

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:11-cv-21886-KMW**

Argudo v. Castellon et al
Assigned to: Judge Kathleen M. Williams
Referred to: Magistrate Judge Patrick A. White
Case in other court: USCA, 12-15865-C
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 05/24/2011
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Jorge L Argudo
Prisoner ID: M07698

represented by **Jorge L Argudo**
M07698
South Bay Correctional Facility
Inmate Mail/Parcels
600 US Highway 27 South
South Bay, FL 33493
PRO SE

V.

Defendant

R Castellon
Dept. 004-ID.01637
TERMINATED: 10/18/2012

Defendant

M Sanchez
Dept.004-ID01637
TERMINATED: 10/18/2012

Defendant

L Sanchez
Dept.004-ID
TERMINATED: 10/18/2012

Defendant

Del Nodal
Dept.004-ID.01029
TERMINATED: 10/18/2012

Defendant

Antonio Sentmanat
Court ID No 1449(04)

represented by **Devang B. Desai**
Gaebe Mullen Antonelli & Dimatteo
420 S Dixie Highway
3rd Floor
Coral Gables, FL 33146
305-667-0223
Fax: 305-284-9844
Email: ddesai@gaebemullen.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Sergeant A. Guerra
TERMINATED: 10/18/2012

Defendant

Sergeant R. Tillman

TERMINATED: 10/18/2012

Defendant**Sergeant Beato**

TERMINATED: 10/18/2012

Defendant**Lieutenant Alvarez**

TERMINATED: 10/18/2012

Defendant**Lieutenant McIntyce**

TERMINATED: 10/18/2012

Defendant**Lieutenant Nazario**

TERMINATED: 10/18/2012

Date Filed	#	Docket Text
05/24/2011	<u>1</u>	COMPLAINT against Alvarez, Beato, R Castellon, Del Nodal, A. Guerra, McIntyce, Nazario, L Sanchez, M Sanchez, Antonio Sentmanat, R. Tillman. Filing fee \$ 350.00. IFP Filed, filed by Jorge L Argudo.(jua) Modified Event Type for MJSTAR on 6/21/2011 (ra). (Entered: 05/24/2011)
05/24/2011	2	Judge Assignment to Judge Jose E. Martinez (jua) (Entered: 05/24/2011)
05/24/2011	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: 05/24/2011)
05/24/2011	<u>4</u>	MOTION for Leave to Proceed in forma pauperis by Jorge L Argudo. (jua) (Entered: 05/24/2011)
06/01/2011	<u>5</u>	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTBLISHING DEBT TO CLERK OF \$350.00 and Granting <u>4</u> Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 5/31/2011. (tw) (Entered: 06/01/2011)
06/01/2011	<u>6</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 5/31/2011. (tw) (Entered: 06/01/2011)
06/01/2011	<u>7</u>	Letter from Jorge Argudo (abe) (Entered: 06/01/2011)
06/14/2011	<u>8</u>	Plaintiff Pleading in Support re <u>1</u> Complaint by Jorge L Argudo. (abe) (Entered: 06/15/2011)
06/14/2011	<u>9</u>	Letter from Jorge Argudo re: address of defendants (abe) (Entered: 06/15/2011)
06/20/2011	<u>10</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Jorge L Argudo. Recommending 1. All claims challenging the pending charges against the plaintiff and seeking dismissal of his cases are dismissed as barred by Heck, and dismissed pursuant to 28 U.S.C.1915(e)(2)(B)(ii), for failure to state a claim. 2. The plaintiff may amend his complaint on the sole issue of use of excessive force by officers upon his arrest. Objections to RR due by 7/8/2011. Signed by Magistrate Judge Patrick A. White on 6/16/2011. (tw) (Entered: 06/20/2011)
07/27/2011	<u>11</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS ; adopting Report and Recommendations re <u>10</u> Report and Recommendations. Plaintiff's claims are dismissed. Plaintiff may file an amended complaint with respect to the claim of excessive force only on or before 8/9/11. Signed by Judge Jose E. Martinez on

		7/27/11. (mg) (Entered: 07/27/2011)
08/04/2011	<u>12</u>	AMENDED COMPLAINT against Alvarez, Beato, R Castellon, Del Nodal, A. Guerra, McIntyce, Nazario, L Sanchez, M Sanchez, Antonio Sentmanat, R. Tillman, filed by Jorge L Argudo.(abe) (Entered: 08/04/2011)
09/08/2011	<u>13</u>	ORDER REASSIGNING CASE to Judge Kathleen M. Williams for all further proceedings, Judge Jose E. Martinez no longer assigned to case. Signed by Judge Jose E. Martinez on 9/8/2011. (vp) (Entered: 09/08/2011)
11/22/2011	<u>14</u>	NOTICE to the Court by Jorge L Argudo (jua) (Entered: 11/23/2011)
12/01/2011	<u>15</u>	AMENDED COMPLAINT against All Defendants, filed by Jorge L Argudo.(jua) (Entered: 12/01/2011)
12/28/2011	<u>16</u>	NOTICE of Filing Amended Discovery Exhibit by Jorge L Argudo.(jua) (Entered: 12/28/2011)
06/20/2012	<u>17</u>	NOTICE of Change of Address by Jorge L Argudo (address updated) (cbr) (Entered: 06/20/2012)
07/09/2012	<u>18</u>	ORDER REFERRING CASE to Magistrate Judge Patrick White to take all necessary and proper action as required by law. Signed by Judge Kathleen M. Williams on 7/9/2012. (lh) (Entered: 07/09/2012)
08/03/2012	<u>19</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case Complaint/Petition filed by Jorge L Argudo Recommending that: 1.The plaintiff should be permitted to file a second amendment on the sole issue of use of excessive force by officers upon his arrest; 2. He must name the officers responsible for the use of force and their specific actions; 3. Failure to file the Proposed Second Amended Complaint should result in dismissal of this case. Objections to RRdue by 8/20/2012 Signed by Magistrate Judge Patrick A. White on 8/2/2012. (br) (Entered: 08/03/2012)
08/13/2012	<u>20</u>	AMENDED COMPLAINT against All Defendants, filed by Jorge L Argudo.(mg) (Entered: 08/13/2012)
09/04/2012	<u>21</u>	ORDER Affirming REPORT AND RECOMMENDATIONS ; adopting and affirming Report and Recommendations re <u>19</u> Report and Recommendations. Certificate of Appealability: No Ruling Signed by Judge Kathleen M. Williams on 8/30/12. (mg) (Entered: 09/04/2012)
09/12/2012	<u>22</u>	SECOND SUPPLEMENTAL REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>20</u> Amended Complaint filed by Jorge L Argudo. Recommending 1. The claim of use of unlawful force should proceed against Officer Sentmanet. 2. All other claims and defendants should be dismissed for failure to state a claim pursuant to 28 U.S.C. §1915(e)(2)(B)(ii). 3. Service will be ordered against the sole defendant by separate order. 4. The second amended complaint (DE#20) is the operative complaint. Objections to RRdue by 10/1/2012 Signed by Magistrate Judge Patrick A. White on 9/12/2012. (tw) (Entered: 09/12/2012)
09/13/2012	<u>23</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AN INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon:Officer Antonio Sentmanat, City of Hialeah Police Department, 5555 East 8th Avenue, Hialeah, FL 33013. Signed by Magistrate Judge Patrick A. White on 9/13/2012. (tw) (Entered: 09/13/2012)
09/18/2012	<u>24</u>	Summons Issued as to Antonio Sentmanat. (br) (Entered: 09/18/2012)
09/28/2012	<u>25</u>	OBJECTIONS to <u>22</u> Report and Recommendations by Jorge L Argudo. (tp) (Entered: 10/01/2012)
10/18/2012	<u>26</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS for <u>20</u> Amended Complaint filed by Jorge L Argudo ; adopting Report and Recommendations re <u>22</u> Report and Recommendations. Certificate of Appealability: No Ruling; This matter remains Referred to United States Magistrate Judge Patrick White. Signed by Judge Kathleen M. Williams on 10/18/2012. (ls) (Entered: 10/18/2012)

10/25/2012	<u>27</u>	SUMMONS (Affidavit) Returned Executed on <u>20</u> Amended Complaint, <u>12</u> Amended Complaint, <u>15</u> Amended Complaint with a 21 day response/answer filing deadline by Jorge L Argudo. Antonio Sentmanat served on 10/23/2012, answer due 11/13/2012. (ls) (Entered: 10/26/2012)
11/07/2012	<u>28</u>	NOTICE of Change of Address by Jorge L Argudo (ls)[System Updated] (Entered: 11/08/2012)
11/07/2012	<u>29</u>	LETTER re: Appeal by Jorge L Argudo. (ls) Modified text on 11/9/2012 (vp). (Entered: 11/08/2012)
11/07/2012	<u>30</u>	Notice of Interlocutory Appeal by Jorge L Argudo re <u>26</u> Order Adopting Report and Recommendations. Filing fee \$(NOT PAID). Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (mc) (Entered: 11/09/2012)
11/09/2012		Transmission of Notice of Appeal, Report and Recommendations, Order and Docket Sheet to US Court of Appeals re <u>30</u> Notice of Interlocutory Appeal (mc) (Entered: 11/09/2012)
11/12/2012	<u>31</u>	ANSWER and Affirmative Defenses to Amended Complaint with Jury Demand by Antonio Sentmanat.(Desai, Devang) (Entered: 11/12/2012)
11/21/2012	<u>32</u>	NOTICE of Change of Address by Jorge L Argudo (system Updated) (cqs) (Entered: 11/21/2012)
11/28/2012	<u>33</u>	Acknowledgment of Receipt of NOA from USCA re <u>30</u> Notice of Interlocutory Appeal, filed by Jorge L Argudo. Date received by USCA: 11/15/2012. USCA Case Number: 12-15865-C. (mc) (Entered: 11/28/2012)
12/20/2012	<u>34</u>	SCHEDULING ORDER: Amended Pleadings due by 5/1/2013. Discovery due by 4/17/2013. Joinder of Parties due by 5/1/2013. Motions due by 5/22/2013. Signed by Magistrate Judge Patrick A. White on 12/20/2012. (tw) (Entered: 12/20/2012)
01/07/2013	<u>35</u>	ORDER of DISMISSAL from USCA. This appeal is DISMISSED, sua sponte, for lack of jurisdiction. The district court's October 18, 2012 order dismissing the case in part is not a final, appealable order re <u>30</u> Notice of Interlocutory Appeal, filed by Jorge L Argudo. No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir.R. 27-2 and all other applicable rules. USCA #12-15865-C (amb) (Entered: 01/07/2013)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 11-21886 ANJEM

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

UNITED STATES DISTRICT
COURTS OF SOUTHERN DISTRICT
OF FLORIDA IN AND FOR MIAMI
DADE COUNTY

JORGE L ARGUDO

v
R. CASTELLON, et al

FILED by <u>MM</u>	D.C.
AUG 13 2012	
STEVEN M. LARIMORE, CLERK, U.S. DIST. CT. MIAMI - MIAMI	

CIVIL DIVISION

Judge: P.A. White

Case no: 11-21886-CIV-MART.

AMENDED COMPLAINT

COMES NOW The plaintiff JORGE L ARGUDO by and through pro se Hereby moves this Honorable court pursuant to R. Civil. P. U.S.C. § 1983 civil action for deprivation of rights.

"ISSUE"

December 2, 2008 from 9:00 to 9:30 am Ofc's Sentmanat Antonio, Quinlan, Lopez-Cao, and Det Meloney alone with Det L Sanchez gained entry to Apt #327 at 4400 W 16 AVE Hialeah Fl 33012

Upon entry ofc Sentmanat struck the plaintiff multiple times in the face with closed fist causing swelling, bleeding, and chipped teeth, Throwing plaintiff to the ground and handcuffing him, Kicking his face then in played his taser and shot the plaintiff and tasered mutiple times, Another ofc, after Sentmanat exited, inplayed his taser and shot the plaintiff again but one prone missed, reloaded and shot the plaintiff again, and tasered mutiple times. At the time plaintiff didn't see other "Ofc", who did second tasering.

The plaintiff was taken down stairs on where ofc R Castellon refused plaintiff medical assistance and removed prones by hand. The plaintiff was taken to Jail and was banded out in order to seek medical assistance at Jackson Memorial Hospital where the plaintiff was still vomiting and having dizzy spells prior to police misconduct.

"RULES"

¶ § 721. Generally, burden of proof.
A warrantless search or seizure is per se unreasonable

under the fourth Amendment unless it falls within one of the well-established exceptions to the warrant requirement. Those exceptions are consent, search incident to a lawful arrest, hot pursuit, stop and frisk and probable cause with emergency or exigent circumstances.

2) § 142. Generally, use of force in making arrest.

A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (1) The officer is justified in the use of any force:

(1) which he or she reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest;

(2) when necessarily committed in retaking felons who have escaped; or

(3) when necessarily committed in arresting felons fleeing from justice.

3) 777.04. Attempt, solicitation, and conspiracy.

(2) A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation, ranked for purpose of sentencing as provided in subsection. (4)

(3) A person who agrees, conspires, combines, or confederates with another person or persons to commit any

offense, any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in subsection (4)

"ANALYSTS"

On December 2, 2008 Officers where given a consent to apt 529 not apt 327, officers did not have any exception as to rules, § 721. Generally; burden of proof, consent search incident to a lawful arrest, hot pursuit, stop and frisk or probable cause with emergency or exigent circumstances to have entered the plaintiff Apt 327 on 4400 WILG AVE Hialeah FL 33012. (see exhibit A)

Police officer, ~~Serjmanat Antonio, Quins, Lopez-Cao, and Det Moloney~~ alone with ~~Det L Sanchez~~ broke the plaintiff door and gained entry, where ofc ~~Serjmanat Antonio~~ claims in Affidavit that he seen plaintiff begin reaching into his waist to justify battering the plaintiff on which he handcuffed plaintiff face down as required by police procedure swat team take down, controlling the situation, on which makes it really hard for someone to spit and kick, in a face down position. Officer is stating this, to justify using his taser, on a handcuffed man.

The plaintiff is requesting the courts to ask officers to produce proof as to blood on Officers or weapons upon arrest to prove issue as required for burden of proof, 79.

Further more ofc's can not justify entry under the grounds that there was no proper consent to search nor any of the exceptions to the warrant requirement § 721 Generally; burden of proof.

Meaning that police officers where not conducting a lawful arrest as required to justify use of force 776.05.

The following police officers are placed as co-defended for Aiding, abetting, advising, or conspiring in violation of the code, (104.091):

- 1) Lt. R. Nazario
- 2) Sgt. R. Duke
- 3) Ofc. B. Hernandez
- 4) Det. L. Servilla
- 5) Det. Penate
- 6) Ofc. Y. Perez
- 7) Sgt. Del Nodal
- 8) Ofc. M. Sanchez

These Officers are from police station:

5555 East 8th AVENUE
Miami FL 33012

Also officers mentioned in the beginning of this Analysis.

CONCLUSION

The plaintiff moves for a claim of \$200,000 two hundred thousand for abuse of discretion, abuse of authority, miscarriage of justice, discrimination, Obstruction of Justice, punitive damages and cruel and unusual punishment inflicted.

Further more, that Officers not be granted immunity for damages but be treated as equal as citizen.

The plaintiff moves within his rights under the 5th, 8th and 14th Amendment of the United States constitution and Respectfully requests this Honorable court to process this complaint.

Date: August, 10, 2012

Respectfully Submitted

cc. Jorge L Argueta
Jorge L Argueta

(EXHIBIT A)



HIALEAH POLICE DEPARTMENT

CONSENT TO SEARCH

You may refuse to consent to a search and may demand that a search warrant be obtained prior to any search of the premises or vehicle described below.

If you consent to a search, anything of evidentiary value seized in the course of the search, can and will be introduced into evidence in court against you.

I have read the above statement and I am fully aware of the said rights.

I hereby consent to a search without warrant by officers of the City of Hialeah Police Department of the following:

4400 W-16ave Unit #529

Mia. Fl. 33012
(286) 991-8914

This statement is signed of my own free will without any threats or promises having been made to me.

[Signature]

12/02/2008
Date

07:17
Time

[Signature] 1374.
Witness

[Signature]
Witness

2008-46572

Hialeah Police Department Case Number

INTERNET MAIL

RECEIVED

RECEIVED
SEP 13 11:29 AM
USA
FIRST-CLASS
FOREVER

FOREVER

USMS
INSPECTED

George C Argudo 00046826
Training and Treatment Center
6950 NW 41st
Miami, FL 33166

United States District Court
Southern District of Florida
Office of the Clerk-Room 8001
400 North Miami Avenue
Miami, Florida 33128-7716

33128771699



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-21886-CIV-MARTINEZ
MAGISTRATE JUDGE P. A. WHITE

JORGE ARGUDO, :
 :
 Plaintiff, :
 :
 v. : SECOND SUPPLEMENTAL REPORT OF
 : MAGISTRATE JUDGE
 R. CASTELLON, et al., : (DE#20)
 :
 Defendant, :

I. Introduction

Jorge Argudo filed a pro se civil rights complaint while confined in the Metro West Detention Center (DE#1). He is proceeding in forma pauperis. A Report was entered recommending dismissal, but permitting the plaintiff to file an amendment solely on the issue of excessive force. The Report was adopted on July 27, 2011, and the plaintiff was ordered to file an amended complaint.

The amended complaint was referred for review and a Supplemental Report was entered. The Report recommended that the amended complaint had not cured the deficiencies in the initial complaint, and that the plaintiff be permitted one further opportunity to amend his complaint. This Report was adopted.

This Cause is before the Court upon the plaintiff's second amended complaint (DE#20) filed on August 13, 2012.

II. Analysis

A. Applicable Law for Screening

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

Sec. 1915 Proceedings in Forma Pauperis

* * *

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

* * *

(B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

This is a civil rights action pursuant to 42 U.S.C. §1983. Such actions require the deprivation of a federally protected right by a person acting under color of state See 42 U.S.C. §1983; Polk County v. Dodson, 454 U.S. 312 (1981); Whitehorn v. Harrelson, 758 F.2d 1416, 1419 (11 Cir. 1985). The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). When reviewing complaints pursuant to 28 U.S.C. §1915(e)(2)(B), the Court must apply the standard of review set forth in Fed.R.Civ.P. 12(b)(6), and the Court must accept as true the factual allegations

in the complaint and all reasonable inferences that can be drawn therefrom. Davis v. Monroe County Bd. Of Educ., 120 F.3d 1390, 1393 (11 Cir. 1997). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998), See: Whitehorn, 758 F.2d at 1419 id. Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31 (1992).

The complaint may be dismissed if the plaintiff does not plead facts that do not state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007)(retiring the oft-criticized "no set of facts" language previously used to describe the motion to dismiss standard and determining that because plaintiffs had "not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed" for failure to state a claim); Watts v. FIU, 495 F.3d 1289 (11 Cir. 2007). While a complaint attacked for failure to state a claim upon which relief can be granted does not need

detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S.Ct. at 1964-65. The rules of pleading do "not require heightened fact pleading of specifics" The Court's inquiry at this stage focuses on whether the challenged pleadings "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007)(quoting Twombly, 127 S.Ct. at 1964). When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred.¹

B. Factual Allegations

The plaintiff alleged use of unlawful force by the police in his initial complaint, but failed to name specific police officers responsible for the actions. A Report was entered, recommended the plaintiff file an amendment. The Report was adopted, and the plaintiff was permitted to amend, solely as to the issue of use of unlawful force, and to name the defendants directly responsible for the use of force. He timely filed an amended complaint on August 4, 2011. In the amended complaint he alleged he was battered and tasered by police, but again failed to name any specific defendants or facts surround their actions. He included an exhibit of a police report relating the event, apparently signed by Officer Sentmanat, stating that he punched him twice in the face with a closed fist when the plaintiff grabbed his vest and pushed him, and that while

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

he was handcuffed, he began kicking and spiting blood and at that time he was tasered.

The amendment, standing on its own, was insufficient, and it was recommended that the plaintiff be granted one further opportunity to file a second, proper amendment, naming officers who took part in the use of unlawful force, and specifically stating their actions. The Exhibit included with this amendment was to be considered part of the record. The Report was adopted, and the plaintiff was permitted one further opportunity file a second amendment on the sole issue of the use of excessive force by officers upon his arrest.

C. Second Amended Complaint (DE#20)

In the second amended complaint the plaintiff alleges that on December 2, 2008, officers Antonio Sentmanat, Quinlan, Lopez-Coo, Maloney and Sanchez entered his apartment unlawfully. He alleges that Senmanat struck the plaintiff multiple times in the face with a closed fist, causing swelling, bleeding, and chipped teeth. He threw him to the ground, handcuffed him, kicking his face and tasered him multiple times. He alleges another officer employed his taser multiple times, but he did not see who he was. He claims Officer Castellon refused him medical assistance. He was taken to jail and bonded out to seek medical assistance at Jackson Memorial Hospital, where he was vomiting and having dizzy spells.

The plaintiff claims Officers Nozario, Duke, Hernandez, Servilla, Penate, perez, Del-Nodal and Sanchez conspired to violate the code. He further attempts to add additional claims of false arrest.

D. Analysis

In the first instance, the plaintiff was granted permission to amend on the sole issue of use of unlawful force and his attempts at alleging unlawful arrest, and the failure of Officer Castellon to provide medical treatment, aside from being conclusory, Twombly, should be dismissed.

Secondly, at this early stage the plaintiff has stated a claim against Officer Sentmanat, and it is recommended that the claim proceed against him for use of unlawful force.

Lastly, the plaintiff fails to state a claim against the remaining defendants. He fails to specifically state the actions of other officers related to the assault, and states he did not see who did the second tasing. As to his claims against multiple defendants for "Aiding, abetting, advising or conspiring in violation of the code", this is a completely conclusory allegation. He does not identify the actions of each defendant, and uses vague allegations as to the claims. These defendants should be dismissed.

III. Conclusions

It is therefore recommended as follows:

1. The claim of use of unlawful force should proceed against Officer Sentmanat.
2. All other claims and defendants should be dismissed for failure to state a claim pursuant to 28 U.S.C. §1915(e)(2)(B)(ii).
3. Service will be ordered against the sole defendant by

separate order.

4. The second amended complaint (DE#20) is the operative complaint.

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

Dated this 12th day of September, 2012.



UNITED STATES MAGISTRATE JUDGE

cc: Jorge Argudo, Pro Se
Treatment and Training Center
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 11-21886-Civ-WILLIAMS/WHITE

JORGE L. ARGUDO

Plaintiff,

vs.

R. CASTELLON et al.,

Defendants.

_____ /

ORDER AFFIRMING REPORT AND RECOMMENDATION

THIS MATTER is before the Court on Judge White's Second Supplemental Report and Recommendation [D.E. 22] and Plaintiff's Second Amended Complaint [D.E. 20]. In his Report, Judge White recommends that Plaintiff be allowed to proceed against Officer Sentmanat via the Second Amended Complaint. Plaintiff filed an objection, arguing that the other defendants should not be dismissed. Upon an independent review of the Report, the Objection and the Record, it is ORDERED AND ADJUDGED that:

1. The Report is AFFIRMED AND ADOPTED.
2. The claim of use of unlawful force shall proceed against Officer Sentmanat.

The Second Amended Complaint shall be the operative complaint.

3. All other claims and defendants are dismissed for failure to state a claim pursuant to 28 U.S.C. §1915(e)(2)(B)(ii).

4. This matter remains REFERRED to United States Magistrate Judge Patrick White to take all necessary and proper action as required by law.

DONE AND ORDERED in Chambers, at Miami, Florida, this 18 day of October, 2012.



KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Patrick White
Counsel of record
Jorge L Argudo
100046826
Treatment and Training Center
6950 NW 41 Street
Miami, FL 33166
PRO SE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 1:11-CV-21886-KMW

JORGE ARGUDO,

Plaintiff,

vs.

R. CASTELLON, et al.,

Defendants.

DEFENDANT, ANTONIO SENTAMANT'S ANSWER, AFFIRMATIVE DEFENSES and DEMAND FOR JURY TRIAL IN RESPONSE TO PLAINTIFF' SECOND AMENDED COMPLAINT [DE#20]

COMES NOW, the Defendant, ANTONIO SENTAMANT (hereinafter "OFFICER"), by and through his undersigned counsel and hereby files his Answer, Affirmative Defenses and Demand for Jury Trial in response to the Plaintiff's Second Amended Complaint [DE#20] as follows:

a. Overall, OFFICER is unable to respond to the Plaintiff's Second Amended Complaint as same has not been pled in a format consistent with the Federal Rules of Civil Procedure which would allow OFFICER to do so. Nonetheless, OFFICER will respond to the allegations as framed to the best of his ability.

"ISSUE"

OFFICER denies the allegations contained within this section of the Plaintiff's Second Amended Complaint and demands strict proof thereof. However, OFFICER admits that at all times material OFFICER was employed as a police officer for the City of Hialeah. Admitted that said officer is and was an adult citizen and resident of Florida. Admitted that on the face of the Second Amended Complaint it appears as if said officer is being sued in his individual capacity.

OFFICER admits that he was acting within the course and scope of his employment with the City of Hialeah and under color of law as a police officer. Admitted that Plaintiff was arrested on charges of possession of a firearm by a violent career criminal, resisting without violence and auto theft on December 2, 2008.

WHEREFORE, having answered the allegations asserted in this count, Defendant, Officer Sentamant, demands strict proof of the allegations not expressly admitted herein. Further, Defendant, Officer Sentamant, demands dismissal of the claims against him and judgment in his favor together with all costs of defense, including attorney's fees, as may be recoverable by law.

"RULES"

1. OFFICER does not respond to this allegation as it purports to be a statement of law and OFFICER has no duty to respond to same as it is not a properly pled allegation, nor is it supported by any factual references. Further, any request by Plaintiff for a legal conclusion is denied.

2. OFFICER does not respond to this allegation as it purports to be a statement of law and OFFICER has no duty to respond to same as it is not a properly pled allegation, nor is it supported by any factual references. Further, any request by Plaintiff for a legal conclusion is denied.

3. OFFICER does not respond to this allegation as it purports to be a statement of law and OFFICER has no duty to respond to same as it is not a properly pled allegation, nor is it supported by any factual references. Further, any request by Plaintiff for a legal conclusion is denied.

WHEREFORE, having answered the allegations asserted in this count, Defendant, Officer Sentamant, demands strict proof of the allegations not expressly admitted herein. Further,

Defendant, Officer Sentamant, demands dismissal of the claims against him and judgment in his favor together with all costs of defense, including attorney's fees, as may be recoverable by law.

"ANALYSIS"

OFFICER admits that at all times material OFFICER was employed as a police officer for the City of Hialeah. Admitted that said officer is and was an adult citizen and resident of Florida. Admitted that said officer, on the face of the Second Amended Complaint, is being sued in his individual capacity. OFFICER admits that he was acting within the course and scope of his employment with the City of Hialeah and under color of law as a police officer. Admitted that Plaintiff was arrested on charges of possession of a firearm by a violent career criminal, resisting without violence and auto theft on December 2, 2008. All other allegations and adverse inferences contained in this paragraph are denied.

WHEREFORE, having answered the allegations asserted in this count, Defendant, Officer Sentmanat, demands strict proof of the allegations not expressly admitted herein. Further, Defendant, Officer Sentamant, demands dismissal of the claims against him and judgment in his favor together with all costs of defense, including attorney's fees, as may be recoverable by law.

"CONCLUSION"

Admitted that Officer Sentamant was acting under color of state law when he used reasonable force appropriate and proportionate to the circumstances to defend himself and/or others and/or to assist in an arrest and/or to secure custody and/or to maintain control over Jorge Argudo and/or otherwise to perform lawful duties. All other allegations and adverse inferences contained in this paragraph are denied.

WHEREFORE, having answered the allegations asserted in this count, Defendant, Officer Sentamant, demands strict proof of the allegations not expressly admitted herein. Further,

Defendant, Officer Sentamant, demands dismissal of the claims against him and judgment in his favor together with all costs of defense, including attorney's fees, as may be recoverable by law.

AFFIRMATIVE DEFENSES

In further response to the Plaintiffs Second Amended Complaint, Defendant, Officer Antonio Sentamant, raises the following Affirmative Defenses:

1. Defendant, Officer Sentamant, is entitled to qualified immunity from suit in his individual capacity because he acted within the course and scope of his official authority and because his conduct did not violate the clearly established statutory or constitutional rights of which a reasonable officer would have known. Thus, Defendant, Officer Sentamant, is shielded from liability for claims brought under 42 U.S.C. §1983.

2. Defendant, Officer Sentamant, was working within the scope of his discretionary authority when the allegedly wrongful acts occurred.

3. There was probable cause to arrest Jorge Argudo for possession of a firearm by a violent career criminal, a violation of §790.235, Fla. Stat., resisting, obstructing, opposing without violence one or more officers in the performance of lawful duties, a violation of §843.02, Fla. Stat., and/or auto-theft.

4. At the time of the events alleged in the Second Amended Complaint, Officer Sentamant was involved in the enforcement of Florida criminal law.

5. Plaintiff knew or had reason to know that Officer Sentamant, was a law enforcement officer, the officer reasonably appeared to be a law enforcement officer and identified himself as such, and pursuant to §§843.023 and 933.15, Florida Statutes, Jorge Argudo was not justified in resisting, obstructing, or opposing, or attempting to resist, obstruct, or oppose

this officer in any manner whatsoever in the discharge of his lawful duties, including by failing to comply with lawful police commands.

6. Pursuant to §§776.08 and 776.085(1), Florida Statutes, it is a complete defense to any and all state claims of Plaintiff that such claims arose from any injury sustained by Jorge Argudo as a participant during the commission or attempted commission of the forcible felony of battery on a police officer, a felony which involved the use of threat of physical force against a law enforcement officer and/or carjacking (auto-theft).

7. Officer Setamant is entitled to immunity as a matter of law as the Plaintiff's Second Amended Complaint fails to state a cause of action and the Plaintiff, Jorge Argudo, shall be disciplined pursuant to Florida Statutes §944.279 and §944.28 for the filing of a frivolous or malicious action and/or for bringing false information before the Court.

8. Officer Sentamant used that amount of force which was necessary under the particular facts and circumstances to prevent harm to himself or others.

9. Officer Sentamant acted as any objectively reasonable police officer would have given the circumstances.

10. Plaintiff's Second Amended Complaint fails to state a claim because the alleged conduct of Officer Sentamant does not amount to a deprivation of Plaintiff's constitutional rights.

11. Plaintiff's Second Amended Complaint fails to state a claim and a cause of action against Officer Sentamant for violation of 42 U.S.C. § 1983.

12. Officer Sentamant used only reasonable and necessary force to effectuate his lawful duties.

13. Officer Sentamant complied with all relevant legal standards at the time and place of the incident and comported with all proper police training. The attempted arrest was based on probable cause and the amount of force used by Officer Sentamant in his attempt to affect the arrest was not disproportionate to the amount of force legitimately authorized by law under the circumstances.

14. The Second Amended Complaint fails to state a federal claim against Officer Sentamant on which relief can be granted in favor of Plaintiff for violation of civil rights in that the acts of Officer Sentamant complied with all relevant legal standards at the time and place of the incident and comported with proper police training, procedure, and supervision as authorized by law under the circumstances.

15. The Second Amended Complaint fails to state a cause of action against Officer Sentamant in that the Plaintiff fails to allege that any of the alleged actions of Officer Sentamant was the proximate cause of any injuries Plaintiff received.

16. At all times Officer Sentamant was acting within the scope of his duties and employment.

17. At all times material, Officer Sentamant acted in good faith and exercised due care in carrying out his duties.

18. Upon examination and analysis of the totality of the circumstances, Officer Sentamant's action were lawful.

19. It was the Plaintiff's own conduct and behavior that caused his injuries, therefore barring recovery against Officer Sentamant. In the alternative, any damages must be reduced based upon the actions of Plaintiff, Jorge Argudo.

20. To the extent that Plaintiff was injured, it was a natural and proximate consequence of his resisting, obstructing or opposing Officer Sentamant in the discharge of his lawful duties, including his lawful attempt to apprehend, calm down, diffuse and eventually arrest Plaintiff.

21. Any damages claimed by Plaintiff were caused by the supervening intentional or criminal acts of Plaintiff, breaking the chain of causation as to any act or omission of Officer Sentamant, thereby barring or estopping any and all claims the Plaintiff has against Officer Sentamant.

22. To the extent that Plaintiff received benefits from collateral sources or other setoffs or recoupment, Plaintiff's claim should be dismissed or diminished accordingly.

23. Plaintiff failed to obey police orders.

24. At all times materials, Officer Sentamant had probable cause to effectuate the lawful arrest of Plaintiff, and thus, the Plaintiff's Second Amended Complaint fails to state a cause of action for excessive force or any other claim.

25. Defendant reserves the right to assert any additional affirmative defenses and claims of avoidance as may be appropriate based upon the facts or issues disclosed during the course of additional investigation and discovery.

DEMAND FOR JURY TRIAL

DEMAND is hereby made by this Defendant for a trial by jury of all issues so triable by law.

Respectfully submitted on **November 12, 2012**.

/s/ Devang Desai
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Counsel for Officer Sentamant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of November 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing. I further certify that a copy of the foregoing is being mailed to Plaintiff, Jorge L. Argudo, via U.S. Mail at: Jorge L. Argudo, M07698 L2103u, South Florida Reception Center, 1400 NW 41st Street, Miami, FL 33178.

By: /s/ Devang Desai
DEVANG DESAI, ESQ.
ddesai@gaebemullen.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-21886-CIV-WILLIAMS
MAGISTRATE JUDGE P. A. WHITE

JORGE L. ARGUDO, :
 :
 Plaintiff, :
 : ORDER SCHEDULING PRETRIAL
 v. : PROCEEDINGS WHEN PLAINTIFF
 : IS PROCEEDING PRO SE
 R. CASTELLON, et al., :
 :
 Defendants. :

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

ORDERED AND ADJUDGED as follows:

1. All discovery methods listed in Rule 26(a), Federal Rules of Civil Procedure, shall be completed by **April 17, 2013**. This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **May 1, 2013**.

3. All motions to dismiss and/or for summary judgment shall be filed by **May 22, 2013**.

4. On or before **June 5, 2013**, the plaintiff shall file with the Court and serve upon counsel for the defendants a document called "Pretrial Statement." The Pretrial Statement shall contain the following things:

- (a) A brief general statement of what the case is about;
- (b) A written statement of the facts that will be offered by oral or documentary evidence at trial; this means that the plaintiff must explain what he intends to prove at trial and how he intends to prove it;
- (c) A list of all exhibits to be offered into evidence at the trial of the case;
- (d) A list of the full names and addresses of places of employment for all the non-inmate witnesses that the plaintiff intends to call (the plaintiff must notify the Court of any changes in their addresses);
- (e) A list of the full names, inmate numbers, and places of incarceration of all the inmate witness that plaintiff intends to call (the plaintiff must notify the Court of any changes in their places of incarceration); and
- (f) A summary of the testimony that the plaintiff expects each of his witnesses to give.

5. On or before **June 19, 2013**, defendants shall file and serve upon plaintiff a "Pretrial Statement," which shall comply with paragraph 4(a)-(f).

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

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

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

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

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

- (a) discuss the possibility of settlement;
- (b) stipulate (agree) in writing to as many facts and issues as possible to avoid unnecessary evidence;
- (c) examine all exhibits and documents proposed to be used at the trial, except

that impeachment documents need not be revealed;

- (d) mark all exhibits and prepare an exhibit list;
- (e) initial and date opposing party's exhibits;
- (f) prepare a list of motions or other matters which require Court attention; and
- (g) discuss any other matters that may help in concluding this case.

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

DONE AND ORDERED at Miami, Florida, this 20th day of December, 2012.

s/Patrick A. White
UNITED STATES MAGISTRATE JUDGE

cc: Jorge L. Argudo, Pro Se
DC #M07698
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Hon. Kathleen M. Williams, United States District Judge