

REF_PTRL

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:10-cv-23677-CMA**

Gerald Lelieve v. John F. Timoney et al
Assigned to: Judge Cecilia M. Altonaga
Referred to: Magistrate Judge Patrick A. White
Demand: \$240,000
Case in other court: Miami-Dade Circuit Court, 10-49281
CA (6)
Cause: 42:1983 Civil Rights Act

Date Filed: 10/12/2010
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Gerald Lelieve

represented by **Gerald Lelieve**
DC #L11928
Hamilton Correctional Institution-
Annex
11419 S.W. County Road #249
Jasper, FL 32052-3735
PRO SE

V.

Defendant

Police Chief John F Timoney
individual and in his official capacity

Defendant

Detective Odney Belfort

represented by **John Anthony Greco**
City of Miami
Office of the City Attorney
444 S.W. 2nd Avenue,
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 ATTORNEY TO BE NOTICED

Defendant**Detective John Doe****Defendant****Detective John Doe #2***in their individual capacities*

Date Filed	#	Docket Text
10/12/2010	<u>1</u>	NOTICE OF REMOVAL Filing fee \$ 350.00 receipt number 113C-3226871, filed by Odney Belfort. (Attachments: # <u>1</u> Exhibit Complaint filed in state court, # <u>2</u> Civil Cover Sheet, # <u>3</u> Exhibit Order of Dismissal in 09-cv-20547-JAL)(Green, Christopher) (Entered: 10/12/2010)
10/12/2010	<u>2</u>	Judge Assignment RE: Electronic Complaint to Judge Cecilia M. Altonaga (lh) (Entered: 10/13/2010)
10/13/2010	<u>3</u>	Notice of Pendency of Other Action by Odney Belfort (Green, Christopher) (Entered: 10/13/2010)
10/13/2010	<u>4</u>	ORDER REFERRING CASE to Magistrate Judge Patrick A. White for a Report and Recommendation. Signed by Judge Cecilia M. Altonaga on 10/13/2010. (ps1) (Entered: 10/13/2010)
10/13/2010	<u>5</u>	MOTION to Dismiss the State Court Complaint contained within the Notice of Removal <u>1</u> Notice of Removal, by Odney Belfort. Responses due by 11/1/2010 (Green, Christopher) (Entered: 10/13/2010)
10/13/2010	<u>6</u>	MOTION to Take Judicial Notice of Record by Odney Belfort. (Green, Christopher) (Entered: 10/13/2010)
10/26/2010	<u>7</u>	ORDER denying <u>5</u> Motion to Dismiss; granting <u>6</u> Motion to Take Judicial Notice of Record. Signed by Judge Cecilia M. Altonaga on 10/26/2010. (ps1) (Entered: 10/26/2010)
10/28/2010	<u>8</u>	SCHEDULING ORDER: Amended Pleadings due by 3/11/2011. Discovery due by 2/25/2011. Joinder of Parties due by 3/11/2011. Motions due by 4/1/2011.. Signed by Magistrate Judge Patrick A. White on 10/27/2010. (tw) (Entered: 10/28/2010)
11/09/2010	<u>9</u>	ANSWER and Affirmative Defenses to Complaint re the Notice of Removal with Jury Demand by Odney Belfort.(Green, Christopher) (Entered: 11/09/2010)
11/24/2010	<u>10</u>	MOTION to Dismiss for Lack of Jurisdiction <u>1</u> Notice of Removal, by Gerald Lelieve. Responses due by 12/13/2010 (lk) (Entered: 11/29/2010)
11/30/2010	<u>11</u>	ORDER dismissing <u>10</u> Motion to Dismiss for Lack of Jurisdiction, this motion

		appears to be a copy of a pleading filed in the state courts.. Signed by Magistrate Judge Patrick A. White on 11/30/2010. (cz) (Entered: 11/30/2010)
12/08/2010	<u>12</u>	MOTION for Summary Judgment by Odney Belfort. Responses due by 1/3/2011 (Attachments: # <u>1</u> Exhibit Declaration of Odney Belfort, # <u>2</u> Exhibit Judgment of conviction, # <u>3</u> Exhibit Complaint in 08-21164, # <u>4</u> Exhibit Order of dismissal in 08-21164, # <u>5</u> Exhibit Complaint in 09-20547, # <u>6</u> Exhibit Order of dismissal in 09-20547)(Green, Christopher) (Entered: 12/08/2010)
12/10/2010	<u>13</u>	ORDER OF INSTRUCTING TO PRO SE PLAINTIFF CONCERNING RESPONSE TO MOTION FOR SUMMARY JUDGMENT. (Responses due by 12/30/2010). Signed by Magistrate Judge Patrick A. White on 12/9/2010. (tw) Modified text on 12/10/2010 (bb). (Entered: 12/10/2010)
01/03/2011	<u>14</u>	RESPONSE to Motion re <u>12</u> MOTION for Summary Judgment filed by Gerald Lelieve. (lh) (Entered: 01/03/2011)
01/04/2011	<u>15</u>	Defendant's MOTION for Extension of Time to File Response/Reply as to <u>14</u> Response to Motion for Summary Judgment by Odney Belfort. (Attachments: # <u>1</u> Text of Proposed Order)(Greco, John) (Entered: 01/04/2011)
01/05/2011	<u>16</u>	ORDER granting <u>15</u> Motion for Extension of Time to File Response/Reply re <u>15</u> Defendant's MOTION for Extension of Time to File Response/Reply as to <u>14</u> Response to Motion for Summary Judgment Responses due by 1/14/2011. Signed by Magistrate Judge Patrick A. White on 1/5/2011. (cz) (Entered: 01/05/2011)
01/12/2011	<u>17</u>	REPLY to Response to Motion re <u>12</u> MOTION for Summary Judgment filed by Odney Belfort. (Attachments: # <u>1</u> Text of Proposed Order)(Green, Christopher) (Entered: 01/12/2011)
02/23/2011	<u>18</u>	NOTICE of Filing Discovery: Request for Production of Documents by Gerald Lelieve.(ls) (Entered: 02/23/2011)
02/28/2011	<u>19</u>	MOTION to Compel <i>Production of Medical Records</i> by Gerald Lelieve. (lh) (Entered: 03/01/2011)
03/02/2011	<u>20</u>	ORDER deferring ruling on <u>19</u> Motion to Compel medical records. The defendants shall file their response forthwith to this motion.. Signed by Magistrate Judge Patrick A. White on 3/2/2011. (cz) (Entered: 03/02/2011)
03/02/2011	<u>21</u>	RESPONSE to Motion re <u>19</u> MOTION to Compel <i>Production of Medical Records</i> filed by Odney Belfort. Replies due by 3/14/2011. (Green, Christopher) (Entered: 03/02/2011)
03/03/2011	<u>22</u>	ORDER denying <u>19</u> Motion to Compel for the reasons stated in defendant's response. Further, it does not appear the plaintiff's medical records are required to determine the outcome of the motion for summary judgment pending.. Signed by Magistrate Judge Patrick A. White on 3/3/2011. (cz) (Entered: 03/03/2011)
04/14/2011	<u>23</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Notice of Removal, filed by Odney Belfort. Recommending (1) the claims against Defendants Police Chief John F. Timoney be dismissed for failure to state a

		claim;(2) the claims against John Doe Detectives #1 and #2 be dismissed for failure to adequately identify the defendants and serve them within 120 days of the complaints filing; and(3) Gerald Belfort's Motion for Summary Judgment (DE# 12) be denied as to the claim he used excessive force, and granted as to the claim that he violated Florida Statutes Section 893.25(1). Objections to R&R due by 5/2/2011. Signed by Magistrate Judge Patrick A. White on 4/14/2011. (tw) (Entered: 04/14/2011)
04/18/2011	24	PRETRIAL STATEMENTS by Gerald Lelieve (lh) (Entered: 04/19/2011)

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Billable Pages:	3	Cost:	0.24

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

GERALD LELIEVE,

Plaintiff,

vs.

CITY OF MIAMI POLICE CHIEF

JOHN F. TIMONEY, *et al.*,

Defendants.

ORDER

THIS CAUSE is before the Court upon Defendant Odney Belfort's ("Detective Belfort['s]") Motion to Dismiss ("Motion") [ECF No. 5] and Motion to Take Judicial Notice of Record [ECF No. 6], filed on October 12, 2010. Detective Belfort seeks to dismiss the Complaint [ECF No. 1-1] filed by the *pro se* Plaintiff, Gerald Lelieve,¹ on grounds of *res judicata*. The Court has reviewed the Motions, the file and the applicable law.

Mr. Lelieve is a *pro se* litigant currently imprisoned at Hamilton Correctional Institution in Jasper, Florida. For nearly two and a half years, he has persistently attempted to navigate the rule-bound terrain of the judicial process to pursue claims of physical abuse against the City of Miami Police Department stemming from his arrest in October 2006. Four cases — three federal and one state — and four dismissals later, Mr. Lelieve once again faces possible dismissal of his claims. A meticulous review of Mr. Lelieve's cases reveals that because of both judicial and filing errors, his claim has never been adjudicated on the merits.

¹ Mr. Lelieve's surname is spelled "LeLieve" in some filings, and "Lelieve" in others. For consistency, the Court uses "Lelieve."

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Mr. Lelieve filed his first case, number 08-cv-21664-JLK (“First Case”), a Complaint Under the Civil Rights Act, 42 U.S.C. § 1983 (“Section 1983”), on June 12, 2008. (See First Case, Compl. [ECF No. 1]). The Complaint describes events that allegedly transpired on or about October 10, 2006 when Mr. Lelieve “was stopped without probable cause or reasonable [sic] suspicion from [his] van and illegally searched in the presence of four passenger witnesses” (*id.* 4), and was “maliciously (and) sadistically & without cause, & (beaten) for the very purpose of causing harm” (*id.*), which resulted in “internal bleeding, swollen face & lips, chin & etc. etc. and was hospitalized for two weeks at Jackson Memorial” (*id.* 4). The First Case was initially dismissed without prejudice for lack of prosecution (*see* First Case, Oct. 22, 2008 Order [ECF No. 8]), following a report of Magistrate Judge Patrick A. White (*see* First Case, Report 1 [ECF No. 7]). Mr. Lelieve had failed to respond to the Court’s instructions to file his six-month prison account statement in support of his Motion to Proceed *In Forma Pauperis* (“IFP”), which was filed with his initial complaint. (See *id.* 1).

On December 16, 2008, Mr. Lelieve filed another Section 1983 complaint based on the same October 2006 events; this case was assigned the number 08-cv-23463-DLG (the “Second Case”). (See Second Case, Compl. 4 [ECF No. 1]). Mr. Lelieve also filed a Motion to Proceed IFP [ECF No. 2], which was denied with instructions that he amend his Motion to include the required financial affidavit. (See Second Case, Dec. 22, 2008 Order 2–3 [ECF No. 4]). On January 5, 2009, Mr. Lelieve filed a request to withdraw his claims and IFP motion in the Second Case because he made “improper and incomplete claim assessments.” (Second Case, Mot. to Withdraw 1 [ECF No. 6]).

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Magistrate Judge White denied the request and directed Mr. Lelieve to either amend his pleading and IFP forms, or file a motion for voluntary dismissal before January 30, 2009.

As directed, Mr. Lelieve filed an Amended Complaint on January 27, 2009. However, the Amended Complaint was filed in the First Case. *Sua sponte*, the court dismissed Mr. Lelieve's First Case with prejudice on January 30, 2010. In its Order, the court stated: "it appears from the face of the document that it is no different than the original filing. Accordingly, the Court has determined that this document is a repeat filing of the Plaintiff's original action." (First Case, Jan. 30, 2009 Order 1 [ECF No. 10]). While the Amended Complaint addressed the same October 2006 incident, it was significantly different from both the initial complaint filed in the First Case and the initial complaint filed in the Second Case in that the Amended Complaint included much more detail and was typewritten. (*See* First Case, Am. Compl. [ECF No. 9]).

Meanwhile, not having received an amended complaint or the IFP form requested from Mr. Lelieve in the Second Case, Judge White recommended dismissing Mr. Lelieve's Second Case for lack of prosecution [ECF No. 8] on February 9, 2009. In his Report, Judge White advised Mr. Lelieve he could file an amended complaint and an application to proceed IFP with his objections to the Report. (*See* Second Case, Report 2). Mr. Lelieve responded in a timely manner to Judge White's directions of February 9, 2009 by filing an amended complaint and his IFP motion (with the correct documents included) on February 26, 2009. Attached to the papers was a copy of Judge White's Report in the Second Case. However, once again, Mr. Lelieve's filings found their way to the docket of the First Case. (*See* First Case, Mot. [ECF No. 11], Second Am. Compl. [ECF No. 12]).

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Addressing the newly-filed documents in the First Case, Judge White ordered the Clerk to file the Second Amended Complaint and the IFP motion “as a new civil rights case and assigned [sic] it a new case no. [sic].” (First Case, Mar. 3, 2009 Order of Magistrate Judge 1 [ECF No. 13]). Thus commenced Mr. Lelieve’s Third Case, number 09-cv-20547-JAL. Because Mr. Lelieve’s amended complaint and IFP motion were never received in his Second Case, the court adopted the recommendations of Judge White’s February 9, 2009 Report and dismissed Mr. Lelieve’s Second Case without prejudice on April 13, 2009. (*See* Second Case, Apr. 13, 2009 Order [ECF No. 9]).

Mr. Lelieve’s Third Case finally began moving through the legal pipeline; summons were issued (*see* Third Case, Summons Issued [ECF Nos. 8–11]), and a preliminary report recommended Mr. Lelieve’s claims be allowed to proceed against the officers involved in the alleged arrest (*see* Prelim. Report 11 [ECF No. 13]). Forward momentum stopped, however, when Detective (then, Officer) Belfort filed a motion to dismiss asserting Mr. Lelieve’s complaint was barred by *res judicata* because of the court’s dismissal of Mr. Lelieve’s First Case with prejudice. (*See* Third Case, Mot. to Dismiss [ECF No. 22]). Mr. Lelieve filed his Response [ECF No. 23] to the motion and Judge White recommended the motion be denied, suggesting Judge King’s dismissal with prejudice was an “apparent scrivener’s error.” (Third Case, August 26, 2009 Report of Magistrate Judge 3 [ECF No. 30]). Detective Belfort objected to the Report (*see* Third Case, Objections [ECF No. 31]), and Mr. Lelieve filed a response in opposition (*see* [ECF No. 32]). The court ultimately rejected Judge White’s Report, stating “[t]here is nothing in the record or Judge King’s January 30, 2009, Order to indicate that it was not his intention to dismiss the case with prejudice. There is nothing in the record to indicate the January 30, 2009, Order contained a scrivener’s error.” (Third

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Case, Nov. 11, 2009 Order 3 [ECF No. 33]). The court granted Detective Belfort's Motion to Dismiss and closed the case. (*See id.*).

Mr. Lelieve — denied his day in federal court — apparently decided to pursue his claims in state court. He filed yet another complaint, which is the basis for the current suit, in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida on July 12, 2010. (*See* Compl. 1). Because the Complaint includes an assertion the Defendants owed Mr. Lelieve a duty of care under the Fourteenth Amendment (*see id.* 2), and also to press the current motion in federal court, Detective Belfort removed the case on October 12, 2010. (*See* Notice of Removal [ECF No. 1]). The following day, Detective Belfort filed the present motions to dismiss and to take judicial notice. As in the Third Case, Detective Belfort asserts Mr. Lelieve's claim is barred under the doctrine of *res judicata* and must be dismissed. (*See* Mot. 1).

At least four errors have occurred in the legal tale of Mr. Lelieve's single claim, which has not yet been decided on the merits, let alone proceeded beyond the pleading stage. First, Mr. Lelieve's efforts to remedy the deficiencies in the First Case were incorrectly filed as the Second Case. Second, the court dismissed the First Case with prejudice when it should have properly dismissed the complaint without prejudice as no decision had been reached on the merits. Next, the Third Case was opened upon receipt of documents intended to respond to the Report in the Second Case. And finally, the Third Case was dismissed with prejudice in reliance on the erroneous dismissal of the First Case.

Detective Belfort asserts *res judicata* warrants dismissal of Mr. Lelieve's claim because the court dismissed Mr. Lelieve's complaints with prejudice in the First and Third Cases. (*See id.*).

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However, *res judicata* is designed to give preclusive effect “by foreclosing *relitigation* of matters that should have been raised in an earlier suit.” *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986) (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984)) (emphasis added). Detective Belfort accurately cites the four elements necessary for *res judicata* to bar a litigant’s second or subsequent action. (See Mot. 2). They are: “(1) a final judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits, and (4) the same cause of action must be involved in both cases.” *Hart*, 787 F.2d at 1470 (citing *Ray v. TVA*, 677 F.2d 818, 821 (11th Cir. 1982)).

But while Detective Belfort asserts all of the elements of *res judicata* have been met, he fails to explain how or when a final judgment on the merits was reached. (See Mot. 2). Nor could he. To date, no court has rendered a final judgment on the merits of Mr. Lelieve’s claim. In short, Mr. Lelieve cannot be foreclosed from relitigating his claim when he has not litigated it in the first place.

For these reasons, it is

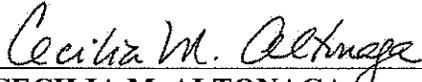
ORDERED AND ADJUDGED that

1. The Defendant’s Motion to Take Judicial Notice of Record [ECF No. 6] is **GRANTED**.
2. The Defendant’s Motion to Dismiss [ECF No. 5] is **DENIED**.
3. But for the undersigned’s intervention in addressing the present Motions, the case is returned to Judge White consistent with the Order of Referral [ECF No. 4].

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4. This case is referred to the Volunteer Lawyer's Project for their consideration and in the event they consider it appropriate to represent Mr. Lelieve.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of October, 2010.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

Gerald Lelieve, *pro se*
DC # L11928
Hamilton Correctional Institution-Annex
11419 S.W. County Road, #249
Jasper, Florida 32052-3735

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23677-CIV-ALTONAGA
MAGISTRATE JUDGE P. A. WHITE

GERALD LELIEVE, :
 :
 Plaintiff, :
 : ORDER SCHEDULING PRETRIAL
 v. : PROCEEDINGS WHEN PLAINTIFF
 : IS PROCEEDING PRO SE
 POLICE CHIEF JOHN F. TIMONEY, :
 et al., :
 :
 Defendants. :
 _____ :

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

ORDERED AND ADJUDGED as follows:

1. All discovery methods listed in Rule 26(a), Federal Rules of Civil Procedure, shall be completed by **February 25, 2011**. This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **March 11, 2011**.

3. All motions to dismiss and/or for summary judgment shall be filed by **April 1, 2011**.

4. On or before **April 15, 2011**, the plaintiff shall file with the Court and serve upon counsel for the defendants a document

called "Pretrial Statement." The Pretrial Statement shall contain the following things:

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

5. On or before **April 29, 2011**, defendants shall file and serve upon plaintiff a "Pretrial Statement," which shall comply with paragraph 4(a)-(f).

6. Failure of the parties to disclose fully in the Pretrial Statement the substance of the evidence to be offered at trial may result in the exclusion of that evidence at the trial. Exceptions will be (1) matters which the Court determines were not discoverable at the time of the pretrial conference, (2) privileged matters, and (3) matters to be used solely for impeachment purposes.

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

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

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

- (a) discuss the possibility of settlement;

- (b) stipulate (agree) in writing to as many facts and issues as possible to avoid unnecessary evidence;
- (c) examine all exhibits and documents proposed to be used at the trial, except that impeachment documents need not be revealed;
- (d) mark all exhibits and prepare an exhibit list;
- (e) initial and date opposing party's exhibits;
- (f) prepare a list of motions or other matters which require Court attention; and
- (g) discuss any other matters that may help in concluding this case.

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

DONE AND ORDERED at Miami, Florida, this 27th day of October, 2010.

Patrick A. White

Patrick A. White
U.S. Magistrate Judge

cc: Gerald Lelieve, Pro Se
DC #L11928
Hamilton Correctional Institution-Annex
11419 S.W. County Road #249
Jasper, FL 32052-3735

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Hon. Cecilia M. Altonaga, United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23677-Civ-ALTONAGA
MAGISTRATE P. A. WHITE

GERALD LELIEVE, :
 :
 Plaintiff, :
 :
 v. :
 :
 JOHN F. TIMONEY, et al., :
 :
 Defendants. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

Gerald Lelieve has filed a *pro se* civil rights complaint pursuant to Title 42, Section 1983. He seeks damages for physical and emotional injuries he allegedly sustained when beaten during an arrest on October 11, 2006.

This case has a long and convoluted history. Lelieve first filed a Section 1983 complaint in the Southern District in 2008, case number 08-cv-21664-JLK.¹ Two more Section 1983 cases followed in 2008 and 2009, case numbers 08-cv-23463-DLG² and 09-cv-20547-

¹ In an unsigned and undated complaint docketed June 11, 2008, Lelieve named the following as defendants: Metro-Dade Police Officer "Fernandez et al.," Metro-Dade Police Officers "Pierre, Belford," and "Metro-Dade Police Chief." He alleged he was stopped without probable cause and beaten in violation of the Eighth and Fourteenth Amendments. He sought declaratory judgment, \$11 million in compensatory damages, and \$10,000 in punitive damages. See (08-cv-21664-JLK, DE# 1).

² In a complaint signed under penalty of perjury filed on December 9, 2008, Lelieve named as defendants: "Officer Belford et al.," Officers Pierre and Fernandez, and the Police Chief of the City of Miami Police Department. Again, he alleged he was stopped without probable cause and beaten. He sought declaratory judgment, \$11 million in compensatory damages, and \$10,000 in punitive damages. See (08-cv-23463-DLG, DE# 1).

JAL.³ Finally, he filed an intentional tort complaint in State court on July 12, 2010, which Defendant Belfort removed to this Court on October 12, 2010, presently pending as case number 10-23677. (DE# 1).

On October 13, 2010, defendant Detective Odney Belfort filed a motion to dismiss arguing the instant complaint is barred by *res judicata* due to the disposition of Lelieve's prior Section 1983 cases. (DE# 5). The Court denied the motion to dismiss after exhaustively addressing the complex procedural history of Lelieve's prior three Section 1983 cases in a detailed order, finding *res judicata* inapplicable because Lelieve's civil rights complaint has never been adjudicated on the merits due to judicial and filing errors. (DE# 7).

Presently before the Court for resolution is Defendant Belfort's motion for summary judgment (DE# 12). After further independent review of the record, it also appears that the claims against Police Chief John F. Timoney and John Doe Detectives #1 and #2 have not been screened for facial sufficiency. This Report therefore addresses the claims against Belfort, Timoney and the two John Does.

A. Plaintiff's Claims

Lelieve filed the instant sworn complaint as an Intentional

³ In a complaint filed under penalty of perjury on February 20, 2009, Lelieve named as defendants: Officers Pierre, Fernandez, Gonzalez, Belfort, Gayle of the City of Miami Police Department, the City of Miami Police Supervisors, and unknown medical staff and doctors at Jackson Memorial Hospital. He alleged he was maliciously beaten in violation of Eighth and Fourteenth Amendments, and that medical personnel at Jackson failed to ascertain his medical needs while treating his injuries. He sought \$2.5 million in compensatory damages and \$1.5 million in punitive damages from the City, Pierre, Fernandez, Gonzalez, and Belfort; and \$1.5 million in compensatory and \$750,000 in punitive damages from Gayle and the unknown medical personnel. See (09-cv-20547-JAL, DE# 1).

Tort Complaint in State court on July 12, 2010. (DE# 1-1). The defendants are: Police Chief John F. Timoney, Detective Odney Belfort, and John Doe Detectives #1 and #2. The claims against Chief Timoney are in his individual and official capacities, and the claims against Detective Belfort and the two John Doe detectives are in their individual capacities only. See (DE# 1 at 1).

According to Lelieve, his vehicle was stopped on October 11, 2006, by the two John Doe detectives. He alleges they repeatedly punched his face and shoved him to the ground after handcuffing him. He claims Belfort then stomped his stomach while the John Does stood by and failed to intervene. He claims Belfort falsely reported that the arrest occurred without incident in violation of Section 839.25(1), Florida Statutes, which criminalizes official misconduct. He claims Timoney failed to thoroughly investigate the detectives involved in use of excessive force against him, ceded a thorough investigation to the District Attorney through official policy, and arbitrarily determined no criminal indictment should be issued and that no further investigation or discipline was warranted.

Lelieve alleges he suffered severe bodily injury from Belfort's actions which required surgery for internal bleeding, hospitalization for almost two weeks, and subsequent care in the infirmary section of Dade County Jail. He claims the beating left him with a twelve-inch scar on his abdomen, constant stomach pain and irritable bowel movements.

Lelieve seeks \$200,000 jointly and severally for physical and emotional injuries, and \$40,000 against Belfort and each of the two John Doe detectives for the beating.

B. Defendant Belfort's Motion for Summary Judgment

Defendant Belfort filed a motion for summary judgment claiming Lelieve failed to state claims under the Fourteenth Amendment and Section 839.25(1). In addition, he argues he is entitled to qualified immunity and that the instant action is barred by *res judicata*. (DE# 12).

Belfort filed an affidavit in support of his motion for summary judgment. (DE# 12-1). He claims he was the "eyeball" conducting surveillance in a narcotics sale investigation. He saw Lelieve drive up in his van and participate in a transaction, then radioed descriptions of Lelieve and his vehicle to "takedown" officers who stopped and arrested Lelieve. Belfort denies he was present at the stop and arrest, claims he did not observe those events, and asserts he never came into physical contact with Lelieve. Belfort has attached to his motion a State court judgment indicating Lelieve was convicted of cocaine trafficking, and some of the filings and orders in Lelieve's prior three Section 1983 cases. (DE# 12-2 - 12-6).

C. Plaintiff's Response

In an unsworn response, Lelieve argued the motion for summary judgment should be dismissed because Belfort did not file a proposed order with his motion. (DE# 14). He requested a stay on the summary judgment ruling until he filed discovery including medical records, county jail records, and prison official affidavits. Lelieve did not address Belfort's factual allegations or attempt to refute them with an affidavit.

D. Defendant Belfort's Reply

Belfort filed a reply attaching a proposed order and noted a proposed order is not required by the rules and does not preclude

summary judgment. (DE# 17). He argued Lelieve's request for a stay pending discovery should be denied because Lelieve did not submit affidavit or declaration showing he cannot present essential facts justifying opposition to summary judgment. Further, the records to which Lelieve referred (medical records, county jail records, prison official affidavits) are immaterial to the issues raised on summary judgment and would not justify opposition.

II. Legal Standards

A Section 1983 plaintiff must establish (1) he was deprived of a right secured by the Constitution or laws of the United States, and (2) the alleged deprivation was committed under color of state law. 42 U.S.C. 1983; Polk County v. Dodson, 454 U.S. 312 (1981); see Martinez v. Ashtin Leasing, Inc., 2011 WL 873302 (11th Cir. March 15, 2011). The plaintiff must establish an affirmative causal connection between a defendant acting under color of state law and the constitutional deprivation alleged. Troupe v. Sarasota County, 419 F.3d 1160, 1165 (11th Cir. 2005).

A district court "shall" dismiss a case proceeding *in forma pauperis* at any time if the court determines that the action "fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). Failure to state a claim under Section 1915 is governed by the same standard as dismissal under Rule 12(b)(6). Alba v. Montford, 517 F.3d 1249, 1252 (11th Cir. 2008).

The United States Supreme Court recently clarified the standard for Rule 12(b)(6) dismissal in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), and Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009). A complaint need not contain detailed factual allegations. See Fed. R. Civ. P. 8(a)(2) (pleading must contain a "short and plain statement of the claim showing that the pleader is

entitled to relief."). However, a plaintiff's obligation to provide the grounds for his entitlement to relief requires more than labels and conclusions; a "formulaic recitation of the elements of a cause of action will not do...." Twombly, 550 U.S. at 555. The allegations must rise above the speculative level and "state a claim to relief that is plausible on its face." Id. at 570.

This analysis requires a two-step inquiry. First, the court must identify the complaint's factual allegations, grant them an assumption of truth, and discard the legal conclusions to which no assumption of truth applies. Iqbal, 129 S.Ct. at 1949-50. Second, the court must determine whether the factual allegations, taken as true, plausibly suggest entitlement to relief. Id. at 1950-51. Determining plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950. If the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint is insufficient to state a claim. Id.

Summary judgment is proper "if the pleading, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The inquiry is whether the evidence viewed in the light most favorable to the party opposing the motion "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986); Skrtich v. Thornton, 280 F.3d 1295, 1299 (11th Cir. 2002).

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to show specific facts exist that raise a genuine issue for trial. Dietz v. Smithkline Beecham Corp., 598 F.3d 812, 815 (11th Cir. 2010). The nonmoving party must go beyond the pleadings with evidentiary materials such as affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing there is a genuine issue for trial. Celotex, 477 U.S. at 324. If the nonmoving party presents evidence that is merely colorable or not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249. *Pro se* complaints are entitled to liberal interpretation. However, "a pro se litigant does not escape the essential burden under summary judgment standards of establishing that there is a genuine issue as to a fact material to his case in order to avert summary judgment." Brown v. Crawford, 906 F.2d 667, 670 (11th Cir. 1990).

Summary judgment is not a procedure for resolving a swearing contest. Chandler v. Baird, 926 F.2d 1057 (11th Cir. 1991).

"Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...." Anderson, 477 U.S. at 255.

III. Discussion

A. Police Chief Timoney

Lelieve claims Timoney failed to thoroughly investigate the alleged use of excessive force in the instant case, ceded a thorough investigation to the District Attorney through official policy, arbitrarily determined no criminal indictment should be issued and that no further investigation or discipline was warranted.⁴ These claims, when the alleged facts are assumed to be true, fail to state a plausible claim for relief and should be dismissed.

(1) Individual Capacity

Lelieve's argument that Timoney is personally liable in his supervisory capacity fails to state a claim for relief.

Section 1983 does not permit recovery against a defendant in his individual capacity under a theory of *respondeat superior* or vicarious liability. Keating v. City of Miami, 598 F.3d 753, 762 (11th Cir. 2010). Therefore, public officials in supervisory positions cannot simply be held vicariously liable for the acts of their subordinates. Robertson v. Sichel, 127 U.S. 507 (1888); Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986), abrogation on other grounds recognized by Nolin v. Isbell, 207 F.3d 1253 (11th Cir. 2000). A supervisor may be individually liable under Section 1983

⁴ Lelieve does not appear to suggest Timoney is liable for the arresting officers' alleged use of excessive force. Any such claim would fail because Lelieve does not allege Timoney was present at the time excessive force was exercised, directed the officer's actions, had any personal knowledge or causal connection to the alleged constitutional deprivations, or that Timoney created a policy of using excessive force.

only when a plaintiff proves: (1) the official was personally involved in the acts that resulted in the constitutional deprivation; or (2) an affirmative causal connection exists between the acts of a supervising official and the alleged constitutional deprivation. See Douglas v. Yates, 535 F.3d 1316, 1322 (11th Cir. 2008); Lloyd v. Van Tassell, 318 Fed. Appx. 755, 760 (11th Cir. 2009). A causal connection is established when: (1) the supervisor was on notice, by a history of widespread abuse, of the need to correct a practice that led to the alleged deprivation, and that he failed to do so; (2) the supervisor's policy or custom resulted in deliberate indifference; (3) the supervisor directed the subordinate to act unlawfully; or (4) the supervisor knew the subordinate would act unlawfully and failed to stop the unlawful action. Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003).

To state a sufficient claim of personal liability in the instant case, then, Lelieve would have to allege Timoney was either personally involved in the acts resulting in a constitutional deprivation, or that an affirmative causal connection existed between Timoney and the deprivation. See, e.g., Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985) (claim sufficient where plaintiff alleged the Public Safety Director was responsible for disciplining officers and setting police department policy, that city police officers engaged in a pattern of excessive force during arrests, and that the director failed to take corrective steps although he was aware of the use of unlawful, excessive force).

Here, Lelieve only alleges Timoney failed to thoroughly investigate the detectives involved in use of excessive force against him, ceded a thorough investigation to the District Attorney through official policy, and arbitrarily determined no

criminal indictment should be issued and that no further investigation or discipline was warranted. The foregoing fails to suggest Timoney was personally involved in the deprivation of his rights, that he was on notice of the need to correct a practice due to a history of widespread abuse, that his policy or custom resulted in deliberate indifference, that he directed subordinates to act unlawfully, or that he knew his subordinates would act unlawfully and failed to stop the unlawful action. See, e.g., Bolander v. Taser Intern., Inc., 2009 WL 2004379 (S.D. Fla. July 9, 2009) (even if the City conducted no investigation after alleged excessive force incident, plaintiffs could not show the failure to investigate caused the excessive force; summary judgment appropriate).

Accordingly, Lelieve has failed to state a plausible claim for relief and the claim against Timoney in his individual capacity should be dismissed. See 28 U.S.C. § 1915 (e)(2)(B)(ii).

(2) Official Capacity

Lelieve's claim that Timoney created a policy in his official capacity that violated his constitutional rights is likewise facially insufficient.

A municipality's Section 1983 liability must be predicated on more than a theory of *respondeat superior*. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). For a plaintiff to demonstrate a defendant is liable in his official capacity, the plaintiff must show the deprivation of a constitutional right resulted from: (1) an action taken or policy made by an official responsible for making final policy in that area of the County's business; or (2) a practice or custom that is so pervasive as to be the functional equivalent of a policy adopted by the final policymaker. Church v.

City of Huntsville, 30 F.3d 1332, 1343 (11th Cir. 1994). "A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality.... A custom is a practice that is so settled and permanent that it takes on the force of law." Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (11th Cir. 1997). Only a final policymaker can be held liable in an official capacity. Church, 30 F.3d at 1342. "[P]roof that a municipality's ... authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 405 (1997). However, "Congress did not intend municipalities to be held liable [under Section 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monell, 436 U.S. at 691.

In the instant case, Lelieve does not allege Timoney is the official responsible for making policy decisions for Miami-Dade County.⁵ Nor does he allege the policy of non-investigation is so pervasive that it is the functional equivalent of a policy adopted by the final policymaker. He merely states Timoney failed to conduct an adequate investigation in the instant case and that his delegation of investigatory function to the District Attorney somehow thwarts proper investigation as a general matter. He has failed to show the required pattern of illegality or that a final policymaker had subjective knowledge of, and failed to stop, an

⁵ Indeed, the Southern District has repeatedly stated that the "final policymaking authority for Miami-Dade County resides in the Board of County Commissioners or the County Manager." Blue v. Miami-Dade County, 2011 WL 1099263 at *3 (S.D. Fla. March 22, 2011); see Fernandez v. Metro Dade Police Dep't, 2008 WL 2705433 (S.D. Fla. July 9, 2008) (Miami-Dade Police Chief is not the final policymaker for the county). Cf. Cooper v. Dillon, 403 F.3d 1208 (11th Cir. 2005) (holding the Key West Police Chief is the ultimate policymaker based in part on the Key West Code of Ordinances).

unconstitutional practice that it was so pervasive that it was the functional equivalent of formal policy. See Doe v. School Bd. of Broward County, 604 F.3d 1248 (11th Cir. 2010) (no municipal liability for a single act of a supervisor lacking final policy-making authority); see, e.g., Fernandez v. Metro Dade Police Dep't, 2008 WL 2705433 (S.D. Fla. July 9, 2008) (summary judgment for defendants granted where allegation that mayor and police chief tolerated actions of three officers and failed to adequately hire, train, discipline and supervise them, failed to demonstrate a custom or policy of rights deprivation, and the defendants were not final policy-makers); Puig v. Miami-Dade County, 2010 WL 1631896 (S.D. Fla. Jan. 13, 2010). Nor has he explained how the alleged existence of a policy or custom caused the violation of his rights. See Monell, 436 U.S. at 658 (official municipal policy must have caused the constitutional tort for Section 1983 liability to attach).

Accordingly, Lelieve's allegations are insufficient to state a plausible claim against Timoney in his official capacity and should be dismissed.

B. John Doe Detectives

Lelieve alleges "John Doe Detectives #1 and #2" used excessive force during his arrest by repeatedly punching his face and shoving him to the ground after he was handcuffed. He also alleges the John Does failed to intervene⁶ when Detective Belfort stomped his stomach.

⁶ An officer who is present and fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for nonfeasance. Velazquez v. City of Hialeah, 484 F.3d 1340, 1341 (11th Cir. 2007). For liability to attach, the non-intervening officer must have been in a position to intervene and failed to have done so. Priester v. City of Riviera Beach, 208 F.3d 919, 924 (11th Cir. 2000).

As a general matter, fictitious party pleading is not permitted in federal court. Richardson v. Johnson, 598 F.3d 734, 738 (11th Cir. 2010). A limited exception to this rule exists when the plaintiff's description of the defendant is so specific as to be "at the very worst, surplusage." Dean v. Barber, 951 F.2d 1210, 1215-16 (11th Cir. 1992) ("Chief Deputy of the Jefferson County Jail John Doe" was sufficiently clear).

In his three prior Section 1983 cases, Lelieve identified a total of five officers allegedly involved in his arrest. He provided only last names: Pierre, Fernandez, Gonzalez, Gayle and Belfort. See (08-cv-21664-JLK, DE#1; 08-cv-23463-DLG, DE# 1; 09-cv-20547-JAL, DE# 1). In a preliminary report in Lelieve's third Section 1983 case (09-cv-20547-JAL), the undersigned recommended dismissing the claim against Gayle as legally insufficient and that the claims remain pending as to the four other officers. (09-cv-20547-JAL, DE# 13 at 6). Belfort was successfully served. (09-cv-20547-JAL, DE# 20). However, summons were returned unexecuted as to Pierre, Fernandez and Gonzalez because the City of Miami Police Department was unable to properly identify these officers "due to the commonness of the name." (09-cv-20547-JAL, DE# 15-17). The undersigned instructed Lelieve in two separate orders to supply more specific identifying information for the remaining defendants and cautioned him that the failure to do so may result in dismissal. (09-cv-20547-JAL, DE# 18, 21). The Court never ruled on the undersigned's preliminary report, having found it moot after dismissing the complaint on *res judicata* grounds. (09-cv-20547-JAL, DE# 33).

Lelieve then filed the instant complaint which refers to the arresting officers as "John Doe Detectives #1 and #2." Unlike his three prior Section 1983 cases, he does not attempt to provide

partial names. Nor does he describe the John Does in any way. The record does not indicate he has attempted to obtain identifying information regarding the John Doe Detectives during discovery.⁷ The time for seeking discovery has now closed. See (DE# 8) (Scheduling Order providing that "[a]ll discovery methods in Rule 26(a), Federal Rules of Civil Procedure, shall be completed by February 25, 2011. This shall include all motions relating to discovery.").

As Lelieve has been previously notified of his obligation to specifically identify the John Does and has evidently failed to make any attempt to do so, the claims against John Doe Detectives #1 and #2 should be dismissed.⁸ See Richardson, 598 F.3d at 738 (plaintiff's identification of defendant as "John Doe (Unknown Legal Name), Guard, Charlotte Correctional Institute" was insufficient to identify the defendant among the many guards employed at the prison; claim properly dismissed); Moulds v. Bullard, 345 Fed. Appx. 387 (11th Cir. 2009) (dismissing John Doe corrections officers who plaintiff completely failed to describe; plaintiff did not timely request any discovery that would have

⁷ The only discovery request on record that could conceivably lead to discovering the John Does' identities is Lelieve's Request for Production of Documents, which broadly requested "[a]ll incident report sheets from the time of Plaintiff's arrest period October 11, 2006, to the date of your response." (DE# 18). Lelieve has neither moved to compel production of this information nor filed a supplement notifying the Court of the John Doe Detectives' identities.

⁸ If the Court is inclined to provide Lelieve with another opportunity to identify the John Doe defendants, a statute of limitations problem may present itself, as more than four years have elapsed since the alleged incident occurred. See Chappell v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003) (Florida's four-year statute of limitations applies to Section 1983 claims); Wayne v. Jarvis, 197 F.3d 1098 (11th Cir. 1999) (amendment to *pro se* Section 1983 plaintiff's complaint filed after the statute of limitations expired which replaced "John Does" with specifically-named defendants is a change in the parties sued and is barred unless the amended complaint relates back), overruled on other grounds by Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003); Fed. R. Civ. P. 4(c), (m) (relation back; dismissal for failure to serve defendant within 120 days after complaint is filed).

allowed him to learn their names and serve process on them).

C. Detective Belfort

(1) Excessive Force

Belfort seeks summary judgment, arguing Lelieve has failed to state a sufficient claim for relief under the Fourteenth Amendment, and that he failed to refute Belfort's affidavit denying he was present for the alleged use of excessive force.

As a preliminary matter, Lelieve's misplaced reliance on the Fourteenth Amendment does not warrant dismissal. The substance of Lelieve's claim is a Fourth Amendment attack on Belfort's alleged use of excessive force and it will be construed as such. See Graham, 490 U.S. at 394-95 (the Fourth Amendment includes the right to be free from excessive force during an arrest); Haines v. Kerner, 404 U.S. 519 (1972) (*pro se* pleadings are liberally construed).

Fourth Amendment jurisprudence "has long recognized that the right to make an arrest or an investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham v. Connor, 490 U.S. 386, 396 (1989). Although suspects have a right to be free of force that is excessive, they are not protected against the use of force that is necessary to the situation at hand. Jean-Baptiste v. Gutierrez, 627 F.3d 816, 821 (11th Cir. 2010) (citing Lee v. Ferraro, 284 F.3d 1188, 1197 (11th Cir. 2002)).

Whether a use of force is reasonable under the Fourth Amendment requires balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests. Tennessee v. Garner, 471 U.S. 1, 7-8 (1985); United States v. Place, 462 U.S. 696, 703

(1983). When a court balances the necessity for force against the arrestee's constitutional rights it considers the facts and circumstances of each particular case including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396; Jean-Baptiste, 627 F.3d at 821. Other considerations include "(1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically." Crenshaw v. Lister, 556 F.3d 1283 (11th Cir. 2009). This is an objective inquiry from the perspective of a reasonable officer confronted with the facts and circumstances of the case; the officer's subjective intent or motivation is irrelevant. See Scott v. United States, 436 U.S. 128, 137-39 (1978) (officer's subjective state of mind does not invalidate action as long as the circumstances, viewed objectively, justify it); Jean-Baptiste, 627 F.3d at 821. The "gratuitous use of force when a criminal suspect is not resisting constitutes excessive force." Brown v. City of Huntsville, 608 F.3d 724, 738 (11th Cir. 2010) (quoting Hadley, 526 F.3d 1324, 1330 (11th Cir. 2008)).

Belfort's argument that Lelieve's allegations are insufficient to state a claim for relief fail. Lelieve alleges in his sworn complaint that, after the John Doe defendants handcuffed him, beat him, and threw him on the ground, Belfort "stomp[ed] on Claimant's stomach repeatedly with his feet," resulting in internal bleeding that required surgery. (DE# 1-1 at 2). Although the cocaine trafficking offense at issue is a first-degree felony, there is no indication Lelieve posed a threat to officer safety, attempted to flee, or offered any resistance. Moreover, the injuries Lelieve

allegedly suffered were severe and were allegedly inflicted maliciously after he was handcuffed. Lelieve's claims, taken in the light most favorable to him, demonstrate that Belfort used gratuitous force after Lelieve was handcuffed and subdued on the ground. See, e.g., Wells v. Cramer, 262 Fed. Appx. 184 (11th Cir. 2008) (drawing reasonable inferences in plaintiff's favor it could be inferred that handcuffed plaintiff, lying face-down on the ground while officers were high-fiving each other, was no longer resisting arrest). This is a facially sufficient claim that Belfort used excessive force in violation of Lelieve's Fourth Amendment rights. See Brown v. City of Hunstville, 608 F.3d at 738 (the "gratuitous use of force when a criminal suspect is not resisting constitutes excessive force.").

Belfort filed a motion for summary judgment supported by his own affidavit in which he denied being present when Lelieve was arrested, or having any physical contact with him. This denial simply contradicts Lelieve's sworn allegations that Belfort kicked him during the arrest and fails to satisfy his summary judgment burden on of proving there is no dispute of material fact. Therefore, the burden never returned to Lelieve to designate specific facts illustrating a factual dispute exists. This swearing contest is not amenable to resolution on summary judgment. See Anderson, 477 U.S. at 255; Chandler, 926 F.2d at 1057.

As Belfort has failed to carry his burden of demonstrating no dispute of material fact exists, the motion for summary judgment on Lelieve's claim of excessive force should be denied.

2. Official Misconduct

Lelieve contends Belfort violated Florida law by falsely reporting the arrest occurred without incident, which constitutes

official misconduct under Section 839.25(1), Florida Statutes. Belfort argues Lelieve has failed to state a facially sufficient claim for relief and that dismissal is warranted.

The Florida Statutes defined "official misconduct" as:

the commission of the following act by a public servant, with corrupt intent to obtain a benefit for himself or herself or another or to cause unlawful harm to another: knowingly falsifying, or causing another to falsify, any official record or official document.

§ 839.25, Fla. Stat. (2000).

This section was repealed effective October 1, 2003. See Laws of Florida 2003-158, § 5.

Assuming the violation of Section 893.25(1) provided a private cause of action, no such suit is possible here because the provision was repealed in 2003, well before the alleged incident in the instant case occurred on October 11, 2006. See Smith v. Bell, 2008 WL 868253 at *9 (S.D. Fla. March 31, 2008) (noting "no private cause of action exists under constitutional right to due process and a fair trial and violated Florida Stat. § 839.25 (repealed)"). Therefore, Lelieve's claim based on Section 893.25(1) fails to state a claim and should be dismissed.

3. Qualified Immunity

Belfort argues he is entitled to qualified immunity because he was engaged in performing discretionary duties as an officer on the date of the incident, and that Lelieve has failed to demonstrate qualified immunity does not apply.

Qualified immunity "insulates government officials from personal liability [under Section 1983] for actions taken pursuant to their discretionary authority." Waldrop v. Evans, 871 F.2d 1030, 1032 (11th Cir. 1989). To receive qualified immunity, the government official must first prove he was acting within his discretionary authority. Gonzalez v. Reno, 325 F.3d 1228, 1234 (11th Cir. 2003). Once the defendant establishes he was acting within his discretionary authority, the burden shifts to the plaintiff to show qualified immunity is not appropriate. Id. Whether qualified immunity is appropriate depends upon whether: (1) the facts the plaintiff has alleged or shown make out a violation of a constitutional right, and (2) the right was clearly established at the time of the defendant's alleged misconduct. Saucier v. Katz, 533 U.S. 194 (2001), receded from by Pearson v. Callahan, 129 S.Ct. 808, 818 (2009). The sequence of this two-part inquiry is often appropriate but is not mandatory; which of the two prongs should be addressed first is discretionary. Pearson, 129 S.Ct. at 818. To show an official is not entitled to immunity, the plaintiff must point to earlier case law that is "materially similar ... and therefore provided clear notice of violation," or to "general rules of law from a federal constitutional or statutory provision or earlier case law that applied with obvious clarity to the circumstances" and clearly established the conduct was unlawful. Trammell v. Thomason, 2009 WL 1706591 at *5 (11th Cir. 2009) (quoting Long v. Slaton, 508 F.3d 576, 584 (11th Cir. 2007)). A narrow exception to the requirement for particularized case law exists where "the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw." Priester, 208 F.3d at 926.

Believe does not appear to dispute that Belfort was acting

within his discretionary authority as a police officer at the time the alleged incident occurred. See (DE# 1-1); Gonzalez, 325 F.3d at 1234 (discretionary authority showing satisfied where it was clear and undisputed).

The burden is therefore on Lelieve to demonstrate qualified immunity should not apply because (1) a constitutional violation occurred and (2) the right that Belfort allegedly violated was clearly established. As set forth in Section (D)(1), *supra*, the allegations taken in favor of Lelieve demonstrate Belfort violated the Fourth Amendment by using excessive and gratuitous force after Lelieve was handcuffed on the ground. Therefore, the first prong of the Saucier inquiry is satisfied. Prong two is also satisfied because kicking a handcuffed subject in the stomach while he is on the ground, causing internal bleeding and resulting in surgery, is "far beyond the hazy border between excessive and acceptable force." See Slicker v. Jackson, 215 F.3d 1225, 1233 (11th Cir. 2000) (concluding the evidence suggested the officers used excessive force in beating plaintiff even though he was handcuffed and did not resist, attempt to flee, or struggle with the officers in any way); Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997) (blow to subject on the ground who had fled then docilely submitted to arrest, that broke his arm in multiple places, violated clearly established law); Wells, 262 Fed. Appx. at 189 (reversing summary judgment based on qualified immunity where plaintiff alleged officers severely beat him after he was placed in handcuffs). Belfort's suggestion that Lelieve failed to carry his burden because he stated the relevant facts in his sworn complaint rather than in his response to the motion for summary judgment fails. See, e.g., Gonzalez v. Reno, 325 F.3d 1228, 1234 (11th Cir. 2003) (examining the factual allegations in the complaint to determine whether qualified immunity was applicable).

Accordingly, Belfort is not entitled to qualified immunity on the excessive force claim.

4. Res Judicata

Belfort also contends the instant suit is barred by *res judicata*.

The Court previously entertained and rejected Belfort's *res judicata* argument in the Order denying his motion to dismiss. (DE# 5, 7). The issue need not be revisited.

IV. Conclusion

It is therefore recommended that:

(1) the claims against Defendants Police Chief John F. Timoney be dismissed for failure to state a claim;

(2) the claims against John Doe Detectives #1 and #2 be dismissed for failure to adequately identify the defendants and serve them within 120 days of the complaint's filing; and

(3) Gerald Belfort's Motion for Summary Judgment (DE# 12) be denied as to the claim he used excessive force, and granted as to the claim that he violated Florida Statutes Section 893.25(1).

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

SIGNED this 14th day of April, 2011.



UNITED STATES MAGISTRATE JUDGE

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