CASREF,PAW

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:11−cv−24638−JAL

Williams v. Feria
Assigned to: Judge Joan A. Lenard
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 12/28/2011
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Lemane Deon Williams
Prisoner ID: M05282

represented by **Lemane Deon Williams**
M05282
Gulf Correctional Institution−Annex
Inmate Mail/Parcels
699 Ike Steele Road
Wewahitchka, FL 32465
PRO SE

V.

Defendant

Officer Anthony Feria
Badge #2637− Miami Dade Police Dept.

represented by **Erica Sunny Shultz Zaron**
Miami−Dade County Attorney's Office
111 N.W. 1st Street
Suite 2810
Miami, FL 33128
305−375−5151
Fax: 305−375−5611
Email: zaron@miamidade.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lauren Elizabeth Morse
Miami−Dade County Attorney's Office
Stephen P. Clark Center
111 N.W. First Street
Suite 2810
Miami Beach, FL 33139
305−375−5151
Email: laurenm@miamidade.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/28/2011	1	A COMPLAINT Under The Civil Rights Act, 42 U.S.C. §1983, against Anthony Feria. Filing fee $ 350.00. IFP Filed, filed by Lemane Deon Williams.(cqs) (Entered: 12/29/2011)
12/28/2011	2	Judge Assignment to Judge Joan A. Lenard (Entered: 12/29/2011)
12/28/2011	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: 12/29/2011)
12/28/2011	4	Application To Proceed Without Prepayment Of Fees and Affidavit, inmate account statment attached by Lemane Deon Williams. (cqs) (Entered: 12/29/2011)
01/10/2012	5	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF $350.00 and Granting 4 Motion for Leave to Proceed in forma pauperis. Signed by Magistrate

		Judge Patrick A. White on 1/9/2012. (tw) (Entered: 01/10/2012)
01/10/2012	6	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 1/9/2012. (tw) (Entered: 01/10/2012)
01/23/2012	7	NOTICE to the Court by Lemane Deon Williams re 1 Complaint (jua) (Entered: 01/24/2012)
02/16/2012	8	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Lemane Deon Williams. Recommending 1.The claim of excessive force shall proceed againstOfficer Feria, in his individual capacity. 2. Service will be ordered by separate order. Objections to RRdue by 3/5/2012. Signed by Magistrate Judge Patrick A. White on 2/16/2012. (tw) (Entered: 02/16/2012)
03/06/2012	9	ORDER adopting Report and Recommendations 8 of Magistrate Judge White and allowing Plaintiff's claim of excessive force to proceed against Officer Feria in his individual capacity. Signed by Judge Joan A. Lenard on 3/6/2012. (cew) (Entered: 03/06/2012)
04/20/2012	10	NOTICE of Change of Address by Lemane Deon Williams (Address Updated) (gp) (Entered: 04/20/2012)
05/04/2012	11	MOTION for Default Judgment by Anthony Feria. (cqs) (Entered: 05/07/2012)
05/08/2012	12	ORDER by Clerk of Non−Entry of Default 11 Motion for Default Judgment, no summons have yet been issued.. Signed by Magistrate Judge Patrick A. White on 5/8/2012. (cz) (Entered: 05/08/2012)
05/08/2012	13	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDAL.The United States Marshal shall serve a copy of the complaint and appropriate summons upon:Detective Anthony Feria (Badge #2637), Metro−Dade Police Department, 9105 N.W. 25th Street, Miami, FL 33172. Signed by Magistrate Judge Patrick A. White on 5/8/2012. (tw) (Entered: 05/08/2012)
05/09/2012	14	Summons Issued as to Anthony Feria. (br) (Entered: 05/09/2012)
05/23/2012	15	NOTICE of Change of Address by Lemane Deon Williams (system updated) (cqs) (Entered: 05/23/2012)
05/24/2012	16	SUMMONS (Affidavit) Returned Executed on 1 Complaint by Lemane Deon Williams. Anthony Feria served on 5/21/2012, answer due 6/11/2012. (cqs) (Entered: 05/24/2012)
05/31/2012	17	NOTICE of Change of Address by Lemane Deon Williams (system updated) (cqs) (Entered: 05/31/2012)
06/05/2012	18	MOTION for Extension of Time to File Response/Reply as to 1 Complaint by Anthony Feria. (Zaron, Erica) (Entered: 06/05/2012)
06/06/2012	19	ORDER granting 18 Motion for Extension of Time to File Response/Reply re 18 MOTION for Extension of Time to File Response/Reply as to 1 Complaint Responses due by 6/25/2012. Signed by Magistrate Judge Patrick A. White on 6/6/2012. (cz) (Entered: 06/06/2012)
06/25/2012	20	ANSWER and Affirmative Defenses to Complaint by Anthony Feria.(Zaron, Erica) (Entered: 06/25/2012)
06/27/2012	21	SCHEDULING ORDER: Amended Pleadings due by 10/25/2012. Discovery due by 10/11/2012. Joinder of Parties due by 10/25/2012. Motions due by 11/16/2012. Signed by Magistrate Judge Patrick A. White on 6/26/2012. (tw) (Entered: 06/27/2012)
08/29/2012	22	MOTION to Appoint Counsel by Lemane Deon Williams. Responses due by 9/17/2012 (cqs) (Entered: 08/29/2012)
08/30/2012	23	ORDER denying 22 Motion to Appoint Counsel Signed by Magistrate Judge Patrick A. White on 8/30/2012. (cz) (Entered: 08/30/2012)
09/14/2012	24	Motion to Dismiss Case as Frivolous 1 Complaint by Anthony Feria. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5

		Exhibit E)(Zaron, Erica) (Entered: 09/14/2012)
09/14/2012	25	MOTION to Stay *Case Pending Ruling on Motion to Dismiss* by Anthony Feria. Responses due by 10/1/2012 (Zaron, Erica) (Entered: 09/14/2012)
09/14/2012	26	MOTION for Order Authorizing Clerk of Courts to Accept Filing of Video by Anthony Feria. (Zaron, Erica) (Entered: 09/14/2012)
09/17/2012	27	ORDER granting 26 Motion for Order authorizing clerk of courts to accept filing of video Signed by Magistrate Judge Patrick A. White on 9/17/2012. (cz) (Entered: 09/17/2012)
09/17/2012	28	ORDER OF INSTRUCTING PRO SE PLAINTIFF CONCERNING RESPONSE as to 24 Motion to Dismiss Case as Frivolous 1 Complaint .(Responses due by 10/12/2012) Signed by Magistrate Judge Patrick A. White on 9/17/2012. (tw) (Entered: 09/17/2012)
09/20/2012	29	NOTICE Of Filing Bond Hearing Video, by Lemane Deon Williams (cqs) (Entered: 09/20/2012)
10/09/2012	30	MOTION to Stay Summary Judgment by Lemane Deon Williams. Responses due by 10/26/2012 (cqs) (Entered: 10/09/2012)
10/09/2012	31	MOTION For Discovery/Reguest For Production Of Documents. by Lemane Deon Williams. (cqs) (Entered: 10/09/2012)
10/09/2012	32	MOTION to Compel *Discovery* by Lemane Deon Williams. Responses due by 10/26/2012 (cqs) (Entered: 10/09/2012)
10/09/2012	34	MOTION for Discovery/ Request For Production Of Documents by Lemane Deon Williams. Responses due by 10/26/2012 (cqs) (Entered: 10/10/2012)
10/09/2012	35	MOTION to Compel *Discovery* by Lemane Deon Williams. Responses due by 10/26/2012 (cqs) (Entered: 10/10/2012)
10/09/2012	36	MOTION to Stay Summary Judgment by Lemane Deon Williams. Responses due by 10/26/2012 (cqs) (Entered: 10/10/2012)
10/09/2012	37	NOTICE of Filing; Request For Admissions by Lemane Deon Williams (cqs) (Entered: 10/10/2012)
10/09/2012	38	NOTICE of Filing; Fisrt Set Of Interrogatories by Lemane Deon Williams (cqs) (Entered: 10/10/2012)
10/10/2012	33	ORDER granting 25 Motion to Stay, the only remaining dates are joinder of parties and the filing of dispositive motions, however a dispositive motion has been filed ; granting in part and denying in part 30 plaintiff's Motion to Stay to the extent the plaintiff is granted a thirty day extension of time to respond to the motion for summary judgement; denying 31 Motion to Produce, the discovery dates have passed; deferring 32 Motion to Compel, the defendants shall respond to this motion. Signed by Magistrate Judge Patrick A. White on 10/10/2012. (cz) (Entered: 10/10/2012)
10/11/2012	39	ORDER denying 34 Motion for Discovery, dates have passed; deferring ruling on 35 Motion to Compel, defendants have been ordered to respond; denying 36 Motion to Stay summary judgement. Signed by Magistrate Judge Patrick A. White on 10/11/2012. (cz) (Entered: 10/11/2012)
10/22/2012	40	RESPONSE in Opposition re 32 MOTION to Compel *Discovery*, 35 MOTION to Compel *Discovery* filed by Anthony Feria. (Zaron, Erica) (Entered: 10/22/2012)
10/29/2012	41	ORDER granting in part and denying in part 35 Motion to Compel, IF THIS CASE SURVIVES SUMMARY JUDGEMENT, in light of the plaintiff's pro−se status, and the fact that the discovery was requested, albeit just before the deadline, the defendants shall respond to the discovery within its control or knowledge. Signed by Magistrate Judge Patrick A. White on 10/29/2012. (cz) (Entered: 10/29/2012)
11/01/2012	42	NOTICE of Attorney Appearance by Lauren Elizabeth Morse on behalf of Anthony Feria (Morse, Lauren) (Entered: 11/01/2012)

11/13/2012	43	Statement of: Disputed Factual Issues by Lemane Deon Williams (cqs) (Entered: 11/13/2012)
11/13/2012	44	NOTICE of Filing Declaration in Opposition to Motion for Summary Judgment by Lemane Deon Williams (cqs) (Entered: 11/13/2012)
11/13/2012	45	MOTION for Leave to File Amended Complaint by Lemane Deon Williams. (cqs) (Entered: 11/13/2012)
11/13/2012	46	Brief In Opposition To Defendant's Summary Judgment Motion by Lemane Deon Williams. (cqs) (Entered: 11/13/2012)
11/13/2012	47	Brief In Opposition To Defendant's Summary Judgment Motion by Lemane Deon Williams. (cqs) (Entered: 11/14/2012)
11/13/2012	48	Declaration In Opposition To Defendant's Motion For Summary Judgment by Lemane Deon Williams (cqs) (Entered: 11/14/2012)
11/13/2012	49	Statement of: Disputed Factual Issues by Lemane Deon Williams (cqs) (Entered: 11/14/2012)
11/13/2012	50	MOTION for Leave to File Amended Complaint by Lemane Deon Williams. (cqs) (Entered: 11/14/2012)
11/14/2012	51	ORDER granting 45 Motion for Leave to File; granting 50 Motion for Leave to File SOLELY TO PERMIT THE PLAINTIFF TO CORRECT THE NAME OF THE HOSPITAL HE WAS TAKEN TO. Signed by Magistrate Judge Patrick A. White on 11/14/2012. (cz) (Entered: 11/14/2012)
11/23/2012	52	REPLY to Response to Motion re 24 Motion to Dismiss Case as Frivolous 1 Complaint filed by Anthony Feria. (Morse, Lauren) (Entered: 11/23/2012)
11/30/2012	53	Pretrial Statement/ General Statement by Lemane Deon Williams (cqs) (Entered: 11/30/2012)
12/07/2012	54	Partial REPLY to Response in Support of re 24 Motion to Dismiss Case as Frivolous 1 Complaint filed by Lemane Deon Williams. (cqs) (Entered: 12/07/2012)
12/14/2012	55	NOTICE by Anthony Feria *Regarding Pre−Trial Statement* (Morse, Lauren) (Entered: 12/14/2012)
01/02/2013	56	NOTICE of Filing Supplemental Discovery Evidence by Lemane Deon Williams (cqs) (Entered: 01/02/2013)
01/17/2013	57	MOTION To Request Permission To Supplement Plaintiff's Pretrial Statement/General Statement by Lemane Deon Williams. (yar) Modified to correct filer on 1/18/2013 (asl). (Entered: 01/17/2013)
01/17/2013	58	MOTION Supplementing Preliminary Statement General Statement 53 Statement by Lemane Deon Williams. (yar) Modified to correct filer on 1/18/2013 (asl). (Entered: 01/17/2013)
01/18/2013	59	Clerks Notice of Docket Correction re 58 MOTION Supplementing Preliminary Statement General Statement re 53 Statement, 57 MOTION for Leave to File per call from attorney. **Modified Filer** by Clerk. (asl) (Entered: 01/18/2013)
01/22/2013	60	ORDER granting 57 Motion for Leave to File. granting 58 Motion to supplement statement. Signed by Magistrate Judge Patrick A. White on 1/22/2013. (cz) (Entered: 01/22/2013)
01/25/2013	61	RESPONSE in Opposition re 58 MOTION Supplementing Preliminary Statement General Statement re 53 Statement filed by Anthony Feria. (Morse, Lauren) (Entered: 01/25/2013)
01/31/2013	62	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 24 Motion to Dismiss Case as Frivolous 1 Complaint filed by Anthony Feria. Recommending that: (1) the Defendant Feria's Motion to Dismiss (DE#24), treated as a Motion for Summary Judgment, be GRANTED, on the ground that the complaint is subject to dismissal, as malicious, pursuant to 28 U.S.C.§1915(e)(2)(B)(i); (2) the dismissal

		be with prejudice; and (3)this case be CLOSED. Objections to RRdue by 2/19/2013 Signed by Magistrate Judge Patrick A. White on 1/30/2013. (tw) (Entered: 01/31/2013)
02/19/2013	63	OBJECTIONS to the Magistrate 62 Report and Recommendations by Lemane Deon Williams. (yar) (Entered: 02/20/2013)
03/05/2013	64	RESPONSE TO OBJECTION to 62 Report and Recommendations by Anthony Feria. (Morse, Lauren) (Entered: 03/05/2013)
03/18/2013	65	ORDER overruling 62 Report and Recommendations; denying Defendant's 24 Motion to Dismiss; and referring case to Magistrate Judge White for further proceedings. Signed by Judge Joan A. Lenard on 3/18/2013. (cew) (Entered: 03/18/2013)
03/29/2013	66	ORDER Scheduling Pretrial Proceedings When Plaintiff is Proceeding Prose: Amended Pleadings due by 6/17/2013. Discovery due by 6/3/2013. Dispositive Motions due by 7/9/2013. Pretrial Statement due for the Plaintiff 7/23/13 and for the defendants 8/6/13. Signed by Magistrate Judge Patrick A. White on 3/28/2013. (br) (Entered: 03/29/2013)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-24638-CIV-LENARD
MAGISTRATE JUDGE P.A. WHITE

LEMANE DEON WILLIAMS, :

Plaintiff, :

v. :

DETECTIVE FERIA, :

Defendant. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

The plaintiff, Lemane Deon Williams, a detainee at the Metro West Detention Center, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 on December 28, 2011, for damages, raising claims of excessive force, arising from events surrounding his arrest in January of 2010.

This Cause is before the Court upon a preliminary screening of the complaint (DE#1) pursuant to 28 U.S.C. §1915. The plaintiff is proceeding in forma pauperis.

II. Analysis

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

> Sec. 1915 Proceedings in Forma Pauperis
>
> * * *
>
> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that –

* * *

(B) the action or appeal –

* * *

(i) is frivolous or malicious;

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

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

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).

Statement of the Claims

The plaintiff contends that Miami-Dade County Detective Anthony Feria arrested him in January of 2010 for various charges. He claims that he handcuffed him and transported him to the police station. He repeatedly asked him for “the gun”, and then started to beat him. Feria pushed him while restrained and he fell. He continued to punch him in his face and body. The plaintiff suffered a broken hand and index finger, chipped teeth, and several abrasions and bruises. He was then transported to Ward D in Jackson Memorial Hospital, where he required surgery to his hand and a steel plate inserted in his right index finger. He states he has lost motion of his injured finger. He seeks ten million dollars in monetary damages and injunctive relief.[2]

Use of Force

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); Hadley v Gutierrez, 526 F.3d 1324, 1329 (11 Cir. 2008); Vinyard v. Wilson, 311 F.3d 1340, 1346-47 (11 Cir. 2002); Lee v. Ferraro, 284 F.3d 1188, 1197 (11 Cir. 2002); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991).

2. The plaintiff also filed (DE#7) which is cumulative of the initial complaint filed.

Such an analysis requires a court to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government interest alleged to justify the intrusion." Graham, supra, quoting United States v. Place, 462 U.S. 696 (1983). The factors to consider when balancing an arrestee's constitutional rights and the need for use of force include (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight; Graham, supra, 490 U.S. at 396; Vinyard, supra, 311 F.3d at 1347; Lee, supra, 284 F.3d at 1197; and in determining whether the force applied was "reasonable" under the circumstances, the Court must examine: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; and (3) the extent of the injury inflicted upon the individual to whom the force was applied. Graham, at 396; Vinyard, at 1347; Lee at 1998. Although the test applied by the Eleventh Circuit previously included a subjective prong, examining whether the force was applies maliciously, see e.g. Leslie v. Ingraham, 786 F.2d 1533, 1536 (11 Cir. 1986), that factor was eliminated from the analysis by Graham and other cases establishing that the excessive force inquiry should be completely objective, thereby excluding consideration of the Officer's intentions. Lee, supra, 284 F.3d at 1198 n.7. Thus, "reasonableness" for purposes of such an analysis is judged according to an objective standard under the totality of the circumstances, without regard to the officers' underlying intent. Graham, supra at 389. In Lee, the Eleventh Circuit explained that "Graham dictates unambiguously that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight." Lee, supra, 284 F.3d at 1198. Courts mut

account for the fact that the police officers are forced to make split second judgements in circumstances that are tense, uncertain and rapidly evolving as to the use of force used. Baptiste v Gutierrez, 627 F.3d 816, 821 (11 Cir. 2010).

Analysis of complaint

Research at the Miami Dade Custody Inmate Information website reveals that the plaintiff is facing charges in state case no. 10-4200 for aggravated assault upon a police officer, robbery with a deadly weapon and other charges. It may well be that the Officer is entitled to qualified immunity. However, at this preliminary stage, the plaintiff has stated a claim of use of unlawful force, and the claim will require further development to determine its sufficiency.

The plaintiff has not specified whether he intends to sue the defendant officer in his individual or official capacity. A §1983 suit against a 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, minimally state a classic case of an official acting outside the scope of their 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.

III. Recommendation

Based on the foregoing, it is recommended that:

1. The claim of excessive force shall proceed against Officer Feria, in his individual capacity.

2. Service will be ordered by separate order.

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 16th day of February, 2012.

UNITED STATES MAGISTRATE JUDGE

cc: Lemane Deon Williams
Metro West Detention Center
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-24638-CIV-LENARD/WHITE

LEMANE DEON WILLIAMS,

Plaintiff,

v.

DETECTIVE FERIA,

Defendant.

_____/

ORDER ADOPTING REPORT & RECOMMENDATION OF MAGISTRATE JUDGE (D.E. 8)

THIS CAUSE is before the Court on the Report and Recommendation of the Magistrate Judge ("Report," D.E. 8), issued on February 16, 2012, recommending that Plaintiff's claim of excessive force proceed against Officer Feria in his individual capacity. The Parties were provided fourteen (14) days to file objections to the Report. To date, the Parties have not filed any objections to the Report. Failure to timely file objections shall bar parties from attacking on appeal the factual findings contained in the report. See Resolution Trust Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Therefore, after an independent review of the Report and record, it is hereby **ORDERED AND ADJUDGED** that:

1. The Report of the Magistrate Judge (D.E. 8), issued on February 16, 2012, is **ADOPTED**;

2. Plaintiff's claim of excessive force shall proceed against Officer Feria in his individual capacity; and

3. Service will be ordered by a separate order from the Magistrate Judge.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of March, 2012.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-24638-CIV-LENARD
MAGISTRATE JUDGE PATRICK A. WHITE

LEMANE DEON WILLIAMS, :

Plaintiff, :

v. :

DETECTIVE FERIA, :

Defendants. :

REPORT OF
MAGISTRATE JUDGE

I. INTRODUCTION

In December 2011, Plaintiff Lemane Deon Williams, then confined as a Miami-Dade County pretrial detainee at the Metro West Detention Facility, filed a pro se civil rights complaint, pursuant to 42 U.S.C. §1983 (DE#1, dated 12/2/11, and docketed 12/28/11). In it he alleges that, on the night of his arrest in 2010, Detective Anthony Feria of the Miami-Dade Police Department ("MDPD") subjected him to brutality during post-arrest questioning at the police station, injuring him so badly that County Corrections officals would not accept him into the county jail; and instead he was taken that night to Jackson Memorial Hospital (Ward D) for surgery.

In April 2012 Williams filed a Notice of Change of Address, indicating he had been transferred to custody of the Florida DOC, at South Florida Reception Center. (DE#10, dated 4/11/12).[1]

In his Complaint, Williams alleged, as follows, *verbatim*:

> In approximately January 2010 Detective Anthonty Feria (Badge 2637) Miami-Dade Police arrested me for various charges. After

[1] Records pertaining to Lemane Williams [Florida DOC# M05282], which are maintained and published as a matter of public record on the internet by the Florida DOC, indicate that he is currently confined at Gulf C.I., serving a 25 year term of incarceration for four offenses [(1) Attempted Robbery with a Deadly Weapon; (2) Attempted Felony Murder; (3) Firearm Possession by a convicted felon; and (4) Attempted Felony Murder], all committed on 02/08/10, on which he was sentenced in Miami-Dade criminal case 10-04200 on 3/21/12. See *Inmate Population Information Detail*, under the "Corrections Offender Network" available for public viewing on the Florida DOC's website (at http://www.dc.state.fl.us).

> he placed me in handcuffs he transported me to the police station. He kept asking me for the "gun," then he commenced to start beating me up. He pushed me while I was in handcuff restraints behind my back when I fell the officer began punching me in my face and body. I suffered a broken hand/index finger, chipped teeth, several abrasions and bruises. I was then taken to the County Jail, but the Jail refused to receive me due to my visible injuries (please see included copy of booking photo)[2] I was then transported to Jackson Memorial Hospital, Ward "D" to undergo treatment for my injuries which included surgery to my hand where a steel plate was inserted in my right index finger. I have lost complete range of motion on my right index finger (unable to bend) This is a permanent injury

(Complaint at ¶II, "Statement of Claim," DE#1 p.4). The Complaint was sworn, under penalty of perjury. (DE#1 p.6).

This Cause is before the Court upon Defendant Feria's Motion (DE#24) captioned "Motion to Dismiss Complaint as Frivolous Pursuant to 28 U.S.C. §1915(e)(2)(B)(i), with supporting exhibits designated as Exs. A-E (at DE#s 24-1 to 24-5, and DE#29).

The defendant's exhibits are: **Exhibit A**, a MDPD "Offense-Incident Report" dated 2/8/10 by Officers McPhearson and Rodriguez [pertaining to Police Case No. 100208059113] (DE#24-1); **Exhibit B**, a "Complaint/Arrest Affidavit" dated 2/9/10 by Detective Anthony Feria MDPD/2637 [pertaining to Police Case No. 100208059113 and Court Case No. F10004200] (DE24-2); **Exhibit C**, Cover Sheet (DE#24-3) for "conventional filing" of the Video of Plaintiff Williams' Bond Hearing conducted on 2/9/10 (see DE#26, Motion for Order Authorizing Clerk to Accept filing of Video; see DE#27, Order Granting Motion DE#26; see DE#29, 9/20/12 Notice of Filing Bond Hearing Video; and see corresponding Expansion File 1:11CV24638-X1

[2] No booking photo or other exhibit was attached to the complaint.

maintained by the Clerk in the Court's Records Department, containing the CD of Williams' 2/9/10 Bond Hearing in Miami-Dade Case F10-4200); **Exhibit D**, a Miami-Dade Corrections and Rehabilitation Department "Jail Booking Record" dated 2/9/10 pertaining in pertinent part to Case F10-004200 (DE#24-4); and **Exhibit E**, a Declaration of Lt. Ruben Okera, the Lieutenant responsible for operation of "Ward D" at Jackson Memorial Hospital, and attached **Exhibit E**-1 consisting of the "Ward D" "sign-in sheet" for 2/8 to 2/9/10, formally titled "Jackson Memorial Hopital Prisoner Admission and Release Sheet (Hospital Service Unit)."

As discussed further, below, in Section II of this Report, the thrust of Defendant Feria's Motion to Dismiss (DE#24) is that material facts asserted in Williams' sworn complaint which are central to his claim of alleged brutality by Feria and the alleged resulting injuries are so clearly contradicted by irrefutable evidence of record [established through Defendant's Exhibits A-E] that Plaintiff's misstatements of such material facts render his complaint to be one that is subject to dismissal as frivolous and/or malicious pursuant to §1915(e)(2)(B)(i), where courts have held that what may be a legitimate claim may cross into the relm of being frivolous if the facts are "grossly exaggerated or totally false," and that a complaint may be subject to dismissal as malicious and abuse of the judicial process under §1915(e)(2)(B)(i), where malice may be inferred from a complaint that contains factual misrepresentations or the plaintiff abuses the judical process.

In this case, where Defendant Feria's Motion to Dismiss pursuant to 28 U.S.C. §1915(e)(2)(B)(i) was accompanied by his Exhibits A-E, the plaintiff Williams was informed of his right to Respond (Order of Instructions, DE#28). The Order DE#28 informed the plaintiff that Defendant's Motion to Dismiss with supporting

Exhibits (documentation and video) would be treated as a Motion for Summary Judgment, informed him of his right to Respond, and instructed him as a *pro se* litigant of requirements under Fed.R.Civ.P. 56 for a proper response to such a motion.[3] In

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[3] Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper

> [i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held that summary judgment should be entered only against

> a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. (citations omitted)

Thus, in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held that summary judgment should be entered only against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. (citations omitted). Thus, pursuant to Celotex and its progeny, a movant for summary judgment bears the initial responsibility of informing the court of the basis for his motion by identifying those parts of the record that demonstrate the nonexistence of a genuine issue of material fact. This demonstration need not be accompanied by affidavits. Hoffman v. Allied Corp., 912 F.2d 1379, 1382 (11 Cir.1990).If the party seeking summary judgment meets the initial burden of demonstrating the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party, to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. Avirgan v. Hull, 932 F.2d 1572, 1577 (11 Cir.), cert. denied, 112 S.Ct. 913 (1992). It is the nonmoving party's burden to come forward with evidence on each essential element of his claim sufficient to sustain a jury verdict. Earley v. Champion International Corp., 907 F.2d 1077, 1080 11 Cir.1990). The non-moving party cannot rely solely on his complaint and other initial pleadings to contest a motion for summary judgment supported by

Response to Defendant Feria's Motion, the Plaintiff Williams filed a "Statement of Disputed Facts" (in duplicate at DE#s 43, 49), a "Declaration in Opposition" (in duplicate at DE#s 44, 48), and a "Brief in Oppostion" (in duplicate at DE#s 46, 47), all of which were dated 11/7/12 and docketed by the Clerk on 11/13/12.

In filing his "Statement of Disputed Factual Issues" (DE#s 43, 49), and "Declaration in Opposition to Defendants' Motion for Summary Judgment" (DE#s 44, 48) plaintiff Williams simply reiterated the same fact allegations he had set out in Paragraph II of his complaint (see DE#1, "Statement of Claim," DE#1 p.4), and signed the complaint (DE#1, at p.6). Williams, however, also signed the complaint a second time, declaring that its contents were true. [Below Williams' first signature, as part of the complaint form, appeared the words "I declare under penalty of perjury that the foregoing is true and correct. (*optional*)" (DE#1 p.6); and below those words Lemane Williams affixed his signature. Williams later filed an unsworn "Statement of Disputed Facts" (DE#s 43, 49), the text of which reads as follows, *verbatim*:

> The defendant has moved for summary judgment on the plaintiff's claim concerning use of force. Pursuant to

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evidentiary material, but must respond with affidavits, depositions, or otherwise to show that there are material issues of fact which require a trial Fed.R.Civ.P. 56(e); Coleman v. Smith, 828 F.2d 714, 717 (11 Cir.1987). If the evidence presented by the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Baldwin County, Alabama v. Purcell Corp., 971 F.2d 1558 (11 Cir.1992). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11 Cir. 1990) (citing Anderson v. Liberty Lobby, Inc., supra).

Pursuant to Brown v. Shinbaum, 828 F.2d 707 (11 Cir.1987), the Order of Instructions to Pro Se Plaintiff Concerning Response to Motion for Summary Judgment (DE#28) was entered to inform the *pro se* plaintiff of his right to respond to the defendant's motion, treated as one for summary judgment, and instruct him regarding requirements under Fed.R.Civ.P. 56 for a proper response to such a motion.

Local Rule 56 (e)(2) of this court, the plaintiff submits the following list of genuine issues of material fact that reqire the denial of the defendant's motion.

1) On approximately January 2010 Officer Anthony Feria (Badge 2637), Miami - Dade Police arrested me for various charges.

2) After he placed me in handcuffs he transported me to the police station.

3) He kept asking me for the "gun," then he commenced to start beating me up.

4) He pushed me while I was in handcuff restraints behind my back.

5) When I fell the officer began punching me in my face and body.

6) I suffered a broken hand / index finger, chipped teeth, several abrasions and bruises.

7) I was then taken to the county jail, but the jail refused to receive me due to my visible injuries (please see include [sic] copy of booking photo).[4]

8) I was then transported to Jackson Memorial Hospital, Ward "D" to undergo treatment for my injuries which included surgery to my hand where a steel plate was inserted in my right index finger.

9) 1 have lost complete range of motion on my right index finger (unable to bend).

10) This is a permanent injury.

Respectfully Submitted
/s/ Lemare Williams

(DE#s 43, 49; "Plaintiff's Statement of Disputed Factual Issues").

[4] No booking photo or other exhibit was attached to the "Statement of Disputed Factual Issues" (DE#s 43, 49).

In a companion filing, his "Declaration In Opposition to Defendant's Motion for Summary Judgment" (DE#s 44, 48), Plaintiff Williams echoed the same allegations he had made in his sworn complaint [DE#1], and in his unsworn "Statement" [DE#s 43, 49], but this time with the Declartion that his [Williams'] words were sworn to be true, under penalty of perjury, pursuant to 28 U.S.C. §1746. The text of Williams' "Declartion" reads, as follows, *verbatim*:

> Plaintiff, Lemane Deon Williams declares under penalty of perjury:
>
> l) I am the plaintiff in the above entitled case. I make this declaration in opposition to defendant's motion for summary judgment on my claim concerning use of force against me by defendant Officer Anthony Feria.
>
> 2) The defendant claims, in summary, that the plaintiffs claims are frivolous and untimely.
>
> 3) The defendant is not entitled to summary judgment because there are genuine issues of material fact to be resolved. These issues are identified in the accompanying statement of disputed factual issues filed by the plaintiff pursuant to rule 56(e)(2) of the local rules of this District Court. The facts are set out in this declaration.
>
> 4) On January 2010 Officer Anthony Feria (Badge 2637), Miami - Dade Police arrested me for various charges. After he placed me in handcuffs he transported me to the police station. He kept asking me for the "gun," then he commenced to start beating me up. He pushed me while I was in handcuff restraints behind my back. When I fell the officer began punching me in my face and body. I suffered a broken hand / index finger, chipped teeth, several abrasions and bruises. I was then taken to the County Jail, but the jail refused to receive me due to my visible injuries (please see included copy of booking photo).[5] I was then transported to Jackson Memorial Hospital, Ward "D" to undergo treatment for my injuries which included surgery to my hand where a steel plate was inserted in my right index

[5] No booking photo or other exhibit was attached to the Plaintiff's "Declartion" (DE#s 44, 48).

> finger. I have lost complete range of motion on my right index finger (unable to bend). This is a permanent injury.
>
> Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.
>
> Respectfully Submitted
> /s/ Lemare Williams

(DE#s 44, 48, "Declaration in Opposition..." at pp.1-2).

In his "Brief In Opposition" (DE#s 46, 47), the Plaintiff Williams, asserting that "the affidavits of the plaintiff and the defendant are squarely contradictory as to what happened," contends that "there exist genuine issues of material fact that preclude summary judgment for the defendant on the plaintiff's use of force claim." (Brief, p.2). In his "Brief in Opposition" the Plaintiff Williams also states, as follows, *verbatim*:

> The plaintiffs declaration submitted in response to the defendant motion states that this case should be dismissed. [sic].
>
> The defendants affidavit tells a different story. The defendant claims that the plaintiffs § 1983 is frivolous based on plaintiff's claim of where he was taken for medical treatment. The plaintiff mistakenly named Dade County Jail when in fact he was taken to Metro West Detention Center and the defendant knew this because whosever took him from there left a record.

(DE#s 46, 47, "Brief in Opposition" at pp.1-2). Thus, the plaintiff Williams by way of his Brief (DE#s 46, 47) indicates that, once he was arrested and was taken to the police station [where he alleges he was questioned and beaten], it was the Metro-West Detention Facility [and not the Dade County Jail] to which MDPD officers transported him for receipt/incarceration as a pre-trial detainee, and it was at Metro-West that Miami-Dade County Corrections Department refused to accept him due to his visible injuries; and

upon that refusal he was immediately taken that night to Jackson Memorial Hospital (Ward D) for surgery.

On 11/13/12, the Clerk docketed Plaintiff Williams' separate filing, captioned "Motion for Leave to File Amended Complaint" (dated 11/7/12, and filed in duplicate at DE#s 45, 50), requesting "leave to file an amended complaint correcting the location that the planitiff was taken to for medical treatment." In the "Motion for Leave to File Amended Complaint" (DE#50) Plaintiff Williams stated his request, in pertinent part, as follows, *verbatim*:

> Plaintiff Lemane Deon Williams pursuant to Rules 15 (a) and 19 (a), Fed.R.Civ.P., requests leave to file an amended complaint correcting the location that the plaintiff was taken to for medical treatment.
>
> 1) The plaintiff in his original complaint names Jackson Memorial Hospital Ward "D" as the location that he was admitted to for medical treatment.
>
> 2) Since the filing of the complaint and the defendant's motion for summary judgment claiming that the plaintiff's claim that he was taken to Jackson Memorial Hospital Ward "D" for medical treatment, the plaintiff has determined that his original complaint misstated the proper location, and an amendment id [sic] necessary to reflect the correct location plaintiff was treated for injuries in use of force by defendant.

(Motion for Leave to File Amended Complaint, DE#50 at pp.1-2). On 11/14/12, a paperless Order DE#51 was entered, ruling on the Motion to Amend [DE#s 45, 50]. The order read: "ORDER granting 45 Motion for Leave to File; granting 50 Motion for Leave to File SOLELY TO PERMIT THE PLAINTIFF TO CORRECT THE NAME OF THE HOSPITAL HE WAS TAKEN TO." (Order, DE#51). On 11/23/12, the Defendant filed a Reply (DE#52), captioned "Reply in Support of Defendant's Motion to Dismiss." Therein, referencing the Plaintiff's Declaration, and the Plaintiff's Motion for Leave to Amend, the Defendant argues that Plaintiff's post-complaint filings and the Court's limited

Order granting leave to amend do not undermine the fact that the Defendant's exhibits (Exhibits A-E –- which include Williams' Booking Record and the Video of his Bond Hearing) establish that material assertions (fact allegations) in Plaintiff's complaint, reiterated in his sworn Declaration, are fabrications. In his Reply, the Defendant argues, therefore, that his Motion to Dismiss pursuant to §1915(e)(2)(B)(i), treated by the Court as a motion for summary judgment, should be granted.

On 11/30/12 Plaintiff Williams' "Pretrial Statement/General Statement" (DE#53, dated 11/27/12) was docketed. Therein, contradicting his Brief [stating it was Metro-West that rejected him], and contadicting his "Motion to Amend" [in which he says he "missstated" the location where he was treated for his injuries], Williams again reiterates the same facts which he had alleged in the Complaint, and Declaration [i.e., that he fell and Detective Feria beat him inflicting injuries, that he was taken to the "County Jail," where officials "refused to receive" him due to his "visible injuries," and that when the County Jail refused him he was taken to "Jackson Memorial Hospital, Ward D" to undergo treatment for his injuries, "which included surgery to my hand where a steel plate was inserted in my finger."] (See Pretrial Statement, at DE#53 pp.1-2).

In his Pretrial Statement, Williams further indicates that, if his case goes to trial, he intends to rely on medical and dental records and Miami-Dade detenion records; that he plans to rely on statements of witnesses: (his wife and stepson) who observed his apprehension and would testify he was not injured during his arrest; (his wife) who upon visiting him in jail observed him with his hand in a cast, and a rod in his finger; (inmates) who observed the condition of his hand while incarcerated, including an inmate

who assisted him with all his writing, including medical and research requests, and communication with a Public Defender.[6]

Finally, on 12/28/12 Williams submitted a document captioned "Plaintiff's Supplemental Discovery Evidence" (DE#56, docketed 1/2/13) attached to which are a series of medical documents. They show that Williams was given medical treatment from February 9, 2010, through and including at least October 2010. They also reflect that Williams was not taken for surgery on the night of his arrest, as he has alleged in his Complaint, in his Declaration, and in his Pretrial Statement. Specifically, the medical documents include a 2/9/10 Metro-West Medication order indicating that Williams was prescribed Tylenol 650 mg BID (twice per day) PRN [as needed] for 7 days, from 2/9 to 2/15/10 (DE#56, p.8). The documents include a Radiology Report for Lemane Williams dated 4/13/10 (DE#56, pp.13-14), stating that Williams was seen for the complaint of "Pain and swelling of the right index finger, Injury 2 months ago." No prior study was available for comparison. The Radiology Report reflects that X-rays of Williams' hand were taken, and that they disclosed the existence of fractures in his right index

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[6] In his Pretrial Statement, Plaintiff Williams describes, as follows, the testimony which he expects his witnesses would give:

> My wife Tamike Shavette William and stepson William Osby. Is going to say is when I was arrested and I was not injured at the time of my arrest. And when she came to the jail to see me I was in a cast because my hand was broken. And rod in my index finger. When I got to metro west detention center Mr. William and Mr. Desmond can testify as to my condition and why I was unable to use my hand. Mr. Dunmore can testify as to months later the condition of my hand an not being able to write or properly hold eating utensils. For Mr. Dumore at the time of his incarceration at metro west. Did all my writing to various departments such as medical request L.R.A. request which is legal request research letters to public defender lawyer. Etc.

(DE#53 p.3)

finger.[7] A 6/8/10 Inmate Request form shows that Williams complained "My finger has been broken for 3 months X-rays has already been taken, I'm in extreme pain, I'm asking to see a doctor please." The Nurse's Objective observation was that there was "right index finger swelling," that Williams had been seen at North Clinic and treated with pain medication; her Assessment was that there was "Alteration [of] Comfort Pain - pain right index finger requesting renewal pain medication;" and the Plan of action was "MD Referral." (DE#56, p.16). A Metro-West "Consultation/Referral Form" dated 6/9/10 states: "31 yr old c/o [complains of] pain [Right] 2nd finger 3-4 months, claiming he fell [with] handcuffed & landed R [right] hand." It states: "X-ray shows subacute intra-articular fractures 2nd middle and distal phalanges done 4/13/10." It indicates that Williams "current medications" are "Naproxyn." Notations on the Consultation/Referral Form reflect that the referral request was approved, and forwarded through channels in June and July 2010. (DE#56, p.12). The documents also include a Memo captioned "Procedure Preparation" from a Metro-West Detention Center Nurse, instructing that Williams was scheduled for a procedure on Tuesday 8/24/10 and that that starting Midnight 8/23/10 he was to fast (have nothing by mouth) because he would be taken to North Clinic prior to midnight, and would leave to the

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[7] The Radiology Report, reads, in pertinent part, as follows:

Findings: There is a rounded radiopacity projecting along the radial soft tissues of the 3rd proximal phalanx, likely. representing a BB. There is an oblique, subacute, intra-articular fracture of the distal 2nd phalanx. In addition, there is an oblique, subacute, intra-articular fracture of the 2nd middle phalanx. There is mild radial subluxation at the 2nd proximal interphalangeal joint. The remainder of the joint spaces is preserved. Bony m ineralization is within normal limits.

Impression:
1. Foreign body along the radial soft tissues of the proximal 3rd digit, likely representing a BB.
2. Subacute intra-articular fractures of the 2nd middle and distal phalanges.

(DE#56, pp.13-14)

hospital from the clinic. (Memo, DE#56 p.3). An attached Public Health Trust Corrections Health Service document indictes that Williams was moved to "JMH" [Jackson Memorial Hospital] on 8/24/10 at 06:00 (DE#56, p.4). Four pages of documents pertaining to Williams reflect his admission to and discharge from the hospital (JMH) on 8/24/10 with discharge instructions and a pain medication prescription (DE#56 pp. 6 and 9-11). A Corrections "Medication Administration" chart reflects prescription and administration of Tylenol 650 mg to Williams from 8/28/ to 8/30/10 (DE#56, p.15). A "Schedule Inquiry" form reflects that a 10/4/10 "Ortho-Rehab-Foll-Up" for Williams at the "Hand Clinic" was confirmed ("Appt.Noted") by Metro-West on 9/21/10 (DE#56, p.7). Lastly, a 9/25/10 "General Sick Call" Nursing evaluation form reflects a Complaint: "Difficulty up/down - request LBP extension." The nurse Observed: "Cast intact RUE [right upper extremity];" the Assessment was "Referral Required" [Referral Type: Routine]; and the Plan of Action was "Instructions to return if conditon worsens," and "Education" about the medical condition and follow up. (DE#56, p.5).

II DISCUSSION

Defendant Feria, through his Motion to Dismiss (DE#24) and supporting exhibits, has established [as discussed further below] that the plaintiff Lemane Williams in his complaint (DE#1) intentionally mis-stated material facts in his complaint, in which he claims that Feria engaged in post-arrest brutality at a police station while questioning Williams, before Williams was taken to a Miami-Dade facility for booking and pre-trial detention. [Specifically, as discussed supra, at some length, Williams contends that post-arrest, when he was first taken from the police station to a Miami-Dade County jail/detention facility for admission/booking, he was so badly injured that the County jail facility would not accept him, and he contends that instead he had to be taken directly to Jackson Memorial Hospital on the night of his arrest, and at that time underwent surgery on his hand which he claims involved *inter alia* insertion of a steel plate in his right

index finger]. The defendant's exhibits in support of dismissal pursuant to §1915(e)(2)(B)(i), as discussed below, irrefutably prove otherwise.

Defendant Feria's exhibits show the following.

On 2/8/10, shortly after 7:30 p.m., a Miami-Dade police unit (Officers McPherson and Rodriguez) responded to a call that shots were fired and a man was "down" at a 284th Street address in Homestead. Upon arrival, they found that two brothers of the shooting victim had overpowered the shooter [Lemane Williams], had managed to take his firearm away from him, and were holding him until police arrived. The two men had heard their brother's [the shooting victim's] calls for help, as Williams was attempting to steal money from him, and the victim was shot while he struggled with Williams. During the brothers' subsequent struggle/fight with Williams, as he was about to fire his gun a second time, the gun was deflected and the bullet struck the ceiling. Officer Arauz (ID 7907) had been the first officer on the scene, and had already taken the Assailant [Williams] into custody. Detective Feria responded to the Crime Scene, and took over the investigation; and the Crime Lab [Officer Gonzalez] responded and impounded the firearm. (See DE#24-1 Exh. A, Offense Incident Report by Officers McPhereson and Rodriguez).

The Complaint/Arrest Affidavit (DE#24-2, Exh. B, by Detective Feria) echos information provided by the witnesses, which had been included in the McPhereson/Rodriguez "Offense Incident Report." Feria's Complaint/Arrest Affidavit dated 2/9/10, indicated that the gun from the Defendant was recovered; that "[the defendant] Post Miranda acknowledged shooting victim and possession of gun which had serial # scratched off. [Defendant] further advised he was a convicted felon." The Complaint/Arrest Affidavit also indicates: "[Defendant] arrested & transported to T.G.K. [Turner Guilford Knight] Via HQ [Headquarters].

The Defendant's Exhibits indicated that McPhereson and Rodriguez had been dispatched at "1939" [7:39 p.m.], and had arrived at "1951" [7:51 p.m.] on 2/8/10 (Exhibit A, DE24-1 p.1). The Complaint/Arrest Affidavit indicates that the "Arrest Time" was at "1945" [7:45 p.m.] on 2/8/10. (Exhibit B, DE#24-2 p.3).

As noted by the Defendant Feria in his Motion (DE#52 p.4), plaintiff's contention that he was refused at a County jail/detention facility on the night of his arrest after leaving the police station, and thus was taken directly to Jackson Memorial Hospital (Ward D) for surgery, is belied by his Miami-Dade County Correction and Rehabilitation Department Jail Booking Record. That record (Exhibit D, at DE#24-4 p.1) establishes that the "Booked Date" for Lemane Williams was 2/9/10, and that his "TIJ" [Time in Jail] was 04:37 [4:37 a.m. on 2/9/10]. It also indicates that his "TOR" [Time of Arrest] was 19:49 [or 7:49 p.m. –- a difference of 4 minutes from the hour listed on Exhibit B, the Complaint/Arrest Affidavit].

The Affidavit by Ruben Okera, the Lieutenant responsible for operation of Ward D of Jackson Memorial Hospital where arrestees are treated (Affidavit, Exh.E, DE#24-5) and the appended "Jackson Memorial Hospital Prisoners Admission and Release Sheet (Hospital Service Unit)" for 2/7 through 2/9/10, establish that Lemane Williams was never admitted to the Jackson Memorial Hospital prison ward on the night of February 8/February 9, 2010, for surgery, as he has sworn he was under penalty of perjury. [Of course, Williams' own exhibits, captioned as "Supplemental Discovery Evidence," filed at DE#56, further belie that sworn statement by him].

Finally, careful viewing of the Video of Lemane Williams' Bond Hearing on 2/9/10 (Defendant's Exhibit C: noticed at DE#24-3; conventionally filed at DE#29; and archived in Expansion Folder X-1 in this case) belies material facts alleged by Williams under penalty of perjury in his Complaint, subsequently reiterated by him under penalty of perjury in his Declaration, and repeated by him

most recently in his Pretrial Statement. A viewing of the Bond Hearing video refects that it is a record of proceedings conducted on 2/9/10 before the Honorable Spencer Eig, a Judge of the Eleventh Judicial Circuit of Florida, at Miami-Dade County.

The video CD shows simultaneous split screen views of Judge Eig on the bench, and detainees in custody at a Miami-Dade County jail/dentention facility appearing before him via video, for findings of probable cause and bond determinations in their cases. [As depicted on the Video, Lemane Williams' two cases heard by Judge Eig on 2/9/10 were Case Nos. F10-4200 and F10-4199]. The video (Defendant's Ex.C) starts at 14:15:39 [at 2:15 p.m. and 39 seconds], and for nearly 8 minutes [through 14:23:02] depicts a hearing pertaining to an inmate named Murray, charged in Miami-Dade cases F10-4196 and F10-4197. At 14:23:07 Lemane Williams is called, and his proceeding begins. Williams walks forward and approaches the camera with his head inclined downward, and with his arms crossed tightly in front of his body. [Video at 14:23:10]. He uncrosses his arms, and his right and left hands are visible. [Id., 14:23:12]. He is handed paperwork by a person off camera and accepts it, graping the papers with his right hand [Id., 14:23:27]; he then uses his left hand to assist in folding the group of papers in half length-wise [Id., 14:23:30], and, grasping the folded papers in his right hand, again crosses his arms tightly in front of his body and tucks his right hand and the papers under his left arm [Id., 14:23:31]. Williams momentarily uncrosses his arms, grasping the papers tightly folded in his right hand [Id., 12:23:54] and switches them to his left hand [Id., 12:24:03]; and momentarily gestures with his right hand, pointing to his left [Id., 14:24:12]. Judge Eig finds probable cause in Case F10-4200 [Id., at 14:24:14]. Williams then raises his right hand to his mouth, with his fingers curled in a loose fist, and at that point a white bandaid or piece of tape can be seen around the the tip of Williams' right index finger. [Id., 14:24:31]. Then, he can again be seen, repeatedly gesturing with his right hand, and with his

left hand in which he is holding the papers [Id., starting at 14:24:41 until 14:24:55], during which time his right hand is clearly visible with a bandaid or thin strip of tape wrapped around the tip of the index finger [Id., at 14:24:52 to 14:24:54]. Judge Eig, sets bond in Case F10-4200 [Id., starting at 12:25:01]. Williams re-crosses his arms [Id., at 14:25:23]. Judge Eig, then references Williams' other case F10-4199 involving 3 counts of Aggravated Assault on a Firefighter or Police, and sets bond in that case [Id., at 14:26:36]. Williams then steps away from the camera at the end of his hearing [Id., 14:27:22]. On the Video, Williams can be heard engaging in commentary to the Court during the hearing, including his contention that it was not his gun, but he says nothing to the Court about injuries, or about having been beaten the night before at a police station during questionining [Id. 14:23:07 to 14:27:22].

While Williams alleges that on the night of his arrest [which the record establishes was 2/8/10], at the police station, Feria beat him about his face and body, allegedly inflicting several abrasions and bruises, Williams' torso cannot be seen on the Video, as that part of his body is covered by his short sleeve shirt. On the Video of his 2/9/10 hearing, however, no obvious contusions or scrapes are visible on Williams' forearms or face. While Williams in his Complaint and Declaration also alleges that he suffered chipping of unspecified teeth during the beating which Defendant Feria allegedly administered [on the night of 2/8/10], the Video of his 2/9/10 probable cause/bond hearing sheds no light on that allegation, as Williams did not not smile or open his mouth in such a way that his teeth were visible on the video of his hearing.

The Complaint/Arrest Affidavit by Detective Feria ("Exhibit B, at DE24-2) relating to Williams was in regard to the attempted robbery, and shooting incident in Homestead on the early evening of 2/8/10, which was assigned Court Case F10-4200. What the Defendant's "Exhibit C" [the 2/9/10 Bond Hearing video for Cases

F10-4200 and F10-4199] and Defendant's "Exhibit D" [the Jail Booking Record for Cases F10-4200 and F10-4199] together unequivocally establish is the untruth of Plaintiff Williams' assertions that he was so badly injured that Miami-Dade Corrections officials refused to accept him on the night of his arrest when MDPD officers brought him to a jail/detention facility for intake, and that he was instead immediately taken to Jackson Memorial Hospital for emergency surgery. They show that at about 2:20 p.m. on 2/9/10, some 16½ hours after Williams' 7:45 p.m. arrest on 2/8/10, there was no evidence of surgery having been performed on his right hand; and show that he was, in fact, booked into the Miami-Dade Corrections and Rehabilitation Department at about 4:37 a.m. on 2/9/10, contrary to his contention that his admission was refused due to his injuries.

In the instant case, as discussed above, the Plaintiff Lemane Williams signed his §1983 complaint (DE#1) and did so stating that he declared "under penalty of perjury" that its contents were "true and correct." Thereafter, Williams was faced with Defendant Feria's Motion to Dismiss pursuant to 28 U.S.C. §1915(e)(2)(B)(i), and Feria's supporting exhibits which demonstrate [as discussed above] that Williams lied about certain material issues of fact in support of his complaint. When faced with Defendant Feria's arguments that the complaint should be dismissed, as frivolous and/or malicious pursuant to §1915(e)(2)(B)(i) because of those lies, the Plaintiff Williams, attempting to create a genuine issue (or issues) of material fact, and hoping to avoid the granting of Feria's Motion (DE#24, treated as one for summary judgment, <u>see</u> Order, DE#28), Williams reiterated in his Declaration (DE#s 44, 48) under penalty of perjury pursuant to 28 U.S.C. §1746, the same allegations which he had raised in his sworn complaint. This included Williams's repetition in his Declaration, and unsworn pretrial statement, of the same allegations which Feria's exhibits proved were untrue.

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party, but only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). The Supreme Court in Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, supra, 475 U.S. at 586–587 (footnote omitted). And the Supreme Court, in Anderson v. Liberty Lobby, Inc., supra 477 U.S. at 247-48 held that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." The Court has further held that "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007). That is the case here, where, with regard to the factual issue of whether the plaintiff Williams was so brutally beaten on the night of his 2/8/10 arrest [according to him at the hands of Detective Feria, during questioning at the police station] that the jail/detention center would not admit him for booking that night, and he instead instead was taken directly to Jackson Memorial Hospital for hand surgery during which a metal plate was placed in his right index finger. Here, that portion of the plaintiff's version of the events is so untterly discredited by the Defendant Feria's exhibits, that no reasonable jury could believe Williams with regard to his assertions regarding those material facts.

Upon consideration of the parties' filings, and reaching a determination as to whether the Defendant Feria's Motion should be

granted, the Court does not and cannot at this juncture reach any determination regarding the cause or causes of injuries that the Plaintiff Williams alleges he sustained, including whether Detective Feria inflicted the injuries that are alleged. Defendant Feria's motion is not supported by his own affidavit, or affidavits of others, or the like, attesting to or otherwise establishing proof of the nature of the interaction between Feria and the plaintiff Williams at a MDPD police station, prior to his transfer at about 4:30 a.m. on 2/9/10 to a Miami-Dade County jail/detention facilty. There are no medical documents shedding light on Williams' claims of bruising, abrasions, and chipped teeth. The medical documents of record, submitted by plaintiff Williams prove that, indeed, he did have fractures in three bones in his right index finger, but the record also shows that he received medical evaluation and/or treatment over a period of 6 months (from February to August 2010) and that surgery was performed on 8/24/10 and not the night of Williams' arrest (2/8 to 2/9/10) as Williams would have the Court believe.

In sum, it is not appropriate or even possible at this juncture to reach a determination on the merits of the question whether Detective Feria beat the inmate/plaintiff inflicting injuries upon him on the night of his arrest. The defendant's exhibits do not provide irrefutable proof that is dispositive on that question.

What defendant Feria's exhibits [together with Plaintiff Williams' sworn Declaration in opposition Feria's Motion] do irrefutably prove, however, is that Williams blatantly lied in his sworn complaint, in his effort to get his foot in the door of the United States Distict Court, so that he might pursue a claim that Feria engaged in post-arrest brutality at a police station while questioning Williams, before Williams was taken to a Miami-Dade facility for booking and pre-trial detention. He then repeated the same untruths in his Declaration, in response to the Defendant's Motion to dismiss the complaint, as frivolous and/or malicious.

This Court is solicitous of *pro se* plaintiffs' interests, and liberally construes pleadings of *pro se* litigants who are incarcerated and unschooled in the law. For example, when filing a *pro se* civil rights complaint for damages or other relief, such litigants need not correctly articulate precisely what constitutional provision it is that they believe has been violated. What is required of them, however, is an adequate statement of the facts underlying the claim or claims that they bring against each named defendant; and what is also expected and indeed demanded of them is that the facts alleged in support of their claims are the truth. For that reason, such complaints are signed and verified.

The court expects its litigants, including *pro se* plaintiffs, to take seriously their attestations under penalty of perjury that the information contained in their complaint forms (and Declarations) is true and correct; and the court will not countenance the intentional voicing/allegation of untruths by a plaintiff, albeit a plaintiff who is proceeding *pro se*.

The Prison Litigation Reform Act of 1995 ("PLRA"), of which 28 U.S.C. §1915(e)(2)(B)(i) is a part, provides:

> "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 ...the action or appeal — is frivolous or malicious."

28 U.S.C. §1915(e)(2)(B)(i) (1996). See Bilal v. Driver, 251 F.3d 1346, 1348 (11 Cir. 2001).

A case may be deemed frivolous where the complaint lacks any arguable basis in law or fact. Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); see also Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1349 (11 Cir.2002); Bilal v. Driver, supra. Frivolous claims include those that

describe "fantastic or delusional scenarios." Bilal, 251 F.3d at 1349.

Malicious filings include those in which a party abuses the judicial process by lying in a pleading under penalty of perjury, Rivera v. Allin, 144 F.3d 719, 731 (11 Cir.1998) (abrogated on other grounds by Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007)). "Malice can be inferred from a complaint that contains material factual misrepresentations or plainly abuses the judicial process." Horton v. Thomas, No. 96 C 0367, 1996 WL 67013, *2 (N.D. Ill. Feb. 14, 1996).

In the present case, upon review of the record, it appears that the complaint should be dismissed under §1915(e)(2)(B)(i) as malicious, based on the plaintiff's utterance of untruths discussed above, and the fact that his act of doing so certainly constitutes an "abuse of the judicial process."

"A district court has inherent authority to sanction conduct that abuses the judicial process." Montano v. City of Chicago, 535 F.3d 558, 563 (7 Cir.2008)(citing Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991), and Dotson v. Bravo, 321 F.3d 663, 667 (7th Cir.2003)). "The sanction imposed should be proportionate to the gravity of the offense." Montano, supra, (citing Allen v. Chicago Transit Authority, 317 F.3d 696, 703 (7 Cir. 2003). Although "particularly severe," the sanction of dismissal is within a court's discretion. Chambers, 501 U.S. at 45

In a context different than the circumstances of this case, where the PLRA mandates dismissal of an inmate/plaintiff's complaint pursuant to 28 U.S.C. §1915(g) if he/she has previously had three or more complaints dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted [each of which counts as a "strike" under the "three strikes" rule of §1915(g)], Courts of this Circuit have

sanctioned inmates for lying under penalty of perjury in an initial complaint [i.e., failure to truthfully disclose in their sworn complaints their history of prior cases, where the failure to do so seeks to avoid disposition of the complaint under §1915(g) by hiding the existence of prior dismissals which count as "strikes"]. See Rivera, supra, at 731.

Such a case dismissed as an "abuse of the judicial process" itself counts as a strike under 28 U.S.C. §1915(g), even if the abuse that resulted in dismissal was not expressly characterized by the Court as "frivolous or malicious," and even if the resulting dismissal was "without prejudice." See Rivera, supra, 144 F.3d at 731; Allen v. Clark, No. 06-16406, 2008 WL 227565, at *1 (11 Cir. Jan. 29, 2008), 266 Fed. Appx. 815, 817 (11 Cir.), *cert. denied*, 555 U.S.__832 (2008); Young v. McNeil, No. 4:09cv72/RS-WCS, 2009 WL 2781442, at *4 (N.D.Fla., Aug.28, 2009) ("Abuse of the Judicial Process," whether or not characterized by a Court as 'frivolous' or 'malicious' is a strike"... "additionally, it matters not that the case was dismissed "without prejudice" (citing Rivera, supra, at 731); James v. Tejera, No. 5:10–cv–048–Oc–30GRJ, 2010 WL 3324833, at *1 and n.2 (M.D.Fla., Aug. 23, 2010) (holding that where a *pro se* plaintiff failed to disclose his prior lawsuits, the appropriate sanction for Plaintiff's abuse of the judicial process in not providing the Court with true responses is to dismiss this cause without prejudice).

The undersigned, here, concludes that dismissal of the plaintiff Williams' complaint, pursuant to §1915(e)(2)(B)(i), as malicious, and an abuse of the judicial process, is appropriate. The question remains, however, whether such a dismissal should be with or without prejudice.

While the dismissals for "abuse of the judical process" in cases where inmates have lied about prior history of litigation are generally without prejudice, resulting in dismissals that count as

"strikes" for purposes of 1915(g), such lies by inmate/plaintiffs in that context are designed to evade the effects of the "three strikes" provision of the PLRA under §1915(g), and thereby avoid having to pay the full Clerk's filing fee upon filing the complaint with the Court, if the plaintiff already had 3 "strikes." In the present case, however, the undersigned believes that the plaintiff Williams' utterances of untruths in this case are even more egregious, as they represent what have been shown to be bald faced lies about material facts pertaining to the nature and extent of his alleged injuries, which he attributes to actions of the named defendant. Here, although mindful of the Supreme Court's admonishment that a court's inherent authority to sanction misconduct is to be exercised with "restraint and discretion," Chambers, 501 U.S. at 44; see Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980), and further recognizing that outright dismissal of a lawsuit is a particularly severe sanction, Roadway Express, supra at 765, the Court nonetheless believes in this case that a dismissal, with prejudice, is appropriate.

A dismissal, without prejudice, would essentially have no deterrent effect, since it would allow plaintiff Williams to simply refile his complaint against the defendant. Moreover, from review of the plaintiff's Motion to proceed *in forma pauperis* and attached Affidavit of indigency (DE#4, "Application to Proceed Without Prepayment of Fees and Affidavit" -- which show that he had no funds in his jail bank account, and in fact was indebted in the amount of $1,148.05, and has no sources of income) it appears that if he were allowed to re-file his complaint he would qualify to again proceed *in forma pauperis* without prepament of fees. (See Order, DE#5). In addition, it appears that the imposition of a lesser sanction, such as imposition of a fine, would have little or no impact or deterrent effect upon the plaintiff in a case such as this, where he has previously been allowed to proceed *in forma pauperis*, without prepayment of any portion of the clerk's filing

fee, and he is apparently without funds from which a monetary sanction (fine) might be paid.

III CONCLUSION

It is therefore recommended that: (1) the Defendant Feria's Motion to Dismiss (DE#24), treated as a Motion for Summary Judgment, be GRANTED, on the ground that the complaint is subject to dismissal, as malicious, pursuant to 28 U.S.C. §1915(e)(2)(B)(i); (2) the dismissal be with prejudice; and (3) this case be CLOSED.

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

Dated: January 30th 2013

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-24638-CIV-LENARD/WHITE

LEMANE DEON WILLIAMS,

Plaintiff,

v.

DETECTIVE FERIA,

Defendant.
_____/

ORDER OVERRULING REPORT OF MAGISTRATE JUDGE (D.E. 62) AND DENYING DEFENDANT FERIA'S MOTION TO DISMISS (D.E. 24)

THIS CAUSE is before the Court on the Report of Magistrate Judge Patrick A. White ("Report," D.E. 62), issued on January 31, 2013. On February 19, 2013, pro se Plaintiff Lemane Williams filed his Objections to the Report (D.E. 63), and on March 5, 2013, Defendant Anthony Feria filed his Response to the Objections (D.E. 64). Upon an independent review of the Report, Objections, Response, and the record, the Court finds as follows.

In his sworn Complaint, Williams alleges as follows:

> In approximately January 2010 Detective Anthony Feria (Badge 2637) Miami-Dade Police arrested me for various charges after he placed me in handcuffs he transported me to the police station. He kept asking me for the "gun," then he commenced to start beating me up. He pushed me while I was in handcuff restraints behind my back when I fell the officer began punching me in my face and body. I suffered a broken hand/index finger, chipped teeth, several abrasions and bruises. I was then taken to the county jail, but the jail refused to receive me due to my visible injuries (please see included copy of booking photo). I was then transported to Jackson Memorial Hospital, Ward "D" to undergo treatment for my injuries which included surgery to my hand where

> a steel plate was inserted in my right index finger. I have lost complete range of motion on my right index finger (unable to bend). This is a permanent injury.

(Complaint, D.E. 1, at 3.)

In his Report, Magistrate Judge White recommends that Defendant Feria's Motion to Dismiss (D.E. 24), filed on September 14, 2012, be treated as a motion for summary judgment and granted. The Magistrate Judge found that Plaintiff's own medical records and Defendant's exhibits, which included a video of Plaintiff's bond hearing taken the day after his arrest and alleged beating by Detective Feria,

> unequivocally establish the untruth of Plaintiff Williams' assertions that he was so badly injured that Miami-Dade Corrections officials refused to accept him on the night of his arrest when MDPD officers brought him to a jail/detention facility for intake, and that he was instead immediately taken to Jackson Memorial Hospital for emergency surgery. They show that at about 2:20 p.m. on 2/9/10, some 16 1/2 hours after Williams' 7:45 p.m. arrest on 2/8/10, there was no evidence of surgery having been performed on his right hand; and show that he was, in fact, booked into the Miami-Dade Corrections and Rehabilitation Department at 4:37 a.m. on 2/9/10, contrary to his contention that his admission was refused due to his injuries.

(Report 17-18.) The Magistrate Judge concluded that Plaintiff's civil rights complaint should be dismissed with prejudice as malicious pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) because Plaintiff "blatantly lied in his sworn complaint" and "then repeated those same untruths in his Declaration." (Id. at 20.)

Section 1915(e)(2) of Title 28, United States Code, states as follows:

> 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--
>
> (A) the allegation of poverty is untrue; or

(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 against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2).

Upon review of the Report and the record, the Court finds that dismissal of the Complaint with prejudice because it is malicious pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) is not appropriate. "In determining whether a particular prisoner complaint is frivolous or malicious under Section 1915(d), the threshold issue for the trial court is an assessment of the substance of the claim presented, i.e., is there a factual and legal basis, of constitutional dimension, for the asserted wrong, however inartfully pleaded." Watson v. Ault, 525 F.2d 886, 892 (5th Cir. 1976).[1] "[A]n allegation that the plaintiff knows to be false is 'malicious,' and a complaint containing only such allegations is properly subject to dismissal under § 1915." Horsey v. Asher, 741 F.2d 209, 212 (8th Cir. 1984) (emphasis added) (finding that the district court erred in dismissing all of the plaintiff's claims in a § 1983 case when only some of the allegations in the complaint were clearly false); see also Williams v. Brown, 347 F. App'x 429, 434 (11th Cir. 2009) (finding that the district court erred in determining that the plaintiff's failure to disclose one appeal qualified as malicious and concluding that the

[1] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

district court abused its discretion in dismissing the plaintiff's § 1983 complaint with prejudice pursuant to § 1915(e)). Furthermore, "'dismissal with prejudice in the context of section 1915 is an extreme sanction to be exercised only in appropriate cases.'" Williams, 347 F. App'x at 434 (quoting Camp v. Oliver, 798 F.2d 434, 438 (11th Cir. 1986)). "'In the absence of a finding of bad faith misstatement of assets, litigiousness or manipulative tactics, however, dismissal with prejudice is not warranted.'" Id. (quoting Matthews v. Gaither, 902 F.2d 877, 881 (11th Cir. 1990) (per curiam)). "Because dismissal with prejudice is a drastic sanction, it should 'be applied only after lesser sanctions are considered and found inadequate.'" Id. (quoting Camp, 798 F.2d at 438-39).

Here, Magistrate Judge White is correct that some of the allegations in the Complaint contradict information contained in exhibits filed by Defendant with his Motion to Dismiss. Specifically, Plaintiff's allegations that the jail refused to admit him and that he was taken to Jackson Memorial Hospital for emergency surgery are not corroborated by the Miami-Dade County Correction and Rehabilitation Department Jail Booking Record (Defendant's Exhibit D) or by an affidavit of Ruben Okera, the lieutenant responsible for operation of Ward D of Jackson Memorial Hospital (Defendant's Exhibit E). (See Report 15.) However, even assuming that Plaintiff is incorrect about the jail refusing to admit him and his hospital admission, these inaccuracies do not render the complaint "malicious" under 28 U.S.C. § 1915(e)(2). These details do not go to the crux of the complaint, which is that following Plaintiff's arrest, Detective Feria allegedly pushed Williams while he was in handcuffs, causing Williams to fall, and punched Williams on his face and body while Williams was on

the floor, causing Williams to have a broken hand and/or index finger, chipped teeth, several abrasions, and bruises. (See Complaint 3.) There is no evidence in the record establishing that these allegations about the beating are false and/or that Plaintiff knows that these allegations are false. Accordingly, because the Court does not find that the complaint only contains false allegations, dismissal of the complaint as malicious under 28 U.S.C. § 1915(e)(2) would be improper. See Horsey, 741 F.2d at 212; see also Williams, 347 F. App'x at 434.

The Court also finds that even if Defendant's Motion to Dismiss was properly converted into a motion for summary judgment, genuine issues of material fact exist so as to preclude the grant of summary judgment for Defendant. As Magistrate Judge White recognized in his Report:

> In sum, it is not appropriate or even possible at this juncture to reach a determination on the merits of the question of whether Detective Feria beat the inmate/plaintiff inflicting injuries upon him on the night of his arrest. The defendant's exhibits do not provide irrefutable proof that is dispositive on that question.

(Report 20.) The issue of whether Detective Feria beat Plaintiff inflicting injuries upon him on the night of the arrest is the dispositive issue in this case. Plaintiff, both in his sworn complaint and in his sworn declaration (D.E. 48) filed as part of his response to Defendant's Motion, states that Detective Feria "pushed me while I was in handcuff restraints behind my back when I fell the officer began punching me in my face and body. I suffered a broken hand/index finger, chipped teeth, several abrasions and bruises." (Complaint 3; Declaration 2.) These statements are not contradicted by the record. "A plaintiff's testimony cannot be

discounted on summary judgment unless it is blatantly contradicted by the record, blatantly inconsistent, or incredible as a matter of law, meaning that it relates to facts that could not have possibly been observed or events that are contrary to the laws of nature." Feliciano v. City of Miami Beach, -- F.3d --, 2013 WL 425445, *7 (11th Cir. Feb. 5, 2013) (citing Scott v. Harris, 550 U.S. 372, 380-81 (2007); Holley Equip. Co. v. Credit Alliance Corp., 821 F.2d 1531, 1537 (11th Cir. 1987); United States v. Flores, 572 F.3d 1254, 1263 (11th Cir. 2009)). Viewing the facts in the light most favorable to Plaintiff, genuine issues of material fact exist as to whether Detective Feria beat Williams, the nature and extent of the beating, and the nature and extent of Williams' injuries. These issues are essential to determining whether Detective Feria used excessive force against Williams; therefore, summary judgment cannot be granted for Defendant. See Holley Equip. Co., 821 F.2d at 1537 (stating that "if one or more of the essential elements of a claim or defense is in doubt, then summary judgment must not be granted").

Accordingly, after an independent review of the Report, the Objections, Response, and the record, it is hereby **ORDERED AND ADJUDGED** that, as consistent with this Order:

1. The Report of the Magistrate Judge (D.E. 62), issued on January 31, 2013, is **OVERRULED**;
2. Defendant Feria's Motion to Dismiss (D.E. 24), filed on September 14, 2012, is **DENIED**; and
3. This case is **REFERRED** to Magistrate Judge White for further proceedings.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of March, 2013.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-24638-CIV-LENARD
MAGISTRATE JUDGE P. A. WHITE

LEMANE DEON WILLIAMS, :

Plaintiff, :

v. :

OFFICER ANTHONY FERIA, :

Defendant. :

SECOND SHORTENED
ORDER SCHEDULING PRETRIAL PROCEEDINGS WHEN PLAINTIFF IS PROCEEDING PRO SE

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 **June 3, 2013**. This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **June 17, 2013**.

3. All motions to dismiss and/or for summary judgment shall be filed by **July 9, 2013**.

4. On or before **July 23, 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 <u>each</u> of his witnesses to give.

5. On or before **August 6, 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 28 day of March, 2013.

s/Patrick A. White
UNITED STATES MAGISTRATE JUDGE

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Hon. Joan A. Lenard, United States District Judge