CASREF,PAW

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:12−cv−20704−JAL

Gonzalez v. Perez et al
Assigned to: Judge Joan A. Lenard
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 Civil Rights Act

Date Filed: 02/21/2012
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Enrique Leonel Gonzalez represented by **Enrique Leonel Gonzalez**
186274
Taylor Correctional Institution
Inmate Mail/Parcels
8515 Hampton Springs Road
Perry, FL 32348
PRO SE

V.

Defendant

Officer Ivan Perez
Florida Department of Corrections

represented by **John Bajger**
Attorney General Office
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West Palm Beach, FL 33401−3432
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LEAD ATTORNEY
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Defendant

Officer Lucious Green
Florida Department of Corrections

represented by **John Bajger**
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LEAD ATTORNEY
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Genny Xiaoya Zhu
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Officer Juan Fernandez
Florida Department of Corrections

represented by **John Bajger**
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LEAD ATTORNEY
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Genny Xiaoya Zhu
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Defendant

Captain W. W. Kelly
Florida Department of Corrections

represented by **Genny Xiaoya Zhu**
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LEAD ATTORNEY
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John Bajger
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/21/2012	1	COMPLAINT against Juan Fernandez, Locious Green, W. W. Kelly, Ivan Perez. Filing fee $ 350.00. IFP Not Filed, filed by Enrique Leonel Gonzalez.(cqs) (Entered: 02/21/2012)
02/21/2012	2	Judge Assignment to Judge Joan A. Lenard (cqs) (Entered: 02/21/2012)
02/21/2012	3	Clerks Notice of Magistrate Judge Assignment to Magistrate Judge Patrick A. White. Pursuant to Administrative Order 2003−19 for a ruling on all pre−trial, non−dispositive matters and for a Report and Recommendation on any dispositive matters. (cqs) (Entered: 02/21/2012)
02/21/2012	4	APPENDIX In Support of 1 Complaint by Enrique Leonel Gonzalez (cqs) (Entered: 02/21/2012)
03/14/2012	5	ORDER REQUIRING PAYMENT OF FILING FEE OR FILING OF MOTION TO PROCEED IFP WITH DETAILED AFFIDAVIT. Filing Fee due by 4/5/2012. Motions due by 4/5/2012.. Signed by Magistrate Judge Patrick A. White on 3/14/2012. (Attachments: # 1 Affidavit IFP) (tw) (Entered: 03/14/2012)
04/04/2012	6	MOTION to Compel *Service of Financial Records* by Enrique Leonel Gonzalez. Responses due by 4/23/2012 (cbr) (Entered: 04/04/2012)
04/10/2012	7	ORDER denying 6 Motion to Compel Taylor CI to provide six month account. The plaintiff must seek his records, if the six month account is not provided, the plaintiff may submit a motion to proceed IFP as best he can.. Signed by Magistrate Judge Patrick A. White on 4/10/2012. (cz) (Entered: 04/10/2012)
04/12/2012	8	MOTION for Leave to Proceed in forma pauperis by Enrique Leonel Gonzalez. (ail) (Entered: 04/13/2012)
04/17/2012	9	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF $350.00 and Granting 8 Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 4/17/2012. (tw) (Entered: 04/17/2012)
05/10/2012	10	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Enrique Leonel Gonzalez. Recommending 1. The plaintiff has stated a claim of use of excessive force against Deputies Perez, Green, Fernandez, and Kelly. 2. Service will be ordered by separate order. Objections to RRdue by 5/29/2012. Signed by Magistrate Judge Patrick A. White on 5/10/2012. (tw) (Entered: 05/10/2012)
05/10/2012	11	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AN INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon:Officer Ivan Perez, Everglades Correctional Inst., 1599 S.W. 187 Avenue, Miami, FL 33194; Officer Lucious Green, Everglades Correctional Inst., 1599 S.W. 187 Avenue, Miami, FL 33194; Officer Juan Fernandez, Everglades Correctional Inst., 1599 S.W. 187 Avenue, Miami, FL 33194 and Captain W. W. Kelly, Everglades Correctional Inst., 1599 S.W. 187 Avenue. Miami, FL 33194. Signed by Magistrate Judge Patrick A. White on 5/10/2012. (tw) (Entered: 05/10/2012)

05/14/2012	12	Summons Issued as to Juan Fernandez. (br) (Entered: 05/14/2012)
05/14/2012	13	Summons Issued as to Lucious Green. (br) (Entered: 05/14/2012)
05/14/2012	14	Summons Issued as to W. W. Kelly. (br) (Entered: 05/14/2012)
05/14/2012	15	Summons Issued as to Ivan Perez. (br) (Entered: 05/14/2012)
05/17/2012	16	SUPPLEMENTAL REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Enrique Leonel Gonzalez. Recommending The plaintiff's claims of denial of due process related to his claims of an unlawful disciplinary report and confinement should be dismissed as without merit. Objections to RRdue by 6/4/2012. Signed by Magistrate Judge Patrick A. White on 5/17/2012. (tw) (Entered: 05/17/2012)
05/21/2012	17	SUMMONS (Affidavit) Returned Executed on 1 Complaint Ivan Perez served on 5/18/2012, answer due 6/8/2012. (cbr) (Entered: 05/22/2012)
05/24/2012	18	SUMMONS (Affidavit) Returned Executed on 1 Complaint Juan Fernandez served on 5/21/2012, answer due 6/11/2012. (cbr) (Entered: 05/24/2012)
05/24/2012	19	SUMMONS (Affidavit) Returned Executed on 1 Complaint Lucious Green served on 5/21/2012, answer due 6/11/2012. (cbr) (Entered: 05/24/2012)
06/07/2012	20	OBJECTIONS to 16 Report and Recommendations by Enrique Leonel Gonzalez. (cbr) (Entered: 06/07/2012)
06/08/2012	21	ANSWER and Affirmative Defenses to Complaint with Jury Demand by Juan Fernandez, Lucious Green, Ivan Perez.(Zhu, Genny) (Entered: 06/08/2012)
06/14/2012	22	SUMMONS (Affidavit) Returned Executed on 1 Complaint W. W. Kelly served on 6/1/2012, answer due 6/22/2012. (cbr) (Entered: 06/14/2012)
06/19/2012	23	SCHEDULING ORDER: Amended Pleadings due by 10/25/2012. Discovery due by 10/11/2012. Joinder of Parties due by 10/25/2012. Motions due by 11/16/2012. Signed by Magistrate Judge Patrick A. White on 6/18/2012. (tw) (Entered: 06/19/2012)
06/21/2012	24	ANSWER and Affirmative Defenses to Complaint with Jury Demand by W. W. Kelly.(Zhu, Genny) (Entered: 06/21/2012)
06/21/2012	25	Defendant's MOTION to Take Deposition from Plaintiff Enrique L. Gonzalez by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez. (Zhu, Genny) (Entered: 06/21/2012)
06/25/2012	26	ORDER granting 25 Motion to Take Deposition from plaintiff Enrique Gonzalez. This is a pro se plaintiff and the defendants' shall govern themselves accordingly. Signed by Magistrate Judge Patrick A. White on 6/25/2012. (cz) (Entered: 06/25/2012)
07/10/2012	27	ORDER adopting 10 Report and Recommendations issued by Magistrate Judge White on May 10, 2012; and adopting 16 Supplemental Report and Recommendations issued by Magistrate Judge White on May 17, 2012. Signed by Judge Joan A. Lenard on 7/10/2012. (cew) (Entered: 07/10/2012)
09/10/2012	28	MOTION For The Appointment of Counsel by Enrique Leonel Gonzalez. Responses due by 9/27/2012 (cbr) (Entered: 09/11/2012)
09/17/2012	29	ORDER denying 28 Motion to Appoint Counsel Signed by Magistrate Judge Patrick A. White on 9/17/2012. (cz) (Entered: 09/17/2012)
09/21/2012	30	MOTION For Order to Compel the *Production of Information and Documents* by Enrique Leonel Gonzalez. Responses due by 10/9/2012 (cbr) (Entered: 09/24/2012)
09/25/2012	31	ORDER deferring ruling on 30 Motion to Compel, DEFENDANTS SHALL FILE A RESPONSE. Signed by Magistrate Judge Patrick A. White on 9/25/2012. (cz) (Entered: 09/25/2012)
10/09/2012	32	RESPONSE to Motion re 30 MOTION to Compel *Production of Information and Documents* filed by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez.

		Replies due by 10/19/2012. (Zhu, Genny) (Entered: 10/09/2012)
10/10/2012	33	ORDER denying 30 Motion to Compel, to obtain discovery from a non party the plaintiff must arrange for the serving of a subpoena. See defendants response (DE#32) Signed by Magistrate Judge Patrick A. White on 10/10/2012. (cz) (Entered: 10/10/2012)
10/10/2012	34	Defendant's MOTION for Extension of Time for all Pretrial Deadlines by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez. Responses due by 10/29/2012 (Zhu, Genny) (Entered: 10/10/2012)
10/11/2012	35	ORDER granting 34 Motion for Extension of Time, all dates entered in pre−trial scheduling order are extended for sixty days from the dates entered in that order. Signed by Magistrate Judge Patrick A. White on 10/11/2012. (cz) (Entered: 10/11/2012)
10/12/2012	36	Plaintiff's First Motion For Production of Documents Per Federal Rules Civil Procedure by Enrique Leonel Gonzalez. (cbr) Modified on 10/17/2012 (dm). (Entered: 10/15/2012)
10/17/2012	37	NOTICE and Information by Enrique Leonel Gonzalez re 23 Scheduling Order (ls) (Entered: 10/17/2012)
11/28/2012	38	NOTICE of Attorney Appearance by John Bajger on behalf of Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez (Bajger, John) (Entered: 11/28/2012)
12/21/2012	39	NOTICE by Enrique Leonel Gonzalez (cbr) (Entered: 12/26/2012)
01/07/2013	40	ORDER denying 36 Motion to Produce, discovery requests are to be sent directly to the defendants. Signed by Magistrate Judge Patrick A. White on 1/7/2013. (cz) (Entered: 01/07/2013)
01/09/2013	41	MOTION for Extension of Time to file motion for summary judgment by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez. Responses due by 1/28/2013 (Bajger, John) (Entered: 01/09/2013)
01/10/2013	42	ORDER granting 41 Motion for Extension of Time TO FILE SUMMARY JUDGMENT TO ON OR BEFORE 1/22/13 Signed by Magistrate Judge Patrick A. White on 1/10/2013. (cz) (Entered: 01/10/2013)
01/22/2013	43	MOTION for Summary Judgment *and Statement of Undisputed Material Facts* by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez. Responses due by 2/8/2013 (Bajger, John) (Entered: 01/22/2013)
01/22/2013	44	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of Filing Deposition* (Attachments: # 1 Deposition Exhibit A)(Bajger, John) (Entered: 01/22/2013)
01/22/2013	45	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of filing Affidavit of Colonel Lugo* (Attachments: # 1 Affidavit Exhibit C)(Bajger, John) (Entered: 01/22/2013)
01/22/2013	46	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of Filing Affidavit of Juan Fernandez* (Attachments: # 1 Affidavit Exhibit D)(Bajger, John) (Entered: 01/22/2013)
01/22/2013	47	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of Filing Affidavit of William Kelley* (Attachments: # 1 Affidavit Exhibit E)(Bajger, John) (Entered: 01/22/2013)
01/22/2013	48	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of Filing Affidavit of Cathy Simcox* (Attachments: # 1 Affidavit Exhibit F)(Bajger, John) (Entered: 01/22/2013)
01/22/2013	49	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of Filing Affidavit of Tony Pesante* (Attachments: # 1 Affidavit Exhibit G)(Bajger, John) (Entered: 01/22/2013)

01/22/2013	50	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of Filing Affidavit of Frank Lewis* (Attachments: # 1 Affidavit Exhibit H)(Bajger, John) (Entered: 01/22/2013)
01/30/2013	51	MOTION for Extension of Time for Pretrial Statement by Enrique Leonel Gonzalez. Responses due by 2/19/2013 (tpl) (Entered: 01/31/2013)
02/01/2013	52	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of filing affidavit* (Attachments: # 1 Affidavit Exhibit B)(Bajger, John) (Entered: 02/01/2013)
02/04/2013	53	ORDER granting 51 Motion for Extension of Time for thirty days from date of this order to file Pretrial statement. Signed by Magistrate Judge Patrick A. White on 2/4/2013. (cz) (Entered: 02/04/2013)
02/04/2013	54	ORDER INSTRUCTINGS PRO SE PLAINTIFF CONCERNING RESPONSE as to 43 MOTION for Summary Judgment *and Statement of Undisputed Material Facts*.(Responses due by 3/1/2013) Signed by Magistrate Judge Patrick A. White on 2/4/2013. (tw) (Entered: 02/04/2013)
02/21/2013	55	MOTION to Compell *Document 43 Motion for Summary Judgment* (Responses due by 3/11/2013) and MOTION for Extension of Time to File Response as to 43 MOTION for Summary Judgment *and Statement of Undisputed Material Facts* by Enrique Leonel Gonzalez. (asl) (Entered: 02/21/2013)
02/25/2013	56	ORDER granting 55 Motion to Compel in an abundance of caution although the certificate of service indicates the motion for summary judgement was sent to the plaintiff, the defendants shall send a second copy to the plaintiff forthwith; granting 55 Motion for Extension of Time to File Response/Reply re 55 MOTION to Compel *Document 43 Motion for Summary Judgment* MOTION for Extension of Time to File Response/Reply as to 43 MOTION for Summary Judgment *and Statement of Undisputed Material Facts* (Responses due by 3/25/2013) Signed by Magistrate Judge Patrick A. White on 2/25/2013. (cz) (Entered: 02/25/2013)
03/06/2013	57	NOTICE by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez *of filing Pretrial Statement* (Bajger, John) (Entered: 03/06/2013)
03/07/2013	58	MOTION for Extension of Time For Pretrial Statement by Enrique Leonel Gonzalez. Responses due by 3/25/2013 (cbr) (Entered: 03/07/2013)
03/11/2013	59	ORDER granting in part and denying in part 58 Motion for Extension of Time to file pre−trial for thirty days from the date of this order. Signed by Magistrate Judge Patrick A. White on 3/11/2013. (cz) (Entered: 03/11/2013)
03/28/2013	60	Declaration in Opposition re 43 MOTION for Summary Judgment *and Statement of Undisputed Material Facts* filed by Enrique Leonel Gonzalez. (cbr) (Entered: 03/28/2013)
04/03/2013	61	MOTION for Extension of Time to File Response/Reply as to 60 Affidavit in Opposition to Motion by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez. (Bajger, John) (Entered: 04/03/2013)
04/04/2013	62	ORDER granting 61 Motion for Extension of Time to File Response/Reply re 61 MOTION for Extension of Time to File Response/Reply as to 60 Affidavit in Opposition to Motion Responses due by 4/18/2013 Signed by Magistrate Judge Patrick A. White on 4/4/2013. (cz) (Entered: 04/04/2013)
04/12/2013	63	MOTION for Extension of Time To File Pretrial Statement by Enrique Leonel Gonzalez. Responses due by 4/29/2013 (cbr) (Entered: 04/12/2013)
04/15/2013	64	ORDER granting 63 Motion for Extension of Time to file pre−trial statement to state requested. Signed by Magistrate Judge Patrick A. White on 4/15/2013. (cz) (Entered: 04/15/2013)
04/18/2013	65	REPLY to Response to Motion re 43 MOTION for Summary Judgment *and Statement of Undisputed Material Facts* filed by Juan Fernandez, Lucious Green, W. W. Kelly, Ivan Perez. (Bajger, John) (Entered: 04/18/2013)

05/10/2013	66	MOTION for Extension of Time to File Reply re 65 Reply to Response to Motion by Enrique Leonel Gonzalez. (asl) (Entered: 05/10/2013)
05/13/2013	67	ORDER granting 66 Motion for Extension of Time to File Response/Reply re 66 MOTION for Extension of Time to File Response/Reply as to 65 Reply to Response to Motion. No further replies are required. Responses due by 5/31/2013 Signed by Magistrate Judge Patrick A. White on 5/13/2013. (cz) (Entered: 05/13/2013)
05/28/2013	68	MOTION for Extension of Time to File Pre−Trial Statement by Enrique Leonel Gonzalez. Responses due by 6/14/2013 (gp) (Entered: 05/29/2013)
05/30/2013	69	ORDER granting 68 Motion for Extension of Time to 6/28/13. Signed by Magistrate Judge Patrick A. White on 5/30/2013. (cz) (Entered: 05/30/2013)
07/01/2013	70	MOTION for Extension of Time to File Pre−Trial Statement by Enrique Leonel Gonzalez. (asl) (Entered: 07/01/2013)
07/03/2013	71	ORDER granting 70 Motion for Extension of Time to File Response/Reply re 70 MOTION for Extension of Time to File Response/Reply. Responses due by 7/31/2013 Re: 70 MOTION for Extension of Time to File Response/Reply. Signed by Magistrate Judge Patrick A. White on 7/3/2013. (cz) (Entered: 07/03/2013)
07/08/2013	72	NOTICE of Inquiry by Enrique Leonel Gonzalez. Copy of docket sheet mailed to filer on 5/9/13. (asl) (Entered: 07/09/2013)
07/31/2013	73	MOTION for Leave of Court to Timely Re−Submit Plaintiff's Traverse to Defendants Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment by Enrique Leonel Gonzalez. (cbr) (Entered: 07/31/2013)
08/01/2013	74	ORDER granting 73 Motion for Leave to File. *Clerks Notice: Filer must separately re−file the amended pleading pursuant to Local Rule 15.1, unless otherwise ordered by the Judge*. Signed by Magistrate Judge Patrick A. White on 8/1/2013. (cz) (Entered: 08/01/2013)
08/06/2013	75	MOTION for Extension of Time to File Pre−Trial Statment by Enrique Leonel Gonzalez. Responses due by 8/23/2013 (asl) (Entered: 08/06/2013)
08/07/2013	76	ORDER granting 75 Motion for Extension of Time to file pre−trial statement to 10 days following disposition on motion for summary judgement. Signed by Magistrate Judge Patrick A. White on 8/7/2013. (cz) (Entered: 08/07/2013)
08/13/2013	77	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 43 MOTION for Summary Judgment *and Statement of Undisputed Material Facts; Recommending Defendants motion for summary judgment (DE# 43) be DENIED. Objections to RRdue by 8/30/2013. Signed by Magistrate Judge Patrick A. White on 8/13/2013. (br) (Entered: 08/13/2013)*
08/13/2013	78	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Enrique Leonel Gonzalez; Recommending that this case be placed on the trial calendar of the District Judge. Objections to RRdue by 8/30/2013. Signed by Magistrate Judge Patrick A. White on 8/13/2013. (br) (Entered: 08/13/2013)
08/19/2013	79	RE−FILED TRAVERSE re 43 MOTION for Summary Judgment *and Statement of Undisputed Material Facts* by Enrique Leonel Gonzalez. (asl) (Entered: 08/19/2013)
08/27/2013	80	MOTION for Extension of Time to File Pre−Trial Statement by Enrique Leonel Gonzalez. Responses due by 9/13/2013 (asl) (Entered: 08/27/2013)
08/28/2013	81	ORDER granting 80 Plaintiff's Motion for Extension of Time to File Pre−trial Statement. Plaintiff shall have until and including September 2, 2013 to file his Pre−trial Statement. This entry constitutes the ENDORSED ORDER in its entirety. Signed by Judge Joan A. Lenard on 8/28/2013. (gie) (Entered: 08/28/2013)
09/03/2013	82	ORDER Adopting 77 Report and Recommendation Of Magistrate Judge and Denying Defendant's Motion for Summary Judgment. Signed by Judge Joan A. Lenard on 9/3/2013. (gie) (Entered: 09/03/2013)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 12-20704-CIV-LENARD
MAGISTRATE WHITE

ENRIQUE L. GONZALEZ,

Plaintiff,

v.

IVAN PEREZ, DEPUTY, et al.,

Defendants.
_____/

PRE-TRIAL STATEMENT OF OFFICER IVAN PEREZ, OFFICER LUCIOUS GREEN, OFFICER JUAN FERNANDEZ AND CAPTAIN WILLIAM KELLEY

Comes now, Defendants Officer Ivan Perez, Officer Lucious Green, Officer Juan Fernandez and Captain William Kelley, pursuant to the Court's scheduling order [D.E. 35], and hereby file this pre-trial statement.

I. A brief general statement of what the case is about.

Plaintiff brings suit against the Defendants under 42 U.S.C. Section 1983 and alleges that the Defendants violated the eighth amendment to the constitution by using excessive force against him. As relief, he seeks compensatory and punitive damages. However, at no time did the Defendants use excessive force on the Plaintiff, nor in anyway violate Florida Department of Corrections rules and regulations.

II. A written statement of the facts that will be offered by oral or documentary evidence at trial

Plaintiff Enrique Gonzalez is an inmate of the Florida Department of Corrections and Plaintiff was housed at Everglades Correctional Institution from March 19, 2007 until March 27, 2008. On March 27, 2008, Officer Ivan Perez was assigned as a housing officer in the E-dormitory of Everglades Correctional Institution (ECI). At or about 10:30 in the morning on March 27, 2008, Officer Perez conducted a random and routine search of cell E2205, which belonged to Inmate Enrique Gonzalez. The only other officer present in E-dormitory at the time was Officer Tamera Woodside, who was in the control room in the center of the dorm with her back to where Officer Perez was conducting his search. As Officer Perez conducted the search of Inmate Gonzalez's cell, Inmate Gonzalez was present and stood at the entryway of the cell. Plaintiff and Officer Perez were the only two people in the cell at the time of the incident. However, there were numerous inmates in the dormitory at the time. As the search continued, Inmate Gonzalez began acting nervous: his hands shook and he talked incessantly. Based on his training and experience, Officer Perez suspected Inmate Gonzalez was attempting to distract him from the search. After finding no contraband in the mattress or the foot locker, Officer Perez found what he recognized to be a large quantity of marijuana on a checkerboard underneath the bottom bunk.

After Officer Perez discovered marijuana, Inmate Gonzalez repeatedly refused orders from Officer Perez to submit to hand restraints. While refusing these orders Inmate Gonzalez persisted in moving towards Officer Perez, cornering him in the back of the cell. Fearing for his safety, and after Inmate Gonzalez's repeated refusal to submit to hand restraints, Officer Perez called for assistance over the radio. In the meantime, a struggle ensued as Officer Perez

attempted to gain control of Inmate Gonzalez, which spilled out on to the walkway outside of the cell. During the struggle, Inmate Gonzalez yelled out to the other inmates in the dormitory "they found that" in Spanish.

Officer Juan Fernandez and Officer Lucious Green responded to the call. Soon after they responded, Captain William Kelley arrived in E-Dormitory as well. On that day, Captain Kelley was the Officer-in-Charge (OIC) and was responsible for the overall security of the institution.

When the officers arrived, Inmate Gonzalez was actively resisting Officer Perez. However, all force ceased on the part of Officer Perez, and he was taken to medical. In an effort to get control over Inmate Gonzalez, Officer Fernandez grabbed Inmate Gonzalez's left arm, placed it behind his back and, with Officer Green's assistance, successfully applied hand restraints. Once Inmate Gonzalez was in hand restraints, all force ceased by Officer Fernandez.

Captain Kelley ordered that Officer Fernandez and Officer Green escort Inmate Gonzalez to confinement in F-Dormitory, which was only a short distance from E-Dormitory at ECI. In doing so, Officer Fernandez and Officer Green grabbed Inmate Gonzalez's arms. The Officers' act of grabbing Inmate Gonzalez's arms did not constitute a use of force, but rather a permissible custodial touching.

In F-Dormitory, Inmate Gonzalez was placed in the shower, which was utilized as a holding cell at ECI. After Inmate Gonzalez was secured in confinement, Officers Fernandez and Green left the scene and had no further involvement with Inmate Gonzalez. Captain Kelley immediately ordered that a camera be placed on Inmate Gonzalez and that a medical evaluation be performed, which was completed in F-Dormitory. All such actions were in accordance with FDOC rules and regulations. At no time during this process did Captain Kelley have any

physical contact of any kind with Inmate Gonzalez. As a result of the incident, Officer Perez sustained bruises, scrapes and a cut to his lip.

As his medical records will show, Inmate Gonzalez suffered no injury as the result of the incident: he did not break any bones, had no fractures, nor did he receive any stitches or anything of the sort. In addition, other than over-the-counter Ibuprofen, Plaintiff was not prescribed any additional medication as a result of the incident.

On March 27, 2008, Inspector Tony Pesante was assigned to investigate the incidents of Battery on a Law Enforcement Officer and Possession of Contraband involving Inmate Gonzalez. As a result of his investigation and analysis of the evidence, Inspector Pesante determined that Inmate Gonzalez violated Florida Statute 784.07(1)(a) by committing the crime of Battery on a Law Enforcement Officer by pushing and head butting Officer Ivan Perez as well as causing other small abrasions. He further determined that Inmate Gonzalez violated Florida Statute 944.047(1)(c) by being in possession of 15.4 grams of marijuana. Inspector Pesante then referred the case to the State Attorney's Office for prosecution.

After Inspector Pesante charged Inmate Gonzalez with the crimes of possession of marijuana and battery on a law enforcement officer, Inmate Gonzalez asserted his allegations of excessive force, and Inspector Frank Lewis was assigned to investigate his complaints. Inspector Lewis determined that Inmate Gonzalez's allegations of excessive force were unfounded

III. A list of all exhibits to be offered into evidence at the trial of this case

1. Plaintiff's Medical Records
2. Inspector General Report of Tony Pesante and all exhibits attached thereto
3. Inspector General Report of Frank Lewis and all exhibits attached thereto
4. All FDOC rules and regulations regarding cell searches
5. All incident reports relevant to incident alleged in Plaintiff's complaint
6. All use of force report relevant to incident alleged in Plaintiff's complaint
7. Disciplinary Reports issued to Plaintiff as a result of incident, and all associated documents.
8. Any and all grievances filed by Plaintiff related to incident described in Plaintiff's complaint.
9. Photographs of Plaintiff's cell and dormitory
10. Plans and diagrams of dormitory where incident occurred

IV. A list of the full names and addresses of places of employment for all witness the Defendant intends to call.

1. Officer Ivan Perez
   C/o Office of the Attorney General

2. Officer Juan Fernandez
   C/o Office of the Attorney General

3. Officer Lucious Green
   C/o Office of the Attorney General

4. Captain William Kelley
   C/o Office of the Attorney General

5. Officer Valerie Rumph
   Florida Department of Corrections
   C/o Office of the Attorney General

6. Officer Tameca Woodside
   Florida Department of Corrections
   C/o Office of the Attorney General

7. Colonel Jose Lugo-Sanchez
   Florida Department of Corrections
   C/o Office of the Attorney General

8. Nurse Ricky Rowe
Florida Department of Corrections
C/o Office of the Attorney General

9. Dr. William Matthews
Florida Department of Corrections
C/o Office of the Attorney General

10. Inspector Tony Pesante
Florida Department of Corrections
C/o Office of the Attorney General

11. Inspector Frank Lewis
Florida Department of Corrections
C/o Office of the Attorney General

12. Inmate Enrique Gonzalez
Taylor Correctional Institution

13. Florida Department of Corrections records custodian for Plaintiff's medical records.

14. Florida Department of Corrections records custodian for Plaintiff's inmate grievances

15. Florida Department of Corrections records custodian for Plaintiff's disciplinary reports

16. Any and all witnesses listed by Plaintiff.

V. A list of the full names, inmate numbers, and places of incarceration of all the inmate witnesses that the Defendant intends to call.

None.

VI. A summary of the testimony that the Defendant expects each of his witnesses to give.

1. Officer Ivan Perez: events surrounding incidents described in the complaint; policies and procedures regarding cell searches and use of force.

2. Officer Juan Fernandez: events surrounding incidents described in the complaint; policies and procedures regarding use of force.

3. Officer Lucious Green: events surrounding incidents described in the complaint; policies and procedures regarding use of force

4. Captain William Kelley: events surrounding incidents described in the complaint; policies and procedures regarding use of force

5. Officer Valerie Rumph: events surrounding incidents described in the complaint

6. Officer Tameca Woodside: events surrounding incidents described in the complaint

7. Colonel Jose Lugo-Sanchez: FDOC policies and procedures regarding cell searches and use of force.

8. Nurse Ricky Rowe: Plaintiff's physical condition after incident and initial medical treatment.

9. Dr. William Matthews: Plaintiff's medical treatment and physical condition.

10. Inspector Tony Pesante: Inspector general investigation into Plaintiff's conduct at the time of the incident.

11. Inspector Frank Lewis: Inspector general investigation into allegations of excessive force.

12. Inmate Enrique Gonzalez: Events surrounding the complaint.

Respectfully submitted,

PAMELA JO BONDI
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of March, 2013, 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, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/S/ John J. Bajger
John J. Bajger
Assistant Attorney General

SERVICE LIST

Enrique L. Gonzalez v. Ivan Perez, et al.
CASE NO.: 12-20704-CIV-LENARD

United States District Court, Southern District of Florida

Enrique Leonel Gonzalez
DC# 186274
Taylor Correctional Institution
8515 Hampton Springs Rd.
Perry, FL 32348
[Via U.S. Mail]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-20704-CIV-LENARD
MAGISTRATE JUDGE P. A. WHITE

ENRIQUE L. GONZALEZ,

Plaintiff,

v.

IVAN PEREZ, ET AL.,

Defendants.

REPORT OF MAGISTRATE JUDGE

I. Introduction

Plaintiff Enrique L. Gonzalez filed a pro se civil rights complaint on February 21, 2012 pursuant to 42 U.S.C. §1983 (DE# 1) alleging use of unlawful force at Everglades Correctional Institution ("ECI"). The plaintiff was granted leave to proceed in forma pauperis (DE# 9). The cause is before the Court upon a joint motion for summary judgment filed by defendants Ivan Perez, William Kelley, Lucious Green, and Juan Fernandez. (DE# 43).

II. Factual and Procedural Background

The plaintiff names as defendants Deputies Ivan Perez, Lucious Green, Juan Fernandez and WW Kelly, employed at Everglades CI. He alleges that on March 27, 2008, he was approached by Perez who attempted to sell him a cell phone and to extort $200.00 dollars from him. When the plaintiff refused, Perez attempted to place him in handcuffs. He then struck plaintiff on the chin with the metal handcuffs wrapped around his closed fist, causing a deep cut. He then pushed him to the floor and handcuffed his right hand and dragged him out of the cell. He repeatedly struck plaintiff in the upper torso area while yelling obscenities.

An Emergency Response Team arrived and Defendants Green and Fernandez and unknown defendants pounced on him, wrenching his arms behind his back and handcuffing him. He was kicked in the back of his legs and upper torso by Perez, Green, and Fernandez and unknown defendants. Kelly ordered plaintiff carried upside down, while handcuffed, to a shower in the confinement unit. Plaintiff passed out. When he came to, he claims Kelly threatened him with chemical agents if he did not stand up and strip off his clothing. He was seen by the medical department and multiple flesh injuries were documented.

He claims that Perez wrote a fabricated affidavit on March 27, 2008, and plaintiff was charged with several felony charges. These charges were nolle prosed in 2009. Perez wrote two disciplinary reports and the plaintiff was sentenced to 60 days in disciplinary confinement. At the hearing Perez said the plaintiff head butted him and he sustained a contusion. Plaintiff was arrested for assault and found guilty in the disciplinary report.

The Undersigned concluded in a preliminary report that the plaintiff has stated a claim of use of excessive force against Deputies Perez, Green, Fernandez, and Kelly. (DE# 10).

The Undersigned issued a supplemental report which provided as follows:

> In the Preliminary Report, it was recommended that the plaintiff has stated a claim of use of excessive force by the four named defendants.
>
> However, the Report failed to address the issue of the plaintiff's alleged wrongful disciplinary report and confinement. Review of the case law reveals that the plaintiff has failed to state a claim. The plaintiff has not stated a viable constitutional claim of denial of due

> process. The fundamental requirement of due process is the opportunity to be heard, at a meaningful time and in a meaningful manner. Armstrong v Manzo, 380 U.S. 545 (1965). In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court established that for loss of a liberty interest resulting from prison disciplinary proceedings, the minimum standards of due process require: 1) advance written notice of the violation; 2) a written statement of the fact finders as to the evidence relied upon, and reasons for the disciplinary action taken; and 3) an opportunity to call witnesses and present documentary evidence in defense, when to do so would not be unduly hazardous to institutional safety or correctional goals. Wolff, supra, 418 U.S. at 563-66.
>
> Two decades later, in Sandin v. Connor, 515 U.S. 472 (1995), the Supreme Court, revisiting this area of the law, held that there are only two circumstances under which a prisoner [who is already deprived of his liberty by virtue of his incarceration] may be further deprived of his liberty so that due process is required: 1) when a change in an inmate's conditions of confinement is so severe that it essentially exceeds the sentence imposed by the Court, Sandin, 515 U.S. at 484; Bass v. Perrin, 170 F.3d 1312, 1318 (11 Cir. 1999); or 2) when a state has consistently given a certain benefit to inmates (for instance, via statute or administrative policy), and the deprivation of that benefit "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," Sandin, at 484.
>
> In this case, there is no suggestion, based on the facts in the complaint, that the conditions or any loss of privileges the plaintiff may have faced during disciplinary confinement as a direct result of the disciplinary report constituted "an atypical and significant hardship" on him "in relation to the ordinary incidents of prison life," Sandin v. Conner, supra at 484.
>
> . . .
>
> The plaintiff's claims of denial of due process related to his claims of an unlawful disciplinary report and confinement should be dismissed as without merit.

(DE# 16).

Subsequently, the District Court issued an order adopting the recommendations of the preliminary report and supplemental reports. (DE# 27).

Defendants Perez, Green, Fernandez, and Kelley filed a joint motion for summary judgment, with exhibits attached in support thereof (DE# 43). The defendants argue that summary judgment in their favor is proper because Gonzalez there is no evidence to support Plaintiff's allegations that the instances of force were excessive or otherwise unreasonable. (Id. at 8). This court issued and order of instructions advising plaintiff concerning a response to the summary judgment motion. (DE# 54).

In response, Gonzalez filed a declaration in opposition to the motion for summary judgment and statement of undisputed material facts. (DE# 60). The defendants filed a reply to Gonzalez's response. (DE# 65).

III. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

In Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), the Supreme Court held that summary judgment should be entered only against

> a party who fails to make a showing sufficient to establish the existence of an element essential to that

> party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. (citations omitted)

Thus, pursuant to Celotex and its progeny, a movant for summary judgment bears the initial responsibility of informing the court of the basis for his motion by identifying those parts of the record that demonstrate the nonexistence of a genuine issue of material fact. This demonstration need not be accompanied by affidavits. Hoffman v. Allied Corp., 912 F.2d 1379, 1382 (11 Cir. 1990). If the party seeking summary judgment meets the initial burden of demonstrating the absence of a genuine issue of material fact, the burden then shifts to the non-moving party, to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. Avirgan v. Hull, 932 F.2d 1572, 1577 (11 Cir.), cert. denied, 112 S.Ct. 913 (1992). It is the non-moving party's burden to come forward with evidence on each essential element of his claim sufficient to sustain a jury verdict. Earley v. Champion International Corp., 907 F.2d 1077, 1080 (11 Cir.1990). The non-moving party cannot rely solely on his complaint and other initial pleadings to contest a motion for summary judgment supported by evidentiary material, but must respond with affidavits, depositions, or otherwise to show that there are material issues of fact which require a trial Fed.R.Civ.P. 56(e); Coleman v. Smith, 828 F.2d 714, 717 (11 Cir. 1987). If the evidence presented by the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Baldwin County, Alabama v. Purcell Corp., 971 F.2d 1558 (11

Cir. 1992). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11 Cir. 1990) (citing Anderson, 477 U.S. 242).

III. Applicable Law

A. Excessive Use of Force

The Supreme Court has held that the question of whether a prison guard "inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Whitley v. Albers, 475 U.S. 312, 320-21 (1986)(quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2 Cir. 1973)).

Whether the prison disturbance is a riot or a lesser disruption, the corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates; but the Courts have acknowledged that "both situations may require prison officials to act quickly and decisively...[and] should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" Hudson v. McMillian, 503 U.S. 1 (1992) (quoting Whitley, 475 U.S. at 321-22); Brown v. Smith, 813 F.2d 1187 (11 Cir. 1987).The test to determine whether a claim of excessive force rises to a constitutional level of cruel and unusual punishment involves both subjective and objective components.

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

Thus, under the Eighth Amendment, force may be employed in a custodial setting as long as it is not done "maliciously and sadistically to cause harm," but applied in a good faith effort to maintain or restore discipline. Brown v. Smith, 813 F.2d 1187, 1188 (11 Cir. 1987); Skritch v. Thornton, 280 F.3d 1295, 1300 (11 Cir. 2002), citing Whitley v. Albers, 475 U.S. 312 (1986) (quotations omitted). The factors relevant to the determination of whether the force was used maliciously and sadistically with the purpose of causing harm include: 1) the extent of the injury inflicted; 2) the need for force; 3) the relationship between the need for force and the amount of force used; 4) any efforts made to temper the severity of a forceful response; and 5) the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of facts known to them. Campbell v. Sikes, 169 F.3d 1353, 1375 (11 Cir. 1999); Redd v. Conway, 160 Fed.Appx. 858, 860 (11 Cir. 2005), citing Carr v. Tatangelo, 338 F.3d 1259, 1271 (11 Cir. 2003); Bennett v. Parker, 898 F.2d 1530, 1532-33 (11 Cir. 1990); Stanley v. Hejirika, 134 F.3d at 634; Branham v. Meachum, 77 F.3d at 630; Lunsford v. Bennet, 17 F.3d 1574, 1581 (7 Cir. 1994).

Courts have held that even simple inmate recalcitrance, in the form of refusal of verbal orders, may in appropriate circumstances justify the use of force (e.g., the application of mace in non-dangerous amounts), to obtain inmate compliance so as to maintain institutional order, even when the inmate is in handcuffs, or locked in his cell when the chemical agent is used. See, e.g., Williams v. Benjamin, 77 F.3d 756, 762-63 (4 Cir. 1996); Soto v. Dickey, 744 F.2d 1260, 1270-71 (7 Cir. 1984); Spain v. Procunier, 600 F.2d 189, 195 (9 Cir. 1979); Williams v. Scott, 116 F.3d 1483 (7 Cir. 1997); Barr v. Williamsburg Co. Sheriff's Dept., No. C/A2:02-0167-22AJ, 2002 WL 32333152, at *4-5 (D.S.C., Dec. 27, 2002); but see Vinyard v. Wilson, 311 F.3d 1340, 1348-49, n.13 (11 Cir. 2002).

In short, for an inmate to prevail on a claim of excessive force he must satisfy not only the subjective component that the corrections officials acted with a sufficiently culpable state of mind, but also the objective component that he suffered some injury which was sufficiently serious in relation to the need for the application of force to establish constitutionally excessive force. See Whitley, 475 U.S. at 319.

B. Failure to Intervene

In a case in which excessive force is used, it is not necessary for police officers to actually participate in its use in order to be held liable under §1983. Rather, they can be held liable for their nonfeasance if they are present at the scene and fail to take steps to protect a victim from a fellow officer's use of excessive force. See Fundiller v. City of Cooper City, 777 F.2d 1436, 1441-42 (11 Cir. 1985), and cases cited therein.

In an excessive force case such as this one, in which several officers are being sued, not because they were directly involved in applying the alleged force, but rather on the ground that they failed to protect the plaintiff from the use of excessive force, the Courts have held that the following is required for an officer to be held liable on that theory: (1) he or she must have observed or had reason to know that excessive force would be or was being used, and (2) must have had both the opportunity and the means to prevent the harm from occurring. Carr v. Tatangelo, 338 F.3d 1259, 1274, n.27 (11 Cir. 2003) (observing, with regard to defendant officer Mercer, that "it is not credible to event postulate that he [Officer Mercer] had a reasonable opportunity to prevent the shooting," where Mercer did not see the "rapidly escalating" situation, and Mercer was some distance away when his fellow officer shot the plaintiff/appellant Carr); Riley v. Newton, 94 F.3d 632, 635 (11 Cir. 1996) (holding, with regard to officer Gisson who was sued on the ground that he failed to intervene to protect plaintiff Riley from another officer's use of excessive force, Gisson had no reason to suspect the use of excessive force until after it occurred, and the obligation for him to take steps to protect the plaintiff never arose) (quoting O'Neill v. Kreminiski, 839 F.2d 9, 11-12 (2 Cir. 1988) for its holding that "The three blows were struck in such rapid succession that Conners had no realistic opportunity to prevent them. This was not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator."); Turner v. Scott, 119 F.3d 425, 429 (6 Cir. 1997). Cf. Anderson v. Branen, 17 F.3d 552, 557 (2 Cir. 1994) (holding that in order for liability to attach there must have been a realistic opportunity to intervene to prevent the harm; and that the question whether an officer had sufficient time to intervene or was capable of preventing the harm being caused by another officer

is an issue of fact for the jury, unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise) (citing O'Neill, 839 F.2d at 11-12); Byrd, 783 F.2d at 1007 (vacating entry of summary judgment for a defendant officer, where there was evidence that the officer was present during the encounter in which the plaintiff was allegedly subjected to an unprovoked beating by another officer)).

IV. Analysis

Defendants' Version of Events:

Plaintiff Enrique Gonzalez is an inmate of the Florida Department of Corrections and is presently serving a life sentence for First Degree Murder. (DE# 44, Plaintiff's Deposition, at 10). Plaintiff was housed at Everglades Correctional Institution from March 19, 2007 until March 27, 2008. (Id. at 6).

On March 27, 2008, Officer Ivan Perez was assigned as a housing officer in the E-dormitory of Everglades Correctional Institution ("ECI"). (DE# 52, Affidavit of Ivan Perez, ¶2).

Pursuant to Florida Department of Corrections procedure 602.018, "all cells, lockers, dormitories, and other areas of an institution may be searched in a reasonable manner at any time." (DE# 45, Affidavit of Jose Lugo-Sanchez and rule 602.018 attached thereto, ¶2). At a minimum, "twenty-five percent (25%)" of all inmates' personal property/living areas will be searched on a monthly basis." (Id.). To fulfill this requirement, all housing officers at ECI in 2008 where required to conduct at least five routine cell searches on each shift. (DE# 52, ¶3; DE# 45, ¶2). Routine cell searches may be conducted with or without an inmate

present. (DE# 45, ¶2). If the inmate is present during the search, a search may be conducted by one officer. (Id.)

At or about 10:30 in the morning on March 27, 2008, Officer Perez conducted a random and routine search of cell E2205, which belonged to Inmate Enrique Gonzalez, to fulfill the five search requirement. (DE# 52, ¶3). Cell E2205 was located on the second tier of the dormitory. (DE# 52, ¶3). In front of the cell is a thin walk way, which stretches from one end of the tier to other, and a small guard rail, consisting of two parallel bars and open space between, above and below the bars. (DE# 44, Plaintiff's Deposition, at 33-34). Because of the open railing and the thin walkway, there exists a real danger of falling from the second tier if one is not careful. (Id. at 34).

The only other officer present in E-dormitory at the time was Officer Tamera Woodside, who was in the control room in the center of the dorm with her back to where Officer Perez was conducting his search. (DE# 52, ¶4). As Officer Perez conducted the search of Inmate Gonzalez's cell, Inmate Gonzalez was present and stood at the entryway of the cell. (DE# 52, ¶6). Plaintiff and Officer Perez were the only two people in the cell at the time of the incident. (DE# 44, Plaintiff's Deposition, at 20-21). However, there were numerous inmates in the dormitory at the time. (Id. at 21).

As the search continued, Inmate Gonzalez began acting nervous. His hands shook and he talked incessantly. (DE# 52, ¶6). Based on his training and experience, Officer Perez suspected Inmate Gonzalez was attempting to distract him from the search. (Id.). After finding no contraband in the mattress or the foot locker, Officer Perez found what he recognized to be a large quantity of

marijuana on a checkerboard underneath the bottom bunk. (DE# 52, ¶7).

After Officer Perez discovered marijuana, Inmate Gonzalez repeatedly refused orders from Officer Perez to submit to hand restraints. (DE# 44, at 35-36; DE# 52, ¶7). While refusing these orders Inmate Gonzalez persisted in moving towards Officer Perez, cornering him in the back of the cell. (DE# 52, ¶7).

Fearing for his safety, and after Inmate Gonzalez's repeated refusal to submit to hand restraints, Officer Perez called for assistance over the radio. (DE# 52, ¶8). In the meantime, a struggle ensued as Officer Perez attempted to gain control of Inmate Gonzalez, which spilled out on to the walkway outside of the cell. (DE# 52, ¶8-9). During the struggle, Inmate Gonzalez yelled out to the other inmates in the dormitory "they found that" in Spanish. (DE# 52, ¶8).

Officer Juan Fernandez and Officer Lucious Green responded to the call. (DE# 46, Affidavit of Juan Fernandez, ¶3). Soon after they responded, Captain William Kelley arrived in E-Dormitory as well. (DE# 47, Affidavit of William Kelley, ¶2). On that day, Captain Kelley was the Officer-in-Charge (OIC) and was responsible for the overall security of the institution. (DE# 47, ¶2).

When the officers arrived, Inmate Gonzalez was actively resisting Officer Perez. (DE# 52, ¶9; DE# 46, ¶3; DE# 47, ¶2). However, all force ceased on the part of Officer Perez, and he was taken to medical. (DE# 47, ¶9; DE# 46, ¶5). In an effort to get control over Inmate Gonzalez, Officer Fernandez grabbed Inmate Gonzalez's left arm, placed it behind his back and, with Officer Green's assistance, successfully applied hand restraints. (DE# 46,

¶4; DE# 47, ¶2). Once Inmate Gonzalez was in hand restraints, all force ceased by Officer Fernandez. (DE# 47, ¶5).

Captain Kelley ordered that Officer Fernandez and Officer Green escort Inmate Gonzalez to confinement in F-Dormitory, which was only a short distance from E-Dormitory at ECI. (DE# 46, ¶5; DE# 47, ¶4). In doing so, Officer Fernandez and Officer Green grabbed Inmate Gonzalez's arms. (DE# 46, ¶5; DE# 47, ¶4).

The Officers' act of grabbing Inmate Gonzalez's arms did not constitute a use of force, but rather a permissible custodial touching. (DE# 45, ¶7 and attached rule 33-602-210(10)).

In F-Dormitory, Inmate Gonzalez was placed in the shower, which was utilized as a holding cell at ECI. (DE# 45, ¶5; DE# 47, ¶6).

After Inmate Gonzalez was secured in confinement, Officers Fernandez and Green left the scene and had no further involvement with Inmate Gonzalez. (DE# 47, ¶6). Captain Kelley immediately ordered that a camera be placed on Inmate Gonzalez and that a medical evaluation be performed, which was completed in F-Dormitory. (Id.). All such actions were in accordance with FDOC rules and regulations. (See DE# 45, ¶5).

At no time during this process did Captain Kelley have any physical contact of any kind with Inmate Gonzalez. (DE# 47, ¶4).

Both Officer Perez and Officer Fernandez completed use of force reports, stating that they used only the minimal amount of force necessary under the circumstances. (DE# 52, ¶11; DE# 46, ¶8).

As a result of the incident, Officer Perez sustained bruises, scrapes and a cut to his lip. (DE# 52, ¶9).

Nurse Rowe at ECI evaluated Inmate Gonzalez very soon after the incident and noted the following: an "abrasion" on his shoulder, a one centimeter "laceration" on his chin, a bruise on the back of his shoulder and another abrasion on top of his head. (DE# 48, Affidavit of Cathy Simcox, and attached medical records, pg. EG000028). At the time, Inmate Gonzalez complained of pain in his hamstring area and wrist. (DE# 48, pgs. EG000028 and EG000030). The Emergency Room record from the day of the incident states that Inmate Gonzalez showed "no signs of distress", that he was "able to walk", that he was able to sit and stand "without difficulty", that he showed full range of motion in his wrist, that he showed no signs of respitory distress, and that he responded well to verbal commands. (DE# 48, pg. EG000033). Nurse Rowe also instructed Inmate Gonzalez to notify medical of any "changes" in his condition. (Id.)

Plaintiff's medical records are devoid of any such notifications on his part. (See DE# 48). On the same day of the incident, when Inmate Gonzalez arrived at South Florida Reception Center (SFRC), he had no complaints of medical issues during his pre-special housing health assessment. (DE# 48, pg. EG000031).

In sum, Inmate Gonzalez suffered no injury as the result of the incident: he did not break any bones, had no fractures, nor did he receive any stitches or anything of the sort. (DE# 44, at 63). In addition, other than over-the-counter Ibuprofen, Plaintiff was not prescribed any additional medication as a result of the incident. (DE# 44, at 64).

On March 27, 2008, Inspector Tony Pesante was assigned to investigate the incidents of Battery on a Law Enforcement Officer and Possession of Contraband involving Inmate Gonzalez. (DE# 49, Affidavit of Inspector Pesante and attached investigative report, ¶2). As a result of his investigation and analysis of the evidence, Inspector Pesante determined that Inmate Gonzalez violated Florida Statute 784.07(1)(a) by committing the crime of Battery on a Law Enforcement Officer by pushing and head butting Officer Ivan Perez as well as causing other small abrasions. (DE# 49, ¶5). He further determined that Inmate Gonzalez violated Florida Statute 944.047(1)(c) by being in possession of 15.4 grams of marijuana. (Id.) Inspector Pesante then referred the case to the State Attorney's Office for prosecution. (Id.)

Inspector Pesante also saw no indication of any wrongdoing by any of the officers involved, including Officer Perez, Officer Green, Officer Fernandez and Captain Kelley, nor any indication that excessive force was used on Inmate Gonzlaez by any of the Officers. (DE# 49, ¶7).

After Inspector Pesante charged Inmate Gonzalez with the crimes of possession of marijuana and battery on a law enforcement officer, Inmate Gonzalez asserted his allegations of excessive force, and Inspector Frank Lewis was assigned to investigate his complaints. (DE# 50, Affidavit of Frank Lewis and attached investigative report, ¶2).

Inspector Lewis determined that Inmate Gonzalez's allegations of excessive force were unfounded for the following reasons:

> First, there was no evidence that Officer Perez's force was excessive. Chapter 33-602.210 governs the use of force. 33.602.210(2)(g) defines reasonable force as 'any

> force that is not excessive for protecting oneself or another or for gaining an inmate's compliance with a lawful order.' 33.602.210(9) likewise authorizes an officer to apply 'lawful and reasonably necessary physical force' to defend 'themselves or others from actions or others from actions that are likely to cause injury or death and to overcome an inmate's physical resistance to a lawful command.' Both exceptions applied in this case. The evidence I reviewed indicated that Inmate Gonzalez initiated contact with Officer Perez in an attempt to discard contraband. In addition, Inmate Gonzalez physically resisted Officer Perez's lawful command to submit to handcuffs after Officer Perez discovered marijuana in his cell.

(DE# 50, ¶4). Inspector Lewis determined that there was no evidence of excessive force by Officer Perez, Officer Fernandez, Officer Green and Captain Kelley. (DE# 50, ¶6).

According to Inspector Pesante and Inspector Lewis, the scrapes and bruises noted in the medical evaluation of Inmate Gonzalez was consistent with the use of minimal force necessary under the circumstances. (DE# 49, ¶7; DE# 50, ¶5).

Plaintiff Gonzalez's Version of Events:

Gonzalez testified as follows to the events at issue during an August 13, 2012 deposition. (DE# 44).

On March 27, 2008, Officer Perez came into his cell and said he was there to conduct a routine cell search. (Id. at 11-12). Perez asked him if he wanted to buy a cell phone for $700. (Id. at 13). Gonzalez responded that he was not interested. (Id.). Perez told Gonzalez that if he did not have $200 cash on him, he, Gonzalez, was in big trouble. (Id.). When Gonzalez responded that he did not have any money, Perez ordered him to turn around and submit to handcuffs. (Id.). Gonzalez questioned why Perez wanted

to put him in restraints and Gonzalez asked to speak with the sergeant. (Id.). Perez continued to insist Gonzalez turn around to be cuffed, while Gonzalez continued to question Perez's actions. (Id.). Perez then called for back up and alleged "officer down." (Id.). After making the call, Perez struck Gonzalez in the chin with the handcuffs in Perez's hands. (Id.). Perez next pushed Gonzalez down and dragged him out of the cell. (Id.). Perez continued to strike and kick Gonzalez while dragging him across the floor. (Id.). During the struggle Green managed to handcuff Gonzalez's hands behind his back. (Id.). Officers Green and Fernandez arrived and multiple officers piled on Gonzalez while striking and kicking him. (Id. at 15). During the struggle Green managed to handcuff Gonzalez's hands behind his back. (Id. at 44). Captain Kelley was present and ordered Green and Fernandez to escort Gonzalez to confinement. (Id. at 15). Green and Fernandez held Gonzalez upside down by his ankles and continued to kick and hit him all the way to confinement. (Id. at 15-16). Captain Kelley did not physically attack Gonzalez, however, he observed the actions against Gonzalez by Officer Green and Officer Fernandez. (Id. at 56).

Green and Fernandez threw Gonzalez in a shower, where he passed out. (Id. at 59). When he awoke, Captain Kelley was yelling at him to get up. (Id.). He had trouble getting up because there was blood everywhere. (Id.). He was bleeding from his forehead, his chin, and his forearms. (Id. at 59-60). Gonzalez's right wrist was damaged and he did not have felling in his hand for weeks. (Id. at 48). His leg was injured and he was not able to walk. (Id. at 15-16).

Next Gonzalez was taken to see Nurse Ricky Rowe. (Id. at 61). Several days later, a nurse examined his leg as it was black and

blue. She recommended he see a doctor. (Id. at 62). He did not break any bones, have any fractures, or get stitches. (Id. at 63). He was given Ibuprofen. (Id.). Four years after the incident, his leg is still "messed up." (Id. at 65).

In his response to defendants' motion for summary judgment, Gonzalez countered the defendants' version of events with an affidavits executed by two inmates and a declaration executed by Gonzalez. Gonzalez reiterated the facts he put forth during his deposition.

June Guerrero asserted in his affidavit that he observed the following on the morning of March 27, 2008. (DE# 60, p. 32). Perez entered Gonzalez's cell and several minutes later, Gonzalez was yelling for Perez to call the dorm sergeant. (Id.). Shortly thereafter, Guerrero observed Gonzalez on the floor bleeding from his face and Perez standing over Gonzalez while kicking and striking him. (Id.).

Frenchy de la Rosa executed an affidavit wherein he stated that he observed Captain Kelley and a group of officers enter the dormitory at a run. (DE# 60, p. 34). Soon after, a group of officers came out of the wing holding Gonzalez upside down by his legs. The officers were striking and kicking Gonzalez. (Id.). Gonzalez was not fighting back. He was bleeding from his face and looked dazed. (Id.).

Gonzalez's sworn testimony, which must be believed, establishes that Perez, Green, and Fernandez possessed a wanton state of mind and maliciously applied force against Gonzalez when, while Gonzalez was restrained by handcuffs and not misbehaving, Perez, Green, and Fernandez repeatedly struck and kicked Gonzalez.

See Hudson, 503 U.S. at 6-7. There was no need for force as Gonzalez posed no threat to the safety of the defendants, or anyone else. See Campbell, 169 F.3d at 1375. Gonzalez claims he suffered an injury to his forehead, arms, and legs. Therefore, Gonzalez testified to facts which satisfy the objective component that he suffered injuries sufficiently serious in relation to the need for the application of force. See Whitley, 475 U.S. at 319. Meanwhile, accordingly to the declarations of Perez, Green, and Fernandez, Gonzalez acted out when Perez found marijuana in Gonzalez's cell. The defendants claim that they applied reasonable force in response to Gonzalez's disorderly conduct, in a good faith effort to maintain and restore discipline. See Brown, 813 F.2d at 1188. In addition, Gonzalez's sworn testimony, which must be believed, establishes that Captain Kelley failed to intervene when Perez, Green, and Fernandez were using excessive force on Gonzalez.

In light of the foregoing, an attempt to resolve at summary judgment the issues and facts in dispute would require the Court to step outside its assigned role, and invade the province of the jury. As the Supreme Court stated in its opinion in Anderson v. Liberty Lobby, Inc., "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. 242, 255 (1986)(citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

Due to the existence of genuine issues of material fact, summary disposition in favor of defendants Perez, Green, Fernandez and

Kelley is not appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Injury

The defendants argue that summary judgment is appropraite because Gonzalez did not sustain any injuries. The defendants' argument is without merit. With the enactment of the PLRA, the requirements relating to injury for various kinds of inmate civil rights claims have changed. Section 1997e(e) of the PLRA provides as follows.

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

The Eleventh Circuit has interpreted this provision to mean that if due to the defendant's actions, a prisoner has not suffered some physical injury which is sufficient to satisfy the statutory provision in question, and the prisoner therefore cannot show anything more than mental or emotional suffering, the prisoner is foreclosed from obtaining *compensatory or punitive* damages even if there has been some violation of his constitutional rights. Harris v. Garner, 190 F.3d 1279, 1286-87 (11 Cir. 1999), vacated in part and reinstated in part, Harris v. Garner, 216 F.3d 970, 984-85 (11 Cir. 2000) (en banc). However, §1997e(e) does not bar suits by prisoners who failed to allege a physical injury if they seek *nominal* damages. See Hughes v. Lott, 350 F.3d 1157, 1162 (11 Cir. 2003).

Even assuming Gonzalez is not entitled to compensatory or punitive damages, due to a failure to establish injury, Gonzalez's claim may proceed because he may be entitled to nominal damages.

See Hughes, 350 F.3d at 1162. Accordingly, the defendants' argument that Gonzalez's lack of physical injury forecloses his claim under §1997(e)e should be rejected.

V. Conclusion

It is therefore recommended as follows: Defendants motion for summary judgment (DE# 43) be DENIED.

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

It is so recommended at Miami, Florida, this 13th day of August, 2013.

UNITED STATES MAGISTRATE JUDGE

cc: Enrique Leonel Gonzalez
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-20704-CIV-LENARD
MAGISTRATE JUDGE P.A. WHITE

ENRIQUE L. GONZALEZ, :
Plaintiff, :
v. :
IVAN PEREZ, ET AL., :
:
Defendants.

REPORT THAT CASE IS READY FOR TRIAL

In this *pro se* civil rights action pursuant to 42 U.S.C. §1983, a separate Report has been entered this date recommending, for reasons stated therein, that the defendants Perez, Green, Fernandez, and Kelley's motion for summary judgment (DE# 43) be denied.

Defendants Perez, Green, Fernandez, and Kelley filed a pre-trial statement of facts. (DE# 57). This court granted Gonzalez's motion to file a pre-trial statement and gave him 10 days following disposition of the defendants' motion for summary judgement to file. The case is otherwise now at issue; and the parties have not consented to trial before a Magistrate Judge pursuant to 28 U.S.C. §636(c). The undersigned respectfully recommends that this case be placed on the trial calendar of the District Judge.

Dated: August 13th, 2013.

UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Joan A. Lenard,
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-20704-CIV-LENARD/WHITE

ENRIQUE L. GONZALEZ,

Plaintiff,

v.

IVAN PEREZ, ET AL.,

Defendants.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE (D.E. 77) AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on the Report of Magistrate Judge Patrick White ("Report," D.E. 77), issued on August 13, 2013, recommending the Court deny Defendants' Motion for Summary Judgment (D.E. 43) filed on January 22, 2013. Judge White recommends that the Motion be denied due to the existence of genuine issues of material facts. The Report provides the Parties with fourteen (14) days to file objections. As of the date of this Order, no objections have been filed. Failure to file objections shall bar parties from attacking on appeal the factual findings contained in the report. See Resolution Trust Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Therefore, after an independent review of the Report and record, it is hereby **ORDERED AND ADJUDGED** that:

1. The Report and Recommendation of the Magistrate Judge (D.E. 77) issued on August 13, 2013, is **ADOPTED**; and

2. The Motion for Summary Judgment is **DENIED**;

DONE AND ORDERED in Chambers in Miami, Florida this 3rd day of September, 2013.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE