CASREF,PAW

U.S. District Court
Southern District of Florida (Ft. Lauderdale)
CIVIL DOCKET FOR CASE #: 0:11-cv-61143-JIC

Long v. Stabile et al
Assigned to: Judge James I. Cohn
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 05/16/2011
Jury Demand: None
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Thomas T. Long
Prisoner ID: K07322

represented by **Thomas T. Long**
K07322
6510 SW 22 Court
Miramar, FL 33023
PRO SE

V.

Defendant

Alfed Stabile
#3154

represented by **Daniel Lawrence Abbott**
Weiss Serota Helfman
200 E. Broward Blvd.
Suite 1900
Ft. Lauderdale, FL 33301
954-763-4242
Fax: 954-764-7770
Email: dabbott@wsh-law.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Joanna Doerfel
Weiss Serota Helfman Pastoriza Cole & Boniske
2525 Ponce de Leon Blvd.
Suite 700
Miami, FL 33134
305-854-0800
Fax: 305-854-2323
Email: Jdoerfel@wsh-law.com
ATTORNEY TO BE NOTICED

Defendant

City of Hollywood
TERMINATED: 08/02/2011

Date Filed	#	Docket Text
05/16/2011	1	COMPLAINT under the Civil Rights Act against City of Hollywood, Alfed Stabile. Filing fee $ 350.00. IFP Filed, filed by Thomas T. Long.(ar2) Modified event for MJSTAR on 6/20/2011 (dgj). (Entered: 05/17/2011)
05/16/2011	2	Judge Assignment to Judge James I. Cohn (ar2) (Entered: 05/17/2011)
05/16/2011	3	Clerks Notice of Magistrate Judge Assignment to Magistrate Judge Patrick A. White. Pursuant to Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. (ar2) (Entered: 05/17/2011)
05/16/2011	4	MOTION for Leave to Proceed in forma pauperis by Thomas T. Long. (ar2) (Entered: 05/17/2011)
05/20/2011	5	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 5/20/2011. (tw) (Entered: 05/20/2011)
05/20/2011	6	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF $350.00 and Granting 4 Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 5/20/2011. (tw) (Entered: 05/20/2011)
06/20/2011	7	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Thomas T. Long. Recommending dismissed pursuant to 28 U.S.C. 1915(e)(2)(B)(ii), for failure to state a claim. 2. The case may proceed against Officer Sabile for use of excessive force by an officer upon his arrest. 3. The claim of deprivation of property should be dismissed for failure to state a claim. Objections to R&R due by 7/8/2011. Signed by Magistrate Judge Patrick A. White on 6/16/2011. (tw) (Entered: 06/20/2011)
06/20/2011	8	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon:Alfed Stabile (3154),Law Enforcement Officer, Hollywood Police Department, 3250 Hollywood Boulevard, Hollywood, FL 33021. Signed by Magistrate Judge Patrick A. White on 6/20/2011. (tw) (Entered: 06/20/2011)
06/21/2011	9	Summons Issued as to Alfed Stabile. (br) (Entered: 06/21/2011)
07/05/2011	10	MOTION for Extension of Time to File Response/Reply as to 7 REPORT AND RECOMMENDATIONS on 42 USC 1983 case by Thomas T. Long. (ar2) (Entered: 07/06/2011)
07/06/2011	11	ACKNOWLEDGMENT OF SERVICE Executed as to 9 Summons Issued. (ar2) (Entered: 07/06/2011)
07/06/2011	12	ORDER granting 10 Motion for Extension of Time to File Response/Reply re 7 REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Thomas T. Long Recommending dismissed pursuant to 28 U.S.C. 1915(e)(2)(B)(ii), for failureto state a claim.2. The case may proceed

		against Officer Sabile for use of excessive. Responses due by 8/5/2011. Signed by Judge James I. Cohn on 7/6/11. (tp) (Entered: 07/07/2011)
07/08/2011	13	MOTION TO DISMISS 1 Complaint/Petition FOR FAILURE TO STATE A CLAIM *Defendant's Motion To Dismiss The Complaint And Incorporated Supporting Memorandum Of Law* by Alfed Stabile. Responses due by 7/25/2011 (Abbott, Daniel) (Entered: 07/08/2011)
07/28/2011	14	OBJECTIONS/Reply to 7 Report and Recommendations by Thomas T. Long. (ar2) (Entered: 07/28/2011)
07/28/2011	15	MOTION for Subpoena of Records by Thomas T. Long. (ar2) (Entered: 07/28/2011)
08/02/2011	16	ORDER ADOPTING REPORT AND RECOMMENDATIONS for 1 Complaint/Petition filed by Thomas T. Long ; Dismissing claims against the City of Hollywood Police Department, City of Hollywood Fire Department, and Assistant State Attorney Taylor; City of Hollywood terminated. ; adopting Report and Recommendations re 7 Report and Recommendations.. Signed by Judge James I. Cohn on 8/2/2011. (ls) (Entered: 08/02/2011)
08/09/2011	17	ORDER denying 15 Motion to for Court to issue subpoenas. The plaintiff must make arrangements for the serving of subpoenas, and pay the fees. See Smith v Florida Dept of Corrections, 369 Fed. Appx 36, 2010 WL 774305 (CA 11 (Fla)).. Signed by Magistrate Judge Patrick A. White on 8/9/2011. (cz) (Entered: 08/09/2011)
08/10/2011	18	MOTION for clarification 16 Order Adopting Report and Recommendations, Terminate Parties,,,, *Defendant's Motion For Clarification* by Alfed Stabile. Responses due by 8/29/2011 (Abbott, Daniel) (Entered: 08/10/2011)
08/11/2011	19	PAPERLESS ORDER granting 18 Motion for Clarification. The Court clarifies that the Motion to Dismiss was not addressed by the Court and remains pending before Judge White. Signed by Judge James I. Cohn on 8/11/2011. (prd) (Entered: 08/11/2011)
08/19/2011	20	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 13 MOTION TO DISMISS 1 Complaint/Petition FOR FAILURE TO STATE A CLAIM *Defendant's Motion To Dismiss The Complaint And Incorporated Supporting Memorandum Of Law* filed by Alfed Stabile. Recommending denying. Objections to R&R due by 9/6/2011. Signed by Magistrate Judge Patrick A. White on 8/19/2011. (tw) (Entered: 08/19/2011)
09/02/2011	21	OBJECTIONS to 20 Report and Recommendations *Defendant's Objection To Report Of Magistrate Judge And Incorporated Supporting Memorandum Of Law* by Alfed Stabile. (Abbott, Daniel) (Entered: 09/02/2011)
09/22/2011	22	ORDER ADOPTING REPORT AND RECOMMENDATIONS denying 13 Motion to Dismiss for Failure to State a Claim; re 20 Report and Recommendations. Defendnt Stabile shall file an Answer by 10/7/11. Signed by Judge James I. Cohn on 9/22/2011. (tp) (Entered: 09/22/2011)
09/22/2011		DE 22 Reset Answer Due Deadline: Alfed Stabile response due 10/7/2011. (tp) (Entered: 09/22/2011)

09/23/2011	23	*Defendant Alfred Stabile's Answer And Affirmative Defenses* ANSWER and Affirmative Defenses to Complaint by Alfed Stabile.(Abbott, Daniel) (Entered: 09/23/2011)
09/28/2011	24	MOTION for Discovery by Thomas T. Long. Responses due by 10/17/2011 (Address updated) (ar2) (Entered: 09/28/2011)
09/30/2011	25	Joint Status and SCHEDULING REPORT - **Rule 26(f)** by Thomas T. Long, Alfed Stabile (Abbott, Daniel) Modified text on 9/30/2011 (asl). (Entered: 09/30/2011)
09/30/2011	26	RESPONSE to Motion re 24 MOTION for Discovery *Defendant's Response To Plaintiff's Motion For Discovery* filed by Alfed Stabile. Replies due by 10/11/2011. (Abbott, Daniel) (Entered: 09/30/2011)
10/03/2011	27	ORDER denying 24 Motion for Discovery, discovery requests should be sent directly to the parties.. Signed by Magistrate Judge Patrick A. White on 10/3/2011. (cz) (Entered: 10/03/2011)
10/06/2011	28	SCHEDULING ORDER: Amended Pleadings due by 1/17/2012. Discovery due by 1/3/2012. Joinder of Parties due by 1/17/2012. Motions due by 3/6/2012.. Signed by Magistrate Judge Patrick A. White on 10/5/2011. (tw) (Entered: 10/06/2011)
10/07/2011	29	MOTION to Take Deposition from Thomas Long *Defendant's Motion For Order To Take Deposition Of Prisoner (Plaintiff)* by Alfed Stabile. (Abbott, Daniel) (Entered: 10/07/2011)
10/19/2011	30	ORDER granting 29 Motion to Take Deposition from plaintiff Thomas Long. This is an unrepresented plaintiff and the defendants shall govern themselves accordingly.. Signed by Magistrate Judge Patrick A. White on 10/19/2011. (cz) (Entered: 10/19/2011)
11/03/2011	31	NOTICE by Alfed Stabile *Notice Of Taking Deposition* (Abbott, Daniel) (Entered: 11/03/2011)
11/08/2011	32	NOTICE by Alfed Stabile *Notice Of Intent To Serve Subpoena For Production Of Documents Without Deposition* (Abbott, Daniel) (Entered: 11/08/2011)
11/16/2011	33	NOTICE of Filing Discovery: Subpoena or Command to Produce Documents Electronically Stored, Records or Depositions of Witnesses from Earlier Action by Thomas T. Long (ar2) (Entered: 11/16/2011)
11/29/2011	34	NOTICE by Alfed Stabile *Notice of Cancellation of Taking Deposition* (Abbott, Daniel) (Entered: 11/29/2011)
11/29/2011	35	NOTICE by Alfed Stabile re 32 Notice (Other) *Notice of Non-Objection* (Abbott, Daniel) (Entered: 11/29/2011)
12/27/2011	36	FIRST MOTION for Production of Documents by Thomas T. Long. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit)(yha) (Entered: 12/27/2011)
12/27/2011	38	Disclosure(s) by Thomas T. Long (jua) (Entered: 12/28/2011)
12/28/2011	37	ORDER dismissing 36 Motion to Produce, this is not a motion to compel, it is

		a discovery request that should be made directly to the defendants.. Signed by Magistrate Judge Patrick A. White on 12/28/2011. (cz) (Entered: 12/28/2011)
01/17/2012	39	MOTION to Order the Defendants to Reply to the Plaintiff's Discovery Requests or MOTION for Default Judgment by Thomas T. Long. (jua) (Entered: 01/17/2012)
01/18/2012	40	ORDER granting 39 for defendants to reply to plaintiff's discovery requests for file objections thereto; denying 39 Motion for Default Judgment.. Signed by Magistrate Judge Patrick A. White on 1/18/2012. (cz) (Entered: 01/18/2012)
01/26/2012	41	Defendant's MOTION for clarification 40 Order on Motion for Miscellaneous Relief, Order on Motion for Default Judgment by Alfed Stabile. Responses due by 2/13/2012 (Doerfel, Joanna) (Entered: 01/26/2012)
01/31/2012	42	ORDER granting 41 Motion for Clarification as follows: the remaining defendant in this case is Officer Stabile. For the plaintiff to obtain discovery from any non parties he must arrange for payment and service of subpoenas. The defendant's responses to discovery, those that have been requested must be timely filed. Summary judgment motions, if filed are due on or before March 6, 2012. If no dispositive motions are filed the case will be reported for trial at that time.. Signed by Magistrate Judge Patrick A. White on 1/30/2012. (cz) (Entered: 01/31/2012)
02/09/2012	43	MOTION for Continuance/Change of Address by Thomas T. Long. Responses due by 2/27/2012 (Address updated) (ar2) (Entered: 02/09/2012)

PACER Service Center			
Transaction Receipt			
02/10/2012 11:53:37			
PACER Login:	vl0006	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	0:11-cv-61143-JIC
Billable Pages:	4	**Cost:**	0.32

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-61143-CIV-COHN/WHITE

The attached hand-written document has been scanned and is also available in the SUPPLEMENTAL PAPER FILE

Cat / div 550/1983/FTL
Case #
Judge Mag White Case Number: 11-61143-CIV-COHN/WHITE
Motn ifp Yes Fee pd $ NO
Receipt #

Date 5/7/11

FILED by D.C.
MAY 16 2011
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. of FLA. – MIAMI

Lone Thomas
D.C. K07322

(Enter above the full name of the plaintiff or plaintiffs in this action.)

v.

STABILE ALFRED, /3154
City of Hollywood police-
FIRE, Hollywood Beach
FLORIDA.

(Enter above the full name of the defendant or defendants 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. Your 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 or plaintiffs 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.

There is a filing fee of $250.00 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.

In addition, if the Judge directs the U.S. Marshal to serve the summons and complaint to teach defendant, the United States Marshal will require you to pay for the costs of this service.

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. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes (X) No ( )

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

Read closed case # 10-21666

1. Parties to this previous lawsuit

Plaintiffs: Long v

Defendants: State - Florida - Monroe - Broward co state Attorney office,

2. Court (if federal court, name the district; if state court, name the county): F.D.C. Southern miami Divison

3. Case Number: 10-21666 CIV-JORDAN

4. Name of Judge to whom case was assigned:

5. Disposition (for example: Was the case dismissed?; Was it appealed?; Is it still pending?): closed pending objections

6. Approximate date of filing lawsuit: 7-10-10

7. Approximate date of disposition: ?

II. Place of present confinement: Gainesville C, I,
2845 N.E 39th ave Gainesville FL.

A. Is there a prisoner grievance procedure in this institution?

Yes (x) No ( )

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

Yes ( ) No (x)

C. If your answer is YES:

1. What steps did you take? civil Action

2. What was the result?

D. If your answer is NO, explain why not: Not a criminal Action By prisoner

III. Parties

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of plaintiff: Long Thomas D.L. #K07322
Address: Gainesvill, C, I,

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

B. Defendant ALFED STABILE,
is employed as Law Enforcement officer Hollywood P.D.
at 3250 Hollywood BLVD, Hollywood FL, 33021

C. Additional Defendants: city, of Hollywood
STATE Attorney, Taylor Broward, CO,

IV. 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 Sept 15, 2008 (hours 1705)
officer STABILE grab me from The Back
of The Head and "Body slamed",
me To The ground with out any warning!
Knocked me out, 2 skull Fracture's At
hosiptal and officer have me listed
as John Doe (on police Report) I woke up
In Hospital and FIRE-police Removing
my Jewery. and never Returned It's Stolen
By Excessive Force during ARRest
This Act was witnesed By chis Quinn
Deposition, Taken, "officer - procutor"
purjuy. Issue's and other violation of
civil Right, are Involed In This case
my Retalilatory claim can only Be Assertod
Abainst a law Enforcement officer, who "Induced"
The prosecutors, decision to prosecute,
we will discuss The Burden's I "dual motive,
and Action's By (State prosecutor, Tayor) - officer
(A-STABILE. Hollywood police, Dept). (page 2 on
Additional Sheet

5-7-11

Lon v. STABILE,
Hollywood Beach police.

page 2-2.
part IV.

UNITED STATES DISTRICT COURT
Southern DISTRICT of FloriDA.

Here are some operative ground for This 1983. complaint,

1. unlawful search - OR excessive FORCE ARREST
(A) conclusion By other case's
(1983 Practing Law Ins. HandBook page 973), (volume 2)
(IF A consititutional violation Based on Excessive force, or Improper search At time of ARREST, and not necessary To overturn conviction Before a 1983 claim can go Forward, case # 1. simpson v Rowan 73 F3d. 134 7th cir (1995),
Thus Suit can go forward without challenging underlying STATE conviction. (See moore v Sims)

(copus - v. city of Edgerton)

(B.) 1983 claim for Excessive force can go Forward even If ARRESTee later convicted of underlying crime, Antonelli - v - Foster 104. F3d. 899 (7th cir 1997)
4th Amendment claim does not challenge lawfulness of confinement.

(C.) Relation To Habas corpus. 1983 claim (ie.. unReasonable force on ARREST Is Brought By STATE prisoner, Federal court can hear latter claim without Requiring Exhaustion Through HABEAS corpus, Delaney - v - Giarrusso 633. F2d. 1126. 5th cir (1981)
(D) "discussing Burden's In "dual motive" First Amendment Retaliatory motive, case's

V. Relief

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

1,) Because of The State of florida contempt of court, and my Amendment Rights I need my case Heard, and some legal Action Taken, By This Federal court.
2) meet your Requirments TO Address my Rights By This court.
3, get monetary Relief, And Return to a Normal life. I'm Asking for 2 million dollars, in damage.
4. protect my 1st Amentment Rights
5, Get a fair TRIAL.
6 was? it structural ERROR. of my 1st Amendment Rights. I Because it was. Because It is not a harmless, ERROR.

Signed this 7th day of may, 20 11.

Thomas Jones
Gainesville F.L. D.C. K07322
2845 N.E. 39th Ave
Gainesville Florida
32609
(Signature of plaintiff or plaintiffs)

I declare under penalty of perjury that the foregoing is true and correct. Executed on 7-may-2011

Thomas Jones
(Signature of plaintiff)

3-8-11

Dear clerk of court

Here is a New 1983, complaint. Enclosed is 1, copy for court! handwritten, along with forma pauperis. will you please Help me and make copyies and mail To other partyies This prison doesn't make copyies In less you pay I dont have any money Becuse of my Legal Lien from my 1st, complaint, I filed Back I June - 2010 Enclosed Is a Inmate TRUST Account from This prison. If you have any problems please let me know, Sorry about my hand writting I am a working man.

Thank you

Tommy

Long

D.C. # K07322

P.S.

my Appeal has been Denied

And my 1st Amendment Right of FREE speach, To Enter photographs, and written Evidence and verbal, "No Evidence could Be spoken, during TRIAL, any defence Evidence witnesses deposition could not Be Spoken, or TALKed About.

"Bad pen!" Sorry (TL) p.s. guilty as charged.

Thomas T Long
D.C.# K07322
Gainesville, C.I
A1-104L
2845 N.E. 39th Ave
Gainesville, Florida
32609

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61143-CIV-COHN
MAGISTRATE JUDGE P. A. WHITE

THOMAS LONG, :

Plaintiff, :

v. : REPORT OF MAGISTRATE JUDGE

ALFED STABILE, :

Defendant, :

I. Introduction

Thomas Long filed a pro se civil rights complaint while confined in the Gainesville Correctional Institution (DE#1). He is proceeding in forma pauperis.

This Cause is before the Court upon a preliminary review of the complaint pursuant to 28 U.S.C. §1915.

II. Analysis

A. Applicable Law for Screening

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

Sec. 1915 Proceedings in Forma Pauperis

* * *

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

* * *

> (B) the action or appeal –
>
> * * *
>
> (i) is frivolous or malicious;
>
> (ii) fails to state a claim on which relief may be granted; or
>
> (iii) seeks monetary relief from a defendant who is immune from such relief.

This is a civil rights action pursuant to 42 U.S.C. §1983. Such actions require the deprivation of a federally protected right by a person acting under color of state See 42 U.S.C. §1983; Polk County v. Dodson, 454 U.S. 312 (1981); Whitehorn v. Harrelson, 758 F.2d 1416, 1419 (11 Cir. 1985). The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). When reviewing complaints pursuant to 28 U.S.C. §1915(e)(2)(B), the Court must apply the standard of review set forth in Fed.R.Civ.P. 12(b)(6), and the Court must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. Davis v. Monroe County Bd. Of Educ., 120 F.3d 1390, 1393 (11 Cir. 1997). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998),See: Whitehorn, 758 F.2d at 1419 id. Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it

appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."' Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A complaint is “frivolous under section 1915(e) “where it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are “indisputably meritless,” id., 490 U.S. at 327, or when the claims rely on factual allegations that are “clearly baseless.” Denton v. Hernandez, 504 U.S. 25, 31 (1992).

The complaint may be dismissed if the plaintiff does not plead facts that do not state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007)(retiring the oft-criticized “no set of facts” language previously used to describe the motion to dismiss standard and determining that because plaintiffs had “not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed” for failure to state a claim); Watts v. FIU, 495 F.3d 1289 (11 Cir. 2007). While a complaint attacked for failure to state a claim upon which relief can be granted does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 127 S.Ct. at 1964-65. The rules of pleading do "not require heightened fact pleading of specifics . . . .” The Court's inquiry at this stage focuses on whether the challenged pleadings "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007)(quoting Twombly, 127 S.Ct. at 1964). When faced with alternative explanations for

the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred.[1]

B. Factual Allegations

This complaint names Hollywood Officer Alfed Stabile, the City of Hollywood, and state prosecutor Taylor as defendants. The plaintiff claims that on September 15, 2008, Officer Stabile grabbed him from the back of his head and body slammed him to the ground without warning. He claims he was knocked out and woke up in the hospital with two skull fractures. He claims his jewelry was taken and never returned. He seeks monetary and other relief.

C. Sufficiency of the complaint
Excessive force

The plaintiff claims that Officer Sabile used excessive force upon his arrest. Claims of excessive force by police officers are cognizable under 42 U.S.C. §1983, as are claims that officers who were present failed to intervene. Fundiller v. City of Cooper City, 777 F.2d 1436 (11 Cir. 1985). A claim that a law enforcement officer used excessive force in the course of an arrest, an investigatory stop, or any other seizure of a free citizen is to be analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v. Connor, 490 U.S. 386 (1989)("all claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and

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

its 'reasonableness' standard"); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991).

The plaintiff seeks monetary damages for the use of excessive force by the police officer. Under certain circumstances a use of excessive force claim can continue in a civil rights suit, if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff. Further, "as long as it is possible that a §1983 suit would not negate the underlying conviction, then the suit is not Heck-barred." Dyer v. Lee, 488 F.3d 876, 879-880 (11 Cir. 2007).

The Eleventh Circuit has permitted §1983 suits for claims of excessive force by police and for claims of Fourth Amendment search and seizure violations to proceed, concluding that these suits did not necessarily imply the invalidity of the underlying convictions. See Dyer, 488 F.3d at 881-82 (permitting a plaintiff convicted of resisting arrest to bring a §1983 claim for excessive force by police); Hughes v. Lott, 350 F.3d 1157, 1160-61 (11 Cir. 2003) (allowing a plaintiff convicted of burglary to bring a §1983 claim for a Fourth Amendment search and seizure violation in the face of a Heck challenge).

In this case the plaintiff was convicted of battery upon a law enforcement officer.[2] It may be that this claim of use of unlawful force is ultimately a challenge to his conviction. Further, it may be that his conviction may be used to demonstrate that the force used against him was not excessive. However, at this preliminary

[2] Research at the Florida Department of Correction's website indicates that the plaintiff was sentenced to three years incarceration in 2009, in Broward County, for battery upon a law enforcement officer.

stage, until further facts are developed, the plaintiff has stated a claim for use of excessive force by Officer Stabile.

Defendants Taylor, a state prosecutor, and the City of Hollywood should be dismissed. To allege a §l983 action against a municipality, the plaintiff must assert that a constitutional deprivation resulted from a custom, policy, or practice. Monell v. Department of Social Services, supra, 436 U.S. 658 (1978); Boilerplate allegations of policy or custom, without supporting facts, are insufficient to sustain a §1983 claim. See Hossman v. Blunk, 784 F.2d 793 (7 Cir. 1986); Gutierrez v. City of Hialeah, 723 F.Supp. 1494 (S.D. Fla. 1989). The plaintiff has failed to demonstrate a custom or policy authorized by the City of Hollywood responsible for violating his constitutional rights.

State Prosecutor Taylor is entitled to immunity in suits for damages. Prosecutors performing "prosecutorial functions" receive absolute immunity and are therefore not subject to suit in a federal civil rights action. See Imbler v. Pachtman, 424 U.S. 409 (1976). Absolute prosecutorial immunity applies where a prosecutor's activities are "intimately associated with the judicial phase of the criminal process. . . ." Imbler, 424 U.S. at 430. The plaintiff fails to state a claim against Taylor that states a constitutional violation, and would subject him to civil liability.

Lastly, any claims for deprivation of property must be raised in the state courts, and are not cognizable in a civil rights complaint. The courts have long expressed concern with a reading of section 1983 which would turn the Fourteenth Amendment into a font of tort law to be superimposed upon whatever systems may already be administered by the states. Parratt v. Taylor, 451 U.S. 527, 544

(1981) (overruled in part not relevant here, by Daniels v. Williams, 474 U.S. 327, 330-31 (1986)); Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693, 701 (1976); Cannon v. Taylor, 782 F.2d 947 (11 Cir. 1986). In Baker v. McCollan, supra, the Supreme Court warned that §1983 must not be used to duplicate state tort law on the federal level. Therefore, this claim should be dismissed.

III. Conclusions

It is therefore recommended as follows:

1. Defendant Taylor, and the City of Hollywood should be dismissed pursuant to 28 U.S.C. 1915(e)(2)(B)(ii), for failure to state a claim.

2. The case may proceed against Officer Sabile for use of excessive force by an officer upon his arrest.

3. The claim of deprivation of property should be dismissed for failure to state a claim.

Objections to this Report may be filed with the District Judge within fourteen days after receipt.

Dated this 16th day of June, 2011.

UNITED STATES MAGISTRATE JUDGE

cc: Thomas T Long, Pro Se
Gainesville Correctional Institution
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THOMAS LONG,

Plaintiff,

v.

ALFRED STABILE,

Defendant.
_____/

CASE NO.: 11-61143-CIV-COHN

MAGISTRATE JUDGE: P.A. WHITE

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT AND INCORPORATED SUPPORTING MEMORANDUM OF LAW

Defendant, City of Hollywood Police Officer Alfred Stabile ("Officer Stabile"), by and through undersigned counsel and pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure and S.D. Fla. L.R. 7.1, , seeks an order dismissing the Complaint (the "Complaint") [DE 1] filed by Plaintiff, Thomas Long ("Long"), and states:

OVERVIEW

The Complaint [DE 1] contends that Officer Stabile utilized excessive force during Long's arrest outside a 7-Eleven store in Hollywood, Florida. The Complaint is subject to dismissal because it does not allege sufficient facts to satisfy the heightened pleading standard required in §1983 excessive force claims against an individual police officer. There are simply no factual allegations regarding the circumstances surrounding the arrest and Long's actions prior to Officer Stabile's decision to utilize force. These omissions are significant in light of the Complaint's explicit admission that Long was convicted of obstructing his arrest with violence. Additionally, the facts alleged in the Complaint do not constitute "unreasonable" force pursuant to §1983. The Complaint should be dismissed.

RELEVANT FACTS[1]

On September 15, 2008 at approximately 5:05 p.m., Officer Stabile arrested Long outside a 7-Eleven store located at 1600 N. Federal Highway in Hollywood, Florida. During the arrest, Officer Stabile "grab(bed) (Long) from the back of the head and 'body slammed' (him) to the ground without any warning." This action "knocked (Long) out" and fractured his skull. Long was subsequently convicted of an unspecified crime[2] during the incident.

MEMORANDUM OF LAW

I. OFFICER STABILE IS ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF LONG'S EXCESSIVE FORCE CLAIM

A. Qualified Immunity Generally

Qualified immunity "offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Vinyard v. Wilson,* 311 F. 3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro,* 284 F. 3d 1188, 1194 (11th Cir. 2002) (internal quotation marks and citations omitted).

For qualified immunity to be denied, "pre-existing law must dictate, that is, truly compel...the conclusion for every like-situated, reasonable government agent that what the

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[1] The below relevant facts are derived from Section IV ("Statement of Claim") of the Complaint. For the purpose of this motion only, Stabile accepts the facts as presented in the Complaint as true.

[2] The Special Magistrate's Report [DE 7] noted that the Florida Department of Correction's website indicated that Long was convicted of battery upon a law enforcement officer, and was sentenced to three (3) years incarceration. *See* Page 5 of Special Magistrate Report, DE 7.

defendant is doing so violates federal law in the circumstances." *McMillian v. Johnson*, 88 F. 3d 1554, 1562, *amended on other grounds*, 101 F. 3d 1363 (11th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997) (emphasis added).

B. Qualified Immunity and Excessive Force Claims

Claims that law enforcement officers used excessive force in apprehending a criminal suspect are governed by the Fourth Amendment. *Samarco v. Neumann*, 44 F.Supp. 2d. 1276, 1284 (S.D. Fla. 1999), *citing Graham v. Connor*, 490 U.S. 386 (1989). Thus, Officer Stabile is entitled to qualified immunity if he can show that he was acting in his discretionary capacity[3] and if Long fails to show that the force utilized by Officer Stabile violated "clearly established law based upon objective standards." *Samarco*, at 44 F.Supp. 2d at 1291.

To satisfy the above burden, Long must identify factual scenarios in preexisting case law which demonstrate that the force utilized by Officer Stabile was illegal. *Id.* at 1292. However, the "myriad of case law interpreting the Fourth Amendment has staked out no bright line for identifying force as excessive." *Id.* at 1293. It is well settled that a citizen's Fourth Amendment right against excessive force claims is based on the reasonableness of the conduct from the objective perspective of a reasonable officer. *Id.* Thus, under the Fourth Amendment, law enforcement officers are permitted to use only that amount of force, which, under the circumstances, is objectively reasonable to effectuate the seizure of a person. *Id.* at 1284.

To determine whether the use of force to effect a seizure is reasonable in a particular instance, courts balance "the nature and quality of the intrusion on the [the suspect's] Fourth Amendment interests" against the government's countervailing interest in effective law enforcement. *Id.* at 1285. Several factors are considered in balancing the respective interests:

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[3] There has been no allegation that Officer Stabile was acting outside his discretionary capacity.

(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. *Id. See also, Gold v. City of Miami,* 121 F. 3d 1442, 1446 (11th Cir. 1997). These factors cannot be applied with mathematical precision; rather, they must be evaluated within the context of how the seizure was carried out. *Id.*

The Eleventh Circuit recognizes that an arrest usually involves some type of force and some injury. *Rodriguez*, 286 F. 3d at 1352. It is important that a "reviewing court judge the use of force 'from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight' and refrain from slipping into the role of a Monday morning quarterback." *Fernandez v. City of Cooper City*, 207 F.Supp. 2d 1371, 1377 (S.D. Fla. 2002). This is because the "calculus of reasonableness must embody allowance for the fact that police officers are forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id. citing Graham*, 490 U.S. at 396-397.

C. The Complaint Fails To Assert An Excessive Force Claim Under The Heightened Pleading Standard.

The Eleventh Circuit has stated that "a heightened standard applies to §1983 cases against individuals who are eligible to claim qualified immunity." *Amnesty Int'l. v. Battle*, 559 F.3d 1170, 1179 (11th Cir. 2009). In applying this heightened pleading standard, courts have granted motions to dismiss §1983 excessive force claims where the complaint failed to plead facts regarding the plaintiff's own conduct. *Jackson v. City of Beaumont Police Department*, 958 F. 2d 616 (5th Cir. 1992)(granting motion to dismiss excessive force claim where plaintiff failed to "plead any facts regarding [plaintiff's] own conduct during the incident, the reasons given, if any, by the officers for being called to the scene, or any other factors relating to the

circumstances leading to, and surrounding, his arrest"); *Keim v. City of El Paso*, 162 F.3d 1159 (5th Cir. 1998)(granting motion to dismiss where plaintiff's complaint "admit(ted) Plaintiff resisted (the) assault in some fashion, but (did) not specify the extent of that resistance"). Significantly, in both *Jackson* and *Keim*, *supra*, the complaint did not affirmative allege that plaintiff was convicted of battery (or other crime) on the arresting officer (as is the case in Long's Complaint).

The Complaint fails to satisfy this heightened pleading standard because it fails to describe: 1) the facts which lead to Long's arrest: 2) Long's conduct during the arrest; and 3) whether Long actively resisted arrest prior to Officer Stabile's use of force. Moreover, the Complaint explicitly admits that Long was convicted of obstructing the arrest. In light of the Complaint's admission that Long was convicted of a crime relating to Long's conduct during the arrest, the Complaint does not sufficiently allege facts demonstrating that Officer Stabile's force was unreasonable.

D. Officer Stabile is Entitled to Qualified Immunity Because The Force Used Was Objectively Reasonable

The conduct Long alleges on the part of Defendant Stabile does not rise to the level of conduct the Eleventh Circuit has determined to constitute excessive force. For instance, in *Nolin v. Isbell,* 207 F.3d 1253 (11th Cir.2000), the Eleventh Circuit granted a motion to dismiss where plaintiff alleged the defendant officer grabbed him from behind by the shoulder and wrist; threw him against a van three or four feet away; kneed him in the back and pushed his head into the side of the van; searched his groin area in an uncomfortable manner; and handcuffed him. *Id.* at 1255; *see e.g., Jones v. City of Dothan,* 121 F.3d 1456, 1458 (11th Cir.1997) (defendant police officer who slammed plaintiff against the wall and kicked his legs apart was entitled to qualified immunity); *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1556 (11th Cir.1993) (police officer

who pushed plaintiff against wall while handcuffed was entitled to qualified immunity), *modified,* 14 F.3d 583 (11th Cir.1994).

Long's Complaint merely contends that Officer Stabile "body slammed" him during the arrest "without any warning." See Complaint. The Complaint does not assert that Officer Stabile exerted any additional force until Long was taken into custody, or state whether Long physically resisted arrest prior to Officer Stabile's use of force. Based on the above authorities, the Complaint's allegations regarding Officer Stabile do not constitute "unreasonable" force. Officer Stabile is therefore entitled to qualified immunity on Long's claim for excessive force under § 1983.

WHEREFORE, Defendant Officer Stabile respectfully requests an Order dismissing the Complaint and for such additional relief as the Court deems proper.

Respectfully submitted,

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.L.
Attorneys for Defendant Alfred Stabile
200 E. Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Telecopier: (954) 764-7770

By: /s/ Daniel L. Abbott
DANIEL L. ABBOTT
Florida Bar No.: 767115

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent it via U.S. Mail to the Plaintiff, Thomas Long.

/s/ Daniel L. Abbott
DANIEL L. ABBOTT

SERVICE LIST

Thomas Long v. Alfred Stabile

Case No. 11-61143-CIV-COHN

Thomas T. Long (DC # K07322)
Gainesville C.I.
2845 N.E. 39th Avenue
Gainesville, Florida 32609-2668
Pro se Plaintiff

Daniel L. Abbott. Esq.
dabbott@wsh-law.com
WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
Suite 1900
Fort Lauderdale, Florida 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770
Counsel for Defendant Alfred Stabile

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61143-CIV-COHN
MAGISTRATE JUDGE P. A. WHITE

THOMAS LONG, :

Plaintiff, :

v. : REPORT OF MAGISTRATE JUDGE

ALFRED STABILE, : (DE#13)

Defendant, :

I. Introduction

Thomas Long filed a pro se civil rights complaint while confined in the Gainesville Correctional Institution (DE#1). He is proceeding in forma pauperis.

This Cause is before the Court upon a review of Defendant Stabile's Motion to Dismiss (DE#13).

II. Analysis

A. Applicable Law for Motion to Dismiss

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint because the plaintiff has failed to state a claim upon which relief may be granted. See Fed.R.Civ.P. 12(b)(6). A Rule 12(b)(6) motion questions the legal sufficiency of a complaint; therefore, in assessing the merits of a Rule 12(b)(6) motion, the court must assume that all the factual allegations set forth in the complaint are true. Erickson v. Pardus, 127 S.Ct. 2197 (2007); Christopher v. Harbury, 536 U.S. 403, 406 (2002). To satisfy the pleading requirements of Federal Rule of Civil Procedure 8, a complaint must

contain a short and plain statement showing an entitlement to relief, and the statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (citing Fed.R.Civ.P. 8). See also Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007) (citations omitted); Erickson v. Pardus, 127 S.Ct. at 2200; Watts v. Florida Intern. University, ___ F.3d ___, 2007 WL 2331029 (11 Cir. 2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [ ] a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 127 S.Ct. at 1964-65 (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." Id. at 1965. The plaintiff must plead enough facts to state a plausible basis for the claim. Id. Dismissal is warranted under Fed.R.Civ.P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford County, 960 F.2d 1002, 1009-10 (11 Cir. 1992).

B. Factual Allegations

The plaintiff claims that on September 15, 2008, during arrest, Officer Stabile grabbed him from the back of his head and body slammed him to the ground without warning. He alleges he was knocked out and woke up in the hospital with two skull fractures. He seeks monetary and other relief.

A Preliminary Report was entered recommending that the case proceed against Officer Stabile for use of excessive force upon arrest. As stated in the Report, claims of excessive force by police officers are cognizable under 42 U.S.C. §1983, as are claims that officers who were present failed to intervene. Fundiller v. City of Cooper City, 777 F.2d 1436 (11 Cir. 1985). A claim that a law enforcement officer used excessive force in the course of an arrest, an investigatory stop, or any other seizure of a free citizen is to be analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v. Connor, 490 U.S. 386 (1989)("all claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard"); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991).

C. Defendant's Motion to Dismiss

Defendant Officer Stabile filed a Motion to Dismiss on the following grounds: 1)he is entitled to qualified immunity on the claim of excessive force, and 2) the plaintiff failed to assert an excessive force claim under the heightened pleading standard.

The defendant's claim of qualified immunity is unavailing at this time. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, Lee v. Ferraro, 284 F.3d 1188, 1194 (11 Cir. 2002) (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987)), and it shields from suit "all

but the plainly incompetent or one who is knowingly violating the federal law." Lee, supra, 284 F.3d at 1194 (quoting Willingham v. Loughnan, 261 F.3d 1178, 1187 (11 Cir. 2001)). Since qualified immunity is a defense not only from personal liability for government officials sued in their individual capacities, but also a defense from suit, it is important for the Court to determine the validity of a qualified immunity defense as early in the lawsuit as is possible. Lee v. Ferraro, supra, at 1194; GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1370 (11th Cir. 1998).

Generally, government officials performing discretionary functions are protected by qualified immunity if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In Saucier, supra, the Supreme Court set forth a two-part test for evaluating a claim of qualified immunity. As a "threshold question," a court must ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Lee, supra at 1194 (quoting Saucier, 533 U.S. 194, 201); and then, if a constitutional right would have been violated under the *plaintiff's* version of the facts, the court must then determine “whether the right was clearly established." Lee, supra, 284 F.3d at 1194 (quoting Saucier, supra). This second inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id.; see also Marsh v. Butler County, 268 F.3d 1014, 1031-33 (11 Cir. 2001) (en banc).

Claims that law enforcement officers used excessive force in apprehending a criminal suspect are governed by the Fourth

Amendment. Samarco v Neumann, 44 F.Supp 2nd 1276, 1284 (SD Fla 1999), citing Graham v Connor, 490 U.S. 386 (1989). Officer Sabile is entitled to qualified immunity if the plaintiff fails to demonstrate that the force utilized by the defendant violated "clearly established law based upon objective standards. Samarco, supra. Law enforcement officers are permitted to use only that amount of force which, under the circumstances is objectively reasonable to effectuate the seizure of a person. Id. at 1284.

The Court is aware that an arrest may involve some type of force and injury, and the Judge must view the use of force from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight, and refrain from slipping into the role of the Monday morning quarterback. Fernandez v City of Cooper City, 207 F. Supp 2d 1371, 13711 (S.D. Fla 2002).

In this case, the plaintiff contends that Officer Stabile body slammed him into the ground during the arrest, without warning, and that he woke up in the hospital with skull fractures. It is difficult to determine whether that amount of force was excessive, in light of the limited facts available to the Court.

As stated in the Preliminary Report, the Court is aware that this plaintiff was convicted of battery upon a law enforcement officer.[1] It may be that this claim of use of unlawful force is ultimately a challenge to his conviction. Further, it may be that his conviction may be used to demonstrate that the force used against him was not excessive. However, at this preliminary stage, until further facts are developed, the plaintiff has stated a claim

[1] Research at the Florida Department of Correction's website indicates that the plaintiff was sentenced to three years incarceration in 2009, in Broward County, for battery upon a law enforcement officer.

for use of excessive force by Officer Stabile.

Secondly, the issue of whether the claim, as stated against Officer Stabile passes the Twombly standard and the 12(b)(6) standard has been determined in the Preliminary Report. The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) (used for preliminary screening) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). The Preliminary Report recommended that the claim proceed against Stabile for use of excessive force. This Report and Recommendation was adopted by the District Judge. Therefore the defendant's Motion to Dismiss is without merit.

III. Conclusions

It is therefore recommended as follows:

1. Defendant Stabile's Motion to Dismiss(DE#13)shall be denied.

2. The case may proceed against Officer Stabile for use of excessive force by an officer upon arrest.

Objections to this Report may be filed with the District Judge within fourteen days after receipt.

Dated this 19th day of August, 2011.

UNITED STATES MAGISTRATE JUDGE

cc: Thomas T Long, Pro Se
DC#K07322
Gainesville Correctional Institution
Address of record

Daniel L. Abbott, Esq.
Attorney of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THOMAS LONG,

Plaintiff,

CASE NO.: 11-61143-CIV-COHN

v.

MAGISTRATE JUDGE: P.A. WHITE

ALFRED STABILE,

Defendant.
_____/

DEFENDANT'S OBJECTION TO REPORT OF MAGISTRATE JUDGE AND INCORPORATED SUPPORTING MEMORANDUM OF LAW

Defendant, City of Hollywood Police Officer Alfred Stabile ("Officer Stabile"), by and through undersigned counsel and pursuant to S.D. Fla. Magistrate Judge Rule 4, files this objection to the Report of Magistrate Judge (the "Report") [DE 20], and states:

OVERVIEW

While the Report recognizes the pleading defects contained in the Complaint [DE 1] filed by Plaintiff, Thomas Long ("Plaintiff" or "Long"), the Magistrate Judge nevertheless recommends that the Motion to Dismiss [DE 13] be denied. It is respectfully submitted that the recommendation should be rejected, and the Motion granted.[1]

ARGUMENT

The Report (accurately) recognizes that the entire factual basis for the claim contained in the Complaint is that Officer Stabile "grabbed (Plaintiff) from the back of the head and body slammed him to the ground without warning." Report at 2. Since Plaintiff's excessive force claim is evaluated under the "reasonableness" standard, Report at 3, the critical question is

[1] A district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). *See also United States v. Farias–Gonzalez,* 556 F.3d 1181, 1184 n. 1 (11th Cir.2009).

whether the Complaint alleges facts that would justify the conclusion that Officer Stabile behaved "unreasonably" when he allegedly, without warning, grabbed Long by the back of the head and body slammed him to the ground. Obviously, there are circumstances under which it would be perfectly reasonable for a police officer to "body slam" an individual without giving the individual "warning" that he planned to do so.[2] One such circumstance would be if the individual had initiated an unprovoked physical attack upon the police officer.

The Complaint, however, is completely silent as to Long's conduct prior to his being "body slammed." The only relevant bit of information available to the Court at this juncture is that Long was convicted of feloniously battering Officer Stabile, and was sentenced to 3 years in prison. Report at 5. As the Report notes, "(i)t is difficult to determine whether that amount of force was excessive, in light of the limited facts available to the Court." Report at 5. The Magistrate Judge is being modest. It is simply *impossible* to determine Long's "entitlement to relief" within the meaning of *Twombly*[3], even assuming all of the facts pled are true, without *any* allegations of Long's own conduct that preceded his being "body slammed" "without warning."

Contrary to the assumption implicit in the recommendation, a complaint that makes it impossible to determine whether a plaintiff would be entitled to relief, even if the allegations contained therein are assumed to be true, requires dismissal. Federal Circuit Courts of Appeal, when faced with nearly identical circumstances, have reached exactly this conclusion. For instance, in *Jackson v. City of Beaumont Police Department*, 958 F. 2d 616 (5th Cir. 1992), the

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[2] Given that self-defense is a complete defense to a battery claim, Officer Stabile's alleged actions were reasonable if done in response to Long's battery of Officer Stabile. *See S.J.C. v. State*, 906 So. 2d 1115 (Fla. 2d DCA 2005)(stating that self-defense is generally a defense to battery); *S.R. v. State*, 11 So. 3d 442, 444 (Fla. 3d DCA 2009)(reversing defendant's battery conviction where the State failed to establish that the defendant did not act in self-defense).

[3] Page 2 of the Report accurately described the holding of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

court granted the defendant's motion to dismiss an excessive force claim where the plaintiff failed to "plead any facts regarding [plaintiff's] own conduct during the incident, the reasons given, if any, by the officers for being called to the scene, or any other factors relating to the circumstances leading to, and surrounding, his arrest." The court concluded that without these facts, it was impossible to conclude whether the officers' conduct was unreasonable. *Id.* at 621. The court added that plaintiff's allegations that the assault was "without justification" and in "bad faith" constituted "conclusory allegations insufficient to overcome the immunity defense." *Id.* Similarly, in *Keim v. City of El Paso*, 162 F. 3d 1159 *1 (5th Cir. 1998), the court granted the defendant's motion to dismiss where the plaintiff's complaint "admit(ted) plaintiff resisted (the) assault in some fashion, but (did) not specify the extent of that resistance." Significantly, in both *Jackson* and *Keim*, *supra*, the complaint did not affirmatively allege that the plaintiff was convicted of battery (or other crime) on the arresting officer (as is the case in Long's Complaint), and the grounds for dismissing those complaints were less compelling than in the instant case.

CONCLUSION

The Complaint fails to allege an excessive force claim under this Circuit's heightened pleading standard. It is impossible to determine whether Officer Stabile's use of force was "reasonable" given that the Complaint is silent as to Long's conduct prior to Officer Stabile's use of force. The omission is especially problematic in light of the Complaint's admission that Long was convicted of obstructing the arrest. The Complaint should be dismissed.

WHEREFORE, Defendant Officer Stabile respectfully requests an Order: i) rejecting the Magistrate Judge's recommendation; ii) dismissing the Complaint; and iii) for such additional relief as the Court deems proper.

Respectfully submitted,

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.L.
Attorneys for Defendant Alfred Stabile
200 E. Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Telecopier: (954) 764-7770

By: /s/ Daniel L. Abbott
DANIEL L. ABBOTT
Florida Bar No.: 767115

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 2, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent it via U.S. Mail to the Plaintiff, Thomas Long.

/s/ Daniel L. Abbott
DANIEL L. ABBOTT

SERVICE LIST

Thomas Long v. Alfred Stabile

Case No. 11-61143-CIV-COHN

Thomas T. Long (DC # K07322)
Gainesville C.I.
2845 N.E. 39th Avenue
Gainesville, Florida 32609-2668
Pro se Plaintiff

Daniel L. Abbott. Esq.
dabbott@wsh-law.com
WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
200 East Broward Blvd., Suite 1900
Fort Lauderdale, Florida 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770
Counsel for Defendant Alfred Stabile

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THOMAS LONG,

Plaintiff,

v.

ALFRED STABILE,

Defendant.
_____/

CASE NO.: 11-61143-CIV-COHN

MAGISTRATE JUDGE: P.A. WHITE

DEFENDANT ALFRED STABILE'S ANSWER AND AFFIRMATIVE DEFENSES

Defendant, Alfred Stabile ("Stabile"), individually and in his official capacity as a police officer of the City of Hollywood, through undersigned counsel, hereby answers the Complaint [DE 1] filed by Plaintiff, Thomas Long ("Long"), and states:

1. Stabile admits that he arrested Long outside a 7-Eleven store (located at 1600 N. Federal Highway, Hollywood, Florida) on September 15, 2008. Stabile denies all allegations that he utilized excessive force or violated Long's federal civil rights during the subject arrest, and demands strict proof thereof.

2. Stabile denies that he removed any property belonging to Long, and demands strict proof thereof.

3. Stabile denies that he made any false statements regarding Long and/or the subject arrest, and demands strict proof thereof.

4. Stabile denies that Long is entitled to any relief (Section V of the Complaint), and demands strict proof thereof.

*Any allegation contained in the Complaint which is not specifically admitted is denied.

AFFIRMATIVE DEFENSES

1. Stabile states that Long is estopped from recovery because he physically resisted arrest prior to being ultimately detained thereby causing Stabile to utilize whatever force was necessary and reasonable under the circumstances to subdue and subsequently arrest Long. Stabile's use of force was necessary and reasonable under the circumstances.

2. Stabile states that Long is estopped from recovery because he physically resisted arrest prior to being ultimately detained and that any and all damages allegedly suffered by Long were solely and proximately caused by his unlawful actions.

3. Stabile states that all actions he undertook were done so in good faith and he is therefore immune from liability under the doctrine of qualified immunity.

4. Stabile states that his actions to intentionally touch Long during the incident described in the Complaint constitute an ordinary incident of detention.

5. Stabile states that Long has failed to mitigate his alleged damages, if any.

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.L.
Attorneys for Defendant Alfred Stabile
200 E. Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Telecopier: (954) 764-7770

By: /s/ Daniel L. Abbott
DANIEL L. ABBOTT
Florida Bar No.: 767115

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 23, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent it via U.S. Mail to the Plaintiff, Thomas Long.

/s/ Daniel L. Abbott_____
DANIEL L. ABBOTT

SERVICE LIST

Thomas Long v. Alfred Stabile

Case No. 11-61143-CIV-COHN

Thomas T. Long (DC # K07322)
Gainesville C.I.
2845 N.E. 39th Avenue
Gainesville, Florida 32609-2668
Pro se Plaintiff

Daniel L. Abbott. Esq.
dabbott@wsh-law.com
WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
Suite 1900
Fort Lauderdale, Florida 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770
Counsel for Defendant Alfred Stabile

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 23rd day of September, 2011, to Thomas T. Long (DC # K07322), Gainesville C.I., 2845 N.E. 39th Avenue, Gainesville, Florida 32609-2668.

WEISS SEROTA HELFMAN PASTORIZA
COLE & BONISKE, P.L.
Attorneys for Defendant Alfred Stabile
200 East Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770

/s/ Daniel L. Abbott
DANIEL L. ABBOTT
Florida Bar No. 767115
DANIEL A. SEIGEL
Florida Bar No. 0867861

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THOMAS LONG,

Plaintiff,

v.

ALFRED STABILE,

Defendant.
_____/

CASE NO.: 11-61143-CIV-COHN

MAGISTRATE JUDGE: P.A. WHITE

DEFENDANT ALFRED STABILE'S ANSWER AND AFFIRMATIVE DEFENSES

Defendant, Alfred Stabile ("Stabile"), individually and in his official capacity as a police officer of the City of Hollywood, through undersigned counsel, hereby answers the Complaint [DE 1] filed by Plaintiff, Thomas Long ("Long"), and states:

1. Stabile admits that he arrested Long outside a 7-Eleven store (located at 1600 N. Federal Highway, Hollywood, Florida) on September 15, 2008. Stabile denies all allegations that he utilized excessive force or violated Long's federal civil rights during the subject arrest, and demands strict proof thereof.

2. Stabile denies that he removed any property belonging to Long, and demands strict proof thereof.

3. Stabile denies that he made any false statements regarding Long and/or the subject arrest, and demands strict proof thereof.

4. Stabile denies that Long is entitled to any relief (Section V of the Complaint), and demands strict proof thereof.

*Any allegation contained in the Complaint which is not specifically admitted is denied.

AFFIRMATIVE DEFENSES

1. Stabile states that Long is estopped from recovery because he physically resisted arrest prior to being ultimately detained thereby causing Stabile to utilize whatever force was necessary and reasonable under the circumstances to subdue and subsequently arrest Long. Stabile's use of force was necessary and reasonable under the circumstances.

2. Stabile states that Long is estopped from recovery because he physically resisted arrest prior to being ultimately detained and that any and all damages allegedly suffered by Long were solely and proximately caused by his unlawful actions.

3. Stabile states that all actions he undertook were done so in good faith and he is therefore immune from liability under the doctrine of qualified immunity.

4. Stabile states that his actions to intentionally touch Long during the incident described in the Complaint constitute an ordinary incident of detention.

5. Stabile states that Long has failed to mitigate his alleged damages, if any.

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.L.
Attorneys for Defendant Alfred Stabile
200 E. Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Telecopier: (954) 764-7770

By: /s/ Daniel L. Abbott
DANIEL L. ABBOTT
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/s/ Daniel L. Abbott_____
DANIEL L. ABBOTT

SERVICE LIST

Thomas Long v. Alfred Stabile

Case No. 11-61143-CIV-COHN

Thomas T. Long (DC # K07322)
Gainesville C.I.
2845 N.E. 39th Avenue
Gainesville, Florida 32609-2668
Pro se Plaintiff

Daniel L. Abbott. Esq.
dabbott@wsh-law.com
WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
Suite 1900
Fort Lauderdale, Florida 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770
Counsel for Defendant Alfred Stabile

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 23rd day of September, 2011, to Thomas T. Long (DC # K07322), Gainesville C.I., 2845 N.E. 39th Avenue, Gainesville, Florida 32609-2668.

WEISS SEROTA HELFMAN PASTORIZA
COLE & BONISKE, P.L.
Attorneys for Defendant Alfred Stabile
200 East Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770

/s/ Daniel L. Abbott
DANIEL L. ABBOTT
Florida Bar No. 767115
DANIEL A. SEIGEL
Florida Bar No. 0867861

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61143-CIV-COHN
MAGISTRATE JUDGE P. A. WHITE

THOMAS LONG, :

Plaintiff, :

v. : ORDER SCHEDULING PRETRIAL PROCEEDINGS WHEN PLAINTIFF IS PROCEEDING PRO SE

ALFRED STABILE, :

Defendant. :

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 **January 3, 2012**. This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **January 17, 2012**.

3. All motions to dismiss and/or for summary judgment shall be filed by **March 6, 2012**.

4. On or before **March 20, 2012**, the plaintiff shall file with the Court and serve upon counsel for the defendants a document called "Pretrial Statement." The Pretrial Statement shall contain the following things:

(a) A brief general statement of what the case is about;

(b) A written statement of the facts that will be offered by oral or documentary evidence at trial; this means that the plaintiff must explain what he intends to prove at trial and how he intends to prove it;

(c) A list of all exhibits to be offered into evidence at the trial of the case;

(d) A list of the full names and addresses of places of employment for all the non-inmate witnesses that the plaintiff intends to call (the plaintiff must notify the Court of any changes in their addresses);

(e) A list of the full names, inmate numbers, and places of incarceration of all the inmate witness that plaintiff intends to call (the plaintiff must notify the Court of any changes in their places of incarceration); and

(f) A summary of the testimony that the plaintiff expects <u>each</u> of his witnesses to give.

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

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

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

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

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

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

(a) discuss the possibility of settlement;

(b) stipulate (agree) in writing to as many facts and issues as possible to avoid unnecessary evidence;

(c) examine all exhibits and documents proposed to be used at the trial, except

that impeachment documents need not be revealed;

(d) mark all exhibits and prepare an exhibit list;

(e) initial and date opposing party's exhibits;

(f) prepare a list of motions or other matters which require Court attention; and

(g) discuss any other matters that may help in concluding this case.

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

DONE AND ORDERED at Miami, Florida, this 5th day of October, 2011.

s/Patrick A. White
UNITED STATES MAGISTRATE JUDGE

cc: Thomas T. Long, Pro Se
DC #K07322
Columbia Correctional Institution
216 S.E. Corrections Way
Lake City, FL 32025-2013

Daniel L. Abbott, Esquire
Weiss, Serota, et al.
200 East Broward Boulevard
Suite 1900
Fort Lauderdale, FL 33301

Hon. James I. Cohn, United States District Judge