

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-23821-CIV-SEITZ
MAGISTRATE JUDGE P. A. WHITE

PERMON THOMAS, :

Plaintiff, :

v. :

ASST. WARDEN SHONEY, et al., : PRELIMINARY REPORT
OF MAGISTRATE JUDGE

Defendants. :

I. Introduction

The plaintiff, Permon Thomas, filed a pro se civil rights suit pursuant to 42 U.S.C. §1983, with multiple exhibits.¹ The plaintiff, confined in Charlotte Correctional Institution in Punta Gorda, Florida, is proceeding in forma pauperis. He seeks monetary damages.

This civil action is before the Court for screening of the complaint (DE#1) pursuant to 28 U.S.C. §1915.

II. Analysis

A. Applicable Law for Screening

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

Sec. 1915 Proceedings in Forma Pauperis

¹ The plaintiff has included medical records and grievances. Those exhibits may only be referred to pursuant to the filing of a motion for summary judgment and were not relied upon in this initial review.

* * *

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

* * *

(B) the action or appeal -

* * *

(i) is frivolous or malicious;

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

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

This is a civil rights action Pursuant to 42 U.S.C. §1983. Such actions require the deprivation of a federally protected right by a person acting under color of state law. See 42 U.S.C. 1983; Polk County v Dodson, 454 U.S.312 (1981); Whitehorn v Harrelson, 758 F. 2d 1416, 1419 (11 Cir. 1985. The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). A complaint

is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

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

the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred.²

B. Factual Analysis - Initial Complaint

The plaintiff names as defendants the following: Classification Officer Tate of the South Florida Reception Center, Dade Correctional Warden Churchwell, along with Officers Rivera and Urbina, Correctional Services Administrator Evelyn Garst, employed at Tallahassee, Regional Director Mart Villacora, along with John Does, and Assistant Warden Shoney, whose addresses are unknown.

The Court takes judicial notice that the plaintiff filed a prior civil rights complaint, Case No. 10-80979-Civ-Ryskamp, in which he related that he underwent total knee replacement at Larkin Hospital in 2009, and that the defendants have denied him medical treatment and destroyed his medical records, causing his medical condition to worsen, in retaliation for filing a prior lawsuit in Case no. 08-21951-Civ-Altonaga, in which he also alleged denial of adequate medical treatment by Dr. Poveda. A Report recommending that Summary Judgment be granted in Dr. Poveda's favor remains pending.

² The application of the Twombly standard was clarified in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

C. Facts in this case

The gravamen of this complaint is the alleged unconstitutional actions of the defendants before the plaintiff received his total knee replacement. He suffered from sever osteoarthritis in his right knee, chronic tears in the anterior and posterior meniscus and degenerative changes in the knee. Defendants Tate, Rivera, Urbina, John Does, and Assistant Warden Shoney refused to honor plaintiff's no work medical pass. They relegated him to a job assignment, thus forcing him to work against doctors' orders, resulting in infliction of cruel and unusual punishment in violation of the Eighth Amendment.

He further alleges that Warden Churchwell, Villacorta, and Garst failed to intervene in the actions of Tate, Rivera and Urbina forcing him to work against doctors' orders, and failed to train their subordinates.

More specifically, the plaintiff alleges that Dr. Poveda, under an Orthopedist's direction, wrote a no work pass for the plaintiff. He contends that as early as December 30, 2008, he advised Rivera, Tate and Urbina of the medical pass and his orders not to work, walk or stand over 5 minutes. The three defendants insisted he be assigned to light duty on the inside grounds and refused to comply with the no work pass. He reported to work the next day and advised Dr. Poveda, who told him he would straighten out the situation. In January of 2009, he was ordered to work as a houseman by the three named defendants. Once again, he showed them the no work pass and they told him to have it altered to light duty. He then had to clean the dorm while in severe pain, until his next reassignment. In February of 2009, he was reassigned as a law clerk. The defendants told him he had to work or could not

accumulate gain time. He either had to work in light duty or be placed in confinement. As a law clerk, he had to pull books off shelves, and walk back and forth while in pain. In March of 2009, he was assigned as a houseman by Tate, Shoney and John Does, despite the severe knee pain and upcoming knee surgery.

He sent a letter to Villacorta in March of 2009. Villacorta wrote him two letters saying he was not to have a job assignment, however he states his situation remained unchanged.

Defendant Garst wrote him a response in 2009, informing him that Health Services would review his medical issues, but that he was to remain as a law clerk, as the Institutional Classification Team deemed the assignment appropriate. He fell in the dorm on June 24, 2009, and twisted his already injured knee, resulting in his being placed in a wheelchair. On July 8, 2009, he underwent total knee replacement.

C. Sufficiency of the complaint

Defendants Churchwell, Garst and Villacorta

Defendants Warden Churchwell, Evelyn Garst and Marta Villacorta are named for their supervisory positions. They are named for their failure to intervene in the acts of their subordinates and failure to train their employees. These defendants cannot be sued for liability merely for an improper or even unconstitutional act of their employees under a theory of respondeat superior. Supervisory liability requires a causal connection between actions of the supervisory official and an alleged deprivation [for example, a showing of knowledge of a history of abuses and failure to take corrective action]. Byrd v. Clark, supra at 1008. Or there must be proof that the alleged

injuries resulted from an official custom, policy, or practice. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); Mandel v. Doe, 888 F.2d 782 (11 Cir. 1989). The plaintiff bears the burden of establishing a causal link between a government policy or custom and the injury which is alleged. Byrd v. Clark, 783 F.3d 1002, 1008 (11 Cir. 1986)(citing Monell, supra). His conclusory statements that it is the defendants' custom and policy to ignore medical passes are simply too conclusory to state a claim against these defendants. See also; Ashcroft v Iqbal, supra. (Heightened pleading standard for supervisory liability).

The plaintiff claims a more direct involvement by Villacorta, who wrote two letters to him in March of 2009, in response to his grievances, advising him he was to be unassigned until further instructions concerning his medical situation. The fact that his situation was not resolved does not demonstrate that Villacorta deliberately ignored his medical situation or failed to attempt to intervene on his behalf. This defendant should be dismissed.

Defendant Garst also addressed his grievances and told him the issues would be reviewed to insure there was no conflict between his medical passes and job assignment. Again, this fails to demonstrate deliberate indifference on the part of Defendant Garst, and she should be dismissed.

Further, it is noted that failure to respond to, or a denial of grievances, in and of itself, does not rise to a constitutional level so as to constitute a denial of due process. This is because the Constitution does not entitle prisoners and pretrial detainees in state or federal facilities to grievance procedures, Adams v. Rice, 40 F.3d 72, 75 (4 Cir. 1994), cert. denied 514 U.S. 1022 (1995); Buckley v. Barlow, 997 F.2d 494, 495 (8 Cir. 1993); Flick

v. Alba, 932 F.2d 728, 729 (8 Cir. 1991); Stewart v. Block, 938 F.Supp. 582, 588 (C.D. Cal. 1996); Brown v. Dodson, 863 F.Supp. 284, 285 (W.D. Va. 1994); and since even if a grievance mechanism has been created for the use of state inmates, the mechanism involves a procedural right, not a substantive one, and it does not give rise to a liberty interest protected by the Due Process Clause, Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7 Cir. 1996); Hoover v. Watson, 886 F.Supp. 410, 418 (D.Del. 1995); Brown v. Dodson, supra at 285. Thus, if the state elects to provide a grievance mechanism, violations of its procedures, or even a failure to respond to the prison grievance, do not give rise to a §1983 claim, Buckley v. Barlow, supra, 997 F.2d at 495; Hoover v. Watson, supra, 886 F.Supp. at 418-19. When the claim underlying the administrative grievance involves a constitutional right, the prisoner's right to petition the government for redress is the right of access to the courts, which is not compromised by an administrative refusal to entertain his grievance. Flick v. Alba, supra, 932 F.2d at 729. Here, the plaintiff has had responses to his grievances in the form of attempts at positive intervention, as well as access to the courts.

Denial of Medical Care

The Eighth Amendment prohibits any punishment which violates civilized standards of decency or "involve[s] the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173(1976)); see also Campbell v. Sikes, 169 F.3d 1353, 1363 (11 Cir. 1999). "However, not 'every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.'" McElligott v. Foley, 182 F.3d 1248, 1254 (11 Cir. 1999) (citation omitted). An Eighth Amendment claim contains both

an objective and a subjective component. Taylor v. Adams, 221 F.3d 1254, 1257 (11 Cir. 2000); Adams v. Poag, 61 F.3d 1537, 1543 (11 Cir. 1995). First, a plaintiff must set forth evidence of an objectively serious medical need. Taylor, 221 F.3d at 1258; Adams, 61 F.3d at 1543. Second, a plaintiff must prove that the prison official acted with an attitude of "deliberate indifference" to that serious medical need. Farmer, 511 U.S. at 834; McElligott, 182 F.3d at 1254; Campbell, 169 F.3d at 1363. The objective component requires the plaintiff to demonstrate that he has been subjected to specific deprivations that are so serious that they deny him "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981); see also Hudson v. McMillian, 503 U.S. 1, 8-9 (1992).

A serious medical need is considered "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Hill v. DeKalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1187 (11 Cir. 1994) (quotation marks and citation omitted). The subjective component requires the plaintiff to demonstrate that the prison officials acted wantonly, with deliberate indifference to the plaintiff's serious needs. See Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson v. Seiter, 501 U.S. 294, 298-99 (1991). Deliberate indifference is the reckless disregard of a substantial risk of serious harm; mere negligence will not suffice. Id. at 835-36. Consequently, allegations of medical malpractice or negligent diagnosis and treatment fail to state an Eighth Amendment claim of cruel and unusual punishment. See Estelle, 429 U.S. at 106. The inadvertent or negligent failure to provide adequate medical care "cannot be said to constitute 'an unnecessary and wanton infliction of pain.'" Estelle, 429 U.S. at 105-06; Wilson, 501 U.S. at 298.

Further to rise to a level of an Eighth Amendment violation the plaintiff must demonstrate inhumane conditions of confinement. Farmer v Brennan, 511 U.S., 825 (1994), These conditions must show a deprivation of a normal civilized measure of life's necessities, see Toney v Fuqua, 09 WL 1451645 (11 Cir. 2009) (denial of tooth paste and tooth brush for a period of time did not rise to an Eighth Amendment violation).

Deliberate indifference can be established by evidence that necessary medical treatment has been withheld or delayed for non-medical or unexplained reasons. Farrow v West, 320 F.3d 1235, 1247 (11th Cir.2003) (finding jury question on issue of deliberate indifference because of unexplained fifteen-month delay in treatment). The tolerable length of delay in providing medical attention depends on the nature of the medical need and the reason for the delay. Harris v. Coweta County, 21 F.3d 388, 393-94 (11 Cir. 1994). A plaintiff may also establish deliberate indifference with evidence of treatment "so cursory as to amount to no treatment at all." Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11 Cir. 1985). If prison officials delay or deny access to medical care or intentionally interfere with treatment once prescribed, they may violate the Eighth Amendment. Estelle, 429 U.S. at 104.

The plaintiff has stated a claim against Tate, Urbina, Rivera, Shoney, and at least one John Doe. It appears from the initial statement of facts that despite the fact that the plaintiff was diagnosed with osteoarthritis in the right knee on December 5, 2008, and X-rays showed severe degenerative changes, the defendants refused to recognize his condition. His condition was severe enough so that an Orthopedist recommended total knee replacement, which the plaintiff subsequently received in 2009. During the time

between diagnosis and the knee replacement it appears that the above defendants consistently ignored Dr. Poveda's no work pass and assigned the plaintiff to work that was painful for him and caused further injury.

It is therefore recommended that at this preliminary stage, the complaint proceed against these defendants on the claim of deliberate indifference to plaintiff's serious medical condition.

The plaintiff names the defendants in their official and individual capacities. A §1983 suit against the defendant in his official capacity is tantamount to a suit against the State, and thus the defendant would be immune from monetary damages based upon the Eleventh Amendment. Gamble v. Fla. Dept. of Health and Rehabilitative Services, 779 F.2d 1509, 1512-13 (11 Cir. 1986). The allegations of the complaint, however, state a classic case of an official acting outside the scope of his duties and in an arbitrary manner. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974). Under this construction of the complaint, this Court has jurisdiction over the defendant in his individual capacity.

Lastly, a determination of whether the defendants might be entitled to qualified immunity cannot be determined at this juncture or upon consideration of a motion to dismiss.

III. Recommendation

It is therefore recommended as follows:

1. The claim of denial of adequate medical treatment shall proceed against Tate, Rivera, Urbina and Warden Shoney.

2. The plaintiff must provide a specific address for Warden Shoney or he shall be dismissed.

3. The plaintiff may file an amended complaint naming specific John Does, their addresses and each defendants actions which violated the plaintiff's constitutional rights.

4. The case shall be dismissed against Defendants Warden Churchwell, Evelyn Garst, and Marta Villacorta for failing to state a claim against these defendants.

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

Dated this 22nd day of November, 2011.



UNITED STATES MAGISTRATE JUDGE

cc: Permon Thomas, Pro Se
Charlotte Correctional Facility
Address of record

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

Case No.: 11-CV-23821-RYSKAMP/WHITE

PERMON THOMAS,

Plaintiff,

v.

ASST. WARDEN SHONEY et al.,

Defendants.

**ORDER ADOPTING REPORT AND RECOMMENDATIONS
OF MAGISTRATE JUDGE**

THIS CAUSE comes before the Court on the report and recommendations of United States Magistrate Judge Patrick A. White [DE 9] entered on November 22, 2011. The Magistrate's report was issued after an initial screening of the complaint [DE 1] conducted pursuant to 28 U.S.C. § 1915. Plaintiff filed objections to the Magistrate's report [DE 15] on December 23, 2011. This matter is ripe for adjudication.

The Court has conducted a *de novo* review of the report, objections, and pertinent portions of the record. Accordingly, it is hereby

ORDERED AND ADJUDGED that

- (1) The report of United States Magistrate Judge Patrick A. White [DE 9] be, and the same hereby is **RATIFIED, AFFIRMED and APPROVED** in its entirety;

- (2) Plaintiff's claims for denial of adequate medical treatment shall proceed against defendants Officer Tate, Javier Rivera, Captain Urbina, and Assistant Warden Shoney;
- (3) Plaintiff must provide a specific address for Assistant Warden Shoney or he shall be dismissed;
- (4) Plaintiff's claims against defendants Warden Churchwell, Evelyn Garst, and Marta Villacorta are **DISMISSED** for failure to state a claim;
- (5) Plaintiff may file an amended complaint naming specific John Does, their addresses, and each defendant's actions which violated Plaintiff's constitutional rights.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 14 day of February, 2012.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 11-23821-CIV-RYSKAMP
MAGISTRATE WHITE

PERMON THOMAS,

Plaintiff,

v.

ASST. WARDEN SHONEY, et al.,

Defendants,

**DEFENDANTS RIVERA AND TATE'S
ANSWER AND AFFIRMATIVE DEFENSES**

COMES NOW, Defendants, JAVIER RIVERA ("RIVERA") and BLONDELL TATE ("TATE") by and through undersigned counsel, pursuant to Fed. R. Civ. P. 8(b) and (c) hereby files this their Answer and Affirmative Defenses to Plaintiff' Complaint (D.E. #1) and states:

STATEMENT OF CLAIMS

A. Defendant denies paragraph labeled "A" including all subparts and demands strict proof thereof.

STATEMENT OF FACTS

1. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph one and therefore deny.

2. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph two and therefore deny.

3. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph three and therefore deny.

4. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph four and therefore deny.

5. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph five and therefore deny.

6. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph six and therefore deny.

7. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph seven and therefore deny.

TATE AND RIVERA

8. Defendant admits that Plaintiff was assigned by the I.C.T. team to Inside Grounds in December 2008. All remaining allegations in paragraph eight are denied.

9. Defendants deny the allegation in paragraph nine as written.

10. The allegation in paragraph ten does not pertain to Defendants TATE and RIVERA and therefore no response is required.

11. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph eleven and therefore deny.

12. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph twelve and therefore deny.

13. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph thirteen and therefore deny.

14. Defendants admit that Plaintiff was assigned by the I.C.T. team to houseman ON

January 7, 2009. All remaining allegations in paragraph fourteen are denied.

15. Defendants admit paragraph fifteen.

16. Defendants deny paragraph sixteen as written.

17. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph seventeen and therefore deny.

18. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph eighteen and therefore deny.

19. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph nineteen and therefore deny.

20. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph twenty and therefore deny.

21. Defendants deny paragraph twenty-one as written.

22. Defendants deny paragraph twenty-two as written.

23. Defendants deny paragraph twenty-three as written.

24. Defendants deny paragraph twenty-four as written.

25. Defendants deny paragraph twenty-five as written.

26. Defendants deny paragraph twenty-six as written.

27. Defendants deny paragraph twenty-seven.

28. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph twenty-eight and therefore deny.

29. Defendants deny paragraph twenty-nine as written.

30. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph thirty and therefore deny.

31. Defendants admit that Plaintiff was assigned as a houseman on March 25, 2009, all remaining allegations are denied as written.

32. Defendants deny paragraph twenty-three.

WARDEN CHURCHWELL

Paragraphs thirty-three through thirty-six does not pertain to Defendants and therefore no responsive is required.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants deny Plaintiff's allegations of exhaustion and demand strict proof thereof.

RELIEF

Defendants deny that Plaintiff is entitled to compensatory or punitive damages and demand strict proof thereof.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Further answering, and as the first affirmative defense, Defendants allege and aver that Defendants acted reasonably within the discretion of their position and the course and scope of their employment and did not violate any clearly established statutory or constitutional right of which a reasonable person would have known, and are therefore entitled to qualified immunity from suit.

SECOND AFFIRMATIVE DEFENSE

Further answering, and as the second affirmative defense, Defendants allege and aver that Plaintiff has failed to state a cause of action because Plaintiff cannot establish the deliberate indifference required at a minimum for liability under 42 U.S.C. § 1983.

THIRD AFFIRMATIVE DEFENSE

Further answering, and as the third affirmative defense, Defendants allege and aver that Plaintiff has failed to state a cause of action because negligence is not actionable under 42 U.S.C. § 1983.

FOURTH AFFIRMATIVE DEFENSE

Further answering and as the fourth affirmative defense, the Defendants would allege and aver that Plaintiff's complaint fails to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE

Further answering and as the fifth affirmative defense, both Defendants would allege and aver that Defendants did not act in any way that would violate any clearly established rights guaranteed to the Plaintiff under the Constitution

SIXTH AFFIRMATIVE DEFENSE

Further answering and as the sixth affirmative defense, Defendants would allege and aver that they are immune from suit pursuant to the Eleventh Amendment.

SEVENTH AFFIRMATIVE DEFENSE

Further answering and as the seventh affirmative defense, both Defendants would allege and aver that Defendants are entitled to the defense that the actions of the Plaintiff are the sole cause of his alleged damages.

EIGHTH AFFIRMATIVE DEFENSE

Further answering and as the ninth affirmative defense, both Defendants would allege and aver that that Plaintiff's claims for damages is barred pursuant to the Prison Litigation Reform Act of 1995 in that the Plaintiff has failed to exhaust his remedies via the inmate grievance procedure.

TENTH AFFIRMATIVE DEFENSE

Further answering and as the ninth affirmative defense, both Defendants would allege and aver that any recovery by the Plaintiff must be reduced to the extent of benefits paid or payable to the Plaintiff from all collateral sources, as well as the existence of any judgments or debts owed to the State of Florida, including those judgments or debts resulting from any criminal convictions.

ELEVENTH AFFIRMATIVE DEFENSE

Further answering and as the eleventh affirmative defense, Plaintiff cannot establish as a subjective matter, that the Defendant acted with a sufficiently culpable state of mind as required for liability under 42 U.S.C. §1983.

TWELFTH AFFIRMATIVE DEFENSE

Further answering and as the twelfth affirmative defense, Plaintiff has failed to state a claim for punitive damages because he has not alleged the type of conduct that would meet the standards set forth by Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 Led.2d 632 (1983).

THIRTEENTH AFFIRMATIVE DEFENSE

Further answering and as the thirteenth affirmative defense, these Defendants reserve the right to amend and supplement these affirmative defenses adding such additional affirmative defenses as may appear to be appropriate upon further discovery being conducted in this case.

WHEREFORE, having fully answered the Complaint, the Defendants RIVERA and TATE deny that the Plaintiff is entitled to the relief sought, or any relief whatsoever, and further

demand trial by jury of all issues so triable as of right by jury.

Respectfully submitted,

PAMELA BONDI
ATTORNEY GENERAL

S/ Kathleen M. Savor
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Attorney for Defendants Rivera
and Tate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served by U.S. mail on 21st Day of March, 2012 on all counsel or parties of record on the attached service list.

S/ Kathleen M. Savor
Kathleen M. Savor
Assistant Attorney General

SERVICE LIST

CASE NO.: 11-23821-CIV-RYSKAMP
MAGISTRATE JUDGE WHITE

Permon Thomas
DC# 425550
Pro Se
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, FL 33955
[Via U.S. Mail]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-23821-CIV-RYSKAMP
MAGISTRATE JUDGE P. A. WHITE

PERMON THOMAS, :
 :
 Plaintiff, :
 : ORDER SCHEDULING PRETRIAL
 v. : PROCEEDINGS WHEN PLAINTIFF
 : IS PROCEEDING PRO SE
 ASST. WARDEN SHONEY, et al., :
 :
 Defendants. :

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

ORDERED AND ADJUDGED as follows:

1. All discovery methods listed in Rule 26(a), Federal Rules of Civil Procedure, shall be completed by **July 19, 2012**. This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **August 2, 2012**.

3. All motions to dismiss and/or for summary judgment shall be filed by **August 23, 2012**.

4. On or before **September 6, 2012**, the plaintiff shall file with the Court and serve upon counsel for the defendants a document called "Pretrial Statement." The Pretrial Statement shall contain the following things:

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

5. On or before **September 20, 2012**, defendants shall file and serve upon plaintiff a "Pretrial Statement," which shall comply with paragraph 4(a)-(f).

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

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

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

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

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

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

that impeachment documents need not be revealed;

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

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

DONE AND ORDERED at Miami, Florida, this 22nd day of March, 2012.

s/Patrick A. White
UNITED STATES MAGISTRATE JUDGE

cc: Permon Thomas, Pro Se
DC #425550
Charlotte Correctional Institution
33123 Oilwell Road
Punta Gorda, FL 33955

Kathleen M. Savor, AAG
Office of the Attorney General
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, FL 33301

Honorable Kenneth L. Ryskamp, United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 11-23821-CIV-RYSKAMP
MAGISTRATE WHITE

PERMON THOMAS,

Plaintiff,

v.

ASST. WARDEN SHONEY, et al.,

Defendants,

_____ /

DEFENDANT URBINA'S
ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW, Defendant, URBINA by and through undersigned counsel, pursuant to Fed. R. Civ. P. 8(b) and (c) hereby files this their Answer and Affirmative Defenses to Plaintiff Complaint (D.E. #1) and states:

STATEMENT OF CLAIMS

A. Defendant denies paragraph labeled "A" including all subparts and demands strict proof thereof.

STATEMENT OF FACTS

1. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph one and therefore deny.

2. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph two and therefore deny.

3. Defendant is without sufficient knowledge to admit or deny the allegations in

paragraph three and therefore deny.

4. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph four and therefore deny.

5. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph five and therefore deny.

6. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph six and therefore deny.

7. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph seven and therefore deny.

URBINA

8. Defendant admits that Plaintiff was assigned by the I.C.T. team to Inside Grounds in December 2008. All remaining allegations in paragraph eight are denied.

9. Defendant denies the allegation in paragraph nine as written.

10. Defendant denies the allegations in paragraph ten as written.

11. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph eleven and therefore denies.

12. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twelve and therefore denies.

13. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph thirteen and therefore denies.

14. Defendant admits that Plaintiff was assigned by the I.C.T. team to houseman on January 7, 2009. All remaining allegations in paragraph fourteen are denied.

15. Defendant admits paragraph fifteen.

16. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph sixteen and therefore denies.

17. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph seventeen and therefore denies.

18. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph eighteen and therefore denies.

19. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph nineteen and therefore denies.

20. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty and therefore denies.

21. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty one and therefore denies.

22. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty two and therefore denies.

23. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty three and therefore denies.

24. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty four and therefore denies.

25. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty five and therefore denies.

26. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty six and therefore denies.

27. Defendant is without sufficient knowledge to admit or deny the allegations in

paragraph twenty seven and therefore denies.

28. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty-eight and therefore denies.

29. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph twenty nine and therefore denies.

30. Defendant is without sufficient knowledge to admit or deny the allegations in paragraph thirty and therefore denies.

31. Defendant admits that Plaintiff was assigned as a houseman on March 25, 2009, all remaining allegations are denied as written.

32. Defendant denies paragraph thirty two.

WARDEN CHURCHWELL

Paragraphs thirty-three through thirty-six does not pertain to Defendant and therefore no responsive is required.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendant denies Plaintiff's allegations of exhaustion and demand strict proof thereof.

RELIEF

Defendant denies that Plaintiff is entitled to compensatory or punitive damages and demand strict proof thereof.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Further answering, and as the first affirmative defense, Defendant alleges and aver that Defendant acted reasonably within the discretion of his position and the course and scope of his employment and did not violate any clearly established statutory or constitutional right of which

a reasonable person would have known, and are therefore entitled to qualified immunity from suit.

SECOND AFFIRMATIVE DEFENSE

Further answering, and as the second affirmative defense, Defendant alleges and avers that Plaintiff has failed to state a cause of action because Plaintiff cannot establish the deliberate indifference required at a minimum for liability under 42 U.S.C. § 1983.

THIRD AFFIRMATIVE DEFENSE

Further answering, and as the third affirmative defense, Defendant alleges and avers that Plaintiff has failed to state a cause of action because negligence is not actionable under 42 U.S.C. § 1983.

FOURTH AFFIRMATIVE DEFENSE

Further answering and as the fourth affirmative defense, the Defendant would alleges and avers that Plaintiff's complaint fails to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE

Further answering and as the fifth affirmative defense, both Defendant would alleges and avers that Defendant did not act in any way that would violate any clearly established rights guaranteed to the Plaintiff under the Constitution

SIXTH AFFIRMATIVE DEFENSE

Further answering and as the sixth affirmative defense, Defendant would alleges and avers that they are immune from suit pursuant to the Eleventh Amendment.

SEVENTH AFFIRMATIVE DEFENSE

Further answering and as the seventh affirmative defense, both Defendant would alleges

and avers that Defendant is entitled to the defense that the actions of the Plaintiff are the sole cause of his alleged damages.

EIGHTH AFFIRMATIVE DEFENSE

Further answering and as the ninth affirmative defense, both Defendant would alleges and avers that that Plaintiff's claims for damages is barred pursuant to the Prison Litigation Reform Act of 1995 in that the Plaintiff has failed to exhaust his remedies via the inmate grievance procedure.

TENTH AFFIRMATIVE DEFENSE

Further answering and as the ninth affirmative defense, both Defendant would alleges and avers that any recovery by the Plaintiff must be reduced to the extent of benefits paid or payable to the Plaintiff from all collateral sources, as well as the existence of any judgments or debts owed to the State of Florida, including those judgments or debts resulting from any criminal convictions.

ELEVENTH AFFIRMATIVE DEFENSE

Further answering and as the eleventh affirmative defense, Plaintiff cannot establish as a subjective matter, that the Defendant acted with a sufficiently culpable state of mind as required for liability under 42 U.S.C. §1983.

TWELFTH AFFIRMATIVE DEFENSE

Further answering and as the twelfth affirmative defense, Plaintiff has failed to state a claim for punitive damages because he has not alleged the type of conduct that would meet the standards set forth by Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 Led.2d 632 (1983).

THIRTEENTH AFFIRMATIVE DEFENSE

Further answering and as the thirteenth affirmative defense, the Defendant reserve the right to amend and supplement these affirmative defenses adding such additional affirmative defenses as may appear to be appropriate upon further discovery being conducted in this case.

WHEREFORE, having fully answered the Complaint, the Defendant URBINA denies that the Plaintiff is entitled to the relief sought, or any relief whatsoever, and further demand trial by jury of all issues so triable as of right by jury.

Respectfully submitted,

PAMELA BONDI
ATTORNEY GENERAL

S/ Kathleen M. Savor
Kathleen M. Savor (Fla Bar. 0139114)
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110 S. E. 6th Street / 10th Floor
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Telephone: (954) 712-4600
Facsimile: (954) 712-4708
Attorney for Defendants Rivera
Tate, and Urbina

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served by U.S. mail on 2nd Day of April, 2012 on all counsel or parties of record on the attached service list.

S/ Kathleen M. Savor
Kathleen M. Savor
Assistant Attorney General

SERVICE LIST

CASE NO.: 11-23821-CIV-RYSKAMP
MAGISTRATE JUDGE WHITE

Permon Thomas
DC# 425550
Pro Se
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, FL 33955
[Via U.S. Mail]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 11-23821-CIV-RYSKAMP
MAGISTRATE WHITE

PERMON THOMAS,

Plaintiff,

v.

ASST. WARDEN SHONEY, et al.,

Defendants,

DEFENDANTS' MOTION FOR LEAVE TO DEPOSE INCACERATED PLAINTIFF

COME NOW the Defendants, TATE. RIVERA, and URBINA, by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 30(a) and hereby move this Court for leave to depose the Plaintiff an inmate housed with the Florida Department of Corrections. The Defendants state as grounds for this motion the following:

1. The testimony of the Plaintiff will be relevant to the subject matter of this pending action and therefore is necessary for the defense to be thoroughly prepared for trial.
2. The Plaintiff is currently being incarcerated with the Florida Department of Corrections
3. Federal Rule of Civil Procedure 30(a)(2)(B) requires a party to seek leave of Court "if the person to be examined is confined in prison."
4. Plaintiff will not be prejudiced by the granting of leave to take this deposition.
5. The Federal Rules of Civil Procedure favor full discovery whenever possible.

Farnsworth v. Proctor & Gamble, Co., 758 F.2d 1545 (11th Cir. 1985).

WHEREFORE, the Defendants respectfully request that this Court grant this Motion for Leave to Depose Plaintiff.

Respectfully submitted,

PAMELA BONDI
ATTORNEY GENERAL

S/ Kathleen M. Savor
Kathleen M. Savor (Fla Bar. 0139114)
Assistant Attorney General
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Telephone: (954) 712-4600
Facsimile: (954) 712-4708
Attorney for Defendants Rivera, Tate
and Urbina

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served by U.S. mail on 25th Day of May, 2012 on all counsel or parties of record on the attached service list.

S/ Kathleen M. Savor
Kathleen M. Savor
Assistant Attorney General

SERVICE LIST

CASE NO.: 11-23821-CIV-RYSKAMP
MAGISTRATE JUDGE WHITE

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