

**U.S. District Court
Southern District of Florida (West Palm Beach)
CIVIL DOCKET FOR CASE #: 9:12-cv-81353-KLR**

George v. Bradshaw
Assigned to: Senior Judge Kenneth L. Ryskamp
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 12/13/2012
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff**Shane Robert George**

represented by **Shane Robert George**
0204313
Palm Beach County Jail
Inmate Mail/Parcels
Post Office Box 24716
West Palm Beach, FL 33416
PRO SE

V.

Defendant**Sheriff Ric Bradshaw**
P.B.S.O.

represented by **Summer Marie Barranco**
Purdy Jolly Giuffreda & Barranco PA
2455 E Sunrise Boulevard
Suite 1216
Fort Lauderdale, FL 33304
954-462-3200
Fax: 462-3861
Email: summer@purdyllaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**Deputy Frennd**

represented by **Summer Marie Barranco**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/13/2012	<u>1</u>	A COMPLAINT Under The Civil Rights Act, 42 U.S.C. 1983 against Ric Bradshaw. Filing fee \$ 350.00. IFP Filed, filed by Shane Robert George.(yar) (Entered: 12/13/2012)
12/13/2012	2	Judge Assignment to Senior Judge Kenneth L. Ryskamp (yar) (Entered: 12/13/2012)
12/13/2012	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. (yar) (Entered: 12/13/2012)
12/13/2012	<u>4</u>	MOTION for Leave to Proceed in forma pauperis by Shane Robert George. (yar) (Entered: 12/13/2012)
12/20/2012	<u>5</u>	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING 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 12/20/2012. (tw) (Entered: 12/20/2012)

12/20/2012	<u>6</u>	ORDER OF INSTRUCTIONS TO PRO SE PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 12/20/2012. (tw) (Entered: 12/20/2012)
12/26/2012	<u>7</u>	NOTICE/Exhibit A– Letter to Nauman Siddique re injury photos by Shane Robert George (asl) (Entered: 12/26/2012)
12/28/2012	<u>8</u>	NOTICE of Filing Discovery: First Request for Production of Documents by Shane Robert George.(asl) (Entered: 12/28/2012)
01/03/2013	<u>9</u>	MOTION for Appointment of Counsel by Shane Robert George. Responses due by 1/22/2013 (asl) (Entered: 01/04/2013)
01/07/2013	<u>10</u>	ORDER denying <u>9</u> Motion to Appoint Counsel Signed by Magistrate Judge Patrick A. White on 1/7/2013. (cz) (Entered: 01/07/2013)
01/09/2013	<u>11</u>	NOTICE/Letter to Nauman Siddique re discovery request by Shane Robert George (asl) (Entered: 01/09/2013)
01/22/2013	<u>12</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Shane Robert George. Recommending 1. The plaintiff has stated a claim for use of unlawful force. 2. Sheriff Bradshaw shall remain in this case for a finite period of time solely to enable the plaintiff to obtain discovery as to the identify of the unknown officers. Objections to RRdue by 2/8/2013 Signed by Magistrate Judge Patrick A. White on 1/22/2013. (tw) (Entered: 01/22/2013)
01/24/2013	<u>13</u>	AFFIDAVIT signed by : Jacqueline George. by Shane Robert George (cbr) (Entered: 01/24/2013)
02/04/2013	<u>14</u>	Declaration of Shane Robert George signed by : Shane Robert George (cbr) (Entered: 02/05/2013)
02/04/2013	<u>15</u>	Plaintiff's First Request for Production of Documents by Shane Robert George. (cbr) (Entered: 02/05/2013)
02/04/2013	<u>16</u>	MOTION to Compel <i>Discovery</i> by Shane Robert George. Responses due by 2/22/2013 (cbr) (Entered: 02/05/2013)
02/06/2013	<u>17</u>	ORDER denying <u>15</u> Motion to Produce, all discovery requests are to be sent directly to the defendant; deferring <u>16</u> Motion to Compel is deferred until the defendant files a response. Signed by Magistrate Judge Patrick A. White on 2/6/2013. (cz) (Entered: 02/06/2013)
02/08/2013	<u>18</u>	ORDER Re Service of Process Requiring Personal Service upon Ric Bradshaw. Signed by Magistrate Judge Patrick A. White on 2/8/2013. (br) (Entered: 02/08/2013)
02/13/2013	<u>19</u>	Summons Issued as to Ric Bradshaw. (br) (Entered: 02/13/2013)
02/21/2013	<u>20</u>	MOTION for Leave to File an Amended Complaint by Shane Robert George. Responses due by 3/11/2013 (asl) (Entered: 02/21/2013)
02/26/2013	<u>21</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Shane Robert George. Recommending 1. The plaintiff has stated a claim for use of unlawful force by K–9 Officer Frend as the K–9 handler. 2. The plaintiff may be permitted to amend his complaint to demonstrate that Funk, Johnson, Dimperio and Fresneda were in a position to intervene and failed to do so. 3. All claims against defendants in their official capacities should be dismissed. 4. Claims of falsifying records should be dismissed. 5. The leave to amend (DE#20) shall be granted and the Operative complaint would be (DE#1) and its supplement(DE#20). Objections to RRdue by 3/15/2013 Signed by Magistrate Judge Patrick A. White on 2/26/2013. (tw) (Entered: 02/26/2013)
03/21/2013	<u>22</u>	SUMMONS (Affidavit) Returned Executed on <u>1</u> Complaint with a 21 day response/answer filing deadline Ric Bradshaw served on 3/11/2013, answer due 4/1/2013. (ral) (Entered: 03/22/2013)
03/25/2013	<u>23</u>	NOTICE of Attorney Appearance by Summer Marie Barranco on behalf of Ric Bradshaw (Barranco, Summer) (Entered: 03/25/2013)

03/25/2013	<u>24</u>	MOTION TO DISMISS <u>1</u> Complaint, <u>20</u> MOTION to Amend/Correct <u>1</u> Complaint FOR FAILURE TO STATE A CLAIM by Ric Bradshaw. Responses due by 4/11/2013 (Barranco, Summer) (Entered: 03/25/2013)
04/02/2013	<u>25</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS, re <u>21</u> Report and Recommendations; granting <u>20</u> Motion to Amend/Correct. Certificate of Appealability: No Ruling Signed by Senior Judge Kenneth L. Ryskamp on 4/1/2013. (cbr) (Entered: 04/02/2013)
04/02/2013	<u>26</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS ; re <u>12</u> Report and Recommendations Signed by Senior Judge Kenneth L. Ryskamp on 4/1/2013. (cbr) (Entered: 04/02/2013)
04/05/2013	<u>27</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>24</u> MOTION TO DISMISS <u>1</u> Complaint, <u>20</u> MOTION to Amend/Correct <u>1</u> Complaint FOR FAILURE TO STATE A CLAIM filed by Ric Bradshaw. Recommending granting. Objections to RR due by 4/22/2013 Signed by Magistrate Judge Patrick A. White on 4/5/2013. (tw) (Entered: 04/05/2013)
04/11/2013	<u>28</u>	ORDER that the United States Marshal shall serve a copy of the complaint and appropriate summons upon: Deputy Frend, K-9 Handler, Palm Beach Co. Sheriffs Office, 3228 Gun Club Road West Palm Beach, FL 33406. Signed by Magistrate Judge Patrick A. White on 4/11/2013. (tw) (Entered: 04/11/2013)
04/17/2013	<u>29</u>	Summons Issued as to Deputy Frend. (br) (Entered: 04/17/2013)
05/10/2013	<u>30</u>	SUMMONS (Affidavit) Returned Executed on <u>1</u> Complaint with a 21 day response/answer filing deadline Frend served on 5/9/2013, answer due 5/30/2013. (asl) (Entered: 05/13/2013)
05/29/2013	<u>31</u>	NOTICE of Attorney Appearance by Summer Marie Barranco on behalf of Frend. Attorney Summer Marie Barranco added to party Frend(pty:dft). (Barranco, Summer) (Entered: 05/29/2013)
05/29/2013	<u>32</u>	ANSWER and Affirmative Defenses to Complaint with Jury Demand by Frend. (Barranco, Summer) (Entered: 05/29/2013)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 12-cv-81353 Ryskamp/White

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

cat/div 1983/550/WPB
Case # _____
Judge _____ Mag PAW
Motn lfp YES Fee pd \$ _____
Receipt # _____

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

UNITED STATES DISTRICT COURT
Southern District of Florida

Case Number: _____

FILED by [Signature] D.C.
DEC 13 2012
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. - MIAMI

Shane Robert George #0204313 D.O.B. 5-31-1975
(Enter the full name of the plaintiff in this action) Last 4 Digits of SS.# 6973

v.

Ric Bradshaw - Sherriff - P.O.B.S.O

(Above, enter the full name of the defendant(s) in this action)

A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

Instructions for Filing:

This packet includes four copies of the complaint form and two copies of the Application to Proceed without Prepayment of Fees and Affidavit. To start an action you must file an original and one copy of your complaint for the court and one copy for each defendant you name. For example, if you name two defendants, you must file the original and three copies of the complaint (a total of four) with the court. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

Your complaint must be legibly handwritten or typewritten. Please do not use pencil to complete these forms. The plaintiff must sign and swear to the complaint. If you need additional space to answer a question, use an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

There is a filing fee of \$350.00 for this complaint to be filed. If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis.

Two blank Applications to Proceed without Prepayment of Fees and Affidavit for this purpose are included in this packet. Both should be completed and filed with your complaint.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to the Clerk's Office of the United States District Court, Southern District of Florida, 400 North Miami Avenue, Room 8N09, Miami, Florida 33128-7788.

I. Parties

In Item A below, place your name in the first blank and place your present address in the third blank.

A. Name of plaintiff: Shane Robert George
Inmate #: 0204313
Address: Palm Beach County Jail PO Box 24716
West Palm Beach FL 33416

In Item B below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use Item C for the names, positions, and places of employment for any additional defendants.

B. Defendant: RIC Bradshaw
is employed as SherriFF of Palm Beach County
at 3228 GUN CLUB Road West Palm Beach FL 33406

C. Additional Defendants: _____

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

II. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places.

Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach an additional blank page if necessary.

On Tuesday, November 27, 2012, I was viciously mauled by a Palm Beach Sheriff's Office K-9 Dog after the Dog was commanded by his handler to attack me despite the fact that I had already surrendered, was unarmed, had complied with Officers requests to comply, was not resisting, ^{and} was not violent or a danger to anyone. After allowing the dog to maul me for several minutes, I was then Beaten by same Deputies after they finally commanded the dog to stop attacking me. This clear and blatant case of excessive force was inflicted with malicious and sadistic intent, and was eyewitnessed by no less than several witnesses who will supply declarations, Affidavits, and testimony in this case. Officers then committed felony misconduct when they falsified official reports in an attempt to cover up and suppress the illegal

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

excessive Force. I suffered severe injuries as a result of this unprovoked and unwarranted attack which I will show through Medical Records, and while hospitalized in the Palm Beach County Jail hospital unit, I was amongst Numerous other Prisoners who were also victims of this Rampant misconduct of P.B.S.O. K-9 Unit.

III. Relief

State briefly exactly what you want the court do to do for you. Make no legal arguments. Cite no cases or statutes.

I want the Court to hold ALL involved Deputies liable in their official as well as Individual Capacities due to the Facts that they intentionally violated K-9 policy in a sadistic and malicious manner. I want the Court to Order a complete Investigation of all involved. I want all involved who Falsified Reports charged Criminally. I want Compensatory Damages, as well as Punitive Damages ordered to Deter this PBSO K-9 Unit and it's individual members From the Clear misconduct and Criminal activity they partake in, and should not be Condoned By Sherriff Bradshaw.

IV. Jury Demand

Do you demand a jury trial? Yes No

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

Signed this 6th day of December, 2012

X SL G

(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct. *(optional)*

Executed on: 12-6-2012

X SL G

(Signature of Plaintiff)

SHANE GEORGE

0204313

PALM BEACH COUNTY JAIL
PO Box 24716

WEST PALM BEACH FL
33416

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-81353-CIV-RYSKAMP
MAGISTRATE JUDGE P. A. WHITE

SHANE ROBERT GEORGE, :
 :
 Plaintiff, :
 :
 v. : REPORT OF
 : MAGISTRATE JUDGE
 RIC BRADSHAW, :
 :
 Defendant. :

I. Introduction

The pro-se plaintiff, Shane Robert George, filed a civil rights complaint pursuant to 42 U.S.C. §1983, alleging use of unlawful force upon arrest.(De#1) The plaintiff is proceeding in forma pauperis.

This civil action is before the Court for an initial screening pursuant to 28 U.S.C. §1915.

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. Such actions require the deprivation of a federally protected right by a person acting under color of state law. See 42 U.S.C. 1983; Polk County v Dodson, 454 U.S.312 (1981); Whitehorn v Harrelson, 758 F. 2d 1416, 1419 (11 Cir. 1985). The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order

to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

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

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

B. Factual Allegations

The plaintiff alleges that on November 27, 2012, he was mauled by a Palm Beach Sheriff's K-9 dog. He claims the dog handler ordered the dog to attack him, despite the fact he had surrendered and was unarmed. Following the mauling, he claims he was beaten and suffered severe injuries. He further claims reports concerning the incident were falsified. He seeks injunctive and monetary damages.

C. Analysis of Sufficiency of Complaint

Claims of excessive force by police officers are cognizable under 42 U.S.C. §1983, as are claims that officers who were present failed to intervene. Fundiller v. City of Cooper City, 777 F.2d 1436 (11 Cir. 1985). A claim that a law enforcement officer used excessive force in the course of an arrest, an investigatory stop, or any other seizure of a free citizen is to be analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v. Connor, 490 U.S. 386 (1989); Vinyard v. Wilson, 311 F.3d 1340, 1346-47 (11 Cir. 2002); Lee v. Ferraro, 284 F.3d 1188, 1197 (11 Cir. 2002); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991).

Such an analysis requires a court to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government interest alleged to justify the intrusion." Graham, supra, quoting United States v. Place, 462 U.S. 696 (1983). The factors to consider when balancing an arrestee's constitutional rights and the need for use of force include (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or

attempting to evade arrest by flight; Graham, supra, 490 U.S. at 396; Vinyard, supra, 311 F.3d at 1347; Lee, supra, 284 F.3d at 1197; and in determining whether the force applied was "reasonable" under the circumstances, the Court must examine: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; and (3) the extent of the injury inflicted upon the individual to whom the force was applied. Graham, at 396; Vinyard, at 1347; Lee at 1998. Although the test applied by the Eleventh Circuit previously included a subjective prong, examining whether the force was applied maliciously, see e.g. Leslie v. Ingraham, 786 F.2d 1533, 1536 (11 Cir. 1986), that factor was eliminated from the analysis by Graham and other cases establishing that the excessive force inquiry should be completely objective, thereby excluding consideration of the Officer's intentions. Lee, supra, 284 F.3d at 1198 n.7. Thus, "reasonableness" for purposes of such an analysis is judged according to an objective standard under the totality of the circumstances, without regard to the officers' underlying intent. Graham, supra at 389. In Lee, the Eleventh Circuit explained that "Graham dictates unambiguously that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight." Lee, supra, 284 F.3d at 1198.

K-9 Force

The practice of police departments authorizing officers to use trained police dogs to find, seize and hold suspects, by biting if necessary, has been upheld by the courts. See: Kerr v. City of West Palm Beach, 875 F.2d 1546 (11 Cir. 1989); Chew v. Gates, 744 F.Supp. 952 (C.D.Cal. 1990). However, whether a particular use of force is a sufficient intrusion, so as to violate a suspect's Fourth Amendment rights, is subject to analysis under Graham v.

Connor, supra.

Research at the Broward County Jail records indicates the plaintiff is facing multiple charges for resisting officers with violence. However, it is difficult at this preliminary stage to make a determination whether the force used to subdue the plaintiff was unlawful, and therefore the claim should be permitted to continue.

The plaintiff's sole defendant is Sheriff Bradshaw. He is clearly named in his supervisory capacity. Liability cannot be predicated solely upon the doctrine of respondeat superior. Monell v Department of Social Services, 436 U.S. 658 (1978). Supervisory liability requires a causal connection between the actions of the supervisory official and the alleged deprivation, or the plaintiff must demonstrate that there is a custom or practice by the county to violate the plaintiff's civil rights. There are no specific allegations against this defendant in the body of the complaint, and the plaintiff has failed to demonstrate a Monell claim. However, it is recommended that Bradshaw be served solely for the purpose of the plaintiff obtaining discovery as to the officers he alleges have engaged in the use of unlawful force.

III. Conclusion

It is therefore recommended as follows:

1. The plaintiff has stated a claim for use of unlawful force.
2. Sheriff Bradshaw shall remain in this case for a finite period of time solely to enable the plaintiff to obtain discovery as to the identify of the unknown officers.

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

Dated this 22nd day of January, 2013.



UNITED STATES MAGISTRATE JUDGE

cc: Shane Robert George, Pro Se
#0204313
Palm Beach County Jail
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-81353-CIV-RYSKAMP
MAGISTRATE JUDGE P. A. WHITE

SHANE ROBERT GEORGE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	<u>REPORT OF</u>
	:	<u>MAGISTRATE JUDGE</u>
RIC BRADSHAW,	:	(DE#20)
	:	
Defendant.	:	

I. Introduction

The pro-se plaintiff, Shane Robert George, filed a civil rights complaint pursuant to 42 U.S.C. §1983, alleging use of unlawful force upon arrest.(De#1) The plaintiff is proceeding in forma pauperis. A Report was entered recommending the plaintiff amend his complaint to name specific officers.

This civil action is before the Court upon the motion for leave to amend (DE#20) and a screening of the amended complaint pursuant to 28 U.S.C. §1915.

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. Such actions require the deprivation of a federally protected right by a person acting under color of state law. See 42 U.S.C. 1983; Polk County v Dodson, 454 U.S.312 (1981); Whitehorn v Harrelson, 758 F. 2d 1416, 1419 (11 Cir. 1985). The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil

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

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

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

B. Factual Allegations

In the initial complaint, the plaintiff alleged that on November 27, 2012, he was mauled by a Palm Beach Sheriff's K-9 dog. He claimed the dog handler ordered the dog to attack him, despite the fact he had surrendered and was unarmed. Following the mauling, he claimed he was beaten and suffered severe injuries. He further claimed reports concerning the incident were falsified. He seeks injunctive and monetary damages.

C. Analysis of Sufficiency of Complaint

Claims of excessive force by police officers are cognizable under 42 U.S.C. §1983, as are claims that officers who were present failed to intervene. Fundiller v. City of Cooper City, 777 F.2d 1436 (11 Cir. 1985). A claim that a law enforcement officer used excessive force in the course of an arrest, an investigatory stop, or any other seizure of a free citizen is to be analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v. Connor, 490 U.S. 386 (1989); Vinyard v. Wilson, 311 F.3d 1340, 1346-47 (11 Cir. 2002); Lee v. Ferraro, 284 F.3d 1188, 1197 (11 Cir. 2002); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991).

Such an analysis requires a court to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government interest alleged to justify the intrusion." Graham, supra, quoting United States v. Place, 462 U.S. 696 (1983). The factors to consider when balancing an arrestee's constitutional rights and the need for use of force

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

K-9 Force

The practice of police departments authorizing officers to use trained police dogs to find, seize and hold suspects, by biting if necessary, has been upheld by the courts. See: Kerr v. City of West Palm Beach, 875 F.2d 1546 (11 Cir. 1989); Chew v. Gates, 744

F.Supp. 952 (C.D.Cal. 1990). However, whether a particular use of force is a sufficient intrusion, so as to violate a suspect's Fourth Amendment rights, is subject to analysis under Graham v. Connor, supra.

Research at the Broward County Jail records indicates the plaintiff is facing multiple charges for resisting officers with violence. It was recommended that it was difficult at this preliminary stage to make a determination whether the force used to subdue the plaintiff was unlawful, and therefore the claim should be permitted to continue.

It was recommended that Sheriff Bradshaw remain in the lawsuit solely for discovery purposes, and service was ordered upon the defendant.

The plaintiff filed a motion to file an amended complaint (DE#20). It is not on the proper form and is merely a supplement to the initial complaint. In the motion he names Deputy Frend, whom he states was the K-9 handler and that he maliciously and sadistically commanded the K-9 to attack after he had surrendered.

He further names officers Funk, Johnson, D'imperio and Fresneda, whom he states were present and failed to intervene and falsified reports.

The motion is granted and the amended complaint (DE#20) will be construed as a supplement. The plaintiff has stated a claim against Officer Frend, the K-9 Handler. However, the claims against the remaining officers for failure to intervene are too conclusory. Twombly. The plaintiff has failed to provide any supporting facts as to the placement of the officers and whether they were in a

position to intervene. The plaintiff fails to state a claim against these officers. He further provides no supporting facts to support the claim that records were falsified. This claim should be dismissed.

Lastly, the plaintiff intends to sue the defendant officers in their individual and official capacities. A §1983 suit against the defendants in their official capacity is tantamount to a suit against the State, and thus the defendants would be immune from monetary damages based upon the Eleventh Amendment. Gamble v. Fla. Dept. of Health and Rehabilitative Services, 779 F.2d 1509, 1512-13 (11 Cir. 1986). The allegations of the complaint, however, state a classic case of officials acting outside the scope of their duties and in an arbitrary manner. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974). Under this construction of the complaint, this Court has jurisdiction over the defendants in their individual capacity.

III. Conclusion

It is therefore recommended as follows:

1. The plaintiff has stated a claim for use of unlawful force by K-9 Officer Frend as the K-9 handler.
2. The plaintiff may be permitted to amend his complaint to demonstrate that Funk, Johnson, D'imperio and Fresneda were in a position to intervene and failed to do so.
3. All claims against defendants in their official capacities should be dismissed.
4. Claims of falsifying records should be dismissed.
5. The leave to amend (DE#20) shall be granted and the

Operative complaint would be (DE#1) and its supplement (DE#20).

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

Dated this 26th day of February, 2013.



UNITED STATES MAGISTRATE JUDGE

cc: Shane Robert George, Pro Se
#0204313
Palm Beach County Jail
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SHANE ROBERT GEORGE,

CASE NO.: 12-CV-81353-RYSKAMP/WHITE

Plaintiff,

vs.

RIC BRADSHAW,

Defendant.

DEFENDANT FREND'S ANSWER/DEFENSES TO OPERATIVE COMPLAINT

The Defendant, K-9 DEPUTY FREND, through his undersigned attorneys, files this his Answer/Defenses to the Operative Complaint [DE #1 & #20]¹ and would state as follows:

As to DE #1:

I. Parties

A. Admitted as to Plaintiff's name and that he is currently housed at the Palm Beach County jail.

B. Denied.

II. Statement of Claim

As the allegations of this section are set forth in narrative fashion, all allegations contained therein are denied and strict proof thereof is demanded.

III. Relief

Denied.

IV. Jury Demand

Admitted that Plaintiff demands a trial by jury.

¹Per the Court's Order dated April 1, 2013 [DE #25], the operative complaint at this time consists of DE # 1 and #20.

As to DE #20:

As the allegations of this document are set forth in narrative fashion, all allegations contained therein are denied and strict proof thereof is demanded.

GENERAL DENIAL

Any and all allegations to which a specific response has not previously been provided is herein denied and strict proof thereof is demanded.

DEFENSES

1. As a first Defense, the Defendant pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure would assert that Plaintiff has failed to make sufficient allegation of ultimate fact from which it can be determined that a claim for relief has been stated.

2. As a further and separate Defense, the Defendant would assert that any and all injuries or damages suffered by Plaintiff were caused by reason of Plaintiff's negligence and/or wrongful acts and/or misconduct.

3. As a further and separate Defense, the Defendant would assert that any and all injuries or damages suffered by Plaintiff were caused in whole or in part by reason of the wrongful acts of others over which this Defendant had no control or responsibility for control.

4. As a further and separate Defense, the Defendant would assert that he is immune from any and all liability through application of the concept of qualified immunity, as he, at no time, committed any act in derogation of Plaintiff's civil rights of which a reasonable officer would have had knowledge and, at all times, otherwise acted in good faith relying upon existing statutes, policies and procedures as authority for his actions.

5. As a further and separate Defense, the Defendant would assert that any and all actions he took were taken:

a. Without malice;

- b. With probable cause;
- c. In pursuit of lawful and legal duties;
- d. With such force as was reasonably necessary under the circumstances.

6. As a further and separate Defense, the Defendant would assert that any and all injuries allegedly suffered by Plaintiff were caused in whole or in part by reason of Plaintiff's harmful acts and/or negligent conduct for which Plaintiff is comparatively chargeable.

7. As a further and separate Defense, the Defendant would assert that the force used was not applied maliciously or sadistically with the intent of causing harm.

8. As a further and separate Defense, the Defendant would assert that he is entitled to a set off for any collateral sources of compensation for Plaintiff's alleged injuries and/or damages.

DEMAND FOR JURY TRIAL

The Defendant K-9 Deputy FREND, hereby demands trial by jury on all issues so triable.

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF and sent a copy of same via U.S. Mail to: **Shane Robert George, Pro Se Plaintiff**, Jail #0204313, Palm Beach County Jail, P.O. Box 24716, West Palm Beach, Florida, this 29th day of May, 2013.

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BY s/ *Summer M. Barranco*
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