is not cognizable under § 1983. A prisoner found guilty in a prison disciplinary hearing cannot use § 1983 to collaterally attack the hearing's validity or the conduct underlying the disciplinary conviction. *Huey v. Stine*, 230 F.3d 226, 230-31 (6th Cir.2000). Because a favorable ruling on Harris's Eighth Amendment claim would imply the invalidity of his disciplinary conviction, this claim is not cognizable. *Edwards*, 520 U.S. at 648, 117 S.Ct. 1584; *Huey*, 230 F.3d at 230.

The remaining arguments on appeal are without merit.

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

C.A.6 (Mich.),2003.
Harris v. Truesdell
79 Fed.Appx. 756, 2003 WL 22435646 (C.A.6 (Mich.))

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-22183-CIV-KING
MAGISTRATE JUDGE P. A. WHITE

CHRISTOPHER URIAH ALSOBROOK, :
 :
 Plaintiff, :
 : ORDER SCHEDULING PRETRIAL
 v. : PROCEEDINGS WHEN PLAINTIFF
 : IS PROCEEDING PRO SE
 SERGEANT ALVARADO, et al., :
 :
 Defendants. :

The plaintiff in this case is incarcerated, without counsel, so that it would be difficult for either the plaintiff or the defendants to comply fully with the pretrial procedures required by Local Rule 16.1 of this Court. It is thereupon

ORDERED AND ADJUDGED as follows:

1. All discovery methods listed in Rule 26(a), Federal Rules of Civil Procedure, shall be completed by February 25, 2011. This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by March 11, 2011.

3. All motions to dismiss and/or for summary judgment shall be filed by April 1, 2011.

4. On or before April 15, 2011, the plaintiff shall file with the Court and serve upon counsel for the defendants a document called "Pretrial Statement." The Pretrial Statement shall contain the following things:

- (a) A brief general statement of what the case is about;
- (b) A written statement of the facts that will be offered by oral or documentary evidence at trial; this means that the plaintiff must explain what he intends to prove at trial and how he intends to prove it;
- (c) A list of all exhibits to be offered into evidence at the trial of the case;
- (d) A list of the full names and addresses of places of employment for all the non-inmate witnesses that the plaintiff intends to call (the plaintiff must notify the Court of any changes in their addresses);
- (e) A list of the full names, inmate numbers, and places of incarceration of all the inmate witness that plaintiff intends to call (the plaintiff must notify the Court of any changes in their places of incarceration); and
- (f) A summary of the testimony that the plaintiff expects each of his witnesses to give.

5. On or before April 29, 2011, defendants shall file and serve upon plaintiff a "Pretrial Statement," which shall comply with paragraph 4(a)-(f).

6. Failure of the parties to disclose fully in the Pretrial Statement the substance of the evidence to be offered at trial may result in the exclusion of that evidence at the trial. Exceptions will be (1) matters which the Court determines were not discover-

able at the time of the pretrial conference, (2) privileged matters, and (3) matters to be used solely for impeachment purposes.

7. If the plaintiff fails to file a Pretrial Statement, as required by paragraph 4 of this order, paragraph 5 of this order shall be suspended and the defendants shall notify the Court of plaintiff's failure to comply. The plaintiff is cautioned that failure to file the Pretrial Statement may result in dismissal of this case for lack of prosecution.

8. The plaintiff shall serve upon defense counsel, at the address given for him/her in this order, a copy of every pleading, motion, memorandum, or other paper submitted for consideration by the Court and shall include on the original document filed with the Clerk of the Court a certificate stating the date that a true and correct copy of the pleading, motion, memorandum, or other paper was mailed to counsel. All pleadings, motions, memoranda, or other papers shall be filed with the Clerk and must include a certificate of service or they will be disregarded by the Court.

9. A pretrial conference may be set pursuant to Local Rule 16.1 of the United States District Court for the Southern District of Florida, after the pretrial statements have been filed. Prior to such a conference, the parties or their counsel shall meet in a good faith effort to:

- (a) discuss the possibility of settlement;
- (b) stipulate (agree) in writing to as many facts and issues as possible to avoid unnecessary evidence;
- (c) examine all exhibits and documents proposed to be used at the trial, except

that impeachment documents need not be revealed;

- (d) mark all exhibits and prepare an exhibit list;
- (e) initial and date opposing party's exhibits;
- (f) prepare a list of motions or other matters which require Court attention; and
- (g) discuss any other matters that may help in concluding this case.

10. All motions filed by defense counsel must include a proposed order for the undersigned Magistrate Judge's signature.

DONE AND ORDERED at Miami, Florida, this 2nd day of November, 2010.

Patrick A. White

Patrick A. White
U.S. Magistrate Judge

cc: Christopher Uriah Alsobrook, Pro Se
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Hon. James Lawrence King, United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-22183-CIV-KING
MAGISTRATE P. A. WHITE

CHRISTOPHER URIAH ALSOBROOK, :
 :
 Plaintiff, :
 :
 v. : REPORT OF
 : MAGISTRATE JUDGE
 SGT. ALVARADO, et al., : (DE#15 & 20)
 :
 :
 Defendants. :
 :

I. Introduction

The pro-se plaintiff, Christopher Uriah Alsobrook, filed a civil rights complaint pursuant to 42 U.S.C. §1983.(De#1) The plaintiff alleged that officers at the South Florida Reception Center endangered him and failed to intervene when he was assaulted by another inmate. The plaintiff seeks monetary damages. The plaintiff is proceeding in forma pauperis.

This civil action is before the Court upon the screening of the amended complaint (DE#18), and motions to dismiss filed by Sgts. Alvarado (DE#15) and Medina (DE#20). The Motions have been referred to the Undersigned Magistrate Judge.

II. Analysis

A. Applicable Law for Screening amended complaint

As amended, 28 U.S.C. §1915 reads in pertinent part as follows:

Sec. 1915 Proceedings in Forma Pauperis

* * *

(e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -

* * *

(B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

This is a civil rights action Pursuant to 42 U.S.C. §1983. Such actions require the deprivation of a federally protected right by a person acting under color of state law. See 42 U.S.C. 1983; Polk County v Dodson, 454 U.S.312 (1981); Whitehorn v Harrelson, 758 F. 2d 1416, 1419 (11 Cir. 1985. The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on

factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

To determine whether a complaint fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Twombly applies to §1983 prisoner actions. See Douglas v. Yates, 535 F.3d 1316, 1321 (11 Cir. 2008). These include "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." The plaintiff is required to plead facts that show more than the "mere possibility of misconduct." The Court must review the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that

no misconduct occurred.¹

B. Factual Allegations

The plaintiff alleged in his initial complaint filed on July 2, 2010, that Officer Alvarado knowingly endangered him by failing to remove him from his cell when the plaintiff's cell mate, a known violent felon, informed him that if he failed to remove the plaintiff, he would "send him out". He further alleges that when he was assaulted by the fellow inmate, Sgt. Medina viewed the assault, and when the plaintiff requested help, told him to "handle your business".² The plaintiff includes a copy of the disciplinary report he received for fighting with another inmate. The plaintiff claims that since the assault he suffers from headaches, vertigo and extreme nausea and vomiting. The Preliminary Report recommended that the plaintiff stated a claim for endangerment against Alvarado and Medina. The Preliminary report was adopted on August 19, 2010, and both defendants were served.

The plaintiff filed the Amended Complaint on October 6, 2010 (DE#18). His claims against Officer Alvarado and Medina essentially remain the same. He clarifies a claim of denial of medical aid against Sgt. Medina in Count 2. (P8) He alleges that Medina refused to summon emergency medical personnel to evacuate and treat the plaintiff's serious medical needs. He claims he suffered serious bodily injuries, including severe pain, soft tissue damages, bleeding from a gash to the back of his head, a cut under his eye,

¹ The application of the Twombly standard was clarified in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

² The plaintiff made a conclusory statement in his initial complaint that Sgt. Medina refused to call for medical aid on his behalf.

a bloody nose and a cut on his forehead, along with swelling and blackening of a large portion of his face.

He further adds an additional defendant in his amended complaint. He claims in Count three that Nurse Harris denied him medical treatment for his serious medical injuries. He claims that while in the emergency room, despite his complaints of pain, disorientation, and a concussion, she provided no treatment for him for days. He seeks monetary relief.

The Eighth Amendment prohibits any punishment which violates civilized standards of decency or "involve[s] the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173(1976)); see also Campbell v. Sikes, 169 F.3d 1353, 1363 (11 Cir. 1999). "However, not 'every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.'" McElligott v. Foley, 182 F.3d 1248, 1254 (11 Cir. 1999) (citation omitted). An Eighth Amendment claim contains both an objective and a subjective component. Taylor v. Adams, 221 F.3d 1254, 1257 (11 Cir. 2000); Adams v. Poag, 61 F.3d 1537, 1543 (11 Cir. 1995). First, a plaintiff must set forth evidence of an objectively serious medical need. Taylor, 221 F.3d at 1258; Adams, 61 F.3d at 1543. Second, a plaintiff must prove that the prison official acted with an attitude of "deliberate indifference" to that serious medical need. Farmer, 511 U.S. at 834; McElligott, 182 F.3d at 1254; Campbell, 169 F.3d at 1363. The objective component requires the plaintiff to demonstrate that he has been subjected to specific deprivations that are so serious that they deny him "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981); see also Hudson v. McMillian, 503 U.S. 1, 8-9 (1992). At this stage in the proceedings, it

appears that the plaintiff has made a minimal claim for denial of medical aid by Officer Medina and Nurse Harris, and Nurse Harris shall be served by separate order. The amended complaint (DE#18) will be the operative complaint.³

The defendants have filed a response in opposition to the motion to amend, with exhibits and affidavits (DE#21). These exhibits and affidavits may be considered in a motion for summary judgment. The defendants make the same unavailing arguments as they do in their motions to dismiss, which will be discussed below.

They further add the argument that the plaintiff has failed to exhaust his administrative remedies. Although the defendant is essentially arguing that the exhaustion requirement is a condition precedent to filing suit, the Supreme Court has held that failure to exhaust is an affirmative defense, and a plaintiff is not required to plead and demonstrate exhaustion of remedies in his complaint. See Jones v. Bock, 549 U.S. 199, 216 (2007). It cannot be assumed for purposes of the defendant's motion and this Report, that the plaintiff has failed to exhaust his administrative remedies. It is apparent that any determination as to whether the operative complaint may be subject to dismissal under §1997e(a), will require further development of the record.

Defendant Alvarado's Motion to Dismiss

³If the plaintiff was a pretrial detainee at the time of the events alleged, his claims must be analyzed under the Due Process Clause of the Fourteenth Amendment rather than the Cruel and Unusual Punishment Eighth Amendment standard. Bell v. Wolfish, 441 U.S. 520, 535 (1979); Hamm v. DeKalb County, 774 F.2d 1567, 1571-74 (11 Cir. 1985).

On September 21, 2010, before the filing of the Amended complaint, Defendant Alvarado filed a Motion to Dismiss the initial complaint. ⁴(DE#15). The defendant argues that the claims against him should be dismissed because the plaintiff's claims are barred by Heck.⁵ Claims which challenge the fact or duration of the imprisonment may be raised in a civil rights complaint only when a conviction or sentence has been reversed or expunged through use of a petition for writ of habeas corpus.

Alvarado alleges that the plaintiff is seeking to overturn two disciplinary reports he received as a result of the incident complained of and to retrieve his thirty days of lost gain time for fighting and being disrespectful to an Officer. ⁶

Review of the initial complaint reveals only that the plaintiff was seeking damages, claiming that Alvarado allowed an assault against him to continue by a prisoner with a known history of violence, and refused to come to his aid, despite the fact he was bleeding profusely. He does not challenge his disciplinary report, nor does he seek restoration of gain time. He seeks purely monetary relief.

Further, Alvarado refers to the plaintiff's statements on his disciplinary report to indicate that the plaintiff was not an innocent victim. On a motion to dismiss, the Court will only review the pleading as filed. The probative value of the Exhibits provided

⁴The analysis for a motion to dismiss is pursuant to Fed.R.Civ.P. 12(b)(6) and is essentially the same as the analysis stated above for reviewing the sufficiency of the complaint.

⁵Heck v Humphrey, 512 U.S. 477 (1994)

⁶The plaintiff is cautioned that any attempts to amend his complaint to obtain lost gain time shall be barred by Heck.

to the Court with the plaintiff's complaint, and defendant's motion to dismiss may be re-filed and discussed at the summary judgment stage.

Lastly, the defendant correctly contends that the plaintiff may not sue him in his official capacity for monetary damages. The defendant is protected by Eleventh Amendment immunity. Will v Michigan dept. of State Police, 491 U.S. 58 (1989) (a suit against a state employee in his official capacity is a suit against the State for Eleventh Amendment purposes.) The defendant may be sued solely in his individual capacity.

It is therefore recommended that Defendant Alvarado's motion to dismiss be granted as to a suit in his official capacity, and denied as to the remaining arguments.

Sgt. Medina's Motion to Dismiss

Although Defendant Medina's motion to dismiss was filed after the filing of the amended complaint, the motion seeks to dismiss the initial complaint, and raises the identical arguments raised in Officer Alvarado's Motion. Therefore, it is recommended that Sgt. Medina's motion to dismiss be granted as to any suit against Medina in his official capacity. He is entitled to Eleventh Amendment immunity for the same reasons as stated above. Medina's remaining arguments are without merit, and it is recommended that the motion to dismiss be denied.

III. Conclusion

It is therefore recommended as follows:

1. The Amended Complaint (DE#18) is the operative complaint.

2. The plaintiff's claims of endangerment against Officer Alvarez, and a claim of failure to intervene against Officer Medina shall remain.

3. A claim of denial of providing medical aid shall proceed against Officer Medina, and Nurse Harris, who will be served by separate order.

4. Defendant Alvarado's Motion to Dismiss (DE#15) shall be denied, with the exception of any claims against him in his official capacity.

5. Defendant Medina's Motion to Dismiss (DE#20) shall be denied, with the exception of any claims against him in his official capacity.

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

Dated this 2nd day of November, 2010.



UNITED STATES MAGISTRATE JUDGE

cc: Christopher Uriah Alsobrook, Pro Se
D09876
Suwannee Correctional Institution
Address of Record

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

Case No.: 10-22183-CV-KING/WHITE

CHRISTOPHER ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

_____ /

**DEFENDANTS' OBJECTIONS
TO MAGISTRATE'S REPORT AND RECOMMENDATION**

Defendants **Alvarado** and **Medina**, through undersigned counsel and pursuant to Rule 72, Federal Rules of Civil Procedure and Local Magistrate Rule 4, respectfully object to the magistrate's November 3, 2010 Report and Recommendation (Doc. 28). As grounds for the objections, Defendants state the following:

1. The magistrate judge states in his Report and Recommendation ("R&R") the following concerning Defendants' exhaustion argument:

They further add the argument that the plaintiff has failed to exhaust his administrative remedies. Although the defendant is essentially arguing that the exhaustion requirement is a condition precedent to filing suit, the Supreme Court has held that failure to exhaust is an affirmative defense, and a plaintiff is not required to plead and demonstrate exhaustion of remedies in his complaint. See Jones v.

Bock, 549 U.S. 199, 216 (2007). It cannot be assumed for purposes of the defendant's motion and this Report, that the plaintiff has failed to exhaust his administrative remedies. It is apparent that any determination as to whether the operative complaint may be subject to dismissal under §1997e(a), will require further development of the record.

(Doc. 28 at 6) The magistrate judge further states that Defendants' Heck¹ defense is premature and not proper in a motion to dismiss. (Doc. 28 at 7-8)

2. The magistrate judge has failed to consider the case of Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008). As Bryant was recently explained:

Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), relied on by the district court. In *Bryant*, this Court concluded that the district court properly resolved factual disputes in granting a motion to dismiss based on failure to exhaust administrative remedies. 530 F.3d at 1377. Specifically, the *Bryant* Court explained that “[b]ecause exhaustion of administrative remedies is a matter in abatement and not generally an adjudication on the merits, an exhaustion defense ... is not ordinarily the proper subject for a summary judgment; instead, it should be raised in a motion to dismiss, or treated as such if raised in a motion for summary judgment.” *Id.* at 1375-76 (quotation marks omitted). The *Bryant* Court treated Rule 12(b) motions regarding exhaustion of nonjudicial remedies as similar to motions regarding jurisdiction and venue in that “[e]xhaustion of administrative remedies is a matter in abatement, and ordinarily does not deal with the merits.” *Id.* at 1374 (quotation marks and brackets omitted). In those types of Rule 12(b) motions, “it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record.” *Id.* at 1376 (footnotes omitted).

Tillery v. U.S. Dept. of Homeland Security, No. 10-11657, 2010 WL 4146149, at *3 (11th Cir. Oct. 22, 2010) (Exh. A). Thus, contrary to the magistrate judge's

¹ Heck v. Humphrey, 512 U.S. 477 (1994).

R&R, the Court has the authority to resolve all matters in abatement, such as exhaustion, in a motion to dismiss.

3. Also, a Heck-bar defense is analogous to a failure to exhaust defense. Neither dismissal for failure to exhaust nor dismissal under Heck is an adjudication on the merits. Mitchell v. Jackson, No. 2:10-CV-13483, 2010 WL 3906304 (E.D.Mich. Sept. 30, 2010) (“When a prisoner’s civil rights claim is barred by the *Heck* doctrine, the appropriate course for a federal district court is to dismiss the claim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h)(3), rather than to dismiss the complaint with prejudice as being frivolous, because the former course of action is not an adjudication on the merits and would allow the prisoner to reassert his claims if his conviction or sentence is latter invalidated.”) (Exh. B). Both defenses are bars to an inmate filing suit and both are essentially a subject-matter jurisdiction issue for the court. See Esensoy v. McMillan, No. 06-12580, 2007 WL 257342 (11th Cir. Jan. 31, 2007) (affirming district court’s dismissal of suit for lack of subject-matter jurisdiction, but for the alternative reason of being Heck-barred) (Exh. C); Felgar v. Burkett, 328 Fed. App’x 107 (3rd Cir. 2009) (same) (Exh. D); Mendia v. City of Wellington, 10-1132-MLB, 2010 WL 4513408 (D.Kan. Nov. 02, 2010) (accepting defendants’ argument in a Rule 12(b)(1) motion that plaintiff’s claims were Heck-barred thus depriving court of subject-matter jurisdiction) (Exh. E). As noted by the Supreme

Court, exhaustion is a precursor to filing suit. Woodford v. Ngo, 548 U.S. 81, 85 (2006). Under Heck,

to recover damages for an unconstitutional conviction or imprisonment a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus.

Crow v. Penry, 102 F.3d 1086, 1087 (10th Cir. 1996). “The purpose behind Heck is to prevent litigants from using a § 1983 action, with its more lenient pleading rules, to challenge their conviction or sentence without complying with the more stringent exhaustion requirements for habeas actions.” Butler v. Compton, 482 F.3d 1277, 1279 (10th Cir. 2007) (citing Muhammad v. Close, 540 U.S. 749 (2004) (per curiam)). Heck also requires an inmate to have a disciplinary report (“DR”) overturned prior to bringing a civil rights claims if the civil rights claim would shed doubt on the DR. Edwards v. Balisok, 520 U.S. 641, 648 (1997); Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005); Harden v. Pataki, 320 F.3d 1289, 1294-95 (11th Cir. 2003). Thus, for both defenses a motion to dismiss is the appropriate vehicle to challenge an inmate’s ability to file a civil rights action. In both instances a court may allow the record to be developed and thereafter act as fact-finder to determine the *threshold issue* of whether the inmate’s suit may be maintained. Bryant, *supra*.

4. In Chambers v. Johnson, 372 Fed. App'x 471, 473 (5th Cir. Mar. 30, 2010) (Exh. F), the Fifth Circuit Court of Appeals noted, without disapproval, that the magistrate judge had acted as fact-finder in defendant's Heck-bar defense raised in a motion to dismiss.

5. Thus, the defenses of failure to exhaust and Heck are properly raised in a motion to dismiss under Rule 12(b)(1), Fed.R.Civ.P. Further, under Bryant, the Court may accept evidence and act as a fact-finder to resolve threshold issues that may deprive the Court of subject-matter jurisdiction.

CONCLUSION

Defendants request the district court judge remand the case to the magistrate with instructions to develop the record before making recommendations as to whether the Plaintiff's suit passes both the prerequisite of exhaustion and the hurdle of Heck. If not, the Court lacks subject-matter jurisdiction making Plaintiff's attempted amendment futile and, thus, requiring the case to be dismissed without prejudice. Finally, Defendants ask the court stay Plaintiff's premature discovery requests (Doc. 31) until after the amended complaint is answered (*i.e.*, after the motions to dismiss and response in opposition for leave to amend are

resolved by final order of this Court), if such an answer is necessary after resolution of the motions.²

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

/s/ Lance Eric Neff

Lance Eric Neff

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² The relevant documents concerning Defendants' defenses of failure to exhaust and Heck are already in Plaintiff's possession. He filed his grievances and is given a copy of all filed grievances. (See, e.g., Doc. 1 at 33-50) Plaintiff also has copies of the relevant DR documents as can be seen in the exhibits to his initial complaint. (Doc. 1 at 29-31) Thus, no discovery is required concerning these defenses.

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Lance Eric Neff
LANCE ERIC NEFF

SERVICE LIST
CHRISTOPHER ALSOBROOK versus SGT. ALVARADO, et al.,
Case No.: 10-22183-CV-KING/WHITE
United States District Court, Southern District of Florida

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/s/ Lance Eric Neff
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Slip Copy, 2010 WL 4146149 (C.A.11 (Fla.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 2010 WL 4146149 (C.A.11 (Fla.)))

H
Only the Westlaw citation is currently available. This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
Eleventh Circuit.
Johane TILLERY, Plaintiff-Appellant,
v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Janet Napolitano, Secretary,
Defendant-Appellee.

No. 10-11657

Non-Argument Calendar.

Oct. 22, 2010.

Background: Employee brought Title VII civil rights action against federal agency alleging she was denied transfer and terminated in retaliation for complaining of sexual harassment. The United States District Court for the Southern District of Florida, granted agency's motion to dismiss for failure to exhaust administrative remedies. Employee appealed.

Holding: The Court of Appeals held that the district court could consider evidence outside the pleadings, and make findings of fact, in considering the motion to dismiss.

Affirmed.

West Headnotes

[1] Federal Civil Procedure 170A ↪1831

170A Federal Civil Procedure

170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1831 k. Fact Issues. Most Cited Cases

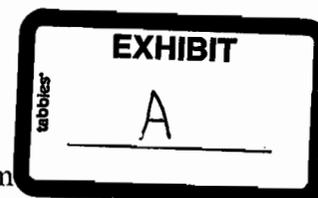
Federal Civil Procedure 170A ↪1832

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1832 k. Matters Considered in General. Most Cited Cases

District court could consider evidence outside the pleadings, and make findings of fact, in considering motion to dismiss for failure to exhaust administrative remedies, in Title VII civil rights action brought by employee against federal agency alleging she was denied transfer and terminated in retaliation for complaining of sexual harassment; facts relating to whether employee exhausted administrative remedies did not bear on merits of her retaliation claim, and employee clearly had sufficient opportunity to develop, and did develop, a record. Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e et seq.

[2] Civil Rights 78 ↪1513

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1512 Exhaustion of Administrative Remedies Before Resort to Courts
78k1513 k. In General. Most Cited Cases
Exhausting administrative remedies is a prerequisite to a federal employee's filing an employment discrimination action under Title VII. Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e et seq. Arthur T. Schofield, Arthur T. Schofield, P.A., West Palm Beach, FL, for Plaintiff-Appellant.



Slip Copy, 2010 WL 4146149 (C.A.11 (Fla.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 2010 WL 4146149 (C.A.11 (Fla.)))

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Assistant U.S. Attorney, U.S. Attorney's Office,
Fort Lauderdale, FL, Jeffrey Sloman U.S. Attorney,
West Palm Beach, FL, Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida. D.C. Docket No.
9:09-cv-80572-KAM.

Before CARNES, HULL and FAY, Circuit Judges.

PER CURIAM:

*1 Johane Tillery appeals the district court's order
dismissing her complaint raising retaliation claims
under Title VII for failure to exhaust administrative
remedies.^{FN1} After review, we affirm.

I. BACKGROUND

A. Title VII Complaint

Plaintiff Johane Tillery ("Tillery") worked as a
transportation security officer for the Transporta-
tion Security Administration ("TSA"), an agency
within the Department of Homeland Security
("DHS"), at the Palm Beach International Airport
("Pbia"). In February 2006, Tillery complained
that her manager, Larry Davis, had sexually har-
assed her. As a result Davis was transferred from
Pbia.

In March 2006, Tillery requested a transfer to an
airport in Tucson, Arizona. On April 13, 2006, her
request was approved. However, on May 5, 2006,
after the Arizona facility spoke to Tillery's Pbia
supervisors, Tillery was told that she could not
transfer to the Arizona facility. On June 7, 2006,
Tillery was terminated. Tillery's complaint alleged
that her Pbia supervisors gave false information to
the Arizona facility in retaliation for her sexual har-
assment complaint against Davis and later termin-
ated her in retaliation, too.

B. Motion to Dismiss

DHS filed a pre-answer motion to dismiss pursuant
to Federal Rule of Civil Procedure 12(b). DHS's
motion argued that Tillery failed to exhaust her ad-
ministrative remedies because she did not contact
TSA's Equal Employment Office ("EEO") within
45 days of the allegedly discriminatory action, as
required by agency regulations. *See* 29 C.F.R. §
1614.105(a)(1) (requiring a federal employee who
believes she has been discriminated against to
"initiate contact with a Counselor within 45 days of
the date of the matter alleged to be discriminatory
or, in the case of personnel action, within 45 days
of the effective date of the action").^{FN2} DHS con-
tended, *inter alia*, that (1) the first alleged retaliat-
ory act occurred on May 5, 2006; (2) the 45-day no-
tification period expired on June 19, 2006; and (3)
Tillery did not contact an EEO counselor until July
12, 2006, 23 days after the 45-day period expired.
DHS further contended Tillery never contacted an
EEO Counselor about the allegedly retaliatory ter-
mination. DHS submitted exhibits, including: (1) an
EEO Counselor's Report; (2) declarations of EEO
officials; (3) Tillery's formal EEO complaint; and
(4) the DHS's final agency decision dismissing her
formal EEO complaint as untimely under the regu-
lations.

Tillery responded, attaching her affidavit and docu-
ments. Tillery contended that the 45-day notifica-
tion period was equitably tolled because, after she
was placed on leave on May 8, 2006, she could
contact an EEO Counselor only by phone and her
repeated calls over a three- or four-week period
were not returned. *See* 29 C.F.R. § 1614.105(a)(2)
(requiring agency to extend the 45-day period
where "despite due diligence" claimant "was pre-
vented by circumstances beyond his or her control
from contacting the counselor within the time lim-
its"). Tillery's affidavit stated that, while on leave,
she made calls three or four times per week over a
25- to 30-day period until July 11, 2006, when she
finally received a return call. Tillery argued that (1)
evidence of her efforts to contact the EEO Coun-

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selor created a genuine issue of material fact that only a jury should decide, and (2) her letter, dated May 30, 2006, to Pete Garcia, the Federal Security Director, within the 45-day period satisfied the EEO Counselor contact requirement.

*2 In reply, DHS filed additional documents, including the declaration of Janet White, an EEO manager, describing the EEO's process for handling telephone calls. White averred that the EEO maintained a 24-hour hotline that employees could call to leave messages regarding EEO concerns. The EEO's protocol was to return messages within 24 hours. Each day, an assigned EEO counselor would check the hotline voicemail, record the information on an "incoming-case spreadsheet," return the call and then supplement the entry on the spreadsheet with information obtained during the telephone conversation. It was contrary to the EEO's mission and business practice to delete messages without responding to them, fail to return calls or inaccurately record dates of contact with the complainants. The EEO's incoming-case spreadsheet indicated that Tillery's only call to TSA's EEO was on July 11, 2006, which was returned on July 12, 2006.

C. District Court's Notice

On February 9, 2010, the district court notified the parties that it was considering DHS's motion to dismiss. The district court advised that it was guided by *Bryant v. Rich*, 530 F.3d 1368 (11th Cir.2008), which directs the district court to resolve factual disputes as to exhaustion of administrative remedies on a motion to dismiss if (1) the factual disputes do not decide the merits of the claims and (2) the parties have had sufficient opportunity to develop the record. *Id.* at 1376. The district court noted that the parties had filed exhibits, including affidavits. The district court gave Tillery ten days to submit any additional evidence in opposition to DHS's motion to dismiss.

D. Tillery's Supplemental Brief

Tillery then submitted a supplemental brief and more evidence, including: (1) Tillery's affidavit; (2) copies of emails; and (3) deposition transcripts of TSA supervisors at the Tucson airport who handled Tillery's transfer request. Tillery's brief argued that DHS reconsidered her transfer request and ultimately denied it on May 29, 2006, making her July 11, 2006 telephone contact with the EEO office timely.

E. District Court's Dismissal Order

On March 10, 2010, the district court granted DHS's motion to dismiss. Again citing *Bryant v. Rich*, the district court reiterated that it could consider the parties' evidence as to exhaustion of administrative remedies on a motion to dismiss and was not required to convert the motion to a summary judgment motion. The district court concluded that "whether Tillery timely initiated an administrative review of her claim, or if not, whether the time should be tolled, do not go to the merits. Therefore the Court will resolve these questions at this stage."

After reviewing the evidence, the district court found that: (1) Tillery first contacted the EEO counselor on July 11, 2006 and complained that the April 24, 2006 transfer denial was retaliatory; (2) it was "highly unlikely that Tillery made any initial contact with TSA's [EEO office] other than the contact recorded on the incoming-case spreadsheet" on July 11, 2006; (3) there was "no credible evidence" supporting Tillery's claim in her "self-serving affidavit" that she had attempted to call the EEO office three to four times a week over a 25 or 30 day period or that her only way to contact the EEO office was by telephone. Accordingly, the district court concluded that there was no basis to equitably toll the 45-day limitation period.

*3 The district court also concluded that Tillery's May 30, 2006 letter to Pete Garcia, sent within the 45-day period, did not satisfy the notification requirement because Garcia was not connected to the

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EEO process and Tillery's letter did not express an intent to begin the EEO process. The district court further found that Tillery never filed a formal complaint charging retaliatory termination. Thus, the district court concluded that Tillery failed to exhaust administrative remedies as to both her claim for retaliatory denial of her transfer request and her claim for retaliatory termination. Tillery appealed.

II. DISCUSSION

On appeal, Tillery does not challenge the merits of the district court's ruling that she failed to exhaust administrative remedies. Rather, Tillery argues only that, in ruling on DHS's motion to dismiss, the district court erred in resolving factual disputes.

We start with our precedent in *Bryant v. Rich*, 530 F.3d 1368 (11th Cir.2008), relied on by the district court. In *Bryant*, this Court concluded that the district court properly resolved factual disputes in granting a motion to dismiss based on failure to exhaust administrative remedies. 530 F.3d at 1377. Specifically, the *Bryant* Court explained that “[b]ecause exhaustion of administrative remedies is a matter in abatement and not generally an adjudication on the merits, an exhaustion defense ... is not ordinarily the proper subject for a summary judgment; instead, it should be raised in a motion to dismiss, or treated as such if raised in a motion for summary judgment.” *Id.* at 1375-76 (quotation marks omitted). The *Bryant* Court treated Rule 12(b) motions regarding exhaustion of nonjudicial remedies as similar to motions regarding jurisdiction and venue in that “[e]xhaustion of administrative remedies is a matter in abatement, and ordinarily does not deal with the merits.” *Id.* at 1374 (quotation marks and brackets omitted). In those types of Rule 12(b) motions, “it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record.” *Id.* at 1376 (footnotes omitted).

[1] Here, both prongs of *Bryant* are satisfied. First, the facts relating to whether Tillery exhausted administrative remedies do not bear on the merits of her retaliation claims. Second, Tillery clearly had sufficient opportunity to develop, and did develop, a record. Accordingly, under *Bryant*, the district court did not err by acting as the factfinder as to when Tillery first contacted the EEO counselor and whether she had made earlier unsuccessful attempts to do so.

We reject Tillery's argument that *Bryant* is applicable only to motions to dismiss under the Prison Litigation Reform Act's (“PLRA”) exhaustion requirement, 42 U.S.C. § 1997e(a). Although the source of the exhaustion requirement in *Bryant* was the PLRA, *Bryant* relied upon general principles that: (1) a matter in abatement, even if non-judicial, such as exhaustion of administrative remedies is appropriately raised in a Rule 12(b) motion to dismiss, and (2) a district court can resolve a factual dispute in ruling on that Rule 12(b) motion to dismiss so long as it does not adjudicate the merits of the claim and the plaintiff has had an opportunity to develop the record. *See id.* at 1374-76.

*4 [2] Like the PLRA's exhaustion requirement, exhausting administrative remedies under Part 1614 of the Code of Federal Regulation is a prerequisite to a federal employee's filing an employment discrimination action under Title VII. *See Crawford v. Babbitt*, 186 F.3d 1322, 1326 (11th Cir.1999) (concluding that exhausting administrative remedies is a jurisdictional prerequisite to filing Title VII action). Thus, the general principles relied upon in *Bryant* apply equally to DHS's motion to dismiss Tillery's Title VII retaliation claims on exhaustion grounds.

Tillery relies upon *Stewart v. Booker T. Washington Insurance*, in which this Court reversed a district court's decision that the plaintiff failed to file her statutory charge of discrimination with the EEOC within 180 days of her termination, as required by 42 U.S.C. § 2000e-5(e)(1). 232 F.3d 844, 846 (11th

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Cir.2000). The *Stewart* Court stressed that Title VII's statutory filing period does not begin to run until the employee receives "unequivocal notice of the adverse employment decision." *Id.* at 849 (quotation marks omitted). The *Stewart* Court first concluded that the May 1997 statements of the defendant employer's president, Kirkwood Balton, to all employees that the company's primary assets were being sold and that the company would "try to hire them, or ... pay them four months' severance pay" were not sufficient to start the time clock running on the 180-day statutory period. *Id.* (omission in original). We pointed out that although Balton's statements gave the plaintiff employee reason "to suspect that she *might* be terminated," this was not a statement that plaintiff was "actually being terminated." *Id.* We also pointed out that plaintiff had filed an uncontradicted affidavit stating that she was never told she was terminated until November 1997. *Id.*

The *Stewart* Court concluded that the district court erred in holding Balton's statements were sufficient to start the 180-day period and in disregarding the plaintiff's affidavit testimony that she was never told she was terminated until November 1997. *Id.* at 849-50. The district court in *Stewart* had converted a motion to dismiss into a motion for summary judgment and had applied the Rule 56 summary judgment standard. *Id.* at 848. This Court reviewed the district court's decision under only the Rule 56 standard. *Id.* The *Stewart* Court stated that it must accept the plaintiff's affidavit as true in the Rule 56(c) summary judgment context and that her affidavit created a factual issue of when she was notified of her termination. *Id.* at 850. The *Stewart* Court did not mention "exhaustion of administrative remedies" at all or whether exhaustion is properly raised and resolved under Rule 12(b). For this reason, *Stewart* did not address the Rule 12(b)-exhaustion issue presented in *Bryant* and in this case too. *Stewart* does not require us to reverse the district court here.

*5 In sum, in ruling on DHS's Rule 12(b) motion to

dismiss based solely on exhaustion of administrative remedies and not on the merits of Tillery's claims, the district court did not err in considering evidence outside the pleadings or in making fact findings as to exhaustion. Accordingly, we affirm the district court's order dismissing Tillery's complaint for failure to exhaust *administrative* remedies with her EEO counselor before filing suit. ^{FN3}

AFFIRMED.

FN1. Civil Rights Act of 1964, § 701 *et seq.*, as amended by Civil Rights Act of 1991, § 104 *et seq.*, 42 U.S.C. § 2000e *et seq.* ("Title VII").

FN2. Under Part 1614, an employee of a federal agency must first consult an EEO Counselor in an effort to "informally resolve the matter." 29 C.F.R. § 1614.105(a). At the end of this informal consultation, the employee may file a formal complaint with the agency within fifteen days, triggering the agency's obligation to conduct an investigation. 29 C.F.R. § 1614.106(a)-(b), (e)(2). The agency is required to dismiss a formal complaint if the employee failed to comply with the time limits for informally consulting with the EEO Counselor or for filing the formal complaint. 29 C.F.R. § 1614.107(a)(2). The employee then has the right to appeal the agency's dismissal of the formal complaint. *See* 29 C.F.R. § 1614.106(e)(1).

FN3. Because Tillery did not appeal the merits of the district court's ruling that she failed to exhaust administrative remedies, she has abandoned this issue. *See Marek v. Singletary*, 62 F.3d 1295, 1298 n. 2 (11th Cir.1995).

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Virgil MITCHELL, Plaintiff,
v.
William JACKSON, Defendant.
No. 2:10-CV-13483.

Sept. 30, 2010.

ORDER OF SUMMARY DISMISSAL

ROBERT H. CLELAND, District Judge.

*1 Plaintiff Virgil Mitchell, a state inmate currently incarcerated at the Lakeland Correctional Facility in Coldwater, Michigan, has filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff is proceeding without prepayment of the filing fee in this action under 28 U.S.C. § 1915(a)(1). After careful consideration, the court summarily dismisses the complaint.

I. BACKGROUND

In his complaint, Plaintiff alleges that on April 28, 2001, he was arrested and charged with "assault with intent to commit robbery." Plaintiff was actually charged with assault with intent to rob while armed but convicted by a jury in the Wayne County Circuit Court of the lesser included offense of assault with intent to rob while unarmed. Plaintiff was sentenced to ten to fifteen years in prison.^{FN1} Plaintiff claims that Defendant, the arresting officer in this case, arrested Plaintiff for this offense, even though Plaintiff had informed him at the time of his arrest that he was innocent. Plaintiff further claims that Defendant used a false statement in the original felony complaint to charge Plaintiff with this crime. Plaintiff seeks monetary damages and any other re-

lief that the court or the jury wishes to grant. Plaintiff remains incarcerated for this conviction.^{FN2}

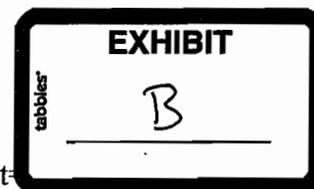
FN1. The court obtained this information from Westlaw. See *People v. Mitchell*, No. 247130, 2004 WL 1635845 (Mich.Ct.App. July 22, 2004).

FN2. The court obtained this information from the Michigan Department of Corrections' Offender Tracking Information System (OTIS), of which this court is permitted to take judicial notice. See *Ward v. Wolfenbarger*, 323 F.Supp.2d 818, 821 n. 3 (E.D.Mich.2004).

II. STANDARD

Civil rights complaints filed by a pro se prisoner are subject to the screening requirements of 28 U.S.C. § 1915(e)(2). *Brown v. Barger*, 207 F.3d 863, 866 (6th Cir.2000). Section 1915(e)(2) requires district courts to screen and to dismiss complaints that are frivolous, that fail to state a claim upon which relief can be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2); *McGore v. Wigglesworth*, 114 F.3d 601, 604 (6th Cir.1997). A complaint is frivolous and subject to sua sponte dismissal under § 1915(e) if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A plaintiff fails to state a claim upon which relief may be granted, when, construing the complaint in a light most favorable to the plaintiff and accepting all the factual allegations as true, the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir.1996); *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir.1996); *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1138 (6th Cir.1995).

In addition, "a district court may, at any time, dis-



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miss sua sponte a complaint for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure when the allegations of a complaint are totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion." *Apple v. Glenn*, 183 F.3d 477, 479 (6th Cir.1999) (citing *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974)).

III. DISCUSSION

*2 Plaintiff's complaint is subject to dismissal for several reasons.

First, to the extent that Plaintiff seeks monetary damages arising from his criminal conviction, he would be unable to obtain such damages absent a showing that his criminal conviction has been overturned. To recover monetary damages for an allegedly unconstitutional conviction or imprisonment, a § 1983 plaintiff must prove that the conviction or sentence was reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by the issuance of a federal writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Because Plaintiff does not allege that his conviction has been overturned, expunged, or called into question by a writ of habeas corpus, his allegations relating to his criminal prosecution, conviction, and incarceration against the defendant fail to state a claim for which relief may be granted and must, therefore, be dismissed. *See Adams v. Morris*, 90 F. App'x 856, 858 (6th Cir.2004); *Dekoven v. Bell*, 140 F.Supp.2d 748, 756 (E.D.Mich.2001); *see also Scheib v. Grand Rapids Sheriffs Dep't*, 25 F. App'x 276, 277 (6th Cir.2001) (state inmate's § 1983 claim that fabricated police records influenced charges brought against him would affect validity of his still-standing conviction, and thus were barred by the *Heck* rule). Moreover, although Plaintiff was not convicted of the original assault with intent to rob while armed charge, Plaintiff's conviction on the lesser included offense of assault with intent to rob while unarmed precludes him

from maintaining a § 1983 action against Defendant, because his complaint would call into question the validity of that conviction. *See Barnes v. Wright*, 449 F.3d 709, 716-17 (6th Cir.2006).

To the extent that Plaintiff is seeking to have his criminal conviction vacated or set aside in this civil rights action, the civil rights complaint is subject to dismissal. Where a state prisoner is challenging the very fact or duration of his physical imprisonment and the relief that he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a petition for a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). A plaintiff cannot seek injunctive relief relating to his criminal conviction in a § 1983 action. *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). Instead, " § 1983 must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *Id.*

To the extent that Plaintiff asks the court to reverse his criminal conviction, his complaint would sound in habeas corpus, and not under the civil rights statute. The current Defendant would not be the proper respondent. *See Urrutia v. Harrisburg County Police Dep't*, 91 F.3d 451, 462 (3d Cir.1996) (citing to Rule 2(a) of the Rules Governing § 2254 Cases). The only proper respondent in a habeas case is the habeas petitioner's custodian, which in the case of an incarcerated habeas petitioner would be the warden of the facility where the petitioner is incarcerated. *See Edwards v. Johns*, 450 F.Supp.2d 755, 757 (E.D.Mich.2006); *see also* Rule 2(a), Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

*3 To the extent that Plaintiff is seeking to be released from custody, his action should have been filed as a petition for a writ of habeas corpus and not as a civil rights suit under § 1983. The court will not, however, convert the matter to a petition for a writ of habeas corpus. When a suit that should

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have been brought under the habeas corpus statute is prosecuted instead as a civil rights suit, it should not be "converted" into a habeas corpus suit and decided on the merits. *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir.1999). Instead, the matter should be dismissed, leaving it to the prisoner to decide whether to refile it as a petition for a writ of habeas corpus. *Id.* The court cannot treat Plaintiff's complaint as an application for habeas corpus relief because the court has no information that Plaintiff has exhausted his state court remedies, as required by 28 U.S.C. § 2254(b)-(c), to obtain federal habeas relief. *See Parker v. Phillips*, 27 F. App'x 491, 494 (6th Cir.2001). Moreover, any habeas petition would be subject to dismissal because Plaintiff has failed to name the appropriate state official as the respondent. *See Clemons v. Mendez*, 121 F.Supp.2d 1101, 1102 (E.D.Mich.2000). Finally, *Heck* clearly directs a federal district court to dismiss a civil rights complaint which raises claims that attack the validity of a conviction; it does not direct a court to construe the civil rights complaint as a habeas petition. *See Murphy v. Martin*, 343 F.Supp.2d 603, 610 (E.D.Mich.2004).

When a prisoner's civil rights claim is barred by the *Heck* doctrine, the appropriate course for a federal district court is to dismiss the claim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h)(3), rather than to dismiss the complaint with prejudice as being frivolous, because the former course of action is not an adjudication on the merits and would allow the prisoner to reassert his claims if his conviction or sentence is later invalidated. *See Murphy*, 343 F.Supp.2d at 609. Therefore, because the court is dismissing Plaintiff's § 1983 complaint under *Heck*, the dismissal will be without prejudice. *See, e.g., Finley v. Densford*, 90 F. App'x 137, 138 (6th Cir.2004).

IV. CONCLUSION

IT IS ORDERED that the Plaintiff's Complaint [Dkt. # 1] is DISMISSED WITHOUT PREJUDICE.

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Only the Westlaw citation is currently available. This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
Eleventh Circuit.

George C. ESENSOY, Plaintiff-Appellant,
v.

H.W. Bucky McMILLAN, Sue Bell Cobb, Pamela W. Baschab, Greg Shaw, A. Kelli Wise, individually and in their capabilities as justices of the Alabama Court of Criminal Appeals, Defendants-Appellees.

No. 06-12580

Non-Argument Calendar.

Jan. 31, 2007.

George C. Esensoy, Huntsville, AL, pro se.

John M. Porter, Cheairs M. Porter, Office of the Attorney General, Montgomery, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama. D.C. Docket No. 05-01063-CV-W-N.

Before EDMONDSON, Chief Judge, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

*1 George Esensoy ("Appellant"), a state prisoner proceeding *pro se*, appeals the district court's dismissal for lack of subject matter jurisdiction of his

42 U.S.C. § 1983 civil complaint seeking declaratory and injunctive relief. Although the district court may have applied the *Rooker-Feldman*^{FN1} doctrine prematurely, we affirm the district court's dismissal because Appellant's claims are barred under *Heck v. Humphrey*, 114 S.Ct. 2364 (1994).

FN1. The *Rooker-Feldman* doctrine generally "provides that federal courts, other than the United States Supreme Court, have no authority to review the final judgments of state courts." *Siegel v. LePore*, 234 F.3d 1163, 1172 (11th Cir.2000).

Appellant was convicted of trafficking cocaine in Alabama state court and received a sentence of 30 years' imprisonment. On direct appeal, the Alabama Court of Criminal Appeals affirmed the conviction, and the Supreme Court of Alabama denied certiorari. Appellant later filed a petition for relief in the state trial court,^{FN2} claiming his criminal indictment was defective because it did not include the term "unlawfully," which Appellant argues is an essential element of his crime. After the state trial court denied the petition, Appellant appealed to the Alabama Court of Criminal Appeals, which affirmed the denial of the petition and later denied Appellant's application for rehearing.^{FN3} The Supreme Court of Alabama then denied Appellant's certiorari on 11 November 2005.

FN2. Appellant filed an Ala. R.Crim. P. 32 Post-Conviction Petition for Relief from Judgment or Sentence and a Motion for an Evidentiary Hearing, both of which the state trial court denied.

FN3. The Alabama Court of Criminal Appeals determined that because the language of the indictment tracked the language of the trafficking statute, the indictment was therefore valid.

Eight days earlier, on 3 November 2005, Appellant



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filed a *pro se* § 1983 action in federal district court against the five judges of the Alabama Court of Criminal Appeals (“Defendants”), alleging that the judges (1) “committed perjury and obstruction of justice” by not correctly identifying Appellant’s argument on appeal; and (2) conspired to violate Appellant’s due process rights by failing to declare that the term “unlawfully” was a necessary element of his crime that should have been included in the indictment.^{FN4} The district court adopted the report of the magistrate judge, which recommended that the district court dismiss Appellant’s complaint *sua sponte* on two grounds: (1) lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine; and (2) judicial immunity.^{FN5} After an independent review, the district court determined that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine and dismissed the complaint with prejudice.

FN4. In Appellant’s complaint, he seeks (1) a declaration that Defendants violated his due process rights; (2) a declaration that “unlawfully” is an essential element of his offense; and (3) injunctive relief entitling him to an evidentiary hearing in state court to prove that failure to include the term “unlawfully” in his indictment deprived the state court of jurisdiction to render judgment.

FN5. Because Appellant did not ask for damages, judicial immunity protects Defendants in this case only to the extent Appellant requests injunctive relief. In *Pulliam v. Allen*, 104 S.Ct. 1970 (1984), the Supreme Court concluded that judicial immunity is not a bar to demands for injunctive relief against state judges. Congress abrogated *Pulliam*, however, by passing the Federal Courts Improvement Act, Pub.L. No. 104-317, 110 Stat. 3847 (1996), which amended § 1983 to provide that “in any action brought against a judicial officer for an act or omission taken in such officer’s

judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” Because Appellant specifically requests declarative relief, judicial immunity protects the Defendants only from Appellant’s request for injunctive relief. But § 1983 does not explicitly bar Appellant’s request for declarative relief.

We review a district court’s determination that it lacks subject matter jurisdiction *de novo*. *Singleton v. Apfel*, 231 F.3d 853, 856 (11th Cir.2000).

We are inclined to believe that dismissal is improper under the *Rooker-Feldman* doctrine. But Appellant’s claims are barred by *Heck v. Humphrey*, 114 S.Ct. 2364 (1994), and we affirm on that basis. In *Heck*, the Supreme Court concluded that in a § 1983 action, if a judgment in favor of a state prisoner “would necessarily imply the invalidity of his conviction or sentence ... the complaint must be dismissed unless the [prisoner] can demonstrate that the conviction or sentence has already been invalidated.” *Heck*, 114 S.Ct. at 2372.^{FN6} We have said that “declaratory or injunctive relief claims which are in the nature of habeas corpus claims—i.e., claims which challenge the validity of the claimant’s conviction or sentence and seek release—are simply not cognizable under § 1983.” *Abella v. Rubino*, 63 F.3d 1063, 1066 (11th Cir.1995).^{FN7}

FN6. Although the plaintiff in *Heck* sought only damages, the Supreme Court has said that dismissal under the principles announced in *Heck* may be appropriate regardless of the kind of relief sought. *Wilkinson v. Dotson*, 125 S.Ct. 1242, 1248 (2005).

FN7. In *Abella*, we applied *Heck* to a *Bivens* claim against federal judges and officials for conspiracy to convict and concluded that a judgment in favor of the prisoner would necessarily imply that the prisoner’s conviction was invalid. *Abella*, 63