

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:

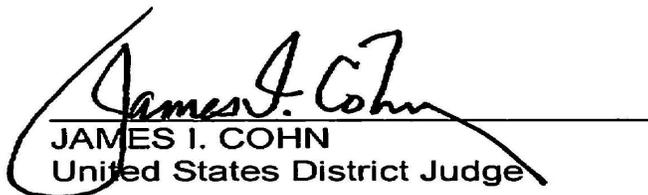
1. The Magistrate Judge's Report and Recommendation [DE 48] is hereby **ADOPTED**.
2. The above-styled cause is hereby set for trial before the Honorable James I. Cohn, United States District Judge, at the United States Courthouse, 299 East Broward Boulevard, Courtroom 203E, Fort Lauderdale, Florida, 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.



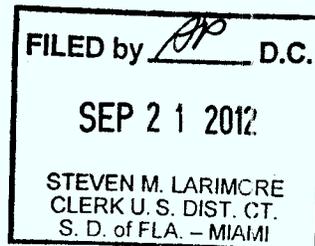
JAMES I. COHN
United States District Judge

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



**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.

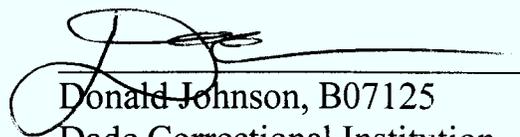
Defendant Lerner claims in his affirmative defense [DE 12], Mr. Johnson was resisting arrest and was becoming combative. Mr. Johnson was neither charged with nor convicted of resisting arrest with violence pursuant to Fla. Stat. 843.01. Therefore, his felony and conviction of sexual battery is not relevant 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
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Miami, Florida 33128

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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.




Donald Johnson, B07125

SERVICE LIST

Case No.: 11-62012-CIV-COHN

Johnson v. Lerner

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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, et al.,

Defendant.

**DEFENDANT'S MEMORANDUM OF LAW
OPPOSING PLAINTIFF'S MOTION IN LIMINE**

Defendant, Miramar Police Officer Adam Lerner ("Lerner"), through his undersigned counsel, files this opposition memorandum, pursuant to L.R. 7.1(c), respectfully requesting that the Court deny Plaintiff Donald Johnson's ("Johnson['s]") Motion in Limine ("Motion") (D.E. 52) filed on September 21, 2012. In support, Lerner states as follows:

OVERVIEW

Johnson has filed the Motion seeking to preclude any mention at trial of the fact that the encounter that forms the basis of this civil rights lawsuit occurred in connection with Johnson's rape of a child,¹ and that he pled guilty to four felonies (§ 1) and was sentenced to 37 years in prison and an additional 40 years of probation (§ 2) in connection therewith. In addition, Johnson seeks to preclude evidence of a statement he apparently made to a police detective (§ 3),

¹ While the numbered paragraphs of the Motion seek only to limit evidence of Johnson's plea and sentence for the underlying sexual crimes, his contention that he was not charged with resisting arrest, and therefore cannot have been "resisting arrest and was becoming combative" (Motion at p. 4) prior to sustaining the injuries complained of, seem to suggest that Johnson seeks to preclude evidence of his criminal conduct prior to arrest as well.

and an apparent felony conviction that predated the subject arrest and conviction (§ 4), but neither the statement nor the conviction is identified, and no argument is offered as to why the referenced evidence should be held inadmissible.

Because Lerner contends that Johnson's injuries were incurred while being taken into custody after committing violent felonies and becoming combative during the course of the arrest, both the underlying circumstances of the encounter and Johnson's convictions are relevant and admissible. The Motion should be denied.

Relevant Facts

The Motion is apparently premised upon the fact the *Johnson contends* he was kicked "in the face causing severe facial injuries after he was placed in handcuffs." (Motion at p.4). In other words, any evidence inconsistent with *his version of events* is irrelevant and prejudicial. Unfortunately for Johnson, however, evidence is admissible if it is relevant to an issue in the lawsuit.

On February 25, 2008, at around 9:30 p.m., Officer Lerner was dispatched to Johnson's residence to respond to a rape in progress. According to Lerner, when he attempted to take Johnson into custody, Johnson "resist(ed) arrest and was becoming combative." Motion at p. 4. Lerner was therefore forced to use an "arm bar" to bring Johnson to the ground, and Johnson's lip was cut during the takedown. Lerner then handcuffed Johnson. Following his arrest, Johnson was treated at Memorial Hospital, then transported to the Miramar Detective Bureau, and finally off to jail. Lerner contends that his use of force was not excessive under the circumstances.

ARGUMENT

1. The *circumstances* surrounding Johnson's arrest are admissible to (a) provide the jury with context necessary to understand the arrest, (b) articulate Lerner's defense theory of

how Johnson's suffered facial injuries, and (c) justify Lerner's entry into the Johnson house, and the level of force used to get Johnson into custody.

2. Evidence of Johnson's *conviction* is admissible because it does not improperly suggest that Lerner's use of force was justified because Johnson pled guilty to state charges of sexual battery arising out of this incident.

3. In addition, evidence of Johnson's *conviction* is admissible to impeach Johnson under Federal Rule of Evidence 609.

4. Evidence of a statement Johnson purportedly gave to a detective and evidence of an unspecified prior felony conviction should not be precluded in limine because Johnson does present facts in the Motion sufficient to evaluate the merits of the claim.

MEMORANDUM OF LAW

I. Evidence of Circumstances Surrounding Johnson's Arrest will Help the Jury Understand Johnson's Excessive Force Claim

A. Circumstances Are Admissible Under Federal Rule of Evidence 404(b)²

Evidence surrounding the circumstances of Johnson's sexual battery arrest should be admitted because (a) the criminal activity was inseparably intertwined with the instant litigation, and (b) the evidence is necessary to provide the jury with a full account of the events. In excessive force cases, federal courts have routinely denied plaintiffs' motions in limine seeking to exclude evidence surrounding the underlying criminal activity, holding that such evidence is admissible under Federal Rule of Evidence 404(b).³ *See, e.g., Greene v. Distelhorst*, 116 F.3d

² Rule 404(b) is applicable in both criminal and civil cases. *Solis v. Seibert*, 2011 WL 398023, at *7 (M.D. Fla. Feb. 4, 2011) (citing *Huddleston v. U.S.*, 485 U.S. 681, 685 (1988)).

³ Lerner acknowledges that the evidence Johnson seeks to exclude is not, strictly speaking, evidence of "other crimes" and does not fit neatly in a Rule 404(b) analysis. The rationale underlying Rule 404(b), however, is useful in determining that events surrounding Johnson's arrest and conviction provide a clear picture to the jury of the circumstances surrounding the instant civil rights case.

1480, at *3–4 (6th Cir. 1997) (denying plaintiff’s motion in limine because evidence of his conduct leading to his arrest and the convictions stemming from that arrest “were admissible to provide the jury with a full account of the events giving rise to [his] present claims”); *Hernandez v. Cepeda*, 860 F.2d 260, 265 (7th Cir. 1988) (admitting evidence that plaintiff—in a § 1983 excessive force claim—was being arrested of rape at the time of the alleged civil rights violation); *Gallagher v. City of West Covina*, 244 F. App’x 577, 578 (9th Cir. 2005) (holding that threats plaintiff allegedly made to police prior to his arrest were “clearly relevant” to plaintiff’s excessive force claim because it explained why the officers entered the house with weapons drawn, plaintiff’s motion in limine denied); *Angelotti v. Roth*, 2006 WL 3666849, at *1 (S.D. Fla. Nov. 17, 2006) (admitting plaintiff’s prior arrests and convictions as the case could turn upon the credibility of plaintiff); *Dean v. Watson*, 1995 WL 692020, at *2 (N.D. Ill. Nov. 16, 1995) (finding admissible plaintiff’s charge of battery in connection with his arrest, thereby denying his motion in limine).

The Rule 404(b) analysis holds true for cases not involving excessive force claims. For instance, evidence of a plaintiff’s underlying crime and events leading up to his arrest are relevant—and thus admissible for several reasons: (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense,⁴ (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged

⁴ It is irrelevant that Johnson was not charged or convicted of resisting arrest. Motion at p. 4; Fla. Stat. 843.01; Fla. Stat. 843.02; *see also Baker v. Coto*, 154 F. App’x 854, 859–60 (11th Cir. 2005) (rejecting the plaintiff’s argument in an excessive force claim that he was never charged with possession of stolen property in his underlying burglary case because such possession went to the plaintiff’s credibility). Pursuant to Rule 404(b), admissible evidence includes that of an uncharged offense which arose out of the same transaction or series of transactions as the charged offense. *U.S. v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998). Resisting arrest is a crime under Florida law. Fla. Stat. 843.01; Fla. Stat. 843.02. Lerner maintains that Johnson resisted arrest and therefore Lerner put Johnson in an arm bar and took him to the ground. As explained, *infra*, use of an arm bar is constitutionally reasonable in such circumstances.

offense. *U.S. v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998). In *U.S. v. Wright*, 392 F.3d 1269, 1271 (11th Cir. 2004), the plaintiff there filed a motion in limine requesting the district court to exclude evidence concerning his resistance to arrest and resulting charges of battery on a law enforcement officer and resisting an officer with violence. He argued that these crimes had no probative value to the present charge, possession of a firearm. *Id.* at 1275–76. The Eleventh Circuit denied the plaintiff’s motion because “evidence of [the plaintiff’s] actions prior to the discovery of the firearm gives the jury the body of the story, not just the ending . . . and evidence of those events contributed to the understanding of the situation as [a] whole.” *Id.* at 1276. Similarly, here, as explained *infra*, evidence of Johnson’s crime and surrounding events goes a long way to help the jury understand the “body” of the instant litigation. Accordingly, evidence of events prior to arrest (to explain Johnson’s takedown) and after arrest (to rebut Johnson’s claim that Lerner hit him with a flashlight) are relevant to the jury and should be admissible.

The probative value of Johnson’s arrest is not substantially outweighed by the danger of unfair prejudice. FED. R. EVID. 403. Johnson is seeking to exclude reference to his criminal activity pursuant to Rule 403, claiming such information is too prejudicial. Mot. at p. 1. But the nature of evidence against a defendant is meant to be prejudicial, “for if all the evidence were favorable, there would be not trial.” *Wright*, 392 F.3d at 1276. Rule 403 is an extraordinary remedy which should be used sparingly since it permits the trial court to exclude concededly probative evidence. *U.S. v. Fallen*, 256 F.3d 1082, 1091 (11th Cir. 2001). The proper question to ask is not whether the evidence is prejudicial, but rather whether its probative value is outweighed by its prejudicial effect. *Id.* The balancing test set forth by Rule 403 favors admissibility. *U.S. v. Dodds*, 347 F.3d 893, 897 (11th Cir. 2003). As explained fully below, the events surrounding Johnson’s arrest are probative and not substantially outweighed by the danger

of unfair prejudice.

B. Circumstances Necessary to Support Lerner's Defense Theory

The circumstances leading up to Johnson's arrest are probative (and therefore admissible) because they support Lerner's defense theory. *See U.S. v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (noting that defendants are entitled to present a defense). Mentioning Johnson's crime (sexual battery on a child) will help the jury understand why Lerner forcibly took Johnson to the ground. By contrast, omitting Johnson's criminal activity will make the takedown appear unprovoked.

Lerner contends that Johnson's facial injuries occurred the takedown, and did not (as Johnson alleges) result from a purported kick to his face. The events surrounding Johnson's arrest were chaotic. On the evening of February 25, 2008, Lerner responded to a dispatch call about a rape in progress. Upon arrival, Lerner stood outside of the front bedroom window and witnessed Johnson raping a child. Lerner then rushed to the rear of the house and was let in by the victim's grandfather. Upon entry into the house, Lerner was immediately met by an aggressive, 100lb American Bulldog. Lerner managed to get by the bulldog at which time he saw Johnson (naked) exit the bedroom. While simultaneously trying to avoid the bulldog, Lerner repeatedly commanded Johnson to get on the ground. When Johnson refused, Lerner approached him, put in him in an arm bar and took him to the ground—at which time Johnson's face hit the tile floor causing a lip laceration.

Significantly, Johnson wants to exclude all reference to his felony prior to his arrest on February 25, 2008. Mot. at p. 2. Stated otherwise, he wants to prevent Lerner from referencing anything that happened (since it *all* relates to Johnson's felony) prior to the moment Johnson was handcuffed and on the ground (the arrest). This is nonsensical. It cannot be that the present

excessive force case will “pick up” at the exact moment Johnson was on the ground without explaining to the jury how and why Johnson got there.

Additionally, events that occurred *after* Johnson’s arrest are relevant to Lerner’s defense that he at no time struck Johnson’s head with a flashlight. Johnson contends he was sitting in the back of parked patrol car at the Miramar Detective Bureau when Lerner purportedly struck him. Revealing this information will make no sense to the jury without a timeline explaining that following arrest Johnson was transported to Memorial Hospital, and then was taken to the Detective Bureau where he waited for the police to finish paperwork. Lerner admits he was there, but maintains that he never hit Johnson. As a result, events after Johnson’s arrest should be admitted to aid the jury’s understanding of events.

C. Circumstances Necessary To Show That Lerner’s Actions Were Justified

If evidence of the circumstances prior to Johnson’s actual physical arrest were precluded, the jury will be left to question the propriety of Lerner’s actions such as (a) arriving to the Johnson residence in the first instance; (b) entering the Johnson house without invitation or a warrant; (c) having his gun drawn; and (d) placing Johnson under arrest, and utilizing force to do so.

Admissibility of the challenged evidence will show that Lerner’s entry into Johnson’s house with a weapon was justified. Use of force by a police officer is governed by the underlying crime.⁵ In the case of rape or sexual battery, an officer is entitled to use deadly force. *See Btresh v. City of Maitland, Fla.*, 2011 WL 3269647, at *19 (M.D. Fla. July 29, 2011) (holding that the officer reasonably used deadly force because the circumstances presented probable cause to believe that the suspect was inside an apartment complex committing rape). Here, Lerner

⁵ Police are entitled to a presumption of good faith in regard to the use of force applied during a lawful arrest. *Davis v. Williams*, 451 F.3d 759, 768 (11th Cir. 2006). It is well established that the typical arrest involves some force and injury. *Rodriguez v. Farrell*, 280 F.3d 1341, 1352–53 (11th Cir. 2002).

witnessed Johnson raping a child. Therefore, Lerner was justified to enter the house with a weapon and seek out Johnson.

Once inside, Lerner justifiably used an arm bar to bring Johnson to the ground. Upon Johnson's refusal to succumb to arrest, Lerner grabbed Johnson's arm and forcibly took him to the ground. Under the circumstances, using an arm bar was reasonable. *See Lloyd v. Tassell*, 384 F. App'x 960, 964 (11th Cir. 2010) (finding that because Lloyd resisted arrest, it was "constitutionally reasonable" for the officer to use a "routine arm bar takedown procedure" to bring him to the ground). Additionally, the fact that Johnson suffered a lip laceration upon takedown does not turn Lerner's accepted police maneuver into excessive force. *See id.* (refusing to find excessive force despite the officer's takedown resulting in abrasions to plaintiff's forehead and nose).

For the foregoing reasons, circumstances surrounding Johnson's arrest are admissible to (a) provide the jury with context necessary to understand the arrest, (b) articulate Lerner's defense theory of how Johnson's suffered facial injuries, and (c) justify Lerner's entry into the Johnson house, and the level of force used to get Johnson into custody.

II. Evidence of Johnson's Conviction is Admissible

Evidence of Johnson's conviction is also admissible for substantive reasons. The Eleventh Circuit has expressly rejected such an admissibility challenge under facts indistinguishable from the case at bar. *See Harrell v. Campbell*, 308 F. App'x 415 (11th Cir. 2009) (expressly rejecting a civil rights/excessive force plaintiff's contention that the admission into evidence of his underlying convictions improperly suggested that the defendant/police officer's "use of force was justified"). Similarly, here, Johnson pled guilty to state charges (sexual battery) and seeks to exclude evidence of his conviction. As in *Harrell*, this Court

should reject his request and accordingly deny his Motion.

Moreover, evidence of Johnson's criminal activity is admissible to impeach Johnson. Federal Rule of Evidence 609 requires that evidence of prior convictions of a non-defendant witness be admitted if (1) the convictions are for crimes punishable by death or imprisonment in excess of one year, (2) the convictions are less than ten years old, and (3) the evidence is being used to attack the witness' credibility. *U.S. v. Burston*, 159 F.3d 1328, 1335 (11th Cir. 1998); FED. R. EVID. 609(a)(1). Johnson's sexual battery conviction meets all three elements: (1) his sentence exceeds one year (37 years), (2) the conviction is less than ten years old (convicted May 2009), and (3) referencing Johnson's criminal activity will be used to attack his credibility. Therefore, evidence of Johnson's sexual battery conviction is admissible.

In *Branley v. Perryman*, 2006 WL 2786880, at *1 (M.D. Ala. Sept. 27, 2006), the plaintiff filed a motion in limine requesting that evidence of his prior rape convictions be excluded. The court denied the plaintiff's motion, finding that plaintiff's credibility was paramount to the case and "the outcome likely will turn on which witnesses to believe." *Id.*

This case, too, turns on whether the jury believes Johnson or Lerner. Accordingly, Johnson's credibility is essential and Lerner should be allowed to attack it under Rule 609(a)(1). Accordingly, evidence that Johnson (a) is a convicted felon, (b) pled guilty to four counts of sexual battery of a person in familial or custodial authority with a person less than 12 years old, Fla. Stat. 794.011(8)(c), and (c) is serving 37 years in Florida State Prison, followed by 40 years of probation is proper evidence. *Brantley*, 2006 WL 2786880, at * 1 (citing *Burston*, 159 F.3d at 1335).

Accordingly, Lerner respectfully requests that Johnson's Motion be denied.

Respectfully submitted,

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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 4th day of October, 2012 to Donald E. Johnson, Inmate # BO7125, Dade Correctional Institution, 19000 SW 377th Street, Florida City, Florida 33034.

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