

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:11-cv-24247-KMM**

Smith v. Chief, North Miami Beach Police et al
Assigned to: Judge K. Michael Moore
Referred to: Magistrate Judge Patrick A. White
Cause: 28:1983 Civil Rights

Date Filed: 11/23/2011
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Tyis Smith
Prisoner ID: 090051077

represented by **Tyis Smith**
090051077
Metro West Detention Center
13850 N.W. 41st Street
Miami, FL 33178
PRO SE

V.

Defendant

Chief, North Miami Beach Police
Rafael P. Hernandez, Jr.

Defendant

State Attorney Dade County
Katherine Fernandez

Defendant

Director of Dade County Jails
Timothy Ryan

Defendant

Nelson Reyes

represented by **Bart Haskell Armstrong**
City of North Miami Beach
17011 ne 19th avenue
North Miami Beach, FL 33162
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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LEAD ATTORNEY
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Defendant

George Festa

Defendant

Luis Soto

represented by

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ATTORNEY TO BE NOTICED

Darcee S. Siegel
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Nelson Camacho

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Darcee S. Siegel
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Defendant

Cosimo Castronovo

represented by **Bart Haskell Armstrong**
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Date Filed	#	Docket Text
11/23/2011	<u>1</u>	A COMPLAINT Under The Civil Rights Act, 42 U.S.C. §1983, against Chief, North Miami Beach Police, Director of Dade County Jails, State Attorney Dade County. Filing fee \$ 350.00. IFP Not Filed, filed by Tyis Smith.(cqs) (Entered: 11/23/2011)
11/23/2011	2	Judge Assignment to Judge K. Michael Moore (cqs) (Entered: 11/23/2011)
11/23/2011	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. (cqs) (Entered: 11/23/2011)
11/23/2011	<u>4</u>	MOTION for Leave to Proceed in forma pauperis by Tyis Smith. (ar2) (Entered: 11/23/2011)
12/05/2011	5	PAPERLESS ORDER. THIS CAUSE came before the Court upon Plaintiff's Motion for Leave to Proceed in forma pauperis <u>4</u> . UPON CONSIDERATION of the Motion, the pertinent portions of the Record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion <u>4</u> is GRANTED. Signed by Judge K. Michael Moore on 12/5/2011. (dwe) (Entered: 12/05/2011)

12/06/2011	<u>6</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 12/6/2011. (tw) (Entered: 12/06/2011)
12/06/2011	<u>7</u>	ORDER ESTABLISHING DEBT TO CLERK OF \$350.00. Signed by Magistrate Judge Patrick A. White on 12/6/2011. (tw) (Entered: 12/06/2011)
12/08/2011	<u>8</u>	PRELIMINARY REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Tyis Smith Recommending 1.This complaint be dismissed for failure to state a claim pursuant to 28 U.S.C. §1915 (e)(2)(B)(ii). 2. The plaintiff should be permitted a period of time to obtain the names of the specific police officers whom he claims were directly involved in his assault, and then file an amended complaint. 3. The amended complaint must refer to Case No. 11-24247-Civ-Moore and be labeled as an amended complaint. 4. Failure to file a proper amended complaint within the time allowed shall result dismissal of this case. Objections to RRdue by 12/27/2011. Signed by Magistrate Judge Patrick A. White on 12/8/2011. (tw) (Entered: 12/08/2011)
12/21/2011	<u>9</u>	AMENDED COMPLAINT against Nelson Reyes, George Festa, Luis Soto, Nelson Camacho, Cosimo Castronovo filed in response to <u>8</u> PRELIMINARY REPORT AND RECOMMENDATIONS on 42 USC 1983 case, filed by Tyis Smith. (New parties added)(jua) (Entered: 12/22/2011)
01/17/2012	<u>10</u>	SUPPLEMENTAL REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Tyis Smith. Recommending 1.The amended complaint (DE#9) be dismissed for failure to state a claim pursuant to 28 U.S.C. §1915 (e)(2)(B)(ii). 2.The plaintiff should be permitted an additional period of time to comply with the Federal Rules of Civil Procedure,and file an amended complaint, with a separate paragraph for each defendant stating specifically what alleged violations he is responsible for. 3. The amended complaint must refer to Case No. 11-24247-Civ-Moore and be labeled as an amended complaint. 4. Failure to file a proper amended complaint within the time allowed shall result dismissal of this case. Objections to RRdue by 2/3/2012. Signed by Magistrate Judge Patrick A. White on 1/17/2012. (tw) (Entered: 01/17/2012)
01/17/2012	<u>11</u>	Notice to the Court of Six month Account Statements by Tyis Smith (jua) (Entered: 01/18/2012)
02/06/2012	<u>12</u>	MOTION for Leave to Proceed in forma pauperis by Tyis Smith. (jua) (Entered: 02/07/2012)
02/06/2012	<u>13</u>	AMENDED COMPLAINT against Nelson Camacho, Cosimo Castronovo, Nelson Reyes, Luis Soto filed in response to <u>10</u> SUPPLEMENTAL REPORT AND RECOMMENDATIONS, filed by Tyis Smith.(jua) (Entered: 02/07/2012)
02/08/2012	<u>14</u>	ORDER denying as moot <u>12</u> Motion for Leave to Proceed in forma pauperis, IFP has been granted by prior order and a debt established.. Signed by Magistrate Judge Patrick A. White on 2/8/2012. (cz) (Entered: 02/08/2012)
03/08/2012	<u>15</u>	PAPERLESS ORDER. THIS CAUSE came before the Court upon a sua sponte examination of the Record. In light of Plaintiff's Amended Complaint filed on February 6, 2012, Magistrate Judge White's Reports and Recommendations <u>8</u> <u>10</u> are DENIED AS MOOT. Signed by Judge K. Michael Moore on 3/8/2012. (dwe) (Entered: 03/08/2012)
04/05/2012	<u>16</u>	ORDER Re Service of Process Requiring Personal Service upon Sgt. Nelson Reyes, Officer Luis Soto, Officer Nelson Camacho & Sgt. Cosimo Castronovo. Signed by Magistrate Judge Patrick A. White on 4/5/2012. (br) (Entered: 04/06/2012)
04/06/2012	<u>17</u>	Summons Issued as to Nelson Camacho. (br) (Entered: 04/06/2012)
04/06/2012	<u>18</u>	Summons Issued as to Cosimo Castronovo. (br) (Entered: 04/06/2012)
04/06/2012	<u>19</u>	Summons Issued as to Nelson Reyes. (br) (Entered: 04/06/2012)
04/06/2012	<u>20</u>	Summons Issued as to Luis Soto. (br) (Entered: 04/06/2012)
04/11/2012	<u>21</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>13</u> Amended Complaint filed by Tyis Smith Recommending that 1) the amended complaint

		(DE#13) is the operative complaint; 2)The claims against Reyes, Luis, Camacho, Helson and Cosimo, Castronovo shall continue on the use of excessive force; 3)All other defendants named on the Courts docket should be dismissed. Objections to RRdue by 4/30/2012. Signed by Magistrate Judge Patrick A. White on 4/11/2012. (br) (Entered: 04/11/2012)
04/18/2012	<u>22</u>	NOTICE of Attorney Appearance by Bart Haskell Armstrong on behalf of Nelson Camacho (Armstrong, Bart) (Entered: 04/18/2012)
04/18/2012	<u>23</u>	NOTICE of Attorney Appearance by Bart Haskell Armstrong on behalf of Nelson Reyes (Armstrong, Bart) (Entered: 04/18/2012)
04/18/2012	<u>24</u>	NOTICE of Attorney Appearance by Bart Haskell Armstrong on behalf of Luis Soto (Armstrong, Bart) (Entered: 04/18/2012)
04/19/2012	<u>25</u>	SUMMONS (Affidavit) Returned Executed on <u>13</u> Amended Complaint Cosimo Castronovo served on 4/16/2012, answer due 4/30/2012. (gp) (Entered: 04/19/2012)
04/19/2012	<u>26</u>	SUMMONS (Affidavit) Returned Executed on <u>13</u> Amended Complaint Nelson Reyes served on 4/16/2012, answer due 4/30/2012. (gp) (Entered: 04/19/2012)
04/20/2012	<u>27</u>	SUMMONS (Affidavit) Returned Executed on <u>13</u> Amended Complaint Nelson Camacho served on 4/17/2012, answer due 5/1/2012. (gp) (Entered: 04/20/2012)
04/20/2012	<u>28</u>	SUMMONS (Affidavit) Returned Executed on <u>13</u> Amended Complaint Luis Soto served on 4/17/2012, answer due 5/1/2012. (gp) (Entered: 04/20/2012)
04/25/2012	<u>29</u>	NOTICE of Attorney Appearance by Darcee S. Siegel on behalf of Nelson Camacho (Siegel, Darcee) (Entered: 04/25/2012)
04/25/2012	<u>30</u>	NOTICE of Attorney Appearance by Darcee S. Siegel on behalf of Nelson Reyes (Siegel, Darcee) (Entered: 04/25/2012)
04/25/2012	<u>31</u>	NOTICE of Attorney Appearance by Darcee S. Siegel on behalf of Luis Soto (Siegel, Darcee) (Entered: 04/25/2012)
04/27/2012	<u>32</u>	Defendant's MOTION to Dismiss <u>13</u> Amended Complaint by Nelson Camacho. Responses due by 5/14/2012 (Armstrong, Bart) (Entered: 04/27/2012)
04/27/2012	<u>33</u>	Defendant's MOTION to Dismiss <u>13</u> Amended Complaint by Nelson Reyes. Responses due by 5/14/2012 (Armstrong, Bart) (Entered: 04/27/2012)
04/27/2012	<u>34</u>	Defendant's MOTION to Dismiss <u>13</u> Amended Complaint by Luis Soto. Responses due by 5/14/2012 (Armstrong, Bart) (Entered: 04/27/2012)
04/30/2012	<u>35</u>	MOTION TO DISMISS <u>13</u> Amended Complaint FOR FAILURE TO STATE A CLAIM by Cosimo Castronovo. Responses due by 5/17/2012 (Stearns, Christopher) (Entered: 04/30/2012)
05/14/2012	36	PAPERLESS ORDER ADOPTING <u>21</u> REPORT AND RECOMMENDATION. THIS CAUSE came before the Court upon Plaintiff Tyis Smiths Complaint Under 42 U.S.C. § 1983 <u>13</u> . THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, who issued a Report <u>21</u> recommending that Plaintiff's excessive force claims against Defendants Reyes, Soto, Camacho, and Castronovo be allowed to proceed and that all other defendants named on the Courts docket be dismissed. No Objections were timely filed. Upon consideration of the Complaint, Report, and after a de novo review of the record, it is hereby ORDERED AND ADJUDGED that Magistrate Judge White's Report and Recommendation <u>21</u> is ADOPTED except to the extent the last page of the Report contains a scrivener's error listing the Defendants' names. Petitioners claims against Defendants Rafael P. Hernandez, Jr., Katherine Fernandez, and Timothy Ryan are hereby DISMISSED. This case remains OPEN. Signed by Judge K. Michael Moore on 5/14/2012. (dwe) (Entered: 05/14/2012)
05/15/2012	<u>37</u>	SCHEDULING ORDER: Amended Pleadings due by 9/28/2012. Discovery due by 9/14/2012. Joinder of Parties due by 9/28/2012. Motions due by 10/19/2012.. Signed by Magistrate Judge Patrick A. White on 5/15/2012. (tw) (Entered: 05/15/2012)

05/17/2012	<u>38</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case. Denying <u>35</u> MOTION TO DISMISS <u>13</u> Amended Complaint FOR FAILURE TO STATE A CLAIM filed by Cosimo Castronovo, Denying <u>34</u> Defendant's MOTION to Dismiss <u>13</u> Amended Complaint filed by Luis Soto, Denying <u>33</u> Defendant's MOTION to Dismiss <u>13</u> Amended Complaint filed by Nelson Reyes, Denying <u>32</u> Defendant's MOTION to Dismiss <u>13</u> Amended Complaint filed by Nelson Camacho. The operative complaint is <u>13</u> Amended Complaint filed by Tyis Smith. Objections to RRdue by 6/4/2012. Signed by Magistrate Judge Patrick A. White on 5/17/2012. (tw) (Entered: 05/17/2012)
06/04/2012	<u>39</u>	ANSWER and Affirmative Defenses to Amended Complaint by Nelson Camacho, Cosimo Castronovo, Nelson Reyes, Luis Soto.(Armstrong, Bart) (Entered: 06/04/2012)
06/04/2012	<u>40</u>	ANSWER and Affirmative Defenses to Amended Complaint with Jury Demand by Cosimo Castronovo.(Stearns, Christopher) (Entered: 06/04/2012)
06/08/2012	41	PAPERLESS ORDER ADOPTING <u>38</u> REPORT AND RECOMMENDATION. THIS CAUSE came before the Court upon Plaintiff Tyis Smiths Amended Complaint Under 42 U.S.C. § 1983 <u>13</u> . THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, who issued a Report <u>38</u> recommending that Defendants' Motions to Dismiss <u>32 33 34 35</u> be denied. No Objections were filed. Upon consideration of the Amended Complaint, Report, Defendants' Motions to Dismiss, and after a de novo review of the record, it is hereby ORDERED AND ADJUDGED that Magistrate Judge White's Report and Recommendation <u>38</u> is ADOPTED. It is further ORDERED AND ADJUDGED that Defendants' Motions to Dismiss <u>32 33 34 35</u> are DENIED. This case remains OPEN. Signed by Judge K. Michael Moore on 6/8/2012. (dwe) (Entered: 06/08/2012)
09/10/2012	<u>42</u>	MOTION to Compel <i>Evidence</i> by Tyis Smith. (lh) (Entered: 09/10/2012)
09/10/2012	<u>43</u>	MOTION to Compel <i>Discovery</i> by Tyis Smith. (lh) (Entered: 09/10/2012)
09/10/2012	<u>44</u>	MOTION to Access Law Library by Tyis Smith. (lh) (Entered: 09/10/2012)
09/14/2012	<u>45</u>	MOTION to Compel <i>DISCOVERY RESPONSES AND TO DEEM REQUESTS FOR ADMISSION ADMITTED</i> by Cosimo Castronovo. Responses due by 10/1/2012 (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Text of Proposed Order)(Stearns, Christopher) (Entered: 09/14/2012)
09/14/2012	<u>46</u>	RESPONSE in Opposition re <u>43</u> MOTION to Compel <i>Discovery</i> , <u>42</u> MOTION to Compel <i>Evidence</i> filed by Nelson Camacho, Cosimo Castronovo, Nelson Reyes, Luis Soto. (Stearns, Christopher) (Entered: 09/14/2012)
09/14/2012	<u>47</u>	MOTION for Extension of Time to Complete Discovery by Nelson Camacho, Cosimo Castronovo, Nelson Reyes, Luis Soto. (Attachments: # <u>1</u> Text of Proposed Order)(Stearns, Christopher) (Entered: 09/14/2012)
09/17/2012	48	ORDER denying <u>42</u> Motion to Compel; denying <u>43</u> Motion to Compel based upon defendants' response that they have not received discovery requests; denying <u>44</u> Motion for access to library, the plaintiff must work within the confines of his place of incarceration; granting <u>45</u> defendants' Motion to Compel, stating that the plaintiff has provided no responses to discovery requests; granting <u>47</u> Motion for Extension of Time to Complete Discovery, ALL DATES ENTERED IN THE PRETRIAL SCHEDULING ORDER ARE EXTENDED FOR 90 DAYS FROM THE DATES ENTERED IN THAT ORDER. Signed by Magistrate Judge Patrick A. White on 9/17/2012. (cz) (Entered: 09/17/2012)
09/19/2012	<u>49</u>	MOTION to Compel <i>Discovery Responses and Deem Request for Admission Admitted</i> by Nelson Camacho, Nelson Reyes, Luis Soto. Responses due by 10/9/2012 (Siegel, Darcee) (Entered: 09/19/2012)
09/20/2012	50	ORDER granting in part and denying in part <u>49</u> Motion to Compel, the plaintiff shall respond to the defendants discovery requests immediately, including the requests for admissions. If no response is filed to the request for admissions they will be deemed admitted. Signed by Magistrate Judge Patrick A. White on 9/20/2012. (cz) (Entered: 09/20/2012)

10/09/2012	<u>51</u>	REQUEST/ MOTION For Judicial Notice by Tyis Smith. (cqs) (Entered: 10/10/2012)
10/09/2012	<u>52</u>	RESPONSE To Interrogatories by Tyis Smith. (cqs) (Entered: 10/10/2012)
10/09/2012	<u>53</u>	RESPONSE To Request For Production by Tyis Smith. (cqs) (Entered: 10/10/2012)
10/09/2012	<u>54</u>	RESPONSE to Request For Admissions by Tyis Smith. (cqs) (Entered: 10/10/2012)
10/09/2012	<u>55</u>	RESPONSE To Request For Admissions by Tyis Smith. (cqs) (Entered: 10/10/2012)
10/09/2012	<u>56</u>	RESPONSE To Interrogatories by Tyis Smith. (cqs) (Entered: 10/10/2012)
10/11/2012	57	ORDER denying <u>51</u> Motion motion to take judicial notice, the motion is unclear. Signed by Magistrate Judge Patrick A. White on 10/11/2012. (cz) (Entered: 10/11/2012)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.11-24247-CIV-MOORE
MAGISTRATE JUDGE P.A. WHITE

TYIS SMITH, :
 :
 Plaintiff, : REPORT
 : OF MAGISTRATE JUDGE
 v. : (DE#32, 33, 34 &35)
 :
 RAFAEL HERNANDEZ, ET AL., :
 :
 Defendants. :

I. Introduction

The plaintiff Tyis Smith, currently housed at the Metro West Detention Center, has 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 review of the motions to dismiss filed by the defendants (DE#s 32, 33, 34 & 35).

II. Analysis

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint because the plaintiff has failed to state a claim upon which relief may be granted. See Fed.R.Civ.P. 12(b)(6). The complaint may be dismissed if the plaintiff 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).

For reasons discussed in the Preliminary Report, the amended complaint in this case is sufficient to state a claim against the defendants.

A. Statement of Claims

In the initial complaint, the plaintiff named as defendants North Miami Beach Chief of Police Rafael Hernandez, Jr., Dade State Attorney Katherine Fernandez and Timothy Ryan, Director of Dade County Jails. The plaintiff alleges that Officers engaged in excessive force when they rammed his parked car from behind, and assaulted him, resulting in trauma to his forehead and a fractured forearm. He was then handcuffed and the police called an ambulance. He claims that the wound was cleaned, however his fracture and head trauma were treated solely with a bandage. The police refused him medical treatment at the station. He seeks monetary damages.

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).

A Report was entered recommending the dismissal of the complaint for failure to state a claim, however the plaintiff was permitted to amend his complaint to state the names of the defendants who were responsible for the use of unlawful force.

Research at the Florida County Jail website reveals that the plaintiff is facing multiple charges of battery on police officers and resisting officer without violence, fleeing to elude police officers following an accident and burglary in case no. F09-19928. The issue then becomes whether the plaintiff's claims are barred by Heck v Humphrey, 512 U.S. 477 (1994).

A plaintiff who has been convicted of resisting arrest or assaulting a police officer during the course of an arrest is not per se Heck barred from maintaining a §1983 action for excessive force stemming from the same confrontation. Puch v Villache of Glenwood, 2008 WL 4442610 (ND Ill), citing to McCann v Neilsen, 466 F.3d 619, 621 (7th Cir. 2006). The inquiry as to whether the

excessive force claim necessarily implies the invalidity of a criminal conviction for resisting an officer is fact specific and depends on a close comparison of the pleadings. Puch, supra, McCann, supra, VanGilder v Baker, 435 F.3d 689, 691 (7th Cir 2006)(no bar where plaintiff claimed he suffered unnecessary injuries because the officers' response to his resistance was not under the law governing excessive use of force objectively reasonable). In this case, it would require further development to determine whether excessive force has been used.

The plaintiff filed an amended complaint on February 12, 2012. (DE#13). The amended complaint was screened. In the amended complaint he named North Miami Beach Police Officers Reyes, Luis, Nelson and Castronova. He does not include Festa in this complaint. He states that he was arrested on June 16, 2009 and ordered on the ground. He claims he was kicked and punched multiple times by Officer Soto. Soto was the first to strike him with the baton several times across the forehead. Reyes twisted his left arm and stepped on it, resulting in a fracture, along with Camacho. He claims that Castronova arrived with the other officers and was kicking and punching him while on the ground.

The Report recommended that the plaintiff has stated a claim of use of excessive force against the named defendants, and service will be ordered by separate order. The Report was adopted by United States District Judge Michael K. Moore on May 14, 2012.

Motions to Dismiss

Defendant Camacho, Reyes and Soto filed motions to dismiss or in the alternative a motion for a more definite statement on April 27, 2012, claiming that the few sentences naming Camacho, Reyes and

Soto are insufficient to prepare a response. The standard of review for screening a complaint tracks the language of Rule 12(b)(6) used for reviewing a motion to dismiss. The Report following preliminary screening, stating that the plaintiff has stated a claim against the defendants was adopted by United States District Judge Michael K. Moore. It has therefore been found that the plaintiff's statement that Reyes twisted his arm behind his back and stepped on it, along with Camacho, resulting in a fracture, was sufficient to state a claim of use of unlawful force. Further, the allegation that Soto kicked and punched him multiple times, and was the first to strike him with a Baton was found sufficient to state a claim against Officer Soto.

Secondly, the defendants correctly assert they may not be sued in their 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. It is therefore recommended that the motions to dismiss filed by Camacho Ryes, and Soto be denied, with the exception that they are being sued in their individual capacity.

Lastly Office Castronova filed a motion to dismiss claiming that the plaintiff's claim against him failed to state a claim, and that he is entitled to qualified immunity. Once again, the claim that Officer Castronova arrived with other officers and was kicking

and punching him while he lay on the ground was found sufficient at this very preliminary stage to state a claim. As to qualified immunity, that cannot be determined at this time, until the facts are fully developed.

III. Recommendation

Based on the foregoing, it is recommended that:

1. The motions to dismiss of Camacho (DE#32), Reyes (DE#33), Soto (DE#34) and Castronova (DE#35) should be denied.

2. The operative complaint is the amended complaint (DE#13).

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 17th day of May, 2012.



UNITED STATES MAGISTRATE JUDGE

cc: Tyis Smith, Pro Se
Metro West Detention Center
Miami, FL
Address of record

Christopher Stearns, Esq.
Darcee Siegel, Asst City Att.
Attorneys of record