

FILED by [Signature] D.C.
JUN 17 2008
STEVEN M. LARIMORE
CLERK U. S. DIST CT
S. D. of FLA. - MIAMI

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

UNITED STATES DISTRICT COURT
Southern District of Florida

Case Number: **08-21664-CIV-KING/WHITE**

GERALD BELIEVE
(Enter the full name of the plaintiff in this action)

v.

OFFICER: FERNANDEZ, ET AL.
(FIRST-NAME) TO BE GIVEN LATER.

METRO-DADE COUNTY POLICE-DEPT.
IN HIS OFFICIAL/INDIVIDUAL
CAPACITY.
(Above, enter the full name of the defendant(s) in this action)

A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

Instructions for Filing:

This packet includes four copies of the complaint form and two copies of the Application to Proceed without Prepayment of Fees and Affidavit. To start an action you must file an original and one copy of your complaint for the court and one copy for each defendant you name. For example, if you name two defendants, you must file the original and three copies of the complaint (a total of four) with the court. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

Your complaint must be legibly handwritten or typewritten. Please do not use pencil to complete these forms. The plaintiff must sign and swear to the complaint. If you need additional space to answer a question, use an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

cat / div Made Co. 11983
Case # 08CV21664
Judge ILK Mot PAW
Motn f/p yes Fee pd \$ 0
Receipt # _____

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

There is a filing fee of \$350.00 for this complaint to be filed. If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis.

Two blank Applications to Proceed without Prepayment of Fees and Affidavit for this purpose are included in this packet. Both should be completed and filed with your complaint.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to the Clerk's Office of the United States District Court, Southern District of Florida, 301 North Miami Avenue, Miami, Florida 33128-7788.

I. Parties

In Item A below, place your name in the first blank and place your present address in the third blank.

A. Name of plaintiff: GERALD BELIEVE, S

Inmate #: FL. DOC. # 0-211828, S

Address: HAMILTON CORR. INSTITUTE, S
10650 S SOUTH WEST 25TH STREET,
JASPER FLORIDA. 32052-1960, S

In Item B below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use Item C for the names, positions, and places of employment for any additional defendants.

B. Defendant: OFFICER: FERNANDEZ, ET. AL.

is employed as A METRO-DADE POLICE-DEPT-
OFFICER.

at 9105 N. W. 25TH STREET,
DORR FLORIDA. (33122.)

C. Additional Defendants: _____

OFFICER(S): PIERRE BELFORD
METRO-DADE POLICE-CHIEF.

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

II. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places.

Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach an additional blank page if necessary.

ON OR ABOUT 10/19/06. I WAS STOPPED
WITHOUT PROBABLE-CAUSE, OR REASONABLE-
SUSPICION, FROM MY CAR AND ILLEGALLY
SEARCHED, IN THE PRESENCE OF FOUR
PASSENGER WITNESSES, I WAS HABITUALLY
(AND) SADISTICALLY WITHOUT CAUSE,
(BEATEN) FOR THE VERY PURPOSE OF CAUSING
HARM. THE DEFENDANTS, KNEW OR SHOULD
HAVE KNOWN THEIR ACTIONS VIOLATED
CLEARLY ESTABLISHED FEDERALLY ENFORCEABLE
CONSTITUTIONAL RIGHTS. OFFICER: PIERRE
REXFORD FERNANDEZ, INTENTIONALLY KNOWINGLY
UNLAWFULLY VIOLATED THE 8TH AND 14TH
AMEND. U.S.C.A. PLAINTIFF WAS INSURED
IN HIS CIVIL RIGHTS. PLAINTIFF
(INCORPORATES) 42 U.S.C. 5506 1983. INTO
8TH AND 14TH AMEND. U.S. CONST.

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

PLAINTIFF SUFFERED 'INTERNAL BLEEDING'
'SWOLLEN FACE' 'LIPS' 'CHIN' 'ETC. ETC.'
AND WAS HOSPITALIZED FOR '2' WKS.
AT JACKSON MEMORIAL (in Miami)
FLORIDA. 'POLICE CHIEF' IS ALSO
LIABLE FOR 'FAILURE' TO 'PROPERLY'
TRAIN SAID OFFICER(S).

III. Relief

State briefly exactly what you want the court do to do for you. Make no legal arguments. Cite no cases or statutes.

- 1) DECLARATORY JUDGMENT.
 - 2) 11,000,000 million COMPENSATORY DAMAGES.
 - 3) 10,000,000 PUNITIVE DAMAGES.
 - 4) ANY OTHER (ASBEST) THE COURT DEEM FAIR AND JUST.
- THANK YOU.

IV. Jury Demand

Do you demand a jury trial? Yes No

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

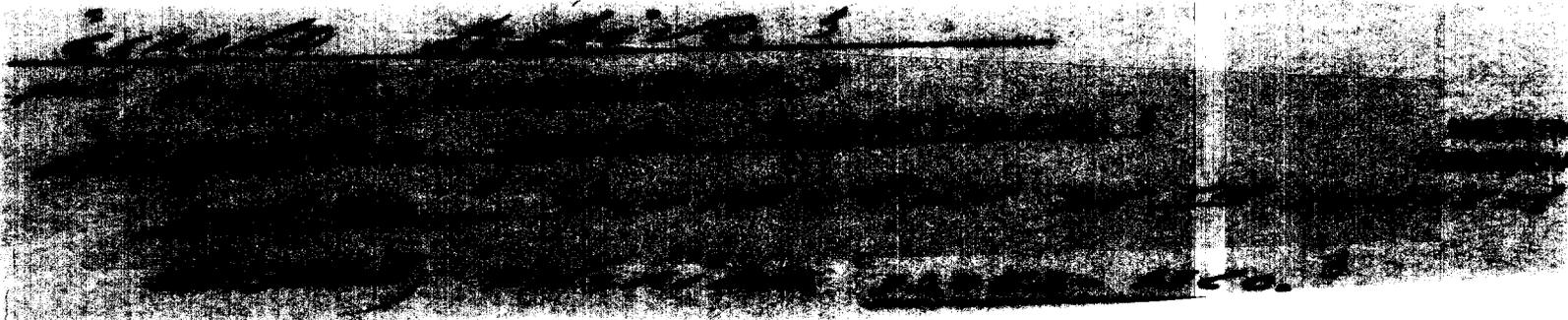
Signed this _____ day of _____, 20____

(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct. (optional) 28 U.S.C. 580
1746

Executed on: _____

(Signature of Plaintiff)



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 08-21664-CIV-KING/WHITE

GERALD LELIEVE,

Plaintiff,

v.

OFFICER FERNANDEZ, et al.,

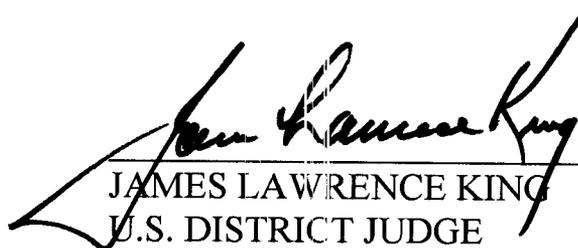
Defendants.

ORDER DISMISSING CIVIL COMPLAINT

THIS CAUSE comes before the Court upon Plaintiff's Amended Complaint, filed January 27, 2009 (D.E. #9).

Upon review of the record, the above-styled case was dismissed on October 22, 2008 for lack of prosecution (D.E. #8). Plaintiff now files an amended complaint; however, 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. Therefore, after a careful review of the record and the Court being otherwise fully advised, it is **ORDERED, ADJUDGED, and DECREED** that Plaintiff's Amended Complaint (D.E. #9) be, and the same is hereby, **DISMISSED WITH PREJUDICE**.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida this 30th day of January, 2009.



JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc:

Magistrate Judge Patrick A. White

Gerald Lelieve

DC #L11928

Hamilton Correctional Institution-Annex

11419 SW County Road #249

Jasper, FL 32052-3735



09-20574-CIV-LENARD/WHITE

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

UNITED STATES DISTRICT COURT Southern District of Florida

2-20-09 Gh

Case Number: 08-CV-21664-JLK

Gerald Beliere #L11928
(Enter the full name of the plaintiff in this action)

AMENDMENT

v.

City of Miami Police, Lt. Pierre, Lt. Fernandez,
Lt. Gonzalez, Lt. DeLoach, and Lt. Galt, also
Jackson Memorial Hospital (Miami) ET AL

FILED by JC D.C.
ELECTRONIC
MAR. 4, 2009
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

(Above, enter the full name of the defendant(s) in this action)

A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

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Your complaint must be legibly handwritten or typewritten. Please do not use pencil to complete these forms. The plaintiff must sign and swear to the complaint. If you need additional space to answer a question, use an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

cat/div Dade "1983"
Case # 09-20547-CIV-
Judge Lenard Mag White
Motn lfp yes Fee pd \$ ---
Receipt # ---

Page 1 of 5

*Please note
(page labeled pages incorrect)*

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

There is a filing fee of \$350.00 for this complaint to be filed. If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis.

Two blank Applications to Proceed without Prepayment of Fees and Affidavit for this purpose are included in this packet. Both should be completed and filed with your complaint.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to the Clerk's Office of the United States District Court, Southern District of Florida, 400 North Miami Avenue, Room 8N09, Miami, Florida 33128-7788.

I. Parties

In Item A below, place your name in the first blank and place your present address in the third blank.

A. Name of plaintiff: GERALD LEBEVE #L11928
Inmate #: DC# L11928
Address: HAMILTON CORRECTIONAL INSTITUTION ANNEX - 11119
SUN. COUNTY RD. #249, JASPER, FLORIDA 32052-3785

In Item B below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use Item C for the names, positions, and places of employment for any additional defendants.

B. Defendant: MR. YIERCE
is employed as MIAMI POLICE OFFICER
at 400 N.W. 2nd ave, MIAMI Florida. 33128

C. Additional Defendants: MR. FERNANDEZ
MIAMI POLICE OFFICER
400 N.W. 2nd ave, MIAMI Florida. 33128

E. Defendant: MR. Gonzalez
Mailing Address: 400 N.W. 2nd Ave
Miami Florida 33128
Position: Patrolman
Employed at: Miami City Police Department

F. Defendant: MR. Belfort
Mailing Address: 400 N.W. 2nd Ave
Miami Florida - 33128
Position: Patrolman
Employed at: Miami City Police Department

G. Defendant: MR. Gayle
Mailing Address: 400 N.W. 2nd Ave
Miami Florida 33128
Position: Patrolman
Employed at: Miami City Police Department

H. Defendant: City of Miami Police Department
Mailing Address: 400 N.W. 2nd Ave
Miami Florida 33128
Position: City of Miami Police Supervisors
Employed at: Miami City Police Department

I. Defendant: Unknown at moment without Medical Records
Mailing Address: Miami Florida
Position: Medical Staff, Doctor MD IMH
Employed at: City of Miami

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

Plaintiff was maliciously beaten by named
Defendant's in violation of his Constitutional rights under
8TH & 14TH U.S.C.A.

II. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places.

Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach an additional blank page if necessary.

ON OR ABOUT THE 11TH DAY OF OCTOBER 2006, PLAINTIFF WAS VIOLENTLY
BEATEN WITHOUT REGARDS, SUFFERED INTERNAL INJURIES AND ALMOST FATAL
DUE TO THE NAMED DEFENDANT'S AND OTHER RESPONSIBLE PERSON'S
FAILURE TO ASCERTAIN FACTS OF MEDICAL NEEDS. DEFENDANT'S
CARELESSLY DISREGARDED, AND NEGLECTED THE SAFETY AND WELFARE OF
~~THE~~ THE PLAINTIFF, COMMITTING MALFEASANCE, WHEREOF INJURIES
HE SUSTAINED CAUSED INTERNAL BLEEDING AND CAUSING AN
IMMEDIATE SURGERY DUE TO LIFE THREATENING REASONS AND
WITHOUT THE PROCEDURE WOULD HAVE DIED. THEY CAUSED
PERMANENT DISFIGUREMENT AND TRAUMA. ON THE 11TH DAY OF
OCTOBER 2006, PLAINTIFF AND ASSOCIATE FRIEND, KNOWN ONLY AS
WESLEY AT THIS TIME DID TRAVEL TOGETHER AND INDIVIDUALS THAT
ARE ALLEGED PASSENGER OF THE SERVICE DROVE FROM ORLANDO TO
MIAMI FLORIDA. THE ALLEGED REASONS BEING THAT WESLEY HAD A
TRANSPORT BUSINESS AND ^{Page 3 of 5} NEEDED ASSISTANCE AND COMPANY.

At approximately 7:00 p.m. on the 11th day of October, Wesley the driver, Plaintiff a social passenger, and three paying customers pulled up to the club and Wesley parked the van, stating to plaintiff that he was stopping to pick up another passenger that was to be returning to Orlando with Plaintiff and Wesley after dropping Orlando fares off. Wesley then exited the van leaving Plaintiff and the three paying customers to allegedly receive another five (5) minutes or more elapsed and Wesley returned to the parked van, but no one accompanied him as alleged. He stated (Wesley) that they were not there, he stated he was tired and would Plaintiff take over the drivers duties because he was very tired, so Plaintiff became the driver operator at that moment. Just as Plaintiff was pulling out of the parking space, it was agreed they would stop at the supermarket and then drop the passenger off and return to Orlando. This did not occur. Some moments elapsed while in route to the nearest supermarket and a police car pulled behind the van that Plaintiff was now driving in the owners place (Wesley), when police signaled to pull over.

Plaintiff then pulled to the side of the road at the police officer's requested signal. When stopped, Plaintiff then rolled the drivers side windows down, when Officers Gonzalez and Pierre ordered the driver out of the vehicle (Plaintiff) and upon exiting was told to place his hands up against and on the vehicle, for which he fully complied.

Officer Pierre conducted the pat frisk search of Plaintiff and found nothing. After questioning Plaintiff and a response given that he had nothing was placed in handcuffs. Plaintiff continued to question officer Pierre's reasoning for placing cuff's on him and why he was being arrested, when officer Pierre punched Plaintiff in his face several times while in restraints and he fell to the ground. Both officers, Pierre and Gonzalez then at once began to continually punch kick and stomped on Plaintiff's mid section, chest, back, legs, stomach repeatedly, during this time, detectives Belfort and Gayle arrived, then Plaintiff noticed Detective Belfort was kicking and stomping him as well.

Detective and Officers, Belfort, Pierre and Gonzalez continued to punch, kick, stomp, and assault Plaintiff in the street without regard to this being observed or reported and without concern for the rights or welfare of Plaintiff. After what seemed to feel like hours, (actually about ten (10) minutes) of this assault against Plaintiff. Plaintiff was then lifted and placed into the rear of the awaiting Patrol Car bleeding from his mouth, spitting blood.

All such was unprovoked. Plaintiff complied fully, had not resisted nor did he attempt to flee, and yet he was victimized and viciously beaten with cause or reason. Reports prepared by Officer Gonzalez states that Plaintiff sustained nor had any injuries, yet within the next two (2) hours or sometime thereafter was rushed into surgery for internal injury and bleeding which may have n=been fatal had he

not been.

Police Officers and Detectives named herein are the cause and of the injury and disfigurements sustained and must be held accountable .

Jackson Memorial Hospital, prisoner only detention medical staff nurses and doctors that said Plaintiff in prisoner section of hospital stated nothing was medically wrong and could leave.

Such diagnosis had almost caused Plaintiff's injuries to be fatal had he not been returned by E.M.S. when he notified by the County Jail medical administrators less than (2) hours later.

The same injury which he had been earlier seen for and told that nothing was wrong, just prior to E.M.S. pickup while being held in county Jail. The Plaintiff became extremely dizzy and passed out, upon E.M.S. returning Plaintiff to E.R. was in surgery immediately for abdominal internal bleeding for injuries Police Stated did not exist or occur and medical staff claimed did not exist and released patient back to police when first seen.

From healthy and nothing wrong, the fake arrest, beating and closely fatal account if surgery had not been procured when it was Plaintiff's claim seeks trial by jury and not judge. He seeks his claim against the named Defendant's and those not known currently, but shall be provided for the unprovoked violent beating, injuries and neglect care given as well the physical disfiguration he must live with

the rest o his life. The trauma and stress and the wrongful incarceration and time taken away from his life and liberty. All such violent claims are of the 8th and 14th Const. Amend protected by the United States and States laws accordingly

RELIEF SOUGHT

1. City of Miami Police Department in their official capacity as employer and the sum sought is 2.5 million in compensatory damages and 1.5 million for punitive damages.

2. Patrol-Man Pierre of the City of Miami Police force is being sued and in the sum of relief sought in his official and individual capacities, compensatory relief of 2.5 million is sought, 1.5 million in punitive damages.

3. Patrol-Man Fernandez of the City of Miami Police force is being sued and in the sum of relief sought in his official and individual capacities, compensatory relief of 2.5 million is sought, 1.5 million in punitive damages.

4. Patrol-Man Gonzalez of the City of Miami Police force is being sued and in the sum of relief sought in his official and individual capacities, compensatory relief of 2.5 million is sought, 1.5 million in punitive damages.

5. Detective Belfort Pierre of the City of Miami Police force is being sued and in the sum of relief sought in his official and individual capacities, compensatory relief of 2.5 million is sought, 1.5 million in punitive damages.

6. Detective Gayle of the City of Miami Police force is being sued and in

the sum of relief sought in his official and individual capacities, compensatory relief of 1.5 million is sought, 750,000 in punitive damages.

7. Jackson Memorial Medical Nurses and Doctors unknown for initial diagnosis are being sued in their capacity as medical care providers in official and individual capacities, compensatory relief of 1.5 million is sought, 750,000 in punitive damages.

CONSTITUTIONAL VIOLATIONS

For violations under 42 U.S.C.A. Section 1983, Protected under the Eighth and Fourteenth United States Constitutional Amendments which have been violated and that are protected rights.

Respectfully Submitted,


GERALD LELIEVE DC #L1928
Hamilton Correctional Inst. – Annex
11419 SW County Road # 249
Jasper, Florida 32052–3735

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

Wesley had to transport people from Orlando to Miami and is a fact that he requested Plaintiff's assistance and company for social and assistance and believe agreed. The two plus passengers left that day early. Plaintiff and Wesley were not close, knew one another only from the neighborhood. They departed early from Orlando on October 11th 2006 along with passengers and arrived about 6:00 - 6:30 P.M.

III. Relief

State briefly exactly what you want the court do to do for you. Make no legal arguments. Cite no cases or statutes.

Punitive and compensatory damages against each named defendant in the official and individual separate capacities as asserted and attach on page 13 lines 1-7 Relief Souleff.

IV. Jury Demand

Do you demand a jury trial? Yes No

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

Signed this _____ day of 2-20-(FEBRUARY), 2009



(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct. *(optional)*

Executed on: 2-20-09



(Signature of Plaintiff)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 09-20547-CIV-LENARD/WHITE

GERALD LELIEVE,

Plaintiff,

vs.

CITY OF MIAMI POLICE, et al.,

Defendants.

**ORDER REJECTING REPORT OF MAGISTRATE JUDGE (D.E. 30) AND
DISMISSING CASE**

THIS CAUSE is before the Court on the Report and Recommendation of the Magistrate Judge (“Report,” D.E. 30), issued on August 26, 2009. The Report recommends that Defendant Belfort’s Motion to Dismiss (“Motion to Dismiss,” D.E. 22), filed on July 24, 2009, should be denied. On August 28, 2009, Defendant Belfort filed objections to the Report (“Objections,” D.E. 31). On September 14, 2009, Plaintiff Gerald Lelieve (“Lelieve”), filed his Response to the Objections (“Response,” D.E. 32). Having considered de novo the Motion to Dismiss, the Report, the Objections, the Response, and the record, the Court finds as follows.

Plaintiff filed the Complaint in this action on March 4, 2009. The instant lawsuit is a re-filing of a prior complaint in another case, Case No. 08-21664-CIV-King. That case was **dismissed with prejudice** on January 30, 2009, for failure to comply with the court’s orders. (See D.E. 10, Case No. 08-21664-King.) As a result, on July 24, 2009, Defendant Belfort

filed his Motion to Dismiss the Complaint on *res judicata* grounds. The Motion to Dismiss was referred to the Magistrate Judge who subsequently issued his Report on August 26, 2009.

The Report acknowledges the procedural history of the case, but finds the January 30, 2009, Order dismissing the prior case with prejudice was an “apparent scrivener’s error.” (Report at 3.) Thus, the Report recommends the Motion to Dismiss be denied and the case proceed as “[t]here has never been a final judgment on the merits of this case.” (*Id.*) Defendant Belfort objects that “[n]othing in the original proceeding reflected that the January 30, 2009 Order was a scrivener’s error” and asks that the Court overrule the Report. (Objections at 1-2.) Plaintiff’s Response states that the January 30, 2009, Order dismissing his case with prejudice was due to scrivener’s error because he complied with the court’s orders but was simply late, and thus asks for the Court to adopt the Report.

Pursuant to Rule 72(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” “The doctrine of *res judicata* bars the filing of claims that were raised or could have been raised in an earlier proceeding.” Tuscano v. Evening Journal Ass’n, 179 Fed. Appx. 621, 625 (11th Cir. 2006); see Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999). A dismissal with prejudice for failure to comply with court orders is an adjudication on the merits. Matthews v. Wolvin,

266 F.2d 722, 728 (5th Cir. 1959).¹

This case is a re-filing of a case that has previously been **dismissed with prejudice**. There 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. Accordingly, consistent with this Order, it is hereby **ORDERED AND ADJUDGED** that:

1. The Report and Recommendation of the Magistrate Judge (D.E. 30), issued on August 26, 2009, is **REJECTED**;
2. Defendant Belfort's Motion to Dismiss the Complaint on *res judicata* grounds (D.E. 22), filed on July 24, 2009, is **GRANTED**;
3. All other motions and the Preliminary Report and Recommendation of the Magistrate Judge (D.E. 13), issued on May 14, 2009, are **DENIED AS MOOT**;
4. The Complaint is **DISMISSED**;
5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of November, 2009.


JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

¹ The Eleventh Circuit in Bonner v. City of Prichard, 661 F.2d 1206, 1207 (1981) (en banc), adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

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.

Relieve 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

cc: Gerald Lelieve, *pro se*
DC# L11928
Hamilton Correctional Institution - Annex
11419 SW County Road #249
Jasper, LF 32052-3735

John Anthony Greco
City of Miami
Office of the City Attorney
444 SW 2nd Ave.
Suite 945
Miami, FL 33130-1910

Christopher Allan Green
Office of the City Attorney
444 SW 2nd Ave.
Suite 945
Miami, FL 33130-1910

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:10-23677-Civ-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO, et al.,

Defendants.

AMENDED COMPLAINT

Plaintiff, GERALD LELIEVE (the “Plaintiff” or “LELEIVE”), sues Defendants, CHIEF OF POLICE MANUEL OROSO (“CHIEF”) and OFFICER ODNEY BELFORT (Badge No. 0332) (“BELFORT”), individually and as an officer of the CITY OF MIAMI POLICE DEPARTMENT (“CITY”) (collectively the “DEFENDANTS”), and states as follows:

VENUE AND JURISDICTION

1. This is an action for money damages brought pursuant to 42 U.S.C. §1983, 42 U.S.C. §1985, the Fourth, Eighth and Fourteenth Amendments to the United States Constitution, and the laws of Florida.

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

3. Venue is proper in pursuant to 28 USC § 1391 because all acts and omissions that give rise to this action occurred in Miami-Dade County, Florida, the principal place of the business of the CITY and CHIEF is in Miami-Dade County, Florida, and OFFICER ODNEY BELFORT is an officer, employee and agency acting in official capacity under color of law in Miami-Dade County, Florida.

4. All conditions precedent to bringing this action have occurred, or have been waived by Ocean Beach.

5. LELIEVE previously retained ZELMER LAW, as counsel, and has agreed to pay reasonable attorneys' fees and costs.

6. LELIEVE is entitled to seek recovery of attorneys' fees, expert fees and costs as permitted at law or equity, including pursuant to Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

THE PARTIES

7. LELIEVE is currently being held at Hamilton Correctional Institution, 10650 SW 46th Street, Jasper, Florida 32052-1360.

8. The CITY OF MIAMI POLICE DEPARTMENT, is a municipal agency located at 400 NW 2nd Avenue, Miami, Florida 33128.

9. Defendant, MANUEL OROSO, is the CHIEF OF POLICE of the CITY OF MIAMI POLICE DEPARTMENT, located at 400 NW 2nd Avenue, Miami, Florida 33128.

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

11. On October 11, 2006, OFFICER DANIEL G. FERNANDEZ (Badge No. 1968) ("FERNANDEZ"), OFFICER HORACE MORGAN (Badge No. 4876) ("MORGAN"), MAJOR KEITH LADUNN CUNNINGHAM (Badge No. 1299) ("CUNNINGHAM"), OFFICER ODNEY BELFORT (Badge No. 0332), and OFFICER DESREEN GAYLE (Badge No. 2233), and OFFICER KEVIN KNOWLES (Badge No. 3768) participated in the takedown and arrest of LELIEVE (collectively "ARRESTING OFFICERS").

STATEMENT OF FACTS

12. On or about October 11, 2006, BELFORT was the lead arresting officer in the takedown of LELIEVE by the crime suppression unit on October 11, 2006.

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

14. While handcuffed, LELIEVE posted no threat to the officers at the arrest scene, and did not pose a flight risk.

15. Nevertheless, after being handcuffed, BELFORT, or alternatively one or more of the ARRESTING OFFICERS, engaged in excessive force by repeatedly punching him in the face and shoving him on the ground.

16. Once on the ground, BELFORT, or in the alternative one or more of the ARRESTING OFFICERS, stomped his stomach repeatedly.

17. One of the ARRESTING OFFICERS standing by stated "Why did you do that? He is going to sue you."

18. BELFORT and the ARRESTING OFFICERS did not report LELIEVE's injury or seek immediate medical attention for LELIEVE.

19. As a result, LELIEVE suffered severe bodily injury which required surgery at Jackson Memorial Hospital for internal bleeding.

20. Following surgery, LELIEVE was stapled from the top of his abdomen to below his navel, developed a 12-inch scar, and remained hospitalized for two weeks.

21. LELIEVE continues to suffer from constant stomach pain and irritable bowel movements.

POLICIES AND CUSTOMS

22. The CITY MANAGER JOHNNY MARTINEZ and BOARD OF CITY COMMISSIONERS delegated the authority of the MIAMI POLICE DEPARTMENT to THE CITY and the CHIEF, including the express power to reprimand, fine, suspend, reduce in rank or dismiss an officer. (Charter of the City of Miami, Sec. 25.; Laws of Fla., ch. 24695(1947); Res. No. 01-843, § 2, 8-9-01). The CHIEF also has the power to option to concur with the Departmental Disciplinary Review Board's recommendation or take alternate action. (Miami, Florida, Code of Ordinances, Sec. 42-70; Ord. No. 9127, § 6(a)(viii)—(xii), 7-10-80; Code 1980, § 42-65; Ord. No. 11823, § 2, 7-27-99). The CHIEF also is required to avail himself to resolve any pending issues when an office of professional compliance investigator opines that an investigation is incomplete, biased, or otherwise deficient. (Miami, Florida, Code of Ordinances, Sec. 42-70; Ord. No. 9127, § 5(c), 7-10-80; Ord. No. 10071, § 7, 1-23-86; Ord. No. 10659, § 4, 10-12-89; Code 1980, § 42-66).

23. The CITY and CHIEF was on notice that several consumer complaints had been made against the ARRESTING OFFICERS for, *inter alia*, police misconduct, false reporting and/or testimony, and excessive force, but did not appropriately reprimand or investigate the incidents.

24. The ARRESTING OFFICERS have received the following complaints in the CITY OF MIAMI INTERNAL AFFAIRS:

	Administrative Complaints	Citizen Complaints	Driving Complaints	Firearm Discharge	Relieve Reassigned	Relieved of Duty	Use of Force
BELFORT	1	18	1	1	0	0	11
FERNANDEZ	0	19	0	0	0	1	15
CUNNINGHAM	0	23	0	0	0	0	16
MORGAN	0	12	0	0	0	0	2
GAYLE	0	8	0	0	0	0	10

KNOWLES	0	8	0	1	0	0	4
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25. Of the above complaints, the following ARRESTING OFFICERS received the following number of complaints for abusive treatment and/or excessive force:

	Abusive Treatment and/or Excessive Force
BELFORT	13
FERNANDEZ	2
CUNNINGHAM	6
MORGAN	3
GAYLE	1
KNOWLES	3

26. Instead of investigating and reprimanding the ARRESTING OFFICERS, the CITY and the CHIEF repeatedly filed most of these actions as “information only” or “inconclusive” and/or otherwise failed to investigate or appropriately reprimand, suspend or terminate the ARRESTING OFFICERS. The CITY and CHIEF substantiated only a few complaints, and of those substantiated failed to take appropriate action to prevent further improper conduct by the ARRESTING OFFICERS.

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

**VIOLATION OF POLICIES AND CUSTOMS
CONCERNING THE ARREST AND INJURIES TO LELIEVE**

28. In violation of policies and procedures, the ARRESTING OFFICERS did not file a RESPONSE to RESISTANCE REPORT concerning the injuries to LELIEVE, and the ARRESTING OFFICERS failed to give LELIEVE immediate medical attention.

29. In violation of policies and procedures, the ARRESTING OFFICERS did not obtain any information on the passengers in the van that LELIEVE was driving, and allowed them to leave without obtaining any witness information.

30. Immediately following LELIEVE's arrest, KNOWLES informed CUNNINGHAM that he transported LELIEVE to Ward D because of LELIEVE's injuries. Ward D failed to administer care and released LELIEVE, who was later admitted to Jackson Memorial Hospital.

31. While at Jackson Memorial Hospital, an investigator from the CITY visited LELIEVE to investigate the matter and took photographs of his injuries.

32. Despite the CITY, CHIEF and ARRESTING OFFICERS being put on notice of the excessive force, LELIEVE's injuries, and violation of the policies and departmental orders for failure to file a RESPONSE TO RESISTANCE REPORT, no police officer was reprimanded or otherwise disciplined concerning LELIEVE, and neither the CITY nor the CHIEF nor any of the ARRESTING OFFICERS investigated the matter.

VIOLATION OF POLICIES AND CUSTOMS
BY OFFICER DANIEL G. FERNANDEZ

33. FERNANDEZ was the sole eyewitness officer who testified that he found possession of cocaine on LELIEVE's person in his criminal trial on or about June 26, 2007 in Case No., F06-34231, in the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida.

34. On or about September 23, 2010, the CITY OF MIAMI INTERNAL AFFAIRS SECTION substantiated an allegation of police misconduct against FERNANDEZ in I.A. Case No. 09-351. The investigation proved that FERNANDEZ used his position as a police officer to falsely arrest and illegally evict Mr. David Peery, including allegedly planting narcotics and

falsifying a police report. As a result of the investigation, FERNANDEZ was arrested Official Misconduct and Petit Theft on April 8, 2010. FERNANDEZ is currently awaiting trial in Case No. 13-2010-CF-010404-C000-XX, in the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida.

35. Thereafter, while FERNANDEZ was in a Relieved of Duty status and awaiting trial on his criminal case, the City of Miami Internal Affairs Section, under I.A. Case No. 10-234 substantiated another allegation of Misconduct against FERNANDEZ for violating several departmental orders in connection with his off duty employment at Liquor Mart.

36. FERNANDEZ was arrested and charged with Selling Alcoholic Beverage to a person under the age of 21 on August 4, 2010. On November 15, 2010, the Court disposed of Case No. 13-2010-MM-039279-0001-XX, in the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida, *nolle prosequi*.

37. As a consequence of the “pattern” of Misconduct, FERNANDEZ was reprimanded and terminated from employment on November 6, 2010.

38. Despite the CITY’s knowledge of the “pattern” of Misconduct and the injuries suffered by LELIEVE during his arrest, the CITY has done nothing to reinvestigate the allegations concerning LELIEVE’s injuries.

COUNT I – CIVIL ACTION FOR DEPRIVATION OF RIGHTS
FOR EXCESSIVE FORCE
42 U.S.C.A. § 1983
FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION
(Against OFFICER ODNEY BELFORT)

39. LELIEVE re-alleges paragraphs 1-38 above.

40. At all times, BELFORT intentionally violated LELIEVE's Fourth and Fourteenth Amendment constitutional rights by subjecting LELIEVE to physical and mental injuries by stomping on his stomach.

41. BELFORT's conduct amounted to use of excessive force against LELIEVE.

42. In doing so, BELFORT acted under color of state law by purporting to act in his official capacity, but abusing or misusing the power possessed by the official and acting beyond the scope of their lawful authority.

43. As a result of such actions, LELIEVE suffered damages, including but not limited to, physical pain and suffering and emotional injuries.

44. BELFORT acted with malice or reckless indifference to LELIEVE's rights, and as such, LELIEVE is also entitled to punitive damages.

45. LELIEVE is entitled to seek recovery of attorneys' fees, expert fees and costs as permitted at law or equity, including pursuant to Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

COUNT II – CIVIL ACTION FOR FAILURE TO INTERVENE
42 U.S.C.A. § 1983
FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION
(Against OFFICER ODNEY BELFORT)

46. LELIEVE re-alleges paragraphs 1-38 above.

47. BELFORT was lead arresting officer, who was present and/or in a position to intervene at the time excessive force was used on LELIEVE; however, during the stomping, BELFORT simply stood by, watched, and did nothing to stop the excessive force.

48. BELFORT failed to intervene when LELIEVE was beaten without provocation, violating his constitutional rights.

49. In doing so, the BELFORT acted under color of state law by purporting to act in his official capacity, but abusing or misusing the power possessed by the official and acting beyond the scope of his lawful authority.

50. As a result of such actions, LELIEVE suffered damages, including but not limited to, physical pain and suffering and emotional injuries.

51. BELFORT acted with malice or reckless indifference to LELIEVE's rights, and as such, LELIEVE is also entitled to punitive damages.

52. LELIEVE is entitled to seek recovery of attorneys' fees, expert fees and costs as permitted at law or equity, including pursuant to Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

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

53. LELIEVE re-alleges paragraphs 1-38 above.

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

55. LELIEVE had a seriously medical need which required immediate medical attention, which has been diagnosed by a physician, and/or is so obvious that even a lay person would easily recognize the necessity for prompt medical attention.

56. BELFORT was the lead arresting officer, who had actual knowledge of LELIEVE's injuries and impending harm because he witnessed the arrest and engaged in the use of excessive force.

57. LELIEVE's impending harm was easily preventable; however, BELFORT was deliberately indifferent to LELIEVE's serious medical needs, and failed to provide necessary medical care or complete an incident report.

58. In doing so, BELFORT acted under color of state law by purporting to act in his official capacity, but abusing or misusing the power possessed by the official and acting beyond the scope of his lawful authority.

59. As such, BELFORT intentionally violated LELIEVE's right not to be subjected to cruel and unusual punishment under the Eighth Amendment to the Constitution.

60. As a result of BELFORT's actions or inactions in failing to give LELIEVE immediate medical care, LELIEVE suffered damages, including but not limited to, physical, emotional pain and mental anguish.

61. BELFORT acted with malice or reckless indifference to LELIEVE's rights, and as such, LELIEVE is also entitled to punitive damages.

62. LELIEVE is entitled to seek recovery of attorneys' fees, expert fees and costs as permitted at law or equity, including pursuant to Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

COUNT IV – VIOLATION OF 42 U.S.C.A. § 1983,
EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION
FOR DELIBERATE INDIFFERENCE TO USE OF FORCE AND ATTENTION TO
SERIOUS MEDICAL NEEDS
THROUGH POLICY, PRACTICE AND CUSTOM
(Against Chief Of Police Manuel Oroso)

63. LELIEVE re-alleges paragraphs 1-38 above.

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

65. The City's policies, practices and customs for arrests, excessive force, deprivation of rights and false imprisonment were inadequate.

66. The CITY and CHIEF were aware of repeated and serious complaints for use of force, failure to file RESPONSE to RESISTANCE REPORTS, police misconduct, discourtesy, and/or other violations of policies, orders, etc. against the ARRESTING OFFICERS.

67. Despite the CITY and CHIEF's knowledge of the "pattern" of violations and illegality, the CITY and CHIEF failed to take action to reprimand, discipline, suspend or terminate the ARRESTING OFFICERS or to otherwise stop unconstitutional practices prior to the use of excessive force against LELIEVE.

68. Instead, the CITY and CHIEF routinely approved personnel evaluations and raises despite known violations.

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

70. By failing to adequately establish policies and procedures, the CITY and CHIEF's actions constituted a "deliberate indifference" to rights of its inhabitants.

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

72. After the use of excessive force against LELIEVE, in November 2008 that the CITY and CHIEF changed its use of force policies through Departmental Order No. 6, Chapter 21.

73. As a result of the CITY and CHIEF's inadequate policies in existence at the time of LELIEVE's arrest, and pervasive custom or practice to ignore a pattern of complaints against

the ARRESTING OFFICERS, the CITY and CHIEF caused the damages that LELIEVE now suffers.

74. In doing so, the CITY and CHIEF acted under color of state law by purporting to act in their official capacity, but abusing or misusing the power possessed by the CITY and CHIEF and acting beyond the scope of their lawful authority.

75. The CITY and CHIEF acted with malice or reckless indifference to LELIEVE's rights, and as such, LELIEVE is also entitled to punitive damages.

76. LELIEVE is entitled to seek recovery of attorneys' fees, expert fees and costs as permitted at law or equity, including pursuant to Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

COUNT V – VIOLATION OF 42 U.S.C.A. § 1983,
EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION
FOR FAILURE TO PROPERLY TRAIN AND SUPERVISE STAFF
(Against Chief Of Police Manuel Oroso)

77. LELIEVE re-alleges paragraphs 1-38 above.

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

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

80. By failing to adequately train and supervise its employees, the CITY and CHIEF's actions constituted a "deliberate indifference" to rights of its inhabitants.

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

82. As a result of the CITY and CHIEF's inadequate policies, failure to train and/or supervise, LELIEVE suffered damages.

83. In doing so, the CITY and CHIEF acted under color of state law by purporting to act in their official capacity, but abusing or misusing the power possessed by the CITY and CHIEF and acting beyond the scope of their lawful authority.

84. The CITY and CHIEF acted with malice or reckless indifference to LELIEVE's rights, and as such, LELIEVE is also entitled to punitive damages.

85. LELIEVE is entitled to seek recovery of attorneys' fees, expert fees and costs as permitted at law or equity, including pursuant to Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

COUNT VI- NEGLIGENCE
(Against OFFICER ODNEY BELFORT)

86. LELIEVE re-allege paragraphs 1-38 above.

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

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

89. As a result, LELIEVE suffered damages.

90. BELFORT acted with malice or reckless indifference to LELIEVE's rights, and as such, LELIEVE is also entitled to punitive damages.

COUNT VII – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(Against OFFICER ODNEY BELFORT)

91. LELIEVE re-allege paragraphs 1-38 above.

92. By using excessive force against LELIEVE and causing severe physical injuries, the BELFORT deliberately or recklessly inflicted mental suffering upon LELIEVE.

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

94. BELFORT's conduct caused the emotional distress.

95. LELIEVE's distress is severe.

96. BELFORT acted with malice or reckless indifference to LELIEVE's rights, and as such, LELIEVE is also entitled to punitive damages.

COUNT VIII – BATTERY
(Against OFFICER ODNEY BELFORT)

97. LELIEVE re-allege paragraphs 1-38 above.

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

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

100. BELFORT acted with malice or reckless indifference to LELIEVE's rights, and as such, LELIEVE is also entitled to punitive damages.

WHEREFORE, as to all counts, LELIEVE demands judgment against the DEFENDANTS in an amount to be determined after a jury trial of this action, together with costs and disbursements, including:

- a. Actual and compensatory damages;
- b. Damages for physical pain and suffering and emotional injuries;
- c. Loss of consortium;

- d. Punitive damages, where appropriate, in an amount sufficient to punish DEFENDANTS and deter others from like conduct;
- e. Prejudgment interest;
- f. Attorney's fees and costs, including expert fees and costs, pursuant to Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.
- g. Such other relief within the Court's jurisdiction as the Court deems proper.

JURY TRIAL DEMAND

LELIEVE demands trial by jury on all issues so triable.

RESERVATION OF RIGHT TO AMEND

LELIEVE is in the process of discovery, and reserves the right to further move for leave to amend the complaint and file a motion to add a party.

Dated: November 4, 2011

Respectfully submitted,

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

/s/ Diane J. Zelmer _____

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

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I HEREBY CERTIFY that on November 4, 2011, I filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other manner authorized for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filings.

SERVICE LIST

I hereby certify that a true and correct copy of the attached has been furnished this 4th day of November, 2011 as follows:

[VIA CM/ECF]

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

/s/ Diane J. Zelmer
Counsel