

Please Read Instructions on Reverse Side of Yellow copy

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Arkansas State Claims Commission

DEC 10 2013

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BEFORE THE STATE CLAIMS COMMISSION Of the State of Arkansas

RECEIVED

- Mr. Mrs. Ms. Miss

Hurlbut Daniel Hurlbut, #658898 Claimant

Do Not Write in These Spaces Claim No. 14-0460-CC Date Filed December 10, 2013 Amount of Claim \$ 12,500.00 Fund DOC

vs. State of Arkansas, Respondent Dept. of Correction

COMPLAINT Failure to Follow Procedure Personal Injury

Daniel Hurlbut, #658898, the above named Claimant, of 300 Corrections Dr, Newport, AR 72112 represented by

of Department of Correction Amount sought: \$12,500

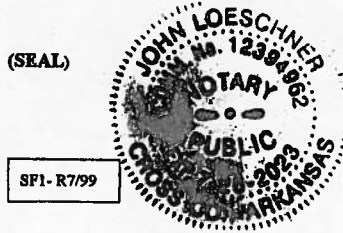
Month, day, year and place of incident or service: July 5, 2013 @ approx 11:15 am in 3 day room, East AR main Unit

Explanation: During a disciplinary hearing, at the request of Cpl. Ricky Thorne, Terre Bawster waived my hearing for non-compliance because I protested that Cpl. Thorne refused to gather my witnesses. Cpl. Thorne told me to leave to go back to my cell, so I refused and ask to speak with a supervisor. Cpl. Thorne went and got Cpl. Cobb (CO). I removed my hand from my cuff while still in the cage, he reached in and pulled me out. Cpl. Cobb wrapped me up from behind, and Cpl. Thorne punched my face several times. I then went to the ground in self-defense. At Cpl. Cobb's instruction, I slowly placed my hands behind my back and was cuffed. Cpl. Cobb held me down, while Cpl. Thorne punched me in my face nearly a dozen times (while still face down, fully restrained and compliant). I leaned to my ear and called out "SPK!" Cpl. Thorne smashed his own of mace into my right eye, then sprayed a long burst of mace while rubbing it and pressing it harder into my eye. My clothes were removed, and I was placed in my cell naked for several days. Cpl. Thorne wrote me a disciplinary in which he himself stated that while I was on the ground, he punched, beat and maced me. The entire incident was caught by the surveillance/security camera. Disciplinary officer Cpl. McDonald refused to review video and forced to call my witnesses. She served my disciplinary as the Warden already pre-marked "No witnesses". Warden Burl claims this was due to a computer "glitch". Warden Burl denies that video shows I was beaten or maced. Deputy Warden Mills claims video shows that I came out of my cuffs and swung on Cpl. Thorne, but that it didn't show he ever hit me. Disciplinary Hearing Officer Keith Whittle conducted my hearing on this disciplinary. I requested for review of video footage and my witnesses but he refused, and found me guilty just by Cpl. Thorne's statement and ignored my claim of retaliation/excess force/lack of evidence. Mr. Whittle did not record all my statement, and left the "Topic #, Side, Matter" section of my report blank. The last communication I got for this grievance (14012-02211) was on 9/17/13, which extended the response deadline to 10/23/13. The retention claim, "Internal Affairs read more into" however I never spoke to any of them. All my inquiries are ignored, and the final response was due 10/23/13. I seek \$12,500 for my claims of Assault & Battery, Outrage, Conspiracy

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof? when? to whom? and that the following action was taken thereon: and that \$ was paid thereon: (2) Has any third person or corporation an interest in this claim? if so, state name and address and that the nature thereof is as follows: and was acquired on, in the following manner:

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verify believes that they are true. Daniel Hurlbut (Print Claimant/Representative Name) Signature of Claimant/Representative

SWORN TO and subscribed before me at Newport AR on this 5th day of December, 2013 (Date) (Month) (Year) My Commission Expires: 26 2013 (Month) (Day) (Year)



SF1-R/799

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

DANIEL HURLBUT (ADC 568898)

CLAIMANT

V.

NO. 14-0460-CC

ARKANSAS DEPARTMENT OF CORRECTION

RESPONDENT

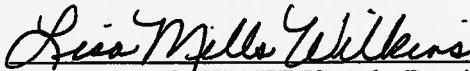
ANSWER

COMES NOW the Respondent, Arkansas Department of Correction, and for its Answer, states and alleges as follows:

1. Respondent denies liability in this claim and asserts it will hold the Claimant to strict proof on each allegation unless admitted by Respondent. Respondent reserves the right to plead further upon completion of the investigation by internal affairs and requests the matter be held in abeyance until the investigation is complete.
2. The applicable account information required by the Commission is:
 - a. Agency number: 0480
 - b. Cost Center: HCA0100
 - c. Internal Order: 340301
 - d. Fund Center: 509

WHEREFORE, for the reasons cited above the Respondent prays that the claim be dismissed with prejudice and that Claimant take nothing, or in the alternative that the matter be held in abeyance until completion of the investigation by internal affairs.

Respectfully submitted,
Department of Correction Office of Counsel


LISA MILLS WILKINS Ark. Bar #87190
Attorney Supervisor
Post Office Box 8707
Pine Bluff, AR 71611
(870)267-6844 Office
(870)267-6373 Facsimile

Arkansas
State Claims Commission

JAN 02 2014

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been served this 31 day of December, 2013, on the Claimant by placing a copy of the same in the U. S. Mail, regular postage to:

Daniel Hurlbut (ADC 658898)
Grimes Unit
300 Corrections Drive
New Port, AR 72112


LISA MILLS WILKINS Ark. Bar #87190

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

DANIEL HURLBUT (ADC #658898)

V.

NO. 14-0397-CC

Arkansas
State Claims Commission
JAN 27 2014
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CLAIMANT

ARKANSAS DEPARTMENT OF CORRECTION

RESPONDENT

RESPONDENT'S MOTION TO DISMISS

COMES NOW the Respondent, Arkansas Department of Correction, and for its MOTION TO DISMISS, states and responds as follows:

1. This is Claimant's second claim of excessive force for two separate instances just 2 ½ months a part.
2. Claimant alleges a failure to follow policy and personal injury as a result of assault and battery, outrage and conspiracy against him on July 5, 2013, when excessive force was used on him by officers. He seeks \$12,500.00 in damages. Claimant has failed to state a cause of action under ARCP 12(b)(6) and failure to exhaust and the claim should be dismissed.
3. Claimant alleges that he received a disciplinary and his witnesses were not present at the hearing on July 5, 2013, due to a computer glitch. AD 11-51 VII (D)(3) states that "Any witness(es) to the infraction shall prepare declaration(s) to be attached to the charging person's report of the incident. Witnesses include any inmates....who have firsthand knowledge of the infraction. Witnesses who appear to testify before the Disciplinary Court will have their statements recorded. If written witness statements are submitted to the Disciplinary Court, those will be read into the record." AD11-51 VII (E)(2) "The manner in which the witnesses' statements are presented to the court shall be within the discretion of the Disciplinary Hearing Officer." EAMU requires the statements in writing.
4. Claimant's hearing was terminated on July 5, 2013, by the DHO due to his conduct and he was found guilty of the offenses related to Claimant having destroyed his light fixture, then refused to submit to restraints to allow officers to search his cell for the missing parts of the light fixture. A cell extraction team had to be assembled. Claimant had stuffed paper in his lock which required maintenance to be called to remove the cover plate. Claimant also had covered his face with plastic wrap tied with string to avoid the chemical spray used to obtain his compliance. Claimant's actions and uncooperativeness took over two hours of time. He never appealed the finding of guilt. Claimant has failed to exhaust his remedies as required by AD 12-16.
5. AD 12-16 N. provides that "inmates are hereby advised that they must exhaust their administrative remedies as to all defendants at all levels of the grievance procedure before filing a Section 1983 lawsuit and Claims Commission claim. If this is not done, their lawsuit or claims may be dismissed immediately.
6. Furthermore, Claimant cannot bring an action for damages for a properly assessed and upheld disciplinary. "A prisoner cannot pursue the damages claim until the conviction or sentence is reversed, expunged, or called into question by a state tribunal or federal court."

Brown v. Sanders 2013 WL 5522435 (E.D. Ark.), citing *Heck v. Humphrey*, 512 U. S. 477, 489 (1994). In *Edwards v. Baliso*, 520, U. S. 641 (1997), the Supreme Court extended its holding in *Heck* so as to apply to disciplinary proceedings that resulted in a loss of good time credits. Claimant's disciplinary conviction for the above has not been reversed, expunged or challenged by a court; therefore, his claim should be dismissed.

7. Claimant alleges that after the disciplinary hearing, he was assaulted by Cpl. Thorne. Cpl. Cobb held him while Cpl. Thorne hit him in the face 'at least a dozen times', he went to the ground in self-defense, slowly placed his hands behind his back and was hand cuffed. Cpl. Thorne then punched him in his face several more times, called him a 'spik', sprayed him with a chemical, and rubbed it in his eyes. His clothes were removed and he was placed in his cell naked for several days. As a result he suffered personal injury
8. Claimant *admitted to removing his hand from the restraint* prior to exiting the holding cage where he was during the disciplinary hearing.
9. Video will show and the officers will testify that Claimant was pulled from the cage and attempted to strike Cpl. Thorne. (Frame 1) Officers took him to the ground in less than two seconds. (Frame 2), Claimant continued to resist. (Frame 3) Officers turned Claimant onto his stomach face down to put restraints on his hands in the back. (Frame 4) Claimant resisted again by trying to stand up. (Frame 5) Officers try to get above Claimant to keep him from standing up. (Frame 6) Officers have secured Claimants hands and are standing up and moving away from Claimant. (Frame 7) Additional officers arrive to assist and take Claimant to medical for pre lock up, (Frame 8) See Exhibit "A".
10. Medical staff note only redness on Claimant's chest during pre lock up. No other injuries are found on Claimant. Claimant made no complaints of injuries during segregation rounds that afternoon, the next day, or at any other time. Claimant had a medical follow-up on July 16, 2013, and no mention was made to the physician at that time of any injury from this incident.
11. Cpl. Thorne wrote Claimant a disciplinary for his actions. At the hearing on July 16, 2013, Claimant was found guilty of failure to obey order of staff, resisting apprehension, and assault upon staff. He did not appeal the conviction.
12. An internal affairs investigation was conducted at the request of then Chief Deputy Director Larry May and the allegation of excessive force was unfounded.
13. Administrative Regulation 409 V(A) "... authorizes the use of force only to the extent necessary to maintain order and discipline, and to ensure the safety of persons and the security of operations. (B) Force may be used to restrain, regain, or maintain control of an inmate or inmates. Employees shall use the minimum amount of force necessary to control the situation." It defines Non deadly force as "force that, under normal circumstance, will not result in death or serious bodily injury." Non-deadly physical force is authorized in VI (A)(3)(c).
14. Cpl. Thorne was justified in the just of non-deadly force, consisting of physical contact with the Claimant and use of chemical spray to obtain his compliance to be restrained due to the

fact that Claimant had already freed himself of one had restraint, attempted to strike Cpl. Thorne, and refused to submit to restraint when placed on the ground.

15. Based on the foregoing statements, has failed to state a claim upon which relief can be granted herein under ARCP Rule 12(b)(6).

WHEREFORE, for the reasons stated above and the evidence submitted, the Claim must be dismissed.

Respectfully submitted,
Department of Correction
Office of Counsel

Lisa Mills Wilkins

LISA MILLS WILKINS Ark. Bar #87190

Attorney Supervisor

Post Office Box 8707

Pine Bluff, AR 71611

(870)267-6844 Office

(870)267-6373 Facsimile

CERTIFICATE OF SERVICE

I certify that a copy of the MOTION TO DISMISS has been served this 24 day of January, 2014, on the below Claimant by placing a copy of the same in the U. S. Mail, regular postage to:

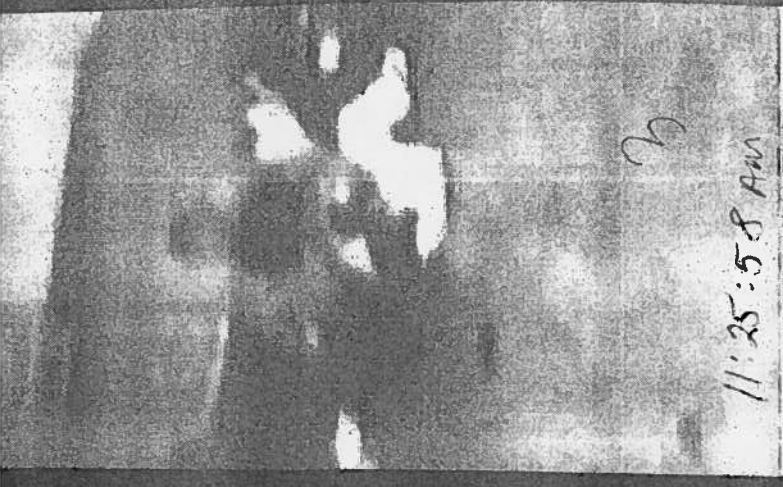
DANIEL HURLBUT (ADC #658898)
GRIMES UNIT
300 CORRECTIONS DRIVE
NEWPORT, AR 72112

Lisa Mills Wilkins

LISA MILLS WILKINS Ark. Bar #87190



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ADC
Arizona Department of Corrections
Exhibit
A

Before the AR State Claims Commission

Daniel Hurlbut (ADC #658898) 14-0460

Claimant

v.

No. ~~14-0397-66~~

Arkansas Department of Correction

~~Respondent~~ Respondent

Arkansas Claims Commission
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OPPOSITION TO RESPONDENT'S
"MOTION TO DISMISS"

Arkansas
State Claims Commission

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Comes now, Claimant Hurlbut, and for his Opposition to Respondent's "Motion to Dismiss, objects, opposes and declares as follows:

1. This is the second time Respondent has filed a motion to dismiss without answering any Discovery, and submitted photos of horrible quality supposedly from video, and Claimant objects to its authenticity. Further, it is not proper to bring up how many lawsuits a person has filed in order to try and prejudice that persons claim. That is irrelevant and violates the claimant's First amendment right to petition the government for a redress of grievances and should be suppressed.
2. The claimant, is entitled to money damages and has stated a claim for which relief can be granted under ARCP 12(b) and he has exhausted all remedies that were available. Please see ~~attached~~ attached hereto as "Exhibit A" claimant's exhausted grievance EAM 13-02883. Additionally see exhausted grievance submitted with Claimant's initial complaint. EAM 13-02211 and EAM 13-02516
3. The claimant did NOT have his requested witnesses at his hearing, and the Respondent's merely reciting their policy does not prove otherwise. It was warden Burt who alleged that the reason claimant's disciplinary report

was deficient was because of a "computer glitch". Warden Burl did not deny that the Claimant's disciplinary did not contain Notification or witness information, but rather offers the explanation that it was a "glitch" and thus, it should be taken as being admitted that the Claimant's disciplinary report was deficient. Please see attached hereto as "Exhibit B", warden Burl's response to Grievance # EAM 13-02516. (Also with original complaint) And as a result, Claimant did not get his requested witnesses. However, if allowed to conduct proper Discovery, to fully investigate his claim and given a fair hearing, Claimant will prove it was Cpl. Thorne's willful and deliberate actions, not an innocent "computer glitch", that caused him to have an unfair hearing. According to then-in-effect AD 13-10 VII M 1 a distinction is made between the "F-831-1" and "ISSR100" disciplinary forms. The F-831-1 is the report that is written before entering into 'EOMIS' and printed, (the ISSR100) by the disciplinary officer. At step 'b' the officer is to note their name, date, time, witnesses and obtain the inmate's signature, on the F-831-1, then later, at step 'f' they enter all that info. into EOMIS and print the ISSR100 and go back to the inmate and give it to them. Cpl. Thorne skips step 'b' and instead only brings the ISSR100 form already printed, thereby not entering notification and witness information, and marking all disciplinary reports as not having witnesses; thus, he purposefully made all the claimant's hearings unfair. Please see attached hereto as "Exhibit C" policy AD 13-10 VII M 1. see also "Exhibit B"

4. Claimant tried to explain to the ~~the~~ DHO, Mr. Banister that none of his witnesses were called, at this point Cpl. Thorne jumps up and calls ~~me~~^{him} a liar and insists DHO Banister waive ~~the~~^{the} hearing. Cpl. Thorne was not allowed to say anything to prejudice claimant's hearing, DHO Banister should not

have been influenced by Gpl. Thorne, and DAO Banister was supposed to make sure all witness and evidence were present. Please see attached hereto as "Exhibit ~~C~~", policy AD 13-10 VII; ~~III~~; E.8; and K. Claimant denies all other allegations in #4 of Respondents Motion to Dismiss, he has a serious mental illness and there is a lot of missing information. Claimant further OBJECTS that this is not relevant as it is not part of this claim. Claimant did file an appeal of his conviction but just never got a response. Please see attached hereto as "Exhibit D" Claimant's disciplinary appeals. Comparing "Exhibit A", one can see that there is a system in place to ensure a response, multiple carbon copies with (2) two inmate copies, an acknowledgement & tracking # system etc... As can be seen by "Exhibit D", the disciplinary appeal system contains none of those insurances or safeguards. The form says if you want to appeal further, to "write a letter", which claimant did and never got a response. This district has said "We believe that a remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy." *Miller v. Norris* 247 F.3d 736, 740 (8th Cir. 2001) and ~~and~~ other courts hold that "Prison officials may not take unfair advantage of the exhaustion requirement... or... use affirmative misconduct to prevent a prisoner from exhausting." *Dole v. Chandler*, 438 F.3d 804, 809, 812 (7th Cir. 2006). Further, AD 12-16 is the Inmate Grievance procedure policy, and Claimant has in fact exhausted his grievances as is clear from "Exhibit A" and the grievances submitted with his initial complaint.

Arkansas Claims Commission
FEB 06 2014

5. Claimant has already demonstrated he is in compliance with the grievance policy & exhaustion requirement. Please see attached hereto as "Exhibit A" Claimant's exhausted grievance. See also grievance attached to original complaint.

6. Claimant is seeking damages for assault and battery and the cover-up that ensued. Not about the disciplinary conviction. He reasonably relied on exhausting his grievance *Carlins v. Selsky*, 2006 WL 3548959 * 9 (S.D.N.Y. Dec. 6, 2006) (citation omitted)

"The exhaustion requirement is a gate keeper, not a 'gotcha' meant to trap unsophisticated prisoners who must navigate the administrative process pro se" (*Bookis v. Rich*, 2006 WL 565909, * 5 (S.D. Cal. Mar. 7 2006)) and Respondent simply refused to respond to Claimant's disciplinary appeal. Please see attached hereto as "Exhibit D" (Claimant's appeals. Furthermore, "it is equally important that [exhaustion] not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his ... rights" *Rhames v. Fed. Bureau of Prisons*, 2002 WL 1268005, * 5 (S.D.N.Y. June 6, 2002)

7. All of claimant's allegations are true and will be substantiated and proved by reviewing the video tape. Once Claimant is permitted to conduct proper Discovery, all evidence will support the same. At this point, no Discovery has been answered by Respondents; claimant has not been able to get the evidence he needs for a fair hearing & presentation of his claim

8. Just because Claimant "removed [his] hand from the restraint" does not give them the right to beat him mercilessly after he was restrained and under control again. (A prisoner's resistance and striking an officer "do not provide blank check justification" for excessive force later) ~~Carles~~ *Carles v. Kearney* 571 F.3d 318, 327 (3rd Cir. 2009) Even if claimant stabbed an officer, there is still no justification for beating him after being subdued see *Bogan v. Stroud* 958 F.2d 180, 185 (7th Cir. 1992)

In fact, Claimant did not intend for any violence to occur whatsoever. As indicated by Respondent, claimant "admitted to removing his hand from the restraint PRIOR TO EXITING THE HOLDING CAGE" (emphasis supplied). The purpose of doing this was to force Cpl. Thorne to go through his chain of command, as is policy, so Claimant could inform a supervisor of Cpl. Thorne refusing to get ~~any~~ his witnesses and interrupting the hearing. Claimant tried to stay in the cage and Cpl. Thorne pulled him out so a supervisor would not learn of his behavior.

9. Video will show, and evidence will support, that Cpl. Thorne beat Claimant in the face while he was face down and cuffed and restrained by Cpl. Cobb. (The pepper-spraying of an inmate who was on the ground with both hands cuffed behind him supports a claim, even if he had previously resist^{ed}) ~~that~~ Henderson v. Munn 439 F.3d 497, 502-03 (8th Cir. 2006) Claimant OBJECTS to the photos submitted with Respondent's "Motion to Dismiss" as not being authentic. For all he can tell, the photos are of two squirrels playing with a marshmallow. He can not make out anything in the photos allegedly from the video, and therefore DENIES they are genuine. Allowing Respondent to submit crummy photos as a substitute for the actual video, would make it too easy for them to omit the most crucial parts. A failure to review the Claimant's requested video-tape would deny due process. Howard v. U.S. Bureau of Prisons 487 F.3d 808, 813-15 (7th Cir. 2007) (citation omitted) Respondent already admits Cpl. Thorne punched Claimant in the face while face down on the ground and he wrote that in his disciplinary report. Please see attached hereto as "Exhibit A" Claimant's Grievance # EAM 13-02883. Claimant states in his grievance in part "~~that~~ ~~he~~ ~~said~~ ~~himself~~ ~~of~~ ~~his~~ ~~own~~ ~~actions~~ ~~to~~ ~~upon~~" "Cpl. Thorne said himself of his own actions... Upon...

... hitting the floor, inmate was still resisting therefore I, Cpl. Thorne applied several strikes to the right side of inmate's face. Inmate was still resisting so I applied a burst of (chemical agent)... " (quoting disciplinary written by Cpl. Thorne) to which ~~warden~~ warden Burl responds in part "Cpl. Thorne does state in his disciplinary that he punched you" Video will show Claimant was fully restrained, compliant, and as Respondent states in # 9, "(in) his stomach face down [with] restraints on his hands in the back" when Cpl. Thorne beat him in the face and maced him.

10. Medical staff, knowing excessive force was used, had a strong motive to omit facts from their reports to protect their co-workers. The law must entertain the possibility that health care providers in a prison setting might bring certain biases to their occupation. *Sanders-El v. Spielman* 38 F. Supp. 2d 438, 439 n.1 (D. Md. 1999) Claimant told everyone of his injuries, and ~~submitted~~ submitted multiple sick calls but medical and security staff did not care and refused to do anything which is common. Please see attached hereto as "Exhibit E" sworn statements from inmate Harry Eugene Surber # 89794. In these statements, Mr. Surber testifies, as will certain officers and other inmates, that it is difficult to get anyone to report anything or help anyone, especially when someone needs medical help. Claimant denies that anything said by Respondent in # 10 is true. (noting claims of falsification of medical records after use of force) *Green v. Branson* 108 F.3d 1296, 1304 (10th Cir. 1997)

11. Cpl. Thorne wrote a disciplinary that was only partly truthful, and Claimant has asked Respondent to produce it (and they have not as of yet) He did appeal his disciplinary but did not get a response. Please see attached

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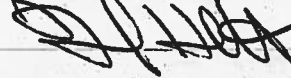
here to as "Exhibit D", Claimant's disciplinary appeal.

12. The party accused of wrong-doing, "investigated" itself. Finding that it didn't do anything wrong. Imagine that. Their claim that "the allegation of excessive force was unfounded" is a perpetuation of their cover-up. Why would they admit to excessive force, knowing there would be a lawsuit of some kind, before the lawsuit? If they admitted to it, then Claimant's job in presenting his case would be very easy, so Respondent has obvious motives to 'unfound' any such allegation even at the expense of the truth and of justice.
13. Claimant admits this is what policy says but denies Cpl. Thorne and Cpl. Cobb used the "minimum amount of force necessary"
14. Cpl. Thorne was NOT justified in beating and macing claimant's face while he was on "his stomach face down [with] restraints on his hands in the back" and Claimant did submit to restraint. Claimant denies all other allegations in #14
15. Based on the foregoing statements, Claimant has stated a claim and IT MUST NOT BE DISMISSED WITHOUT A HEARING OR Claimant's video being reviewed.
16. Claimant has submitted Interrogatories to Respondent, as well as Request for Documents. None of Claimant's Discovery has been responded to. His evidence is not on record. Respondent's motion is pre-mature, and if granted, would deny justice and is repugnant to the conscience.

17. Claimant DENIES, ³OBJECTS every allegation and piece of evidence Respondent relies on in their "Motion to Dismiss". There are too many issues of material fact in dispute precluding dismissal without a hearing

WHEREFORE, for the above stated reasons and the evidence submitted herein, this claim MUST BE SCHEDULED FOR TRIAL and Claimant allowed to complete Discovery. The video must be subpoenaed and reviewed. Respondent's Motion to Dismiss must be denied

Respectfully Submitted



Daniel Hurlbut #658898, ^{claimant} ~~plaintiff~~

CRIME'S unit

300 Corrections Drive

Newport, AR 72112

CERTIFICATE OF SERVICE

I certify a copy of this OPPOSITION TO MOTION TO DISMISS has been served this 30 day of January 14, 2014 on Respondent via U.S. Mail, properly addressed to Lisa Mills Wilkins, ADC attorney

P.O. Box 8707

Pine Bluff, AR 71611

