

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

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

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

**Plaintiff**

**Jorge L Argudo**

represented by **Humberto Jose Corrales**  
Law Office of Humberto J. Corrales  
8550 W. Flagler Street  
Suite 108  
Miami, FL 33144  
305-221-6005  
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Email: [hjcorrales@hotmail.com](mailto:hjcorrales@hotmail.com)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

V.

**Defendant**

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

**Defendant**

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

**Defendant**

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

**Defendant**

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

**Defendant**

**Antonio Sentmanat**  
*Court ID No 1449(04)*

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

**Defendant**

**Sergeant A. Guerra**  
*TERMINATED: 10/18/2012*

**Defendant****Sergeant R. Tillman**

TERMINATED: 10/18/2012

**Defendant****Sergeant Beato**

TERMINATED: 10/18/2012

**Defendant****Lieutenant Alvarez**

TERMINATED: 10/18/2012

**Defendant****Lieutenant McIntyce**

TERMINATED: 10/18/2012

**Defendant****Lieutenant Nazario**

TERMINATED: 10/18/2012

Date Filed	#	Docket Text
05/24/2011	<u>1</u>	COMPLAINT against Alvarez, Beato, R Castellon, Del Nodal, A. Guerra, McIntyce, Nazario, L Sanchez, M Sanchez, Antonio Sentmanat, R. Tillman. Filing fee \$ 350.00. IFP Filed, filed by Jorge L Argudo.(jua) Modified Event Type for MJSTAR on 6/21/2011 (ra). (Entered: 05/24/2011)
05/24/2011	2	Judge Assignment to Judge Jose E. Martinez (jua) (Entered: 05/24/2011)
05/24/2011	3	Clerks Notice of Magistrate Judge Assignment to Magistrate Judge Patrick A. White. Pursuant to Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. (jua) (Entered: 05/24/2011)
05/24/2011	<u>4</u>	MOTION for Leave to Proceed in forma pauperis by Jorge L Argudo. (jua) (Entered: 05/24/2011)
06/01/2011	<u>5</u>	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTBLISHING DEBT TO CLERK OF \$350.00 and Granting <u>4</u> Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 5/31/2011. (tw) (Entered: 06/01/2011)
06/01/2011	<u>6</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 5/31/2011. (tw) (Entered: 06/01/2011)
06/01/2011	<u>7</u>	Letter from Jorge Argudo (abe) (Entered: 06/01/2011)
06/14/2011	<u>8</u>	Plaintiff Pleading in Support re <u>1</u> Complaint by Jorge L Argudo. (abe) (Entered: 06/15/2011)
06/14/2011	<u>9</u>	Letter from Jorge Argudo re: address of defendants (abe) (Entered: 06/15/2011)
06/20/2011	<u>10</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Jorge L Argudo. Recommending 1. All claims challenging the pending charges against the plaintiff and seeking dismissal of his cases are dismissed as barred by Heck, and dismissed pursuant to 28 U.S.C.1915(e)(2)(B)(ii), for failure to state a claim. 2. The plaintiff may amend his complaint on the sole issue of use of excessive force by officers upon his arrest. Objections to RR due by 7/8/2011. Signed by Magistrate Judge Patrick A. White on 6/16/2011. (tw) (Entered: 06/20/2011)
07/27/2011	<u>11</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS ; adopting Report and Recommendations re <u>10</u> Report and Recommendations. Plaintiff's claims are

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

10/25/2012	<u>27</u>	SUMMONS (Affidavit) Returned Executed on <u>20</u> Amended Complaint, <u>12</u> Amended Complaint, <u>15</u> Amended Complaint with a 21 day response/answer filing deadline by Jorge L Argudo. Antonio Sentmanat served on 10/23/2012, answer due 11/13/2012. (ls) (Entered: 10/26/2012)
11/07/2012	<u>28</u>	NOTICE of Change of Address by Jorge L Argudo (ls)[System Updated] (Entered: 11/08/2012)
11/07/2012	<u>29</u>	LETTER re: Appeal by Jorge L Argudo. (ls) Modified text on 11/9/2012 (vp). (Entered: 11/08/2012)
11/07/2012	<u>30</u>	Notice of Interlocutory Appeal by Jorge L Argudo re <u>26</u> Order Adopting Report and Recommendations. Filing fee \$(NOT PAID). Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (mc) (Entered: 11/09/2012)
11/09/2012		Transmission of Notice of Appeal, Report and Recommendations, Order and Docket Sheet to US Court of Appeals re <u>30</u> Notice of Interlocutory Appeal (mc) (Entered: 11/09/2012)
11/12/2012	<u>31</u>	ANSWER and Affirmative Defenses to Amended Complaint with Jury Demand by Antonio Sentmanat.(Desai, Devang) (Entered: 11/12/2012)
11/21/2012	<u>32</u>	NOTICE of Change of Address by Jorge L Argudo (system Updated) (cqs) (Entered: 11/21/2012)
11/28/2012	<u>33</u>	Acknowledgment of Receipt of NOA from USCA re <u>30</u> Notice of Interlocutory Appeal, filed by Jorge L Argudo. Date received by USCA: 11/15/2012. USCA Case Number: 12-15865-C. (mc) (Entered: 11/28/2012)
12/20/2012	<u>34</u>	SCHEDULING ORDER: Amended Pleadings due by 5/1/2013. Discovery due by 4/17/2013. Joinder of Parties due by 5/1/2013. Motions due by 5/22/2013. Signed by Magistrate Judge Patrick A. White on 12/20/2012. (tw) (Entered: 12/20/2012)
01/07/2013	<u>35</u>	ORDER of DISMISSAL from USCA. This appeal is DISMISSED, sua sponte, for lack of jurisdiction. The district court's October 18, 2012 order dismissing the case in part is not a final, appealable order re <u>30</u> Notice of Interlocutory Appeal, filed by Jorge L Argudo. No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir.R. 27-2 and all other applicable rules. USCA #12-15865-C (amb) (Entered: 01/07/2013)
04/01/2013	<u>36</u>	MOTION for Extension of Time Pertaining to Document #34 Reference Discovery Due Date of April 17, 2013 re <u>34</u> Scheduling Order. Responses due by 4/18/2013 (yar) (Entered: 04/02/2013)
04/02/2013	<u>37</u>	MOTION for Appearance Ad Hoc of Attorney Humberto J. Corrales by Jorge L Argudo. (Corrales, Humberto) Modified on 4/3/2013 (ls). (Entered: 04/02/2013)
04/03/2013	<u>38</u>	ORDER denying <u>36</u> Motion for Extension of Time without prejudice, this motion was filed pro-se and there is a motion for appearance of counsel ; respectfully deferring ruling on <u>37</u> MOTION for Appearance Ad Hoc to the United States District Judge. Signed by Magistrate Judge Patrick A. White on 4/3/2013. (cz) (Entered: 04/03/2013)
04/04/2013	<u>39</u>	ORDER granting <u>37</u> MOTION for Appearance Ad Hoc. Signed by Judge Kathleen M. Williams on 4/4/2013. (ls) (Entered: 04/05/2013)
04/16/2013	<u>40</u>	Joint MOTION for Extension of Time to Complete Discovery, Motion to Dismiss and Motion for Summary Judgment Deadlines by Antonio Sentmanat. Responses due by 5/3/2013 (Attachments: # <u>1</u> Text of Proposed Order)(Desai, Devang) Modified Relief on 4/16/2013 (ls). (Entered: 04/16/2013)
04/16/2013	<u>41</u>	Clerks Notice to Filer re <u>40</u> Joint MOTION for Extension of Time for Discovery, Motion to Dismiss and Motion for Summary Judgment Deadlines . <b>Wrong Motion Relief(s) Selected</b> ; ERROR – The Filer selected the wrong motion relief(s) when docketing the motion. The correction was made by the Clerk. It is not necessary to refile this document but future motions filed must include applicable reliefs. (ls)

		(Entered: 04/16/2013)
04/17/2013	<u>42</u>	ORDER granting <u>40</u> Motion for Extension of Time, all dates entered in the pre-trial scheduling order are extended for twenty days from the dates in the Order. Signed by Magistrate Judge Patrick A. White on 4/17/2013. (cz) (Entered: 04/17/2013)
05/07/2013	<u>43</u>	Defendant's MOTION to Compel <i>Rule 26 Disclosure and Discovery Responses from Plaintiff</i> by Antonio Sentmanat. Responses due by 5/24/2013 (Attachments: # <u>1</u> Exhibit First Request for Production, # <u>2</u> Exhibit First Set of Interrogatories, # <u>3</u> Exhibit First Requests for Admissions)(Desai, Devang) (Entered: 05/07/2013)
05/07/2013	<u>44</u>	NOTICE of Filing Discovery: Notice of Serving First Set of Interrogatories by Jorge L Argudo.(Corrales, Humberto) Modified Text on 5/8/2013 (ls). (Entered: 05/07/2013)
05/08/2013	<u>45</u>	ORDER granting in part and denying in part <u>43</u> Motion to Compel, it appears the plaintiff has provided some discovery. Signed by Magistrate Judge Patrick A. White on 5/8/2013. (cz) (Entered: 05/08/2013)
05/09/2013	<u>46</u>	*Endorsed Order Signed by Magistrate Judge Patrick A. White on 5/9/2013. (cz) (Entered: 05/09/2013)
05/09/2013	<u>47</u>	*Endorsed Order COUNSEL FOR THE DEFENDANT HAS SOUGHT A RESPONSE TO ADMISSIONS PROPOUNDED TO THE PLAINTIFF. COUNSEL FOR THE PLAINTIFF SHALL EITHER RESPOND TO THE REQUESTS FOR ADMISSIONS ON OR BEFORE 5/24/13 OR THEY SHALL BE DEEMED ADMITTED. FURTHER PLAINTIFF'S COUNSEL SHALL SUPPLY RESPONSES TO THE REMAINING DISCOVERY REQUESTS TO DEFENDANTS COUNSEL. THE COURT IS AWARE THAT COUNSEL IS PROCEEDING PRO BONO HOWEVER DISCOVERY REQUESTS MUST BE RESPONDED TO SO AS NOT TO ACCRUE PREJUDICE TO THE PLAINTIFF. THE ISSUE OF PRECLUSION OF WITNESSES AND EVIDENCE WILL BE DETERMINED AT A LATER DATE IF A TRIAL IS SET. Signed by Magistrate Judge Patrick A. White on 5/9/2013. (cz) (Entered: 05/09/2013)
05/10/2013	<u>48</u>	NOTICE of Change of Address by Jorge L Argudo (yar) (Entered: 05/13/2013)
05/14/2013	<u>49</u>	Defendant's APPEAL of Magistrate Judge <u>47</u> Endorsed Order,, to District Court (Desai, Devang) (Entered: 05/14/2013)
05/17/2013	<u>50</u>	Defendant's MOTION for clarification <u>34</u> Scheduling Order by Antonio Sentmanat. Responses due by 6/3/2013 (Desai, Devang) (Entered: 05/17/2013)
05/20/2013	<u>51</u>	Defendant's APPEAL of Magistrate Judge to District Court <i>Response to</i> (Corrales, Humberto) (Entered: 05/20/2013)
05/20/2013	<u>52</u>	RESPONSE to <u>49</u> Defendant's APPEAL of Magistrate Judge <u>47</u> Endorsed Order,, to District Court by Jorge L Argudo. (ls)(See Image at DE # <u>51</u> ) (Entered: 05/21/2013)
05/21/2013	<u>53</u>	Clerks Notice to Filer re <u>51</u> Defendant's APPEAL of Magistrate Judge to District Court <i>Response to</i> . <b>Wrong Event Selected; ERROR</b> – The Filer selected the wrong event. The document was re-docketed by the Clerk, see [de#52]. It is not necessary to refile this document. (ls) (Entered: 05/21/2013)
05/24/2013	<u>54</u>	RESPONSE to Motion re <u>50</u> Defendant's MOTION for clarification <u>34</u> Scheduling Order filed by Jorge L Argudo. Replies due by 6/3/2013. (Corrales, Humberto) (Entered: 05/24/2013)
05/28/2013	<u>55</u>	REPLY to Response to Motion re <u>51</u> Defendant's APPEAL of Magistrate Judge to District Court <i>Response to</i> filed by Antonio Sentmanat. (Desai, Devang) (Entered: 05/28/2013)
05/31/2013	<u>56</u>	ORDER Setting Hearing re <u>49</u> Defendant's APPEAL of Magistrate Judge <u>47</u> Endorsed Order,, to District Court : Hearing set for 6/6/2013 01:00 PM in Miami Division before Judge Kathleen M. Williams. Signed by Judge Kathleen M. Williams on 5/30/2013. (ls) (Entered: 05/31/2013)

05/31/2013	<u>57</u>	REPLY to Response to Motion re <u>50</u> Defendant's MOTION for clarification <u>34</u> Scheduling Order filed by Antonio Sentmanat. (Desai, Devang) (Entered: 05/31/2013)
05/31/2013	<u>58</u>	Unopposed MOTION for Extension of Time to File Motion to Dismiss and/or Motion for Summary Judgment by Antonio Sentmanat. Responses due by 6/17/2013 (Desai, Devang) (Entered: 05/31/2013)
05/31/2013	59	REPLY to <u>55</u> Reply to Response to Motion by Antonio Sentmanat. (ls)(See Image at DE # <u>57</u> ) (Entered: 06/03/2013)
06/03/2013	60	Clerks Notice to Filer re <u>57</u> Reply to Response to Motion. <b>Wrong Event Selected; ERROR</b> – The Filer selected the wrong event. The document was re-docketed by the Clerk, see [de#59]. It is not necessary to refile this document. (ls) (Entered: 06/03/2013)
06/04/2013	61	ORDER granting <u>58</u> Motion for Extension of Time to file summary judgement to on or before July 9, 2013, date requested. Signed by Magistrate Judge Patrick A. White on 6/4/2013. (cz) (Entered: 06/04/2013)
06/06/2013	62	Minute Entry for proceedings held before Judge Kathleen M. Williams: Status Conference re: appeal of magistrate judge held on 6/6/2013. Court will take referral back. Court will review discovery. All dispositive motions due on 7/9/13. Order to follow. Humberto Corrales, Esq., for plaintiff and Mark Antonelli, Esq. for defendants, both present in court. Court Reporter: Patricia Sanders, 305-523-5548 / Patricia_Sanders@flsd.uscourts.gov (mc1) (Entered: 06/06/2013)
06/06/2013	<u>63</u>	ORDER denying as moot <u>49</u> Appeal/Objection of Magistrate Judge Order to District Court; Dispositive Motions due by 7/9/2013; Withdrawing Reference to Magistrate Judge White. Signed by Judge Kathleen M. Williams on 6/6/2013. (ls) (Entered: 06/07/2013)
06/07/2013	<u>64</u>	NOTICE OF UNAVAILABILITY by Antonio Sentmanat for dates of 6/28/13 through 7/5/13 (Desai, Devang) (Entered: 06/07/2013)
06/11/2013	<u>65</u>	ORDER on DISCOVERY denying as moot <u>50</u> Motion for Clarification <u>34</u> Scheduling Order. Signed by Judge Kathleen M. Williams on 6/10/2013. (ls) (Entered: 06/11/2013)
06/14/2013	<u>66</u>	Unopposed MOTION for Extension of Time to Complete Discovery by Antonio Sentmanat. (Attachments: # <u>1</u> Text of Proposed Order)(Desai, Devang). Added MOTION to Amend/Correct <u>34</u> Scheduling Order on 6/17/2013 (ls). (Entered: 06/14/2013)
06/17/2013	67	Clerks Notice to Filer re <u>66</u> Unopposed MOTION for Extension of Time to Complete Discovery . <b>Motion with Multiple Reliefs Filed as One Relief; ERROR</b> – The Filer selected only one relief event and failed to select the additional corresponding events for each relief requested in the motion. The docket entry was corrected by the Clerk. It is not necessary to refile this document but future filings must comply with the instructions in the CM/ECF Attorney User's Manual. (ls) (Entered: 06/17/2013)
06/17/2013	<u>68</u>	ORDER granting in part and denying in part <u>66</u> Unopposed Motion for Extension of Time to Complete Discovery; granting in part and denying in part <u>66</u> Motion to Amend/Correct Pre-Trial Scheduling Order ( Dispositive Motions due by 8/19/2013., Pretrial Stipulation due by 9/16/2013.) Signed by Judge Kathleen M. Williams on 6/17/2013. (ls) (Entered: 06/17/2013)
07/19/2013	<u>69</u>	Unopposed MOTION for Extension of Time to Complete Discovery by Jorge L Argudo. (Attachments: # <u>1</u> Text of Proposed Order)(Corrales, Humberto) Modified Text on 7/22/2013 (ls). (Entered: 07/19/2013)
07/22/2013	<u>70</u>	ORDER granting <u>69</u> Unopposed Motion for Extension of Time to Complete Discovery. Discovery due by 8/14/2013. Signed by Judge Kathleen M. Williams on 7/22/2013. (ls) (Entered: 07/22/2013)
07/30/2013	<u>71</u>	Unopposed MOTION to Compel <i>Compliance with Rule 45 Subpoena for Deposition and/or in the alternative, Motion for Extension of Time to Conduct Limited Discovery</i> by Antonio Sentmanat. Responses due by 8/16/2013

		(Attachments: # <u>1</u> Exhibit Depo Notice, # <u>2</u> Exhibit Subpoena, # <u>3</u> Exhibit Certificate of Non-Appearance, # <u>4</u> Text of Proposed Order)(Desai, Devang) (Entered: 07/30/2013)
07/30/2013	<u>72</u>	ORDER granting <u>71</u> DEFENDANTS Motion to Compel ADDITIONAL TWENTY DAYS TO TAKE DEPOSITION OF COURTNEY MCKNIGHT. Signed by Magistrate Judge Patrick A. White on 7/30/2013. (cz) (Entered: 07/30/2013)
07/30/2013	<u>73</u>	ORDER Granting in Part re <u>71</u> Unopposed MOTION to Compel <i>Compliance with Rule 45 Subpoena for Deposition and/or in the alternative, Motion for Extension of Time to Conduct Limited Discovery</i> filed by Antonio Sentmanat. Signed by Judge Kathleen M. Williams on 7/30/2013. (ls) (Entered: 07/31/2013)
08/09/2013	<u>74</u>	NOTICE by Jorge L Argudo <i>that Ad Hoc Counsel has completed Appearance</i> (Corrales, Humberto) Modified Text on 8/12/2013 (ls). (Entered: 08/09/2013)
08/16/2013	<u>75</u>	NOTICE by Antonio Sentmanat <i>of Filing Deposition in Support of his Motion for Summary Judgment</i> (Attachments: # <u>1</u> Deposition Jorge Argudo)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>76</u>	NOTICE by Antonio Sentmanat <i>of Filing Deposition in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Deposition Courtney McKnight)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>77</u>	NOTICE by Antonio Sentmanat <i>of Filing Deposition in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Deposition Antonio Sentmanat)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>78</u>	NOTICE by Antonio Sentmanat <i>of Filing Affidavit in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Affidavit Ivis Socorro, # <u>2</u> Audio 1, # <u>3</u> Audio 2)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>79</u>	NOTICE by Antonio Sentmanat <i>of Filing Depositions in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Deposition Sanchez, # <u>2</u> Deposition Quinlan, # <u>3</u> Deposition Hernandez, # <u>4</u> Deposition Del Nodal, # <u>5</u> Deposition Castellon)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>80</u>	NOTICE by Antonio Sentmanat <i>of Filing Depositions in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Deposition Servilla, # <u>2</u> Deposition Gutierrez, # <u>3</u> Deposition Moloney, # <u>4</u> Deposition McIntyre)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>81</u>	NOTICE by Antonio Sentmanat <i>Exhibits in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Docket Sheet Criminal Court F08-044153, # <u>2</u> Transcripts Plea Hearing, # <u>3</u> Judgment and Sentence)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>82</u>	NOTICE by Antonio Sentmanat <i>of Filing Exhibit in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Porkys Records)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>83</u>	NOTICE by Antonio Sentmanat <i>of Filing Exhibits in Support of Motion for Summary Judgment</i> (Attachments: # <u>1</u> Arrest Affidavits, # <u>2</u> Response to Resistance Use of Force Report, # <u>3</u> HPD Offense Incident Reports, # <u>4</u> HPD Swat After Action Report)(Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>84</u>	Statement of: <i>Material Facts in Support of Motion for Final Summary Judgment</i> by Antonio Sentmanat (Desai, Devang) (Entered: 08/16/2013)
08/16/2013	<u>85</u>	Defendant's MOTION for Summary Judgment <i>and Incorporated Memorandum of Law</i> by Antonio Sentmanat. Responses due by 9/3/2013 (Desai, Devang) (Entered: 08/16/2013)
09/03/2013	<u>86</u>	Notice of Supplemental Authority re <u>85</u> Defendant's MOTION for Summary Judgment <i>and Incorporated Memorandum of Law</i> , <u>84</u> Statement by Antonio Sentmanat (Attachments: # <u>1</u> Exhibit A)(Desai, Devang) (Entered: 09/03/2013)

09/11/2013	<u>87</u>	NOTICE by Antonio Sentmanat re <u>34</u> Scheduling Order, <u>68</u> Order on Motion for Extension of Time to Complete Discovery,, Order on Motion to Amend/Correct, of <i>Advising Court of Plaintiff's Non-Compliance with Scheduling Orders</i> (Desai, Devang) Modified Text on 9/12/2013 (ls). (Entered: 09/11/2013)
09/12/2013	<u>88</u>	ORDER Suspending Defendant's Pre-Trial Statement Deadline. Signed by Judge Kathleen M. Williams on 9/12/2013. (tpl) (Entered: 09/12/2013)
09/13/2013	<u>89</u>	NOTICE of Filing Exhibit in Support of His Reply to Motion for Defendant Summary Judgment by Jorge L Argudo (tpl) (Entered: 09/13/2013)
09/13/2013	<u>90</u>	MOTION for Reply by Jorge L Argudo. (tpl) (Entered: 09/13/2013)
09/19/2013	<u>91</u>	Defendant's MOTION to Strike <u>90</u> MOTION for Reply <i>and/or Reply to Plaintiff's "Reply" in support of Defendant's Motion for Final Summary Judgment</i> by Antonio Sentmanat. Responses due by 10/7/2013 (Desai, Devang) (Entered: 09/19/2013)
10/08/2013	92	VACATED ORDER denying <u>90</u> Motion WITHOUT PREJUDICE ; denying <u>91</u> Motion to Strike WITHOUT PREJUDICE, PLT WILL BE SENT ORDER OF INSTRUCTIONS HOW TO REPLY TO SUMMARY JUDGEMENT.. Signed by Magistrate Judge Patrick A. White on 10/8/2013. (cz) Vacated on 10/9/2013 per Order 93 (mg). (Entered: 10/08/2013)
10/08/2013	93	*Endorsed Order order de# 92 vacated, case is no longer referred to Magistrae Judge White. Signed by Magistrate Judge Patrick A. White on 10/8/2013. (cz) (Entered: 10/08/2013)
10/21/2013	<u>94</u>	Statement of Material Facts by Jorge L Argudo (tpl) (Entered: 10/21/2013)
10/24/2013	<u>95</u>	Defendant's MOTION to Strike <u>94</u> Statement <i>and/or Response Thereto</i> by Antonio Sentmanat. Responses due by 11/12/2013 (Desai, Devang) (Entered: 10/24/2013)

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

**Case No.** 11-21886 ANJEM

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

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

JORGE L ARGUDO

v  
R. CASTELLON, et al

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

CIVIL DIVISION

Judge: P.A. White

Case no: 11-21886-CIV-MART.

AMENDED COMPLAINT

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

"ISSUE"

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

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

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

"RULES"

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

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

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

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

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

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

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

3) 777.04. Attempt, solicitation, and conspiracy.

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

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

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

### "ANALYSTS"

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

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

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

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

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

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

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

These Officers are from police station:

5555 East 8th AVENUE  
Miami FL 33012

Also officers mentioned in the beginning of this Analysis.

CONCLUSION

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

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

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

Date: August, 10, 2012

Respectfully Submitted

cc. Jorge L Argueta  
Jorge L Argueta

(EXHIBIT A)



# HIALEAH POLICE DEPARTMENT

## CONSENT TO SEARCH

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

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

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

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

4400 W-16ave Unit #529

Mia. Fl. 33012  
(786) 991-8914

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

[Signature]

12/02/2008

Date

07:17

Time

[Signature] 1374.  
Witness

[Signature]  
Witness

2008-46572

Hialeah Police Department Case Number

INTERNET FL 3301

**USMS  
INSPECTED**

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

**RECEIVED**

SEP 13 11:29 AM

USA  
FIRST-CLASS

FOREVER

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

33128771699



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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

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

---

### I. Introduction

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

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

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

### II. Analysis

#### A. Applicable Law for Screening

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

Sec. 1915 Proceedings in Forma Pauperis

\* \* \*

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

\* \* \*

(B) the action or appeal -

\* \* \*

(i) is frivolous or malicious;

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

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

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

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

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

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

#### B. Factual Allegations

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

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

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

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

C. Second Amended Complaint (DE#20)

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

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

D. Analysis

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

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

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

III. Conclusions

It is therefore recommended as follows:

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

separate order.

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

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

Dated this 12<sup>th</sup> day of September, 2012.



---

UNITED STATES MAGISTRATE JUDGE

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

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

JORGE L. ARGUDO

Plaintiff,

vs.

R. CASTELLON et al.,

Defendants.

ORDER AFFIRMING REPORT AND RECOMMENDATION

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

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

The Second Amended Complaint shall be the operative complaint.

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

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

DONE AND ORDERED in Chambers, at Miami, Florida, this 18<sup>th</sup> day of October, 2012.

  
\_\_\_\_\_  
KATHLEEN M. WILLIAMS  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

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

JORGE ARGUDO,

Plaintiff,

vs.

R. CASTELLON, et al.,

Defendants.

**DEFENDANT'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF  
DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT**

Defendant, Officer Antonio Sentmanat (hereinafter "Ofc. Sentmanat"), by and through his undersigned counsel, acknowledging that the facts, as established in the record, are being presented in a light more favorable to the Plaintiff than the actual facts of the case, files this Statement of Material Facts in Support of his Motion for Final Summary Judgment as follows:

**STATEMENT OF FACTS**

1. Plaintiff originally filed his Complaint [DE#1] on May 24, 2011 against several police officers asserting claims of excessive force. Magistrate White on June 20, 2011, issued a Report and Recommendations [DE#10] allowing the Plaintiff to amend the Complaint on the sole issue of use of excessive force by officers upon his arrest. The Court adopted the Report and Recommendation on July 27, 2011 [DE#11].
2. Plaintiff filed on August 4, 2011 his Amended Complaint [DE#12]. On August 3, 2012, Magistrate White issued another Report and Recommendation [DE#19], allowing the Plaintiff to file a second amended complaint on the sole issue of use of excessive force by officers upon his arrest and requiring Plaintiff to name specific officers responsible for the alleged use of force.

The Court affirmed the Report and Recommendations [DE#21] on September 4, 2012. Magistrate White entered a Second Supplemental Report and Recommendation on September 12, 2012 [DE#22], authorizing the use of unlawful force claim to proceed against Officer Sentmanat based only on Plaintiff's prior filing of a police report relating the event. The Court adopted the Second Supplemental Report and Recommendations on October 18, 2012 [DE#26].

3. The pleadings, affidavits, and exhibits on file show that there is no genuine issue of material fact, and, as a result, Ofc. Sentmanat is entitled to final summary judgment on the basis of qualified immunity as a matter of law.

4. Plaintiff's Second Amended Complaint [DE#20] alleges that on December 2, 2008, Ofc. Sentmanat, and others, entered his apartment unlawfully and that Ofc. Sentmanat struck the Plaintiff multiple times in the face with a closed fist, causing swelling, bleeding, and chipped teeth. Plaintiff further alleges that he was thrown to the ground, handcuffed and later taken to jail.

5. Pursuant to the Second Supplemental Report of Magistrate Judge White [DE#22], the only pending claim is that of alleged unlawful use of force by Ofc. Sentmanat. All other Defendants and claims identified in the Plaintiff's Second Amended Complaint were dismissed.

6. On November 12, 2012, Ofc. Sentmanat filed his Answer, Affirmative Defenses and Demand for Jury Trial in Response to the Second Amended Complaint [DE#31].

7. On December 1 and 2, 2008, Jorge Argudo (hereinafter "Plaintiff") was living at 4400 West 16<sup>th</sup> Avenue, Apartment 327 in Hialeah, Florida 33012. [DE#75-1:50:25].

8. Plaintiff lived at 4400 West 16<sup>th</sup> Avenue, Apartment 327, Hialeah, Florida 33012 with his mother, Linda Argudo, and his girlfriend, Courtney McKnight (hereinafter "McKnight") during the early part of 2008. [DE#76-1:10:13-25].

9. Approximately two months from the date that McKnight began living with Plaintiff and Linda Argudo, Linda Argudo moved out of the apartment, and Plaintiff and McKnight continued to reside together at 4400 West 16<sup>th</sup> Avenue, Apartment 327, Hialeah, Florida 33012 until Plaintiff's December 2, 2008 arrest. [DE#76-1:10:22-25; 11:1-20].

10. As of December 2, 2008, Plaintiff was a member of "Porky's Gym." [DE#75-1:142:11-23], [DE#76-1:20: 9-11; 21:4-5], [DE#82-1].

11. On December 2, 2008, Plaintiff owned two firearms, a .22 caliber handgun and a .38 caliber handgun. [DE#76-1:23:20-24; 24:6-8].

12. During the late evening hours of December 1, 2008, Plaintiff was "hanging out" with McKnight and their neighbor, Ivis Socorro (hereinafter "Socorro"). [DE#76-1:13:7-25; 14:1-24].

13. Plaintiff and McKnight left their apartment sometime between 2:30 a.m. and 3:00 a.m. on December 2, 2008 "to steal a car to try to get more money." [DE#76-1:15:12-13].

14. On December 2, 2008, Plaintiff used a flathead screwdriver to break into a white four-door Honda Accord. [DE#76-1:21:19-25; 22:1-19], [DE#79-1:7:22-25].

15. At approximately 4:28 a.m., on December 2, 2008, City of Hialeah Police Department 911 dispatchers received a call from Socorro. [DE#78-1].

16. Socorro stated that her neighbors, Plaintiff and McKnight, were coming to pick her (Socorro) up in a stolen vehicle and that Plaintiff "has a gun on him." [DE#78-2], [DE#78-3].

17. Socorro explained how she knew Plaintiff, the way in which she learned about him having stolen the car, her relationship to Plaintiff, and why she was calling. [DE#78-2], [DE#78-3].

18. Socorro stated that she knew about the stolen car because “they told me what they’re doing,” and explained that at the time of her call to the Hialeah Police Department, she had been on the phone with Plaintiff several times during the evening. [DE#78-2], [DE#78-3].

19. Socorro further provided the apartment building address that Plaintiff would be arriving at, Plaintiff’s direction of travel, what time he would be arriving, that he would be with McKnight, and that he would arrive in a stolen white four-door Honda Accord. [DE#78-2], [DE#78-3].

20. Upon receiving the dispatch for this incident, Hialeah Police Sgt. Ramiro Del Nodal and Ofc. Raul Castellon both reported to the area where the stolen Honda Accord was expected to arrive. [DE#79-4:5:10-15].

21. After arriving at the scene, Sgt. Del Nodal observed a car that matched the description of the stolen vehicle “roll up” and “approach” the particular apartment complex. [DE#79-4:6:10-14].

22. According to Sgt. Del Nodal, “when the car rolled up to the apartment building, it wasn’t too hard to figure that was the car we were being advised over the radio.” [DE#79-4:6:12-15].

23. Upon seeing the matching description, and that the car came to the particular apartment at the particular time predicted by Ms. Socorro’s 911 call, Sgt. Del Nodal initiated a traffic stop of the vehicle. [DE#79-4:7:7-10].

24. Sgt. Del Nodal turned on his overhead police lights, and asked the individuals to exit the vehicle, while simultaneously getting out of his police car with his weapon drawn. [DE#79-4:9:6-25; 10:1-13].

25. After the vehicle came to a stop, the driver, Courtney McKnight, and the passenger, Plaintiff, both exited the vehicle. [DE#79-4:8:10-19].

26. Before McKnight and Plaintiff exited the vehicle, McKnight told Plaintiff to “Tell [the cops] my name is Tiffany.” [DE#76-1:9:5-12; 30:14-17]. McKnight continued to hold herself out to be “Tiffany Muñoz” on December 2, 2008. [DE#76-1:8:17-25].

27. Upon exiting the vehicle, Sgt. Del Nodal observed Plaintiff go into his waistband and quickly drop some objects, one of which the officer recognized to be a firearm. [DE#79-4:11:21-25; 12:1-15].

28. Plaintiff then proceeded to flee the scene on foot. [DE#79-4:12:12], [DE#79-5:8:2-4].

29. Sgt. Del Nodal and Ofc. Castellon both began to follow Plaintiff as he ran from the location of the stolen vehicle to a nearby apartment complex. [DE#79-4:12:17-25; 13:1-13], [DE#79-5:8:2-6].

30. In pursuing Plaintiff, Ofc. Castellon observed Plaintiff again reaching into his waistband, at which point Ofc. Castellon demanded that Plaintiff “show me your hands.” [DE#79-5:8:5-13].

31. After Plaintiff failed to comply with Ofc. Castellon’s commands, Ofc. Castellon drew his Taser and deployed it on the Plaintiff. [DE#79-5:8:20-25]. One of the Taser prongs hit Plaintiff and stuck in his back, while the other Taser prong bounced off Plaintiff. [DE#79-5:8:20-25; 9:1-20].

32. Upon fleeing from the police, it appeared as if Plaintiff was heading in the direction of his apartment. [DE#76-1:32:22-25; 33:3-7].

33. Unable to ascertain which apartment Plaintiff fled to, Sgt. Del Nodal and Ofc. Castellon then obtained Socorro’s contact information, and went to her apartment. [DE#79-5:10:19-24].

34. Socorro then helped advise the police units of which apartment Plaintiff fled to. [DE#79-5:11:20-25].

35. McKnight subsequently provided consent for the police to enter Plaintiff's apartment under the alias "Tiffany Muñoz." [DE#76-1:38: 22-25; 39:1-25; 40:1-12], [DE#79-3:7:1-4].

36. SWAT units, one of which included Ofc. Sentmanat, then responded to Plaintiff's apartment. [DE#77-1:6:2-11], [DE#79-3:4:7-9].

37. After establishing a perimeter around Plaintiff's apartment, SWAT officers observed Plaintiff "looking out onto the balcony" and "open the blinds and then close them again." [DE#80-1:5:9-11; 19-22], [DE#80-2:6:21-23; 8:7-10], [DE#80-3:8:1-4].

38. SWAT officers attempted to make contact with Plaintiff, but Plaintiff "barricaded" himself in the apartment. [DE#77-1:7:20-21], [DE#79-2:6:11-16; 7:1-9], [DE#79-1:4:15-17].

39. The SWAT team was eventually able to make entry into Plaintiff's apartment and Ofc. Sentmanat entered the apartment. [DE#77-1:10:11-18], [DE#79-3:12:3-10].

40. Upon entry into the apartment, SWAT officers gave Plaintiff, who was "five to seven feet from the door," [DE#77-1:11:13-14] several lawful commands to "come towards the door." [DE#77-1:11:14-18].

41. Plaintiff refused such commands and instead "walked backwards" and "reached into his waistband." [DE#77-1:12:3-10], [DE#80-3:6:17-22], [DE#79-3:11:22-25; 12:1].

42. The SWAT officers had cause for concern that there was a firearm either on Plaintiff's person or in the area immediately surrounding Plaintiff. [DE#77-1:40:16-18], [DE#79-3:7:6-11; 12:15-20].

43. Ofc. Sentmanat was the "contact officer" for this particular SWAT call, and it was therefore his responsibility to arrest and/or apprehend the Plaintiff. [DE#77-1:19:2-4].

44. Ofc. Sentmanat then "closed the distance" between him and Plaintiff in an attempt to take Plaintiff into custody. [DE#77-1:12:10-12; 13:8-10].

45. Acting pursuant to his responsibility as the “contact officer” and with the concern that Plaintiff may be armed, Ofc. Sentmanat grabbed Plaintiff’s hand in an effort to minimize any danger to Ofc. Sentmanat and his fellow SWAT officers. [DE#77-1:14:3-8].

46. Upon Ofc. Sentmanat grabbing Plaintiff’s arm, Plaintiff resisted by grabbing Ofc. Sentmanat’s vest and pushing him towards the door. [DE#77-1:14:3-8], [DE#79-3:12:3-5].

47. Ofc. Sentmanat then delivered a “distractionary strike” to Plaintiff [DE#77-1:16:16-24] and a “struggle ensued,” which resulted in Ofc. Sentmanat and Plaintiff falling to the ground [DE#77-1:20:11-13].

48. As Ofc. Sentmanat and Plaintiff were on the ground, Plaintiff continued to resist lawful commands and attempts by Ofc. Sentmanat to gain Plaintiff’s compliance. After a brief struggle, Ofc. Sentmanat, with assistance from Ofc. Andrew Lopez-Cao, was able to place handcuffs on Plaintiff. [DE#77-1:20:22-24; 21:1-2].

49. Once Plaintiff was handcuffed, he continued to disobey lawful police commands and continued acting “belligerent” by “kicking,” “moving around,” “screaming obscenities,” and “spitting blood” at the officers. [DE#77-1:21:12-14; 19-22].

50. Ofc. Sentmanat gave Plaintiff several lawful commands to cease kicking, yelling, spitting blood, moving, and resisting, however Plaintiff refused to comply. [DE#77-1:22:6-20].

51. Ofc. Sentmanat then advised Plaintiff that he would utilize his City of Hialeah issued Taser to gain compliance if Plaintiff did not obey his commands and stop his belligerent behavior. [DE#77-1:22:6-8].

52. Despite Ofc. Sentmanat’s warnings and continuous lawful commands, Plaintiff continued to act belligerently, at which point Ofc. Sentmanat deployed his Taser. [DE#77-1:24:4-9].

53. Ofc. Sentmanat had to use his Taser four times before Plaintiff stopped “kicking,” “moving,” “trying to get up,” “spitting blood,” “acting belligerent” and “screaming.” [DE#77-1:26:6-15].

54. In between each Taser deployment, Ofc. Sentmanat continued to warn and provide the Plaintiff with lawful commands, which were not followed by the Plaintiff. [DE#77-1:26:11-15].

55. Following the fourth cycle, Plaintiff ceased his belligerent behavior and was calm. [DE#77-1:26:11-15].

56. After Plaintiff was calm and compliant, he was treated by the SWAT medics in his apartment. [DE#77-1:27: 3-17].

57. After Plaintiff was taken into custody and brought outside of his apartment, Ofc. Castellon observed that Plaintiff still had a Taser prong embedded in his back from when Ofc. Castellon used his Taser on Plaintiff during the earlier foot chase of Plaintiff. [DE#79-5:12:6-9; 13:21-25; 14:1-4].

58. Before SWAT officers made entry into Plaintiff’s apartment, Plaintiff shaved his hair off in an attempt to “alter his identity.” [DE#80-4:9:11-20], [DE#80-3:8:17-19], [DE#79-5:12:2-4], [DE#76-1 : 33:6-7; 42:21-23].

59. Ofc. Castellon identified Plaintiff as the same individual that exited the passenger side of the stolen four-door Honda and fled from Sgt. Del Nodal and Ofc. Castellon. [DE#79-5:13:15-20].

60. Plaintiff was subsequently arrested on charges of possession of a firearm by a violent career criminal, resisting without violence, possession of a stolen firearm, grand theft auto, burglary (unoccupied conveyance), possession of burglary tools, criminal mischief, resisting

with violence (pertaining to the struggle with Ofc. Sentmanat). [DE#81-1], [DE#83-1], [DE#83-2], [DE#83-3], [DE#83-4].

61. Police recovered a .22 caliber handgun, a flathead screwdriver, and a set of keys containing a Porky's gym membership key fob from the area immediately surrounding the stolen white four-door Honda Accord. [DE#83-2].

62. McKnight identified the .22 caliber handgun, flathead screwdriver, and set of keys containing a Porky's gym membership key fob recovered from the area immediately surrounding the stolen white four-door Honda Accord as belonging to Plaintiff. [DE#76-1:20:7-25; 21:1-18; 24:17-25; 25:1-3].

63. On September 27, 2012, Plaintiff entered a plea of nolo contendere and was adjudicated guilty for one count of grand theft auto (a third degree felony), one count of concealed possession of a weapon by a violent career criminal (a first degree felony), and one count of resisting an officer without violence to his person (a first degree misdemeanor) for the events arising out of the December 2, 2008 incident. [DE#82-1], [DE#82-2], [DE#81-3].<sup>1</sup>

Respectfully submitted on **August 16, 2013**.

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**Counsel for Ofr. Sentmanat**

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<sup>1</sup> These three convictions are the subject of a pending appeal.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the **16<sup>th</sup> day of August 2013**, a copy of the foregoing was furnished via e-mail to Humberto J. Corrales, Esq., [hjcorrales@corrales-law.com](mailto:hjcorrales@corrales-law.com) and via U.S. Mail to: Pro Se Plaintiff, Jorge L. Argudo - #501302570, Broward County Jail, c/o North Broward Bureau, P.O. Box 407037, Fort Lauderdale, Florida 33340

By: s/ Devang Desai

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

**MIAMI DIVISION**

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

JORGE ARGUDO,

Plaintiff,

vs.

R. CASTELLON, et al.,

Defendants.

**DEFENDANT, ANTONIO SENTMANAT'S, MOTION FOR FINAL SUMMARY  
JUDGMENT AND INCORPORATED MEMORANDUM OF LAW**

Defendant, OFFICER ANTONIO SENTMANAT (Ofr. Sentmanat), by and through his undersigned counsel and pursuant to Fed.R.Civ.P. 56, moves for an order granting final summary judgment against Plaintiff, Jorge Argudo, on the basis of qualified immunity. Because the plausible record facts demonstrate that Ofr. Sentmanat did not use excessive force (or the unlawful use of force), and because Ofr. Sentmanat's actions did not violate a clearly established constitutional right, summary judgment should be granted in Ofr. Sentmanat's favor where the only force that was used against Plaintiff was lawful *de minimus* force.<sup>1</sup>

**Standard of Review**

Summary judgment is appropriate "if the pleadings [and] depositions, ... together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." Fed.R. Civ.P. 56(c). The Supreme Court has clarified the meaning of this standard in holding that Rule 56(c) "mandates –the entry of summary judgment . . . against a party who fails to establish the

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<sup>1</sup> Officer Sentmanat relies upon his separately filed Statement of Material Facts [DE#84], exhibits and deposition transcripts [DE#75-83] in support of this Motion for Final Summary Judgment. Additionally, references to the record will be labeled as: DE# : Page # of Deposition : Line(s).

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 317 (1986). The moving party meets its burden of summary judgment by showing that the evidence does not support the non-moving party's case. *See id.* at 325. When the moving party has met this burden, the nonmoving party must then "go beyond the pleadings" to designate specific facts showing there is a genuine issue for trial under Rule 56 (e). *Id.* at 324.

A genuine dispute of material fact exists if the "evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is proper if the evidence "is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. "A court need not permit a case to go to a jury, however, when the inferences that are drawn from the evidence, and upon which the non-movant relies, are implausible." *Cuesta v. School Bd. of Miami-Dade Cnty.*, 285 F.3d 962, 970 (11th Cir. 2002). "The critical inquiries for summary judgment purposes [in a qualified immunity analysis] are what the officers knew, what they observed, and that they had reason to believe." *Bolander v. Taser Int'l, Inc.*, 2009 WL 2004379 (S.D. Fla. 2009) (quoting *Magee v. City of Daphne*, 2006 WL 3791971 (S.D. Ala. 2006).

### **Introduction**

Plaintiff's specific claim fails as a matter of law in light of the absence of any material facts that would substantiate the claims against Ofr. Sentmanat. Even if one were to accept as true the Plaintiff's allegations against Ofr. Sentmanat and Plaintiff's deposition testimony, Ofr. Sentmanat is still entitled to final summary judgment as a matter of law. Based upon Plaintiff's testimony, his mother's (Linda Argudo) testimony, the testimony of Courtney McKnight, a/k/a

Tiffany Munoz (McKnight), and the record evidence before this Court, Plaintiff is unable to maintain the asserted claims against Ofr. Sentmanat for the reasons contained herein.

**1) Plaintiff's vague, conclusory, and inconsistent allegations detailing the events in question are implausible under the totality of the circumstances.**

In his Second Amended Complaint, Plaintiff alleges that Ofr. Sentmanat, upon entering the Plaintiff's apartment, struck the Plaintiff in the face with a closed fist, threw him to the ground, handcuffed him and tased him multiple times. [See DE#20:1; DE#75-1:90-91]. However, the Plaintiff failed to allege or state all of the facts and the totality of the circumstances. Plaintiff also alleges that after Ofr. Sentmanat tased him, another unidentified Ofr. deployed his Taser, but one prong missed, causing the unidentified Ofr. to re-deploy and tase Plaintiff multiple times. See *id.* [DE#75-1:112-114]. The incomplete and overwhelmingly unsubstantiated allegations fail to state a claim. The Court "need not entertain conclusory and unsubstantiated allegations or fabrication of evidence." *Kingsland v. City of Miami*, 382 F.3d 1220, 1227 n. 8 (11th Cir. 2004). Plaintiff has offered a number of varied versions of the incident, often incomplete and inaccurate, and claims that the police Ofr.s' version as contained in the police reports, the Ofr.'s testimony, Ms. McKnight's testimony and the Affidavit of Ivis Socorro (Socorro) did not occur, and thus Ofr. Sentmanat and others have fabricated the events that took place in this case. To the contrary, the record evidence establishes that Plaintiff has offered several versions of the subject incident, which versions fail to defeat the entry of an order granting final summary judgment in favor of Ofr. Sentmanat.

Separate from Plaintiff's allegations concerning the alleged excessive force used by Ofr. Sentmanat and the unidentified police Ofr., Plaintiff testified that on the date of this incident he was arrested for "something that had nothing to do with [him], and [he] got charged for it and

everything.” [DE#75-1:116:12-20]. Further, despite being convicted of possession of a firearm by a violent career criminal, auto theft and resisting without violence from the earlier events<sup>2</sup> which led to Hialeah SWAT being called-out to Plaintiff’s apartment building, Plaintiff testified that he was threatened and coerced into taking a plea for those convictions by the criminal court trial judge and his retained criminal defense counsel. [DE#75-1:64-67]. Further, Plaintiff even went so far as to testify that his filed appeal in the criminal case went to issues regarding the conviction and resulting sentence. [DE#75-1:65].

The above allegations and testimony by the Plaintiff are directly contradicted by the testimony of Sgt. Ramiro Del Nodal, Ofr. Raul Castellon, Ofr. Sentmanat, McKnight (the Plaintiff’s live-in girlfriend), and Socorro (the 911 caller, per an affidavit).<sup>3</sup> Specifically, during the late evening hours of December 1, 2008, Plaintiff was “hanging out” with McKnight and their neighbor, Socorro. [DE#76-1:13:7-25; 14:1-24]. At approximately 4:28 a.m., on December 2, 2008, City of Hialeah Police Department 911 dispatchers received a call from Socorro. [DE#78-1:1:4-8; 2:8-10]. Socorro stated that her neighbors, Plaintiff and McKnight, were coming to pick her up in a stolen vehicle and that Plaintiff may be armed. [DE#78-2], [DE#78-3]. Socorro further provided the apartment building address that Plaintiff would be arriving at, the direction of travel, what time Plaintiff would be arriving, that Plaintiff would be with McKnight, and that Plaintiff would arrive in a stolen white four-door Honda Accord. [DE#78-2], [DE#78-3].

Hialeah Police Sergeant Ramiro Del Nodal and Ofr. Raul Castellon, having then been dispatched, both reported to the area where the stolen Honda Accord was expected to arrive.

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<sup>2</sup> [See DE#84¶62].

<sup>3</sup> [See DE#76-1:8:17-25; 9:5-12; 30:14-17].

[DE#79-4:5:10-15]. After arriving at the scene, Sgt. Del Nodal observed a car that matched the description of the stolen vehicle “roll up” and “approach” the particular apartment complex.

[DE#79-4:6:10-14]. According to Sgt. Del Nodal, “when the car rolled up to the apartment building, it wasn’t too hard to figure that was the car we were being advised over the radio.”

[DE#79-4:6:12-15].

Upon seeing the matching description and the car’s arrival at the particular apartment at the particular time consistent with Socorro’s 911 call, Sgt. Del Nodal initiated a traffic stop of the vehicle. [DE#79-4:7:7-10]. Sgt. Del Nodal turned on his overhead police lights and asked the individuals to exit the vehicle, while simultaneously getting out of his police car with his weapon drawn. [DE#79-4:9:6-25; 10:1-13]. The vehicle came to a stop, and the driver (McKnight) and the passenger (Plaintiff), both exited the vehicle. [DE#79-4:8:10-19]. Upon exiting the vehicle, Sgt. Del Nodal observed Plaintiff reach into his waistband and quickly drop some objects, one of which the Ofr. identified to be a firearm. [DE#79-4:11:21-25; 12:1-15]. Plaintiff then proceeded to flee the scene on foot. [DE#79-4:12:12].

Sgt. Del Nodal and Ofr. Castellon both began to follow Plaintiff as he ran from the location of the stolen vehicle to a nearby apartment complex. [DE#79-4:12:17-25; 13:1-13] and [DE#84¶25]. Upon fleeing from the police, it appeared as if Plaintiff was heading in the direction of his apartment. [DE#76-1:32:22-25; 33:3-7]. Unable to ascertain which apartment Plaintiff fled to, Sgt. Del Nodal and Ofr. Castellon then obtained Socorro’s contact information, and went to her apartment. [DE#79-5:10:19-24]. Socorro then advised the police to which apartment Plaintiff fled. [DE#79-5:11:20-25].

After Hialeah police Ofr.s obtained the apartment number for the Plaintiff, McKnight provided consent for the police to enter Plaintiff’s apartment. [DE#76-1:38:22-25; 39:1-25; 40:1-

12]. Hialeah SWAT Ofr.s, including Ofr. Sentmanat, then responded to Plaintiff's apartment. [DE#77-1:6:2-11]. Ofr. Sentmanat was the "contact Ofr." for this particular SWAT call, and it was therefore his responsibility to arrest and/or apprehend the Plaintiff. [DE#77-1:19:2-4].

After unsuccessful negotiating attempts by the SWAT unit to have Plaintiff voluntarily open the door and surrender to law enforcement, SWAT was forced to make entry into the Plaintiff's apartment. [DE#77-1:7:20-21; 10:11-18]. Upon entry into the apartment, SWAT Ofr.s gave Plaintiff, who was "five to seven feet from the door," [DE#77-1:11:13-14] several lawful commands to "come towards the door." [DE#77-1:11:14-18]. Plaintiff refused such commands and instead "walked backwards" and was observed by Ofr. Sentmanat to have "reached into his waistband." [DE#77-1:12:3-10].<sup>4</sup> Acting pursuant to his responsibility as the "contact Ofr." and with the concern that Plaintiff may be armed, Ofr. Sentmanat grabbed Plaintiff's hand in an effort to minimize any danger to Ofr. Sentmanat and his fellow SWAT Ofr.s once he was within close range. [DE#77-1:12:10-12; 13:8-10; 14:3-8]. Following Ofr. Sentmanat's attempt to grab Plaintiff's hand, Plaintiff resisted by grabbing Ofr. Sentmanat's vest in an attempt to push him away, resulting in Ofr. Sentmanat having to deliver two distractionary strikes to the Plaintiff's face in order to gain control over the Plaintiff, which resulted in both of the Ofr. and Plaintiff falling to the ground. [DE#77-1:14:3-8; 20:11-13].

Once Ofr. Sentmant and the Plaintiff were on the apartment floor, the Plaintiff continued to resist lawful commands and attempts by Ofr. Sentmanat to gain Plaintiff's compliance. [DE#77-1:20:22-24]. After a brief struggle, Ofr. Sentmanat, with assistance from Ofr. Andrew Lopez-Cao, was able to place handcuffs on Plaintiff. [DE#77-1:20:22-24; 21:1-2]. Despite

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<sup>4</sup> Ms. McKnight testified that Plaintiff kept a weapon in apartment, and Ms. Socorro in the 911 call said the Plaintiff was armed. [DE#76-1:23:20-24; 24:6-8], [DE#78-2], [DE#78-3]. Officer Sentmanat therefore had cause to concern that there was a firearm either on Plaintiff's person or in the area immediately surrounding Plaintiff. [DE#77-1:40:16-18].

being handcuffed, Plaintiff continued to act “belligerent” by “kicking,” “moving around,” “screaming obscenities,” and “spitting blood” at the Ofr.s. [DE#77-1:21:12-14; 19-22].

Following the issuance of several lawful commands for the Plaintiff to cease kicking, yelling, spitting, moving, and resisting; all of which resulted in Plaintiff’s non-compliance, Ofr. Sentmanat advised Plaintiff that a Taser would be deployed. [DE#77-1:22:6-20; 24:4-9]. The Taser was then employed, but before any subsequent further Taser deployment, Ofr. Sentmanat further advised the Plaintiff with lawful commands and warned the Plaintiff that non-compliance would result in further tasing. [DE#77-1:26:11-15]. Ofr. Sentmanat ultimately deployed his Taser four times before Plaintiff stopped “kicking,” “moving,” “trying to get up,” “spitting blood,” “acting belligerent” and “screaming.” [DE#77-1:26:6-15]. Plaintiff was treated by the SWAT medics on scene. [DE#77-1:27:3-17].

The arrest affidavits, use of force report, and SWAT After Action Report are consistent with McKnight’s and Ofr.s Del Nodal, Castellon and Sentmanat’s testimony and Socorro’s affidavit. *See* [DE#83-1], [DE#83-2], [DE#83-4], [DE#76-1], [DE#79-4], [DE#79-5], [DE#77-1], [DE#78-1], respectively.

The Court, when presented with a motion for summary judgment, must view the facts in the light most favorable to the non-moving party, herein the Plaintiff. In doing so here, Plaintiff testified that he had never left his apartment (#327) on the early morning hours of December 2, 2008 (prior to the police knocking on his door), had never been an occupant of a white Honda on December 2, 2008, was never in possession of a firearm on December 2, 2008 and had no knowledge of McKnight. [DE#75-1:66:23; 127:3-17; 140-141: 22-25; 182:1-21; 211:8-23]. Despite Plaintiff’s testimony, one need only look at the September 27, 2012 plea transcript from

Plaintiff's criminal case arising out of the subject incident, which plea is wholly supported by the global testimony of the non-party witnesses and Ofr. Sentmanat's testimony.<sup>5</sup>

During the plea hearing before Judge Dava Tunis, Plaintiff herein appeared for charges of grand theft and possession of a firearm by career criminal as a result of the events of December 2, 2008. [DE#81-2]. Plaintiff accepted a plea of no contest and was advised by Judge Tunis that his acceptance of the plea would be an adjudication, which is a conviction on his record. [See DE#81-2:20]. Additionally, Judge Tunis went through an extensive plea colloquy with the criminal defendant (Plaintiff herein), wherein the Plaintiff confirmed his understanding the charges being presented against him, the evidence obtained by the state against him (and that there was no evidence that anyone was in possession of that would exonerate him of the charges), his right to a jury trial, and the consequences of his freely accepting a plea offer from the State of Florida. [DE#81-2:22-47]. Clearly, Plaintiff's veracity is once again unsupported where he testified in his deposition that the only reason he accepted a plea in criminal case for the December 2, 2008 incident was due to his being threatened by the judge and the ineffective assistance of his counsel. [DE#75-1:64-67].

This Court has found such an inconsistency to be insufficient to uphold the credibility of such evidence. *See e.g., Dominguez v. Metro. Miami-Dade Cnty.*, 359 F. Supp. 2d 1323, 1332 (S.D. Fla. 2004). Plaintiff's incomplete and inaccurate allegations are not supported by the sworn testimony or record evidence. Such inconsistencies merely offer alternative unsubstantiated versions of the facts. These alternative versions violate the duty of candor and as such, are highly offensive to the court. *See Godby v. Montgomery Co. Bd. of Educ.*, 996 F. Supp.

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<sup>5</sup> The court may take judicial notice of certain public records (such as records of prior legal proceedings), so long as their accuracy and authenticity is not reasonably subject to dispute. *See Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010); *see Fed. R. Evid.* 201(b).

1390, 1417 (M.D. Ala. 1998); *See also Golding v. Dept. of Homeland Sec.*, 2009 WL 2222779 at \*7 (S.D. Fla. July 29, 2009) (finding that two mutually exclusive and inconsistent versions of the facts demonstrate a lack of candor and a lack of character to the Court). Due to the inconsistencies in Plaintiff's version of the facts, summary judgment is appropriate.

**2) Even assuming *arguendo* that Plaintiff's version of events are plausible, no constitutional violation occurred when Ofr. Sentmanat used objectively reasonable *de minimus* force during his lawful police action involving the Plaintiff.**

**A. At all times, Ofr. Sentmanat used objectively reasonable force.**

"The question is whether the Ofr.'s conduct is objectively reasonable in light of the facts confronting the Ofr.." *Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002) (citations omitted). This objective reasonableness is determined while the incident is taking place; the Court should not look back in hindsight to determine what the Ofr. could or should have done. *Id.* "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

The Supreme Court has held that "claims of excessive force in the course of an arrest, investigatory stop, or other seizure, should be analyzed under the Fourth Amendment and its 'objective reasonableness' standard." *Whittington*, 490 F. Supp. 2d at 1254; *Graham*, 490 U.S. at 388. Thus, in determining whether the amount of force used was excessive, the Court must "focus upon whether the amount of force used was reasonable under the circumstances." *Madura v. City of N. Miami Beach*, 2011 WL 3627265, at \*3 (S.D. Fla. 2011) (quoting *Sullivan v. City of Pembroke Pines*, 161 F. Appx. 906, 907 (11th Cir. 2006) (emphasis added). That is, an objectively reasonable Ofr. in the same situation could have believed the use of force was not excessive. *Brown v. City of Huntsville*, 608 F.3d 724, 738 (11th Cir. 2010). "This standard requires balancing the nature and quality of the intrusion on the individual's Fourth Amendment

interest against the importance of the governmental interests alleged to justify the intrusion.” *Whittington*, 490 F. Supp. 2d at 1254. To balance the necessity of the use of force against the arrestee's constitutional rights, a court must evaluate several factors, including: “(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the Ofr.s or others; and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.” *Fils v. City of Aventura*, 647 F.3d 1272, 1288 (11th Cir. 2011) (quoting *Brown* 608 F.3d at 738). Furthermore, “[u]se of force must be judged on a case-by-case basis from the perspective of a reasonable Ofr. on the scene, rather than with the 20/20 vision of hindsight.” *Brown* 608 F.3d at 738 (quoting *Post v. City of Fort Lauderdale* 7 F.3d 1552, 1559 (11th Cir. 1993)).

Here, Ofr. Sentmanat’s actions were indeed reasonable given the circumstances surrounding Plaintiff’s arrest. Ofr. Sentmanat, along with other members of the Hialeah Police Department, responded to the Plaintiff’s residence to locate a potentially armed suspect who had fled from police custody during a traffic stop of a reported stolen vehicle. The Ofr.s were in full police uniform (SWAT gear) and arrived in marked police vehicles. Upon arrival to the apartment complex, Ofr.s were able to determine that Plaintiff had fled into his apartment and refused to respond to the Ofr.s’ repeated requests and direct commands to open the door and discuss matters with the Ofr.s on scene. Ofr.s had knowledge that the suspect they were attempting to meet with may have been armed and were unaware of what else may have been within Plaintiff’s reach within the apartment (or who else was with Plaintiff).

As Ofr.s attempted to legally detain Plaintiff and effectuate his arrest, Plaintiff’s voice became elevated, he used profanity towards the Ofr.s (including Ofr. Sentmanat), and he

continued to demand that Ofr.s present him with a warrant.<sup>6</sup> Once Ofr.s entered Plaintiff's apartment, Ofr. Sentmanat observed Plaintiff reach into his waistband and retreat backwards from the front door, causing Ofr. Sentmanat great alarm and fear for his safety and that of others. This alarm and fear was heightened by the SWAT team's inability to see into the rest of the apartment. Again, Plaintiff refused to heed lawful police commands, yelled obscenities, and acted hostile and belligerent towards Ofr. Sentmanat and others. Perceiving a threat of Plaintiff reaching for a weapon in his waistband, Ofr. Sentmanat reached for Plaintiff's hand and in turn, Plaintiff grabbed Ofr. Sentmanat's vest and pushed him; resulting in Ofr. Sentmanat having to use physical force against the Plaintiff. Following Plaintiff's physical struggle with Ofr. Sentmanat, Plaintiff was eventually handcuffed while on the floor of this apartment by Ofr. Lopez-Cao, another member of the SWAT team.

Despite Plaintiff's being handcuffed, he continued to willfully obstruct Ofr. Sentmanat and others in carrying out their police functions while inside the apartment by continuing his belligerent behavior, kicking at Ofr.s, moving around on the floor, screaming obscenities and spitting blood at the Ofr.s. Even after being handcuffed, Plaintiff ignored Ofr. Sentmanat's repeated commands. Ofr. Sentmanat warned the Plaintiff that, if Plaintiff would not obey his commands and stop his belligerent behavior, he would be tased. Regardless, Plaintiff did not heed these warnings and was tased four times by Ofr. Sentmanat in order to gain his compliance.

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<sup>6</sup> Officer Sentmanat and the other police officers' entry into Plaintiff's apartment was lawful and reasonable. The law provides that even a "warrantless arrest in a suspect's home is permissible if probable cause and exigent circumstances are present." *Hathcock v. Cohen*, 547 F. Supp. 1271, 1274 (S.D. Fla. 2008); *see also* Fla. Stat. § 901.15. Recognized exigent circumstances include: (1) danger of flight or escape; (2) danger of harm to police officers or the general public; (3) hot pursuit of a fleeing suspect. *Id.* Here, not only did officers (including Defendant) have consent to search from McKnight, but they had probable cause for Plaintiff's arrest and exigent circumstances existed due to Plaintiff fleeing into the apartment.

Prior to each use of the Taser Plaintiff was provided with warnings and commands to stop acting belligerent, kicking, screaming, moving around, yelling obscenities and spitting blood.

Faced with these circumstances, Ofr. Sentmanat had no reasonable choice but to use physical force, albeit *de minimus*.

“Our system of law enforcement depends on police Ofr.s having the ability to back up their directives with force and take a subject into custody once he is placed under arrest. It would render their authority illusory if police Ofr.s with probable cause to arrest a suspect were obliged to abandon their arrest whenever a suspect disregards lawful commands to effectuate the arrest.”

*Magee v. City of Daphne*, 2006 WL 3791971, at \*9 (S.D. Ala. 2006) and *see also Terrell v. Smith*, 668 F.3d 1244, 1252-53 (11th Cir. 2012) (“[t]he law does not create a duty for a law enforcement Ofr. to retreat or abandon his efforts to effect an arrest simply because a suspect is noncompliant”). Moreover, Officers may take reasonable steps to maintain or restore order in a potentially violent situation. *See, e.g., Helfin v. Miami-Dade Cnty.*, 823 F. Supp. 2d 1298, 1306 (S.D. Fla. 2011).

“The critical inquiries for summary judgment purposes are what the involved Ofr.s knew, what they observed, and what they had reason to believe.” *Bolander v. Taser Int’l. Inc.*, 2009 WL 2004379, at \*7 (S.D.Fla.) (citing *Magee*, 2006 WL 3791971 \* 1 n. 6). Since Ofr. Sentmanat observed Plaintiff reaching into his waistband for a weapon, all the while refusing to obey police commands, the actions of Ofr. Sentmanat were reasonable to subdue the Plaintiff under the circumstances. As such, “a reasonable Ofr. would believe that this level of force [was] necessary to the situation at hand.” *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002).

Plaintiff additionally makes conclusory, inflammatory, and unsubstantiated allegations that Ofr. Sentmanat’s actions were an “abuse of discretion, abuse of authority, miscarriage of justice, discrimination, obstruction of justice ...” [DE#20:5]. Even though these statements are

not supported by the facts, the Supreme Court noted their irrelevance in *Graham* by noting that the “calculus of reasonableness” test does not include a subjective prong evaluating the Ofr.’s actions in terms of bad faith or malicious intent. *Graham v. Connor*, 490 U.S. 386, 397-398 (1989). As such, Ofr. Sentmanat’s personal attitude when dealing with Plaintiff is irrelevant to this inquiry.

**B. Ofr. Sentmanat applied *de minimis* force.**

The force used against Plaintiff was justified given the forceful and threatening nature of Plaintiff’s resistance, along with the possibility that Plaintiff was armed, the fact that Plaintiff did not comply with police commands, Plaintiff’s hostile, belligerent and uncooperative behavior towards Ofr. Sentmanat and SWAT members, the fact that the Plaintiff was a suspect in a grand theft auto and had previously fled from police after a traffic stop, and Plaintiff’s inability to peacefully allow Ofr.s, after a lengthy standoff, into his apartment to tell his version of events to Ofr.s on the scene. Based on these actions by Plaintiff, he is the sole person that bears the responsibility for requiring police Ofr.s to make a forced entry into the apartment to extract him and permitting Ofr. Sentmanat to utilize the physical force he did to gain compliance. Even though there was a clear need for application of force, and even though Plaintiff was clearly and violently resisting arrest, refusing lawful police commands and threatening Ofr. Sentmanat by reaching into his waistband, only minimal force was used against the Plaintiff. “[T]he application of *de minimis* force, without more, will not support” an excessive force claim and will not defeat an Ofr.’s qualified immunity. *Nolin v. Isbell*, F.3d 1253, 1257-58 (11th Cir. 2000) (concluding that only *de minimis* force was used when Ofr. grabbed the plaintiff, shoved him a few feet against a vehicle, pushed his knee into plaintiff’s back, pushed plaintiff’s head against the van, searched plaintiff’s groin area in an uncomfortable manner, and placed plaintiff

in handcuffs, all resulting in only minor bruising); *see also Woodruff v. City of Trussville*, 434 Fed. Appx. 852 (11th Cir. 2011) (punching plaintiff in the face, forcefully removing him from his car, and slamming him on the ground – even when construed in the light most favorable to plaintiff, constituted *de minimis* force). In the instant case—again viewing the facts in a light most favorable to the Plaintiff—Ofr. Sentmanat’s attempt to grab Plaintiff’s arm after he was observed reaching into his waistband, followed by Plaintiff grabbing Ofr. Sentmanat’s vest and pushing him and resulting in Ofr. Sentmanat punching the Plaintiff twice in the face to coax the Plaintiff into surrender, support a granting of qualified immunity.

Further, once Plaintiff was handcuffed, he continued to yell, use profanity, kick, scream, move around, resist, and spit blood at Ofr.s on scene, including Ofr. Sentmanat. As a result, Ofr. Sentmanat issued additional lawful directives to have the Plaintiff stop his belligerent, hostile and uncooperative behavior in an effort to avoid Ofr. Sentmanat to use his Taser to gain compliance. Plaintiff was not moved by any of the warnings provided by Ofr. Sentmanat and in turn was tased. Despite being tased, Plaintiff continued his belligerent, hostile and uncooperative behavior, forcing Ofr. Sentmanat to tase Plaintiff three additional times, each time giving the Plaintiff ample warning before the Taser was used. As a result, the force that Ofr. Sentmanat had to apply was reasonable under the facts he encountered. *See Buckley v. Haddock*, 292 Fed. Appx. 791 (11th Cir. 2008) (finding three Taser shots to be reasonable after plaintiff refused to comply with an Ofr.’s orders by refusing to stand and the Ofr. “resorted to using the Taser only after trying to persuade Plaintiff to cease resisting . . . and after repeatedly and plainly warning Plaintiff that a Taser would be used and then giving Plaintiff some time to comply”).

Plaintiff’s belligerent and uncooperative demeanor throughout the incident led to Ofr. Sentmanat’s reasonable belief that he would need to use the Taser. Plaintiff’s continued

noncompliance and the threat of danger, whether actual or perceived, supports the use of the Taser as *de minimis* force. Additionally, the use of a Taser in order to control an unruly individual, who an Ofr. reasonably believes is a threat to the Ofr., to herself and others, has been found to have been reasonable *de minimis* force. *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004).

There is no evidence that Ofr. Sentmanat used excessive force once Plaintiff went to the ground after his struggle with the Ofr.. When Plaintiff went to the ground, Ofr. Sentmant, with assistance from Ofr. Lopez-Cao, handcuffed the Plaintiff. Following the handcuffing, a Taser was deployed only due to uncooperative and non-compliant behavior of the Plaintiff. Plaintiff offers no evidence that the Taser was a deadly weapon *per se*, nor that it was used improperly under the circumstances.

**3) Ofr. Sentmanat's use of force was not "clearly excessive."**

Ofr. Sentmanat's use of force was not clearly excessive in his attempt to effectuate the arrest under Florida law. The Eleventh Circuit has held that "[p]ursuant to Florida law, police Ofr.s are entitled to a presumption of good faith in regard to the use of force applied during a lawful arrest, and Ofr.s are only liable for damage where the force used is clearly excessive." *Davis v. Williams*, 451 F.3d 759, 768 (11th Cir. 2006) (internal quotations omitted). Even if Ofr. Sentmanat's two strikes and use of the Taser were not completely flawless, Ofr. Sentmanat's actions were not clearly excessive and were within his discretionary police functions. Florida's Third District Court of Appeal, in granting summary judgment for a tort claim involving a police Ofr., held that the courts should not be entangled in an Ofr.'s discretionary judgment "in such fundamental law enforcement policies--even where, as here, that judgment might in hindsight be

arguably faulted either in whole or in part.” *Seguine v. City of Miami*, 627 So. 2d 14, 19 (Fla. 3d DCA 1993).

Additionally, the facts do not show that Ofr. Sentmanat intentionally desired to harm Plaintiff with his conduct. The only contacts that Ofr. Sentmanat made with Plaintiff were the grasping of his arm, striking Plaintiff twice after Plaintiff grabbed Ofr. Sentmanat’s vest, and the use of the Taser. None of these actions were unnecessary or unreasonable in this situation. Plaintiff has therefore failed to demonstrate that the actions of Ofr. Sentmanat were excessive and violated his constitutional rights.

**4) Ofr. Sentmanat’s actions did not violate clearly established constitutional rights, thus Ofr. Sentmanat is entitled to the protection of qualified immunity.**

“Qualified immunity protects municipal Ofr.s from liability in § 1983 actions as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (quotations omitted). Qualified immunity is intended to protect “all but the plainly incompetent or one who is knowingly violating the law.” *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). In order to assert the defense of qualified immunity in an action alleging the use of excessive force, the Ofr. must have been acting within the scope of his discretionary authority, which Plaintiff’s Second Amended Complaint suggests. The undisputed facts also show that any alleged misconduct and resulting injuries caused by Ofr. Sentmanat occurred while he was on duty and responding to a SWAT call-out stemming from Plaintiff fleeing from Ofr.s during a traffic stop of a stolen vehicle.

Once the police Ofr. has established that he acted within the scope of his discretionary authority, the burden then shifts to the plaintiff to show that qualified immunity is inappropriate because the official's conduct violated clearly established constitutional rights which a reasonable person would have known. *Hope v. Pelzer*, 536 U.S. 730 (2002); *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002). Since Ofr. Sentmanat was acting in the scope of his discretionary authority as a police Ofr., Plaintiff has the burden of showing that Ofr. Sentmanat should not be entitled to qualified immunity.

Courts have used the two-part test set forth in *Saucier v. Katz*, 533 U.S. 194, 201 (2001) in determining whether a qualified immunity defense can be overcome.<sup>7</sup> In *Saucier*, the Supreme Court found that qualified immunity should be upheld *unless* a plaintiff can establish that (1) the facts alleged, taken in the light most favorable to the party asserting the injury, show that the Ofr.'s conduct violated a constitutional right and (2) that the constitutional right was clearly established. *Saucier*, 533 U.S. at 201.

Plaintiff is unable to establish the first prong of this test since Ofr. Sentmanat's use of force did not rise to a constitutional violation. Ofr. Sentmanat used objectively reasonable *de minimis* force against Plaintiff, as discussed above.

Even assuming *arguendo* that Plaintiff could establish the burden of a constitutional violation, he would then need to prove that his rights were clearly established at the time of the incident. In determining whether the right was clearly established during the alleged violations, the Court's inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. "The relevant, dispositive inquiry in determining

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<sup>7</sup> In *Pearson v. Callahan*, 129 U.S. 818, 819 (2009), the Court noted that while the *Saucier* test is no longer mandatory, it remains "often beneficial" to the court's analysis in qualified immunity cases. Judges are permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. *Id.* at 236.

whether a right is clearly established is whether it would be clear to a reasonable Ofr. that his conduct was unlawful in the situation he confronted.” *Id.* at 202. “If the law did not put the Ofr. on notice that his conduct was clearly unlawful, summary judgment based on qualified immunity is appropriate.” *Id.* at 201. The Ofr.’s notice can be determined by whether the Ofr. had fair warning that his alleged mistreatment of the plaintiff was unconstitutional. *See Hope*, 566 U.S. at 741. Whether the Ofr. had fair warning that the right was clearly established can be shown in three ways:

- (1) case law with indistinguishable facts clearly establishing the constitutional right;
- (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or
- (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.

*Lewis*, 561 F.3d at 1291-92 (citations omitted).

In applying these three factors to the instant case, Plaintiff cannot prove that Ofr. Sentmanat had fair warning that his conduct violated any of Plaintiff’s clearly established constitutional rights. There is no case law with indistinguishable facts clearly establishing such a right. In fact, courts analyzing actions with similar facts have found that such constitutional rights as Plaintiff claims were violated have been deemed non-existent under these circumstances. As discussed *supra*, the Eleventh Circuit has held that the punching of a suspect and the use of a Taser in effecting an arrest is constitutional if the amount of force is reasonably proportionate to the need for force under the circumstances. *See generally Nolin* F.3d at 1257-58; *see also Woodruff v. City of Trussville*, 434 Fed. Appx. 852 (11th Cir. 2011) and *Buckley v. Haddock*, 292 Fed. Appx. 791 (11th Cir. 2008). Based upon the facts as a whole, which include the Plaintiff acting hostile, belligerently and noncompliant with Ofr. Sentmanat’s requests, it is reasonable for Ofr. Sentmanat to have used physical force. Regarding Plaintiff’s claimed

physical injuries, Courts have found “that the typical arrest involves some force and injury.” *Rodriguez v. Farrell*, 280 F.3d 1341, 1351 (11th Cir. 2002) (citing *Nolin* 207 F.3d at 1257-58.<sup>8</sup> Plaintiff has failed to meet his burden of proof in showing that a constitutional right was clearly established with the citation of authority with indistinguishable facts holding to the contrary.

Secondly, Plaintiff cannot argue any broad statement of principle within the Constitution that clearly establishes a constitutional right. Plaintiff’s noncompliance with requests by Ofr.s to open his apartment door, the Plaintiff reaching into his waistband as if Plaintiff was reaching for a weapon, being hostile, non-compliant and acting with disregard for police directives made it reasonable for Ofr. Sentmanat to use physical force. Ofr. Sentmanat reasonably believed that Plaintiff was a threat to the Plaintiff’s own safety and a potential threat to the safety of others (including all of the SWAT Ofr.s), since he continuously resisted requests and disobeyed all orders. Ofr. Sentmanat’s position is again supported by the case law in that “the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Graham* 490 U.S. at 396. Plaintiff has failed to meet his burden of proof since he has not shown that an established constitutional right has been interpreted in a situation with indistinguishable facts. Additionally, Ofr. Sentmanat’s conduct was not “so egregious that a constitutional right was clearly violated.” *Lewis*, 561 F.3d at 1292. In light of the record facts, Ofr. Sentmanat’s actions cannot be considered an egregious constitutional violation.

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<sup>8</sup> In *Rodriguez*, the officer “grabbed plaintiff’s arm, twisted it around plaintiff’s back, jerking it up high to the shoulder and then handcuffed plaintiff as plaintiff fell to his knees screaming that [the officer] was hurting him. Plaintiff was placed in the rear of [the officer’s] patrol car, kept handcuffed behind his back and transported to the police station.” 280 F.3d at 1351. Even though “the resulting complications included more than twenty-five subsequent surgeries and ultimately amputation of the arm below the elbow,” the Court held that the handcuffing technique was not excessive force. The handcuffing technique used “is a relatively common and an ordinarily **accepted non-excessive way to detain an arrestee.**” *Id.* (emphasis added)

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**Summary and Conclusion**

Plaintiff cannot establish that Ofr. Sentmanat's actions constituted anything more than objectively reasonable *de minimus* force, and even if he could, he cannot prove that Ofr. Sentmanat's actions violated a clearly established constitutional right under a qualified immunity analysis. Although the Plaintiff has offered this Court with a colorful version of the facts surrounding this incident, (while claiming the Ofr.'s version is not truthful or accurate), the inconsistencies in the Plaintiff's own story combined with the strong and consistent testimony of others in this case, together with the record evidence, calls for the granting of summary judgment. *Lanier, Jr. v. Smith*, No. 3:08-CV-833-J-12JRK, 2009 WL 3853170, at \*8 (M.D. Fla.). When one party's version of the facts is blatantly contradicted by the record, "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).

WHEREFORE, Defendant, OFR. ANTONIO SENTMANAT, moves for entry of final judgment in his favor declaring that the Plaintiff, JORGE ARGUDO, go hence without day, and/or for the entry of an Order Dismissing the Plaintiff's Second Amended Complaint, and reserving jurisdiction to award costs, including such reasonable attorney's fees as are authorized by law, and or for any other relief this Court deems just and proper.

Respectfully submitted on **August 16, 2013**.

/s/ Devang Desai

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**Counsel for Ofr. Sentmanat**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16<sup>th</sup> day of August 2013, a copy of the foregoing was furnished via e-mail to Humberto J. Corrales, Esq., [hjcorrales@corrales-law.com](mailto:hjcorrales@corrales-law.com) and via U.S. Mail to: Pro Se Plaintiff, Jorge L. Argudo - #501302570, Broward County Jail, c/o North Broward Bureau, P.O. Box 407037, Fort Lauderdale, Florida 33340

By: s/ Devang Desai

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

**MIAMI DIVISION**

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

JORGE ARGUDO,

Plaintiff,

vs.

R. CASTELLON, et al.,

Defendants.

**DEFENDANT'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY IN SUPPORT  
OF HIS MOTION FOR FINAL SUMMARY JUDGMENT**

Comes Now Defendant, OFFICER ANTONIO SENTMANAT, by and through his undersigned counsel and hereby gives notice of filing the attached supplemental authority in support of Defendant's Motion for Final Summary Judgment [DE #85] and in support thereof states the following:

1. On August 16, 2013, Officer Sentmanat filed his Motion for Final Summary Judgment and Incorporated Memorandum of Law [DE # 85] as well as his Statement of Material Facts in Support of Defendant's Motion for Final Summary Judgment [DE#84].
2. Pursuant to this Court's Local Rule 7.1(c), Plaintiff was required to file an opposing memorandum of law with the Court by August 30, 2013. Plaintiff has failed to respond to Officer Sentmanat's Motion for Final Summary Judgment and Incorporated Memorandum of Law and Statement of Material Facts in Support of Defendant's Motion for Final Summary Judgment. Further, Plaintiff never sought an extension of time in which to file his response.

3. “All material facts set forth in the movant’s statement filed and supported as required above will be deemed admitted unless controverted by the opposing party’s statement, provided that the Court finds that the movant’s statement is supported by evidence in the record.” Local Rule 56.1(b), S.D. Fla. Furthermore, where a nonmoving party fails to respond to a movant’s statement of material facts, the movant’s statement of material facts will be deemed admitted. See Williams v. Slack, 438 Fed. Appx. 848, 849 (11th Cir. 2011); see also BMU, Inc. v. Cumulus Media, Inc., 366 Fed. Appx. 47, 49 (11th Cir. 2010). Attached hereto as Composite Exhibit “A”.
  
4. Here, Plaintiff has failed to oppose or otherwise respond to Officer Sentmanat’s Statement of Material Facts in Support of the Defendant’s Motion for Final Summary Judgment within the time period prescribed by law. Therefore, this Court should admit Officer Sentmanat’s Statement of Material Facts in ruling on his Motion for Final Summary Judgment.

WHEREFORE, Defendant, OFR. ANTONIO SENTMANAT, moves for entry of an order deeming his Statement of Material Facts Admitted and final judgment in his favor declaring that the Plaintiff, JORGE ARGUDO, go hence without day, and/or for the entry of an Order Dismissing the Plaintiff’s Second Amended Complaint, and reserving jurisdiction to award costs, including such reasonable attorney’s fees as are authorized by law, and or for any other relief this Court deems just and proper.

Respectfully submitted on **September 3, 2013**.

/s/ Devang Desai  
Devang Desai, Esq. - FBN: 664421

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Williams v. Slack, 438 Fed.Appx. 848 (2011)

KeyCite Yellow Flag - Negative Treatment

Distinguished by Bank of the Ozarks v. Kingsland Hospitality, LLC, S.D.Ga., October 5, 2012

438 Fed.Appx. 848

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3) United States Court of Appeals, Eleventh Circuit.

Eric Raymond WILLIAMS, Plaintiff--Appellant,  
v.

A. SLACK, Correctional Officer II, J. Carr, Correctional Officer II, Sgt. Jackson, C.O. II McCord, C.O. I Jones, Defendants--Appellees.

No. 10-13201 | Non-Argument  
Calendar. | Aug. 23, 2011.

**Synopsis**

**Background:** Prisoner brought § 1983 action against correctional officers, alleging that they used excessive force. The United States District Court for the Northern District of Georgia, 2010 WL 2545809, entered summary judgment for officers. Prisoner appealed.

**Holdings:** The Court of Appeals held that:

[1] District Court did not abuse its discretion in applying local rule to deem officers' statements of material facts admitted, and

[2] officers did not act maliciously or sadistically to harm prisoner, and thus did not use excessive force.

Affirmed.

West Headnotes (2)

[1] **Federal Civil Procedure**

↳ Hearing and Determination

District court did not abuse its discretion in applying local rule to deem correctional officers' statements of material facts as admitted by prisoner in § 1983 action, where prisoner's response to officers' motions for summary judgment did not contain individually numbered, concise, non-argumentative responses corresponding to each of officers' enumerated material facts, response did not directly refute material facts set forth in officers' statements of material facts with specific citations to evidence, and response otherwise failed to state valid objection to material facts. 42 U.S.C.A. § 1983; U.S.Dist.Ct.Rules N.D. Ga., Local Rule 56.1 .

4 Cases that cite this headnote

[2] **Prisons**

↳ Use of force

**Prisons**

↳ Shackles or other restraints

**Sentencing and Punishment**

↳ Use of force

Correctional officers did not act maliciously or sadistically to harm prisoner, and thus did not use excessive force in violation of Eighth Amendment, where prisoner created disturbance by rushing at officer, force used including handcuffs was proportionate to need for that force, prisoner suffered relatively minor injuries consisting of abrasions and swelling, officers reasonably perceived that situation in dormitory where altercation took place was becoming dangerous and volatile, and officers acted to temper use of force. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

Williams v. Slack, 438 Fed.Appx. 848 (2011)

### Attorneys and Law Firms

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Matthew F. Boyer, Samuel Scott Olens, Devon Orland, Kathleen M. Pacious, Office of the Attorney General, \*849 Vincent A. Toreno, D. Michael Williams, Rutherford & Christie, LLP, Matthew Richard Lavallee, Daley Koster & Lavallee, LLC, Atlanta, GA, for Defendants–Appellees.

Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:08–cv–02920–TCB.

Before HULL, PRYOR and ANDERSON, Circuit Judges.

### Opinion

PER CURIAM:

Eric Raymond Williams appeals the district court's grants of summary judgment to Officers Arzialous Slack, Joseph Jones, Eric Jackson, Jeremiah Carr, and Joseph McCard on his 42 U.S.C. § 1983 complaint alleging that they used excessive force against him in violation of the Eighth Amendment. On appeal, Williams contends that the district court abused its discretion by deeming the defendants' statements of material facts admitted because he filed a response and objection to the defendants' motions for summary judgment. Williams also argues that the district court erred by then granting the officers' motions for summary judgment because there were genuine issues of material fact regarding the officers' alleged use of excessive force. We address each argument in turn.

#### 1. Northern District of Georgia Local Rule 56.1

We review a district court's application of its local rules for an abuse of discretion, finding such abuse only when the plaintiff demonstrates that the district court made a clear error of judgment. *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1302 (11th Cir.2009).

Federal Rule of Civil Procedure 56 requires a party asserting that a fact is genuinely disputed to support his assertion by citing to specific materials in the record, and a failure to do so allows the district court to consider the facts as undisputed for purposes of the motion for summary judgment. Fed.R.Civ.P. 56(c)(1)(A), (e)(2). Similarly, Northern District

of Georgia Local Rule 56.1 “demands that the non-movant's response [to a motion for summary judgment] contain individually numbered, concise, non-argumentative responses corresponding to each of the movant's enumerated material facts.” *Mann*, 588 F.3d at 1302–03 (holding that plaintiffs' response failed to comply with local rule 56.1 because it was “convoluted, argumentative, and non-responsive”); *see also* N.D. Ga. R. 56.1(B)(2)(a).

Where the party responding to a summary judgment motion does not directly refute a material fact set forth in the movant's Statement of Material Facts with specific citations to evidence, or otherwise fails to state a valid objection to the material fact pursuant to Local Rule 56.1B(2), such fact is deemed admitted by the respondent.

*Mann*, 588 F.3d at 1302.

In applying Local Rule 56.1 at the summary judgment stage, the district court should “disregard or ignore evidence relied on by the respondent—but not cited in its response to the movant's statement of undisputed facts—that yields facts contrary to those listed in the movant's statement.” *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir.2008). A Local Rule 56.1 statement, however, “is not itself a vehicle for making factual assertions that are otherwise unsupported in the record,” and, therefore, we must still review the materials submitted by the movant “to determine if there is, indeed, no genuine issue of material fact.” *Id.* at 1303 (quotation omitted).

Additionally, although the Supreme Court has “insisted that the pleadings prepared by prisoners who do not have access \*850 to counsel be liberally construed,” the Court has “never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.” *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21 (1993).

[1] In this case, Williams has failed to demonstrate that the district court made a clear error of judgment in applying Local Rule 56.1 to deem the defendants' statements of material facts as admitted. Local Rule 56.1 is an ordinary procedural rule of civil litigation that we do not interpret “so as to excuse mistakes by those who proceed without counsel.” *McNeil*, 508 U.S. at 113, 113 S.Ct. at 1984. Williams's

**Williams v. Slack, 438 Fed.Appx. 848 (2011)**

response to the motions for summary judgment did not "contain individually numbered, concise, non-argumentative responses corresponding to each of the movant's enumerated material facts." *Mann*, 588 F.3d at 1302. Neither did the response directly refute the material facts set forth in the movants' statements of material facts with specific citations to evidence, and it otherwise failed to state a valid objection to the material facts.

## II. Motion for Summary Judgment

We review a district court's grant of summary judgment *de novo*, considering the facts and drawing reasonable inferences in the light most favorable to the non-moving party. *Mann*, 588 F.3d at 1303. Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "[G]enuine disputes of facts are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant." *Mann*, 588 F.3d at 1303 (quotation omitted). "For factual issues to be considered genuine, they must have a real basis in the record." *Id.* (quotation omitted).

The use of force in a custodial setting does not violate the Eighth Amendment "as long as it is applied in a good faith effort to maintain or restore discipline and not maliciously and sadistically to cause harm." *Skrtich v. Thornton*, 280 F.3d 1295, 1300 (11th Cir.2002) (quotation and alteration omitted). To determine whether force was applied maliciously and sadistically to cause harm, we consider: (1) the need for the application of force, (2) the relationship between that need and the amount of force used, (3) the extent of the prisoner's injuries, (4) the threat reasonably perceived by the officials, and (5) efforts made to temper the severity of the force. *Cockrell v. Sparks*, 510 F.3d 1307, 1311 (11th Cir.2007). In considering these factors, we give "a wide range of deference to prison officials acting to preserve discipline and security, including when considering decisions made at the scene of a disturbance." *Id.* (quotations and alteration omitted).

[2] We affirm the district court's grant of summary judgment to Officer Jackson because Williams concedes, and the evidence demonstrates, that he was not on duty on the date of the incident, and, therefore, did not participate in the events giving rise to Williams's complaint. We also conclude that the district court did not err in granting the remaining defendants'

motions for summary judgment because the undisputed evidence demonstrates that they did not act maliciously or sadistically to harm Williams. Instead, the officers acted to restore order and preserve discipline at the scene of a disturbance.

First, the admitted evidence established that Williams created a disturbance, and "[p]rison guards may use force when necessary to restore order and need not wait \*851 until disturbances reach dangerous proportions before responding." *Cockrell*, 510 F.3d at 1311 (quotation omitted). Taking the evidence as elucidated in the defendants' statement of material facts, the altercation occurred because Williams rushed at Officer Slack and engaged in a physical altercation with him. The other inmates who were roaming the prison dormitory became agitated and raucous and began threatening the officers when Williams and Slack began to tussle. Thus, there was a need for force to restrain Williams and to remove Williams from the volatile situation in the dormitory. *See Cockrell*, 510 F.3d at 1311.

Second, the force that the officers employed was proportionate to the need for that force. *See id.* The officers restrained Williams and acted to expeditiously remove him from the dormitory. Accordingly, they handcuffed him, placed him in leg restraints, carried him down the stairs, and then pulled him outside of the dormitory. Officer Jones concedes that his knee might have contacted Williams while Jones was attempting to handcuff him. However, he states that he did not knee Williams in the side for the purpose of causing him harm, and this statement was deemed admitted pursuant to Local Rule 56.1. Thus, even if Officer Jones's knee hit Williams in the side three times during the altercation, such impacts alone do not prove that Officer Jones's actions were malicious or sadistic.

Furthermore, Williams's assertions that he was beaten in the back of the head by numerous officers, thrown down the stairs, and stomped on the knee by Officer McCard, are blatantly contradicted by the defendants' statements of material facts, and the district court, therefore, properly disregarded them. *See Reese*, 527 F.3d at 1268. The properly considered evidence indicates, instead, that Williams was restrained and then accidentally dropped on the stairs because the altercation aggravated a preexisting injury in Officer Slack's hand and because Williams was "bucking."

On appeal, Williams contends that he never posed a threat to the officers' safety or to his own safety. However,

Williams v. Slack, 438 Fed.Appx. 848 (2011)

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Williams's assertion mischaracterizes the nature of the threat to the officers and to Williams. As Officer Carr stated in his declaration, it was necessary to remove Williams from the dormitory as quickly as possible because both the officers and Williams were vulnerable to attack from other inmates while Williams was restrained. This Court gives great deference to prison officials acting to preserve discipline and security, especially when they make decisions at the scene of a disturbance, and thus the amount of force used was proportionate to the need for force. *See Cockrell*, 510 F.3d at 1311.

Third, Williams suffered relatively minor injuries consisting of abrasions and swelling. The minimal nature of those injuries indicates that the officers did not use force maliciously and sadistically to harm Williams. *See Cockrell*, 510 F.3d at 1311. Although Williams alleged that his ribs were fractured, that contention is not supported by the evidence. Furthermore, contrary to Williams's assertions, there is no reason to believe that only an orthopedic specialist could identify a fracture from an x-ray that a radiologist could not.

Fourth, given that there were approximately 50 inmates freely roaming the dormitory at the time of the altercation, and those inmates began to yell and threaten the officers, the defendants reasonably perceived that the situation in the dormitory was becoming dangerous and volatile. Thus, the undisputed evidence indicates that the officers' use of force was in response to the dangerous and volatile situation \*852 that they perceived. *See Cockrell*, 510 F.3d at 1311.

Fifth, the undisputed evidence indicates that the officers acted to temper the use of their force. It is undisputed that the officers placed handcuffs and leg restraints on Williams rather than using more forceful methods of restraint. *See, e.g., Campbell v. Sikes*, 169 F.3d 1353, 1376-78 (11th Cir.1999) (upholding officials' use of an "L" shaped restraint for "hog-tying" in addition to a straightjacket). Additionally, the officers verbally instructed Williams to stop "bucking," but he did not comply. Further, as discussed above, the undisputed evidence contradicts Williams's allegations of being punched and kicked in the head and back by numerous officers and then thrown down nine steps. Accordingly, even if the officers could have used alternative methods to achieve their goal of restraining and transporting Williams quickly, the evidence fails to demonstrate that they chose their course of conduct to maliciously or sadistically inflict harm on Williams. *See Cockrell*, 510 F.3d at 1311.

Finally, based on our holding that the defendants were entitled to summary judgment, we need not consider their arguments that they were entitled to qualified immunity. Therefore, upon review of the record and consideration of the parties' briefs, we affirm the district court's grant of summary judgment to the defendants.

**AFFIRMED.**

**Parallel Citations**

2011 WL 3684543 (C.A.11 (Ga.))

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BMU, Inc. v. Cumulus Media, Inc., 366 Fed.Appx. 47 (2010)

366 Fed.Appx. 47

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3) United States Court of Appeals, Eleventh Circuit.

BMU, INC., Plaintiff-Counter-Defendant-Appellant, World-Wide Card Solution, LLC, Plaintiff-Appellant,

v.

CUMULUS MEDIA, INC., Defendant-Counter-Claimant-Appellee.

No. 09-13900 | Non-Argument Calendar. | Feb. 16, 2010.

**Synopsis**

**Background:** Plaintiff brought action against defendant, alleging breach of contract. Cross-motions for summary judgment were filed. The United States District Court for the Northern District of Georgia granted defendant's motion and denied plaintiff's motion. Plaintiff appealed.

**Holding:** The Court of Appeals held that plaintiff's failure to submit response to defendant's statement of undisputed facts constituted admission of facts set forth in defendant's statement of facts.

Affirmed.

West Headnotes (1)

[1] **Federal Civil Procedure**

➡ Hearing and Determination

Plaintiff's failure to submit response to defendant's statement of undisputed facts on motion for summary judgment in plaintiff's breach of contract action constituted admission of facts set forth in defendant's statement of facts.

7 Cases that cite this headnote

**Attorneys and Law Firms**

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Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 07-03141-CV-TCB-1.

Before CARNES, MARCUS and COX, Circuit Judges.

**Opinion**

PER CURIAM:

BMU, Inc. and World-Wide Card Solutions, LLC ("BMU") filed suit against Cumulus Media, Inc., which owns hundreds of radio stations across the country. BMU alleges that Cumulus breached an agreement to distribute BMU's debit cards to its listeners in the Tallahassee, Florida market. The district court granted Cumulus's motion for summary judgment, and denied BMU's summary judgment motion. The court found that BMU failed to file a response to Cumulus's statement of material facts, as required by Local Rule 56.1(B)(2)(a), N.D. Ga. Accordingly, the district court accepted the statement of facts supplied by Cumulus as undisputed. BMU appeals the district court's grant of summary judgment to Cumulus, arguing that it indeed filed a response to Cumulus's statement of material facts

The relevant local rule provides that, "[a] respondent to a summary judgment motion shall include the following documents with the responsive brief: [ ] [a] response to the movant's statement of undisputed facts[, which] shall contain individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts." L.R. 56.1(B)(2)(a)(1). The rules further provide that the district court

will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence

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(including page or \*49 paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1 B.(1).

L.R. 56.1(B)(2)(a)(2).

On September 22, 2008, Cumulus filed its motion for summary judgment and statement of material facts. On October 24, 2008<sup>1</sup>, BMU filed its response to Cumulus's motion for summary judgment and two copies of a statement of material facts<sup>2</sup> (R.3-79, 80, 81.) It appears that the two statements of material facts are identical, except that the second version, (R.1-81), includes an exhibit omitted from the first filing. The local rules allow a "statement of additional facts which the respondent contends are material and present a genuine issue for trial." L.R. 56.1(B)(2)(b). However, the rules first clearly require a "response to the movant's statement of undisputed facts." L.R. 56.1(B)(2)(a).

As noted by the district court, BMU failed to comply with this requirement, despite the fact that Cumulus "pointed out this deficiency in its reply brief in support of its motion for summary judgment." (R.4-91 at 2, citing, R.4-86 at 2.) BMU "did not file a response [to Cumulus's statement of material facts]; all that they filed was their own statement of additional facts. Although a statement of additional facts is permitted ... it is not a substitute for a response." (R.5-100 at 3.)

Because BMU failed to file a response to Cumulus's statement of undisputed facts, the district court did not err by deeming "all of the facts set forth in [Cumulus's] statement of facts to be admitted." (R.4-91 at 2.) Given that these facts are deemed admitted, BMU presents no argument to support a conclusion that summary judgment was improperly granted or a conclusion that BMU's motion for reconsideration was improperly denied. And, we find no error in denial of BMU's motion for summary judgment.

AFFIRMED.

#### Parallel Citations

2010 WL 529284 (C.A.11 (Ga.))

#### Footnotes

- 1 BMU filed a motion on October 3, 2008 to extend the deadline to respond to Cumulus's motion, which the district court granted. (R.3-76, 78.)
- 2 Although not relevant to the issue before this court, on October 31, 2008, BMU filed a motion for summary judgment and a statement of material facts. (R.3-82.) On November 24, 2008, Cumulus filed its response to BMU's motion, and a response to BMU's statement of material facts, as required by the local rules. (R.4-88, 89.)

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