

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:11-cv-23897-RNS**

Burkes v. Opa Locka Police Department et al
Assigned to: Judge Robert N. Scola, Jr
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 10/28/2011
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

George Burkes, Jr
Prisoner ID: 429874

represented by **George Burkes, Jr**
429874
Moore Haven Correctional Facility
P.O. Box 718501
1900 East State Road 78 NW
Moore Haven, FL 33471
PRO SE

V.

Defendant

Opa Locka Police Department

Defendant

Officer Orlando Muniz-Bueno

represented by **Michael Ross Piper**
Johnson Anselmo Murdoch Burke Piper
&Hochman, P.A.
International Building
2455 E Sunrise Boulevard
Suite 1000
PO Box 030220
Fort Lauderdale, FL 33304-0220
954-463-0100
Fax: 954-463-2444
Email: piper@jambg.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rhea Pincus Grossman
Michael Braverman
2650 W State Road 84
Suite 103
Fort Lauderdale, FL 33312
954-791-2010
Fax: 791-2141
Email: rheagrossman@comcast.net
TERMINATED: 12/19/2012
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher J. Stearns , Jr.
Johnson Anselmo Murdoch Burke Piper
&Hochman PA
2455 E Sunrise Boulevard
Suite 1000
Fort Lauderdale, FL 33304
954-463-0100
Fax: 954-463-2444
Email: stearns@jambg.com
ATTORNEY TO BE NOTICED

Defendant**Officer Francois Wuihudson****Defendant****Officer Lawrence Holborow**represented by **Christopher J. Stearns , Jr.**
(See above for address)
*ATTORNEY TO BE NOTICED***Michael Ross Piper**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/28/2011	<u>1</u>	COMPLAINT Under the Civil Rights Act, 42 U.S.A.§ 1983, against Lawrence Holborow, Orlando Muniz–Bueno, Opa Locka Police Department, Francois Wuihudson. Filing fee \$ 350.00. IFP Filed, filed by George Burkes, Jr.(cqs) (Entered: 10/28/2011)
10/28/2011	2	Judge Assignment to Judge Patricia A. Seitz (cqs) (Entered: 10/28/2011)
10/28/2011	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: 10/28/2011)
10/28/2011	<u>4</u>	MOTION for Leave to Proceed in forma pauperis by George Burkes, Jr. (cqs) (Entered: 10/28/2011)
11/04/2011	<u>5</u>	ORDER denying without prejudice <u>4</u> Motion for Leave to Proceed in forma pauperis and requiring more detailed financial affidavit. Signed by Magistrate Judge Patrick A. White on 11/3/2011. (Attachments: # <u>1</u> Affidavit IFP) (tw) (Entered: 11/04/2011)
11/04/2011	<u>6</u>	ORDER OF INSTRUCTIONS TO PRO SE LITIGANT. Signed by Magistrate Judge Patrick A. White on 11/3/2011. (tw) (Entered: 11/04/2011)
11/23/2011	<u>7</u>	ORDER REASSIGNING CASE to Judge Robert N. Scola, Jr for all further proceedings, Judge Patricia A. Seitz no longer assigned to case. Signed by Judge Patricia A. Seitz on 11/22/2011. (vp) (Entered: 11/23/2011)
12/01/2011	<u>8</u>	MOTION for Leave to Proceed in forma pauperis by George Burkes, Jr. (jua) (Entered: 12/01/2011)
12/05/2011	9	ORDER denying <u>8</u> Motion for Leave to Proceed in forma pauperis without prejudice as unresponsive to the Court's Order. The plaintiff is to file a six month prison account statement. The time to file the statement is extended to on or before December 30, 2011.. Signed by Magistrate Judge Patrick A. White on 12/5/2011. (cz) (Entered: 12/05/2011)
01/30/2012	<u>10</u>	REPORT AND RECOMMENDATIONS on 28 USC 2254 case re <u>1</u> Complaint filed by George Burkes, Jr. Recommending that this complaint be dismissed without prejudice for lack of prosecution. Objections to RRdue by 2/16/2012. Signed by Magistrate Judge Patrick A. White on 1/30/2012. (tw) (Entered: 01/30/2012)
02/23/2012	<u>11</u>	NOTICE of Compliance/Notice of Six Month Account Statement re 9 ORDER denying <u>8</u> Motion for Leave to Proceed in forma pauperis without prejudice as unresponsive to the Court's Order. The plaintiff is to file a six month prison account statement, by George Burkes, Jr(jua) (Entered: 02/23/2012)
03/26/2012	<u>12</u>	ORDER REFERRING CASE to Magistrate Judge Patrick A. White for Report and Recommendation, Motions terminated: <u>10</u> REPORT AND RECOMMENDATIONS on 28 USC 2254 case re <u>1</u> Complaint filed by George Burkes, Jr Recommending that this complaint be dismissed without prejudice for

		lack of prosecution... Signed by Judge Robert N. Scola, Jr on 3/27/2012. (ls) (Entered: 03/27/2012)
04/16/2012	<u>13</u>	NOTICE of Compliance/ Affidavit of Indigency and Inmate Account Atatments by George Burkes, Jr re 9 Order on Motion for Leave to Proceed in forma pauperis, (cqs) (Entered: 04/17/2012)
04/18/2012	<u>14</u>	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF \$350.00 and Granting <u>13</u> Notice of Compliance filed by George Burkes, Jr. Signed by Magistrate Judge Patrick A. White on 4/18/2012. (tw) (Entered: 04/18/2012)
05/07/2012	<u>15</u>	SUPPLEMENTAL REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by George Burkes, Jr. Recommending 1. The plaintiff be permitted to file an amended complaint to demonstrate injuries. 2. Failure to timely file the amended complaint, or to demonstrate injury may result in dismissal of the complaint for failure state a claim pursuant to 28 U.S.C. §1915 (e)(2)(B)(ii). 3. Officers Holborow and Wuihudson should be dismissed. Objections to RRdue by 5/24/2012. Signed by Magistrate Judge Patrick A. White on 5/7/2012. (tw) (Entered: 05/07/2012)
05/22/2012	<u>16</u>	AMENDED COMPLAINT against All Defendants, filed by George Burkes, Jr.(cbr) (Entered: 05/22/2012)
05/29/2012	<u>17</u>	Order Adopting Report and Recommendation and Referring Case Back to the Magistrate Judge. Signed by Judge Robert N. Scola, Jr on 5/29/2012. (jcy) (Entered: 05/29/2012)
05/31/2012	<u>18</u>	SUPPLEMENTAL REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by George Burkes, Jr. Recommending 1. The case proceed against Officer Muniz–Bueno on the claim of use of unlawful force upon arrest. 2. Officer Holborow and the Opa Locka Police Department should be dismissed for failure state a claim pursuant to 28 U.S.C.§1915 (e)(2)(B)(ii). 3. The Operative complaint is the initial complaint(DE#1) and the amendment (DE#16). Objections to RRdue by 6/18/2012. Signed by Magistrate Judge Patrick A. White on 5/31/2012. (tw) (Entered: 05/31/2012)
06/15/2012	<u>19</u>	OBJECTIONS to <u>18</u> Report and Recommendations by George Burkes, Jr. (cqs) (Entered: 06/15/2012)
06/19/2012	<u>20</u>	ORDER adopting in part <u>18</u> REPORT AND RECOMMENDATIONS OF MAGISTRATE JUDGE. The Recommendations are adopted, but Plaintiff is given leave to amend. The amended complaint shall be filed by July 13, 2012. See ORDER for details. Signed by Judge Robert N. Scola, Jr. on 6/19/2012. (jky) (Entered: 06/19/2012)
06/20/2012		Set/Reset Deadlines/Hearings as per DE <u>20</u> : Amended Pleadings due by 7/13/2012. (lk) (Entered: 06/20/2012)
06/29/2012	<u>21</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon:Officer Orlando Muniz–Bueno, City of Opa–Locka Police Department, 2105 Ali Baba Avenue, Opa Locka, FL. Signed by Magistrate Judge Patrick A. White on 6/29/2012. (tw) (Entered: 06/29/2012)
07/03/2012	<u>22</u>	Summons Issued as to Orlando Muniz–Bueno. (br) (Entered: 07/05/2012)
07/16/2012	<u>23</u>	AMENDED COMPLAINT against Lawrence Holborow, Orlando Muniz–Bueno, Opa Locka Police Department filed in response to Order Granting Motion for Leave, filed by George Burkes, Jr.(ls) (Entered: 07/16/2012)
07/24/2012	<u>24</u>	SUMMONS (Affidavit) Returned Executed on <u>23</u> Amended Complaint Orlando Muniz–Bueno served on 7/20/2012, answer due 8/10/2012. (cqs) (Entered: 07/24/2012)
08/13/2012	<u>25</u>	ANSWER and Affirmative Defenses to Complaint , ANSWER and Affirmative Defenses to Amended Complaint by Orlando Muniz–Bueno.(Grossman, Rhea) (Entered: 08/13/2012)

08/13/2012	<u>26</u>	NOTICE of Attorney Appearance by Rhea Pincus Grossman on behalf of Orlando Muniz-Bueno (Grossman, Rhea) (Entered: 08/13/2012)
08/15/2012	<u>27</u>	SECOND REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by George Burkes, Jr., Recommending 1. The case proceed against Officer Holborow for failure to intervene. 2. The Opa Locka Police Department should be dismissed for failure state a claim pursuant to 28 U.S.C. §1915 (e)(2)(B)(ii). 3. The Operative complaint is the initial complaint(DE#1), and amendments (DE#16 and 23). Objections to RRdue by 9/4/2012 Signed by Magistrate Judge Patrick A. White on 8/15/2012. (Attachments: # <u>1</u> Affidavit IFP) (tw) (Entered: 08/15/2012)
08/16/2012	<u>28</u>	NOTICE of Attorney Appearance by Michael Ross Piper on behalf of Orlando Muniz-Bueno (Piper, Michael) (Entered: 08/16/2012)
08/16/2012	<u>29</u>	<i>Answer and Defenses</i> ANSWER to Complaint with Jury Demand by Orlando Muniz-Bueno.(Piper, Michael) (Entered: 08/16/2012)
08/21/2012	<u>30</u>	ORDER that the United States Marshal shall serve a copy of the complaint and appropriate summons upon: Officer Holborow, Opa-Locka Police Department, 2495 Ali-Baba Avenue, Opa-Locka, FL 33054. Signed by Magistrate Judge Patrick A. White on 8/21/2012. (tw) (Entered: 08/21/2012)
08/21/2012	<u>31</u>	SCHEDULING ORDER: Amended Pleadings due by 12/28/2012. Discovery due by 12/14/2012. Joinder of Parties due by 12/28/2012. Motions due by 1/18/2013. Signed by Magistrate Judge Patrick A. White on 8/21/2012. (tw) (Entered: 08/21/2012)
08/28/2012	<u>32</u>	NOTICE by Orlando Muniz-Bueno <i>Of Filing Designation of Email Addresses</i> (Piper, Michael) (Entered: 08/28/2012)
08/30/2012	<u>33</u>	Summons Issued as to Lawrence Holborow. (br) (Entered: 08/31/2012)
09/05/2012	<u>34</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS ; adopting Report and Recommendations re <u>27</u> Report and Recommendations. Signed by Judge Robert N. Scola, Jr on 9/4/2012. (lh) (Entered: 09/05/2012)
09/18/2012	<u>35</u>	SUMMONS (Affidavit) Returned Executed on <u>23</u> Amended Complaint Lawrence Holborow served on 9/13/2012, answer due 10/4/2012. (cqs) (Entered: 09/18/2012)
10/05/2012	<u>36</u>	NOTICE OF UNAVAILABILITY by Orlando Muniz-Bueno for dates of November 16, 2012 through and including November 26, 2012 (Piper, Michael) (Entered: 10/05/2012)
10/18/2012	<u>37</u>	<i>Amended Answer and Defenses</i> ANSWER to Amended Complaint with Jury Demand by Orlando Muniz-Bueno.(Piper, Michael) (Entered: 10/18/2012)
10/18/2012	<u>38</u>	<i>Answer and Defenses</i> ANSWER to Amended Complaint with Jury Demand by Lawrence Holborow.(Piper, Michael) (Entered: 10/18/2012)
10/19/2012	<u>39</u>	UNSTIPULATED First MOTION for Substitution of Counsel <i>Stipulated Motion for Withdrawal and Substitution of Counsel of Record for Defendant, Orlando Muniz-Bueno, and to Deem Defendant's October 18, 2012 Amended Answer and Defenses as the "Operative" Pleading</i> by Orlando Muniz-Bueno. Responses due by 11/5/2012 (Piper, Michael) (Entered: 10/19/2012)
10/19/2012	<u>40</u>	UNSTIPULATED Proposed MOTION for Substitution of Counsel <i>Proposed Order Granting Stipulated Motion for Withdrawal and Substitution of Counsel for Defendant, Orlando Muniz-Bueno, and Deeming Amended Answer and Defenses (DE 39) as "Operative" Pleading</i> by Orlando Muniz-Bueno. Responses due by 11/5/2012 (Piper, Michael) (Entered: 10/19/2012)
10/19/2012	41	Clerks Notice to Filer re <u>40</u> UNSTIPULATED Proposed MOTION for Substitution of Counsel <i>Proposed Order Granting Stipulated Motion for Withdrawal and Substitution of Counsel for Defendant, Orlando Muniz-Bueno, and Deeming Amended Answer and Defenses (DE 39) as "Operative". Proposed Order Docketed as Main Document; CORRECTIVE ACTION REQUIRED – Filer must File a Notice of Striking, then resubmit the proposed order as instructed in the CM/ECF Administrative Procedures (lh)</i> (Entered: 10/22/2012)

10/23/2012	<u>42</u>	NOTICE of Striking <i>Docket Entries 39 and 40</i> by Lawrence Holborow, Orlando Muniz–Bueno (Piper, Michael) (Entered: 10/23/2012)
10/23/2012	<u>43</u>	STIPULATION <i>Stipulated Motion for Withdrawal and Substitution of Counsel of Record for Defendant, Orlando Muniz–Bueno, and to Deem Defendant's October 18, 2012 Amended Answer and Defenses as the "Operative" Pleading</i> by Orlando Muniz–Bueno (Piper, Michael) (Entered: 10/23/2012)
11/16/2012	<u>44</u>	NOTICE of Filing Discovery: Notice of Service of Interrogatories to Plaintiff, George Burkes, Jr. by Orlando Muniz–Bueno.(lh) (Entered: 11/16/2012)
12/03/2012	45	ORDER respectfully deferring ruling on <u>39</u> Unstipulated Motion for Substitution of Counsel to United States District Judge Scola. Signed by Magistrate Judge Patrick A. White on 12/3/2012. (cz) (Entered: 12/03/2012)
12/17/2012	<u>46</u>	Letter from George Burkes, Jr. (lh) (Entered: 12/18/2012)
12/19/2012	47	PAPERLESS ORDER granting <u>39</u> <u>43</u> Motion for Withdrawal and Substitution of Counsel. The Motion is granted in all respects. Attorney Grossman is permitted to withdraw and discharged of further responsibility with respect to the representation of Defendant Orlando Muniz–Bueno. Attorney Piper is substituted as counsel of record for this Defendant. The Court deems the Amended Answer, dated October 18, 2012, the operative pleading for this Defendant. Signed by Judge Robert N. Scola, Jr. on 12/19/2012. (jky) (Entered: 12/19/2012)
01/17/2013	<u>48</u>	MOTION for Extension of Time to Complete Discovery <i>and to Extend All Pre–trial Deadlines</i> by Lawrence Holborow, Orlando Muniz–Bueno. (Attachments: # <u>1</u> Text of Proposed Order)(Stearns, Christopher) (Entered: 01/17/2013)
01/22/2013	49	ORDER granting <u>48</u> Motion for Extension of Time to extend ALL Dates entered in the Pre–trial Dealines by 90 days from the dates entered in the Pre Trial Order. Signed by Magistrate Judge Patrick A. White on 1/22/2013. (cz) (Entered: 01/22/2013)

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

Case No. 11cv23897 SCOLA

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

JUL 16 2012

FILED by RLG D.C.
JUL 16 2012
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

GEORGE BURKES, JR.,
PLAINTIFF,

v.
OPA LOCKA POLICE DEPT. et al.,
DEFENDANT(S).

CASE NO. 11-23897-CIV-SGOLA

AMENDED COMPLAINT TO SUPPORT ALLEGATIONS
AGAINST OFFICER HOLBOROW AND THE OPA LOCKA
POLICE DEPARTMENT

The Plaintiff, GEORGE BURKES, JR., A STATE PRISONER, PROSE AND IN PROPRIA PERSON, hereby files to this Honorable Court, this Amended Complaint to Support Allegations Against Officer Holborow and The Opa Locka Police Department, to meet Rule 12(b)(6) standard under Twombly or Iqbal, and to state a Monell claim.

As grounds and or in support thereof, the Plaintiff submits the following:

Plaintiff, GEORGE BURKES, JR., filed a Civil Rights Complaint to this Court on or about October, 2011, and on April 16, 2012, this Court granted his affidavit to proceed in forma pauperis.

This Court granted the Plaintiff the right to Amend his Complaint to demonstrate injury, which Plaintiff complied with, and this Court determined that the Plaintiff in his Amended Complaint has stated a sufficient claim against OFFICER MUNIZ-BUENO, and that the claim may proceed against OFFICER MUNIZ-BUENO.

However, this Court determined that the claims against OFFICER Holborow and the Opa Locka Police Department were insufficient claims, but gave leave for the Plaintiff to proceed on a second Amended Complaint to state a sufficient claim against OFFICER Holborow and the Opa Locka Police Department, which Complaint will be demonstrated below by the Plaintiff.

On the date that OFFICER Orlando MUNIZ-BUENO used excessive force upon the Plaintiff, causing extensive damage to the Plaintiff as has been described in Plaintiff's Complaint, OFFICER Holborow was an assisting officer in the capture and arrest of the Plaintiff. In fact, it was OFFICER Holborow who held the flashlight on the Plaintiff, and directed OFFICER Orlando MUNIZ-BUENO to the whereabouts of the Plaintiff.

Through his assistance of the capture and arrest of the Plaintiff, OFFICER Holborow was at the point of arrest and had he intervened, could have prevented OFFICER Orlando MUNIZ-BUENO for using excessive force on the Plaintiff.

WHICH CAUSED SEVERE AND PERMANENT INJURIES AND DAMAGE TO THE PLAINTIFF, AND THUS, OFFICER HOLBOROW WHO WAS AN ACTIVE PARTICIPANT IN THE CAPTURE AND ARREST OF THE PLAINTIFF, IS JUST AS LIABLE FOR THE PLAINTIFF'S INJURIES AS OFFICER ORLANDO MUNIZ BUENO, AS HE WAS IN A POSITION TO PREVENT THE EXCESSIVE USE OF FORCE THAT WAS INFLICTED UPON THE PLAINTIFF BY OFFICER BUENO.

OFFICER HOLBOROW HAS A DUTY AS A LAW OFFICER TO UPHOLD THE LAW AND PROTECT THE PUBLIC, WHICH HE CLEARLY NEGLECTED HIS DUTIES AS AN EMPLOYEE OF THE OPA LOCKA POLICE DEPARTMENT, WHEN HE FAILED TO INTERVENE IN THE USE OF EXCESSIVE FORCE UPON THE PLAINTIFF BY HIS CO-WORKER, OFFICER ORLANDO MUNIZ BUENO, AND THIS COURT SHOULD CONCLUDE THE SAME.

IN RELATION TO THE OPA LOCKA POLICE DEPARTMENT, IT IS THEIR POLICY TO PROTECT THE CIVIL RIGHTS OF ALL CITIZENS IN THEIR JURISDICTION, AND TO POINT OUT SUCH DUTIES TO ALL THEIR EMPLOYEES. PLAINTIFF ARGUES THAT AT THE TIME OF OFFICERS ORLANDO MUNIZ BUENO AND HOLBOROW ACTIONS OF EXCESSIVE USE OF FORCE, CAUSING INJURY TO THE PLAINTIFF, THE BOTH OF THEM WERE WORKING IN THE CAPACITY OF THE OPA LOCKA POLICE DEPARTMENT, AND SINCE THE OFFICERS VIOLATED THE POLICIES OF THE OPA LOCKA POLICE DEPARTMENT, WERE EMPLOYED

by that Agency, the OPA Locka Police Department is liable for the actions of its officers, must be held accountable and is responsible for the officer actions, resulting in injuries to the Plaintiff.

It cannot be said that the OPA Locka Police Department is not liable for the officers actions in this cause, as the officers clearly violated the civil and constitutional rights of the Plaintiff.

As such, this Court should conclude that this Amended Complaint by the Plaintiff is a colorable claim made against both Officer Holborow and the OPA Locka Police Department, and the Plaintiff should be allowed to proceed with a claim against both, having met Rule 12(b)(6) standard under Twombly Original, and has stated a Monell claim in relation to the OPA Locka Police Department.

WHEREFORE, the Plaintiff GEORGE BURKES, JR., humbly request of this Honorable Court to grant his Amended Complaint, and issue an order to proceed on a claim against Officer Holborow and the OPA Locka Police Department.

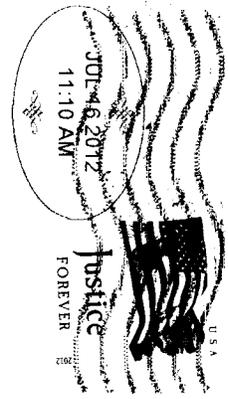
MOORE HAVEN CORRECTIONAL FACILITY
P.O. Box 718501
MOORE HAVEN, Florida 33471
7-6-12
DATE

Respectfully Submitted,

GEORGE BURKES, JR.
DC# 429874

George, Burkes, JR. # 429874
1990, East State Road 78 N.W.
P.O. Box 718501
Moore, Haven, Florida 33471

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JUL 12 2012

United States District Court
Southern District of Florida
Office of the Clerk, Room 1808
400 ~~N. Biscayne~~ ~~Ave.~~ ~~N. Biscayne~~ Ave.
Miami, Florida 33128 - 7716

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-23897-CIV-SCOLA
MAGISTRATE JUDGE P.A. WHITE

GEORGE BURKES, JR.,	:	<u>SECOND</u>
	:	<u>SUPPLEMENTAL REPORT</u>
Plaintiff,	:	<u>OF MAGISTRATE JUDGE</u>
v.	:	
OPA LOCKA POLICE DEPT, et al.,	:	
Defendant(s).	:	

I. Introduction

The plaintiff filed a civil rights complaint pursuant to 42 U.S.C. 1983, alleging use of unlawful force upon arrest. The complaint was screened, and the plaintiff was permitted to amend his complaint. The amended complaint was screened, and a Preliminary Report entered. The plaintiff has filed a second amended complaint (DE#23).

This Cause is before the Court upon the screening of the second amended complaint pursuant to 28 U.S.C. §1915 (DE#23).

II. Analysis

A. Applicable Law for Screening

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

Sec. 1915 Proceedings in Forma Pauperis

* * *

(e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid,

the court shall dismiss the case at any time if
the court determines that -

* * *

(B) the action or appeal -

* * *

(i) is frivolous or malicious;

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

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

This is a civil rights action Pursuant to 42 U.S.C. §1983. Such actions require the deprivation of a federally protected right by a person acting under color of state law. See 42 U.S.C. 1983; Polk County v Dodson, 454 U.S.312 (1981); Whitehorn v Harrelson, 758 F. 2d 1416, 1419 (11 Cir. 1985. The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31

(1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997) ("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

To determine whether a complaint fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Twombly applies to §1983 prisoner actions. See Douglas v. Yates, 535 F.3d 1316, 1321 (11 Cir. 2008). These include "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." The plaintiff is required to plead facts that show more than the "mere possibility of misconduct." The Court must review the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred.¹

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

B. Factual Allegations

The facts as stated in the Preliminary Report, taken from the plaintiff's complaint, are as follows: the plaintiff arrived at the jail on May 12, 2010, after running from the police. He was released on June 9, 2010. He returned to jail on July 10, 2010, for a new case, again after running from the police. Officer Muniz Bueno was one of the officers in the May, 2010 case. When he apprehended the plaintiff, he told the plaintiff he would not run again, and drove his knee into his ankle two times. Burkes states that Officer Holborow was also present during both the May 2010 arrest and the July 20, 2010 arrest. He seeks monetary damages.

A Preliminary Report was entered recommending that the plaintiff had stated a claim of use of unlawful force by Officer Bueno, but had failed to state his injuries as required by 1997e(e). It was recommended that the plaintiff be permitted to amend his complaint to state his injuries. Further, the report recommended dismissal of Holborow, as there was insufficient facts as to his actions during the assault. The Report was adopted. On May 22, 2012, the plaintiff filed an "Amended Complaint to Demonstrate Injury" (DE#16), which were sufficient to allow the case to proceed.

C. Sufficiency of the second amended complaint

On July 16, 2012, the plaintiff filed another amended complaint to support allegations against the Opa Locka Police Department and Officer Holborow. (DE#23) The Opa Locka Police Department must be dismissed as an improper defendant. In Section

1983 actions, police departments cannot be sued, because a police department is merely an administrative arm of the local municipality, and is not a separate judicial entity. Eddy v. City of Miami, 715 F.Supp. 1553 (S.D.Fla. 1989); DeBellis v. Kulp, 166 F.Supp.2d 255, 264 (E.D.Pa. 2001). The Opa Locka Police Department is merely an arm of a municipality. To allege a §1983 action against a county a plaintiff must assert that a constitutional deprivation resulted from a custom, policy, or practice of the county. Wideman v. Shallowford Community Hospital, Inc. *supra*, 826 F.2d at 1032, and cases cited therein. Such liability, however, may not be predicated on the theory of respondeat superior. Only if the alleged constitutional violations resulted from a county custom, policy or practice of a county, may its administrators or supervisors be held liable. Monell v. Department of Social Services, *supra*, 436 U.S. at 694; Free v. Granger, 887 F.2d 1552 (11 Cir. 1989); Wideman v. Shallowford Community Hospital, Inc., *supra*, 826 F.2d at 1032. Boilerplate allegations of policy or custom, without supporting facts, are insufficient to sustain a §1983 claim. See Hossman v. Blunk, 784 F.2d 793 (7 Cir. 1986); Gutierrez v. City of Hialeah, 723 F.Supp. 1494 (S.D. Fla. 1989). It is therefore recommended that the Opa Locka Beach Police Department be dismissed.

The plaintiff claims that Officer Holborow was in a position to intervene in the assault. He claims he was present and was an active participant in his capture and arrest. Claims of excessive force by police officers are cognizable under 42 U.S.C. §1983, as are claims that officers who were present failed to intervene. Fundiller v. City of Cooper City, 777 F.2d 1436 (11 Cir. 1985). At this preliminary stage the plaintiff has stated a claim of failure to intervene by Office Holborow.

III. Recommendation

It is recommended as follows:

1. The case proceed against Officer Holborow for failure to intervene.

2. The Opa Locka Police Department should be dismissed for failure state a claim pursuant to 28 U.S.C. §1915 (e)(2)(B)(ii).

3. The Operative complaint is the initial complaint(DE#1), and amendments (DE#16 and 23).

Objections to this Report may be filed with the United States District Judge within fourteen days.

Dated at Miami, Florida this 15th day of August, 2012.



UNITED STATES MAGISTRATE JUDGE

cc: George Burkes, Jr., Pro Se
DC #429874
Moore Haven Correctional Facility
Address of record

Attorney of record

UNITED STATES DISTRICT COURT

District of

Plaintiff

V.

Defendant

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF FEES AND AFFIDAVIT

CASE NUMBER:

I, _____ declare that I am the (check appropriate box)

petitioner/plaintiff/movant other

in the above-entitled proceeding; that in support of my request to proceed without prepayment of fees or costs under 28 USC §1915 I declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief sought in the complaint/petition/motion.

In support of this application, I answer the following questions under penalty of perjury:

1. Are you currently incarcerated? Yes No (If "No," go to Part 2)

If "Yes," state the place of your incarceration _____

Are you employed at the institution? _____ Do you receive any payment from the institution? _____

Attach a ledger sheet from the institution(s) of your incarceration showing at least the past six months' transactions.

2. Are you currently employed? Yes No

a. If the answer is "Yes," state the amount of your take-home salary or wages and pay period and give the name and address of your employer.

b. If the answer is "No," state the date of your last employment, the amount of your take-home salary or wages and pay period and the name and address of your last employer.

3. In the past 12 twelve months have you received any money from any of the following sources?

- a. Business, profession or other self-employment Yes No
b. Rent payments, interest or dividends Yes No
c. Pensions, annuities or life insurance payments Yes No
d. Disability or workers compensation payments Yes No
e. Gifts or inheritances Yes No
f. Any other sources Yes No

If the answer to any of the above is "Yes," describe, on the following page, each source of money and state the amount received and what you expect you will continue to receive.

4. Do you have **any** cash or checking or savings accounts? Yes No

If "Yes," state the total amount. _____

5. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles or any other thing of value? Yes No

If "Yes," describe the property and state its value.

6. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support.

I declare under penalty of perjury that the above information is true and correct.

Date

Signature of Applicant

NOTICE TO PRISONER: A Prisoner seeking to proceed without prepayment of fees shall submit an affidavit stating all assets. In addition, a prisoner must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.