

**U.S. District Court  
Southern District of Florida (Ft. Lauderdale)  
CIVIL DOCKET FOR CASE #: 0:11-cv-60557-RNS**

Stickney v. Casey et al  
Assigned to: Judge Robert N. Scola, Jr  
Referred to: Magistrate Judge Patrick A. White  
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 03/15/2011  
Jury Demand: Defendant  
Nature of Suit: 550 Prisoner: Civil Rights  
Jurisdiction: Federal Question

**Plaintiff**

**Frederick Stickney**  
Prisoner ID: 182791

represented by **Frederick Stickney**  
182791  
Calhoun Correctional Institution  
Inmate Mail/Parcels  
19562 SE Institution Drive  
Blountstown, FL 32424  
PRO SE

V.

**Defendant**

**Kathrine Casey**  
*Telephone Coordinator*

represented by **Robert Dominic Yates**  
Robert D. Yates, P.A.  
208 S.E. 6th Street  
Fort Lauderdale, FL 33301  
954-467-5700  
Fax: 954-467-5810  
Email: [fbcysy@bellsouth.net](mailto:fbcysy@bellsouth.net)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**LT. COL. Kim Spadaro**  
*Director of Department of Detention*

represented by **Robert Dominic Yates**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**Faircloth**  
*BSO Detective*

represented by **Robert Dominic Yates**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

Date Filed	#	Docket Text
03/15/2011	<u>1</u>	COMPLAINT against Kathrine Casey, Faircloth, Kim Spadaro. Filing fee \$ 350.00. IFP Filed, filed by Frederick Stickney.(ar2) (Entered: 03/15/2011)
03/15/2011	2	Judge Assignment to Judge Adalberto Jordan (ar2) (Entered: 03/15/2011)
03/15/2011	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: 03/15/2011)
03/15/2011	<u>4</u>	MOTION for Leave to Proceed in forma pauperis by Frederick Stickney. (ar2) (Entered: 03/15/2011)
03/17/2011	<u>5</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 3/17/2011. (br) (Entered: 03/17/2011)

03/17/2011	<u>6</u>	ORDER Permitting Plaintiff to Proceed without Prepayment of Filing Fee but Establishing Debt to Clerk of \$350.00; granting <u>4</u> Motion for Leave to Proceed in forma pauperis to the extent that the plaintiff need not prepay even a partial filing fee in this case, or to prepay costs such as forservice of process. Signed by Magistrate Judge Patrick A. White on 3/17/2011. (br) (Entered: 03/17/2011)
03/21/2011	<u>7</u>	ORDER Re Service of Process Requiring Personal Service upon: Kathrine Casey, Detective Faircloth & Lt. Col. Kim Spadaro. Signed by Magistrate Judge Patrick A. White on 3/21/2011. (br) (Entered: 03/21/2011)
03/21/2011	<u>8</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Frederick Stickney Recommending: 1) the complaint shall proceed on the claim of denial of Sixth Amendment rights to counsel against Defendants Spadaro, Faircloth and Casey; 2) Claims against the defendants in their official capacities shall be dismissed for any claims for monetary damages; 3) the plaintiff shall amend his complaint to include a prayer for relief. Objections to RR due by 4/7/2011. Signed by Magistrate Judge Patrick A. White on 3/21/2011. (br) (Entered: 03/21/2011)
03/22/2011	<u>9</u>	Summons Issued as to Kathrine Casey. (br) (Entered: 03/22/2011)
03/22/2011	<u>10</u>	Summons Issued as to Faircloth. (br) (Entered: 03/22/2011)
03/22/2011	<u>11</u>	Summons Issued as to Kim Spadaro. (br) (Entered: 03/22/2011)
04/04/2011	<u>12</u>	SUMMONS (Affidavit) Returned Executed Faircloth served on 3/31/2011, answer due 4/21/2011. (lh) (Entered: 04/04/2011)
04/04/2011	<u>13</u>	SUMMONS (Affidavit) Returned Executed Kim Spadaro served on 3/31/2011, answer due 4/21/2011. (lh) (Entered: 04/04/2011)
04/04/2011	<u>14</u>	Summons (Affidavit) Returned Unexecuted as to Kathrine Casey. (lh) (Entered: 04/04/2011)
04/20/2011	<u>15</u>	Joint MOTION for Extension of Time to File Answer RE: Complaints re <u>1</u> Complaint by Faircloth, Kim Spadaro. (Attachments: # <u>1</u> Text of Proposed Order)(Yates, Robert) (Entered: 04/20/2011)
04/20/2011	<u>16</u>	Corrected MOTION for Extension of Time to File Answer RE: Complaints re <u>1</u> Complaint ( <i>Corrects and withdraws DE 15</i> ) by Faircloth, Kim Spadaro. (Attachments: # <u>1</u> Text of Proposed Order)(Yates, Robert) (Entered: 04/20/2011)
04/20/2011	<u>17</u>	WITHDRAWAL of Motion by Faircloth, Kim Spadaro re <u>15</u> Joint MOTION for Extension of Time to File Answer RE: Complaints re <u>1</u> Complaint filed by Kim Spadaro, Faircloth. (lh) per DE# <u>16</u> (Entered: 04/21/2011)
04/21/2011	<u>18</u>	Clerks Notice to Filer re <u>16</u> Corrected MOTION for Extension of Time to File Answer RE: Complaints re <u>1</u> Complaint ( <i>Corrects and withdraws DE 15</i> ). <b>Two or More Document Events Filed as One</b> ; ERROR – Only one event was selected by the Filer but more than one event was applicable to the document filed. The docket entry was corrected by the Clerk. It is not necessary to refile this document but in the future, the Filer must select all applicable events. (lh) (Entered: 04/21/2011)
04/21/2011	<u>19</u>	ORDER granting <u>16</u> Motion for Extension of Time to Answer RE: Complaints answer due 5/23/2011.. Signed by Magistrate Judge Patrick A. White on 4/21/2011. (cz) (Entered: 04/21/2011)
05/23/2011	<u>20</u>	Joint MOTION to Dismiss <u>1</u> Complaint by Kathrine Casey, Faircloth, Kim Spadaro. Responses due by 6/9/2011 (Yates, Robert) (Entered: 05/23/2011)
07/07/2011	<u>21</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>20</u> Joint MOTION to Dismiss <u>1</u> Complaint filed by Kathrine Casey, Kim Spadaro, Faircloth. Recommending Denying. Objections to RR due by 7/25/2011. Signed by Magistrate Judge Patrick A. White on 7/7/2011. (tw) (Entered: 07/07/2011)
07/13/2011	<u>22</u>	OBJECTIONS to <u>21</u> Report and Recommendations <i>Denying Motion To Dismiss</i> by Kathrine Casey, Faircloth, Kim Spadaro. (Yates, Robert) (Entered: 07/13/2011)

08/01/2011	<u>23</u>	MOTION to Amend <u>1</u> Complaint by Frederick Stickney. Responses due by 8/18/2011 (jua) (Entered: 08/01/2011)
08/08/2011	24	ORDER granting <u>23</u> Motion to Amend/Correct to the extent that the amendment will be screened in turn. Signed by Magistrate Judge Patrick A. White on 8/8/2011. (cz) (Entered: 08/08/2011)
09/14/2011	<u>25</u>	ORDER REQUIRING AMENDED COMPLAINT. Due on or before October 3, 2011. Signed by Magistrate Judge Patrick A. White on 9/14/2011. (Attachments: # <u>1</u> Supplement 1983) (tw) (Entered: 09/14/2011)
09/26/2011	<u>26</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS <u>8</u> Report and Recommendations and <u>21</u> Report and Recommendations.; denying <u>20</u> Motion to Dismiss. Amended Complaint due by 10/18/2011. Signed by Judge Adalberto Jordan on 9/26/2011. (lbc) (Entered: 09/26/2011)
10/14/2011	<u>27</u>	MOTION to Amend to Add Prayer of Relief re <u>1</u> Complaint by Frederick Stickney. Responses due by 10/31/2011 (yha) (Entered: 10/14/2011)
10/19/2011	28	ORDER granting <u>27</u> Motion to Amend/Correct complaint by adding prayer for relief.. Signed by Magistrate Judge Patrick A. White on 10/19/2011. (cz) (Entered: 10/19/2011)
11/02/2011	<u>29</u>	<i>Defendants'</i> ANSWER and Affirmative Defenses to Complaint with Jury Demand by Kathrine Casey, Faircloth, Kim Spadaro.(Yates, Robert) (Entered: 11/02/2011)
11/04/2011	<u>30</u>	SCHEDULING ORDER: Amended Pleadings due by 3/6/2012. Discovery due by 2/21/2012. Joinder of Parties due by 3/6/2012. Motions due by 3/27/2012.. Signed by Magistrate Judge Patrick A. White on 11/3/2011. (tw) (Entered: 11/04/2011)
11/29/2011	<u>31</u>	ORDER REASSIGNING CASE to Judge Robert N. Scola, Jr for all further proceedings, Judge Adalberto Jordan no longer assigned to case. Signed by Judge Adalberto Jordan on 11/29/2011. (vp) (Entered: 11/29/2011)
12/15/2011	<u>32</u>	MOTION to Use Pro-Se Telephone by Frederick Stickney. (jc) (Entered: 12/16/2011)
12/16/2011	<u>33</u>	Clerks Notice of Receipt of Partial Filing Fee received on 12/16/2011 in the amount of \$ 97.00, receipt number FLS100030183 (jc) (Entered: 12/16/2011)
01/11/2012	<u>34</u>	MOTION of Discovery by Frederick Stickney. Responses due by 1/30/2012 (jua) (Entered: 01/11/2012)
01/17/2012	35	ORDER granting in part <u>32</u> Motion motion for order to use pro-se phone, the plaintiff may show a copy of the Court's docket indicating that he is proceeding pro se to the jail officials; denying <u>34</u> Motion for Discovery, all requests for specific discovery must be sent directly to the defendants.. Signed by Magistrate Judge Patrick A. White on 1/17/2012. (cz) (Entered: 01/17/2012)
02/16/2012	<u>36</u>	NOTICE of Change of Address by Frederick Stickney (Address updated) (ar2) (Entered: 02/16/2012)
03/27/2012	<u>37</u>	Joint MOTION for Summary Judgment by Kathrine Casey, Faircloth, Kim Spadaro. Responses due by 4/13/2012 (Attachments: # <u>1</u> Exhibit Statement of Facts in Support of Summary Judgment)(Yates, Robert) (Entered: 03/27/2012)
03/27/2012	<u>38</u>	NOTICE by Kathrine Casey, Faircloth, Kim Spadaro re <u>37</u> Joint MOTION for Summary Judgment <i>Of Filing Multiple Exhibits in Support of Summary Judgment</i> (Attachments: # <u>1</u> Exhibit 1-Probable Cause Affidavit of Pena, # <u>2</u> Exhibit 2-Probable Cause Affidavit of Copley, # <u>3</u> Exhibit 3-BSO After Action Report, # <u>4</u> Exhibit 4-Court Dispo 10-3065CF10A, # <u>5</u> Exhibit 5-Investigative Report, # <u>6</u> Exhibit Pawn Receipt, # <u>7</u> Exhibit 7-Affidavit & Order for cell phone, # <u>8</u> Exhibit 8-BSO Crime Lab Report, # <u>9</u> Exhibit 9-Court Dispo 10-7938CF10A, # <u>10</u> Affidavit of Kathleen Casey, # <u>11</u> Affidavit of Ronald Faircloth, # <u>12</u> Transcripts of Jail Phone calls)(Yates, Robert) (Entered: 03/27/2012)
03/27/2012	<u>39</u>	Defendant's MOTION for Permission to Conventionally file Notice and Audio CD re <u>37</u> Joint MOTION for Summary Judgment by Kathrine Casey, Faircloth, Kim Spadaro. (Attachments: # <u>1</u> Text of Proposed Order)(Yates, Robert) (Entered: 03/27/2012)

		03/27/2012)
03/28/2012	<u>40</u>	ORDER granting <u>39</u> Motion to permit filing of CD. Signed by Magistrate Judge Patrick A. White on 3/28/2012. (cz) (Entered: 03/28/2012)
03/28/2012	<u>41</u>	ORDER OF INSTRUCTIONS CONCERNING RESPONSE TO MOTION FOR SUMMARY JUDGMENT TO PRO SE PLAINTIFF. Signed by Magistrate Judge Patrick A. White on 3/28/2012. (lh) (Entered: 03/28/2012)
03/29/2012	<u>42</u>	NOTICE OF CONVENTIONAL FILING of CD Containing Telephone Recordings of Plaintiff in Support of <u>37</u> Joint MOTION for Summary Judgment by Kathrine Casey, Faircloth, Kim Spadaro (cqs) (Entered: 03/29/2012)
03/30/2012		Set Deadlines per <u>41</u> Order as to <u>37</u> Joint MOTION for Summary Judgment . Responses due by 4/19/2012 (asl) (Entered: 03/30/2012)
04/11/2012	<u>43</u>	MOTION for Extension of Time to File Response as to <u>37</u> Joint MOTION for Summary Judgment by Frederick Stickney. (cqs) (Entered: 04/11/2012)
04/12/2012	<u>44</u>	ORDER granting <u>43</u> Motion for Extension of Time to File Response/Reply re <u>43</u> MOTION for Extension of Time to File Response/Reply as to <u>37</u> Joint MOTION for Summary Judgment Responses due by 5/10/2012, no further extensions will be granted.. Signed by Magistrate Judge Patrick A. White on 4/12/2012. (cz) (Entered: 04/12/2012)
04/24/2012	<u>45</u>	NOTICE by Kathrine Casey, Faircloth, Kim Spadaro re <u>30</u> Scheduling Order of <i>Plaintiff's Non-Compliance with Scheduling Order</i> (Yates, Robert) (Entered: 04/24/2012)
05/14/2012	<u>46</u>	MOTION for Summary Judgment by Frederick Stickney. Responses due by 6/1/2012 (cbr) (Entered: 05/14/2012)
05/14/2012	<u>47</u>	Statement of: Material Facts in Support of Motion of Summary Judgement by Frederick Stickney re <u>46</u> MOTION for Summary Judgment (cbr) (Entered: 05/14/2012)
05/14/2012	<u>48</u>	Notice of Filing Multiple Documents and EXHIBITS in Support of Motion of Summary Judgment by Frederick Stickney re: <u>46</u> MOTION for Summary Judgment filed by Frederick Stickney. Related document: <u>46</u> MOTION for Summary Judgment filed by Frederick Stickney.(cbr) (Entered: 05/14/2012)
05/23/2012	<u>49</u>	RESPONSE/REPLY to <u>37</u> Joint MOTION for Summary Judgment , <u>46</u> MOTION for Summary Judgment ( <i>Consolidated REPLY in Support of Defendants' Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment</i> ) by Kathrine Casey, Faircloth, Kim Spadaro. (Yates, Robert) (Entered: 05/23/2012)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

**Case No. 11-60557-Civ-JORDAN/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  
Motn lfp Yes Fee pd \$ \_\_\_\_\_  
Receipt # \_\_\_\_\_  
(REV. 09-2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

UNITED STATES DISTRICT COURT  
Southern District of Florida

Case Number: **11-60557-Civ-JORDAN/WHITE**

Frederick Stickney  
(Enter the full name of the plaintiff in this action)

v.

LT. COL. Kim Spadaro  
BSO: Det. Faircloth  
Telephone Coordinator:  
Kathrine Casey (are sued in  
their individual and official capacities)  
(Above, enter the full name of the defendant(s) in this action)

FILED by [Signature] D.C.  
MAR 15 2011  
STEVEN M. LARIMORE  
CLERK U. S. DIST. CT.  
S. D. of FLA. -- MIAMI

**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.

①

(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: Frederick Stickney  
Inmate #: 561000196  
Address: P.O. Box 4356 (main jail)  
Fort Lauderdale, Florida 33316

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: LT. Col. Kim Spadaro  
is employed as Director of Dept - of - Detention  
at 555 NE 1<sup>st</sup> street Fort. Loud, Florida 33301  
C. Additional Defendants: Telephone Coordinator:  
Kathrine Casey 555 NE 1<sup>st</sup> street  
Fort Lauderdale, Florida 33301

#5. On Feb. 24. 2010 the telephone Coordinator Kathrine Casey; recorded my conversation and gave that information to BSO. Det. Faircloth.

#6 I have paper work pertaining to this conversation word for word that has violated my VI Amendment rights.

#7 LT. Col. Kim Spadaro who is Director of Committee and Control of Dept. of Detention is also responsible for this happening because of her position within BSO.

#8 Kathrine Casey and BSO. Det. Faircloth used this information and conversation with my Attorney to put charges against me that aren't true.

#9 Any reasonable person in that same position as LT. Col. Kim Spadaro; Telephone Coordinator Kathrine Casey, and BSO. Det. Faircloth would know that they were violating my my Constitutional Rights and my VI Amendment Rights as Attorney and Client privilege without due process of law.

#10 At all times relevant to this claim these defendants in this case Lt. Col. Spadaro; Kathrine Casey, and Det. Faircloth were acting under color of state law with a total disregard of my VI Amendment Rights.

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

Signed this 9<sup>th</sup> day of March, 20 11

Frederick Stickey  
(Signature of Plaintiff)

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

Executed on: \_\_\_\_\_

\_\_\_\_\_  
(Signature of Plaintiff)

Frederick Stickney #561000196  
P.O. BOX 9356  
Fort Lauderdale, Florida 33310

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-60557-CIV-JORDAN  
MAGISTRATE P. A. WHITE

FREDERICK STICKNEY, :  
 :  
 Plaintiff, :  
 :  
 v. :  
 :  
 LT. KIM SPADARO, et al., :  
 :  
 Defendants. :

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REPORT OF  
MAGISTRATE JUDGE

The pro-se plaintiff, Frederick Stickney, filed a civil rights complaint pursuant to 42 U.S.C. §1983.(De#1) The plaintiff alleges that officials at the Broward County Jail recorded his telephone conversation with his attorney. The plaintiff is proceeding in forma pauperis. [DE# 4].

This civil action is before the Court for an initial screening 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 law. 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)"). 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). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). 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)"). 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).

To determine whether a complaint fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Twombly applies to §1983 prisoner actions. See Douglas v. Yates, 535 F.3d 1316, 1321 (11 Cir. 2008). These include "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." The plaintiff is required to plead facts that show more than the "mere possibility of misconduct." The Court must review the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." 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.<sup>1</sup>

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<sup>1</sup> The application of the Twombly standard was clarified in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

B. Factual Allegations

The plaintiff alleges that his Sixth Amendment rights were violated when Telephone Coordinator Kathrin Casey recorded his conversation with his attorney at the Broward County Main Jail on February 24, 2010. She then allegedly provided the information to BSO Det. Faircloth, and this information was used to place false charges against him. He claims that Lt. Col. Spadaro was aware of this policy because of her position as "Director of Committee and Control of the Department of Detention". The defendants are sued in their official and individual capacities. The plaintiff has failed to include a prayer for relief.

C. Analysis of Sufficiency of Complaint

The case law is unsettled as to whether inmates have a right to privacy when speaking to their attorney, and the issue has been both analyzed as a right to access to the Court and a Sixth Amendment right to an attorney. The Court in *Lonegan v Hasty*, 436 F. Supp 2nd 419 (ED NY 2006) upheld a Fourth Amendment right to inmate's conversations with his attorney free of governmental eavesdropping. Eavesdropping or monitoring of detainee phone calls has been held by some courts as constitutionally objectionable; See: *Fillmore v Ordonez*, 829 F. Supp 1544 (D. Kan. 1993), citing to *Moore v Janning*, 427 F. Supp 567, at 576 (D.Neb.1976); *US v Novak*, 453 F. Supp 2d 249 (D.Mass 2006)(calls to attorneys should be exempted from monitoring). However, See: *Tucker v Randall*, 948 (F.2d 388 (CA Ill. 1991) (monitoring may be acceptable if it does not substantially affect detainees right to counsel, information cannot be used in any fashion without prior Court authority based upon probable cause); *Lee v Carlson*, 645 F. Supp 1430 (SD NY 1986) (conversations may be monitored in order to preserve security and

orderly management of the institution and to protect public).

In this case, at this early stage in development, it is unclear whether Broward County has a policy of recording conversations of inmates with their attorneys, and if such a policy exists, whether it is constitutional. Further, the facts surrounding the plaintiff's attempts to telephone his attorney are unclear and need to be developed. Therefore this claim will be permitted to proceed against the named defendants.

#### Official Capacity

The plaintiff may not sue the defendants in their official capacity for monetary damages. The defendants are protected by Eleventh Amendment immunity. *Will v Michigan Dept. Of State Police*, 491 U.S. 58 (1989) (a suit against a state employee in his official capacity is a suit against the State for Eleventh Amendment purposes); *Gamble v Fla. Dept. Of Health and Rehabilitative Services*, 729 F.2d 1509 (11 Cir. 1986). Local officials may be sued in their official capacities under §1983 if the action alleged to be unconstitutional implements or executes a policy statement or represents an official policy. *Monell v Department of Social Services of City of New York*, 436 US 658 (1978). The plaintiff has not demonstrated a *Monell* claim of unconstitutional policy at this stage. However, the defendants may have acted beyond the scope of their duties and may be sued for damages in their individual capacity. *Schuerer v Rhodes*, 416 US 232 (1974). Officials can be sued for prospective injunctive relief in their official capacities. *Ahmed v Fenesus*, 2007 SL 2746842 (D. Minn 2007).

III. Conclusion

It is therefore recommended as follows:

1. The complaint shall proceed on the claim of denial of Sixth Amendment rights to counsel against Defendants Spadaro, Faircloth and Casey.

2. Claims against the defendants in their official capacities shall be dismissed for any claims for monetary damages.

3. The plaintiff shall amend his complaint to include a prayer for relief.

Dated this 21<sup>st</sup> day of March, 2011.

  
UNITED STATES MAGISTRATE JUDGE

cc: Frederick Stickney, Pro Se  
#561000196  
Broward County Main Jail  
Address of Record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

FREDERICK STICKNEY,

Plaintiff,

CASE NO: 11-60557-CIV-JORDAN

Magistrate Judge P.A. WHITE

vs.

LT. KIM SPADARO, et al.,

Defendants.

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**DEFENDANTS' MOTION TO DISMISS**

COMES NOW, Defendants, LT. COL. KIM SPADARO; DETECTIVE FAIRCLOTH and KATHARINE CASEY, by and through the undersigned counsel and pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure and 42 U.S.C.A. 1997e(e) files this Motion to Dismiss the Complaint (DE 1) and states as follows:

1. The Defendants' are entitled to qualified immunity as there was an absence of clearly established law to provide notice and "fair warning" to the defendants that recording inmate phone calls with his lawyer violates an inmate's constitutional rights.

2. The *pro se* Plaintiff has filed a narrative complaint which was screened pursuant to 28 U.S.C. § 1915 and the Magistrate Judge did not analyze or consider the "impact rule" within 42 USC §1997e(e) as it relates to the complaint, which lacks any claim of physical injury or impact.

3. The complaint fails to include a prayer for relief.

**WHEREFORE**, the Defendants, respectfully requests that the present case be dismissed or limited accordingly.

**FURTHER AND IN SUPPORT** of the present motion the Defendants hereby incorporate the following memorandum of law in support.

## MEMORANDUM OF LAW

The standard for a court to evaluate a motion to dismiss is set forth within the case of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Twombly applies to prisoner actions. *See Douglas v. Yates*, 535 F.3d 1316, 1321 (11<sup>th</sup> Cir. 2008). First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth exacting out legal conclusions and bare bones recitals supported by conclusory statements. Twombly, *supra*, 550 U.S. at 555. Second, the court must determine whether the complaint states a plausible claim for relief. Id.

### I. Qualified Immunity.

Even construing the Plaintiff's facts as correct regarding the his allegations of having his jail house phone calls with his lawyer recorded, the case still must be dismissed as there is no clearly established legal right with which these defendants should have known violated any of Plaintiff's Constitutional rights. The Magistrate Judge acknowledges within his screening report that the case law on this area is "unsettled." (DE 8, p. 4). This finding acknowledges that there is no clearly established law and warrants that qualified immunity be granted.

Qualified immunity affords "complete protection for government officials sued in their individual capacities so long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." Lee v. Ferraro, 284 F.3d 1188, 1194 (11<sup>th</sup> Cir. 2002); *see also*, Anderson v. Creighton, 483 U.S. 635,636 (1987); Gonzalez v. Reno, 325 F.3d 1228,1233 (11<sup>th</sup> Cir. 2003). Its purpose is the freedom of officers to carry on their duties free from hesitations arising out of fear from individual liability or "harassing litigation." Id.; *see also*, Anderson, 483 U.S. at 638; Reno, 325 F.3d at 1233. Unless an officer is "plainly incompetent" or "knowingly violating the federal law," he is protected by qualified immunity. Id."

The qualified immunity analysis proceeds in two steps. The defendant must first prove that he was acting within the scope of his discretionary authority at the time the allegedly wrongful acts occurred. Vinyard v. Wilson, 311 F.3d 1340,1346 (11<sup>th</sup> Cir. 2002). Whether the defendants acted within the scope of their discretionary authority turns on whether the acts in question are of a type that fell within the employee's job responsibilities, rather than whether they involved the exercise of actual discretion. Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1265 (11th Cir.2004). The inquiry is two-fold; the court asks whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize. See Hill v. DeKalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1185 n. 17 (11th Cir.1994). If the defendant meets this burden, the burden shifts to the plaintiff to establish that the defendant's conduct violated clearly established law. Williams v. Bd. of Regents of Univ. Sys. of Georgia, 441 F.3d 1287, 1302 (11th Cir.2006); *see also* Akins v. Fulton County, Georgia, 420 F.3d 1293, 1300 (11th Cir.2005); Hope v. Pelzer, 536 U.S. 730, 736, (2002) (*citing* Saucier v. Katz, 533 U.S. 194, 201 (2001)).

The second prong of the qualified immunity analysis also poses two questions: (1) what was the clearly established law at the time of the public official's actions, and (2) did the public official's conduct violate that clearly established law. Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir.1988). The court determines whether the applicable law was clearly established at the time of the challenged action by reference to decisions of the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the State Supreme Court. McClish v. Nugent, 483 F.3d 1231, 1237 (11th Cir.2007); This inquiry is "fact specific." Rodgers v. Horsley, 39 F.3d 308, 311 (11th Cir.1994). The plaintiff must point to a controlling case, decided before the events at issue, that establishes a constitutional

violation on “materially similar” facts. The contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. In other words, “[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.” Rodgers, 39 F.3d at 311; Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir.1993), *modified*, 14 F.3d 583 (11th Cir.1994)).

The “salient question” in the clearly established right analysis is whether the state of the law at the time gave the officers “fair warning” that their conduct was unconstitutional. Id. citing Hope v. Pelzer, 536 U.S. 730, 741 (2002). A plaintiff can demonstrate that fair warning existed in three ways as explained in Harvey. First, the Constitutional provision in question “will be specific enough to establish clearly the law applicable to particular conduct and circumstances.” Vinyard v. Wilson, 311 F.3d 1340,1350 (11<sup>th</sup> Cir. 2002). Where, however, the conduct is not so egregious as to violate, for example, the Fourth Amendment on its face, we then turn to case law.<sup>1</sup> Under this second method of providing fair and clear notice, a broad principle found in the case law can establish clearly the law applicable to a specific set of facts facing a government official when the principle is set forth ‘with obvious clarity to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted. As a third method, if we have no case law with a broad holding ... that is not tied to particularized facts, we then look at precedent that is tied to the facts. Harvey, supra, 518 at 1248.

With this “fair warning” framework at hand, in conjunction with the clearly established law

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<sup>1</sup> Meaning decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state ... can clearly establish the law. McClish v. Nugent, 483 F.3d 1231, 1237 (11th Cir.2007);

analysis, there is no case law within the United States Supreme Court, United States Court of Appeals for the eleventh circuit, or the Florida Supreme court on the issue of recording inmate jail calls with their lawyers. The Magistrate Judge in his initial screening of the complaint recognized conflicting decisions from courts outside of the Eleventh Circuit. (DE 8, p. 4). Some district courts outside of the Eleventh Circuit have found it Constitutionally objectionable to monitor calls between an inmate and a lawyer<sup>2</sup> and others have found it permissible if it does not impact one's right to an attorney; or that calls may be monitored in order to preserve security and for the orderly management of the institution and to protect the public.<sup>3</sup> Therefore, as there is no clearly established law on this issue in the within the United States Supreme Court, the Eleventh Circuit, or the Florida Supreme court, the Defendants should be granted qualified immunity as no fair warning has been given to these defendants.

## **II. The Impact Rule.**

The Plaintiff's claims should be barred or limited by the "Impact Rule" set forth within the Prison Litigation Reform Act at 42 U.S.C. § 1997e(e) as the present complaint does not alleged nor involve physical impact or injury. In a case of first impression, the Eleventh Circuit in the case of Napier v. Preslicka, 314 F.3d 528, 530-531 (11th Cir.2002), decided that 42 USC §1997e(e) barred claims brought by a current inmate for claims unrelated to the prisoner's current incarceration. Section 42 USC §1997e(e) which is also referred to the "impact rule" within the Prison Litigation

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<sup>2</sup> See Lonegan v Hasty, 436 F. Supp. 2<sup>nd</sup> 419 (ED NY 2006); Fillmore v. Ordonez, 829 F. Supp 1544 (D. Kan. 1993); Moore v. Janning, 427 F. Supp 567, 576 (D. Neb. 1976); US v. Novak, 453 F. Supp. 2d 249 (D. Mass 2006).

<sup>3</sup> See Tucker v. Randall, 948 F.2d 388 (CA Ill. 1991); Lee v. Carlson, 645 F. Supp 1430 (SD NY 1986).

Reform Act, bars the present suit. The applicable provision states: that [n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury. The Plaintiff has not suffered nor claimed any physical injury or impact and therefore his case should be dismissed, or limited accordingly.

**III. No Prayer for Relief.**

The present compliant fails to include a prayer for relief. Upon the screening of the initial complaint, the Magistrate Judge instructed the Plaintiff to file an amended complaint seeking a prayer for relief (DE 8 p. 6). Plaintiff has never complied. Federal Rule of Procedure 8 (a)(3) mandates that a demand for relief must be sought. Accordingly, the compliant should be dismissed.

Dated: May 23, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 23, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identical on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

BY: /s/ Robert D. Yates  
Robert D. Yates, Esq.  
FBN #090387

**SERVICE LIST**

United States District Court, Southern District of Florida

STICKNEY v. LT. KIM SPADARO, et al.  
CASE NO: : 11-60557-CIV-JORDAN  
Magistrate Judge: Patrick A. White

Frederick Stickney, *pro se*  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-60557-CIV-JORDAN  
MAGISTRATE P. A. WHITE

FREDERICK STICKNEY, :  
 :  
 Plaintiff, :  
 :  
 v. : REPORT OF  
 : MAGISTRATE JUDGE  
 LT. KIM SPADARO, et al., : (DE#20)  
 :  
 Defendants. :

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### I. Introduction

The pro-se plaintiff, Frederick Stickney, filed a civil rights complaint pursuant to 42 U.S.C. §1983.(De#1) The plaintiff alleges that officials at the Broward County Jail recorded his telephone conversation with his attorney. The plaintiff is proceeding in forma pauperis. [DE# 5].

This civil action is before the Court upon Defendants' Joint Motion to Dismiss (DE#20).

### II. Analysis

#### A. Applicable Law for Reviewing 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). The complaint may be dismissed if the plaintiff fails to plead facts that 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).

B. Factual Allegations

The facts, as included in the Preliminary Report reveal that the plaintiff alleges his Sixth Amendment rights were violated when Telephone Coordinator Kathrin Casey recorded his conversation with his attorney at the Broward County Main Jail on February 24, 2010. She then allegedly provided the information to BSO Det. Faircloth, and this information was used to place false charges against him. He claims that Lt. Col. Spadaro was aware of this policy because of her position as "Director of Committee and Control of the Department of Detention". The defendants are sued in their official and individual capacities. The plaintiff has failed to include a prayer for relief.

C. Analysis of Sufficiency of Complaint

The Preliminary Report indicated that the case law is unsettled as to whether inmates have a right to privacy when speaking to their attorney, and the issue has been both analyzed as a right to access to the Court and a Sixth Amendment right to an attorney. The Court in *Lonegan v Hasty*, 436 F. Supp 2nd 419 (ED NY 2006) upheld a Fourth Amendment right to inmate's conversations with his attorney free of governmental eaves-dropping. Eavesdropping or monitoring of detainee phone calls has been held by some courts as constitutionally objectionable; *See: Fillmore v Ordonez*, 829 F. Supp 1544 (D. Kan. 1993), citing to *Moore v Janning*, 427 F. Supp 567, at 576 (D.Neb.1976); *US v Novak*, 453 F. Supp 2d 249 (D.Mass 2006)(calls to attorneys should be exempted from monitoring). However, *See: Tucker v Randall*, 948 (F.2d 388 (CA Ill. 1991) (monitoring may be acceptable if it does not substantially affect detainees right to counsel, information cannot be used in any fashion without prior Court authority based upon probable cause); *Lee v Carlson*, 645 F. Supp 1430 (SD NY 1986) (conversations may be monitored in order to preserve security and orderly management of the institution and to protect public).

The Report recommended that the case proceed against the named defendants. At this early stage in development, it is unclear whether Broward County has a policy of recording conversations of inmates with their attorneys, and if such a policy exists, whether it is constitutional. Further, the facts surrounding the plaintiff's attempts to telephone his attorney are unclear and need to be developed.

It was further recommended that claims against the defendants in their official capacities be dismissed. Lastly the complaint

failed to include a prayer for relief, and it was recommended that the plaintiff amend his complaint to add the relief he is seeking. The Report remains pending.

Defendants' Motion to Dismiss (DE#20)

The defendants seek dismissal for two reasons; 1) they are entitled to qualified immunity and 2) the complaint should be dismissed pursuant to 42 U.S.C. §1997e(e) for lack of injury.

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)"). In the preliminary screening it was found that a claim was stated against the named defendants. This finding remains unchanged.

The defendants argue they are entitled to qualified immunity. 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).

The defendants argue that the constitutional right alleged to be violated was not clearly established. While it is true that the law appears to be in flux as to whether the monitoring of attorney client telephone calls violates an inmates civil rights, it is unclear in this particular case how the calls are monitored and what the information is used for. The facts are simply not

sufficient at this time to enable the Court to make a determination of whether the defendants might be entitled to qualified immunity, and that issue may be decided at a later date when the facts are more developed.

The defendants' second argument, that the complaint should be dismissed pursuant to §1997e(e) because the plaintiff has failed to demonstrate any physical injuries is not persuasive. The plaintiff is not barred from seeking nominal damages. As to compensatory and punitive damages, the Courts have held that §1997e(e) does not apply to First Amendment violations. See: Cornell v Gubbles, 2010 WL 3928198 (CD Ill); Swachkhammer v Goodspeed, 2009 WL 189854 (WD Mich); Thompson v Caruso, 08 WL 559655 (WD Mich). Whether the plaintiff is entitled to compensatory or punitive damages must be determined at a later date. The plaintiff's request for declaratory judgment would be regarding past conduct and not amenable to declaratory relief. Summit Medical Associates, P.C. v Pryor, 180 F.3d 1326, 1337 (11 Cir. 1999). In this case the plaintiff has been ordered to amend his complaint to specifically state the relief he is seeking. If the plaintiff fails to amend his complaint, he may be sanctioned at a later date. <sup>1</sup>

### III. Conclusion

It is therefore recommended as follows:

1. The Defendants' Motion to Dismiss (DE#20) should be denied.

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<sup>1</sup> Research at the Broward County Main Jail does not list a Frederick Stickney at their facility.

2. The plaintiff shall be ordered to amend his complaint to include his prayer for relief.

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

Dated this 7<sup>th</sup> day of July, 2011.



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UNITED STATES MAGISTRATE JUDGE

cc: Frederick Stickney, Pro Se  
#561000196  
Broward County Main Jail  
Address of Record

Robert Yates, Esq.  
Attorney of Record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

FREDERICK STICKNEY,

Plaintiff,

vs.

LT. KIM SPADARO, et al.,

Defendants.

CASE NO: 11-60557-CIV-JORDAN

Magistrate Judge P.A. WHITE

---

**ANSWER AND AFFIRMATIVE DEFENSES**

COMES NOW, Defendants, LT. COL. KIM SPADARO; DETECTIVE FAIRCLOTH and KATHARINE CASEY, by and through the undersigned counsel and pursuant to Rule 8 (B) and (C) of the Federal Rules of Civil Procedure and files their Answers and Affirmative Defenses toward the complaint and states as follows:

The *pro se* Plaintiff has filed a combination fill in the blank form civil rights complaint with a mis-numbered attachment. Because of the format of the complaint the Defendants will address the allegations starting with page four and beginning with paragraph number five as there are no earlier numbered paragraphs.

5. Denied.

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Admitted only that the Defendants were acting under color of law but denied that any constitutional rights were violated.

11. General Denial. Any unnumbered allegation other assertion, unnumbered claim, or part thereof not specifically addressed is here by denied and strict proof thereof demanded.

**AFFIRMATIVE DEFENSES**

12. As their First Affirmative Defense, the Defendants asserts they are entitled to Immunity from liability for compensatory and/or damages of any nature, pursuant to the Eleventh Amendment of the United States; the Doctrine of Qualified Immunity; and other applicable federal and state constitutional statutory and common law principals.

13. As their Second Affirmative Defense, the Defendants assert that their actions were objectively reasonable and lawful under the circumstances and pursuant to all policies and procedures within the Broward Sheriff's Office.

14. As their third Affirmative Defense, the Defendants assert that any and all of Plaintiff's calls, if they were recorded, were done with his consent and knowledge through the automated call system, with warning announcements regarding the policies of recording phone conversations.

15. As their fourth Affirmative Defense, the Defendants assert that their actions were at most a lack of due care (negligence) and that they did not act in a manner or possess the requisite state of mind including, but not limited to: Malice, ill will, reckless disregard, deliberate indifference, or willful and wanton state of mind that would state a cause of action for the deprivation of a constitutional right.

16. As their fifth Affirmative Defense, the Defendants assert that *probable cause* or at least *arguable probable cause* existed to believe that Plaintiff had committed a crime and was discussing it with persons other than a lawyer.

17. As their sixth Affirmative Defense, the Defendants assert that at all times material hereto that they acted in good faith and upon a reasonable belief that a crime or crimes had been committed and had reason to believe the Plaintiff committed it/them.

18. As their seventh Affirmative Defense, the Defendants assert Plaintiff has failed to allege all of the necessary elements for the claims set forth in the Complaint and he was not deprived of any rights guaranteed under any Federal, Statutory or Constitutional provision including the Sixth Amendment against all of the named individual defendants.

19. As their eighth Affirmative Defense, the Defendants assert that the Defendant's actions were not the proximate cause of the Plaintiff's alleged damages, but were either pre-existing, or the cause of persons, entities, natural causes, forces, or events outside of the Defendants control and or were caused or contributed to by the Plaintiff himself.

20. As their ninth Affirmative Defense, the Defendants assert that all their actions were taken pursuant to law and for a lawful purpose.

21. As their tenth Affirmative Defense, the Defendants assert that information leading to the arrest of Plaintiff was acquired through a warrant and or subpoena, or acquired from sources other than from any recorded conversations between Plaintiff and a lawyer.

22. As their eleventh Affirmative Defense, the Defendants assert that any relief that Plaintiff seeks in this action is restricted by the statutes and acts which form the basis for his cause of action, including but not limited to the Prisoner Litigation Reform Act "PLRA," 42 USC § 1997(e) et. seq... with regard to all limitations on suits, damages, fees and conditions precedent.

23. As their twelfth Affirmative Defense, the Defendants asserts that at no time was Plaintiff caused to be deprived of any federal, statutory, or constitutional right.

24. As his thirteenth Affirmative Defense, the Defendants assert that Plaintiff's claims should be limited or barred because there was probable cause or arguable probable cause to arrest Plaintiff for at least some offense independent of any phone records, or calls that Plaintiff may have made while in the Broward County Jail.

25. As their fourteenth Affirmative Defense, the Defendants named herein assert that their actions at most constitute negligence which would not rise to the level of a constitutional deprivation.

26. As their fifteenth Affirmative Defense, the Defendants assert that Plaintiff was guilty-in-fact of all or at least, one of the charges for which he was arrested for and that any arrest of the plaintiff would be justified.

27. As their sixteenth Affirmative Defense, the Defendants assert that even if the Defendants' conduct could be construed as violative of the sixth amendment, Plaintiff has suffered no damages and therefore fails to state a cause of action.

28. As their eighteenth Affirmative Defense, the Defendants assert that at all times material hereto, the Plaintiff has been incarcerated and as such, the Plaintiff's claims are barred pursuant to 42 USC §1997e(a) or the Prisoner Litigation Reform Act ("PLRA"), for failure to exhaust all available administrative remedies.

29. As their nineteenth Affirmative Defense, the Defendants assert that at all times material hereto, the Plaintiff has been incarcerated and as such, the Plaintiff's claims are barred pursuant to 42 USC §1997e(e) or the "Impact Rule" within the Prisoner Litigation Reform Act ("PLRA") for the lack of physical injury.

30. As their twentieth Affirmative Defense, the Defendants would state that Plaintiff's

claims are barred by the applicable statute of limitations.

31. As their twenty first Affirmative Defense, the Defendants would state that Plaintiff was never denied access to counsel, nor the opportunity to speak to counsel unrecorded.

32. As her twenty second Affirmative Defense, Defendant Spadaro would assert that there is no respondeat superior liability for a civil rights claim and therefore Plaintiff's claims are barred.

**DEMAND FOR JURY TRIAL**

33. The Defendant respectfully demands trial by jury on all issues so triable as a matter of right.

**REQUEST FOR ATTORNEY'S FEES**

34. The Defendant asserts that in the event that if he is determined to be the prevailing party he should she is entitled to seek that the court award reasonable attorneys fees pursuant to 42 U.S.C. § 1988.

**WHEREFORE**, the Defendants respectfully request that judgment be entered in their favor together with an order awarding costs, attorney's fees and any other relief deemed proper under the circumstances.

Dated: November 2, 2011

Respectfully submitted,  
BY: /s/ Robert D. Yates  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 2, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identical on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

BY: /s/ Robert D. Yates  
Robert D. Yates, Esq.  
FBN #090387

**SERVICE LIST**

United States District Court, Southern District of Florida

STICKNEY v. LT. KIM SPADARO, et al.  
CASE NO: : 11-60557-CIV-JORDAN  
Magistrate Judge: Patrick A. White

Frederick Stickney, *pro se*  
Inmate No. # 561000196  
Broward County Jail  
P.O. Box 9356  
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*Plaintiff Pro Se*  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-60557-CIV-JORDAN  
MAGISTRATE JUDGE P. A. WHITE

FREDERICK STICKNEY, :  
 :  
 Plaintiff, :  
 : ORDER SCHEDULING PRETRIAL  
 v. : PROCEEDINGS WHEN PLAINTIFF  
 : IS PROCEEDING PRO SE  
 LT. KIM SPADARO, et al., :  
 :  
 Defendants. :

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

ORDERED AND ADJUDGED as follows:

1. All discovery methods listed in Rule 26(a), Federal Rules of Civil Procedure, shall be completed by **February 21, 2012**. This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **March 6, 2012**.

3. All motions to dismiss and/or for summary judgment shall be filed by **March 27, 2012**.

4. On or before **April 10, 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 each of his witnesses to give.

5. On or before **April 24, 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 3rd day of November, 2011.

s/Patrick A. White  
UNITED STATES MAGISTRATE JUDGE

cc: Frederick Stickney, Pro Se  
Jail #561000196  
Broward County Main Jail  
P.O. Box 9356  
Fort Lauderdale, FL 33310

Robert Dominic Yates, Esq.  
208 S.E. 6<sup>th</sup> Street  
Fort Lauderdale, FL 33301

Hon. Adalberto Jordan, United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

FREDERICK STICKNEY,

Plaintiff,

vs.

LT. KIM SPADARO, et al.,

Defendants.

---

CASE NO: 11-60557-CIV-JORDAN

Magistrate Judge P.A. WHITE

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendants, LT. COL. KIM SPADARO, DETECTIVE FAIRCLOTH and KATHLEEN CASEY, by and through the undersigned attorneys and pursuant Federal Rule of Civil Procedure 56(b) and S.D. L R. 7.1( C) and files their Joint Motion for Summary Judgment, and as grounds therefore would state:

1. The Defendants' are entitled to qualified immunity because:

(i). Stickney has not suffered a Constitutional deprivation because none of his inmate phone calls were, or could have been recorded without his prior knowledge and consent given through the use of the Jail's automated attendant prompt by pressing "0" to accept and consent to being recorded.

(ii). There is an absence of clearly established law to provide notice and "fair warning" to the defendants that recording inmate phone calls with a lawyer violates an inmate's constitutional rights.

2. There exists no *respondeat superior* (vicarious liability) or supervisory liability for a 42 USC § 1983 action against Lt. Col. Kim Spadero.

3. Stickney's claims are all barred and or limited by the "impact rule" within 42 USC §1997e(e) as it relates to the complaint, because the present suit lacks any claim of physical injury or impact.

**WHEREFORE**, the Defendants seek that summary judgment in their favor be granted and the case fully dismissed with prejudice.

**FURTHER** and in support of the Defendant's Motion for Summary Judgment, defendants hereby incorporate the following memorandum of law and argument, together with their separately and contemporaneously filed Concise Statement of Material Facts in Support of their Motion for Summary Judgment and their Omnibus Notice of Filing Multiple Documents and Exhibits in Support of Summary Judgment and the audio CD of the calls sought to be filed within a separate Motion to Conventionally file the same.<sup>1</sup>

#### MEMORANDUM OF LAW

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56( C ). The Court must view the evidence and draw all reasonable inferences therefrom in a light most favorable to the non-moving party. However, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Even though courts must interpret *pro se* complaints liberally, "a *pro se* litigant does not escape the essential

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<sup>1</sup> The Defendants have filed contemporaneously an Omnibus Notice of Filing Multiple Documents and Exhibits in support of their Motion for Summary Judgment, "ONF" and therefore any citations to "ONF" are referring to said pleading followed by the number of the exhibit annexed thereto and a description of the particular exhibit.

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 (11<sup>th</sup> Cir. 1990).

**I. Qualified Immunity.**

Qualified immunity affords “complete protection for government officials sued in their individual capacities so long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.” Lee v. Ferraro, 284 F.3d 1188, 1194 (11<sup>th</sup> Cir. 2002); *see also*, Anderson v. Creighton, 483 U.S. 635,636 (1987); Gonzalez v. Reno, 325 F.3d 1228,1233 (11<sup>th</sup> Cir. 2003). Its purpose is the freedom of officers to carry on their duties free from hesitations arising out of fear from individual liability or “harassing litigation.” Id.; *see also*, Anderson, 483 U.S. at 638; Reno, 325 F.3d at 1233. Unless an officer is “plainly incompetent” or “knowingly violating the federal law,” he is protected by qualified immunity. Id.“

The qualified immunity analysis proceeds in two prongs.<sup>2</sup> For purposes of the qualified immunity analysis, we examine: (1) whether the facts alleged establish a constitutional violation; and (2) whether that right was clearly established. Randall v. Scott, 610 F.3d 701, 715 (11<sup>th</sup> Cir. 2010).

(i) **No Constitutional Deprivation Occurred.**

No Constitutional deprivation occurred because Stickney consented to the seven recorded

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<sup>2</sup> The Supreme Court has stated that Courts have discretion in deciding which of the two prongs to address first. Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009).

phone calls.<sup>3</sup> The transcripts demonstrate that the automated attendant notice and prompt was given regarding consent to record every call; and that consent was required through pressing "0" to proceed on each and every call. (ONF 12, *transcript*).<sup>4</sup> Casey and Faircloth have also supplied affidavits stating that every call of the seven recorded contained the notice and prompt for consent. (ONF 10 ¶ 20; ONF ¶ 9). Furthermore, it is not possible for the T-Netix system used by BSO to record a call without both parties pressing the "0" key to consent after the message prompt from the automated attendant. (ONF 10, ¶ 14, *Casey Affidavit*). Casey testified conclusively in her Affidavit that neither the system itself or any person did or could have recorded any of Mr. Stickney's telephone conversations with anyone, including any attorney, unless he pressed "0" to consent to the call being recorded. (*Id.*). This is because none of the numbers Stickney called were opted out of, or registered with the T-Netix (BSO) phone system; meaning he would have had to consent through the prompt feature to speak with anyone with an unregistered number. (*Id.* at ¶ 8-14).

The system has many safeguards so that attorney calls are not recorded. First it automatically does not record calls to attorney numbers in the Broward Public Defender's Office, nor the Florida Bar registered phone number of any attorney in Dade, Broward, and Palm Beach Counties. (ONF 10 ¶ 8-10, *Casey Affidavit*). Attorneys from anywhere are also able to call up T-Netix and register or opt out any number from being recorded. (*Id.*). All other calls, including attorneys from out of the area, or attorney's that have multiple numbers, or any numbers not registered and opted out by the system, are notified that in order to continue the call, that consent must be given through the

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<sup>3</sup> Call number 6 to Gerald Williams purports to be a lawyer but does not give incriminating information.

<sup>4</sup> The Defendants have also contemporaneously filed a motion to conventionally file the CD of the actual calls.

prompt feature. The same initial message regarding the consent to continue also provides the number to T-Netix. Any attorney with an unregistered number, who hears the consent prompt and does not want to consent and continue the call may call T-Netix and opt out any number. There are also notifications of recorded calls within the Inmate handbook, listed on the BSO website, plus the automated attendant gives the notification and prompt at the beginning of every inmate phone call to a non-registered number. Accordingly, Stickney consented to all the calls retrieved and or recorded and therefore no Constitutional Deprivation occurred.

**(ii). The Law Surrounding Recording of Inmate Phone calls is not Clearly Established.**

The second prong of the qualified immunity analysis poses two questions: (1) what was the clearly established law at the time of the official's actions, and (2) did the official's conduct violate that clearly established law. Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir.1988). The court determines whether the applicable law was clearly established at the time of the challenged action by reference to decisions of the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the State Supreme Court. McClish v. Nugent, 483 F.3d 1231, 1237 (11th Cir.2007); This inquiry is “fact specific.” Rodgers v. Horsley, 39 F.3d 308, 311 (11th Cir.1994). The plaintiff must point to a controlling case, decided before the events at issue, that establishes a constitutional violation on “materially similar” facts. The contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. In other words, “[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.” Rodgers, 39 F.3d at 311; Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir.1993), *modified*, 14 F.3d 583 (11th Cir.1994)).

The “salient question” in the clearly established right analysis is whether the state of the law at the time gave the officers “fair warning” that their conduct was unconstitutional. *Id. citing Hope v. Pelzer*, 536 U.S. 730, 741 (2002). A plaintiff can demonstrate that fair warning existed in three ways as explained in *Harvey*. First, the Constitutional provision in question “will be specific enough to establish clearly the law applicable to particular conduct and circumstances.” *Vinyard v. Wilson*, 311 F.3d 1340,1350 (11<sup>th</sup> Cir. 2002). Where, however, the conduct is not so egregious as to violate, for example, the Fourth Amendment on its face, we then turn to case law.<sup>5</sup> Under this second method of providing fair and clear notice, a broad principle found in the case law can establish clearly the law applicable to a specific set of facts facing a government official when the principle is set forth ‘with obvious clarity to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted. As a third method, if we have no case law with a broad holding ... that is not tied to particularized facts, we then look at precedent that is tied to the facts. *Harvey, supra*, 518 at 1248.

With this “fair warning” framework at hand, in conjunction with the clearly established law analysis, there is no case law within the United States Supreme Court, United States Court of Appeals for the eleventh circuit, or the Florida Supreme court on the issue of recording inmate jail calls with their lawyers.

Magistrate Judge White in his initial screening of the complaint recognized conflicting decisions from courts outside of the Eleventh Circuit. (DE 8, p. 4). Some district courts outside of

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<sup>5</sup> Meaning decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state ... can clearly establish the law. *McClish v. Nugent*, 483 F.3d 1231, 1237 (11<sup>th</sup> Cir.2007);

the Eleventh Circuit have found it Constitutionally objectionable to monitor calls between an inmate and a lawyer<sup>6</sup> and others have found it permissible if it does not impact one's right to an attorney; or that calls may be monitored in order to preserve security and for the orderly management of the institution and to protect the public.<sup>7</sup>

In the present case, all Stickney's seven calls were recorded through an automated phone system that could not have recorded the calls unless the parties provided consent. A non-discriminatory phone system in place is certainly good to preserve the security and for the orderly management of the institution and to protect the public. No reasonable official in the position of the defendants would believe that it was unlawful to retrieve records of calls that could only be recorded through the parties' consent. Neither Casey or Faircloth even knew who Stickney called. Such actions are not so clearly and patently unlawful that qualified immunity should be denied. Therefore, as there is no clearly established law on this issue within the United States Supreme Court, the Eleventh Circuit, or the Florida Supreme court, the Defendants should be granted qualified immunity.

**(2). No Respondeat Superior or Supervisory Liability Exists for Lt. Col. Spadero.**

It is well settled in the jurisprudence of Section 1983 case law that supervisory officials are not liable for the acts of their subordinates on the basis of respondeat superior. *See Belcher v. City of Foley*, 30 F.3d 1390, 1396 (11 cir. 1994). In order to attach liability to a supervisory official that

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<sup>6</sup> *See Lonegan v Hast*y, 436 F. Supp. 2<sup>nd</sup> 419 (ED NY 2006); *Fillmore v. Ordonez*, 829 F. Supp 1544 (D. Kan. 1993); *Moore v. Janning*, 427 F. Supp 567, 576 (D. Neb. 1976); *US v. Novak*, 453 F. Supp. 2d 249 (D. Mass 2006).

<sup>7</sup> *See Tucker v. Randall*, 948 F.2d 388 (CA Ill. 1991); *Lee v. Carlson*, 645 F. Supp 1430 (SD NY 1986).

official must have personally participated in the constitutional deprivation, or there must be a causal connection between the actions of the supervising official and the alleged constitutional deprivation. See Hartley v. Parnell, 193 F.3d 1263, 1269 (11<sup>th</sup> Cir. 1999). A causal connection must be shown by a history of widespread abuse that is obvious, flagrant, rampant and of continued duration, rather than isolated incidents, such that it puts the supervisor on notice and he fails to correct the abuse. See Brown v. Crawford, 906 F.2d 667, 671 (11<sup>th</sup> Cir. 1990).

Lt. Col. Spadero had no personal knowledge of Stickney's investigation, or his phone calls, of that records were being made of any of his calls. (ONF 10 ¶ 19; ONF 11, ¶ 11). Stickney's conclusory allegations against Defendant Lt. Col. Spadero are that she should be liable because she is the supervisor and allowed the BSO policy of recording inmate phone calls to exist. (DE 28 ¶ 6, *Amended Complaint*). This is the type of respondeat superior claim that is not proper and woefully short of establishing the rigorous standard of supervisory liability. Moreover an analysis of an agencies policies should not be conducted when no individual officer has committed an constitutional deprivation. See Garczynski v. Bradshaw, 573 F.3d 1158 (11<sup>th</sup> Cir. 2009) *citing*, Case v. Eslinger, 555 F.3d 1317, 1328 (declining to review the sheriff's and city's customs and policies in the absence of a constitutional deprivation by the individual police officer); *see also* Rooney v. Watson, 101 F.3d 1378, 1381 (11<sup>th</sup> Cir.1996) ("Since we have determined that Deputy Watson's conduct did not cause the Rooneys to suffer a constitutional deprivation, we need not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training."). All claims against SPADARO should be dismissed.

**(3). The Impact Rule.**

STICKNEY's claims should be barred or limited by the "Impact Rule" set forth within the Prison Litigation Reform Act at 42 U.S.C. § 1997e(e) as the present complaint does not alleged nor involve physical impact or injury. In a case of first impression, the Eleventh Circuit in the case of Napier v. Preslicka, 314 F.3d 528, 530-531 (11th Cir.2002), decided that 42 USC §1997e(e) barred claims brought by a current inmate for claims unrelated to the prisoner's current incarceration. Section 42 USC §1997e(e) which is also referred to the "impact rule" within the Prison Litigation Reform Act, bars the present suit. The applicable provision states: that [n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury. The Plaintiff has not suffered nor claimed any physical injury or impact and therefore in the event that this Court does not fully grant summary judgment in this matter, this case should be dismissed, or limited accordingly to nominal damages, at best.

Dated: March 27, 2012

Respectfully submitted,

BY: /s/ Robert D. Yates  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 27, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identical on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

BY: /s/ Robert D. Yates  
Robert D. Yates, Esq.  
FBN #090387

**SERVICE LIST**

United States District Court, Southern District of Florida

STICKNEY v. LT. KIM SPADARO, et al.  
CASE NO: : 11-60557-CIV-JORDAN  
Magistrate Judge: Patrick A. White

Frederick Stickney, *pro se*  
Inmate: # 182791  
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via U.S. Mail

Robert D. Yates, Esq.  
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208 SE 6th Street  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

FREDERICK STICKNEY,

Plaintiff,

CASE NO: 11-60557-CIV-JORDAN

Magistrate Judge P.A. WHITE

vs.

LT. KIM SPADARO, et al.,

Defendants.

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**DEFENDANTS' STATEMENT OF MATERIAL FACTS  
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendants, LT. COL. KIM SPADARO, DETECTIVE RONALD FAIRCLOTH and KATHLEEN CASEY, by and through the undersigned attorneys, and pursuant to S.D. L. R. 7.5 (c) and files this their Concise statement of Material Facts in Support of their Motion for Summary Judgment, and states as follows:

1. **Procedural History.** Stickney filed a *pro se* prisoner Civil Rights complaint pursuant to 42 U.S.C. § 1983 on March 15, 2011 (while incarcerated at the Broward County Jail) against Defendants Broward Sheriff's Office ("BSO") personnel Lt.Col. Kim Spadaro, Kathleen Casey and Detective Ronald Faircloth, claiming a Sixth Amendment Rights violation for the alleged tape recording of his jail phone calls. (DE 1). The initial screening by the Magistrate Judge White recommended that the case proceed against Spadaro, Casey and Faircloth in their individual capacities only for alleged Six Amendment Right violations because it was unclear what BSO's policy was regarding inmate calls. (DE 8, p. 5). The defendants filed a motion to dismiss claiming that because the law was unsettled on the issue of tape recording inmate phone calls they should be

granted qualified immunity and the case dismissed. (DE 20). A second Report and Recommendation by the Magistrate was issued recommending denial of the motion to dismiss. (DE 21). Objections were then filed by the Defendants (DE 22) and were ultimately denied by Judge Jordan. (DE 26) An amended complaint was then filed (DE 23) and then a second amended complaint to add a prayer for relief. (DE 27) The case currently remains open against Defendants Lt. Kim Spadaro, Kathleen Casey and Detective Faircloth, solely on the Sixth Amendment issues surrounding the alleged tape recording of the Plaintiff's inmate phone call with his attorney. (DE 26).

2. **Stickney's Initial Arrest on February 18, 2010.** At 10:18PM on February 18, 2010 the Lauderhill Police arrested Stickney for multiple charges after chasing him in a stolen vehicle culminating in a crash and K-9 foot pursuit. (ONF 1, *Probable Cause Affidavit of Officer Pena*).<sup>1</sup> Earlier in the same day (4:45AM), the same subject vehicle was stolen at gun point from a newspaper deliveryman along with credit and debit cards.(ONF 2, *Probable Cause Affidavit of Det. Copley*). Stickney was identified in ATM photos using the victim's credit cards by his own brother, Gregory Stickney, that depicted him wearing the same knit cap he was arrested in. (ONF 3, *BSO Investigative Action Report Armed Carjacking*). A review of Stickney's cell phone records and follow up investigation revealed that a pizza order to Papa Johns was made using the debit card and a delivery address to an apartment that Stickney was residing in at the time. (Id.).

3. Formal criminal charges were filed in Broward County Case No.: 10-3065CF10A and Stickney ultimately pled guilty on January 11, 2012 to the charges of: (1) Robbery with a

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<sup>1</sup> The Defendants have filed contemporaneously an Omnibus Notice of Filing Multiple Documents and Exhibits in support of their Motion for Summary Judgment, "ONF" and therefore any citations to "ONF" are referring to said pleading followed by the number of the exhibit annexed thereto and a description of the particular exhibit.

Firearm, (2) Carjacking with a Firearm, (3) Aggravated Fleeing, (4) Battery on a Police Dog, (5) Resisting Without Violence; and is now currently serving 17 years in prison as a habitual offender. (ONF 4, *Court Disposition order 10-03065CF10A*).

4. **Faircloth's Investigation and Resulting Criminal Case.** BSO Defendant Detective Ronald Faircloth was assigned to investigate a burglary that occurred on January 27, 2010 wherein a television, Wii console, Sony Playstation, jewelry and a Jimenez 9mm firearm was stolen. (ONF 5, p.3, *BSO Investigative Action Report Burglary-Residence Armed*). During his investigation Faircloth followed up on a lead from the victim that the Stickney family may have been involved. (*Id.* p. 3). Faircloth checked the pawn tracker database and found that Fredrick Stickney had just pawned the stolen Wii, Sony Playstation and videogame on January 28, 2010 (day after the burglary) and then went and obtained the receipt. (ONF 6, *Peoples Pawn Receipt*). The stolen video game items were retrieved and positively identified by the victim because of unique markings caused by the family dog. (ONF 5, p. 3). The firearm was not recovered.

5. On February 24, 2010, Detective Faircloth after finding out Stickney was in jail, met with Stickney at the Broward County Jail where Stickney admitted to possession of the recovered pawned items, but denied committing the burglary and blamed the burglary on an acquaintance named Jamal Nickerson. (ONF 5, p 3-5). On March 17, 2010 Faircloth obtained a court order for cell phone records of all suspects together with cell tower maps to pin point their locations at various times. (ONF 7, *BSO Affidavit for and Order to produce Cellular Records*). The records revealed that Jamal was not in the location where the burglary occurred at the time, but that Stickney was. (ONF 5, p. 4). A fingerprint analysis result was completed on April 20, 2010 of the pawn slip which did positively identify Stickney. (ONF 8, *BSO Crime Lab Report*).

6. Stickney was formally charged by the State Attorney's Office with (1) Armed Burglary, (2) Dealing in Stolen Property and (3) Grand Theft Firearm in Broward County Case No.: 10-7938CF10A and ultimately entered into a plea to 17 years of Florida State prison on January 12, 2012 concurrently with his other cases. (ONF 9, *Court Disposition order 10-03065CF10A*).

7. **BSO Inmate Phone Call Policy**. Upon being booked into the Broward County Jail all inmates are assigned an arrest number that also serves as their personal identification number ("PIN") for purposes of making phone calls. (ONF 10, ¶ 7, *Affidavit of Kathleen Casey*). The BSO Jails have an automated phone system operated in conjunction with an outside vendor ( T-Netix) that allows the inmates' calls to be catalogued, blocked, recorded and opted out of recording with attorneys. (*Id.* ¶ 7-12). The process is set up so that inmate calls to the Broward Public Defenders Office and all Dade, Broward and Palm Beach County private attorneys' Florida Bar registered numbers are automatically opted out and not recorded or monitored. (*Id.* ¶ 8). Private attorneys anywhere may also call the vendor to register and opt out of the recording process so that calls to the registered number will not be recorded, or prompted for consent to record. (*Id.* ¶ 9). All other calls, including unregistered attorney numbers, are subject to recording and require consent granted through the use of the automated attendant feature, by both parties. (inmate and call recipient)(*Id.* ¶ 11-14)). When the call is answered, the automated attendant announces that it is a collect call from a correctional institution, provides the cost of the call, and informs both parties the information that if they press "0" to continue the call it will be subject to recording. (*Id.* ) If they do not consent to the recording by pressing "0" to continue the call, the call is disconnected. (*Id.* ¶ 11).

The inmate phone process is outlined in the Inmate Employee Handbook that any non-registered attorney numbers will be prompted for consent and that continuing the call after being

prompted will subject it to recording or monitoring. (Id. ¶ 6, exh. “A,” *BSO Inmate Handbook* p. 7). The procedure is outlined in the inmate handbook, on the BSO website and explained by the automated attendant for every call made to a non-registered phone number. (Id. ¶ 6)

8. **Stickney’s Jail Calls.** Faircloth retrieved audio tapes of Stickney’s recorded phone calls from BSO Detention Communication Coordinator, Kathleen Casey. (ONF 11, ¶ 6, *Affidavit of Ronald Faircloth*). As part of her employment with BSO, Casey retrieved the records upon Faircloth’s request. Casey had never listened to them before, did not know Stickney, nor had any knowledge of what he was being investigated for. (ONF 10, ¶ 15). There were a total of seven recorded phone calls that were made using Stickney’s arrest number. (ONF 12, ¶ 9, *Faircloth Affidavit*; ONF 13, *Transcript of Stickney Jail Calls*).<sup>2</sup> All calls that were recorded and transcribed have the automated attendant message, inform and prompt the participants to press “0” to accept the call and consent to the recording of the calls. (ONF 11, ¶ 9, *Faircloth Affidavit*; ONF 10, ¶ 20, *Casey Affidavit*; ONF 13, *Transcripts*; See also *Audio CD conventionally filed*).

9. None of Stickney’s recorded phone calls lacked the message and prompting for consent (Id.). None of Mr. Stickney’s phone calls could have been recorded without the parties pressing “0” and giving consent when prompted by the automated attendant. (ONF, 10, ¶ 14, *Casey Affidavit*).

Dated: March 27, 2012

Respectfully submitted,

BY: /s/ Robert D. Yates  
ROBERT D. YATES, Esq.

---

<sup>2</sup> A Motion to Conventionally file the recording in a CD format has also been filed with a copy of the actual CD.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 27, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identical on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

BY: /s/ Robert D. Yates

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**SERVICE LIST**

United States District Court, Southern District of Florida

STICKNEY v. LT. KIM SPADARO, et al.  
CASE NO: : 11-60557-CIV-JORDAN  
Magistrate Judge: Patrick A. White

Frederick Stickney, *pro se*  
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