

21.4.6.1.2 The package containing the copies will be submitted to Internal Affairs before the end of the involved officers' tour of duty. It will be the Field Lieutenant's responsibility to review, sign, date and ensure that the report is placed inside of the Internal Affairs Response to Resistance Box. Failure to submit the copy at the end of tour of duty will result in disciplinary action.

**21.4.7 PROCEDURES FOR THE USE OF DEADLY FORCE:**

1. Police Officers are prohibited from using deadly force against another person unless they have reasonable belief that they must protect themselves or another person present from imminent danger of death or serious physical injury.
2. Police Officers are prohibited from discharging their firearms when doing so will unnecessarily endanger innocent persons.
3. Police Officers are prohibited from discharging their firearms in the defense of property.
4. Police Officers are prohibited from discharging their firearms to subdue a fleeing felon who presents no imminent danger of death or serious physical injury to them or to another person present.
5. Police Officers are prohibited from firing warning shots.
6. Police Officers are prohibited from discharging their firearms to summon assistance except in emergency situations when someone's personal safety is endangered and no other reasonable means is available.
7. Police Officers are prohibited from discharging their firearms at or from a moving vehicle unless deadly force is being used against the police officer or another person present, by means other than the moving vehicle.
8. Police Officers are prohibited from discharging their firearms at a dog or another animal except to protect themselves or another person from imminent danger of death or serious physical injury and there is no other reasonable means to eliminate the threat.
9. Police Officers are prohibited from discharging their firearms when the circumstances are clearly obvious to the officer that he/she has lost visual sight of the subject or has no identifiable imminent threat.
10. Police Officers shall not unreasonably place themselves in a position where a threat of imminent danger of death or serious physical injury is created when attempting to approach, pursue, stop a motor vehicle or armed subject. Police Officers will follow all training protocols regarding "felony stops" involving armed subjects or vehicles.
11. Police Officers are reminded of the potential danger while encountering emotionally disturbed individuals. For the protection of police and such persons, officers will be guided by Departmental Order 11, Chapter 11.

**Definitions:**

- In determining whether a "reasonable belief" exists, the standard is whether a reasonable police officer in the same circumstances and experiencing the same informational input would feel the same level of danger and the same need to use force.
- Serious physical injury includes, but is not limited to, an injury which creates a substantial risk of death or serious personal disfigurement, disability, or protracted loss or impairment of the functioning of any organ or part of the body.
- Imminent danger/threat means immediate danger that must be instantly met in self-defense or in the defense of another person.
- Last resort means that all practical methods available to the officer to avoid using deadly force have been exhausted. Depending on the tactical situation, these methods may include verbal commands (i.e., "STOP POLICE, OR I'LL SHOOT") foot pursuit, using a lesser level of necessary force, establishing a perimeter, etc., when these means can be accomplished without endangering the officer or the public.

**21.4.8 Discharging Weapons:** These procedures shall be followed after a weapon is fired by an officer, whether on or off duty, excluding firing practice at an approved range, legal hunting, etc.

The officer firing the weapon shall notify his/her respective supervisor immediately. The supervisor shall ensure the immediate notification of his/her respective Commanding Officer, the Staff Duty Officer, and Internal Affairs. If the Commanding Officer is not available, the supervisor shall notify any on-duty commanding Officer of the Patrol Section. The full Shooting Team will be notified on all discharges of firearms except on those involving animals or accidental discharges without injuries.

The scene of any discharge of firearms incident will be maintained until the on-scene investigation has been completed by the Commanding Officer, the Internal Affairs Investigator, and if appropriate, the Shooting Team.

The officer(s) involved in a discharge of firearms may be asked to do a walk through with the investigators at the scene and point out any evidence or potential evidence.

The officer(s) involved in a Category 4 or 5 Discharge or any other Category discharge at the discretion of the Section Commander shall be assigned to administrative duties for a minimum of 3 days. During this 3-day period, the officer will be required to attend Post Traumatic Counseling. The Section Commander will ensure the officer is provided with this counseling.

**21.4.9. Categories/Types/and Responses/Reports:**

**All Discharge of Firearms whether "On" or "Off-Duty"**

Report Response Required	CATEGORY 1	CATEGORY 2	CATEGORY 3	CATEGORY 4	CATEGORY 5
Report	No Injury Accidental or Dangerous Animal	No Injury Duty Related	Injury Accidental	Injury Duty Related	Death Accidental or Duty Related
Appropriate Jurisdiction Incident Report	YES	YES	YES	YES	YES
Control of Persons	NO	YES	NO	NO	NO
Discharge of Firearm Supplementary	YES	YES	YES	NO	NO
Shooting Team File & Supplement	NO	NO	YES	YES	YES
Internal Affairs Fact Finding Report	YES	YES	YES	YES	YES
Response Police Jurisdiction	YES	YES	YES	YES	YES
Chain of Command	YES	YES	YES	YES	YES
I.A. Investigator Notification/Response	YES	YES	YES	YES	YES
Shooting Team	NO	NO	YES	YES	YES

**21.4.10 Category 1:** Each Category 1 discharge of firearm shall be personally investigated by an on-duty Commanding Officer and an Internal Affairs investigator.

**21.4.10.1** The Commanding Officer shall submit a detailed written report (Discharge of Firearms Supplementary Report, R.F. #184) to the Internal Affairs Division through channels, which will then become part of the Discharge of Firearms Report that is forwarded to the Firearms Review Board. Report requirements are as follows:

**21.4.10.1.1** All pertinent details and facts of the shooting incident.

1.4.10.1.2 A diagram of the shooting scene, except accidental shootings.

21.4.10.1.3 A conclusion will not be rendered in the Discharge of Firearms Supplementary Report by the investigating Commanding Officer. The Firearms Review Board and/or other appropriate agencies will make a recommendation to the Chief of Police as to whether the discharge is in compliance with Florida State Statutes, Departmental Rules and Regulations, and Departmental General Orders.

21.4.10.1.4 The Internal Affairs investigator will submit a separate fact finding report, which will be routed to the Firearms Review Board. The Internal Affairs report will not render a conclusion.

21.4.11 All Discharge of Firearms Reports will be routed to the Firearms Review Board for review and conclusions. All reports will be put in packages by the Discharge of Firearms Review Board and forwarded to the concerned Division Chief and Chief of Police.

21.4.12 In the event there are multiple discharges of firearm incidents by multiple personnel, e.g., emergency situation, civil disturbances, etc., the Chief of Police may modify this procedure, if it is determined that the interest and safety of the public shall be best served.

21.4.13 Category 2, 3, 4 or 5: If the shooting is a Category 2, 3, 4 or 5 discharge of firearm, the officer's Commanding Officer and the On Duty Homicide Sergeant shall ensure the notification of the Shooting Team Commander, Crime Scene Investigation, Risk Management, Police Legal Advisor, and the Staff Duty Officer. (Internal Affairs and the Staff Duty Officer shall be notified of all discharge of firearms regardless of injury to persons or property). The on-duty Homicide Team will be responsible for responding, holding and containing the scene until the Shooting Team arrives.

21.4.13.1 In Category 2 shootings, a Response to Resistance Report (R.F. #186) shall be prepared and submitted, through channels, by the officer firing the weapon.

21.4.14 Composition of The Shooting Team: The Chief of the Internal Affairs Division will designate the commander of the Shooting Team.

21.4.14.1 Lead Investigator: The Lead Investigator for the Shooting Team will be a Lieutenant from the Internal Affairs Division. The rank of the individuals involved in the discharge may necessitate that a higher-ranking Internal Affairs Division person be the Lead Investigator. The criminal investigation responsibilities also necessitate that the Lead Investigator be the Commander of the Internal Affairs Division or designee. Unusual cases may necessitate the assignment of a Lead Investigator, based on expertise.

21.4.14.2 Composition of Shooting Team: The Shooting Team will be led by a Lieutenant from the Internal Affairs Division. The Shooting Team will be comprised of one Internal Affairs Sergeant, one Homicide Sergeant, three Internal Affairs Investigators, three Homicide Investigators and two Crime Scene Investigation technicians. The shooting team will respond to all category 3, 4, and 5 shootings.

The Internal Affairs Division will handle all category 1 and 2 shootings. The Internal Affairs Division will determine the assignment of investigative supplementary and administrative reports. All investigative and supplemental reports will be submitted through the Internal Affairs chain of command for review and endorsement.

21.4.14.3 Crime Scene Investigation Unit Supervisor:

21.4.14.4 Other Law Enforcement Representative(s): In the event that officers from any other law enforcement agency (local, state, or federal) are involved in a Category 5 Discharge of Firearms

incident, a command or management level official of that agency should be on the Shooting Team. However, incidents not involving Miami Police personnel, the Shooting Team will not respond and the Homicide Unit will have the sole and primary responsibility for investigating the incident.

**21.4.15 Investigative Support:** The following units, details or agencies will be notified on all Category 3, 4 and 5 shootings.

Patrol Commanding Officer  
State Attorney's Office Representative  
Medical Examiner's Office Representative  
Public Information Office Representative  
Police Legal Advisor

**21.4.15.1 Sworn Statement Procedures:** The necessity to obtain sworn statements will probably exist in all discharge situations. In these instances the Shooting Team Investigator will take sworn statements. The investigator will clearly enter into the record the circumstances under which the statement is being provided, whether voluntary, under Garrity warnings, or under Miranda warnings. NOTE: Special attention must be given to ensure the officers being interviewed understand when the Garrity rule is and is not in effect.

**21.4.15.2 Persons Present During Sworn Statements:** The number of persons present at a sworn statement needs to be limited because an excessive number of people could have an adverse affect upon the statement. The following are some of the people who may or may not be present during the taking of a statement, depending on the circumstances and the discretion of the Shooting Team Commander/Internal Affairs Investigator.

1. Civilian witness or officer
2. Stenographer
3. Lead investigator
4. Assistant State Attorney
5. Officer's attorney or representative
6. Police Legal Advisor

**21.4.15.3 Miranda Warnings:** The Shooting Team's lead investigator will take officers' statements. If a discharge of firearm may result in a criminal case, Miranda Warnings shall be given in accordance with current case law. The fact that the officer is not compelled to give a statement and that the Garrity rule is not in effect will be clearly entered into the record.

**21.4.15.4 Voluntary Statement:** Any and all officers involved in a police shooting when giving a voluntary statement must be informed that the statement is not compelled, but is voluntary. The fact that the officer is not compelled to give a statement and that the Garrity rule is not in effect will be clearly entered into the record.

**21.4.15.5 Garrity Statement:** Once the determination has been made that the discharge of firearm will not result in a criminal case, a "Garrity Statement" may be required. The Shooting Team may take this statement.

**21.4.15.6 Officers' Attorneys/Union Representative:** Preserving the integrity of the investigation is of paramount importance. Therefore, attorney/union representatives representing the officers should not be permitted to represent and converse with more than one officer.

**21.4.15.7 Confer with Assistant State Attorney:** The police shooting team will confer with the on-scene Assistant State Attorney regularly regarding Miranda, Garrity and Voluntariness issues and other aspects of the investigation. The Police Shooting Team will also comply fully with the current written "Police Shooting Policy" issued by the State Attorney's Office and adopted by the Miami Police Department.

**21.4.15.8 Taking of Firearms from Officer - With Injuries:** In cases where anyone has been injured as a result of a discharge, the Shooting Team's Crime Scene Investigation Technician or designee will take the firearm that has been discharged and submit it for ballistic tests. A shooting team member will be present whenever a firearm is taken from an officer in order to account for unused rounds.

**21.4.15.9 Taking of Firearms from Officer - No Injuries:** In cases where no one has been injured by gunfire, a shooting team member may take the firearm that has been discharged for testing. A replacement weapon will immediately be issued to the Officer, unless otherwise determined by the Chief of the Internal Affairs Division.

**21.4.15.10 Preliminary Finding Report:** In Category 3, 4 and 5 shootings, the Shooting Team shall prepare a Preliminary Finding Report within seventy-two (72) hours after beginning its investigation.

**21.4.16 News Media Coordination:** The Public Information Office representative will be responsible for responding to the scene of the incident, gathering information, and establishing a media contact point.

The Public Information Office representative will coordinate with the Shooting Team Commander to develop all media releases. The Public Information Office will issue news releases and coordinate news media interviews on the scene and/or later.

In the event that media concerns necessitate interviews or statements by persons involved in the investigation, the Internal Affairs Chief, the Criminal Investigation Chief, the Field Operations Chief, or the Chief of Police will provide such interviews or statements. The Chief of Police will designate the appropriate person to handle the interview or statement.

**21.4.17 Inter-Agency and Intra-Agency Responsibilities and Coordination:**

**21.4.17.1** It is the duty of the Internal Affairs Division to respond to the various categories of discharges in order to coordinate the Police Department's response and to ensure that the Department's responsibilities are properly addressed.

**21.4.17.2** Category 1 and 2 shootings will be investigated by the chain of command (or on-duty Patrol Commander) of the officer involved in the shooting and by Internal Affairs.

**21.4.17.3** Category 3, 4 and 5 shootings will be investigated by a full Shooting Team with representatives from Homicide, Internal Affairs, the Identification Unit and possibly other law enforcement agencies, as dictated by the seriousness of the incident. When designated as a member of a Shooting Team, all representatives are full and complete participants in the investigation. All Shooting Team members must be cognizant of the necessity to assume passive roles at appropriate times to fulfill requirements of law and for the preservation of evidence and investigative integrity.

**21.4.17.4** The primary reporting responsibility for all discharges involving department personnel occurring outside the City of Miami jurisdiction rests with the Internal Affairs Division.

21.4.17.4.1 Responding Internal Affairs investigators will coordinate their efforts with the lead investigator of the reporting jurisdiction.

21.4.18 **In Police Custody Death:** An "In Police Custody Death" will be handled in the same manner as a Category 5 Discharge of Firearm. Any officer involved in an "In Police Custody Death" incident shall be reassigned to administrative responsibilities for a minimum of 3 days or until such time that it has been determined that the officer is cleared to return to regular duty. Only a Chief may authorize the officer's return to regular duty.

21.4.18.1 Complete in-custody death investigations will be routed for review as a normal administrative investigation. The investigative package will not be forwarded to the Discharge of Firearms Advisory Committee.

21.4.19 **Discharge of Firearms Committee:**

21.4.19.1 As soon as practical after the completion of the Supplementary Discharge of Firearms Report (R.F. #184) and the Internal Affairs Report, the Division Chief of the Field Operations Division will convene a Firearms Review Board.

21.4.19.2 The committee will be comprised of the following personnel:

21.4.19.2.1 The Chief of the Field Operations Division, Chairperson.

21.4.19.2.2 The Chief of the Administration Division.

21.4.19.2.3 The Chief of the Investigations Division.

21.4.19.2.4 The Legal Counsel (Assistant City Attorney) of the Chief of Police.

21.4.19.2.5 The Commander of the Training Unit who serves in an advisory capacity.

21.4.19.2.6 If a Division Chief is unable to attend, he/she may appoint a Major from his/her division to represent him/her on the committee.

21.4.19.3 The committee's purpose will be as follows:

21.4.19.3.1 To determine if the discharge of firearm is in compliance with the Florida State Statutes; Civil Service Rules and Regulations; and Departmental Rules and Regulations, Orders, S.O.P.'s, policy and training.

21.4.19.3.2 To determine if the Departmental Rules and Regulations and Departmental Orders provided adequate direction given the circumstances of the discharge.

21.4.19.3.3 To reach and document their conclusions and recommendations and forward a final report to Internal Affairs for distribution.

21.4.19.3.4 If disciplinary action involves or calls for termination, the officer's Commanding Officer will relieve him of duty with pay until the disciplinary process is completed. The officer will be reassigned to an administrative task until a final determination is made, however the Chief of Police may provide other assignments or direction regarding the officer's status.

21.4.19.3.5 If the discharge is found justified, the officer shall be returned to normal duty as quickly as possible.

21.4.19.3.6 The Division Chief will personally review the case and make the necessary reassignment decisions.

**21.4.20 Unauthorized Discharge of Firearms Penalty Schedule:** The following is the recommended minimum discipline schedule for a first offense, unauthorized discharge of firearms by department personnel. A second offense will automatically double the recommended discipline in the category it falls, except Subsection 21.4.20.6 where dismissal will be recommended.

21.4.20.1	Reasonable Action – Careless No One Placed in Danger	REPRIMAND + 20 HOURS FORFEITURE
21.4.20.2	Reasonable Action - Careless Someone Placed in Danger	REPRIMAND + 40 HOURS FORFEITURE
21.4.20.3	Reasonable Action - Careless Someone Injured	REPRIMAND + 80 HOURS FORFEITURE
21.4.20.4	Unreasonable Action - Careless No One Placed in Danger	REPRIMAND + 80 HOURS SUSPENSION
21.4.20.5	Unreasonable Action - Careless Someone Placed in Danger	REPRIMAND + 120 HOURS SUSPENSION
21.4.20.6	Unreasonable Action - Careless Someone Injured	DISMISSAL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO,  
et al.,

Defendants.

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**DEFENDANT BELFORT'S REPLY MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
ON COUNTS III AND VI OF THE AMENDED COMPLAINT**

Defendant DETECTIVE ODNEY BELFORT hereby files his reply memorandum in support of his motion for partial summary judgment. At the outset, Plaintiff concedes without explicitly stating that he does not have an Eighth Amendment claim and partial summary judgment is warranted in that regard. However, Defendant submits that Plaintiff has failed to meet his burden in establishing that qualified immunity is not appropriate under the particular facts of this case viewed in the light most favorable to Plaintiff. Those facts taken from the Plaintiff's own pleadings are that a pretrial detainee was transported to a hospital after complaining of injuries, the hospital staff assessed the detainee's physical condition without diagnosing internal bleeding, the staff then released the detainee back to the police for transportation to jail, and the detainee was later transported to the hospital from jail and treated for internal bleeding. The record evidence does not establish that Defendant was deliberately indifferent to a serious

medical need as defined in the context of a qualified immunity analysis for a claim of deliberate indifference to medical needs.

“We have explained that a successful constitutional claim for ‘immediate or emergency medical attention’ requires medical needs that are obvious even to a layperson because they involve life-threatening conditions or situations where it is apparent that delay would detrimentally exacerbate the medical problem. In contrast, delay or even denial of medical treatment for superficial, non-serious physical conditions does not constitute a constitutional violation.” *Fernandez v. Metro Dade Police Dep't.*, 397 Fed. Appx. 507, 511-512 (11th Cir. 2010).

In *Fernandez*, as in this case, the Plaintiff alleged police officers beat him after he was arrested and handcuffed in February, 2006. Fernandez alleged the officers kicked him multiple times in the face causing him to bleed from his nose and mouth, punched him in the head and ribs, and slammed his face into a vehicle’s trunk. *Id.* Fernandez was transported to a police station and remained there for approximately nine hours before he was transported to Jackson Memorial Hospital’s Ward D Unit. *Id.* Under those facts, the Eleventh Circuit held that the defendant police sergeant was entitled to qualified immunity because the record did not establish an objectively serious medical need. “We do not believe Plaintiff has demonstrated an objectively serious medical need. The evidence Plaintiff submitted, taken in the light most favorable to him, reveals that at most he suffered a bloody nose and mouth which lasted over five minutes, facial bruising, pain, disorientation, and blood clogs in his nose.” *Id.* If, as Plaintiff alleged, he was bleeding from his mouth at the scene of his arrest, this was not sufficient to put Defendant on notice of a serious medical need as described in the *Fernandez* opinion.

As previously stated, internal bleeding is not an obvious medical condition for a layperson to detect, and Plaintiff himself alleged that medical personnel at Jackson Memorial Hospital failed to appropriately detect and treat that condition after he was transported there by a police officer.

The case cited in Plaintiff's response, *Bozeman v. Orum*, 422 F.3d 1265 (11<sup>th</sup> Cir. 2005), is clearly distinguishable from the instant case. In *Bozeman*, the defendant correctional officers knew that the decedent detainee was unconscious and not breathing for fourteen minutes and did nothing. *Id.* "We also conclude that the Officers, who knew Haggard was unconscious and not breathing and who then failed for fourteen minutes to check Haggard's condition, call for medical assistance, administer CPR or do anything else to help, disregarded the risk facing Haggard in a way that exceeded gross negligence." *Id. at 1273.* Here, there is no record evidence that Defendant Belfort knew Plaintiff was bleeding internally and failed to act. As noted in *Bozeman*, deliberate indifference cases are highly fact-specific and most cases are far from obvious violations of the Constitution. *Id.* Plaintiff has failed to show Defendant violated clearly established law, and Defendant is entitled to qualified immunity on Count III.

In challenging Defendant's statement of material facts, Plaintiff cited to a deposition excerpt from the deposition testimony of Officer Kelvin Knowles. Plaintiff's reliance on this testimony is misplaced for two reasons. First, Officer Knowles had no independent recollection of this incident or transporting Plaintiff. (Depo. of Knowles, 4:10-11). Consequently, pursuant to Rule 56(c)(2) Defendant objects to Plaintiff's reliance on this material to oppose summary judgment because it is inadmissible as speculative testimony. "A witness may testify to a matter only if evidence is introduced

sufficient to support a finding that the witness has personal knowledge of the matter.” Fed. R. Evid. 602. Defendant submits that a witness who has no personal recollection of a matter cannot satisfy the personal knowledge test for admissible testimony.

Secondly, even if the Court deems the deposition testimony admissible, it does not create a material issue of fact because Plaintiff does not deny that he was transported to Jackson Memorial Hospital prior to being taken to jail. [09-20574-CIV-Leanrd/White, ECF No. 1, p. 8]. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). For purposes of Plaintiff’s deliberate indifference to medical needs claim, it is immaterial whether Officer Knowles or another officer transported Plaintiff to the hospital. Plaintiff alleged under oath that the police transported him to the hospital. The mere fact that a dispute may exist as to which officer transported Plaintiff to the hospital does not preclude the Court from granting summary judgment to Defendant Belfort on Count III.

Additionally, Plaintiff’s reliance on police departmental orders to show clearly established law is misplaced. Plaintiff cited City of Miami Police departmental orders concerning medical attention for arrestees in support of his position that the law was clearly established in October 2006. In the Eleventh Circuit, the law can be “clearly established” for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose. *Wilson v. Strong*, 156 F.3d 1131, 1135 (11th Cir. 1998). *See also Andujar v. Rodriguez*, 486 F.3d 1199, 1204 (11th Cir. 2007)(“Andujar argues that a City of Miami

Rescue Policy required Newcomb and Barea to transport him to a treatment facility. But this observation, even if true, misses the point. Failure to follow procedures does not, by itself, rise to the level of deliberate indifference because doing so is at most a form of negligence.)" Consequently, the departmental orders are irrelevant for the Court's consideration of clearly established law in the qualified immunity context. The Court may only look to decisions of the Supreme Court, the Eleventh Circuit, and the Florida Supreme Court to determine clearly established law in October 2006. The departmental orders are not binding or persuasive authority for purposes of qualified immunity determinations. Any alleged violation of departmental orders does not give rise to a constitutional violation which may be addressed in a section 1983 claim.

Finally, Defendant submits Plaintiff has failed to show why he may recover damages under the theory the Defendant negligently applied excessive force during his arrest.

WHEREFORE, Defendant Detective Odney Belfort requests that this Court enter an Order granting his motion for partial summary judgment on counts III and VI of the amended complaint.

| Christopher A. Green, Assistant City Attorney  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, FL 33130-1910  
Tel.: (305) 416-1800  
Fax: (305) 416-1801  
[CAGreen@ci.miami.fl.us](mailto:CAGreen@ci.miami.fl.us)

By: **s/ Christopher Green**  
Christopher A. Green  
Florida Bar No. 957917

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on January 3, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: **s/ Christopher Green**  
Christopher A. Green  
Assistant City Attorney  
Florida Bar No. 957917

**SERVICE LIST**

**Christopher Green, Esq.**

Assistant City Attorney  
Counsel for Defendant Belfort  
City of Miami City Attorney's Office  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, Florida 33130  
(305) 416-1800 Telephone  
(305) 416-1801 Fax  
[CAGreen@miamigov.com](mailto:CAGreen@miamigov.com)  
Via notice of electronic filing

**Diane J. Zelmer, Esq.**

Counsel for Plaintiff  
150 North Federal Highway, Suite 230  
Fort Lauderdale, Florida 33301  
(954) 400-5055 Telephone  
(954) 916-7855 Fax  
[dzelter@zelmerlaw.com](mailto:dzelter@zelmerlaw.com)  
Via notice of electronic filing

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CITY OF POLICE MANUEL OROSO, et al.,

Defendants.

\_\_\_\_\_ /

**CHIEF OF POLICE MANUEL OROSA<sup>1</sup>'S ANSWER TO AMENDED  
COMPLAINT, AFFIRMATIVE DEFENSES, AND DEMAND FOR JURY TRIAL**

Defendant Chief of Police Manuel Orosa hereby files his answer and affirmative defenses to the amended complaint [ECF No. 75] and states as follows:

1. Admitted that Plaintiff is pleading a claim for relief pursuant to 42 U.S.C. section 1983, the United States Constitution and the laws of Florida. Denied that Plaintiff is entitled to relief.
2. Admitted.
3. Admitted.
4. Without knowledge.
5. Without knowledge.
6. Denied.

**THE PARTIES**

\_\_\_\_\_  
<sup>1</sup> Plaintiff has misspelled the Chief's last name.

7. Admitted.
8. Admitted
9. Admitted.
10. Admitted.
11. Denied that Officers Belfort, Gayle and Knowles participated in the takedown of Lelieve. Admitted that Officers Belfort and Gayle observed criminal activity leading to Lelieve's arrest. Admitted that Officer Fernandez, Morgan, and Cunningham participated in the takedown of Lelieve. All remaining allegations are denied.

**STATEMENT OF FACTS**

12. Admitted that Belfort observed criminal activity leading to Lelieve's arrest by the crime suppression unit on October 11, 2006. All remaining allegations are denied.
13. Admitted.
14. Denied.
15. Denied.
16. Denied.
17. Denied.
18. Denied.
19. Denied.
20. Without knowledge.
21. Without knowledge.

**POLICIES AND CUSTOMS**

22. Denied that the Chief is required to avail himself to resolve any pending issues when an office of professional compliance investigator opines that an investigation is incomplete, biased, or otherwise deficient. All remaining allegations are admitted.
23. Denied.
24. Denied that the column designated “use of force” represents complaints. The remaining allegations are admitted.
25. Denied that the listed officers were all arresting officers. Denied that the complaint against Officer Gayle is accurate. The remaining allegations are admitted.
26. Denied.
27. Admitted that Departmental Order no. 6, chapter 21, was revised in November 2008. The remaining allegations are denied.

**VIOLATION OF POLICES AND CUSTOMS  
CONCERNING THE ARREST AND INJURIES TO RELIEVE**

28. Denied.
29. Denied.
30. Without knowledge.
31. Without knowledge.
32. Denied.

**VIOLATION OF POLICES AND CUSTOMS  
BY OFFICER DANIEL G. FERNANDEZ**

33. Without knowledge.

34. Admitted that the City of Miami Internal Affairs Section conducted an investigation in IA case no. 09-351 and substantiated allegations against Fernandez. Without knowledge as to the remaining allegations.
35. Admitted that the City of Miami Internal Affairs Section conducted an investigation in I.A. case no. 10-234 and substantiated allegations against Fernandez. Without knowledge of the remaining allegations.
36. Without knowledge.
37. Admitted that Fernandez was terminated from employment with the City. The remaining allegations are denied.
38. Denied.

**COUNT I: CIVIL ACTION FOR DEPRIVATION OF RIGHTS FOR  
EXCESSIVE FORCE: 42 U.S.C. § 1983; FOURTH AND FOURTEENTH  
AMENDMENTS OF THE CONSTITUTION AGAINST OFFICER ODNEY  
BELFORT**

39. The allegations of paragraphs 39 through 45 do not pertain to this Defendant, therefore no responses are required.

**COUNT II: CIVIL ACTION FOR FAILURE TO INTERVENE  
42 U.S.C. § 1983; FOURTH AND FOURTEENTH  
AMENDMENTS OF THE CONSTITUTION AGAINST OFFICER ODNEY  
BELFORT**

46. The allegations of paragraphs 46 through 52 do not pertain to this Defendant, therefore no responses are required.

**COUNT III: 42 U.S.C. § 1983 – DEPRIVATION OF CIVIL RIGHTS FOR  
DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS  
EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION  
AGAINST OFFICER ODNEY BELFORT**

53. The allegations of paragraphs 53 through 62 do not pertain to this Defendant, therefore no responses are required.

**COUNT IV: VIOLATION OF 42 U.S.C. § 1983,**  
**EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION**  
**FOR DELIBERATE INDIFFERENCE TO USE OF FORCE AND**  
**ATTENTION TO SERIOUS MEDICAL NEEDS**  
**THROUGH POLICY, PRACTICE, AND CUSTOM**  
**AGAINST CHIEF OF POLICE MANUEL OROSO**

63. Defendant adopts his responses to paragraphs 1 through 38 as though set forth herein.

64. Admitted.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

72. Admitted that departmental order no. 6, chapter 21, was revised in November 2008. The remaining allegations are denied.

73. Denied.

74. Denied.

75. Denied.

76. Denied.

**COUNT V: VIOLATION OF 42 U.S.C. § 1983,**  
**EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION**

**FOR FAILURE TO PROPERLY TRAIN AND SUPERVISE STAFF  
AGAINST CHIEF OF POLICE MANUEL OROSO**

77. Defendant adopts his responses to paragraphs 1 through 38 as though set forth herein.

78. Admitted.

79. Denied.

80. Denied.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. Denied.

**COUNT VI: NEGLIGENCE AGAINST OFFICER ODENY BELFORT**

86. The allegations of paragraphs 86 through 90 do not pertain to this Defendant, therefore no responses are required.

**COUNT VII: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS  
AGAINST OFFICER ODENY BELFORT**

91. The allegations of paragraphs 91 through 96 do not pertain to this Defendant, therefore no responses are required.

**COUNT VIII: BATTERY AGAINST OFFICER ODENY BELFORT**

97. The allegations of paragraphs 97 through 100 do not pertain to this Defendant, therefore no responses are required.

**AFFIRMATIVE DEFENSES**

**First Affirmative Defense**

As to Plaintiff's federal claims, Plaintiff did not suffer a constitutional deprivation.

**Second Affirmative Defense**

The complaint fails to state a claim upon which relief can be granted for alleged violations of the Eighth Amendment.

**Third Affirmative Defense**

The complaint fails to state claims upon which relief can be granted in Counts IV and V.

**Fourth Affirmative Defense**

Plaintiff's claims are barred by the statute of limitations.

**Fifth Affirmative Defense**

Plaintiff's claims are barred under the doctrines of *res judicata* and collateral estoppel.

**Sixth Affirmative Defense**

Plaintiff cannot recover punitive damages from Defendant in his official capacity as Chief of Police because the City is immune from punitive damages.

**DEMAND FOR JURY TRIAL**

Defendant demands a trial by jury.

Christopher A. Green, Assistant City Attorney  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, FL 33130-1910  
Tel.: (305) 416-1800  
Fax: (305) 416-1801  
[cagreen@miamigov.com](mailto:cagreen@miamigov.com)

By: **s/ Christopher Green**  
Christopher A. Green  
Florida Bar No. 957917

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on January 27, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: **s/ Christopher Green**  
Christopher A. Green  
Assistant City Attorney  
Florida Bar No. 957917

**SERVICE LIST**

**Diane J. Zelmer, Esq.**

Counsel for Plaintiff

150 North Federal Highway, Suite 230

Fort Lauderdale, Florida 33301

(954) 400-5055 Telephone

(954) 916-7855 Fax

[dzalmer@zelmerlaw.com](mailto:dzalmer@zelmerlaw.com)

Via notice of electronic filing

**Christopher Green, Esq.**

Assistant City Attorney

Counsel for Defendants Belfort and Orosa

City of Miami City Attorney's Office

444 S.W. 2<sup>nd</sup> Avenue, Suite 945

Miami, Florida 33130

(305) 416-1800 Telephone

(305) 416-1801 Fax

[cagreen@miamigov.com](mailto:cagreen@miamigov.com)

Via notice of electronic filing

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO, *et al.*,

Defendants.

---

**DEFENDANTS' MOTION TO BIFURCATE TRIAL AND MEMORANDUM OF LAW**

Defendants, Officer Belfort and Chief Orosa, by and through undersigned counsel, and pursuant to Rule 42 of the Federal Rules of Civil Procedure, hereby move to bifurcate the trial on Plaintiff's claims against Defendant Orosa who is sued in his official capacity as Chief of Police for the City of Miami. Defendants seeks a separate trial from the claims against Defendant Orosa, so that claims against Officer Belfort (deprivation of rights and excessive force in violation of the Fourth and Fourteenth Amendments (Count I), failure to intervene in violation of the Fourth and Fourteenth Amendments (Count II), deprivation of civil rights for deliberate indifference to serious medical needs in violation of the Eighth and Fourteenth Amendments (Count III)), would be tried before the claims against Defendant Orosa for alleged deliberate indifference to use of force and attention to serious medical needs through policy, practice, and custom in violation of the Eighth and Fourteenth Amendments (Count IV) and failure to properly train and supervise staff in violation of the Eighth and Fourteenth Amendments (Count V).

**MEMORANDUM OF LAW**

Rule 42(b) authorizes the Court to separate the trial of claims, “[f]or convenience, to avoid prejudice, or to expedite and economize...” FED. R. CIV. P. 42 (b). It is well-established in multiple jurisdictions that a court may order separate trials in order to avoid prejudice, provide for convenience, or expedite proceedings for the sake of judicial economy. *Ricciuti v. N.Y.C. Transit Authority*, 796 F.Supp. 84, 86 (S.D.N.Y. 1992). The Court has broad discretion in deciding whether to bifurcate claims for trial and the exercise of that discretion is only set aside if it is clearly abused. *Id.* It is commonplace for courts to hear police misconduct cases brought under 42 U.S.C. § 1983 in two stages: first, the jury considers liability and damages, if any against the individual officer defendant(s); then the court decides whether there is a need to proceed to a second stage where the jury will determine liability and damages, if any, against the municipal defendant(s). See *Treece v. Hochstetler*, 213 F.3d 360, 365 (7th Cir. 2000) (holding bifurcation of trial was proper where trial proceeded against officer first and city agreed to entry of judgment against it if jury entered finding of liability against individual officer); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 316 (2d Cir. 1999) (holding district court did not abuse discretion in ordering claims against officers be tried first and that if the jury found liability on behalf of the officers, trial against city would commence with the same jury); and *Dawson v. Prince George’s County*, 896 F.Supp. 537, 539–40 (S.D.M.D. 1995)(holding that if the jury finds police officers involved to be innocent, a trial against the County would be unnecessary and thus bifurcation is proper to avoid prejudice and for the sake of economy and expedition).

Furthermore, bifurcation is even more commonplace in cases where *Monell* claims are filed against municipalities in order to avoid prejudice and promote judicial efficiency. See *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (holding *Monell* claims are appropriate

for bifurcation because often a trial against a municipality is not necessary if individual government employees are not found to be liable); *Quintanilla v. City of Downey*, 84 F.3d 353, 356 (9th Cir. 1996) (finding that bifurcation was permissible because it enabled the court to separate questions regarding constitutionality of the officers' actions from the questions regarding the chief and city's liability under *Monell v. Dep't. Soc. Sec. Services*, 436 U.S. 658 (1978)). "Courts have noted that severance of the *Monell* claim eliminates the potential unfair prejudice to an officer that can occur from the plaintiff's introduction of an officer's prior wrongful acts in order to establish a *Monell* claim." *Foltz v. City of Largo*, 2011 U.S. Dist. LEXIS 51387 (M.D. Fla. May 3, 2011). "Also, bifurcation permits the court to isolate evidence regarding municipal policies and customs (for example, prior incidents of excessive force and the policymaker's response) which would be relevant to a *Monell* analysis but could be prejudicial to the individual employees." *McQueen v. Morgan*, 2010 U.S. Dist. LEXIS 123314 (N.D. Fla. Nov. 4, 2010).

In this case, bifurcation will avoid any prejudice against Officer Belfort that may arise from evidence of the *Monell* claims against Chief Orosa. Indeed, Plaintiff's proposed exhibit list includes documents related to 39 Internal Affairs files. While evidence of prior acts of police excessive force may be relevant to Plaintiff's claim against the City, the prejudicial effect of that evidence substantially outweighs its probative value with respect to an individual officer, thus bifurcation in such a situation is appropriate. *Dawson*, 896 F.Supp. at 540. Without bifurcation, the evidence that will be introduced for the *Monell* claims against Manuel Orosa is unfairly prejudicial against Officer Belfort because there is a substantial likelihood that a jury will confuse the purpose for which the evidence is being introduced. Accordingly, the best way to

avoid such a conflict is to bifurcate the proceedings. *See id.* (“The best way to avoid the conflict [of prejudice] resulting in trying the two claims together is to bifurcate them.”).

To avoid unfair prejudice to Officer Belfort from the *Monell* claims and for the sake of convenience and judicial economy, Defendants respectfully request the Court bifurcate the trial. If the defense motion is granted, then the jury would first consider whether to impose liability damages against Officer Belfort. If Officer Belfort is not held liable, the trial would be concluded. If Officer Belfort is held liable, the jury would proceed to a separate trial on the claims against Defendant Orosa.

*Pursuant to Local Rule 7.1, the undersigned has conferred with counsel for Plaintiff who opposes the requested relief.*

WHEREFORE, Defendants request the Court grant their motion to bifurcate the trial.

Christopher A. Green, Asst. City Attorney  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, FL 33130-1910  
Tel.: (305) 416-1800  
Fax: (305) 416-1801  
[CAGreen@ci.miami.fl.us](mailto:CAGreen@ci.miami.fl.us)

By: s/ Christopher Green  
Christopher A. Green  
Florida Bar No. 957917

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on February 2, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: **s/ Christopher Green**  
Christopher A. Green  
Assistant City Attorney  
Florida Bar No. 957917

**SERVICE LIST**

**Christopher Green, Esq.**

Assistant City Attorney  
Counsel for Defendants  
City of Miami City Attorney's Office  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, Florida 33130  
(305) 416-1800 Telephone  
(305) 416-1801 Fax  
[CAGreen@miamigov.com](mailto:CAGreen@miamigov.com)  
Via notice of electronic filing

**Diane J. Zelmer, Esq.**

Counsel for Plaintiff  
150 North Federal Highway, Suite 230  
Fort Lauderdale, Florida 33301  
(954) 400-5055 Telephone  
(954) 916-7855 Fax  
[dzelmer@zelmerlaw.com](mailto:dzelmer@zelmerlaw.com)  
Via notice of electronic filing

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO, et al.,

Defendants.

\_\_\_\_\_ /

**ORDER GRANTING DEFENDANTS' MOTION TO BIFURCATE**

THIS CAUSE came before the Court on Defendants' motion to bifurcate the trial. The Court, having considered the motion and being otherwise advised in the premises, it is therefore:

**ORDERED AND ADJUDGED** that the motion is GRANTED. The trial of Plaintiff's claims against Defendant Belfort will take place prior to the trial of Plaintiff's claims against Defendant Orosa.

**DONE AND ORDERED** in Chambers in Miami-Dade County, Florida, on this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
CECILIA M. ALTONAGA  
U.S. DISTRICT COURT JUDGE

cc: Christopher Green, Esq.  
Diane Zelmer, Esq.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No.: 10-23677-Civ-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSA, et al.,

Defendants.

---

**PLAINTIFF, GERALD LELIEVE'S**  
**MOTION IN LIMINE**

Plaintiff, GERALD LELIEVE (the "Plaintiff"), files this motion in limine, and as good cause therefore states:

**A. BACKGROUND**

This case involves claims for use of unreasonable force and deliberate indifference to Plaintiff's medical needs. Plaintiff alleges that Defendant Officer Odney Belfort engaged in use of excessive force during the arrest on October 11, 2006, causing internal injuries which required Plaintiff to undergo surgery. Plaintiff further alleges a claim against Defendant Chief of Police Manuel Orosa for failure to establish policies and customs and failure to supervise to prevent Defendant's injuries. On November 4, 2011, Plaintiff filed its Amended Complaint [ECF No. 75], containing eight (6) counts against BELFORT, including Count I-Civil Action for Deprivation of Rights for Excessive Force 42 U.S.C.A. § 1983, Count II-Civil Action for Failure to Intervene 42 U.S.C.A. § 1983, Count III- Deprivation of Rights for Deliberate Indifference to Serious Medical Needs 42 U.S.C.A. § 1983, Count VI-Negligence, Count VII-Intentional Infliction of Emotional Distress, Count VIII-Battery, and two counts against the CHIEF,

including, Count IV-Violation of 42 U.S.C.A. § 1983 for Deliberate Indifference to Use of Force and Attention to Serious Medical Needs through policy, practice and custom, Count V-Violation of 42 U.S.C.A. § 1983 for failure to properly train and supervise staff.

**B. MEMORANDUM OF LAW**

1. **Standard of Review.** “The district court has wide discretion in determining the relevance of evidence produced at trial.” *Boyd v. Alabama Dept. of Corrections*, 296 Fed. Appx. 907, 908 (11th Cir. 2008)(quoting *Cabello v. Fernandez-Larios*, 402 3d 1148, 1161 (11th Cir. 2005)).

2. **Prior Convictions.**

a. **The Court Should Bar Evidence of Plaintiff’s Prior Convictions for Direct Evidence.**

Rule 403 of the Federal Rules of Evidence provides:

**Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**

The court may exclude *relevant* evidence if its probative value is substantially outweighed by a danger of one or more of the following: *unfair prejudice, confusing the issues, misleading the jury*, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 403 (2011)(e.s.). Here, Defendants may attempt to introduce evidence of Plaintiff’s prior convictions. However, Plaintiff’s prior convictions are entirely irrelevant under FRE 401 and 402<sup>1</sup> – although Plaintiff was convicted for the arrest on October 11, 2006, it does

---

<sup>1</sup> “Irrelevant evidence is not admissible.” Fed R. Evid. 402.

“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

not provide the Defendants with any defense for violating Plaintiff's constitutional rights. Admitting such evidence would create unfair prejudice, will confuse the issues and mislead the jury.

Moreover, this Court could construe Plaintiff's conviction as being overruled in *Fleurimond v. The State of Florida*, 10 So.3d 1140 (Fla. 3d DCA May 27, 2009), Cope, Ramirez, and Salter, JJ., (reversing conviction and sentence two counts of trafficking in cocaine and two counts of possession of co-defendant, FLEURIMOND, and granting a new trial *on same grounds* raised by LELIEVE); *but cf.*, *Lelieve v. The State of Florida*, 7 So.3d 624 (Fla. 3d DCA April 15, 2009), Wells, Continas and Rothenberg, JJ. (affirming conviction of trafficking cocaine and denying LELIEVE's grounds for mistrial). Further, Detective Daniel Fernandez, who was the sole eyewitness who testified in Plaintiff's trial that he recovered cocaine, does not recall anything about the incident; in fact, Fernandez could not testify against Plaintiff today to support the conviction against Plaintiff.

Therefore, under the circumstances of this case, and because admission of such evidence will create unfair prejudice, confuse the issues and mislead the jury, the Court should bar admission of any of Plaintiff's prior convictions.

b. **The Court Should Bar Evidence of Plaintiff's Prior Convictions for Impeachment Purposes.**

i. *The Court Should Bar Evidence of All Prior Convictions.*

Rule 609(a) of the Federal Rules of Evidence provides:

**Rule 609. Impeachment by Evidence of a Criminal Conviction**

(a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, *subject to Rule 403*, in a *civil* case or in a criminal case in which the *witness is not a defendant*; and (B) must

be admitted in a *criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant*; and (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.

Fed. R. Evid. 609 (a).

As the Southern District of Georgia stated, quoting the Seventh Circuit:

Except for crimes involving dishonesty or false statements, **a district court must engage in a balancing test when deciding whether to admit prior convictions.** The standards for witnesses and defendants are not identical (although each requires that convictions carry a sentence of more than one year and be less than ten years old. **To admit a defendant's conviction, its probative value must outweigh its prejudicial effect. Rule 609; *United States v. Fawley*, 137 F.3d 458, 473 (7<sup>th</sup> Cir. 1998).** For a witness, a prior conviction comes in if its probative value is not substantially outweighed by the danger of unfair prejudice. Rules 403 and 609.

*Lofton v. Smith*, 2007 WL 2725869 \*1 (2007)(e.s.)(quoting *U.S. v. Peters*, 2007 WL 1646057 at \*6 (7th Cir. 6/7/07)(unpublished)(emphasis added); see also, *Therrien v. Town of Jay*, 489 F.Supp.2d 113, 114-15 (D.Me.2007). Rule 403 evidence must be used sparingly and the district court must strike a balance in admitting such evidence. *Boyd v. Alabama Dept. of Corrections*, 296 Fed. Appx. 907, 909 (11th Cir. 2008).

Here, the probative value of Plaintiff's convictions are a nullity. Plaintiff's conviction is not a defense to the alleged claims for use of unreasonable force and deliberate indifference to Plaintiff's medical needs; his constitutional rights still stand. To the contrary, admissibility of Plaintiff's convictions would be highly prejudicial as a juror may find that because Plaintiff was convicted, he should not be entitled to damages, which is contrary to Plaintiff's constitutional rights. Further, Plaintiff was convicted of a crime involving the sale and purchase of cocaine,

which does not involve dishonesty and do not relate to truthfulness. Therefore, Plaintiff requests the Court to bar evidence of his prior convictions.

**ii. *The Court Should Bar Evidence of Any Prior Conviction Older than March 2002.***

In addition, Rule 609(b) of the Federal Rules of Evidence provides:

**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible *only if*:

(1) its *probative value*, supported by specific facts and circumstances, substantially *outweighs its prejudicial effect*; and

(2) the proponent gives an adverse party *reasonable written notice* of the intent to use it so that the party has a fair opportunity to contest its use.

Fed. R. Evid. 609 (b). As indicated *supra*, the probative value does not outweighed its prejudicial effect. In addition, Defendants have not given any written notice to Plaintiff of Defendants intent to use evidence of any prior convictions older than 10 years. Therefore, the Court should bar admissibility of any conviction earlier than March 2002.

**3. Children Born out of Wedlock.**

Defendants may attempt to admit evidence of Plaintiff's children who were born out of wedlock. Any such evidence of family marital relationships are barred under FRE 401 and 402 because they are completely irrelevant and have no bearing to the allegations or defenses in this action. Alternatively, even if it is relevant, admission of such evidence would create "*unfair prejudice, confus[e] the issues, mislead[] the jury,*" and as such, are barred under FRE 403. Any compensatory damages relate to the physical and emotional injuries on Plaintiff caused by the officers. Defendants' counsel has indicated that he does not oppose the motion in limine relating to evidence concerning any children born out of wedlock.

4. **Tax Returns.**

Defendants may attempt to admit evidence of the date, method and filing of Plaintiff's tax returns. Any such evidence is barred under FRE 401 and 402 because it is completely irrelevant and has no bearing to the allegations or defenses in this action. Alternatively, even if it is relevant, admission of such evidence would create "*unfair prejudice, confus[e] the issues, mislead[] the jury,*" and as such, are barred under FRE 403. Any compensatory damages relate to the physical and emotional injuries on Plaintiff caused by the officers. Defendants' counsel has indicated that he does not oppose the motion in limine relating to evidence concerning Lelieve's tax returns.

**C. CONCLUSION**

For the reasons set forth above, Plaintiff requests this Court to exclude evidence of the following:

- (1) Any information concerning Plaintiff's convictions (opposed);
- (2) Any information concerning whether Plaintiff's children may have been born out of wedlock (unopposed); and
- (3) Any information concerning Plaintiff's tax returns (unopposed).

**CERTIFICATE OF GOOD FAITH CONFERENCE;**  
**REASONABLE EFFORTS TO CONFER**

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that counsel for the movant has made reasonable efforts to confer with Defendants' counsel, Christopher A. Green, who represents all parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues. The reasonable efforts made were specifically as follows: On January 29, 2011 and January 30, 2011, Diane J. Zelmer and Christopher A. Green communicated by email and telephone, and Mr. Green indicated that he opposed the motion in limine relating to Lelieve's prior convictions, but did not oppose the motion in limine relating to evidence concerning children born out of wedlock or Lelieve's tax returns.

/s/ Diane J. Zelmer  
Diane J. Zelmer  
Fla. Bar. No. 27251

WHEREFORE, Plaintiff requests this Court to exclude Defendants from admitting any evidence of Plaintiff's prior convictions, tax returns, children born out of wedlock, and such other relief as the Court deems just and proper.

Respectfully submitted,

ZELMER LAW  
150 North Federal Highway  
Suite 230  
Fort Lauderdale, Florida 33301  
Tel: (954) 400-5055  
Fax: (954) 252-4311  
Email: [dzelter@zelmerlaw.com](mailto:dzelter@zelmerlaw.com)  
*Counsel for Plaintiff, Gerald Lelieve*  
*Volunteer Lawyers' Project of the*  
*Southern District of Florida*

/s/ Diane J. Zelmer  
Diane J. Zelmer, P.A.  
Florida Bar No. 27251

**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

**I HEREBY CERTIFY** that on February 6, 2012, I filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other manner authorized for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filings.

**SERVICE LIST**

I hereby certify that a true and correct copy of the attached has been furnished this 6th day of February, 2012 as follows:

***[VIA CM/ECF]***

Christopher A. Green  
Florida Bar No. 957917  
Assistant City Attorney  
City of Miami City Attorney's Office  
444 S.W. 2nd Avenue, Suite 945  
Miami, FL 33130  
Tel: (305) 416-1800  
Fax: (305) 416-1801  
Email: [CAGreen@miamigov.com](mailto:CAGreen@miamigov.com)  
***Attorneys for Defendants, City of  
Miami Police, Chief Manuel Orosa, et. al.***

/s/ Diane J. Zelmer \_\_\_\_\_  
Counsel

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No.: 10-23677-Civ-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSA, et al.,

Defendants.

---

**JOINT PRETRIAL STIPULATION**

This Pretrial Stipulation is entered into between the Plaintiff, **GERALD LELIEVE** (“LELIEVE” or “PLAINTIFF”) and the Defendants, **CHIEF OF POLICE MANUEL OROSA** (“OROSA”) and **ODNEY BELFORT** (“BELFORT”) (collectively the “DEFENDANTS”), this 6th day of February 2012.

1. **CONCISE STATEMENT OF THE CASE:**

a. **PLAINTIFF contends that the Statement of Case is as follows:**

On or about October 11, 2006, BELFORT was the lead arresting officer in the takedown of LELIEVE by the crime suppression unit on October 11, 2006. One of the arresting officers handcuffed and arrested LELIEVE. While handcuffed, LELIEVE posed no threat to the officers at the arrest scene, and did not pose a flight risk. Nevertheless, after being handcuffed, BELFORT engaged in excessive force by repeatedly punching him in the face and shoving him on the ground. Once on the ground, BELFORT stomped his stomach repeatedly. BELFORT did not report LELIEVE’s injury or seek immediate medical attention for LELIEVE. As a result, LELIEVE suffered severe bodily injury which required surgery at Jackson Memorial Hospital for internal bleeding. Following surgery, LELIEVE was stapled from the top of his abdomen to below his navel, developed a 12-inch scar, and remained hospitalized for two weeks. The CITY

and CHIEF failed to establish policies and procedures and train and supervise its personnel to prevent the use of unreasonable force against LELIEVE and deliberate indifference to his medical needs, and violation of LELIEVE's constitutional rights.

**b. DEFENDANTS contend that the Statement of Case is as follows:**

Defendant Belfort is a police officer employed by the City of Miami Police Department, and has been employed with the Miami Police Department for sixteen years. In October 2006, Belfort was assigned to the Crime Suppression Unit of the Miami Police Department. The Crime Suppression Unit investigated narcotics sales within the City of Miami. On October 11, 2006, Officer Belfort and Officer Desreen Gayle were inside an unmarked van watching a duplex apartment located at 5929 N.E. 1st Avenue which was known for narcotics sales. Belfort observed Plaintiff arrive at the duplex in a white van and engage in a narcotics transaction with a person at the duplex's door. Plaintiff exited the duplex property, returned to the white van, and drove away from the scene. Belfort used his police radio to give other police officers a description of Plaintiff and his vehicle. Officers Belfort and Gayle remained at the duplex location while other City officers stopped Plaintiff's vehicle to arrest him. Officers Belfort and Gayle were not present during the physical arrest of Plaintiff. Officers Fernandez, Allen, Morgan, Joseph, and Sgt. Cunningham were involved in the physical arrest of Plaintiff which occurred at N.W. 1st Avenue and 62nd Street. Officer Fernandez recovered suspected cocaine from inside the Plaintiff's crotch area. After the drugs were recovered from Plaintiff he attempted to flee the scene of his arrest and ran into Sgt. Cunningham who blocked his path. Plaintiff fell to the ground and officers rolled him over to handcuffed him behind his back. No officers kicked or punched Plaintiff at the scene of his arrest. Plaintiff did not complain of any injuries to Sgt. Cunningham. Plaintiff has previously alleged that he was transported to Ward D at Jackson Memorial Hospital and released back to the police for transport to the jail. Plaintiff was ultimately convicted of trafficking in cocaine.

**2. BASIS OF FEDERAL JURISDICTION:**

This Court has original jurisdiction pursuant to 28 USC §1331, 28 USC §1343, and supplemental jurisdiction pursuant to 28 USC §1367.

**3. PLEADINGS RAISING THE ISSUES:**

- a. PLAINTIFF's Amended Complaint dated November 4, 2011 [DE 75].
- b. DEFENDANT BELFORT's Answer to Amended Complaint, Affirmative Defenses and Demand for Jury Trial. [DE 79].
- c. DEFENDANT CHIEF OF POLICE MANUEL OROSA's Answer to Amended Complaint, Affirmative Defenses and Demand for Jury Trial. [DE 89].

**4. LIST OF ALL UNDISPOSED MOTIONS OR OTHER MATTERS REQUIRING ACTION BY THE COURT:**

- a. DEFENDANT BELFORT's Motion for Partial Summary Judgment dated December 6, 2011 [DE 81]; PLAINTIFF's Response in Opposition to DEFENDANT BELFORT's Motion for Summary Judgment dated December 23, 2011 [DE 82]; DEFENDANT BELFORT's Reply to PLAINTIFF's Response in Opposition to DEFENDANT BELFORT's Motion for Summary Judgment [DE 83].
- b. DEFENDANTS' MOTION TO BIFURCATE TRIAL [DE 94].
- c. PLAINTIFF and DEFENDANTS each intend to file a Motion in Limine.
- d. PLAINTIFF intends to file a Motion to Allow Plaintiff to Appear at Trial in Civilian Clothing.

**5. CONSISE STATEMENT OF UNCONTESTED FACTS WHICH WILL REQUIRE NO PROOF AT TRIAL, WITH RESERVATIONS, IF ANY:**

- a. On October 11, 2006, Defendant, OFFICER ODNEY BELFORT (Badge No. 0332), was a detective of the CITY OF MIAMI POLICE DEPARTMENT, located at 400 NW 2nd Avenue, Miami, Florida 33128.

b. On or about October 11, 2006, BELFORT observed criminal activity prior to the takedown of LELIEVE by the crime suppression unit on October 11, 2006.

c. One of the ARRESTING OFFICERS handcuffed and arrested LELIEVE.

d. BELFORT acted under color of state law.

e. The CITY MANAGER JOHNNY MARTINEZ and BOARD OF CITY COMMISSIONERS delegated the authority of the MIAMI POLICE DEPARTMENT to THE CITY and the CHIEF, including the express power to reprimand, fine, suspend, reduce in rank or dismiss an officer. (Charter of the City of Miami, Sec. 25.; Laws of Fla., ch. 24695(1947); Res. No. 01-843, § 2, 8-9-01). The CHIEF also has the power to option to concur with the Departmental Disciplinary Review Board's recommendation or take alternate action. (Miami, Florida, Code of Ordinances, Sec. 42-70; Ord. No. 9127, § 6(a)(viii)—(xii), 7-10-80; Code 1980, § 42-65; Ord. No. 11823, § 2, 7-27-99).

f. The policymaker, the City Manager and Board of City Commissioners, delegated authority to the CITY and CHIEF to the establishment of departmental orders and supervision of the police officers, including use of force.

In addition, Plaintiff contends the following issues of fact are uncontested based on the Answer and Affirmative Defenses of Defendants; Defendants disagree:

a. In November 2008, after LELIEVE's arrest and conviction, the CITY and CHIEF revised the Use of Force Departmental Order No. 6, Chapter 21.

b. On or about September 23, 2010, the CITY OF MIAMI INTERNAL AFFAIRS SECTION conducted an investigation and substantiated allegations against FERNANDEZ in I.A. Case No. 09-351.

c. The City of Miami Internal Affairs Section, under I.A. Case No. 10-234 conducted an investigation and substantiated allegations against FERNANDEZ.

d. The CITY reprimanded and terminated FERNANDEZ from employment on November 6, 2010.

6. **STATEMENT OF ISSUES OF FACT WHICH REMAIN TO BE LITIGATED AT TRIAL:**

- a. Whether DEFENDANT BELFORT engaged in excessive use of force.
- b. Whether BELFORT was present and/or in a position to intervene at the time excessive force was used on LELIEVE
- c. Whether LELIEVE was beaten without provocation, violating his constitutional rights.
- d. Whether BELFORT failed to intervene when LELIEVE was allegedly beaten without provocation, violating his constitutional rights.
- e. Whether LELIEVE had a seriously medical need which required immediate medical attention, which was so obvious that even a lay person would easily recognize the necessity for prompt medical attention.
- f. Whether BELFORT had actual knowledge of LELIEVE's injuries and impending harm.
- g. Whether BELFORT was deliberately indifferent to LELIEVE's serious medical needs, and failed to provide necessary medical care.
- h. Whether BELFORT intentionally violated LELIEVE's right not to be subjected to cruel and unusual punishment under the Eighth Amendment to the Constitution.
- i. Whether the City's policies, practices and customs for arrests, excessive force, deprivation of rights and false imprisonment were inadequate.
- j. Whether the CITY and CHIEF were aware of repeated and serious complaints for use of force, failure to file RESPONSE to RESISTANCE REPORTS, police misconduct, discourtesy, and/or other violations of policies, orders, etc.

k. Whether the CITY and CHIEF failed to take action to reprimand, discipline, suspend or terminate the ARRESTING OFFICERS or to otherwise stop unconstitutional practices prior to the use of excessive force against LELIEVE.

l. Whether the CITY and CHIEF routinely approved personnel evaluations and raises despite known violations.

m. Whether the CITY and CHIEF's custom or practice of non-investigation and failure to take any action on the complaints is so pervasive and well-settled that it assumes the force of law or the functional equivalent of a formal policy.

n. Whether the CITY and CHIEF's actions constituted a "deliberate indifference" to rights of its inhabitants.

o. Whether the CITY and CHIEF knew of the need to change its procedures on use of force, and the disciplinary actions for use of force, and made deliberate choice not to take any action.

p. Whether the policymaker, the City Manager and Board of City Commissioners, delegated authority to the CITY and CHIEF to the training and supervision of the police officers, including use of force.

q. Whether the CITY's policies, training and supervision of police officers in connection with arrests, excessive force, deprivation of rights and false imprisonment were inadequate.

r. Whether failure to adequately train and supervise its employees, the CITY and CHIEF's actions constituted a "deliberate indifference" to rights of its inhabitants.

s. Whether the CITY and CHIEF knew of the need to train and/or supervise in excessive force, and the municipality made deliberate choice not to take any action.

t. Whether BELFORT engaged in outrageous conduct, i.e., behavior that goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community.

u. Whether BELFORT's conduct caused the emotional distress.

v. Whether LELIEVE's distress is severe.

w. Whether BELFORT intended to cause a harmful or offensive contact with LELIEVE when they used excessive force and failed to intervene to prevent injuries to LELIEVE.

x. Whether BELFORT's offensive contact directly or indirectly resulted in severe medical injuries for internal bleeding, which required an operation and left a permanent scar. LELIEVE still suffers medical problems from the abdominal injuries.

y. Whether BELFORT acted with malice or reckless indifference to LELIEVE.

z. Whether, as a result of such actions, LELIEVE suffered damages as follows:

i. Actual and compensatory damages, damages for physical pain and suffering and emotional injuries in the amount of:

Physical Injuries	\$250,000.00
Pain and Suffering	\$200,000.00
Emotional Injuries	\$200,000.00
Punitive damages	\$400,000.00
TOTAL APPROXIMATE DAMAGES:	\$1,050,000.00

ii. Punitive damages, where appropriate, in an amount sufficient to punish DEFENDANT BELFORT and deter others from like conduct;

iii. Prejudgment interest;

iv. Such other relief within the Court's jurisdiction as the Court deems proper.

aa. Plaintiff believes additional issues are as follows relating to Count VI-Negligence; Defendants disagree:

i. Whether BELFORT had a duty to exercise care in its police duties.

ii. Whether BELFORT breached his duty of care by using excessive force against LELIEVE and failing to provide LELIEVE immediate medical care.

bb. Plaintiff believes additional issues are as follows relating to damages against Defendant, CHIEF OF POLICE MANUEL OROSA; Defendants disagree:

i. Punitive damages, where appropriate, in an amount sufficient to punish DEFENDANT OROSA and deter others from like conduct;

7. **STATEMENT OF ISSUES OF LAW ON WHICH THERE IS AGREEMENT:**

There are no statements of law on which the parties agree at this time.

8. **STATEMENT OF ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY THE COURT:**

a. Whether LELIEVE was entitled to necessary medical care while in the custody of the BELFORT.

b. Whether LELIEVE states a claim for relief in County III against BELFORT because the applicable standard for deliberate indifference to medical needs is the same for both pretrial detainees in custody and convicted prisoners.

b. Whether BELFORT is entitled to qualified immunity.

c. Whether LELIEVE's rights were clearly established by law on the date of the incident.

d. Whether LELIEVE may state an alternative claim of relief for negligence against BELFORT.

e. Whether LELIEVE's actions are barred by the statute of limitations.

f. Whether LELIEVE's actions are barred by the res judicata or collateral estoppel.

g. Whether LELIEVE's can claim punitive damages against the Defendants.

h. Whether BELFORT is entitled to statutory immunity from Plaintiff's negligence claim pursuant to Florida Statute section 768.28(9)(a).

i. Whether any injury to Plaintiff was due to and caused by his own unlawful actions under

j. Florida Statute section 776.051(1) in resisting arrest and said actions were the proximate cause of his damages.

k. Whether Plaintiff's claim is barred by Florida Statute section 776.085 in that he was injured during the commission of a forcible felony.

9. **LIST OF TRIAL EXHIBITS WITH OBJECTIONS:**

- a. PLAINTIFF'S list of trial exhibits are attached as Exhibit "A."
- b. DEFENDANTS list of trial exhibits are attached as Exhibit "B."
- c. The parties agree that copies of original documents may be used in lieu of originals.
- d. The parties agree that Record Custodians will not need to be called to authenticate documents unless objected to on the attached trial exhibit list.
- e. The parties agree that further amendments to the Exhibit Lists may be required, and shall provide an Amended Exhibit List no later than seven (7) days before calendar call.

10. **TRIAL WITNESSES:**

- a. PLAINTIFF'S list of trial witnesses are attached as Exhibit "C."
- b. DEFENDANTS list of trial witnesses are attached as Exhibit "D."

The parties agree that further amendments to the Witness Lists may be required, and shall provide an Amended Witness List no later than seven (7) days before calendar call.

The parties reserve the right to object to witnesses.

11. **ESTIMATED TRIAL TIME:**

The parties anticipate that the trial will take three to four days.

12. **ATTORNEYS' FEES:**

If PLAINTIFF prevails, he is entitled to recovery of attorneys' fees, expert fees and costs as permitted at law or equity, including pursuant to Civil Rights Attorney's Fees Awards Act of

1976, 42 U.S.C. § 1988. PLAINTIFF estimates that the maximum properly allowable is \$70,900.00 through trial.

Dated: February 6, 2012.

Respectfully submitted,

<p>Assistant City Attorney City of Miami City Attorney's Office 444 S.W. 2nd Avenue, Suite 945 Miami, FL 33130 Tel: (305) 416-1800 Fax: (305) 416-1801 Email: <a href="mailto:CAGreen@miamigov.com">CAGreen@miamigov.com</a> <i>Attorneys for Defendants, City of Miami Police, Chief of Police Manuel Orosa, et. al.</i></p> <p><u>*/s/ Christopher A. Green</u> Christopher A. Green Florida Bar No. 957917</p>	<p>ZELMER LAW 150 N. Federal Highway Suite 230 Fort Lauderdale, FL 33301 Tel: 954-400-5055 Fax: 954-252-4311 Email: <a href="mailto:dzelder@zelmerlaw.com">dzelder@zelmerlaw.com</a> <i>Attorneys for Plaintiff Volunteer Lawyers Project</i></p> <p><u>/s/ Diane J. Zelmer</u> Diane J. Zelmer, P.A. Florida Bar No. 27251</p>
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**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

**I HEREBY CERTIFY** that on February 6, 2012, I filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other manner authorized for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filings.

**SERVICE LIST**

I hereby certify that a true and correct copy of the attached has been furnished this 6th day of February, 2012 as follows:

<p><b><i>[VIA CM/ECF]</i></b>                  Christopher A. Green                  Florida Bar No. 957917                  Assistant City Attorney                  City of Miami City Attorney's Office                  444 S.W. 2nd Avenue, Suite 945                  Miami, FL 33130                  Tel: (305) 416-1800                  Fax: (305) 416-1801                  Email: <a href="mailto:CAGreen@miamigov.com">CAGreen@miamigov.com</a>  <b><i>Attorneys for Defendants, City of Miami Police, Chief of Police Manuel Orosa, et. al.</i></b></p>	<p><b><i>[VIA CM/ECF]</i></b>                  ZELMER LAW                  Diane J. Zelmer                  Florida Bar No. 27251                  150 N. Federal Highway                  Suite 230                  Fort Lauderdale, FL 33301                  Tel: 954-400-5055                  Fax: 954-252-4311                  Email: <a href="mailto:dzelmer@zelmerlaw.com">dzelmer@zelmerlaw.com</a>  <b><i>Attorneys for Plaintiff Volunteer Lawyers Project</i></b></p>
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/s/ Diane J. Zelmer \_\_\_\_\_  
 Counsel for Plaintiff

\*/s/ Christopher A. Green \_\_\_\_\_  
 Counsel for Defendants

*\*Defendants, CHIEF OF POLICE MANUEL OROSA and OFFICER ODNEY BELFORT's counsel has authorized Plaintiff, GERALD LELIEVE's counsel to submit his electronic signature on this Joint Motion.*

**EXHIBIT “A”**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No.: 10-23677-Civ-Altonaga/SIMONTON

GERALD LELIEVE,

Plaintiff,

v.

CHIEF OF POLICE MANUEL OROSA, et al.,

Defendants.

\_\_\_\_\_ /

OBJECTION CODES	
A	AUTHENTICITY
I	CONTAINS INADMISSIBLE MATTER
R	RELEVANCY
H	HEARSAY
UP	UNDULY PREJUDICIAL-PROBATIVE VALUE OUTWEIGHTED BY UNDUE PREJUDICE
P	PRIVILEGED

PLAINTIFF'S NUMBERED EXHIBIT LIST				
No.	DESCRIPTION	EXPECT TO PRESENT	MAY PRESENT IF NEED ARISES	OBJECTION
1	Complaint/Arrest Affidavits of Gerald Lelieve	x		
2	Complaint/Arrest Affidavits of Fleurimond Augustin		x	R, H
3	Complaint/Arrest Affidavits of Andre Pierre		x	R, H
4	Field Interrogation Form of Gerald Lelieve	x		R, H
5	Case No 061011-300277 Incident QTH Form		x	R, H
6	Handwritten notes on envelope of Gerald Lelieve, together with contents	x		R, H
7	Computer photo printout of Gerald Lelieve dated October 2006	x		
8	Central Crime Suppression Tactical Report for Gerald Lelieve	x		
9	Report of Investigation for arrest of Gerald Lelieve	x		R, H
10	Property Receipts of Gerald Lelieve		x	
11	Moneysheet		x	R, H
12	Complaint/Arrest Affidavits of Fleurimond Augustin		x	R, H
13	Field Interrogation Form of Fleurimond Augustin		x	R, H
14	Handwritten notes on envelope of Augustin Fleurimond , together with contents	x		R, H
15	Complaint/Arrest Affidavits of Fleurimond Augustin		x	R, H
16	Field Interrogation Form of Fleurimond Augustin		x	R, H
17	Affidavit Prefile Cover Sheet of Augustin Fleurimond		x	R, H
18	Affidavit Prefile Case Summary Sheet Augustin Fleurimond		x	R, H
19	Property Receipts of Augustin Fleurimond		x	R, H
20	Affidavit Prefile Cover Sheet of Augustin Fleurimond		x	R, H
21	Tactical Report for Augustin Fleurimond		x	R, H
22	Polaroid Photo of Augustin Fleurimond		x	R, H
23	Handwritten notes on envelope of Andre Pierre , together with contents		x	R, H
24	Complaint/Arrest Affidavits of Andre Pierre		x	R, H

PLAINTIFF'S NUMBERED EXHIBIT LIST				
No.	DESCRIPTION	EXPECT TO PRESENT	MAY PRESENT IF NEED ARISES	OBJECTION
25	Field Interrogation Form of Andre Pierre		x	R, H
26	Field Interrogation Form of Andre Pierre		x	R, H
27	Affidavit Prefile Cover Sheet of Andre Pierre		x	R, H
28	Affidavit Prefile Case Summary Sheet Andre Pierre		x	R, H
29	Property Receipts of Andre Pierre		x	R, H
30	Affidavit Prefile Cover Sheet of Andre Pierre		x	R, H
31	Tactical Report for Andre Pierre		x	R, H
32	Polaroid Photo of Andre Pierre		x	R, H
33	Commendation of Odney Belfort regarding October 2006 crime suppression unit	x		
34	Concise Officer History Report for Odney Belfort	x		R, H, U
35	Concise Officer History Report for Officer Daniel Fernandez		x	R, H, U
36	Concise Officer History Report for Major Keith Cunningham		x	R, H, U
37	Concise Officer History Report for Officer Horace Morgan		x	R, H, U
38	Concise Officer History Report for Officer Desreen Gayle		x	R, H, U
39	Concise Officer History Report for Officer Kevin Knowles		x	R, H, U
40	Documents related to IA Case No. 97-135 re Odney Belfort	x		R, H, U
41	Documents related to IA Case No. 97-680 re Odney Belfort	x		R, H, U
42	Documents related to IA Case No. 97-681 re Odney Belfort	x		R, H, U
43	Documents related to IA Case No. 98-222 re Odney Belfort	x		R, H, U
44	Documents related to IA Case No. 98-272 re Odney Belfort	x		R, H, U
45	Documents related to IA Case No. 98-318 re Odney Belfort	x		R, H, U
46	Documents related to IA Case No. 99-107 re Odney Belfort	x		R, H, U
47	Documents related to IA Case No. 99-263 re Odney Belfort	x		R, H, U
48	Documents related to IA Case No. 00-424 re Odney Belfort	x		R, H, U
49	Documents related to IA Case No. 00-631 re Odney Belfort (Control of Persons)	x		R, H, U
50	Documents related to IA Case No. 01-379 re Odney Belfort	x		R, H, U
51	Documents related to IA Case No. 01-207 re Odney Belfort	x		R, H, U
52	Documents related to IA Case No. 01-197 re Odney Belfort	x		R, H, U
53	Documents related to IA Case No. 03-154 re Odney Belfort	x		R, H, U
54	Documents related to Civil Service Case No. 04-14D re Odney Belfort	x		R, H, U
No.	DESCRIPTION	x		OBJECTION
55	Documents related to IA Case No. 03-173 re Odney Belfort	x		R, H, U
56	Documents related to IA Case No. 04-185 re Odney Belfort	x		R, H, U
57	Documents related to IA Case No. 05-002 re Odney Belfort	x		R, H, U
58	Documents related to IA Case No. 05-178 re Odney Belfort	x		R, H, U
59	Documents related to IA Case No. 96-0036 re Odney Belfort (Use of Force)	x		R, H, U
60	Documents related to IA Case No. 96-182 re Odney Belfort (Use of Force)	x		R, H, U
61	Documents related to IA Case No. 98-0016 re Odney Belfort (Use of Force)	x		R, H, U
62	Documents related to IA Case No. 98-0015 re Odney Belfort (Use of Force)	x		R, H, U
63	Documents related to IA Case No. 98-0065 re Odney Belfort (Use of Force)	x		R, H, U
64	Documents related to IA Case No. 00-536 re Odney Belfort (Use of Force)	x		R, H, U
65	Documents related to IA Case No. 01-0041 re Odney Belfort	x		R, H, U
66	Documents related to IA Case No. 01-0207 re Odney Belfort	x		R, H, U
67	Documents related to IA Case No. 01-0253 re Odney Belfort	x		R, H, U
68	Documents related to IA Case No. 01-0390 re Odney Belfort (Use of Force)	x		R, H, U
69	Documents related to IA Case No. 01-0374 re Odney Belfort	x		R, H, U
70	Documents related to IA Case No. 01-0379 re Odney Belfort	x		R, H, U
71	Documents related to IA Case No. 02-061 re Odney Belfort (Use of Force)	x		R, H, U
72	Documents related to IA Case No. 02-162 re Odney Belfort	x		R, H, U
73	Documents related to IA Case No. 02-333 re Odney Belfort	x		R, H, U
74	Documents related to IA Case No. C03-341 re Odney Belfort	x		R, H, U
75	Documents related to IA Case No. F05-266 re Odney Belfort (Use of Force)	x		R, H, U

PLAINTIFF'S NUMBERED EXHIBIT LIST				
No.	DESCRIPTION	EXPECT TO PRESENT	MAY PRESENT IF NEED ARISES	OBJECTION
76	Documents related to IA Case No. C07-211N re Odney Belfort	x		R, H, U
77	Documents related to IA Case No. 09-351 re Daniel Fernandez and D. Valentin, including 3 CDs	x		R, H, U
78	Departmental Order 6, Chapter 21 in Effect beginning December 2003 "Use of Force"	x		
79	Departmental Order 6, Chapter 21 in Effect beginning September 2006 "Use of Force"	x		
80	Departmental Order 6, Chapter 21 in Effect beginning November 2008 "Use of Force"	x		R
81	City of Miami Fire Rescue Patient Care Report (non-HIPAA)	x		
82	Officer P Sheets re Gerald Lelieve		x	R, H
83	Officer Notification of Deposition re Case No. F06034231A for appearance of Daniel Fernandez		x	
84	Documents re Case No. 13-2010-CF-010404-C000-XX, in the Circuit Court of the 11 <sup>th</sup> Judicial Circuit, in and for Miami-Dade County, Florida against Daniel Fernandez		x	R, H, U
85	Documents related to IA Case No. 10-234 re Daniel Fernandez and D. Valentin, including 3 CDs		x	R, H, U
86	Documents re Case No. 13-2010-MM-039279-0001-XX, in the Circuit Court of the 11 <sup>th</sup> Judicial Circuit, in and for Miami-Dade County, Florida against Daniel Fernandez		x	R, H, U
87	City of Miami Personnel documents re termination of Daniel Fernandez	x		R, H, U
88	Amended Answers to Plaintiff's Second Set of Interrogatories to Detective Odney Belfort		x	
89	Answers to Plaintiff's First Set of Interrogatories to Detective Odney Belfort		x	
90	Composite exhibit of medical records received from Jackson Memorial Hospital	x		
91	Composite photos of incident site		x	R
92	Composite exhibit of records received from City of Miami Internal Affairs		x	R
93	Composite exhibit of records received from City of Miami Personnel Department		x	R
94	Composite exhibit of Miami-Dade County Department of Corrections	x		
95	Composite exhibit of documents from Florida State Attorney's Office re Gerald Lelieve		x	R, H
96	Composite exhibit of documents from Hamilton Corrections		x	R
97	Composite exhibit of documents from Civilian Invetigative Panel		x	R, H, U
98	Composite exhibit of documetns from Departmental Disciplinary Review Board		x	R
99	Composite Exhibit of Florida Department of Highway Safety and Motor Vehicles re license plate No. FO28BF		x	R
100	Emails re production of and missing documents	x		R, H, U

**EXHIBIT “B”**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO, et al.,

Defendants.

**DEFENDANTS' EXHIBIT LIST**

<b>Presiding Judge:</b> The Hon. Cecilia Altonaga		<b>Plaintiff's Attorneys:</b> Diane Zelmer, Esq.		<b>Defendants' Attorneys:</b> Christopher Green, Esq.	
<b>Trial Date(s):</b> March 12-23, 2012		<b>Court Reporter:</b>		<b>Courtroom Deputy:</b>	
<b>PLT. NO.</b>	<b>DEF. NO.</b>	<b>OBJECTIONS</b> A =Authenticity I =Contain inadmissible matter R =Relevancy H =Hearsay UP=Unduly prejudicial P =Privileged	<b>DESCRIPTION OF EXHIBITS</b>	<b>NO. OF PAGES</b>	
	1		Complaint/arrest affidavit for Lelieve	2	
	2		Central Crime Suppression Tactical Unit Tactical Report	1	
	3		Computer photo printout of Lelieve	1	
	4		Miami-Dade Corrections booking photo of Lelieve	1	
	5		City of Miami Police Departmental Order 6, Chapter 21, date 9/06	14	
	6		Complaint filed in case no. 09-20574-CIV-Lenard	11	

**EXHIBIT “C”**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No.: 10-23677-Civ-Altonaga/SIMONTON

GERALD LELIEVE,

Plaintiff,

v.

CHIEF OF POLICE MANUEL OROSA, et al.,

Defendants.

\_\_\_\_\_ /

PLAINTIFF'S NUMBERED LIST OF TRIAL WITNESSES				
NO.	NAME AND ADDRESS	EXPECT TO PRESENT	MAY PRESENT IF NEED ARISES	EVIDENCE MAY BE PRESENTED AS DEPOSITION DESIGNATION
1	Joseph Reinhardt, M.D., Jackson Memorial Hospital 1611 Northwest 12th Avenue Miami, FL 33136-1096	x		
2	Mauricio Lynn, M.D., Jackson Memorial Hospital 1611 Northwest 12th Avenue Miami, FL 33136-1096	x		
3	Gerald Lelieve, LC#L11928 Hamilton Correction Institution Florida Department of Corrections 10650 SW 46th Street Jasper, FL 32052	X		
4	Officer Kevin Knowles 400 NW 2nd Avenue Miami, FL 33128	X		X
5	Officer Daniel G. Fernandez 400 NW 2nd Avenue Miami, FL 33128	X		X
6	Major Keith Ladunn Cunningham 400 NW 2nd Avenue Miami, FL 33128	X		X
7	Officer Horace Morgan 400 NW 2nd Avenue Miami, FL 33128	X		X

PLAINTIFF'S NUMBERED LIST OF TRIAL WITNESSES				
NO.	NAME AND ADDRESS	EXPECT TO PRESENT	MAY PRESENT IF NEED ARISES	EVIDENCE MAY BE PRESENTED AS DEPOSITION DESIGNATION
8	Officer Odney Belfort 400 NW 2nd Avenue Miami, FL 33128	X		X
9	Office Desreen Gayle 400 NW 2nd Avenue Miami, FL 33128	X		X
10	Chief of Police Manuel Orosa 400 NW 2nd Avenue Miami, FL 33128	x		
11	Corporate Representative having the most knowledge of policies, procedures, customs, training, supervision, reprimands and termination of officers & Officer Odney Belfort City of Miami Internal Affairs 1313 NW 36 Street, 5th Floor Miami, FL 33128		x	
12	Corporate Representative having the most knowledge of policies, procedures, customs, training, supervision, reprimands and termination of officers City of Miami Personnel 400 NW 2nd Avenue Miami, FL 33128		x	
13	Corporate Representative having the most knowledge of Gerald Lelieve's admission to Ward D on or about October 11, 2006 Miami Dade County Department of Corrections 2525NW 62nd Street Miami, FL 33147		x	
14	Records Custodian City of Miami Internal Affairs 1313 NW 36 Street, 5th Floor Miami, FL 33128		x	
15	Records Custodian City of Miami Personnel 400 NW 2nd Avenue Miami, FL 33128		x	

PLAINTIFF'S NUMBERED LIST OF TRIAL WITNESSES				
NO.	NAME AND ADDRESS	EXPECT TO PRESENT	MAY PRESENT IF NEED ARISES	EVIDENCE MAY BE PRESENTED AS DEPOSITION DESIGNATION
16	Records Custodian Miami Dade County Department of Corrections 2525NW 62nd Street Miami, FL 33147		x	
17	Records Custodian Jackson Memorial Hospital 1611 Northwest 12th Avenue Miami, FL 33136-1096		x	
18	Records Custodian Hamilton Correction Institution Florida Department of Corrections 10650 SW 46th Street Jasper, FL 32052		x	
19	Katherine Fernandez-Rundle, State Attorney E. R. Graham Building 1350 N. W. 12 Avenue Miami, Florida 33136 (305) 547-0100		x	
20	Records Custodian E. R. Graham Building 1350 N. W. 12 Avenue Miami, Florida 33136 (305) 547-0100		x	
21	Corporate Representative having the most knowledge of the arrests and prosecution of Gerald Lelieve and Daniel Fernandez State Attorney E. R. Graham Building 1350 N. W. 12 Avenue Miami, Florida 33136 (305) 547-0100		x	
22	Vergnaud Poliard 155 NE 131 Street North Miami, FL 33161-4529		x	
23	G. Strachan Miami Dade County Department of Corrections 2525NW 62nd Street Miami, FL 33147		x	

**EXHIBIT “D”**

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF FLORIDA  
 MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO, et al.,

Defendants.

\_\_\_\_\_ /

**DEFENDANTS' WITNESS LIST**

<b>Presiding Judge:</b> The Hon. Cecilia Altonaga			<b>Plaintiff's Attorney:</b> Diane Zelmer, Esq.	<b>Defendants' Attorney:</b> Christopher Green, Esq.	
<b>Trial Date(s):</b> March 12 -23, 2012			<b>Court Reporter:</b>	<b>Courtroom Deputy:</b>	
PLT. NO.	DEF. NO.	DATE OFFERED	DESCRIPTION OF WITNESSES		NO. OF PAGES
	1		Officer Odney Belfort, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida, <i>Defendant</i>		
	2		Officer Desreen Gayle, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida		
	3		Officer Kelvin Knowles, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida		
	4		Maj. Keith Cunningham, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida		
	5		Officer Horace Morgan, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida		
	6		Chief Manuel Orosa, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida, <i>Defendant</i>		
	7		Lt. Rafael Tapanes, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida		

<b>Presiding Judge:</b> The Hon. Cecilia Altonaga			<b>Plaintiff's Attorney:</b> Diane Zelmer, Esq.	<b>Defendants' Attorney:</b> Christopher Green, Esq.	
<b>Trial Date(s):</b> March 12 -23, 2012			<b>Court Reporter:</b>	<b>Courtroom Deputy:</b>	
<b>PLT. NO.</b>	<b>DEF. NO.</b>	<b>DATE OFFERED</b>		<b>DESCRIPTION OF WITNESSES</b>	<b>NO. OF PAGES</b>
	8			Officer Rossicia Allen, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida	
	9			Officer Ed Joseph, 400 N.W. 2 <sup>nd</sup> Avenue, Miami, Florida	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO, et al.,

Defendants.

\_\_\_\_\_ /

**DEFENDANTS' OMNIBUS MOTION IN LIMINE**

Defendants Belfort and Orosa, by and through undersigned counsel, and pursuant to the Federal Rules of Evidence, hereby moves *in limine* to exclude the following evidence at trial:

**I. Evidence of Daniel Fernandez's arrest, prosecution and termination**

Former police officer Daniel Fernandez participated in Plaintiff's arrest in October, 2006. Plaintiff intends to introduce evidence showing that Fernandez was arrested, prosecuted and terminated *after* the incident in question. Furthermore, Plaintiff intends to show that Fernandez violated departmental policies after Plaintiff's 2006 arrest. Specifically, Plaintiff intends to introduce evidence concerning a September 23, 2010 substantiated allegation of misconduct against Fernandez in IA case no. 09-351, Fernandez's arrest for official misconduct and petit theft on April 8, 2010, a substantiated allegation of misconduct against Fernandez in IA case no. 10-234, Fernandez's arrest for selling alcoholic beverages to a minor on August 4, 2010, and Fernandez's termination

from employment with the City on November 6, 2010. [Third amended complaint, ECF # 75, ¶¶33-38].

Internal Affairs case no. 09-351 involved a complaint made by David Peery on September 1, 2009, that Fernandez used his position as a City of Miami police officer to illegally evict and falsely arrest him. The allegation of misconduct arising from Peery's complaint was substantiated by the Internal Affairs investigator, Det. Robin Starks, and the matter was presented to the State Attorney's Office. The investigating officer found that Fernandez violated multiple departmental orders of the City of Miami Police Department, including but not limited orders prohibiting conduct unbecoming an officer or employee, making a false statement, and immorality.

Rule 401 of the Federal Rules of Evidence states that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Furthermore, Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." . Fed. R. Evid. 403. In determining the legal relevance of evidence and testimony under Rule 403, the trial judge has broad discretion, reviewable only for abuse. *United States v. Johnson*, 558 F. 2d 744 (5th Cir. 1977).

Defendants submit evidence of Fernandez's arrest, prosecution and termination is not relevant pursuant to Rule 401 because the incident occurred nearly three years after Plaintiff's October 2006 arrest and could not serve as evidence of an unconstitutional

custom or policy which was the driving force behind Plaintiff's arrest *three years earlier*. Moreover, the evidence is not relevant, and substantially more prejudicial than probative under Rule 403, because the complaint does not involve allegations of excessive force or deliberate indifference to the medical needs of a pretrial detainee.

In addition, Defendants submit that evidence of I.A. case no. 10-234 is not relevant pursuant to Rule 401 because the incident occurred *after* Plaintiff's 2006 arrest and could not serve as evidence of an unconstitutional custom or policy which was the driving force behind Plaintiff's arrest four years earlier. Moreover, the evidence is not relevant, and substantially more prejudicial than probative under Rule 403, because the complaint did not involve allegations of excessive force or deliberate indifference to medical needs of a pretrial detainee. In addition, evidence of Fernandez's arrests and prosecution is inadmissible impeachment evidence under Rule 609 because there is no evidence that Fernandez has been convicted of the criminal charges. Finally, under Federal Rule of Evidence 404(b) evidence of prior acts is not admissible to prove the character of a person in order to show action in conformity therewith. Fed. R. Evid. 404(b).

## **II. Evidence of Officer History Reports**

In his exhibit list, Plaintiff has listed proposed exhibits identified as officer history reports for Officers Belfort, Fernandez, Cunningham, Morgan, Gayle, and Knowles. (Plaintiff's exhibits 34-39). The Police Department compiles these reports for every police officer as a record of citizen complaints, administrative complaints, and incidents involving use of force. The history reports include complaints which were substantiated and not substantiated. Moreover, the reports include each use of force documented by the

officer to determine whether the force used was effective or not effective. Defendants submit this evidence is substantially more prejudicial than probative because it presents the officers in a false light. The number of Internal Affairs/citizen's complaints against an officer does not bear any relation to their validity, and it is upon the opposing party to show that such prior complaints had merit. See *Brooks v. Schieb*, 813 F. 2d 1191, 1193 (11th Cir. 1987). In addition, the mere fact that an officer had to use force in a particular situation does not prove that he acted pursuant to an unconstitutional custom or policy of the City's police department.

### **III. Evidence of Internal Affairs/citizen's complaints**

Plaintiff's exhibits 40 through 76 related to Internal Affairs investigations involving Officer Belfort. No Internal Affairs/citizen's complaints or investigations against Belfort should be admitted into evidence where such complaints were either not substantiated or were not relevant to the issue at hand. *Brooks v. Schieb*, 813 F. 2d 1191, 1193 (11th Cir. 1987). In *Brooks*, an individual injured in altercation with a police officer brought suit against that individual police officer and a city alleging deprivation of his constitutional rights in violation of section 1983. *Id.* at 1191. Among a combination of other things, the plaintiff argued to the jury that the large number of complaints against the officer proved that the city's procedures were faulty and that the city knew that the officer had a violent nature. *Id.* at 1193. However, the Court held that the plaintiff never demonstrated that these past complaints had any merit, that the number of the complaints bore no relation to their validity, and that such evidence would not allow a jury to find that the city knew or should have known that the natural consequence of its policy and practices would be the deprivation of constitutional rights. *Id.*

Similarly, in this case, Plaintiff's counsel seeks to admit a number of Belfort's prior complaints into evidence. However, only three of the prior complaints were deemed substantiated: exhibits 47, 51, and 70. With respect to those files, Defendants submit the probative value of the evidence is substantially outweighed by their prejudice. Exhibit 47 concerns I.A. case no. 99-263 related to a pepper spray incident involving Belfort. Defendants submit this incident is not factually similar to the case at hand and substantially more prejudicial than probative. Exhibit 51 concerns I.A. case no. 01-379, regarding an allegation of misconduct for Belfort's testimony during a Disciplinary Review Board Hearing. Although the Internal Affairs investigator deemed the allegation to be substantiated, the finding was later dismissed by the Civil Service Board. Exhibit 70 concerns I.A. case no. 01-379, regarding allegations of abusive treatment and improper procedure. In that case, Belfort was cleared of the allegations for abusive treatment but the allegation of improper procedure was substantiated because Belfort did not complete an injury report. Defendants submit these three complaints are irrelevant to the case at hand.

Furthermore, all other Internal Affairs/citizen's complaints cannot be substantiated because they were investigated and found to either be inconclusive or unsubstantiated. Therefore, Plaintiff's counsel would not be able to show that any of the complaints against Belfort have any sort of merit. "It would be perverse to require that courts exclude allegations of past wrongdoing in order to protect the rights of defendants, while at the same time demanding that police officials give credence to unsubstantiated complaints against individual police officers." *Brooks v. Schieb*, 813 F. 2d 1191, 1194 (11th Cir. 1987). See also *Hopson v. Fredericksen*, 961 F.2d 1374, 1379 (8th Cir.

1992("evidence of other acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Showing a "proclivity to engage" in conduct is the same as showing a propensity to engage in conduct and both are prohibited by the Rule.") Thus, these complaints should not be admitted into evidence for a jury to review based on their irrelevance and prejudicial nature.

**IV. Evidence that arresting officers did not file a response to resistance report**

At paragraph 28 of his amended complaint, Plaintiff alleged that the arresting officers violated departmental policy when they did not file a response to resistance report concerning alleged injuries to Plaintiff. [ECF 75, ¶ 28]. Evidence of the City of Miami Police Department's internal regulations, and whether or not the Defendant violated them are irrelevant in Plaintiff's 1983 claim against Defendant Belfort. Moreover, the introduction of such evidence will likely prejudice the Defendants by confusing the jury as to the appropriate standard for a constitutional violation. *Edwards v. Baer*, 863 F.2d 606, 608 (8<sup>th</sup> Cir. 1988)(police department guidelines do not create a constitutional right).

**V. Hearsay statement from an unidentified source**

In his amended complaint, Plaintiff alleges that an unidentified police officer stated: "why did you do that? He is going to sue you." (ECF 75, ¶ 17). The statement is inadmissible hearsay which does not fall within any exception to the hearsay rule as the Plaintiff cannot attribute that alleged statement to any specific police officer or person. Moreover, the probative value of this statement is substantially outweighed by the danger unfair prejudice.

WHEREFORE, Defendants requests this Court enter an Order prohibiting Plaintiff from admitting the foregoing evidence at trial.

Christopher A. Green, Asst. City Attorney  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, FL 33130-1910  
Tel.: (305) 416-1800  
Fax: (305) 416-1801  
[CAGreen@ci.miami.fl.us](mailto:CAGreen@ci.miami.fl.us)

By: s/ Christopher Green  
Christopher A. Green  
Florida Bar No. 957917

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on February 6, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Christopher Green  
Christopher A. Green  
Assistant City Attorney  
Florida Bar No. 957917

**SERVICE LIST**

**Christopher Green, Esq.**

Assistant City Attorney  
Counsel for Defendants  
City of Miami City Attorney's Office  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, Florida 33130  
(305) 416-1800 Telephone  
(305) 416-1801 Fax  
[CAGreen@miamigov.com](mailto:CAGreen@miamigov.com)  
Via notice of electronic filing

**Diane J. Zelmer, Esq.**

Counsel for Plaintiff  
150 North Federal Highway, Suite 230  
Fort Lauderdale, Florida 33301  
(954) 400-5055 Telephone  
(954) 916-7855 Fax  
[dzelter@zelmerlaw.com](mailto:dzelter@zelmerlaw.com)  
Via notice of electronic filing

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No.: 10-23677-Civ-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSA, et al.,

Defendants.

\_\_\_\_\_ /

**JOINT PROPOSED JURY INSTRUCTIONS, SPECIAL VERDICT  
INTERROGATORIES AND VERDICT FORM**

Pursuant to the Court’s Scheduling Order dated August 9, 2011 [ECF No. 39],<sup>1</sup> the parties hereby jointly file their proposed Jury Instructions, Special Interrogatories and Verdict Form. Per the Court’s order, where the parties do not agree on a proposed instruction, that instruction is set forth in bold type. Instructions proposed only by the plaintiff are underlined; instructions proposed only by the defendants are italicized.

Dated: February 6, 2012.

Respectfully submitted,

<p>Assistant City Attorney City of Miami City Attorney’s Office 444 S.W. 2nd Avenue, Suite 945 Miami, FL 33130 Tel: (305) 416-1800 Fax: (305) 416-1801 Email: <a href="mailto:CAGreen@miamigov.com">CAGreen@miamigov.com</a> <i>Attorneys for Defendants, City of Miami Police, Chief of Police Manuel Orosa, et. al.</i></p> <p><u>*/s/ Christopher A. Green</u> Christopher A. Green Florida Bar No. 957917</p>	<p>ZELMER LAW 150 N. Federal Highway Suite 230 Fort Lauderdale, FL 33301 Tel: 954-400-5055 Fax: 954-252-4311 Email: <a href="mailto:dzelter@zelmerlaw.com">dzelter@zelmerlaw.com</a> <i>Attorneys for Plaintiff Volunteer Lawyers Project</i></p> <p><u>/s/ Diane J. Zelmer</u> Diane J. Zelmer, P.A. Florida Bar No. 27251</p>
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<sup>1</sup> In its order, the Court did not request the Special Verdict Interrogatories or the Verdict Form. In an abundance of caution, the parties are submitting them, with a reservation of right to amend and consolidate.

**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

**I HEREBY CERTIFY** that on February 6, 2012, I filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other manner authorized for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filings.

**SERVICE LIST**

I hereby certify that a true and correct copy of the attached has been furnished this 6th day of February, 2012 as follows:

<p>Assistant City Attorney City of Miami City Attorney's Office 444 S.W. 2nd Avenue, Suite 945 Miami, FL 33130 Tel: (305) 416-1800 Fax: (305) 416-1801 Email: <a href="mailto:CAGreen@miamigov.com">CAGreen@miamigov.com</a> <i>Attorneys for Defendants, City of Miami Police, Chief of Police Manuel Orosa, et. al.</i></p> <p><i>*/s/ Christopher A. Green</i> _____ Christopher A. Green Florida Bar No. 957917</p>	<p>ZELMER LAW 150 N. Federal Highway Suite 230 Fort Lauderdale, FL 33301 Tel: 954-400-5055 Fax: 954-252-4311 Email: <a href="mailto:dzelter@zelmerlaw.com">dzelter@zelmerlaw.com</a> <i>Attorneys for Plaintiff Volunteer Lawyers Project</i></p> <p><i>/s/ Diane J. Zelmer</i> _____ Diane J. Zelmer, P.A. Florida Bar No. 27251</p>
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cc: [altonaga@flsd.uscourts.gov](mailto:altonaga@flsd.uscourts.gov) in Wordperfect format.

*/s/ Diane J. Zelmer* \_\_\_\_\_  
Counsel for Plaintiff

*\*/s/ Christopher A. Green* \_\_\_\_\_  
Counsel for Defendants

*\*Defendants, CHIEF OF POLICE MANUEL OROSA and OFFICER ODNEY BELFORT's counsel has authorized Plaintiff, GERALD LELIEVE's counsel to submit his electronic signature on these Joint Proposed Jury Instructions.*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No.: 10-23677-Civ-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSA, et al.,

Defendants.

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**PROPOSED JURY INSTRUCTION NO. 1**

**PRELIMINARY INSTRUCTIONS BEFORE TRIAL**

Ladies and Gentlemen:

You have now been sworn as the Jury to try this case. By your verdict you will decide the disputed issues of fact. I will decide all questions of law and procedure that arise during the trial, and, before you retire to the jury room at the end of the trial to deliberate upon your verdict and decide the case, I will explain to you the rules of law that you must follow and apply in making your decision. The evidence presented to you during the trial will primarily consist of the testimony of the witnesses, and tangible items including papers or documents called "exhibits."

**Transcripts Not Available.** You should pay close attention to the testimony because it will be necessary for you to rely upon your memories concerning what the testimony was. Although, as you can see, the Court Reporter is making a stenographic record of everything that is said, typewritten transcripts will not be prepared in sufficient time or appropriate form for your use during your deliberations and you should not expect to receive them.

**Exhibits Will Be Available.** On the other hand, any exhibits admitted in evidence during the trial will be available to you for detailed study, if you wish, during your deliberations. So, if

an exhibit is received in evidence but is not fully read or shown to you at the time, don't be concerned because you will get to see and study it later during your deliberations.

**Notetaking - Permitted.** If you would like to take notes during the trial you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you, individually. If you do decide to take notes, do not try to write everything down because you will get so involved in notetaking that you might become distracted from the ongoing proceedings. Just make notes of names, or dates and places - - things that might be difficult to remember. Also, your notes should be used only as aids to your memory, and, if your memory should later differ from your notes, you should rely upon your memory and not your notes. If you do not take notes, you should rely upon your own independent recollection or memory of what the testimony was and you should not be unduly influenced by the notes of other Jurors. Notes are not entitled to any greater weight than the recollection or impression of each Juror concerning what the testimony was.

During the trial you should keep an open mind and should avoid reaching any hasty impressions or conclusions. Reserve your judgment until you have heard all of the testimony and evidence, the closing arguments or summations of the lawyers, and my instructions or explanations to you concerning the applicable law.

Because of your obligation to keep an open mind during the trial, coupled with your obligation to then decide the case only on the basis of the testimony and evidence presented, you must not discuss the case during the trial in any manner among yourselves or with anyone else, nor should you permit anyone to discuss it in your presence; and you should avoid reading any newspaper articles that might be published about the case. You should also avoid seeing or hearing any television or radio comments about the trial.

From time to time during the trial I may be called upon to make rulings of law on objections or motions made by the lawyers. You should not infer or conclude from any ruling or

other comment I may make that I have any opinions on the merits of the case favoring one side or the other. And if I should sustain an objection to a question that goes unanswered by a witness, you should not guess or speculate what the answer might have been nor should you draw any inferences or conclusions from the question itself.

During the trial it may be necessary for me to confer with the lawyers from time to time out of your hearing with regard to questions of law or procedure that require consideration by the court or judge alone. On some occasions you may be excused from the courtroom for the same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly. The order of the trial's proceedings will be as follows: In just a moment the lawyers for each of the parties will be permitted to address you in turn and make what we call their "opening statements." The Plaintiff will then go forward with the calling of witnesses and presentation of evidence during what we call the Plaintiff's "case in chief." When the Plaintiff finishes (by announcing "rest"), the Defendant[s] will proceed with witnesses and evidence, after which, within certain limitations, the Plaintiff may be permitted to again call witnesses or present evidence during what we call the "rebuttal" phase of the trial. The Plaintiff proceeds first, and may rebut at the end, because the law places the burden of proof or burden of persuasion upon the Plaintiff (as I will further explain to you as a part of my final instructions).

When the evidence portion of the trial is completed, the lawyers will then be given another opportunity to address you and make their summations or final arguments in the case, after which I will instruct you on the applicable law and you will then retire to deliberate upon your verdict.

Now, we will begin by affording the lawyers for each side an opportunity to make their opening statements in which they may explain the issues in the case and summarize the facts they expect the evidence will show.

I caution you that the statements that the lawyers make now (as well as the arguments they present at the end of the trial) are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for purposes of opening statements.

Eleventh Circuit Pattern Jury Instruction – Preliminary Instruction

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 2**

**COURT'S INSTRUCTIONS  
TO THE JURY**

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions - - what we call your deliberations.

Eleventh Circuit Pattern Jury Instruction – Face page

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 3**

**Claim**

In your deliberations, you are to consider Gerald Lelieve's claim of deprivation of civil rights for excessive force under 42 U.S.C. §1983 against Detective Odney Belfort during his arrest on October 11, 2006.

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 4**

**1.10.1<sup>i</sup>**

**Miscellaneous Issues**

**Respondeat Superior**

**(Under 42 USC § 1983)**

*The rules of law that apply to the Plaintiff's claim against the City are different from the rules of law that apply to the Plaintiff's claims against the individual Defendant, and each claim must be considered separately. I will first explain the rules or principles of law you must apply in deciding the Plaintiff's claim against the City and will then discuss the Plaintiff's claims against the individual Defendant. Ordinarily, a corporation - - including a public body or agency such as the City of Miami - - is legally responsible for the acts of its employees carried out in the regular course of their job duties as employees. This is known in the law as the doctrine of "respondeat superior" which means "let the superior respond" for any losses or injuries wrongfully caused by its employees in the performance of their jobs. This doctrine does not apply, however, in a case such as this where the Plaintiff claims a violation of constitutional rights.*

*So, in this case, the City of Miami can be held liable only if you find that the deprivation of the Plaintiff's constitutional rights was the direct result of the City's ordinance, regulation, decision, policy, or custom. A governmental entity is responsible only when an injury is inflicted through the execution of its policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. It is not enough merely to show that a City employee caused the Plaintiff's injury.*

*A policy or custom means a persistent, widespread, or repetitious course of conduct by policy makers with final authority to establish the City's policy with respect to the action*

*ordered. It may be written, or it may be a consistent series of decisions and actions adopted or approved by the policy makers.*

*Therefore, if you find that the acts of the official policy maker deprived the Plaintiff of constitutional rights, the City of Miami is liable for such deprivations.*

**PROPOSED JURY INSTRUCTION NO. 5**

**2.1**

**Consideration Of The Evidence  
Duty To Follow Instructions  
No Corporate Party Involved**

In deciding the case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone.

In your deliberations you should consider only the evidence - - that is, the testimony of the witnesses and the exhibits I have admitted in the record - - but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Remember that anything the lawyers say is not evidence in the case. And, except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your decision concerning the facts. It is your own recollection and interpretation of the evidence that controls.

Eleventh Circuit Pattern Jury Instruction 2.1

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 6**

**2.3  
Consideration Of The Evidence  
Duty To Follow Instructions  
Governmental Entity Or Agency Involved**

In deciding the case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone.

The fact that a governmental entity or agency is involved as a party must not affect your decision in any way. A governmental agency and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a governmental agency is involved, of course, it may act only through people as its employees; and, in general, a governmental agency is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of that governmental agency.

In your deliberations you should consider only the evidence - - that is, the testimony of the witnesses and the exhibits I have admitted in the record - - but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Remember that anything the lawyers say is not evidence in the case. And, except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your decision concerning the facts. It is your own recollection and interpretation of the evidence that controls.

Eleventh Circuit Pattern Jury Instruction 2.3

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 7**

**3**

**Credibility Of Witnesses**

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness' testimony differ from other testimony or other evidence?

Eleventh Circuit Pattern Jury Instruction 3

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 8**

**4.1**  
**Impeachment Of Witnesses**  
**Inconsistent Statement**

**You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.**

**You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.**

Eleventh Circuit Pattern Jury Instruction 2.1

Given \_\_\_\_\_

Denied \_\_\_\_\_

Modified \_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 9**

4.2

*Impeachment Of Witnesses*

*Inconsistent Statement And Felony Conviction*

*You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.*

*The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe the testimony of that witness.*

*You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.*

**Eleventh Circuit Pattern Jury Instruction 4.2**

*Given* \_\_\_\_\_

*Denied* \_\_\_\_\_

*Modified* \_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 10**

**5.1  
Expert Witnesses  
General Instruction**

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters. Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Eleventh Circuit Pattern Jury Instruction 5.1

Given \_\_\_\_\_

Denied \_\_\_\_\_

Modified \_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 11**

**6.2  
Burden Of Proof  
When There Are Multiple Claims Or  
When Both Plaintiff And Defendant Or  
Third Parties Have Burden Of Proof**

In this case each party asserting a claim or a defense has the responsibility to prove every essential part of the claim or defense by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that a claim or contention is more likely true than not true.

When more than one claim is involved, and when more than one defense is asserted, you should consider each claim and each defense separately; but in deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence you should find against the party making that claim or contention.

Eleventh Circuit Pattern Jury Instruction 6.2

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 12**

**2.2  
Civil Rights  
42 USC § 1983 Claims  
Fourth Amendment Claim  
Citizen Alleging Excessive Force**

In this case the Plaintiff claims that the Defendants, while acting "under color" of state law, intentionally deprived the Plaintiff of the Plaintiff's rights under the Constitution of the United States. Specifically, the Plaintiff claims that while the Defendants were acting under color of state law as members of the Police Department of the City of Miami they intentionally violated the Plaintiff's constitutional right to be free from the use of excessive or unreasonable force during an arrest.

Under the Fourth Amendment to the Constitution of the United States, every citizen has the right not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer, even though the arrest is otherwise made in accordance with the law.

The law further provides that a person may sue in this Court for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates the Plaintiff's rights under the Constitution of the United States.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendants intentionally committed acts that violated the Plaintiff's federal constitutional right not to be subjected to excessive or unreasonable force during an arrest;

Second: That in so doing the Defendants acted "under color" of state law; and

Third: That the Defendants' acts were the proximate or legal cause of damages sustained by the Plaintiff.

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

In this case the parties have stipulated or agreed that the Defendants acted "under color" of state law and you should, therefore, accept that fact as proven.

The [first] aspect of the Plaintiff's claim is that excessive force was used by the Defendants in effecting the Plaintiff's arrest. In that regard, as previously mentioned, every person has the constitutional right not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer, even though such arrest is otherwise made in accordance with the law. On the other hand, in making a lawful arrest, an officer has the right to use such force as is reasonably necessary under the circumstances to complete the arrest. Whether a specific use of force is excessive or unreasonable turns on factors such as the severity of the crime, whether the suspect poses an immediate violent threat to others, and whether the suspect is resisting or fleeing. You must decide whether the force used in making an arrest was excessive or unreasonable on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances disclosed in this case.

If you should find for the Plaintiff and against the Defendants, you must then decide the issue of the Plaintiff's damages. For damages to be the proximate or legal result of a constitutional deprivation, it must be shown that, except for that constitutional deprivation, such damages would not have occurred.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they also cover both the mental and physical aspects of injury - - tangible and intangible.

Thus, no evidence of the value of such intangible things as physical or emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

**(a) The reasonable value of any property lost or destroyed during, or as a result of, the Defendant's unconstitutional acts;**

**(b) The reasonable cost of medical care and hospitalization;**

(c) Physical or emotional pain and mental anguish;

The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, you would be authorized to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts.

Eleventh Circuit Pattern Jury Instruction 2.2

Given \_\_\_\_\_

Denied \_\_\_\_\_

Modified \_\_\_\_\_

**2.2  
Civil Rights  
42 USC § 1983 Claims  
Fourth Amendment Claim  
Citizen Alleging  
Unlawful Arrest - Unlawful Search - Excessive Force**

**SPECIAL INTERROGATORIES<sup>ii</sup>  
TO THE JURY**

Do you find from the preponderance of the evidence:

1. That Defendant Belfort failed to intervene in the use of excessive or unreasonable force during an arrest?

Answer Yes or No: \_\_\_\_\_

2. That Defendant Chief of Police Manuel Orosa failed to establish adequate policies and procedures to prevent the unreasonable use of excessive or unreasonable force against Plaintiff?

Answer Yes or No: \_\_\_\_\_

3. That Defendant Chief of Police Manuel Orosa failed to train and/or supervise its officers to prevent the unreasonable use of excessive or unreasonable force against Plaintiff?

Answer Yes or No: \_\_\_\_\_

4. That Defendants spoiled any documents?

Answer Yes or No: \_\_\_\_\_

5. If your answer to question 4 is yes, that the spoliation of documents was in bad faith?

Answer Yes or No: \_\_\_\_\_

**6. *That Defendant Belfort was physically present when Plaintiff was arrested.***

***Answer Yes or No: \_\_\_\_\_***

**7. *That Defendant Belfort had physical contact with Plaintiff.***

***Answer Yes or No: \_\_\_\_\_***

SO SAY WE ALL.

\_\_\_\_\_  
Foreperson Signature

\_\_\_\_\_  
Foreperson Printed Name

\_\_\_\_\_  
Dated

**VERDICT**

**Do you find from a preponderance of the evidence:**

1. That the Defendant intentionally committed acts that violated the Plaintiff's federal constitutional right not to be subjected to excessive or unreasonable force during an arrest?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

2. That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

[Note: If you answered No to either Question No. 1 or Question No. 2, skip the remaining questions and have your foreperson sign this verdict form at the bottom of the next page.]

**3. That the Plaintiff should be awarded damages to compensate for the reasonable value of any property lost or destroyed during, or as a result of, the Defendant's unconstitutional acts?**

**DEFENDANT BEFLORT: Answer Yes or No** \_\_\_\_\_

**DEFENDANT CHIEF: Answer Yes or No** \_\_\_\_\_

**If your answer was Yes, in what amount? \$** \_\_\_\_\_

**4. That the Plaintiff should be awarded damages to compensate for the reasonable cost of medical care and hospitalization?**

**DEFENDANT BEFLORT: Answer Yes or No** \_\_\_\_\_

**DEFENDANT CHIEF: Answer Yes or No** \_\_\_\_\_

**If your answer was Yes, in what amount? \$** \_\_\_\_\_

5. That the Plaintiff should be awarded damages to compensate for physical as well as emotional pain and mental anguish?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

If your answer was Yes, in what amount? \$ \_\_\_\_\_

6. That the Defendant acted with malice or with reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant.

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

**DEFENDANT CHIEF: Answer Yes or No** \_\_\_\_\_

If your answer was Yes, in what amount? \$ \_\_\_\_\_

SO SAY WE ALL.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Foreperson

**PROPOSED JURY INSTRUCTION NO. 13**

**2.4.2<sup>iii</sup>  
Civil Rights  
42 USC § 1983 Claims  
Fourteenth Amendment Claim  
Pretrial Detainee Alleging Deliberate  
Indifference To Serious Medical Need**

In this case the Plaintiff claims that the Defendant, while acting under color" of state law, intentionally violated the Plaintiff's rights under the Constitution of the United States.

Specifically, the Plaintiff claims that while the Defendant was acting under color of state law as an employee of City of Miami Police Department, the Defendant intentionally violated the Plaintiff's right to due process of law under the Fourteenth Amendment to the Constitution.

More specifically, the Plaintiff claims that the Defendant was deliberately indifferent to the Plaintiff's serious medical needs in violation of the Plaintiff's right, as a pretrial detainee, to necessary medical care and attention.

Under the due process of law clause of the Fourteenth Amendment anyone who is arrested and detained under state law is entitled to necessary medical care. Thus, a police officer would violate that constitutional right if the officer is deliberately indifferent to an inmate's serious medical need.

A "serious medical need" is one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a lay person would easily recognize the necessity for prompt medical attention.

Notice, however, that deliberate or intentional conduct on the part of the officer is required before any violation of the Constitution occurs.

Mere negligence or a lack of reasonable care on the part of the officer is not enough; the Plaintiff must prove deliberate and intentional conduct resulting in a deprivation of the Plaintiff's constitutional rights.

In order to prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff had a "serious medical need," as previously defined;

Second: That the Defendant was aware of the Plaintiff's serious medical need;

Third: That the Defendant with deliberate indifference, failed to provide the necessary medical care;

Fourth: That in so doing the Defendant acted "under color" of state law; and

Fifth: That the Defendant's acts were the proximate or legal cause of the damages sustained by the Plaintiff.

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

With regard to the fourth required element of proof - - that the Defendant acted "under color" of state law - - that fact is not disputed in this case and you may accept that fact as proved.

With regard to the fifth required element of proof - - that the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff - - remember that for damages to be the proximate or legal result of a constitutional deprivation, it must be shown that, except for the constitutional deprivation, such damages would not have occurred.

If you find for the Plaintiff and against the Defendant, you will then consider the Plaintiff's claim for damages.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

- (a) Physical and emotional pain and mental anguish.
- (b) Nominal damages (as explained in these instructions); and
- (c) Punitive damages, if any (as explained in the Court's instructions)

You are authorized to award \$1 in nominal damages if you find for the Plaintiff but also find that Plaintiff's damages have no monetary value.

The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts.

Eleventh Circuit Pattern Jury Instruction 2.1

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**2.4.2**  
**Civil Rights**  
**42 USC § 1983 Claims**  
**Fourteenth Amendment Claim**  
**Pretrial Detainee Alleging Deliberate**  
**Indifference To Serious Medical Need**

**SPECIAL INTERROGATORIES<sup>iv</sup>**  
**TO THE JURY**

**Do you find from the preponderance of the evidence:**

1. That Defendant Chief of Police Manuel Orosa failed to establish adequate policies and procedures to prevent the deliberate indifference to Plaintiff's serious medical injuries?

Answer Yes or No: \_\_\_\_\_

2. That Defendant Chief of Police Manuel Orosa failed to train and/or supervise its officers to prevent the deliberate indifference to Plaintiff's serious medical injuries?

Answer Yes or No: \_\_\_\_\_

3. That Defendants spoiled any documents?

Answer Yes or No: \_\_\_\_\_

4. If your answer to question 3 is yes, that the spoliation of documents was in bad faith?

Answer Yes or No: \_\_\_\_\_

SO SAY WE ALL.

\_\_\_\_\_  
Foreperson Signature

\_\_\_\_\_  
Foreperson Printed Name

\_\_\_\_\_  
Dated

**VERDICT**

**Do you find from a preponderance of the evidence:**

1. That the Plaintiff had a “serious medical need,” as defined in the Court’s instructions?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

2. That the Defendant was aware of the Plaintiff’s serious medical need?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

3. That the Defendant was deliberately indifferent to the Plaintiff’s serious medical need?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

Note: If you answered No to Question No. 1, 2 or 3, skip the remaining questions and have your foreperson sign this verdict form at the bottom of the next page.

4. That the Defendant’s acts were the proximate or legal cause of the damages sustained by the Plaintiff?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

5. That the Plaintiff should be awarded damages to compensate for physical as well as emotional pain and mental anguish?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

If you answered Yes, in what amount? \$\_\_\_\_\_

6. That the Plaintiff should be awarded \$1 in nominal damages?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

DEFENDANT CHIEF: Answer Yes or No \_\_\_\_\_

7. That the Defendant acted with malice or reckless indifference to the Plaintiff’s federally protected rights and that punitive damages should be assessed against the Defendant?

DEFENDANT BEFLORT: Answer Yes or No \_\_\_\_\_

**DEFENDANT CHIEF: Answer Yes or No** \_\_\_\_\_

If you answered Yes, in what amount? \$ \_\_\_\_\_

SO SAY WE ALL.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Foreperson

**PROPOSED JURY INSTRUCTION NO. 14**

**NEGLIGENCE**

**In this case the Plaintiff claims that the Defendant acted negligently in his police duties that resulted in Plaintiff's injuries.**

**Mere negligence or a lack of reasonable care on the part of the officer is enough for this claim.**

**In order to prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:**

**First: That the Defendant had a "duty" of care in his police duties not to be negligent;**

**Second: That the Defendant breached this duty of care by failing to provide Plaintiff medical care;**

**Third: That the Defendant's acts were the proximate or legal cause of the damages sustained by the Plaintiff.**

**In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.**

**With regard to the third required element of proof - - that the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff - - remember that for damages to be the proximate or legal result of the negligent acts, it must be shown that, except for the Defendant's negligence, such damages would not have occurred.**

**If you find for the Plaintiff and against the Defendant, you will then consider the Plaintiff's claim for damages.**

**In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize**

the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

- (a) Physical and emotional pain and mental anguish.
- (b) Nominal damages (as explained in these instructions); and
- (c) Punitive damages, if any (as explained in the Court's instructions)

The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts.

**PROPOSED JURY INSTRUCTION NO. 15**

*If, however, the greater weight of the evidence supports Plaintiff's claim, then you shall consider the defense raised by the Defendant.*

*On that defense, the issue for you to decide is whether Plaintiff was himself negligent and, if so, whether that negligence was a contributing legal cause of injury or damage to Plaintiff.*

*If the greater weight of the evidence does not support the Defendant's defense and the greater weight of the evidence supports Plaintiff's claim, then your verdict should be for Plaintiff in the total amount of his damages.*

*If, however, the greater weight of the evidence shows that both Plaintiff and the Defendant were negligent and that the negligence of each contributed as a legal cause of loss, injury, or damage sustained by Plaintiff, you should decide and write on the verdict form, which I will give you at the end of the case, what percentage of the total negligence of both parties to this action was caused by each of them.*

*In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Plaintiff. The court will enter a judgment based on your verdict and, if you find that Plaintiff was negligent in any degree, the court, in entering judgment, will reduce the total amount of damages by the percentage of negligence, which you find was caused by Plaintiff.*

*Florida Standard Jury Instructions 401.22, 401.23, and 501.3*

*Given* \_\_\_\_\_

*Denied* \_\_\_\_\_

*Modified* \_\_\_\_\_

**VERDICT**

**Do you find from a preponderance of the evidence:**

Note: If you awarded damages to Plaintiff above for use of excessive force, then skip the remaining questions, and sign this verdict form at the bottom of the next page.

1. That the Defendant Belfort had a duty not to be negligent in his police duties?

Answer Yes or No \_\_\_\_\_

2. That Defendant Belfort breached his duty of care to Plaintiff?

Answer Yes or No \_\_\_\_\_

3. That the Plaintiff should be awarded damages?

Answer Yes or No \_\_\_\_\_

If you answered Yes, in what amount? \$\_\_\_\_\_

SO SAY WE ALL.

\_\_\_\_\_

Foreperson

DATED: \_\_\_\_\_

Given \_\_\_\_\_

Denied \_\_\_\_\_

Modified \_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 16**

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

In this case the Plaintiff claims that Defendant intentionally inflicted emotional distress.

In order to prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant acted with “intent” to inflict emotional distress or with reckless disregard of the high probability of causing severe emotional distress;

Second: That the Defendant engaged in outrageous conduct, i.e., behavior that goes beyond all possible bounds of decency and is regarded atrocious and utterly intolerable in a civilized community;

Third: That the Defendant’s acts were the proximate or legal cause of the damages sustained by the Plaintiff.

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

With regard to the third required element of proof - - that the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff - - remember that for damages to be the proximate or legal result of the intentional acts, it must be shown that, except for the Defendant’s intentional acts, such damages would not have occurred.

If you find for the Plaintiff and against the Defendant, you will then consider the Plaintiff's claim for damages.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

- (a) Physical and emotional pain and mental anguish.
- (b) Nominal damages (as explained in these instructions); and
- (c) Punitive damages, if any (as explained in the Court's instructions)

The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts.

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**VERDICT**

**Do you find from a preponderance of the evidence:**

1. That the Defendant Belfort deliberately or recklessly inflicted mental suffering upon Plaintiff?

Answer Yes or No \_\_\_\_\_

2. That Defendant Belfort engaged in outrageous conduct?

Answer Yes or No \_\_\_\_\_

3. That the Defendant Belfort's conduct caused the Plaintiff emotional distress?

Answer Yes or No \_\_\_\_\_

4. That the Plaintiff's emotional distress is severe?

5. That the Defendant Belfort acted with malice or reckless indifference to Plaintiff?

Answer Yes or No \_\_\_\_\_

6. That the Plaintiff should be awarded damages to compensate for his emotional pain and mental anguish?

Answer Yes or No \_\_\_\_\_

If you answered Yes, in what amount? \$\_\_\_\_\_

SO SAY WE ALL.

\_\_\_\_\_  
Foreperson

DATED:\_\_\_\_\_

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 17**

**BATTERY**

In this case the Plaintiff claims that Defendant intended to cause a harmful or offensive contact.

In order to prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant “intended” to cause harmful or offensive contact;

Second: That the Defendant’s offensive contact directly or indirectly resulted in severe medical injuries;

Third: That the Defendant’s acts were the proximate or legal cause of the damages sustained by the Plaintiff.

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

With regard to the third required element of proof - - that the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff - - remember that for damages to be the proximate or legal result of the intentional acts, it must be shown that, except for the Defendant’s intentional acts, such damages would not have occurred.

If you find for the Plaintiff and against the Defendant, you will then consider the Plaintiff's claim for damages.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

- (a) Physical and emotional pain and mental anguish.
- (b) Nominal damages (as explained in these instructions); and
- (c) Punitive damages, if any (as explained in the Court's instructions)

**The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.**

**If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.**

**If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts.**

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED SPECIAL INSTRUCTION NO. 18**

*Gerald Lelieve claims that punitive damages should be awarded against Officer Belfort for their conduct in committing a battery. Punitive damages are warranted against Officer Belfort if you find by clear and convincing evidence that Officer Belfort was guilty of intentional misconduct or gross negligence, which was a substantial cause of loss, injury, or damage to Gerald Lelieve. Under those circumstances, you may, in your discretion, award punitive damages against Officer Belfort. If clear and convincing evidence does not show such conduct by Officer Belfort, punitive damages are not warranted against Officer Belfort.*

*“Intentional misconduct” means that Officer Belfort had actual knowledge of the wrongfulness of the conduct and that there was a high probability that injury or damage to Gerald Lelieve and, despite that knowledge, he intentionally pursued that course of conduct, resulting in injury or damage. “Gross negligence” means that Officer Belfort’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.*

*“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive. As I have already instructed you, “greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.*

*If you decide that punitive damages that are warranted against Officer Belfort then you must decide the amount of punitive damages, if any, to be assessed as punishment against Officer Belfort and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should consider the following:*

*(1). The nature, extent and degree of misconduct and the related circumstances, including the following:*

*(A) whether the wrongful conduct was motivated solely by unreasonable financial gain;*

*(B) whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by Officer Belfort;*

*© whether, at the time of loss, injury or damage, Officer Belfort had a specific intent to harm Gerald Lelieve and the conduct of Officer Belfort did in fact harm Gerald Lelieve, and*

*(2) the financial resources of Officer Belfort.*

*However, you may not award an amount that would financially destroy Officer Belfort.*

*You may in your discretion decline to assess punitive damages.*

*Florida Standard Jury Instructions in Civil Cases: 503.2*

*Given* \_\_\_\_\_

*Denied* \_\_\_\_\_

*Modified* \_\_\_\_\_

**VERDICT**

**Do you find from a preponderance of the evidence:**

1. That the Defendant Belfort intended to cause a harmful or offensive contact by using excessive force or failing to intervene?

Answer Yes or No \_\_\_\_\_

2. That Defendant Belfort's offensive contact directly or indirectly resulted in severe medical injuries?

Answer Yes or No \_\_\_\_\_

3. That Defendant Belfort acted with malice or reckless indifference?

Answer Yes or No \_\_\_\_\_

4. That the Plaintiff should be awarded damages?

Answer Yes or No \_\_\_\_\_

If you answered Yes, in what amount? \$ \_\_\_\_\_

SO SAY WE ALL.

\_\_\_\_\_  
Foreperson

DATED: \_\_\_\_\_

Given \_\_\_\_\_

Denied \_\_\_\_\_

Modified \_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 19**

**7.1  
Duty To Deliberate  
When Only The Plaintiff Claims Damages**

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Eleventh Circuit Pattern Jury Instruction 7.1

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 20**

**8**

**Election Of Foreperson  
Explanation Of Verdict Form(s)**

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

Eleventh Circuit Pattern Jury Instruction 8

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED JURY INSTRUCTION NO. 21**

**9<sup>v</sup>**

**Civil Allen Charge**

Members of the jury, I'm going to ask that you continue your deliberations in an effort to reach agreement upon a verdict and dispose of this case; and I have a few additional thoughts or comments I would like for you to consider as you do so.

This is an important case. The trial has been expensive in terms of time, effort, money and emotional strain to both the plaintiff and the defense. If you should fail to agree on a verdict, the case is left open and may have to be tried again. A second trial would be costly to both sides, and there is no reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you.

Any future jury would be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to a jury of people more conscientious, more impartial, or more competent to decide it or that more or clearer evidence could be produced on behalf of either side.

As stated in my previous instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced it is wrong. To bring your minds to a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard to the opinions of others and with a disposition to reexamine your own views.

If a substantial majority of your number are for a verdict for one party, each of you who hold a different position ought to consider whether your position is a reasonable one since it makes so little impression upon the minds of so many equally honest and conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and consider all the evidence in the case bearing upon the questions before you in light of the court's instructions on the law.

You may be as leisurely in your deliberations as the occasion may require and you may take all the time that you may feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given to you as a whole. You should not single out any part of any instruction, including this one, and ignore others.

You may now retire and continue your deliberations.

Eleventh Circuit Pattern Jury Instruction 9

Given\_\_\_\_\_

Denied\_\_\_\_\_

Modified\_\_\_\_\_

**PROPOSED SPECIAL INSTRUCTION NO. 1<sup>vi</sup>**

**If you find that the City of Miami, its agents or police officers destroyed or withheld evidence that was within their control, in bad faith, you may infer that the missing or withheld evidence would have been unfavorable to the government and favorable to the defendant had it been preserved or provided.**

**<sup>i</sup> ANNOTATIONS AND COMMENTS**

In *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that municipalities may not be held liable under Section 1983 on a theory of respondeat superior, but may only be held liable for the execution of a government policy or custom. [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. *Id.* at 694, 98 S.Ct. at 2037-38. To establish a policy or custom, the Plaintiff must show a persistent and widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a custom or usage with the force of law." In other words, a longstanding and widespread practice is deemed authorized by the policymaking officials because

they must have known about it but failed to stop it." *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir. 1991) (internal citations omitted); *Cuesta v. School Board of Miami-Dade County*, 285 F.3d 962, 966 (11th Cir. 2002). Later, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the Supreme Court modified the "policy or custom" requirement to include "a single decision by municipal policy makers under appropriate circumstances." *Id.* at 480, 106 S.Ct. at 1298. Specifically, "where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly," provided that "the decision maker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 481, 106 S.Ct. at 1299.

Also, in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed. 2d 107

(1988), the Supreme Court held that a municipal official does not have final policy making authority over a matter when that official's decisions are subject to meaningful administrative review. The Eleventh Circuit has held that: [T]he mere delegation of authority to a subordinate to exercise discretion is not sufficient to give the subordinate policy-making authority. Rather, the delegation must be such that the subordinate's

202 discretionary decisions are not constrained by official policies and are not subject to review. *Mandel v. Doe*, 888 F.2d 783, 792 (11 Cir. th 1989) (citing *City of St. Louis v.*

*Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)). See also *Matthews v. Columbia County*, 294 F.3d 1294, 1297 (11th Cir. 2002); *Brown v. Neumann*, 188 F.3d 1289, 1291 (1999); *Scala v. City of Winter Park*, 116 F.3d 1396, 1399-1400 (11th Cir. 1997). A private entity may become the functional equivalent of the municipality when it

contracts with the municipality to perform functions traditionally within the exclusive prerogative of the State and therefore, may enjoy the protections afforded by Monell

and its progeny. *Buckner v. Toro*, 116 F.3d 450 (11th Cir.1997). In cases where a plaintiff presents a § 1983 claim against a municipality based on a hiring decision and inadequate screening of the particular municipal employee who caused the plaintiff's injury, the Supreme Court has stated the following: Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute deliberate indifference." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 411, 117 S.Ct. 1382, 1392, 137 L.Ed.2d 626 (1997). "It is not sufficient under this standard that a municipal actor's inadequate screening of an applicant's record reflects an 'indifference' to the applicant's background." *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1313 (11th Cir. 2001). "Rather a plaintiff must demonstrate that the municipal hiring decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Id.* "[C]ulpability simply cannot depend on the mere probability that any officer inadequately screened

will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff.” *Brown*, 520 U.S. at 412, 117 S.Ct. at 1392 (emphasis in original).

ii ANNOTATIONS AND COMMENTS

See the Annotations and Comments following Federal Claims Instruction 2.1, *supra*.

In *Graham v. M.S. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court held that all claims of excessive force against law enforcement an individual’s person are properly analyzed under the Fourth Amendment’s “objective reasonableness” standard, rather than under the substantive due process standard applied in pre-1989 cases like *Gilmer v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985), abrogation recognized by *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000).

The *Graham* Court re-emphasized that a “seizure” triggering the Fourth Amendment’s protections occurs only when government actors have, “by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.” *Id.*, 490 U.S. at 395 n. 10, 109 S.Ct. at 1871 n. 10 (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968)). The court left unanswered the question of whether the Fourth Amendment continues to protect individuals against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins. However, the court did state that the Due Process Clause clearly protects a pretrial detainee from the use of excessive force that amounts to punishment, and that the Eighth Amendment is the primary source of protection for post-conviction incidents of excessive force. *Id.*; *Bell v. Wolfish*, 441 U.S. 520, 535-39, 99 S.Ct. 1861, 1871-74, 60 L.Ed.2d 447 (1979); *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

In the Eleventh Circuit, “[c]laims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment’s Due Process Clause, instead of the Eighth Amendment’s Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners.” *Lumley v. City of Dade City, Fla.*, 327 F.3d 1186, 1196 (11th Cir. 2003) (quotes and cite omitted); see also *Whiting v. Tunica County*, 222 F.Supp.2d 809, 822-23 (N.D. Miss. 2002) (collecting circuit-split cases); 3B Fed. Jury Prac. & Instr. § 165.20 at 601 (5th ed. 2001). Accordingly, this instruction deals with the case in which a citizen is the complainant. Federal Claims Instruction 2.3.1, *infra*, deals with the case in which a convicted inmate is the complainant (asserting a claim under the Eighth Amendment); and Federal Claims Instruction 2.4.1, *infra*, deals with the case in which a pretrial detainee is the complainant (asserting a claim under the Due Process Clause of the Fourteenth Amendment).

Where a case is litigated under the first two sections of the foregoing pattern charge (i.e., that the plaintiff was seized or arrested and/or unreasonably searched without probable cause), a “pretext” instruction may be warranted. See *Arkansas v. Sullivan*, 532 U.S. 769, 772, 121 S.Ct. 1876, 1878, 149 L.Ed.2d 994 (2001) (so long as arrest is supported by probable cause, the Fourth Amendment is not violated, even if the officer had a pretextual subjective motive for stopping the driver for speeding); *U. S. v. Bookhardt*, 277 F.3d 558, 565 (D.C. Cir. 2002) (even if the stop is a pretext for a search, the officer’s subjective intent is irrelevant so long as there was probable cause to believe the driver had committed a traffic violation); *U. S. v. Dhinsa*, 171 F.3d 721, 724-25 (2d Cir. 1998) (officer’s use of traffic violation as pretext to stop car in order to obtain evidence of more serious crime is of no constitutional significance).

If this charge is adapted for use in automobile-search cases, consider instructing that the Fourth Amendment’s protections against “unreasonable searches and seizures” include searches conducted during “brief investigatory stops of persons or vehicles that fall short of traditional arrest.” *U. S. v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 750, 151 L.Ed.2d 740 (2002). But searches can follow arrests for minor offenses - - even those that are punishable only by a fine. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 1557, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) (upholding custodial arrest for traffic violations); see also *Brookins v. Rafferty*, 59 Fed.Appx. 983 (9th Cir. 2003) (“window-tint” violation). And “[t]he existence of probable cause . . . is an absolute bar to a section 1983 action for false arrest.” *Marx v. Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir. 1990). Nominal damages are also available in this context. *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996) (nominal damages available to remedy Fourth Amendment excessive force claim); *Dawkins v. Huffman* 25 Fed. Appx. 107 (4th Cir. 2001) (District Court was required to award nominal damages in § 1983 action in which plaintiff established violation of his Fourth Amendment rights, but did not prove actual injury); *Shain v. Ellison* 273 F.3d 56, 67 (2d Cir. 2001); 3B Fed. Jury Prac. & Instr. § 166.61 (5th ed. 2001). But they should not exceed \$1.00, *Carey v. Phipus*, 435 U.S. 247, 267, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978); *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980), and are

waivable. See *Oliver v. Falla*, 258 F.3d 1277, 1282 (11th Cir. 2001) (waived by failing to request nominal damages instruction or object to lack of such an instruction).

### iii ANNOTATIONS AND COMMENTS

In the Eleventh Circuit, “[c]laims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment’s Due Process Clause, instead of the Eighth Amendment’s Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners.” *Lumley v. City of Dade City, Fla.*, 327 F.3d 1186, 1196 (11th Cir. 2003) (quotes and cite omitted). “However, the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees.” *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996); *Lancaster v. Monroe County*, 116 F.3d 1419, 1425 n.6 (11th Cir. 1997). Therefore, consult the Annotations to Pattern Instruction 2.3.1, *supra*. In contrast to the preceding “excessive-force” pattern instructions, *supra*, this charge assumes that the detainee will be able to show a substantial enough injury to qualify for “mental anguish” (hence, emotional-injury based) damages. Otherwise, such claims are barred by 42 USC § 1997e(e) (“[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury”).

Medical neglect can constitute a § 1997e(e) physical injury. See *Sealock v. Colorado*, 218 F.3d 1205, 1210-11 (10th Cir. 2000) (where inmate alleged that sergeant was deliberately indifferent to his need for medical attention, heart attack satisfied § 1997e(e)’s physical injury requirement even though inmate presented no evidence that delay caused by sergeant resulted in any damage to his heart; where jury could find the delay prolonged inmate’s pain and suffering); *Wolfe v. Horn*, 130 F.Supp.2d 648, 658 (E.D. Pa. 2001) (§ 1997e(e) physical injury requirement satisfied where pre-operative transsexual inmate alleged that after her hormone therapy was withdrawn, she suffered headaches, nausea, vomiting, cramps, hot flashes and hair loss and that with the re-emergence of masculine physical characteristics (reduced breast size, increased body hair and lowered voice pitch), she became depressed and suicidal); *Cole v. Artuz*, No. 97CIV.0977(RWS), 2000 WL 760749 at \*2,\*4 n.2, \*5 (S.D.N.Y. June, 12, 2000) (unpublished) (back condition “requiring aggressive treatment, therapy and most likely, surgery” satisfied § 1997e(e)’s physical injury requirement).

But de minimis injuries do not make the grade. See *Siglar v. Hightower*, 112 F.3d 191, 193-94 (5th Cir. 1997) (a sore bruised ear lasting for three days did not constitute a physical injury as required to state a claim for excessive force); *Luong v. Hatt*, 979 F.Supp. 481, 486 (N.D. Tex. 1997) (sore muscles, scratches, abrasions and bruises did not constitute a “physical injury” within the meaning of § 1997e(e)). Note that § 1997e(e) analysis is fused with Eighth and Fourteenth Amendment analysis here. See *Harris v. Garner*, 190 F.3d 1279 (11th Cir.), vacated by 197 F.3d 1059 (11th Cir. 1999), reinstated in relevant part by 216 F.3d 970 (11th Cir. 2000); accord *Siglar*, 112 F.3d at 193 (Absent any definition of “physical injury” in § 1997e(e), court will be guided by established Eighth Amendment standards in determining whether prisoner has sustained necessary physical injury to support claim for mental or emotional suffering, and, thus, injury must be more than de minimis, but need not be significant).

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See the Annotations and Comments following Federal Claims Instruction 2.1, *supra*.

In *Graham v. M.S. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court held that all claims of excessive force against law enforcement an individual’s person are properly analyzed under the Fourth Amendment’s “objective reasonableness” standard, rather than under the substantive due process standard applied in pre-1989 cases like *Gilmer v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985), abrogation recognized by *Nolin v. Isbell*, 207 F.3d 1253 (11<sup>th</sup> Cir. 2000).

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primary source of protection for post-conviction incidents of excessive force. *Id.*; *Bell v. Wolfish*, 441 U.S. 520, 535-39, 99 S.Ct. 1861, 1871-74, 60 L.Ed.2d 447 (1979); *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

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Where a case is litigated under the first two sections of the foregoing pattern charge (i.e., that the plaintiff was seized or arrested and/or unreasonably searched without probable cause), a “pretext” instruction may be warranted. See *Arkansas v. Sullivan*, 532 U.S. 769, 772, 121 S.Ct. 1876, 1878, 149 L.Ed.2d 994 (2001) (so long as arrest is supported by probable cause, the Fourth Amendment is not violated, even if the officer had a pretextual subjective motive for stopping the driver for speeding); *U. S. v. Bookhardt*, 277 F.3d 558, 565 (D.C. Cir. 2002) (even if the stop is a pretext for a search, the officer’s subjective intent is irrelevant so long as there was probable cause to believe the driver had committed a traffic violation); *U. S. v. Dhinsa*, 171 F.3d 721, 724-25 (2d Cir. 1998) (officer’s use of traffic violation as pretext to stop car in order to obtain evidence of more serious crime is of no constitutional significance).

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#### <sup>v</sup> **ANNOTATIONS AND COMMENTS**

This proposed instruction was derived largely from Kevin F. O’Malley, Jay E. Grenig & Hon. William C. Lee, *Federal Jury Practice and Instructions* § 106.09 and § 106.10 (5th ed. 2000).

The former Fifth Circuit approved of the use of civil Allen charges in *Brooks v. Bay State Abrasive Products, Inc.*, 516 F.2d 1003, 1004 (5th Cir. 1975), which was cited in *U.S. v. Chigbo*, 38 F.3d 543, 546 (11th Cir. 1994). In *Brooks*, the court stated that it has approved the use of an Allen charge if it makes clear to members of the jury that (1) they are duty bound to adhere to honest opinions; and (2) they are doing nothing improper by maintaining a good faith opinion even though a mistrial may result.

<sup>vi</sup> *Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997); *Martinez v. Brinks, Inc.*, 410 F.Supp.2d 1202 (S.D.Fla. 2004); *Ritchie v. United States*, 451 F.3d 1019 (9th Cir. 2006); *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005); *United States v. Wise*, 221 F.3d 140 (5th Cir. 2000); and *United States v. Woodall*, 438 F.2d 1217 (5th Cir. 1971)(en banc).

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO, et al.,

Defendants.

\_\_\_\_\_ /

**DEFENDANTS' SUPPLEMENT TO MOTION IN LIMINE**

Defendants Belfort and Orosa, by and through undersigned counsel, and pursuant to the Local Rule 7.1, hereby files this supplement to their motion *in limine* [ECF no. 97]. Through inadvertence and oversight, Defendants' neglected to include their certificate of good faith conference with opposing counsel in the body of their motion.

**CERTIFICATE OF GOOD FAITH CONFERENCE**

Pursuant to Local Rule 7.1, undersigned counsel for the moving parties certifies that he has made reasonable efforts to confer with Plaintiff's counsel to resolve the issues raised in the Defendants' motion *in limine*. The reasonable efforts were made via telephone communications with Diane Zelmer who indicated she opposes the exclusion of evidence sought in Defendants' motion in limine.

By: **s/ Christopher Green**  
Christopher A. Green  
Florida Bar No. 957917

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on February 7, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: **s/ Christopher Green**  
Christopher A. Green  
Assistant City Attorney  
Florida Bar No. 957917

**SERVICE LIST**

**Christopher Green, Esq.**

Assistant City Attorney  
Counsel for Defendants  
City of Miami City Attorney's Office  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, Florida 33130  
(305) 416-1800 Telephone  
(305) 416-1801 Fax  
[cagreen@miamigov.com](mailto:cagreen@miamigov.com)  
Via notice of electronic filing

**Diane J. Zelmer, Esq.**

Counsel for Plaintiff  
150 North Federal Highway, Suite 230  
Fort Lauderdale, Florida 33301  
(954) 400-5055 Telephone  
(954) 916-7855 Fax  
[dzelmer@zelmerlaw.com](mailto:dzelmer@zelmerlaw.com)  
Via notice of electronic filing