CASREF,PAW

U.S. District Court
Southern District of Florida (Ft. Lauderdale)
CIVIL DOCKET FOR CASE #: 0:11−cv−62012−JIC

Johnson v. City of Miramar et al
Assigned to: Judge James I. Cohn
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 09/13/2011
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Donald E. Johnson
Prisoner ID: B07125

represented by **Donald E. Johnson**
B07125
Dade Correctional Institution
19000 S.W. 377 Street
Florida City, FL 33034
PRO SE

V.

Defendant

City of Miramar
TERMINATED: 12/01/2011

Defendant

Melvin D. Standley
Chief of Police
TERMINATED: 12/01/2011

Defendant

Adam Lerner
Police Officer

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
200 East Broward Blvd
Suite 1900
Fort Lauderdale, FL 33301
954−234−0290
Fax: 954−763−7770
Email: Jdoerfel@wsh−law.com
ATTORNEY TO BE NOTICED

Robert H De Flesco , III
Weiss Serota Helfman
2525 Ponce de Leon Blvd.
Suite 700
Coral Gables, FL 33134
305−854−0800
Fax: 305−854−2323
Email: rdeflesco@wsh−law.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/13/2011	1	COMPLAINT against City of Miramar, Adam Lerner, Melvin D. Standley. Filing fee $ 350.00. IFP Filed, filed by Donald E. Johnson.(jua) (Entered: 09/14/2011)
09/13/2011	2	Judge Assignment to Judge James I. Cohn (jua) (Entered: 09/14/2011)
09/13/2011	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. (jua) (Entered: 09/14/2011)
09/13/2011	4	MOTION for Leave to Proceed in forma pauperis by Donald E. Johnson. (jua) (Entered: 09/14/2011)
09/30/2011	5	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 9/29/2011. (tw) (Entered: 09/30/2011)
09/30/2011	6	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 9/29/2011. (tw) (Entered: 09/30/2011)
11/02/2011	7	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Donald E. Johnson. Recommending 1.The claims of excessive force under the Fourth Amendment and the pendent state law battery claims proceed against defendant Lerner in his individual capacity. 2.The City of Miramar and Chief Standley be dismissed as aparty to this action pursuant to 28 U.S.C.§1915(e)(2)(B)(ii), for failure to state a claim upon which relief may be granted. Objections to RRdue by 11/21/2011. Signed by Magistrate Judge Patrick A. White on 11/2/2011. (tw) (Entered: 11/02/2011)
11/04/2011	8	ORDER that the United States Marshal shall serve a copy of the complaint and appropriate summons upon:Adam Lerner, Police Officer, Miramar Police Department,3064 North Commerce Parkway, Miramar, FL 33025. Signed by Magistrate Judge Patrick A. White on 11/3/2011. (tw) (Entered: 11/04/2011)
11/07/2011	9	Summons Issued as to Adam Lerner. (br) (Entered: 11/07/2011)
11/17/2011	10	SUMMONS (Affidavit) Returned Executed on 1 Complaint Adam Lerner served on 11/15/2011, answer due 12/6/2011. (jua) (Entered: 11/17/2011)
12/01/2011	11	ORDER ADOPTING 7 REPORT AND RECOMMENDATION, ORDER Dismissing Certain Defendants; City of Miramar and Melvin D. Standley (Chief of Police) terminated. Signed by Judge James I. Cohn on 11/30/2011. (ral) (Entered: 12/01/2011)
12/05/2011	12	*Officer Lerner's* ANSWER and Affirmative Defenses to Complaint *filed by Johnson* by Adam Lerner.(Doerfel, Joanna) (Entered: 12/05/2011)
12/05/2011	13	ANSWER and Affirmative Defenses to Complaint by Adam Lerner.(Doerfel, Joanna) (Entered: 12/05/2011)
12/09/2011	14	SCHEDULING ORDER: Amended Pleadings due by 4/4/2012. Discovery due by 3/21/2011. Joinder of Parties due by 4/4/2012. Motions due by 4/24/2012.. Signed by Magistrate Judge Patrick A. White on 12/8/2011. (tw) (Entered: 12/09/2011)
12/12/2011	15	Notice of Pendency of Other Action by Adam Lerner (Doerfel, Joanna) (Entered: 12/12/2011)
12/12/2011	16	Initial Disclosure(s) by Adam Lerner (Doerfel, Joanna) Modified on 12/12/2011 (ls). (Entered: 12/12/2011)
12/22/2011	17	Initial Disclosure(s) by Donald E. Johnson (ar2) (Entered: 12/23/2011)
12/28/2011	18	First Set of Interrogatories by Donald E. Johnson (jua) (Entered: 12/28/2011)

01/06/2012	19	NOTICE of Filing Discovery: Plaintiff's Request for Production of Documents by Donald E. Johnson (ar2) (Entered: 01/09/2012)
02/22/2012	20	Second Set of Interrogatories by Donald E. Johnson (cbr) (Entered: 02/23/2012)
02/22/2012	21	MOTION/Request for Admissions by Donald E. Johnson. (cbr) (Entered: 02/23/2012)
03/12/2012	22	MOTION for Extension of Time to Complete Discovery by Donald E. Johnson. (yha) (Entered: 03/12/2012)
03/20/2012	23	ORDER denying 21 Motion to Produce, this is not a motion, but a discovery request; granting 22 Motion for Extension of Time to Complete Discovery; all dates entered in the pre−trial scheduling order are extended for sixty days from the dates entered in the order.. Signed by Magistrate Judge Patrick A. White on 3/20/2012. (cz) (Entered: 03/20/2012)
03/22/2012	24	NOTICE of Attorney Appearance by Daniel Lawrence Abbott on behalf of Adam Lerner (Abbott, Daniel) (Entered: 03/22/2012)
03/30/2012	25	MOTION for Leave to Submit a Second Set of Interrogatories by Donald E. Johnson. (yha) (Entered: 03/30/2012)
03/30/2012	26	MOTION to Compel *Clerk of the Court to Issue Blank Subpoenas to the Plaintiff* by Donald E. Johnson. Responses due by 4/16/2012 (yha) (Entered: 03/30/2012)
04/03/2012	27	ORDER denying 25 Motion for Leave to File 2nd set of interrogatories without prejudice, discovery requests must go to defendants if they object as to the number or type they may file objections ; denying 26 Motion to Compel subpoenas, the plaintiff must arrange this with the clerk.. Signed by Magistrate Judge Patrick A. White on 4/3/2012. (cz) (Entered: 04/03/2012)
04/10/2012	28	NOTICE of Attorney Appearance by Robert H De Flesco, III on behalf of Adam Lerner (De Flesco, Robert) (Entered: 04/10/2012)
04/11/2012	29	RESPONSE in Opposition re 25 MOTION for Leave to File *A Second Set of Interrogatories* filed by Adam Lerner. (Abbott, Daniel) (Entered: 04/11/2012)
04/12/2012	30	*Endorsed Order Defendants objections to respond to additional interrogatories are well taken and the Court orders the defendants do not have to respond.. Signed by Magistrate Judge Patrick A. White on 4/12/2012. (cz) (Entered: 04/12/2012)
04/17/2012	31	MOTION for Leave to Submit a Second Set of Interrogatories by Donald E. Johnson. (yha) (Entered: 04/17/2012)
04/17/2012	32	SECOND SET OF INTERROGATORIES by Donald E. Johnson re 31 MOTION for Leave to File (yha) (Entered: 04/17/2012)
04/18/2012	33	ORDER denying 31 Motion for Leave to File second set of interrogatories. This motion has been denied by prior order.. Signed by Magistrate Judge Patrick A. White on 4/18/2012. (cz) (Entered: 04/18/2012)
05/16/2012	34	MOTION to Compel *Clerk's Office to Provide the Plaintiff with Subpoena Duces Tecums* (Responses due by 6/4/2012), MOTION for Extension of Time to Complete Discovery by Donald E. Johnson. (yha) (Entered: 05/16/2012)
05/22/2012	35	ORDER denying 34 Motion to Compel, the plaintiff must make his arrangements with the Clerk's Office; granting 34 Motion for Extension of Time to Complete Discovery to 6/22/12.. Signed by Magistrate Judge Patrick A. White on 5/22/2012. (cz) (Entered: 05/22/2012)
05/24/2012		Set/Reset Deadlines/Hearings as per DE 35 : Discovery completion due by 6/22/2012. (lk) (Entered: 05/24/2012)
06/15/2012	36	MOTION for Extension of Time to Complete Discovery by Adam Lerner. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(De Flesco, Robert) (Entered: 06/15/2012)
06/15/2012	37	Notice of Supplemental Disclosure(s) of Witnesses and Documents by Donald E. Johnson (gp) (Entered: 06/15/2012)

06/18/2012	38	ORDER granting 36 Motion for Extension of Time to Complete Discovery; All dates entered in the Pre−Trial Scheduling Order (DE#14) are extended for 90 days from the dates entered in that order. Signed by Magistrate Judge Patrick A. White on 6/18/2012. (cz) (Entered: 06/18/2012)
06/19/2012	39	*Endorsed Order Addendum to DE#38, discovery is extended to on or before 7/23/12. Signed by Magistrate Judge Patrick A. White on 6/19/2012. (cz) (Entered: 06/19/2012)
06/22/2012	40	Pretrial Statement by Donald E. Johnson (yha) (Entered: 06/22/2012)
06/26/2012	41	REPLY re 34 MOTION to Compel *Clerk's Office to Provide Plaintiff with Subpoena Duces Tecums* MOTION for Extension of Time to Complete Discovery by Donald E. Johnson. (yha) (Entered: 06/27/2012)
06/29/2012	42	REPLY to Response to Motion re 34 MOTION to Compel *Clerk's Office to Provide Plaintiff with Subpoena Duces Tecums* MOTION for Extension of Time to Complete Discovery *Response to Plaintiff's Objection to Defendant's Mtn to Serve Subpoena Duces Tecum for Signature and Production of Medical Records* filed by Adam Lerner. (Attachments: # 1 Exhibit A)(De Flesco, Robert) (Entered: 06/29/2012)
07/10/2012	43	REPORT AND RECOMMENDATIONS on 42 USC 1983 case Recommending that the defendants notice of subpoena for psychiatric records be denied, without prejudice. The plaintiff is to release all Medical Records, but at this time cannot be compelled to release all psychiatric records. Objections to RRdue by 7/27/2012. Signed by Magistrate Judge Patrick A. White on 7/10/2012. (br) (Entered: 07/10/2012)
08/01/2012	44	MOTION for *for Order Permitting Use of Deposition at Trial−Exceptional Circumstances* by Adam Lerner. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(De Flesco, Robert) Modified event and text on 8/1/2012 (bb). (Entered: 08/01/2012)
08/02/2012	45	ORDER respectfully deferring ruling on 44 Motion use of deposition at trial to the United States District Judge, although a trial date has not been set. Signed by Magistrate Judge Patrick A. White on 8/2/2012. (cz) (Entered: 08/02/2012)
08/02/2012	46	ORDER adopting 43 Report and Recommendation re 41 Plaintiff's Objection to Notice of Subpoena. Please see Order for details. Signed by Judge James I. Cohn on 8/2/2012. (sry) (Entered: 08/02/2012)
08/08/2012	47	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Donald E. Johnson. Recommending that this case be placed upon the trial calendar of the District Judge. Objections to RRdue by 8/27/2012 Signed by Magistrate Judge Patrick A. White on 8/8/2012. (tw) (Entered: 08/08/2012)
08/08/2012	48	Clerks Notice of Docket Correction re 47 REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Donald E. Johnson Recommending that this case be placed upon the trial calendar of the District Judge **Document Restricted Due to Error**; The correct document has been attached to this notice. (tw) (Entered: 08/08/2012)
08/17/2012	49	Statement of: Pretrial by Adam Lerner re 14 Scheduling Order (De Flesco, Robert) (Entered: 08/17/2012)
09/12/2012	50	ORDER Adopting 48 Report and Recommendation; denying 44 Motion to Use Deposition at Trial, and Setting Case for Trial. (In Limine Motions due by 12/20/2012., Joint Pretrial Stipulation due by 1/7/2013., Calendar Call set for 1/10/2013 09:00 AM before Judge James I. Cohn., Trial set for 1/14/2013 09:00 AM in Fort Lauderdale Division before Judge James I. Cohn). Signed by Judge James I. Cohn on 9/12/2012. (See Order for details). (ar2) (Entered: 09/12/2012)
09/12/2012	51	Writ of Habeas Corpus ad Testificandum Issued as to Donald E. Johnson for Calendar Call set for 1/10/2013 at 9:00 a.m. and Jury Trial set for 1/14/2013 at 9:00 a.m. before the Honorable James I. Cohn, United States District Judge, 299 East Broward Boulevard, Courtroom 203E, Fort Lauderdale. Signed by Judge James I. Cohn on 9/12/2012. (vt1) (Entered: 09/12/2012)

09/21/2012	52	MOTION in Limine by Donald E. Johnson. (yha) (Entered: 09/21/2012)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-62012-CV-COHN/WHITE

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

Clerk

FILED by ____ D.C.
SEP 13 2011
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. – MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Donald E. Johnson
Plaintiff

vs

Case No.:

City of Miramar,
Melvin D. Standley, Chief of Police,
Adam Lerner, Police officer
Defendants

CIVIL RIGHTS COMPLAINT WITH A JURY DEMAND

This is a 1983 action filed by Donald E. Johnson, alleging violation of his constitutional right and is seeking money damages and declartary Judgment. The Plaintiff requests a trial by Jury.

JURISDICTION

1) This is a civil rights action under 42 U.S.C. 1983. This court has jurisdiction under 28 U.S.C. 1343 (3). Plaintiff also invokes the pendent Jurisdiction of this court.

cat/div 1983/550/Miami
Case #
Judge ____ Mag ____
Motn Ifp Yes Fee pd $ No
Receipt #

PARTIES

2) Plaintiff Donald E. Johnson DC# B07125 is presently incarcerated at Dade Correctional Institution 19000 SW 377 St. Florida city, Fl. 33034. Year of Birth: 1972

3) The City of Miramar, Defendant in the above style cause, Lori C. Moseley, Mayor of the City of Miramar, 2300 Civic Center Place, Miramar, Fl. 33025

4) Melvin D. Standley, Chief of Police, Defendant in the above style cause, 3064 N. Commerce Parkway Miramar, Fl. 33025

5) Adam Lerner, Police officer of Miramar Police Department, Defendant in the above style cause, 3064 N. Commerce Parkway Miramar, Fl. 33025

STATEMENT OF FACTS

6) On February 25, 2008 at approximatley 21:37 hrs. Defendant Lerner of miramar Police Department was dispatched to the Plaintiffs residence located at 7041 S.W. 27th St. Miramar Fl. 33023

7) Upon arrival Defendant Lerner made entry through the rear of Plaintiff's residence with the assistance of Andra Liyim who occupied the efficiency in the rear of the residence.

8) Upon entry of the residence, Defendant Lerner was confronted by Plaintiff's dogs.

9) When the Plaintiff was alerted by the commotion taking place within his home, Plaintiff exited his bedroom.

10) Upon Plaintiff exiting his bedroom he was confronted by Defendant Lerner with his gun drawn and pointed at Plaintiff's dogs while standing at the rear of Plaintiff home.

11) When Defendant Lerner noticed Plaintiff exited the bedroom, Defendant Lerner raised his firearm and aimed it at the Plaintiff.

12) While Defendant Lerner's firearm trained on Plaintiff, Defendant Lerner ordered the Plaintiff to the ground.

13) Plaintiff at that time complied to Defendant Lerner's order and placed himself face down on the ground a foot from the bedroom door he exited.

14) While Plaintiff was on the ground and verbally trying to control his dogs, Defendant Lerner order Plaintiff to place his hands behind his head, again Plaintiff complied with Defendant Lerner's orders

15) While Plaintiff was on the ground, hands behide his head and Defendant Lerner's firearm still drawn, he instructed Andra Ligim to place Plaintiff's dogs in the backyard.

16) When Defendant Lerner and Plaintiff were alone, Defendant Lerner approached the Plaintiff while he was still on the ground and placed a knee on the back of the Plaintiff's neck, than Holstered his firearm and removed his handcuff to secure the Plaintiff.

17) Andre Liyim reentered the residence after placing the dogs in the backyard as ordered, Plaintiff was secured face down on the ground and Defendant Lerner over the Plaintiff.

18) Andre Liyim proceeded to the front door of the residence to let more police officers in, who were banging on the door to gain access.

19) An unidentify police officer entered the home and as he walked past the Plaintiff, the officer Kicked the Plaintiff in the back of his head.

20) When Plaintiff asked if that was necessary, Defendant Lerner proceeded to Kick the Plaintiff in the face.

21) As a result of Defendant Lerner's assult, the Plaintiff's lower right lip was torn off and his front tooth chipped.

22) While bleeding, Defendant Lerner and an unidentified officer picked the Plaintiff off the ground and escorted him to a patrol car while unclothed.

23) As the Plaintiff was being placed in the back of the patrol car Defendant Lerner purposely made Plaintiff's head hit the door frame of the Patrol car.

24) After Plaintiff was secured in the back of the patrol car while bleeding, Defendant Lerner left the Plaintiff unattended and unsupervised and proceeded back into Plaintiff's residence

25) While semi-conscious in the back of the patrol car, a call went out to Miramar Fire/Resuce

26) At approximatley 21:53 hrs. Miramar Fire/Rescue attended to Plaintiff's injuries, than transported to Memorial Reginal Hospital by Miramar Fire/Resuce

27) During the events listed in paragraph 10 through 26, Plaintiff did not resist Defendant Lerner or disobey his orders in any way.

28) Plaintiff was admitted to Memorial Reginal Hospital emergency wing at 22:37 hrs.

29) While awaiting medical attention, Plaintiff was left in the custody of two unidentified police officers, was never informed that he was under arrest. But had both hands secured to the bed rails by handcuffs.

30) Before receiving medical attention Plaintiff asked serval Hospital personal for photo's to be taken of his injuries, but was denied

31) Plaintiff was discharged from Memorial Reginal Hospital at 02:30 hrs. in the custody of Miramar Police officer

SUPPORTING FACTS

32) After Plaintiff was discharged from Memorial Reginal Hospital he was placed in a miramar Police Department Patrol car and transported to Miramar Police Department.

33) Upon arrival the officer parked the patrol car in the rear of Miramar Police Department's Building, while Plaintiff was secure in the backseat.

34) While parked, the officer rolled the windows up in the patrol car than turned the climate controls to high heat and exited the vehicle while the Plaintiff was still handcuffed in the backseat.

35) As the Plaintiff was suffering in the backseat due to the vehicle's heating system, the officer began eating his meal on the trunk of a Police cruiser parked beside the patral car that Planitiff occupied.

36) Plaintiff began having difficalty breathing and was in sevear pain from his facial injuries he recieved from Defendant Lerner, Plaintiff began making every effort to get the officer's attention who was eating beside the patrol car, but was ignored.

37) While the heat was getting unbearable Plaintiff was making every effort to stay conscious while the officer ate his meal

38) When the officer was done eating he retured to the patorl car, entered and began rolling the windows down and turned of the vehicle's heating system.

39) At which time Plaintiff requested to be taken to jail and speak to an attorney, but both requests went unanswered.

40) The officer started the patrol car and transported Plaintiff accross the street and drove behind that Building and parked.

41) While parked behind this building (later discovered to be the Detective Bureau for the Miramar Police Department): Six patrol cars from Miramar Police Department arrived and parked beside the patrol car that the Plaintiff occupied.

42) Plaintiff noticed Defendant Lerner approaching the Patrol car, when he opened the door Plaintiff started to exit but was punched in the face forcing Plaintiff to stay seated.

43) At this point the officer of the patrol car once again rolled the windows up and turned the heater system back on then exited the Driver seat of the vehicle.

44) While Plaintiff was seated in the rear of the patrol car and the heater on, lip bleeding from the blow he just received from Defendant Lerner, Defendant Lerner once again opened the rear door and hit the Plaintiff over the head with his Flashlight.

45) When Plaintiff requested Defendant Lerner to stop this abuse, Defendant Lerner again hit the Plaintiff over the head with his Flashlight a second time, then slammed the Door shut.

46) Plaintiff began hitting the window of the patrol car due to the torment he was enduring with the heat inside the vehicle, this promited an officer to respond. When the officer opened the door of the patrol car this started a totally new type of emotional torment.

47) The Plaintiff was removed from the patrol car, then threaten to be tasered several times while his feet were shackled, after being shackled the officers began to further torment Plaintiff by making more threats with the taser and intimidations.

48) Plaintiff at this time made several requests to go back to the Hospital because his suture came undone and was bleeding, but again Plaintiff's request was denied.

49) Plaintiff was placed back in the patrol car and eventulity transported to Broward county main jail.

50) Broward County main jail took custody of Plaintiff and logged him in for full intake at 06:46 hrs., 4 hrs and 16 min. after being discharged from Memorial Reginal Hospital, and booked at 08:14 hrs for a total of 5 hrs and 46 min. after being discharged from the Hospital.

51) On December 8, 2008 Plaintiff filed a complaint with internal affairs Division of the Miramar Police Department over aggravated assult and Felony Battery that caused great bodily harm and permanent disfiguement from the use of excessive force when Plaintiff gave no cause for such use, in all Plaintiff was in fear of his life

52) On May 22, 2009, acting chief of Police Raymond Black found that the complaint against Police officer Adam Lerner was unfounded and he was exonerated of all charges.

53) The city of Miramar failed to take corrective action concerning the allegations contained in this complaint.

CLAIMS

FIRST CAUSE OF ACTION

54) The actions of Defendant Lerner in paragraph 20 violated Fla. Stat. 784.03 and 784.041 of the State law, Assult and Battery with the respect to the lawful use of force.

55) The actions of Defendant Lerner in paragraph 20 denied Plaintiff's fourth and fourteenth Amendment, right to be free from unjustified and excessive use of force.

56) The actions of Defendant Lerner in paragraph 20 through 25 denied Plaintiff's due process of law in violation of his fourth and fourteenth amendment right when the Plaintiff was:

A) Kicked in the face while handcuffed, laying face down on the floor, and

B) Left unattended and unsupervised in the backseat of the patrol car after suffering facial injuries, and Defendant Lerner did nothing in attempt to stop the bleeding and was unaware of the Plaintiff consious State

SECOND CAUSE OF ACTION

57) Plaintiff alleges that Defendant Lerner failed to follow Miramar Police Department policy and procedure 102-24, when he did not attempt to stop the bleeding until Fire/Rescue arrived.

THIRD CAUSE OF ACTION

58) Plaintiff alleges that Miramar Police Chief, Melvin D. Standley violated Plaintiff's fourteenth amendment right of due process, for failure to follow Department's policy and procedure when he allowed acting chief of Police, Raymond Black to declare Plaintiff's complaint against Defendant Lerner to be unfounded, without attaching any part of the records or reports of the investigation, I.E. Names and rank of the board members of the review board who reviewed the excessive use of force by Defendant Lerner and any report of recommendation of the review board per policy 102-21-(D)-(2)

59) Miramar Police Chief, Melvin D. Standley, is responsible for the enforcement of department policy and procedures. Police Chief, Standley is also responsiable for the day to day operations of the Miramar Police Department and responsiable for reviewing allegations of excessive use of force and any report made by the use of force review board. Mr. Standley is in charge of evaluating a thorough review of any possable criminal investigation and the internal affairs reports surrounding the allegation of any use of force. Miramar Police Chief, Melvin D. Standley is being sued in his individual and official capacity, per policy 102-21-(A), (D)-(1)-(2) and 102-21-(E).

FOURTH CAUSE OF ACTION

60) The Plaintiff alleges that the city of Miramar failed to properly train their police officers in the proper use of force, Defendant Lerner in his misuse of power, became

Judge, Jury and executor by inflicting his own form of Justice. The city is responsiable for the operations and management of the Miramar Police Department. The city is also ultimatley responsible for the training and supervision of the personal employed with the Miramar Police Department.

61) The city of Miramar allowed Defendant Lerner to exceed his constitutional limitations base on inadquate policy and proceedure and unsupervised a Plaintiff while bleeding from facial injuries he received at the hands of a Miramar Police officer and such fail to apply basic first aid while awaiting for fire/rescue, Defendant Lerner's, issued first aid kit located in the truck of his patrol car went unused while Plaintiff sat in the back of Defendant Lerner's patrol car handcuff and bleeding.

62) The city of Miramar inadequate policy and procedure, failed to instruct their officers to supervise a suspect in their custody that has suffered any injuries, specially as a result of an officers excessive use of force, and the police officer unaware of the conscious state of the suspect.

63) The city of Miramar allowed Defendant Lerner to take matters into his own hands, the use of excessive force on the Plaintiff after the Plaintiff has been handcuffed and secured

Relief

Wherefore, Plaintiff request this Honorable court to grant the following relief:

(A) Issue a declartory Judgment, that Defendant Lerner violated the United States Constitution and state law whe he:

1) Kicked the Plaintiff in the face while he was handcuffed and laying face down on the ground without Justification.

(B) Grant compensatory damages in the following amount:

1) $5,000.00 against the City of Miramar for emotional pain and suffering the Plaintiff endured while in custody of Miramar Police Department

2) $5,000.00 against the chief of Police Melvin D. Standley of the Miramar Police Department for emotional pain and suffering the Plaintiff endured while he was in custody of the miramar Police Department.

3) $15,000 against Police officer Adam Lerner of the Miramar Police Department for the physical pain and disfigurement Defendant Lerner has cause the Plaintiff, and the emotional pain and suffering of the torment and fear Defendant Lerner has inflicted on the Plaintiff

(c) Grant such other relief as it may appear Plaintiff is entitled

Signed this 12 day of September 2011.

Respectfully Submitted

Donald E. Johnson
DC# B07125

OATH

Under the penatly of perjury, I Donald E. Johnson hereby declare that I have read the foregoing document "Civil rights complaint with a jury demand" and that the facts stated within are true and correct

Donald E. Johnson
DC# B07125
Dade Correctional Institution
9000 SW 377 St.
Florida city Fl. 33034

RECEIVED
SEP 12 2011
By

DONALD Johnson
B07125
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, FL. 33034

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-62012-CIV-COHN
MAGISTRATE JUDGE P.A. WHITE

DONALD EDWARD JOHNSON, :

Plaintiff, :

v. :

OFFICER ADAM LERNER, ET AL., :

Defendants. :

PRELIMINARY REPORT
OF MAGISTRATE JUDGE

I. Introduction

The plaintiff Donald Edward Johnson, currently housed at the Dade Correctional Institution, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 for damages and other relief. [DE# 1]. The plaintiff has been granted leave to proceed in forma pauperis.

This cause is presently before the Court for initial screening pursuant to 28 U.S.C. §1915, because the plaintiff is proceeding in forma pauperis.

II. Analysis

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.

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).

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 (1979) (quoting Haines v. Kerner, 404 U.S. 519, 520-21 (1972)). The allegations of the complaint are taken as true and are construed in the light most favorable to Plaintiff. Davis v. Monroe County Bd. Of Educ., 120 F.3d 1390, 1393 (11 Cir. 1997). 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]

A. Statement of Claims

The plaintiff names the following defendants:

City of Miramar, Miramar Police Chief Melvin Standley, and Police Officer Adam Learner

The plaintiff alleges that on February 25, 2008, several Miramr police officers engaged in excessive force and other tactics upon his arrest. The plaintiff details a series of events that started upon his arrest at his home and continued for several hours in a police car. He alleges specifically that Learner kicked him in the face at his home after he was handcuffed and hit him in the head with a flashlight in his patrol car. Although the plaintiff states that several other officers were involved, he names only Lerner. The assault resulted in multiple injuries. Included in his claim of use of unlawful force appears to be a state action for battery.

The plaintiff states that Acting Chief of Police Raymond Black exonerated Lerner of all charges. He alleges Defendant Police Chief Standley, who is responsible for the enforcement of department

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

policy and procedures, violated his rights by allowing Chief Black to exonerate Lerner. He alleges the City of Miramar failed to take corrective action regarding the allegations of the complaint and failed to adequately train its officers. He seeks monetary and declaratory judgment.

B. Analysis

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

The plaintiff has stated sufficient facts under the Twombly or any "heightened pleading" standard so that the case should proceed against Lerner, as the plaintiff has alleged that the officer violated his Fourth Amendment rights by causing physical harm. Further the claim for a state tort of battery should proceed.

The plaintiff has failed to specify whether he intends to sue the defendant in his individual and official capacity. A §1983 suit against the defendant in his official capacity is tantamount

to a suit against the State, and thus the defendant would be immune from monetary damages based upon the Eleventh Amendment. Gamble v. Fla. Dept. of Health and Rehabilitative Services, 779 F.2d 1509, 1512-13 (11 Cir. 1986). The allegations of the complaint, however, state a classic case of an official acting outside the scope of his duties and in an arbitrary manner. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974). Under this construction of the complaint, this Court has jurisdiction over the defendant in his individual capacity. Moreover, a determination of whether the defendant might be entitled to qualified immunity cannot be determined at this juncture or upon consideration of a motion to dismiss.

Defendant City of Miramar and Police Chief Standley

To allege a §l983 action against a county/city a plaintiff must assert that a constitutional deprivation resulted from a custom, policy, or practice of the county. Wideman v. Shallowford Community Hospital, Inc. supra, 826 F.2d at 1032, and cases cited therein. Such liability, however, may not be predicated on the theory of respondeat superior. Only if the alleged constitutional violations resulted from a county custom, policy or practice of a county, may its administrators or supervisors be held liable. Monell v. Department of Social Services, supra, 436 U.S. at 694; Free v. Granger, 887 F.2d 1552 (11 Cir. 1989); Wideman v. Shallowford Community Hospital, Inc., supra, 826 F.2d at 1032. 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). Therefore the City of Miramar should be dismissed.

The plaintiff's allegations against Police Chief Standley are based upon his supervisory position. He cannot be sued for liability merely for an improper or even unconstitutional act of his employees under a theory of respondeat superior. If a plaintiff sues a supervisor, there must be proof that the alleged injuries resulted from an official custom, policy, or practice. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); Mandel v. Doe, 888 F.2d 782 (11 Cir. 1989). The plaintiff bears the burden of establishing a causal link between a government policy or custom and the injury which is alleged. Byrd v. Clark, 783 F.3d 1002, 1008 (11 Cir. 1986)(citing Monell, supra). See also; Ashcroft v Iqbal, supra. (Heightened pleading standard for supervisory liability). The plaintiff has failed to state a claim against Chief Standley.

Prior History

The Court takes judicial notice that the plaintiff filed a prior case naming Officer Lerner as a defendant, and raising the same claims against him as in this case. The complaint was assigned Case No. 08-61344-Civ-Ungaro. In that case, a motion for summary judgment was decided against Defendant Lerner by Order of United States District Judge Ursula Ungaro, and the case was in a preparatory trial posture. However, upon stipulation by defendants' counsel and plaintiff's appointed counsel, the case was voluntarily dismissed without prejudice on November 20, 2009. [2]

[2] As the case was dismissed without prejudice it is unclear whether Judge Ungaro's Order denying a motion for summary judgment would constitute collateral estoppel or res judicata in this case.

III. Recommendation

Based on the foregoing, it is recommended that:

1. The claims of excessive force under the Fourth Amendment and the pendent state law battery claims proceed against defendant Lerner in his individual capacity.

2. The City of Miramar and Chief Standley be dismissed as a party to this action pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), for failure to state a claim upon which relief may be granted.

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

It is so recommended at Miami, Florida, this 2nd day of November, 2011.

UNITED STATES MAGISTRATE JUDGE

cc: Donald Edward Johnson, Pro Se
#B07125
Dade Correctional Institution
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-62012-CIV-COHN

DONALD EDWARD JOHNSON,

Magistrate Judge White

Plaintiff,

vs.

OFFICER ADAM LERNER, et al.,

Defendants.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION
ORDER DISMISSING CERTAIN DEFENDANTS

THIS CAUSE is before the Court upon the Report and Recommendation [DE 7] of Magistrate Judge Patrick A. White. The Court has carefully considered all of the filings in this case, and notes the lack of Objections to the Report by the deadline of November 21, 2011.

After an initial review, the Magistrate Judge recommended that the claim of excessive force upon arrest proceed against Defendant Police Officer Adam Lerner, while the § 1983 claims against Defendants City of Miramar and Chief of Police Melvin D. Standley be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief may be granted. This Court has conducted a de novo review of the report and recommendation, and is otherwise fully advised in the premises.

The Court agrees with the reasoning and analysis of the Magistrate Judge regarding dismissal of the City of Miramar and Police Chief Standley. A municipality bears liability under § 1983 only where the challenged action implements or executes a municipal policy or custom, and not simply because an employee who is alleged to commit a civil rights violation works for the city. Scala v. City of Winter Park, 116 F.3d 1396, 1399 (11th Cir. 1997) (citing Monell v. Department of Social Services of the City of

New York, 436 U.S. 658, 694 (1978)). In addition, a supervisor cannot be liablie under § 1983 merely for an act of his employees under a theory of respondeat superior. Plaintiff's Complaint fails to sufficiently allege that the allegedly excessive force actions of Defendant Police Officer Lerner were taken pursuant to any policy. Therefore, the City of Miramar and Chief Standley should be dismissed.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Magistrate Judge's Report and Recommendation [DE 7] is hereby **ADOPTED**;
2. The claim of excessive force against Police Officer Adam Lerner shall proceed;
3. Plaintiff's claims against the City of Miramar and Melvin D. Standley, Chief of Police, shall be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief may be granted.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30th day of November, 2011.

JAMES I. COHN
United States District Judge

copies to:

Magistrate Judge White

Donald E. Johnson, DC # B07125
Dade C.I. (via CM/ECF regular mail)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DONALD E. JOHNSON,

Plaintiff,

CASE NO. 11-62012-CIV-COHN

JUDGE COHN/MAGISTRATE JUDGE WHITE

v.

OFFICER ADAM LERNER, et al.,

Defendant.
_____/

DEFENDANT LERNER'S ANSWER & AFFIRMATIVE DEFENSES

Defendant Officer Adam Lerner ("Lerner"), through undersigned counsel, hereby answers the Complaint filed by Plaintiff, Donald E. Johnson ("Johnson") as follows:

ANSWER

Parties

1. Lerner admits that this purports to be a civil rights action under 42 U.S.C. 1983 and admits that this Court has subject matter jurisdiction.

2. Lerner is without knowledge as to the allegations contained in paragraph 2 of the Complaint and therefore denies same and demands strict proof thereof.

3. Lerner admits the allegations contained in paragraph 3 of the Complaint as to the identity and location of the City of Miramar but denies that the City engaged in any wrongdoing or should be considered a defendant in this litigation.

4. Lerner admits the allegations contained in paragraph 4 of the Complaint as to the address and location of Chief of Police Melvin Standley, but denies that the Chief of Police engaged in any wrongdoing or should be considered a defendant in this litigation.

5. Lerner admits the allegations contained in paragraph 5 of the Complaint as to his identity and address but denies any wrongdoing and denies that he should be considered a defendant in this litigation.

Statement of Facts

6. Lerner admits the allegations contained in paragraph 6 of the Complaint.

7. Lerner admits that he entered Johnson's residence with the assistance of Andres Liyim, but is without knowledge as to the remaining allegations contained in paragraph 7 of the Complaint and therefore denies same and demands strict proof thereof.

8. Lerner admits that upon entry into the residence, he was confronted by dogs, but is without knowledge as to the remaining allegations contained in paragraph 8 of the Complaint and therefore denies same and demands strict proof thereof.

9. Lerner is without knowledge as to the allegations contained in paragraph 9 of the Complaint and therefore denies same and demands strict proof thereof.

10. Lerner denies the allegations contained in paragraph 10 of the Complaint and demands strict proof thereof.

11. Lerner denies the allegations contained in paragraph 11 of the Complaint and demands strict proof thereof.

12. Lerner admits that he ordered Johnson to the ground but denies that Johnson complied.

13. Lerner denies the allegations contained in paragraph 13 of the Complaint and demands strict proof thereof.

14. Lerner admits that he ordered Johnson to place his hands behind his head, but denies that Johnson complied with his request and any remaining allegations contained in this paragraph, and demands strict proof thereof.

15. Lerner admits that Andres Liyim placed the dogs in the backyard.

16. Lerner denies the allegations contained in paragraph 16 of the Complaint and demands strict proof thereof.

17. Lerner admits the allegations contained in paragraph 17 of the Complaint.

18. Lerner admits the allegations contained in paragraph 18 of the Complaint.

19. Lerner denies the allegations contained in paragraph 19 of the Complaint and demands strict proof thereof.

20. Lerner denies the allegations contained in paragraph 20 of the Complaint and demands strict proof thereof.

21. Lerner denies the allegations contained in paragraph 21 of the Complaint and demands strict proof thereof.

22. Lerner admits that he and another officer escorted Johnson to the patrol car but denies any remaining allegations contained in paragraph 22 of the Complaint and demands strict proof thereof.

23. Lerner denies the allegations contained in paragraph 23 of the Complaint and demands strict proof thereof.

24. Lerner admits that after Johnson was secured in the back of the patrol car, he returned to the residence to continue the investigation but denies any remaining allegations contained in paragraph 24 of the Complaint and demands strict proof thereof.

25. Lerner is without knowledge as to the allegations contained in paragraph 25 of the Complaint and therefore denies same and demands strict proof thereof.

26. Lerner is without knowledge as to the allegations contained in paragraph 26 of the Complaint and therefore denies same and demands strict proof thereof.

27. Lerner denies the allegations contained in paragraph 27 of the Complaint and demands strict proof thereof.

28. Lerner is without knowledge as to the allegations contained in paragraph 28 of the Complaint and therefore denies same and demands strict proof thereof.

29. Lerner is without knowledge as to the allegations contained in paragraph 29 of the Complaint and therefore denies same and demands strict proof thereof.

30. Lerner is without knowledge as to the allegations contained in paragraph 30 of the Complaint and therefore denies same and demands strict proof thereof.

31. Lerner is without knowledge as to the allegations contained in paragraph 31 of the Complaint and therefore denies same and demands strict proof thereof.

Supporting Facts

32. Lerner is without knowledge as to the allegations contained in paragraph 32 of the Complaint and therefore denies same and demands strict proof thereof.

33. Lerner is without knowledge as to the allegations contained in paragraph 33 of the Complaint and therefore denies same and demands strict proof thereof.

34. Lerner is without knowledge as to the allegations contained in paragraph 34 of the Complaint and therefore denies same and demands strict proof thereof.

35. Lerner is without knowledge as to the allegations contained in paragraph 35 of the Complaint and therefore denies same and demands strict proof thereof.

36. Lerner is without knowledge as to the allegations contained in paragraph 36 of the Complaint and therefore denies same and demands strict proof thereof.

37. Lerner is without knowledge as to the allegations contained in paragraph 37 of the Complaint and therefore denies same and demands strict proof thereof.

38. Lerner is without knowledge as to the allegations contained in paragraph 38 of the Complaint and therefore denies same and demands strict proof thereof.

39. Lerner is without knowledge as to the allegations contained in paragraph 39 of the Complaint and therefore denies same and demands strict proof thereof.

40. Lerner is without knowledge as to the allegations contained in paragraph 40 of the Complaint and therefore denies same and demands strict proof thereof.

41. Lerner is without knowledge as to the allegations contained in paragraph 41 of the Complaint and therefore denies same and demands strict proof thereof.

42. Lerner denies the allegations contained in paragraph 42 of the Complaint and demands strict proof thereof.

43. Lerner is without knowledge as to the allegations contained in paragraph 43 of the Complaint and therefore denies same and demands strict proof thereof.

44. Lerner denies the allegations contained in paragraph 44 of the Complaint and demands strict proof thereof.

45. Lerner denies the allegations contained in paragraph 45 of the Complaint and demands strict proof thereof.

46. Lerner is without knowledge as to the allegations contained in paragraph 46 of the Complaint and therefore denies same and demands strict proof thereof.

47. Lerner is without knowledge as to the allegations contained in paragraph 47 of the Complaint and therefore denies same and demands strict proof thereof.

48. Lerner is without knowledge as to the allegations contained in paragraph 48 of the Complaint and therefore denies same and demands strict proof thereof.

49. Lerner is without knowledge as to the allegations contained in paragraph 49 of the Complaint and therefore denies same and demands strict proof thereof.

50. Lerner is without knowledge as to the allegations contained in paragraph 50 of the Complaint and therefore denies same and demands strict proof thereof.

51. Lerner admits that Johnson filed a complaint with internal affairs at the Miramar Police Department but denies that there was any merit to the complaint or any of the allegations contained therein.

52. Lerner admits the allegations contained in paragraph 52 of the Complaint.

53. Lerner admits that the City did not discipline any officer as a result of the allegations contained in Johnson's Complaint but Lerner denies that any discipline or corrective action was needed.

First Cause of Action

54. Lerner denies the allegations contained in paragraph 54 of the Complaint and demands strict proof thereof.

55. Lerner denies the allegations contained in paragraph 55 of the Complaint and demands strict proof thereof.

56. Lerner denies the allegations contained in paragraph 56 of the Complaint and demands strict proof thereof.

Second Cause of Action

57. This Cause of Action was dismissed by the Court in its Order Adopting Report and Recommendation Order Dismissing Certain Defendants [D.E. 11]. Accordingly, no response is required to paragraph 57 of the Complaint

Third Cause of Action

58-59. This Cause of Action is not addressed to Lerner. Moreover, this Cause of Action was dismissed by the Court in its Order Adopting Report and Recommendation Order Dismissing Certain Defendants [D.E. 11]. Accordingly, no response is required to paragraphs 58-59 of the Complaint.

Fourth Cause of Action

60-63. This Cause of Action is not addressed to Lerner. Moreover, this Cause of Action was dismissed by the Court in its Order Adopting Report and Recommendation Order Dismissing Certain Defendants [D.E. 11]. Accordingly, no response is required to paragraphs 60-63 of the Complaint.

Lerner denies that Johnson is entitled to any of the relief requested in his "Wherefore" clause.

Any allegation not specifically admitted herein is denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Johnson is estopped from recovery because he physically resisted arrest prior to being ultimately detained, thereby causing Lerner to utilize whatever force was necessary and reasonable under the circumstances to subdue and subsequently arrest Johnson. Any use of force was necessary and reasonable under the circumstances.

Second Affirmative Defense

Johnson was engaged in a capital felony of sexual battery on an eleven-year-old, and the force used was reasonable and appropriate under the circumstances.

Third Affirmative Defense

Johnson is estopped from recovery because he physically resisted arrest prior to being ultimately detained, and any damages allegedly suffered by Johnson were solely and proximately caused by his own unlawful actions.

Fourth Affirmative Defense

Any actions to intentionally touch Johnson during the incident described in the Complaint constituted an ordinary incidence of detention.

Fifth Affirmative Defense

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

Sixth Affirmative Defense

This action is barred, in whole or in part, by the doctrine of sovereign immunity because Lerner's alleged actions constituted discretionary, planning level governmental functions for which Lerner is immune under § 768.28, Florida Statutes. Further, Lerner pleads all defenses available to him under § 768.28, Florida Statutes, and states that his liability in this action is limited pursuant to the limitations set forth in that statute.

Seventh Affirmative Defense

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

Eighth Affirmative Defense

Lerner states that all actions he undertook were performed within the scope of his employment and therefore he cannot be liable in tort.

Ninth Affirmative Defense

None of the alleged actions or inactions constituted a deliberate indifference to a risk whereby the deprivation of a constitutional right would be a plainly obvious consequence.

Tenth Affirmative Defense

Johnson may not recover, or may not recover fully, to the extent that he failed to mitigate any of his alleged damages.

Lerner reserves the right to plead other defenses, affirmative or otherwise, which may become known during its continuing investigation, and during discovery in this action.

WHEREFORE, Defendant, Officer Adam Lerner, demands entry of judgment in his favor, plus costs, including attorney's fees pursuant to 42 U.S.C. § 1988, incurred in defending this action.

Respectfully submitted,

Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
Counsel for Officer Lerner
200 East Broward Blvd., Ste. 1900
Fort Lauderdale, Florida 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770

By: /s/ Daniel L. Abbott
Daniel L. Abbott, Esq.
Florida Bar. No. 767115
E-Mail Address: dabbott@wsh-law.com
Joanna D. Thomson, Esq.
Florida Bar. No. 55723
E-Mail Address: jthomson@wsh-law.com

CASE NO. 11-62012-CIV-COHN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by CM/ECF and regular mail on this 5th day of December, 2011 to Donald E. Johnson, Inmate # BO7125, Dade Correctional Institution, 9000 SW 377th Street, Florida City, Florida 33034.

By: /s/ Daniel L. Abbott
Daniel L. Abbott, Esq.
Florida Bar. No. 767115
E-Mail Address: dabbott@wsh-law.com
Joanna D. Thomson, Esq.
Florida Bar. No. 55723
E-Mail Address: jthomson@wsh-law.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DONALD E. JOHNSON,

Plaintiff,

v.

OFFICER ADAM LERNER, et al.,

Defendant.
_____/

CASE NO. 11-62012-CIV-COHN

JUDGE COHN/MAGISTRATE JUDGE WHITE

NOTICE OF FILING PENDING, REFILED, RELATED OR SIMILAR ACTIONS

Defendant Adam Lerner ("Lerner"), hereby files this Notice of Pending, Refiled, Related or Similar Actions in accordance with Local Rule 3.8. The following case has been filed (and subsequently voluntarily dismissed) in the United States District Court for the Southern District of Florida and involves the identical allegations and underlying claims as the case presently before this Court: *Donald Edward Johnson v. Officer Adam Lerner & Officer Ralph Savain, et al.*, Case No.: 08-61344-CIV-UNGARO/WHITE.

Dated: December 12, 2011

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.L.
Attorneys for Officer Lerner
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, Esq.
Florida Bar. No. 767115
E-Mail Address: dabbott@wsh-law.com
Joanna D. Thomson, Esq.
Florida Bar. No. 55723
E-Mail Address: jthomson@wsh-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by CM/ECF and regular mail on this 12th day of December, 2011 to Donald E. Johnson, Inmate # BO7125, Dade Correctional Institution, 9000 SW 377th Street, Florida City, Florida 33034.

By: /s/ Daniel L. Abbott
Daniel L. Abbott, Esq.
Florida Bar. No. 767115
E-Mail Address: dabbott@wsh-law.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED by ___ D.C.
JUN 22 2012
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. – MIAMI

Case No.: 11-62012-CIV-COHN
Judge COHN / Magistrate Judge WHITE

DONALD E. JOHNSON,
Plaintiff,

Vs.

ADAM LERNER,
Defendant.
_____/

PLAINTIFF'S PRETRIAL STATEMENT

On February 25, 2008, between 21:43 and 21:46 in the evening, police officer Adam Lerner of the Miramar Police Department, used brutal excessive force upon Mr. Johnson's arrest after he was seized, handcuffed, and laying face down on the ground without justification for such force.

STATEMENT OF THE FACTS

In the late evening of February 25, 2008, at 21:37, Defendant Lerner was dispatched to Mr. Johnson's residence located at 7041 S.W. 27th Street in response to a felony in progress. He arrived at the residence at 21:40 where he was flagged down by Andre Liyim who was a resident in Mr. Johnson's home. Mr. Liyim relentlessly persuaded Defendant Lerner to follow him into the home; thus, withdrawing his gun, he approached the front door only to find out that the front

door was locked. Defendant Lerner advises dispatch at 21:42 that he is "going to gain entry through the rear; have the next responding unit come to the front door." Defendant Lerner was the only law enforcement officer to arrive on scene at 21:40, however, instead of waiting for additional units to arrive, he decided to gain entry into the residence with the aid of Mr. Liyim.

Defendant Lerner made entry through the rear of the house and was confronted by Mr. Johnson's dog — 100 lb American Bulldog — barking and growling at him very aggressively. All this noise and commotion taking place within his home startled Mr. Johnson and he became alarmed, as a result, Mr. Johnson exited his bedroom very quickly.

Defendant Lerner confronted Mr. Johnson at 21:43 and ordered him to the ground and put his hands behind his head. Mr. Johnson did not resist or disobey Defendant Lerner's demands in any way. Accordingly, he complied with all of Defendant Lerner's orders.

Defendant Lerner instructed Mr. Liyim to secure the dog in the backyard and once the dog was secured, he was then able to approach Mr. Johnson and subsequently place him in handcuffs without incident. Mr. Liyim walked back inside the residence after securing the dog in the backyard and proceeded to unlock the front door to allow additional officers entry.

An unknown police officer walked past Mr. Johnson and consequently kicked him in the back of the head in which Mr. Johnson made a comment "was that necessary? I am handcuffed." In a show of aggression and a total disregard for Mr. Johnson's constitutional rights, Defendant Lerner kicked Mr. Johnson in the face while he was in handcuffs and laying face down on the ground in his living room. This brutal assault on Mr. Johnson caused serious bodily injuries, specifically to his lower right lip and front tooth. At 21:46, Defendant Lerner requested Fire Rescue to respond to the residence.

Defendant Lerner and an unidentified police officer escorted Mr. Johnson to the patrol car where Defendant Lerner purposely hit Mr. Johnson's head on the door frame while he was being placed in the back seat. Miramar Fire Rescue provided medical attention to Mr. Johnson's facial injuries at 21:53 and thereafter, was transported to Memorial Regional Hospital where he was admitted to the emergency wing at 22:30.

While waiting for medical attention, at the hospital, Mr. Johnson was left in the custody of two unidentified police officers and under these extreme circumstances, he was never informed he was under arrest. Before receiving medical care, Mr. Johnson asked several hospital personnel for photos to be taken of his injuries and for that reason, his request was denied. Mr. Johnson received a number of stitches to his right bottom lip and x-rays taken of his jaw. He was

discharged from the hospital at 02:30 in the early morning of February 26, 2008, and placed in the custody of the Miramar Police Department.

Mr. Johnson was transported to the Miramar Police Department where an unidentified police officer left him in handcuffs, sitting in the back seat of his patrol car with the windows rolled up and the vehicle's heating system on high. All the while, this police officer is eating his meal on the trunk of the patrol car that was parked beside the one Mr. Johnson was in. Mr. Johnson began having difficulty breathing and was in severe pain after just receiving a brutal kick to the face from Defendant Lerner. Despite his pain, he was making every effort to stay conscious. This police officer eventually finished his meal and then proceeded to transport Mr. Johnson across the street to park in the back of the Miramar Investigation Division where he received the same torturous treatment that he received just moments ago at the Miramar Police Department.

Defendant Lerner approached the patrol car that Mr. Johnson was in, opened the door and intentionally punched him in the face forcing him to remain seated. Defendant Lerner moved toward Mr. Johnson again and hit him over the head with his flashlight. Mr. Johnson begged Defendant Lerner to stop the abuse but he was simply ignored. Defendant Lerner again proceeded to hit Mr. Johnson over the head with his flashlight and then he slammed the door shut.

Mr. Johnson began hitting the window of the patrol car due to the torment he was enduring with the heat inside the vehicle. This prompted a response from an unknown officer who opened the door, removed Mr. Johnson from the back seat and was threatening to taser him several times while his feet were being shackled. Defendant Lerner further tormented Mr. Johnson by using intimidation tactics to inflict emotional pain and suffering. Defendant Lerner had a total disregard for Mr. Johnson's safety and his civil rights. Defendant Lerner used his position of authority to manipulate the system, and inflict his own form of justice upon Mr. Johnson's arrest, who was showing no signs of resisting arrest or attempting to flee. Mr. Johnson pleaded several times with Defendant Lerner to take him back to the hospital because his stitches came undone and he was bleeding profusely from his facial injuries; for a second time, Defendant Lerner simply ignored his request.

Mr. Johnson was placed back in the patrol car and eventually transported to Broward County Main Jail, where he was later booked and processed at 08:14 in the early morning of February 26, 2008, for a total of 5 hours and 44 minutes after being discharged from Memorial Regional Hospital.

Defendant Lerner, while employed with the Miramar Police Department and who is clothed with the authority of State law, used his position of power to kick Mr. Johnson in the face with such force, that his injuries required hospitalization. Therefore, violating Mr. Johnson's clearly established rights.

Mr. Johnson intends to prove at trial the following facts with both oral and documentary evidence:

1. Defendant Lerner kicked Mr. Johnson in the face after he was seized, handcuffed, and laying face down on the ground. As a result of being kicked, Mr. Johnson received facial injuries;
2. Defendant Lerner assaulted and battered Mr. Johnson contrary to Fla. Stat. 784.03 and 784.041;
3. Defendant Lerner used force that was grossly disproportionate which violated his clearly established rights under the constitution;
4. Mr. Johnson was not in commission of a felony when he received a brutal kick to the face from Defendant Lerner. In fact Mr. Johnson was in another part of the house when he was arrested. Furthermore, Mr. Johnson submitted to the assertion of authority when he walked out of the bedroom. Therefore, Mr. Johnson was seized by Defendant Lerner and he voluntarily laid face down on the ground when told to do so. Mr. Johnson was not in the same proximity of the alleged felony when he was seized and arrested;
5. Mr. Johnson was not an immediate threat to the safety of Defendant Lerner or others prior to being placed in handcuffs;
6. Mr. Johnson did not resist arrest or attempt to evade arrest by flight;

7. Defendant Lerner did not take Mr. Johnson down in an arm bar as he alleges in his police report because Mr. Johnson's dog stood in the way of Defendant Lerner and any attempt to approach Mr. Johnson without first securing the dog would have provoked an aggressive reaction from the dog;
8. Defendant Lerner was the only law enforcement officer present in the home when Mr. Johnson walked out of the bedroom. Neither Captain Bonis nor any other law enforcement officer was inside or outside the residence until after Mr. Johnson was placed in handcuffs;
9. The front door of the residence was locked prior to Mr. Johnson being placed in handcuffs. It was not until after Mr. Johnson was arrested did Mr. Liyim unlock the front door to allow additional officers entry;
10. Photos of the bloodstains on the floor of Mr. Johnson's residence will show blood splatter that is consistent to receiving a brutal kick to the face from Defendant Lerner;
11. Photos of the dog will prove Defendant Lerner did not put Mr. Johnson in an arm bar because of the size and aggressiveness of the dog;
12. Defendant Lerner did not follow department policy when he was authorized to shoot any animal that was a threat to him or to others.

Defendant Lerner alleges the dog was aggressive and in addition, Defendant Lerner exposed his firearm. Mr. Johnson intends to prove at trial, because of the aggressiveness of the dog, it would be questionable under these circumstances to take down a suspect in an arm bar;

13. Defendant Lerner showed a deliberate indifference when he was made aware of the severity of Mr. Johnson's injuries. Defendant Lerner was informed by Mr. Johnson at the Miramar Investigation Division that his stitches came undone and was bleeding profusely. Defendant Lerner chose to ignore his request for medical assistance and allowed Mr. Johnson to bleed from his facial injuries. Therefore, Defendant Lerner did not follow department police when he refused to render aid in an attempt to stop the bleeding;

14. Defendant Lerner exhibits a pattern of using excessive force during the course of an arrest. Mr. Johnson intends to prove at trial that Defendant Lerner has a history of this type of behavior and police misconduct;

15. Defendant Lerner lied under oath in a sworn deposition surrounding the events of Mr. Johnson's arrest and apprehension;

16. Defendant Lerner lied in his police report in an attempt to cover up the truth surrounding Mr. Johnson's arrest and apprehension.

This type of abuse of authority will not be tolerated and any law enforcement officer who is sworn to uphold the laws of this State and the United States constitution will be held accountable for their actions. Mr. Johnson will prove the aforementioned facts in a court of law that Defendant Lerner violated the laws of Florida and Mr. Johnson's rights given to him under the United States constitution.

WITNESSES

Donald E. Johnson
B07125
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, FL 33034

Adam Lerner
3064 N. Commerce Parkway
Miramar, FL 33025

Andre Liyim
7041 S.W. 27th Street
Miramar, FL 33027

Thomas Waters
14801 S.W. 27th Street
Miramar, FL 33027

Mario Bonis
3064 N. Commerce Parkway
Miramar, FL 33025

Nicolas Wydra
14801 S.W. 27th Street
Miramar, FL 33027

Michael Kelly
3064 N. Commerce Parkway
Miramar, FL 33025

John Childress
3501 Johnson Street
Hollywood, FL 33021

Bruce Hill
14801 S.W. 27th Street
Miramar, FL 33027

Jonathan Black
3064 N. Commerce Parkway
Miramar, FL 33025

James Dunkelberger
3064 N. Commerce Parkway
Miramar, FL 33025

Steven Croye
3064 N. Commerce Parkway
Miramar, FL 33025

EXPERT WITNESS

Dr. R. Arosomena
Dentist Dade C.I.
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, FL 33034

EXHIBITS

Miramar Fire Rescue records and reports

Hospital records and reports

Plaintiff's booking photo

Dr. John Childress deposition

Michael Kelly's supplemental report

Photos of the bloodstains in Mr. Johnson's residence

Map of the layout of the residence

Andre Liyim's deposition

Andre Liyim's statement to police

Adam Lerner's deposition

Plaintiff's booking report

Plaintiff's statement to Internal Affairs

Miramar Police Department police and procedure

Photos of the Plaintiff's dog

Adam Lerner's dispatch records

Adam Lerner's answers to the first set of interrogatories

Plaintiff's dental records

The following is testimony the Plaintiff expects each witness to give in this court to prove his case:

Andre Liyim

Mr. Liyim will testify Defendant Lerner approached the front door with his gun in his hand and found the front door to be locked. Defendant Lerner was the only law enforcement officer to make entry through the rear of the house and was the only law enforcement officer present in the home when Mr. Johnson exits his bedroom. Moreover, Mr. Liyim will testify he grabbed the dog when he hears knocking at the front door. Mr. Liyim secures the dog in the backyard and proceeded to unlock the front door. Mr. Liyim will state as fact Captain Bonis was not present before or during Mr. Johnson's arrest as Defendant Lerner alleges in his deposition given to Mr. Johnson's criminal attorney. Mr. Liyim will explain he did not unlock the front door until Mr. Johnson was handcuffed and arrested laying facedown on the ground. Mr. Liyim will state as fact no additional law enforcement officers entered through the rear of the house because he secured the

dog in the backyard before Mr. Johnson was handcuffed and arrested. Finally Mr. Liyim will attest in court Mr. Johnson laid facedown on the ground when told to do so the moment he exited his bedroom.

Mario Bonis

Mr. Bonis will testify he arrived at Mr. Johnson's residence after Mr. Johnson was arrested and in handcuffs, not before. Mr. Bonis will explain to the court that he was knocking on the front door to gain entry and Mr. Liyim proceeded to unlock the front door to allow Mr. Bonis inside. Mr. Bonis will testify he did not witness the arrest of Mr. Johnson and saw no signs of a struggle. Mr. Bonis will affirm he was also involved in the investigation of allegations of excessive force against Defendant Lerner. He will also affirm he did not write up a police report indicating his involvement before, during, or after Mr. Johnson's apprehension. Mr. Bonis will testify he did not write up any report supporting Defendant Lerner's version Mr. Bonis was present in the house when Mr. Johnson exited his bedroom. When in fact, Mr. Liyim did not unlock the front door to allow Mr. Bonis entry until after the dog was secured in the backyard and Mr. Johnson in handcuffs laying facedown on the ground. Mr. Bonis will testify there is no evidence to support Defendant Lerner's allegations Mr. Johnson became combative and resisted arrest as he states in his police report.

Michael Kelly

Mr. Kelly will testify he arrived at Mr. Johnson's residence at 22:50 where he met up with Sgt. Steven Croye, Sgt. Richard Georgi, Officer Adam Lerner, Officer Jonathan Black, Officer Marcus Mariner, and Det. Ralph Savain. Mr. Kelly will state as fact he entered the residence with officer Lerner and Det. Savain. Mr. Kelly will testify he observed bloodstains on the tile floor by the front that led into the kitchen. Officer Lerner informed Mr. Kelly that the bloodstains were a direct result from Mr. Johnson being taken down. Mr. Kelly will testify close-up photographs were taken of the bloodstains with and without scale.

Bruce Hill

Mr. Hill will testify Miramar Fire Rescue 19 arrived at Mr. Johnson's residence at 21:48 and provided medical attention to Mr. Johnson's facial injuries at 21:53. Mr. Hill will testify Miramar Fire Rescue found Mr. Johnson sitting in the back of the patrol car in handcuffs and bleeding from his lip and face. Mr. Hill will testify he completed his report and his assessment of Mr. Johnson's injuries at 22:31.

Thomas Waters

Mr. Waters will testify Mr. Johnson received facial injuries to his face and mouth and his injuries were serious enough to require hospitalization. Mr. Waters will state as fact he completed a treatment summary which included manual

immobilization of Mr. Johnson, backboard, C-collar and performed an E.K.G. Mr. Waters completed his treatment summary at 22:16.

Nicolas Wydra

Mr. Wydra will testify he made an assessment of Mr. Johnson's facial injuries and concluded Mr. Johnson suffered a lip laceration and he will also testify Mr. Johnson's lip laceration was serious enough to require hospitalization; his injuries deep enough to require stitches.

John Childress

Mr. Childress will testify he examined Mr. Johnson in the emergency wing of the hospital and will affirm Mr. Johnson did in fact receive facial injuries to his lip and face. Mr. Childress will attest in court Mr. Johnson's right bottom lip was torn open and blood was oozing from his wound. Mr. Childress will state as fact that there was not a whole lot of blood loss. He will also testify he stitched up Mr. Johnson's wound and took x-rays of his jaw. Mr. Childress will state as fact his primary diagnosis is complex lip laceration which required deep sutures and Mr. Johnson was complaining of pain in his jaw. Mr. Childress will attest there was also a second small laceration as well. Mr. Childress will testify that there was no visual damage to Mr. Johnson's teeth and panorex image would have told him if there was serious damage to his teeth that he was not able to see but no such x-ray was ordered.

Jonathan Black

Mr. Black will testify about the circumstances surrounding his injuries he said he received from the Plaintiff's dog. Mr. Black will state as fact the backyard was fenced in with a "beware of dog" sign hanging on the gate. Mr. Black will explain why he proceeded to go through the backyard when he could visually see the Plaintiff's dog and he was aware of the dangers of approaching the backyard fence when the dog was in the backyard. Mr. Black will state as fact he arrived at the residence at 21:47 after the front door was unlocked and opened and Mr. Johnson was in handcuffs laying facedown on the ground. Mr. Black will testify the dog was aggressive and was a serious threat to any law enforcement officer who approached the back fence. Mr. Black did not shoot the dog, although he was authorized to per "Miramar Police Department Policy and Procedure." Mr. Black will testify he was treated for the dog bite by Miramar Fire Rescue but delayed going to the hospital for almost 2 hours. Mr. Black will testify he could not have walked through the backyard without putting his life at risk because the dog in fact was very aggressive.

James Dunkelberger

Mr. Dunkelberger will testify he was the Internal Affairs investigator assigned to investigate allegations of excessive use of force against Defendant Lerner. He will testify there was no eyewitnesses or evidence to support

Defendant Lerner's claim Mr. Johnson was combative and resisted arrest. Therefore, was taken down in an arm bar. Mr. Dunkelberger will state as fact Defendant Lerner was exonerated of all charges based on Defendant Lerner's statement. Mr. Dunkelberger will testify Defendant Lerner was investigated for allegations of excessive use of force in 2009 and was also exonerated of all charges. Mr. Dunkelberger will testify Mr. Johnson did receive facial injuries and there was blood evidence of Mr. Johnson's injuries on the tile floor of the residence. Mr. Dunkelberger will attest Mr. Johnson submitted a written complaint of excessive force on December 8, 2008. Mr. Dunkelberger will testify the initial incident was reviewed by Captain Bonis who found the force was necessary but Captain Bonis chose not to file a report in support of his findings.

Steven Croye

Mr. Croye will testify he was the on-scene investigator and will state as fact Mr. Johnson received facial injuries and there was quite a bit of blood on the floor where Mr. Johnson was arrested. Mr. Croye will testify there was no eyewitnesses or evidence to support Defendant Lerner's claim Mr. Johnson was combative and resisted arrest. Mr. Croye will testify Mr. Johnson's dog was aggressive and as a result, attacked Mr. Black. Mr. Croye will testify, based on his investigation there was no struggle or fight between Defendant Lerner and Mr. Johnson but notice a blood trail that led from the front door into the kitchen.

Expert Witness

Dr. R. Arosomena

Mr. Arosomena will testify he performed a dental exam on Mr. Johnson at Dade Correctional Institution and will explain the dental records of Mr. Johnson. He will also testify Mr. Johnson's front tooth was chipped prior to the exam. He will state as fact he took x-rays of Mr. Johnson's teeth and will explain his findings to the court.

Respectfully Submitted,

Donald Johnson
B07125
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, FL 33034

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished to the following:

United States District Court
Southern District of Florida
Office of the Clerk – Room 8N09
400 N. Miami Ave.
Miami, FL 33128

Daniel L. Abbott, Esq.
Weiss, Serota, et al.
200 East Broward Blvd.
Suite 1900
Ft. Lauderdale, FL 33301

Joanna Doerfel, Esq.
Weiss, Serota, et al.
2525 Ponce De Leon Blvd.
Suite 700
Miami, FL 33134

Robert H. DeFlesco III, Esq.
Weiss, Serota, et al.
2525 Ponce De Leon Blvd.
Suite 700
Miami, FL 33134

And was placed in the hands of prison officials at Dade Correctional Institution for the purposes of mailing via U.S. Mail on this 21 day of June, 2012.

Donald Johnson
B07125
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, FL 33034

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JUN 21 2012
DT

SERVICE LIST

Case No.: 11-62012-CIV-COHN
Johnson v. Lerner

Donald E. Johnson
B07125
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, FL 33034
Pro se Plaintiff

Daniel L. Abbott, Esq.
Weiss, Serota, et al.
Counsel for Defendant Lerner
200 East Broward Blvd.
Suite 1900
Ft. Lauderdale, FL 33301

Joanna Doerfel, Esq.
Weiss, Serota, et al.
Counsel for Defendant Lerner
2525 Ponce De Leon Blvd.
Suite 700
Miami, FL 33134

Robert H. DeFlesco III, Esq.
Weiss, Serota, et al.
Counsel for Defendant Lerner
2525 Ponce De Leon Blvd.
Suite 700
Miami, FL 33134

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-62012-CIV-COHN
MAGISTRATE JUDGE P.A. WHITE

DONALD E. JOHNSON, :

Plaintiff, :

v. : REPORT THAT CASE IS READY FOR TRIAL

CITY OF MIRAMAR, et al., :

Defendants. :

This prisoner civil rights case was referred to the undersigned for preliminary proceedings pursuant to 28 U.S.C. §636(b)(l).

The case is now at issue. The dates entered in the pre-trial scheduling order have been extended and have now passed. No dispositive motions have been filed. I will handle any motions re-referred to me.

It is therefore respectfully recommended that this case be placed upon the trial calendar of the District Judge.

DONE AND ORDERED at Miami, Florida, this 8th day of August, 2012.

UNITED STATES MAGISTRATE JUDGE

cc: Donald E. Johnson, Pro Se
B07125
Dade Correctional Institution
Address of record

Daniel Lawrence Abbot, Esq.
Joanna Doerfel, Esq.
Attorneys of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-62012-CIV-COHN

JUDGE COHN/MAGISTRATE JUDGE WHITE

DONALD E. JOHNSON,

Plaintiff,

v.

OFFICER ADAM LERNER,

Defendant.
_____/

DEFENDANT'S PRETRIAL STATEMENT

Pursuant to Judicial Order Scheduling Pretrial Proceedings When Plaintiff is Proceeding Pro Se (DE 14), Defendant Adam Lerner ("Lerner"), through his undersigned counsel, submits this Pretrial Statement and states as follows:

A. Brief General Statement

The instant litigation arises out of the Miramar Police Department's arrest of the Plaintiff, Donald Johnson ("Johnson"), on February 25, 2008. At issue are Johnson's excessive force allegations that Lerner, among other things, (a) kicked Johnson in the face while handcuffed on the floor, and (b) punched and hit Johnson in the head with a flashlight while he sat in the back of a patrol car.

B. Written Statement of Facts

At 9:38 p.m. on February 25, 2008, Officer Lerner was dispatched to a call of a rape in progress. Upon his arrival at the residence located at 7051 SW 27th Street, Miramar, Florida, Lerner observed a young female child naked on the bed, on her hands and knees, and a naked

adult male behind her, engaged in sexual intercourse. Lerner immediately entered the house (via the back entrance).

Once inside the residence, the bedroom door opened and the naked male (that Lerner had observed through the window) exited the room very quickly. Lerner immediately ordered Johnson to get on the ground. Johnson did not obey these instructions and continued walking towards Lerner. Lerner then grabbed Johnson's arm and brought him to the ground. Johnson's face struck the tile floor causing injury to his mouth. Lerner placed Mr. Johnson into handcuffs and proceeded to secure him in the rear of his police vehicle. At no time did Lerner kick Johnson. Johnson was then taken to Memorial Regional Hospital for treatment.

Thereafter, Johnson was medically cleared and transported to the Miramar Police Station, where he remained in the back of the patrol car. He was then transported across the street to the Miramar Detective Bureau[1] for the purpose of obtaining a probable cause affidavit prepared by Detective Ralph Savain ("Savain"). Johnson was then taken to jail. At no time at the Police Station or the Detective Bureau did Officer Lerner punch, strike with a flashlight, or otherwise hit Johnson.

On May 19, 2009, Johnson pled guilty to four (4) counts of sexual battery on a child with family or custodial authority (a first degree felony), and was sentenced to 37 years in a Florida state prison, followed by 40 years of sexual offender probation. Johnson was classified as a "sexual predator."

C. Exhibits

No.	Exhibit/Description
1	Miramar Police Department Policy & Procedures
2	BSO Call Service Reports (February 25, 2008 – February 26, 2008)
3	BSO In-House Summary Sheet (Detailed Activity Sheet)

[1] The Detective Bureau is also referred to as the Criminal Investigation Department ("CID").

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2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

4	Incident/Investigation Report
5	Case Supplemental Report: Statement of Johnson
6	Internal Police Memorandum from Sergeant James Dunkelberger to Chief of Police Keith Dunn (includes subject officers statements from Officers Lerner and Savain) (dated May 22, 2009)
7	Internal Police Memorandum from Sergeant Steve Croye (dated March 6, 2008)
8	Officer Response to Resistance report by Officer Lerner
9	Public Corruption/Special Prosecutions Closeout Memorandum from David Schulson (dated April 24, 2009)
10	Complaint (DE 1, dated September 14, 2011)
11	Amended Complaint (previous case, filed September 23, 2008
12	Miramar Fire Rescue Records
13	Memorial Hospital Records
14	Armor Health Services Progress Notes, February 26, 2008 – February 29, 2008
15	Deposition of Donald Johnson
16	Medical Records from Dade County Correctional Institute
17	Mental Health Records from Dade County Correctional Institute
18	Deposition of Officer Lerner
19	Johnson's Dental Records From Dade County Correctional Institute
20	Deposition of Dr. John Childress
21	Affidavit of Adam Lerner
22	Sworn statement from Andres Liyim (dated February 27, 2008; interviewed by Detective Savain, translated by Detective Arbelaez)
23	Sworn Statement of Capt. Mario Bonis (March 24, 2009)
24	Sworn Statement of Det. Ralph Savain (May 22, 2009)
25	Sworn Statement of Plaintiff Donald Johnson (March 2, 2009)
26	Sworn Statement of Miramar Fire Rescue Lt. Bruce Hill (March 27, 2009)
27	Sworn Statement of Miramar Firefighter Paramedic Nicolas Wydra (March 27, 2009)
28	Sworn Statement of Miramar Sergeant Steve Croye (March 17, 2009)
29	Sworn Statement of Adam Lerner (May 22, 2009)
30	Letter from Plaintiff Johnson to Internal Affairs Division (December 8, 2008)
31	Photograph: Broward Sheriff's Office booking photo
32	Photograph: Johnson's house at 7041 SW 27th St., Miramar, FL 33023
33	Photograph: Johnson's dog jumping on cage
34	Photograph: Johnson's dog on all fours at gate of fence
35	Photograph, interior of residence: depicting living room and closed front door which is facing north
36	Photograph, interior of residence: depicting dining room and closed rear door which faces south
37	Photograph, doorway to Johnson's bedroom: photograph depicts tile floor where Johnson was taken to the ground face first.
38	Photograph, living room: depicting Johnson's bedroom in upper left rear, the front doorway with door open to the right of that. Bottom of picture depicts tile floor, blood pattern at exact location where Johnson was taken to the ground

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D. Witnesses (non-inmate)

1. Captain (Ret.) Mario Bonis

2. Officer Adam Lerner
Miramar Police Department
3064 N. Commerce Parkway
Miramar, FL 33025

3. Detective Ralph Savain
Miramar Police Department
3064 N. Commerce Parkway
Miramar, FL 33025

4. Officer Jason Sorrell
Miramar Police Department
3064 N. Commerce Parkway
Miramar, FL 33025

5. Officer Jonathan Black
Miramar Police Department
3064 N. Commerce Parkway
Miramar, FL 33025

6. Sergeant James Dunkelberger
Miramar Police Department
3064 N. Commerce Parkway
Miramar, FL 33025

7. Sergeant Steve Croye
Miramar Police Department
3064 N. Commerce Parkway
Miramar, FL 33025

8. Lieutenant Bruce Hill
Miramar Fire Rescue
14801 SW 27 St.
Miramar, FL 33027

9. Nicolas Wydra, Firefighter Paramedic
Miramar Fire Rescue
14801 SW 27 St.
Miramar, FL 33027

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

10. Dr. John Childress[2]
Biscayne Dental Group
350 N.E. 24th St.
No. 105
Miami, FL 33137

11. Any and all witnesses identified by Johnson and not objected to by Defendant.

12. Any rebuttal and impeachment witnesses.

13. Defendant reserves his right to supplement this list with any additional witnesses identified during the discovery of this matter.

E. Witnesses (inmate)

Lerner does not expect to call any inmate witnesses at trial.

F. Summary of Witness Testimony

1. Captain (Ret.) Mario Bonis

Captain Bonis was the second officer on-scene at the residence (after Lerner). He entered the residence and attended to Johnson's dog and the rape victim. He is expected to testify that at no time did Lerner intentionally kick Johnson in the face. Johnson's injuries were consistent with a forcible take down in which his face hit the tile floor causing injuries to his mouth.

2. Officer Adam Lerner

Officer Lerner was the first to respond to the residence. He is expected to testify that upon entrance into the house, Johnson resisted arrest. Accordingly, Lerner placed Johnson into an arm bar and forcibly put him to the ground, at which time his face hit the tile causing a lip laceration. At no time did Lerner kick Johnson in the face. Similarly, at no time thereafter did Lerner punch, strike with a flashlight, or otherwise hit Johnson — neither at the police station nor at the detective bureau.

[2] At the time of this filing, a motion to use Dr. Childress' deposition in lieu of his live testimony remains pending before the Court.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

3. Detective Ralph Savain

Detective Savain arrived at the residence at about 11 p.m. to conduct an investigation. His testimony is important for two reasons. First, he will testify to what he learned from the late Andres Liyim[3] during the course of his investigation. Second, he will testify that he did not see Lerner hit, strike, or punch Johnson at the Miramar Detective Bureau.

4. Officer Jason Sorrell

Officer Sorrell was at the Miramar Detective Bureau[4] while Johnson was sitting in the back of a parked patrol car. Officer Sorrell is expected to testify that he did not at any time see Officer Lerner punch, strike with a flashlight, or otherwise hit Johnson.

5. Officer Jonathan Black

Officer Black has knowledge regarding the facts and circumstances surrounding Johnson's arrest.

6. Sergeant James Dunkelberger

Sergeant James Dunkelberger was the head of the Miramar Internal Affairs Department at the time Johnson's arrest. He is expected to testify that after conducting an investigation and reviewing all available evidence, he concluded the excessive force claim against Officer Lerner was unfounded.

7. Sergeant Steve Croye

Sergeant Steve Croye is a supervisor with the Miramar Police Department and was responsible for conducting an investigation into Officer Lerner's use of force. Sergeant Croye is expected to testify that Lerner's actions (using an arm bar to gain control over a resisting

[3] Mr. Liyim was the grandfather of the rape victim. He was an eyewitness to the rape and subsequent take down of Johnson. Mr. Liyim passed away in early 2012.

[4] Officer Sorrell was at the detective bureau on other police matters.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Johnson) were proper and within the guidelines of Miramar police procedures.

8. Lieutenant Bruce Hill

Lieutenant Bruce Hill responded to the residence and provided onsite medical treatment to Johnson before he was transported to Memorial. He is expected to testify that Johnson (a) was being evasive and not answering questions, and (b) suffered a lip laceration.

9. Nicolas Wydra, Firefighter Paramedic

Firefighter Paramedic Nicolas Wydra responded to the residence and provided onsite medical treatment. He is expected to testify that he performed some routine tests which helped him conclude that Johnson faked being unconscious. He will also testify that he observed some bleeding coming from Johnson's lip.

10. Dr. John Childress

Dr. Childress was the emergency room doctor at Memorial Regional Hospital who treated Johnson in the early morning hours of February 26, 2008. Most notably, Dr. Childress treated Johnson for a lip laceration. Dr. Childress is expected to testify that (a) aside from a lip laceration, Johnson displayed no other medical symptoms, (b) Johnson did not appear to be in a lot of pain, and was calm while on the hospital bed, (c) minimal amounts of bleeding oozed from Johnson's lip and blood was not seen coming from his gums or teeth, and (d) Johnson's teeth were not loose, nor were his upper teeth shifted or front tooth broken.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Respectfully submitted,

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

By: /s/ Robert H. de Flesco
DANIEL L. ABBOTT
Florida Bar No.: 767115
Email: dabbott@wsh-law.com
ROBERT H. DE FLESCO
Florida Bar No.: 90831
Email: rdeflesco@wsh-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by CM/ECF and regular mail on this 17th day of August, 2012 to Donald E. Johnson, Inmate # BO7125, Dade Correctional Institution, 19000 SW 377th Street, Florida City, Florida 33034.

By: /s/ Robert de Flesco

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-62012-CIV-COHN/WHITE

DONALD E. JOHNSON,

Plaintiff,

vs.

OFFICER ADAM LERNER, et al.,

Defendants.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION, SETTING CASE FOR TRIAL, AND DENYING DEFENDANT'S MOTION TO USE DEPOSITION AT TRIAL

THIS CAUSE is before the Court upon the Report and Recommendation [DE 48] ("Report") of Magistrate Judge Patrick A. White, and Defendant Adam Lerner's Motion for Order Permitting Use of Deposition at Trial—Exceptional Circumstances [DE 44] ("Motion"). The Court notes that neither party has filed objections to the Report by the deadline of August 27, 2012, and that Plaintiff Donald E. Johnson has not responded to Defendant's Motion within the time permitted by the Local Rules. Nevertheless, the Court has reviewed *de novo* the file herein and is otherwise advised in the premises.

This action generally involves a claim by Johnson that Lerner, an officer of the Miramar Police Department, used excessive force against Johnson during his arrest on February 25, 2008.[1] The Magistrate Judge reports that pretrial proceedings have been completed and that the case is ready for trial. Therefore, the Magistrate Judge recommends that this action be placed on the Court's trial calendar. Having reviewed the Report and the case file, the Court agrees that the case should be set for trial.

---

[1] The Court previously dismissed Plaintiff's claims against Defendants City of Miramar and Chief of Police Melvin D. Standley. See DE 11.

In his Motion, Lerner seeks to introduce at trial the deposition of Dr. John Childress—who treated Johnson on the night of his arrest—in lieu of live testimony from Dr. Childress. In support of this request, Dr. Childress has submitted an affidavit explaining that he has an "extremely busy" work schedule that would make it "very difficult" for him to testify at trial. DE 44-2 at 3. Dr. Childress further states that his schedule is "very unpredictable" and that he "will be unable to commit, in advance, to testifying at a certain date and time." Id. According to Lerner, "Dr. Childress's extremely busy schedule constitutes exceptional circumstances sufficient to make him an unavailable witness, and therefore, allow his deposition to be read in at trial." DE 44 at 2; see Fed. R. Civ. P. 32(a)(4)(E) (authorizing a party to use a deposition at trial if the court finds "on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used").

While the Court fully appreciates Dr. Childress's busy schedule, the Court denies Lerner's request to introduce Dr. Childress's deposition at trial. Aside from the general importance of live testimony at trial, Dr. Childress's testimony regarding Johnson's medical condition on the night of his arrest appears especially important in this case, where Johnson alleges that he suffered severe injuries as a result of Lerner's use of excessive force. Indeed, both parties have listed Dr. Childress as a witness. And though Lerner contends that Johnson had the chance to participate in Dr. Childress's deposition by telephone but did not do so, Johnson's ability to participate may have been limited by his incarceration. Therefore, it is important that Johnson be given the opportunity to cross-examine Dr. Childress at trial. To the extent that Dr. Childress's schedule is unpredictable, the Court can accommodate that concern by allowing him to

testify out of order as his schedule permits. Finally, as set forth below, the trial in this case will not take place for four months, and Dr. Childress's availability may change during that time.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Magistrate Judge's Report and Recommendation [DE 48] is hereby **ADOPTED**.

2. The above-styled cause is hereby set for trial before the Honorable James I. Cohn, United States District Judge, at the United States Courthouse, 299 East Broward Boulevard, Courtroom 203E, Fort Lauderdale, Florida, on **January 14, 2013, at 9:00 a.m.**

3. The Calendar Call will be held on **January 10, 2013, at 9:00 a.m.**

4. The following pretrial deadlines shall apply in this case:

Motions in limine	December 20, 2012
Responses to motions in limine, joint pretrial stipulation, and deposition designations for trial for unavailable witnesses	January 7, 2013
Proposed jury instructions, voir dire questions, and objections to deposition designations and/or counter-designations	Calendar Call

5. Proposed jury instructions with substantive charges and defenses, as well as verdict forms, shall be in typed form and e-mailed to the Court. To the extent these instructions are based upon the Eleventh Circuit Pattern Jury Instructions, the parties shall indicate the appropriate Eleventh Circuit Pattern Jury Instruction upon which the instruction is modeled. All other instructions shall include

citations to relevant supporting case law.

6. Prior to trial, the parties shall submit to the Court a typed list of proposed witnesses and/or exhibits. All exhibits shall be pre-labeled in accordance with the proposed exhibit list. Exhibit labels must include the case number.

7. Defendant Adam Lerner's Motion for Order Permitting Use of Deposition at Trial—Exceptional Circumstances [DE 44] is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of September, 2012.

JAMES I. COHN
United States District Judge

Copies to:

Magistrate Judge Patrick A. White

Counsel of record via CM/ECF

Donald E. Johnson, *pro se* (via CM/ECF mail)
B07125
Dade Correctional Institution
19000 S.W. 377 Street
Florida City, FL 33034

FILED by GP D.C.
SEP 21 2012
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. – MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DONALD E. JOHNSON,
Plaintiff,

Vs.

ADAM LERNER,
Defendant.
_____/

Case No.: 11-62012-CIV-COHN
Judge: COHN
Magistrate Judge: WHITE

MOTION IN LIMINE

Plaintiff, Donald E. Johnson, pursuant to Fed. R. Evid. 403, is challenging the admissibility of prejudicial evidence introduced by Defendant Lerner and moves for an order instructing the Defendant and Defendant's counsel not to refer to, comment on, examine any witness regarding, or suggest to the jury in any way:

1. On May 19, 2009, Mr. Johnson pled guilty to four (4) counts of sexual battery familiar / custodial authority contrary to Fla. Stat. 794.011(8)(c);
2. On May 19, 2009, Mr. Johnson was sentenced to thirty-seven (37) years in the Florida State Prison followed by forty (40) years of Sex Offender Probation and is designated as a sexual predator;
3. Mr. Johnson's statement given to Detective Nikki Fletcher on the night of February 25, 2008;

4. Any reference to Mr. Johnson's felony prior to his arrest on the night of February 25, 2008.

As grounds for this motion, Mr. Johnson states as follows:

According to Fed. R. Evid. 403:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

By contrast, if the jury was to hear evidence of Mr. Johnson's felony and conviction, it would consequently create an atmosphere of unfair prejudice against Mr. Johnson and would deny him the right to a fair trial. "Unfair prejudice within its context means an undue tendency to suggest decisions on an improper basis, commonly, not necessarily, an emotional one." ***Old Chief v. United States***, 519 U.S. 172, 117 S.Ct. 644, 650 136 L.Ed.2d 574 (1997). Mr. Johnson is not on trial in this case. Furthermore, this is an attempt by Defendant Lerner to put Mr. Johnson on trial; convicting him for a second time. "[E]vidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence." ***Id.*** at 651. Rule 403 also "[r]equires the court to look at the evidence in light most favorable to its admissions, maximizing its probative value and minimizing its undue prejudicial impact." ***United States v. Lopez***, 649 F.3d 1222, 1247 (11th Cir. 2011); *see also*

United States v. Bradbury, 466 F.3d 1249 (11th Cir. 2006) (quoting ***United States v. Dodds***, 34 F.3d 893 (11th Cir. 2003)).

The evidence of Mr. Johnson's felony and conviction is not relevant to determine whether or not Defendant Lerner used excessive force upon Mr. Johnson's arrest and under Rule 403, presenting such evidence would be "substantially outweighed by the danger of unfair prejudice."

The Eleventh Circuit Court of Appeals "[r]ecognized that Fed. R. Evid. 403 permits the District Court to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice" and Rule 403 demands a balancing approach between the degrees of probative value that a piece of evidence has and its prejudicial effect. (Quotations omitted) ***United States v. Dodds***, 347 F.3d 893, 897 (11th Cir. 2003).

"Only if the decision to admit evidence over a Rule 403 challenge is unsupportable when the evidence is viewed in the light most supportive of the decision ... constitutes an abuse of discretion." ***United States v. Jernigan***, 341 F.3d 1273, 1285 (11th Cir. 2003), and [t]his Rule is an extraordinary remedy which should be used sparingly, and indeed, the trial court's discretion to exclude evidence as unduly prejudicial is narrowly circumscribed. ***Id.*** The jury would base their decisions on the evidence of Mr. Johnson's felony and conviction and

not on the evidence Defendant Lerner used excessive force upon Mr. Johnson's apprehension after he was seized and arrested.

This is a 42 U.S.C. 1983 civil rights complaint filed against Defendant Lerner for using excessive force during and after Mr. Johnson was arrested. Defendant Lerner kicked Mr. Johnson in the face causing severe facial injuries after he was placed in handcuffs. Mr. Johnson fails to see how his felony and conviction contributed to Defendant Lerner use of excessive force.

Defendant Lerner claims in his affirmative defense [DE 12], Mr. Johnson was resisting arrest and was becoming combative. Mr. Johnson was neither charged with nor convicted of resisting arrest with violence pursuant to Fla. Stat. 843.01. Therefore, his felony and conviction of sexual battery is not relevant and cannot be used to prove Mr. Johnson did in fact become combative and resisted his arrest. If Mr. Johnson would have been charged and convicted of resisting arrest then the evidence of his conviction would have been relevant.

The circumstances surrounding Mr. Johnson's felony and conviction would run the risk of inducing a decision from the jury on a purely emotional basis and not on the evidence.

WHEREFORE, this motion is based on the pleadings, records, and papers on file in this action. Accordingly, Mr. Johnson respectfully requests this court to

exclude evidence of his felony and conviction because such evidence would inflame the jury even if the jury was instructed to disregard it.

Respectfully Submitted,

Donald Johnson, B07125
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, Florida 33034

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished to the following:

United States District Court
Southern District of Florida
Office of the Clerk – Room 8N09
400 N. Miami Ave.
Miami, Florida 33128

Daniel L. Abbot, Esq.
Weiss, Serota, et al.
200 East Broward Blvd.
Suite 1900
Ft. Lauderdale, Florida 33301

Joanna Doerfel, Esq.
Weiss, Serota, et al.
2525 Ponce DeLeon Blvd.
Suite 700
Miami, Florida 33134

Robert H. Deflesco III, Esq.
Weiss, Serota, et al
2525 Ponce DeLeon Blvd.
Suite 700
Miami, Florida 33134

And was placed in the hands of prison officials at Dade Correctional Institution for the purposes of mailing via U.S. Mail on this 19 day of September, 2012.

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DADE C.I.

Donald Johnson, B07125

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Case No.: 11-62012-CIV-COHN

Johnson v. Lerner

Donald E. Johnson
B07125
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, Florida 33034
Pro se Plaintiff

Daniel L. Abbot, Esq.
Weiss, Serota, et al.
Counsel for Defendant Lerner
200 East Broward Blvd.
Suite 1900
Ft. Lauderdale, Florida 33301

Joanna Doerfel, Esq.
Weiss, Serota, et al.
Counsel for Defendant Lerner
2525 Ponce DeLeon Blvd.
Suite 700
Miami, Florida 33134

Robert H. Deflesco III, Esq.
Weiss, Serota, et al.
Counsel for Defendant Lerner
2525 Ponce DeLeon Blvd.
Suite 700
Miami, Florida 33134