CASREF, PAW

U.S. District Court
Southern District of Florida (Ft. Pierce)
CIVIL DOCKET FOR CASE #: 2:10-cv-14238-DLG

McCray v. Mascara et al
Assigned to: Judge Donald L. Graham
Referred to: Magistrate Judge Patrick A. White
Cause: 28:1983 Civil Rights

Date Filed: 09/13/2010
Jury Demand: None
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Otis McCray represented by **Otis McCray**
DC #874767
Marion Correctional Institution
P.O. Box 158
Lowell, FL 32663-0158
PRO SE

V.

Defendant

Sheriff Ken J. Mascara
TERMINATED: 12/29/2010

Defendant

Sgt Harold Wells
TERMINATED: 12/29/2010

Defendant

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

Defendant

St. Lucie County Sheriff's Office
TERMINATED: 12/29/2010

Defendant

Deputy Clay Mangrum represented by **Adriana Mihaela Jisa**

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/13/2010	1	COMPLAINT against Robert Funk, Clay Mangrum, Ken J. Mascara, St. Lucie County Sheriff's Office, Harold Wells. Filing fee $ 350.00.IFP Filed,filed by Otis McCray.(ots) Modified MJSTAR event on 11/29/2010 (yc). (Entered: 09/13/2010)
09/13/2010	2	Judge Assignment RE: Electronic Complaint to Judge Donald L. Graham (ots) (Entered: 09/13/2010)
09/13/2010	3	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. (ots) (Entered: 09/13/2010)
09/13/2010	4	MOTION for Leave to Proceed in forma pauperis by Otis McCray. (ots) (Entered: 09/13/2010)
09/23/2010	5	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF $350.00 and Granting 4 Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 9/23/2010. (tw) (Entered: 09/23/2010)
09/23/2010	6	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 9/23/2010. (tw) (Entered: 09/23/2010)
11/19/2010	7	PRELIMINARY REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Otis McCray. Recommending 1. The claim of unlawful force shall proceed against Officers Funk and Mangrum, in their individual capacity, and service shall be ordered. 2. Defendants Sheriff Mascara, St Lucie County Sheriffs Department and Deputy Wells shall be dismissed pursuantto 28 U.S.C. §1915(e)(2)(B)(ii), for failure to state a claim upon which relief may be granted. Objections to R&R due by 12/6/2010. Signed by Magistrate Judge Patrick A. White on 11/19/2010. (tw) (Entered: 11/19/2010)
12/01/2010	8	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:Deputy Robert Funk,St. Lucie County Sheriffs Office, 4700 West Midway Road, Fort Pierce, FL 34981-4825 and Deputy Clay Mangrum, St. Lucie County Sheriffs Office, 4700 West Midway Road, Fort Pierce, FL 34981-4825. Signed by Magistrate Judge Patrick A. White on 11/30/2010. (tw) (Entered: 12/01/2010)
12/09/2010	9	Clerk's Notice of Undeliverable Mail re 7 REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Otis

		McCray Recommending 1.The claim of unlawful force shall proceed againstOfficers Funk and Mangrum, in their individual capacity,and service shall be ordered.2.Defendants SherifREPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Otis McCray Recommending 1.The claim of unlawful force shall proceed againstOfficers Funk and Mangrum, in their individual capacity,and service shall be ordered.2.Defendants SherifREPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Otis McCray Recommending 1.The claim of unlawful force shall proceed againstOfficers Funk and Mangrum, in their individual capacity,and service shall be ordered.2.Defendants Sherif, 8 Order,. US Mail returned for: return to sender inmate no longer in custody. unable to forward. *The Court has not located an updated address for this party. After two unsuccessful noticing attempts, notices from the Court will no longer be sent to this party in this case until a correct address is provided.*US Mail returned for Otis McCray. First return/Attempt (rb) (Entered: 12/09/2010)
12/10/2010	10	Summons Issued as to Robert Funk. (br) (Entered: 12/10/2010)
12/10/2010	11	Summons Issued as to Clay Mangrum. (br) (Entered: 12/10/2010)
12/29/2010	12	ORDER on or before January 21, 2011, the plaintiff shall notify the Court whether he wishes to continue this lawsuit. Signed by Magistrate Judge Patrick A. White on 12/29/2010. (tw) (Entered: 12/29/2010)
12/29/2010	13	Order Adopting 7 Report and Recommendations. Signed by Judge Donald L. Graham on 12/28/2010. (jcy) (Entered: 12/29/2010)
12/30/2010	14	Clerk's Notice of Undeliverable Mail re 8 Order,. **US Mail returned for: OTIS MCCRAY Return to Sender** . *The Court has not located an updated address for this party. After two unsuccessful noticing attempts, notices from the Court will no longer be sent to this party in this case until a correct address is provided.* (lbc) (Entered: 12/30/2010)
01/12/2011	15	Clerk's Notice of Undeliverable Mail re 12 Order, 13 Order Adopting Report and Recommendations, Terminate Parties. US Mail returned for: return to sender not deliverable as addressed unable to forward.. *The Court has not located an updated address for this party. After two unsuccessful noticing attempts, notices from the Court will no longer be sent to this party in this case until a correct address is provided.*US Mail returned for Otis McCray. Second Return/Attempt (rb) (Entered: 01/12/2011)
02/14/2011	16	MOTION/NOTICE of Change of Address by Otis McCray (ls)(System Updated) (Entered: 02/14/2011)
02/16/2011	17	ORDER 1. The Court will assume the plaintiff wishes to continue this lawsuit unless he files a notice of voluntary dismissal. 2. The Marshal shall file a return of service for the two named defendants Funk and Mangrum. Signed by Magistrate Judge Patrick A. White on 2/16/2011. (tw) (Entered: 02/16/2011)
04/19/2011	18	NOTICE of Compliance as to 17 Order, Party Robert Funk Served On 4/11/11. (jcy) (Entered: 04/19/2011)
04/19/2011	19	NOTICE of Compliance as to 17 Order, Party Clay Mangrum served on

		4/11/11. (jcy) (Entered: 04/19/2011)
04/19/2011		Set Answer Due Deadline: Robert Funk response due 4/25/2011; Clay Mangrum response due 4/25/2011. Per DE 18 and 19 . (jcy) (Entered: 04/19/2011)
04/26/2011	20	NOTICE of Attorney Appearance by Adriana Mihaela Jisa on behalf of Robert Funk, Clay Mangrum (Jisa, Adriana) (Entered: 04/26/2011)
04/26/2011	21	*Defendants Funk and Mangrum's* ANSWER and Affirmative Defenses to Complaint by Robert Funk, Clay Mangrum.(Jisa, Adriana) (Entered: 04/26/2011)
05/06/2011	22	SCHEDULING ORDER: Amended Pleadings due by 8/19/2011. Discovery due by 8/5/2011. Joinder of Parties due by 8/19/2011. Motions due by 9/9/2011.. Signed by Magistrate Judge Patrick A. White on 5/5/2011. (tw) (Entered: 05/06/2011)
05/17/2011	23	Defendant's MOTION to Take Deposition from Otis McCray , *a Confined Person (And Memorandum of Law)* by Robert Funk, Clay Mangrum. (Jisa, Adriana) (Entered: 05/17/2011)
05/18/2011	24	ORDER granting 23 Motion to Take Deposition from plaintiff Otis Mccray. A Copy of the plaintiff's deposition shall be furnished to him.. Signed by Magistrate Judge Patrick A. White on 5/18/2011. (cz) (Entered: 05/18/2011)

PACER Service Center			
Transaction Receipt			
06/22/2011 10:52:11			
PACER Login:	vl0006	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	2:10-cv-14238-DLG
Billable Pages:	3	**Cost:**	0.24

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

cat / div 555 / 1983 / St. Lucie
Case # /
Judge _____ Mag White
Motn ifp yes Fee pd $ _____
Receipt # _____

UNITED STATES DISTRICT COURT
Southern District of Florida

Case Number: **10-14238-CV-Graham/White**

OTIS McCRAY
(Enter the full name of the plaintiff in this action)

FILED by _____ D.C.
SEP 13 2010
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - FT. PIERCE

v.

KEN J. MASCARA, SHERIFF
SGT. HAROLD WELLS
DEPUTY ROBERT FUNK
ST. LUCIE COUNTY SHERIFF'S OFFICE
DEPUTY CLAY MANGRUM
(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.

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: Otis McCray

Inmate #: 57053

Address: 900 North Rock Rd

Fort Pierce, FL 34945

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: Ken J. Mascara

is employed as Sheriff

at St Lucie County Sheriff's Office

C. Additional Defendants: Sgt. Harold Wells

Depty, Robert Funk

II. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places.

Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach an additional blank page if necessary.

On 9-5-09, I was arrested by the St. Lucie County Sheriff's office. At the time of the arrest, the listed defendant had assaulted me in St. Lucie County Florida.

Deputy Robert Funk had hit me in my forehead with his large black metal flashlight, for which caused me to get six staples in my head at the Lawnwood Regional Medical Center in Fort Pierce. I now also have a permanent scar on the left side of my forehead. When I tried to get them to stop hitting me with the flashlight accross my forehead,

physically and Racially abused by Deputy Robert Funk and Deputy Clay Mangrum. It was Deputy Robert Funk that was kicking me while I was on the ground being hit with a heavy metal flashlight by Deputy Mangrum.

All of what's happened to me by the foregoing defendants is a violation of my first and eighth amendments, and fourteenth amendment of the U.S. Constitution.

Every time I tried to speak to these officers, I was hit with the flash light and kicked. I was retaliated on everytime I tried to speak

Deputy Mangrum began to hit me accross my back with the same flashlight saying, "STOP RESISTING NIGGER." When I tried to speak with this Deputy I wasn't permitted to talk to tell my side of the story. I was

III. Relief

State briefly exactly what you want the court do to do for you. Make no legal arguments. Cite no cases or statutes.

$ 250.000 Damages

IV. Jury Demand

Do you demand a jury trial? ☒ Yes ☐ No

Signed this 9th day of September, 2010

Otis McCray
(Signature of Plaintiff)

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

Executed on: 9-9-10

Otis McCray
(Signature of Plaintiff)

McCray, Otis
900 North Rock Road
Fort Pierce, Florida 34945

United States District Court
Southern District of Florida
300 South Sixth Street
Fort Pierce, Florida 34950

USMS INSPECTED
BY: JH

Return to Inmate W
For Postage and Veri

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-14238-CIV-GRAHAM
MAGISTRATE JUDGE P. A. WHITE

OTIS McCRAY,	:	
Plaintiff,	:	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF $350.00
v.	:	
SHERIFF KEN MASCARA, et al.,	:	
Defendants.	:	

The pro se plaintiff in this case has not paid the Clerk's filing fee of $350.00, but has filed a motion to proceed *in forma pauperis* with supporting financial affidavit and inmate bank statement.

On April 26, 1996, 28 U.S.C. §1915(a) was amended in part to provide that:

> A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

The six month account statement is needed because pursuant to 28 U.S.C. §1915(b), as amended April 26, 1996, if a prisoner brings a civil action *in forma pauperis*, the prisoner must be required to

pay the full filing fee. Initially, the Court must assess 20% of the greater of

A) the average monthly deposits to the prisoner's account; or

B) the average monthly balance in the prisoner's account for the six month period immediately preceding the filing of the complaint.

Thereafter, the prisoner must make payments of 20% of the preceding month's income credited to his or her account. The agency having custody of the prisoner must forward payments from the prisoner's account to the Clerk of the Court each time the amount in the account exceeds $10.00 until the filing fees are paid.

The plaintiff in this case has filed documentation to establish that he cannot at present pay the fee.

The statute provides at 28 U.S.C. §1915(b)(4) that:

> In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

It is thereupon

ORDERED AND ADJUDGED as follows:

1. The plaintiff's motion to proceed *in forma pauperis* (**DE# 4**) is **granted** to the extent that the plaintiff need not prepay even a partial filing fee in this case, or to prepay costs such as for service of process.

2. The plaintiff owes the United States a debt of $350.00 which must be paid to the Clerk of the Court as funds become available.

3. The jail/prison having custody of the plaintiff must make payments from the prisoner's account to the Clerk of this Court each time the amount in the account exceeds $10.00 until the full filing fee of $350.00 is paid.

DONE AND ORDERED at Miami, Florida, this 23rd day of September, 2010.

Patrick A. White
Patrick A. White
U.S. Magistrate Judge

cc: Otis McCray, Pro Se
Jail No. 57053
St. Lucie County Jail
900 North Rock Road
Fort Pierce, FL 34945

Warden/Superintendent
St. Lucie County Jail
900 North Rock Road
Fort Pierce, FL 34945

Aggie Reed, Assistant Financial Administrator
for Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-14238-CIV-GRAHAM
MAGISTRATE JUDGE P.A. WHITE

OTIS MCCRAY, :

Plaintiff, :

v. :

SHERIFF MASCARA, et al., :

Defendants. :

PRELIMINARY REPORT OF MAGISTRATE JUDGE

I. Introduction

The plaintiff Otis McCray, currently housed at the St. Lucie County Jail, has filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 for damages and other relief. [DE# 1]. The plaintiff has been granted leave to proceed in forma pauperis. [DE# 5].

This Cause is presently before the Court for initial screening pursuant to 28 U.S.C. §1915, because the plaintiff is proceeding in forma pauperis.

II. Analysis

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.

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).

Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1979) (quoting Haines v. Kerner, 404 U.S. 519, 520-21 (1972)). The allegations of the complaint are taken as true and are construed in the light most favorable to Plaintiff. Davis v. Monroe County Bd. Of Educ., 120 F.3d 1390, 1393 (11 Cir. 1997).

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]

A. Statement of Claims

The plaintiff names as defendants the St. Lucie County Sheriff's Department, and St. Lucie County Sheriff Ken Mascara, along with Deputies Robert Funk, Clay Mangrum and Harold Wells.

The plaintiff alleges that on September 5, 2009, he was arrested by the St. Lucie County Sheriff's Department. He claims that Deputy Funk hit him in the forehead with a large black metal flashlight, causing him to receive six staples in his head at the Lawnwood Regional Medical Center in Ft. Pierce, and resulting in a permanent scar. He alleges that Funk kicked him while he was on the ground, and Deputy Mangrum hit him with the flashlight across his back. He claims when he tried to speak to the officers he was hit with the flashlight and kicked.

Excessive Force

Claims of excessive force by police officers are cognizable under 42 U.S.C. §1983, as are claims that officers who were present failed to intervene. Fundiller v. City of Cooper City, 777 F.2d 1436 (11 Cir. 1985). A claim that a law enforcement officer used excessive force in the course of an arrest, an investigatory stop, or any other seizure of a free citizen is to be analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v.

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

Connor, 490 U.S. 386 (1989)("all claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard"); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991).

The plaintiff has stated sufficient facts under the Twombly standard so that the case should proceed against the defendant deputies, Funk and Mangrum.

The plaintiff has failed to state a claim against Sheriff Mascara. There are no direct allegations against him in the complaint and clearly he was sued for his supervisory position as sheriff. Such liability cannot result merely from an improper or even unconstitutional act of his employees under a theory of respondeat superior. If a plaintiff sues a supervisor, there must be proof that the alleged injuries resulted from an official custom, policy, or practice. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); Mandel v. Doe, 888 F.2d 782 (11 Cir. 1989). The plaintiff bears the burden of establishing a causal link between a government policy or custom and the injury which is alleged. Byrd v. Clark, 783 F.3d 1002, 1008 (11 Cir. 1986)(citing Monell, supra). The plaintiff has raised no claim under Monell against the Sheriff. See also; Ashcroft v Iqbal, supra. (Heightened pleading standard for supervisory liability). The plaintiff has failed to demonstrate that Sheriff Mascarra was responsible for the actions of his employees through any instituted policy, custom or practice, and he must be dismissed from this lawsuit.

The plaintiff has also failed to state a claim against the St. Lucie County Sheriff's Office. The Sheriff's Department is not amenable to suit because it is not a person within the meaning of §1983 and also may not be held liable in a civil rights suit for damages. Although certain governmental entities can under some circumstances be deemed "persons" within the meaning of §1983, under Florida law neither a Sheriff's Department nor a police department is a governmental body. They have no status as a legal entity and therefore cannot sue or be sued. See Dean v. Barber, 951 F.2d 1210 (11 Cir. 1992). If the Sheriff's Department were considered as an arm of the County, the plaintiff must demonstrate that a constitutional deprivation resulted from a custom, policy or practice of the County. Monell v Dept. Of Social Services, 436 US 691-694 (1978). The plaintiff has demonstrated no policy of custom used to deprive him of his constitutional rights.

Lastly, the plaintiff has failed to state a claim against Sgt. Harold Wells. He is not mentioned in the complaint, and therefore he should be dismissed from this lawsuit.

III. Recommendation

Based on the foregoing, it is recommended that:

1. The claim of unlawful force shall proceed against Officers Funk and Mangrum, in their individual capacity, and service shall be ordered.

2. Defendants Sheriff Mascara, St Lucie County Sheriff's Department and Deputy Wells shall be dismissed pursuant

to 28 U.S.C. §1915(e)(2)(B)(ii), for failure to state a claim upon which relief may be granted.

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

It is so recommended at Miami, Florida, this 19th day of November, 2010.

UNITED STATES MAGISTRATE JUDGE

cc: Otis McCray Pro Se
57053
900 North Rock Rd
Ft Pierce, FL
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-14238-CIV-GRAHAM/WHITE

OTIS MCCRAY

Plaintiff,

vs.

SHERIFF MASCARA, et. al.,

Defendants.
_____/

ORDER

THIS CAUSE comes before the Court upon Plaintiffs' pro se Complaint.

United States Magistrate Judge Patrick A. White reviewed the Complaint for an initial screening pursuant to 28 U.S.C. § 1915. The Magistrate Judge issued a Preliminary Report recommending the claim of unlawful force proceed against Officers Funk and Mangrum in their individual capacity and service ordered and that Defendants Sheriff Mascara, St. Lucie County Sheriff's Department and Deputy Wells be dismissed. None of the parties have filed timely objections.

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

ORDERED AND ADJUDGED that the Magistrate Judge's Report and Recommendation [D.E. 7] is **AFFIRMED, ADOPTED AND RATIFIED** in its entirety. It is further

ORDERED AND ADJUDGED that the Claim for unlawful force against Officers Funk and Mangrum in their individual capacity shall proceed. It is further

ORDERED AND ADJUDGED that claims against Sheriff Mascara, St. Lucie County Sheriff's Department and Deputy Wells are **DISMISSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of December, 2010.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge White
Counsel of Record
Otis McCray

USM-285 is a 5-part form. Fill out the form and print 5 copies. Sign as needed and route as specified below.

U.S. Department of Justice
United States Marshals Service

PROCESS RECEIPT AND RETURN

See "Instructions for Service of Process by U.S. Marshal"

PLAINTIFF	COURT CASE NUMBER
OTIS McCRAY	10-14238
DEFENDANT	**TYPE OF PROCESS**
SHERIFF KEN MASCARA, et al.,	SUMMONS IN A CIVIL ACTION

SERVE AT
NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC. TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
DEPUTY ROBERT FUNK
ADDRESS *(Street or RFD, Apartment No., City, State and ZIP Code)*
ST. LUCIE COUNTY SHERIFF'S OFFICE 4700 WEST MIDWAY ROAD FORT PIERCE, FL 34981

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW

OTIS MCCRAY, PRO SE, JAIL #57053
ST. LUCIE COUNTY JAIL
900 NORTH ROCK ROAD
FORT PIERCE, FL 34945

Number of process to be served with this Form 285	2
Number of parties to be served in this case	2
Check for service on U.S.A.	

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE *(Include Business and Alternate Addresses, All Telephone Numbers, and Estimated Times Available for Service)*:

Fold

APR 19 2011
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - FT. PIERCE

Fold

Signature of Attorney other Originator requesting service on behalf of:	☐ PLAINTIFF ☐ DEFENDANT	TELEPHONE NUMBER	DATE

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY-- DO NOT WRITE BELOW THIS LINE

I acknowledge receipt for the total number of process indicated. *(Sign only for USM 285 if more than one USM 285 is submitted)*	Total Process	District of Origin	District to Serve	Signature of Authorized USMS Deputy or Clerk	Date
	1	No. 04	No. 04	J. Karowitz	4/11/11

I hereby certify and return that I ☐ have personally served, ☐ have legal evidence of service, ☐ have executed as shown in "Remarks", the process described on the individual, company, corporation, etc., at the address shown above on the on the individual, company, corporation, etc. shown at the address inserted below.

☐ I hereby certify and return that I am unable to locate the individual, company, corporation, etc. named above *(See remarks below)*

Name and title of individual served *(if not shown above)*
Det. Squiers

☒ A person of suitable age and discretion then residing in defendant's usual place of abode

Address *(complete only different than shown above)*

Date	Time
4/11/11	12:25 ☐ am ☒ pm

Signature of U.S. Marshal or Deputy
John E Deacon

Service Fee	Total Mileage Charges including *endeavors)*	Forwarding Fee	Total Charges	Advance Deposits	Amount owed to U.S. Marshal* or (Amount of Refund*)
					$0.00

REMARKS: 4/11/11 JDIS
Due to schedule conflict, Dest SGT. Served.

PRINT 5 COPIES:
1. CLERK OF THE COURT
2. USMS RECORD
3. NOTICE OF SERVICE
4. BILLING STATEMENT*: To be returned to the U.S. Marshal with payment, if any amount is owed. Please remit promptly payable to U.S. Marshal.
5. ACKNOWLEDGMENT OF RECEIPT

PRIOR EDITIONS MAY BE USED

Form USM-285
Rev. 12/80

USM-285 is a 5-part form. Fill out the form and print 5 copies. Sign as needed and route as specified below.

U.S. Department of Justice
United States Marshals Service

PROCESS RECEIPT AND RETURN

See "Instructions for Service of Process by U.S. Marshal"

PLAINTIFF	COURT CASE NUMBER
OTIS McCRAY	10-14238
DEFENDANT	**TYPE OF PROCESS**
SHERIFF KEN MASCARA, et al.,	SUMMONS IN A CIVIL ACTION

SERVE AT
NAME OF INDIVIDUAL, COMPANY, CORPORATION. ETC. TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
DEPUTY CLAY MANGRUM
ADDRESS *(Street or RFD, Apartment No., City, State and ZIP Code)*
ST. LUCIE COUNTY SHERIFF'S OFFICE 4700 WEST MIDWAY ROAD FORT PIERCE, FL 34981

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW

OTIS MCCRAY, PRO SE, JAIL #57053
ST. LUCIE COUNTY JAIL
900 NORTH ROCK ROAD
FORT PIERCE, FL 34945

Number of process to be served with this Form 285	2
Number of parties to be served in this case	2
Check for service on U.S.A.	

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE *(Include Business and Alternate Addresses, All Telephone Numbers, and Estimated Times Available for Service):*

Fold

FILED D.C.
APR 19 2011
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - FT. PIERCE

Fold

Signature of Attorney other Originator requesting service on behalf of:	☐ PLAINTIFF ☐ DEFENDANT	TELEPHONE NUMBER	DATE

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY– DO NOT WRITE BELOW THIS LINE

I acknowledge receipt for the total number of process indicated. *(Sign only for USM 285 if more than one USM 285 is submitted)*	Total Process	District of Origin	District to Serve	Signature of Authorized USMS Deputy or Clerk	Date
	1	No. 04	No. 04	S. Kazovich	4/11/11

I hereby certify and return that I ☐ have personally served, ☐ have legal evidence of service, ☐ have executed as shown in "Remarks", the process described on the individual, company, corporation, etc., at the address shown above on the on the individual, company, corporation, etc. shown at the address inserted below.

☐ I hereby certify and return that I am unable to locate the individual, company, corporation, etc. named above *(See remarks below)*

Name and title of individual served *(if not shown above)*
Det. Squiers

☒ A person of suitable age and discretion then residing in defendant's usual place of abode

Address *(complete only different than shown above)*

Date	Time
4/11/11	12:25 ☐ am ☒ pm

Signature of U.S. Marshal or Deputy
Deacon

Service Fee	Total Mileage Charges including *endeavors)*	Forwarding Fee	Total Charges	Advance Deposits	Amount owed to U.S. Marshal* or (Amount of Refund*)
					$0.00

REMARKS: 4/11/11 JDIS
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5. ACKNOWLEDGMENT OF RECEIPT

PRIOR EDITIONS MAY BE USED

Form USM-285
Rev. 12/80

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 10-14238-CIV-GRAHAM

OTIS MCCRAY,

Plaintiff,

vs.

SHERIFF KEN MASCARA, et. al.,

Defendant.
_____/

DEFENDANTS FUNK AND MANGRUM'S
ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT[1]

I. PARTIES

A. Admitted that Mr. Otis McCray is the Plaintiff in this action. Also admitted that at the time the lawsuit was filed the Plaintiff was an inmate at the St. Lucie County Jail. The Plaintiff is no longer at that address.

B. Denied.

C. Admitted only that Robert Funk is a Defendant.

II. STATEMENT

Denied.

III. RELIEF

Denied.

[1]Defendants Wells and Mascara have been dismissed from this lawsuit.

GENERAL DENIAL

Any and all allegations which were not specifically addressed are hereby denied.

DEFENSES

1. As a first and separate defense, the Defendants, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, would assert that Plaintiff has failed to make sufficient allegation of ultimate fact from which it may be determined that a claim for relief has been stated.

2. As a further and separate Defense, the Defendants would assert that any and all injuries suffered by Plaintiff were caused in whole or in part by reason of Plaintiff's negligent and/or wrongful acts and conduct, as a consequence of which the Plaintiff is not entitled to recovery or any recovery should be reduced in direct proportion thereto.

3. As a further and separate Defense, the Defendants would assert that any and all injury or damage suffered by Plaintiff was caused in whole or in part by reason of Plaintiff's negligence and/or wrongful acts and/or misconduct.

4. As a further and separate Defense, the Defendants would assert that they are immune from any and all liability through application of the concept of qualified immunity, as they, at no time, committed any act in derogation of Plaintiff's civil rights of which a reasonable police officer would have had knowledge and, at all times, otherwise acted in good faith relying upon existing statutes and policies and procedures as authority for their actions and otherwise acted with arguable probable cause and/or probable cause.

5. As a further and separate Defense, the Defendants would assert that any and all actions were taken:

a. Without malice;

b. With probable cause;

c. In pursuit of lawful and legal duties;

d. With such force as was reasonable and necessary under the circumstances.

6. As a further and separate defense, the Defendants would assert that they are entitled to a set off for any collateral sources of compensation for Plaintiff's alleged injuries and/or damages.

7. The Plaintiff is barred from bringing this lawsuit against the Defendants pursuant to Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), because if the Plaintiff was successful in this lawsuit, it would undermine his criminal conviction and sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail to: **Otis McCray, Pro Se, # 874767-13-L,** Marion Correctional Institution, P.O. Box 158, Lowell, Fl 32663-0158 this *26th* day of April, 2011.

PURDY, JOLLY, GIUFFREDA & BARRANCO, P.A.
Attorneys for Defendants MANGRUM and FUNK
2455 East Sunrise Boulevard, Suite 1216
Fort Lauderdale, Florida 33304
Telephone (954) 462-3200
Telecopier (954) 462-3861
E-mail: Adriana@purdylaw.com

BY *s/ Adriana M. Jisa*
ADRIANA M. JISA, ESQUIRE
Florida Bar No.: 0627925

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-14238-CIV-GRAHAM
MAGISTRATE JUDGE P. A. WHITE

OTIS McCRAY, :

Plaintiff, :

v. :

SHERIFF KEN MASCARA, et al., :

Defendants. :

ORDER SCHEDULING PRETRIAL PROCEEDINGS WHEN PLAINTIFF IS PROCEEDING PRO SE

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 **August 5, 2011.** This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **August 19, 2011.**

3. All motions to dismiss and/or for summary judgment shall be filed by **September 9, 2011.**

4. On or before **September 23, 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 <u>each</u> of his witnesses to give.

5. On or before **October 7, 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 5th day of May, 2011.

s/Patrick A. White
UNITED STATES MAGISTRATE JUDGE

cc: Otis McCray, Pro Se
DC #874767
Marion Correctional Institution
P. O. Box 158
Lowell, FL 32663-0158

Adriana M. Jisa, Esquire
Purdy, Jolly, et al.
2455 East Sunrise Boulevard
Suite 1216
Fort Lauderdale, FL 33304

Hon. Donald L. Graham, United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 10-14238-CIV-GRAHAM

OTIS MCCRAY,

Plaintiff,

vs.

SHERIFF KEN MASCARA, et. al.,

Defendant.
_____/

MOTION TO DEPOSE CONFINED PERSON
(AND MEMORANDUM OF LAW)

The Defendants DEPUTY ROBERT FUNK and DEPUTY CLAY MANGRUM, by and through their undersigned attorneys, pursuant to Rule 30(a) of the Federal Rules of Civil Procedure, file this their Motion to Depose Confined Person, and in support thereof would allege as follows:

1. Plaintiff is a prison inmate housed at the Marion Correctional Institution, located in Lowell, Florida.

2. The Defendants wish to depose the Plaintiff in this cause.

3. Before such deposition may be conducted, the applicable Federal Rule of Civil Procedure requires leave of court.

WHEREFORE, it is respectfully requested that this Honorable Court enter its Order permitting the deposition of the Plaintiff, OTIS MCCRAY.

Further, and in support of this Motion to Depose Confined Person, the Defendant Sheriff would refer this Honorable Court to the Memorandum of Law below.

MEMORANDUM OF LAW

Rule 30(a)(2) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison.

Fed.R.Civ.P. 30(a). Plaintiff is currently within the custodyDepartment of Corrections and is housed at the Marion Correctional Institution in Lowell, Florida. As such, he is a confined person. As the Rule provides, a deposition of Plaintiff may be taken only with leave of court.

As the Motion recites, the Defendants wish to depose the Plaintiff in this cause of action.

The deposition, if permitted, will be coordinated through the administration office for the Marion Correctional Institution. The date and time for the deposition will be selected so as to allow advance notice to the institution to minimize security disruption, etc.

The Motion to Depose Confined Person should be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail to: **Otis McCray, Pro Se, # 874767,** Marion Correctional Institution, P.O. Box 158, Lowell, Fl 32663-0158 this *17th* day of May, 2011.

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BY: *Adriana M. Jisa*
ADRIANA M. JISA, ESQUIRE
Florida Bar No.: 0627925