UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-CIV-20001-MORENO/O'SULLIVAN

WARREN REDLICH,

Plaintiff,
v.

CRAIG LEEN, individually and as City Attorney
for the City of Coral Gables,
CITY OF CORAL GABLES, et al.,

Defendants.
/

REPORT AND RECOMMENDATION

THIS MATTER is before the Court pursuant to the City of Coral Gables Defendants' Motion to Dismiss (DE# 33, 3/7/16). This matter was referred to the undersigned by the Honorable Federico A. Moreno in accordance with 28 U.S.C. § 636(b) (DE# 21; 2/8/16). Having reviewed the motion, response and reply and having held a hearing, it is respectfully recommended that the City of Coral Gables Defendants' Motion to Dismiss (DE# 33, 3/7/16) should be GRANTED in part.

INTRODUCTION

In his Complaint with Jury Demand ("Complaint")(DE# 1, 1/1/2016), the plaintiff alleges state and federal claims for torts and violations of the United States Constitution arising out of the plaintiff's stop and arrest at a sobriety checkpoint in Coral Gables based on his refusal to follow the police officers' directions to provide his driver's license rather than simply holding it up against his car window. The plaintiff maintains that the City of Coral Gables defendants violated his rights by failing to strictly comply with the sobriety checkpoint guidelines. The City of Coral Gables Defendants include

the City of Coral Gables, its legal advisors and their law firm, the City Attorney, individually and in his official capacity, the assistant state attorneys, the Police Chief, individually and in his official capacity, individually-named City of Coral Gables police officers, as well as certain unidentified police officers of the City of Coral Gables and the Miami-Dade County Police Department. Additionally, the plaintiff includes the Coral Gables Police Department despite its inability to be sued as an entity. The plaintiff previously voluntarily dismissed his claim against Katherine Fernandez Rundle, individually and as State Attorney of the Eleventh Judicial Circuit.

In his complaint, the plaintiff asserts the following fifteen counts:

Count 1: Injunctive Relief

Count 2: False Arrest (Florida law)

Count 3: False Imprisonment (Florida law)

Count 4: False Arrest (federal law)

Count 5: Excessive Force (federal law)

Count 6: Battery (Florida law)

Count 7: 42 U.S.C. §1983 - First Amendment

Count 8: 42 U.S.C. §1983 - Second Amendment

Count 9: 42 U.S.C. §1983 - Fourth Amendment - Stop

Count 10: 42 U.S.C. §1983 - Fourth Amendment - Search

Count 11: 42 U.S.C. §1983 - Fifth Amendment - Silent

Count 12: 42 U.S.C. §1983 - Sixth Amendment - Counsel

Count 13: Malicious Prosecution (Florida law)

Count 14: Punitive Damages

Count 15: Monell Claim against City of [Coral Gables]

At the hearing, the plaintiff readily agreed to dismiss the following claims: Count 2 (False Arrest - Florida law), Count 3 (False Imprisonment - Florida law), Count 6 (Battery - Florida law), Count 11 (Fifth Amendment - Silent), Count 12 (Sixth Amendment - Counsel), Count 13 (Malicious Prosecution - Florida law), and Count 14 (Punitive Damages).

The remaining counts that will be addressed in this Report and Recommendation are: Count 1 (Injunctive Relief), Count 4 (False Arrest - federal law), Count 5 (Excessive Force - federal law), Count 7 (First Amendment), Count 8 (Second Amendment), Count 9 (Fourth Amendment - Stop), Count 10 (Fourth Amendment - Search), and Count 15 (Monell Claim against City of [Coral Gables]).

During the hearing, the plaintiff voluntarily dismissed the Coral Gables Police Department, which was named in all Counts of his Complaint except Counts 13 and 14, as well as the Miami-Dade County Police Department since neither entity is capable of being sued under Rule 17(b) of the Federal Rules of Civil Procedure. Dean v. Barber, 951 F.2d 1210, 1214 (11th Cir. 1992) (finding that "[s]heriff's departments and police departments are not usually considered legal entities subject to suit"); Ball v. City of Coral Gables, 548 F. Supp. 2d 1364, 1369-70 (S.D. Fla. 2008)(granting summary judgment because the City of Coral Gables Police Department is not a separate legal entity).

Additionally, during the hearing, the plaintiff agreed to dismiss all of the attorneys

and The Reyes Law Firm except Manuel A. Guarch, an attorney with The Reyes Law Firm who was present during the sobriety checkpoint and allegedly gave legal advice to the police officers. Finally, the parties agreed that the Complaint would be amended by inter-lineation to substitute Hector Diaz as the proper defendant and to delete Augustin Diaz, who was not involved in the matter.

FACTUAL BACKGROUND

The *pro se* plaintiff, Warren Redlich, is a member of the Florida and New York Bars and an author and promoter of "a new approach to help drivers handle traffic stops and checkpoints." This action arises out of the events that occurred during the plaintiff's encounter with police at a sobriety checkpoint in the City of Coral Gables on August 19, 2015. Complaint ¶¶ 13, 14 and 16 (DE# 1; 1/1/16). The plaintiff alleges that he drove a car equipped with six cameras into the sobriety checkpoint set up on South Dixie Highway in order "to test the checkpoint." Complaint ¶¶ 42 and 43. The plaintiff approached and was directed into the checkpoint.

The plaintiff complied and the officers then approached the vehicle and "asked to see Plaintiff's license." Complaint ¶ 46. In response, the "Plaintiff displayed the license by pressing it up against the window without rolling the window down." Complaint ¶ 47. The plaintiff was asked by the officers to hand the license outside the window and the plaintiff refused. Complaint ¶¶ 48 and 53. At this point, the plaintiff was advised that holding his license up against the window "was not going to work." Complaint ¶ 54. The plaintiff was then advised to turn over his driver's license and the plaintiff refused. Complaint ¶¶ 56-57. "Defendant Escobar threatened to arrest Plaintiff for 'obstruction'

if Plaintiff did not hand over the license. He later indicated that Plaintiff would be arrested for 'resisting without violence.'" Complaint ¶ 60. "Defendant Escobar stated: 'I have the state attorneys here and my legal advisors. They have authorized me to arrest you if you refuse to hand over your drivers license." Complaint ¶ 61. "During the encounter several police officers, John Doe #8-15, shined flashlights into the vehicle and specifically aimed at cameras held by the plaintiff and Mr. Stern, in a comically pathetic attempt to interfere with their First Amendment rights to record the encounter." Complaint ¶ 66.

"Defendant Escobar opened the unlocked door to the vehicle and Defendant Rios opened Plaintiff's seatbelt. Plaintiff stepped out of the car under duress." Complaint ¶ 69. Defendants Escobar, Diaz and Rios placed Plaintiff in handcuffs and he was held in custody for approximately three hours. Complaint ¶¶ 70-71. The plaintiff was subject to a pat-down search and all items were removed from the plaintiff's person including his lawfully owned and carried Glock 26 pistol with two extra magazines. Complaint ¶ 73. The defendants also searched the vehicle. Complaint ¶ 77. The plaintiff alleged that "[t]he actions of all the defendant police officers were pursuant to policies, practices and procedures directed by the defendant municipalities." Complaint ¶ 87. "Ultimately Plaintiff was released without being charged with any crime. Defendant Escobar stated that he was 'unarresting' Plaintiff, not charging him with a crime, and instead issued a traffic ticket for 'failure to exhibit under [Florida Statute] § 322.15.'" Complaint ¶ 89. "Defendants returned Plaintiff's pistol and magazines to him after he was released and ordered him not to load the

pistol until he was not in the presence of police." Complaint ¶ 90.

Initially, the traffic ticket was dismissed by the Traffic Hearing Officer on October 7, 2015. Complaint ¶ 98. "On or about October 12, 2015, Defendants Guarch, Reyes and The Reyes Law Firm PA filed a motion in Miami Traffic Court for a new hearing on the ticket, purportedly on behalf of the City of Coral Gables." Complaint ¶ 99. Eventually, the Plaintiff was found guilty of the non-criminal traffic violation and filed an appeal with the circuit court. The plaintiff concedes that the traffic court matter remains pending. Complaint ¶ 104.

The motion is fully briefed and ripe for disposition.

LEGAL ANALYSIS

I. Standard of Review

Under Rule 12(b)(c) of the Federal Rules of Civil Procedure, a court shall grant a motion to dismiss where, based upon a dispositive issue of law, the factual allegations of the complaint cannot support the asserted cause of action. Glover v. Liggett Group, Inc., 459 F.3d 1304, 1308 (11th Cir. 2008); Fed. R. Civ. P. 12(b)(c). Indeed, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, __ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). In deciding a motion to dismiss, the Court's analysis is limited to the four corners of the plaintiff's complaint and the attached exhibits. Grossman v. Nationsbank, 225 F.3d 1228, 1231 (11th Cir. 2000); Milburn v. U.S., 734 F.2d 762, 765

(11th Cir. 1984) ("Consideration of matters beyond the complaint is improper in the context of a motion to dismiss ....").

On a motion to dismiss, the Court must also accept the plaintiff's well pled facts as true and construe the complaint in the light most favorable to the plaintiff. Twombly, 550 U.S. at 555; Caravello v. American Airlines, Inc., 315 F. Supp. 2d 1346, 1348 (S.D. Fla. 2004) (citing United States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1236 (11th Cir. 1999)(en banc)); Beck v. Deloitte & Touche et al., 144 F.3d 732, 735 (11th Cir. 1998). A motion to dismiss a complaint should not be granted if the factual allegations are "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. A complaint will survive a motion to dismiss "even if it appears that a recovery is very remote and unlikely." Id. at 556.

The issue to be decided by the Court is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scheuer, 468 U.S. 183 (1984); Taylor v. Ledbetter, 818 F.2d 791, 794 n.4 (11th Cir. 1987), cert. denied, 489 U.S. 1065 (1989). It is only "when on the basis of a dispositive issue of law no construction of the factual allegations will support the cause of action [that] dismissal of the complaint is appropriate." Excess Risk Underwriters, Inc. v. LaFayette Life Ins. Co., 208 F. Supp. 2d 1310, 1313 (S.D. Fla. 2002)(citing Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993)).

When considering a motion to dismiss based on the affirmative defense of

qualified immunity, "[a] court may dismiss a complaint under Rule 12(b)(6) 'when its allegations, on their face, show that an affirmative defense bars recovery on the claim.'" Lawson v. City of Miami Beach, 908 F. Supp. 2d 1285, 1289 (S.D. Fla. 2012) (quoting Cottone v. Jenne, 326 F.3d 1352, 1357 (11th Cir. 2003)). Qualified immunity "'allow[s] government officials to carry out their discretionary duties without fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law.'" Brown v. City of Huntsville, 608 F.3d 724, 733 (11th Cir. 2010) (quoting Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)). "[U]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before commencement of discovery." Cottone, 326 F.3d at 1289.

II. The Motion to Dismiss Should Be Granted in Part

A. Improper Shotgun Complaint and Failure to Comply with Rule 8(a)(2) Notice Pleading Requirements

The Complaint fails to comply with the basic pleading requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure and should be dismissed. Fed. R. Civ. P. 8(a)(2). The plaintiff's Complaint is a shot-gun pleading and fails to give the defendants fair notice of the claims against them and the facts upon which the claims are based. The complaint generally alleges "defendants" or "all defendants."[1] Additionally, the Complaint improperly realleges all prior allegations into each and every subsequent

[1] Counts 13 (Malicious Prosecution) and 14 (Punitive Damages) are the only claims that identify specific defendants, namely private and city attorneys. The plaintiff agreed to voluntarily dismiss both of these counts.

count: "Plaintiff repeats and realleges all previous allegations." Complaint ¶¶ 105, 126, 135, 141, 146, 152, 155, 161, 165, 169, 179, 186, 191, 202 and 207.

Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The statement must "give the defendant fair notice of what the ... claim is and the ground upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007). "Shotgun pleadings" are prohibited. McMahon v. Cleveland Clinic Foundation Police Department, 455 Fed. App'x 874, 877 (11th Cir. 2011). A complaint that "fails to articulate claims with sufficient clarity to allow the defendant to frame a responsive pleading constitutes a 'shotgun pleading.'" Lampkin-Asam v. Volusia County Sch. Bd., 261 Fed. App'x 274, 277 (11th Cir. 2008) Typical "shotgun pleadings" incorporate by reference each paragraph into each and every other paragraph. See McMahon, 455 Fed. App'x at 877. "Shotgun pleadings" are often "confusing, incoherent, and clogged with seemingly irrelevant ... allegations" and thus, appropriate for dismissal. Lampkin-Asam, 261 Fed. App'x at 277.

This Court should grant the defendants' motion to dismiss on the ground that the plaintiff's Complaint is a shotgun pleading. The Court should require the plaintiff to amend his Complaint by identifying only the specific defendants who are the subject of each count. Additionally, the Court should require the plaintiff to incorporate by reference only the prior allegations that are relevant and necessary to assert each particular claim.

Because the plaintiff readily agreed to dismiss the state law claims (Counts 2, 3, 6 and 13), the federal claims regarding the Fifth Amendment right to remain silent and

the Sixth Amendment right to counsel (Counts 11 and 12), and the claim for punitive damages (Count 14), the defendants' motion to dismiss should be DENIED as moot as to those Counts.

This Report and Recommendation will address only the remaining eight counts: Count 1 (Injunctive Relief), Count 4 (False Arrest - federal law), Count 5 (Excessive Force - federal law), Count 7 (First Amendment), Count 8 (Second Amendment), Count 9 (Fourth Amendment - Stop), Count 10 (Fourth Amendment - Search), and Count 15 (Monell Claim against City of [Coral Gables]).

B. The Plaintiff Agreed to Dismiss All Individual Defendants Except Manual A. Guarch, Esq. and Police Chief Edward Hudak

At the hearing, the plaintiff agreed to dismiss all of the individual defendants except Manual A. Guarch, Esq. of the Reyes Law Firm and Police Chief Edward Hudak. Additionally, the plaintiff agreed to dismiss the City of Coral Gables Police Department and the Miami-Dade County Police Department because neither police department is an entity that is capable of being sued. Dean v. Barber, 951 F.2d 1210, 1214 (11th Cir. 1992) ("Sheriff's departments and police departments are not usually considered legal entities subject to suit ....)(citations omitted); see Eddy v. City of Miami, 715 F. Supp. 1553, 1556 (S.D. Fla. 1989) ("Where a police department is an integral part of the city government as the vehicle through which the city government fulfills its policing functions, it is not an entity subject to suit."). Additionally, the plaintiff agreed to dismiss Craig Leen, individually and as City Attorney and the other private attorneys namely The Reyes Law Firm, P.A. and Israel U. Reyes, except Mr. Guarch. The plaintiff alleges that Mr. Guarch was one of the legal advisers that Officer Escobar referenced

as authorizing him to arrest the plaintiff. Complaint ¶¶ 41, 61 and 63. In his opposition, the plaintiff argues that "Reyes and Guarch are private attorneys retained by the city as police advisors" and that they "are not public prosecutors as part of their daily function." Response at 13. The plaintiff argues that Guarch is not entitled to prosecutorial absolute immunity. The plaintiff voluntarily dismissed the malicious prosecution claim during the hearing and concedes that "[t]he only claim to which absolute immunity might conceivably apply is part of the 13th cause of action for malicious prosecution, where defendants Leen, Guarch, Reyes and the Reyes law firm appeared in local traffic court purporting to be prosecutors. Such claim does not apply to their role advising Defendant Escobar to charge Plaintiff (e.g. Burns v. Reed, 500 U.S. 478, 496 (1991), nor to any other cause of action asserted in the Complaint." Id. In Burns, the Supreme Court held that qualified immunity applied to the prosecutorial function of giving legal advice to the police rather than absolute immunity. The Supreme Court explained that

> although the absence of absolute immunity for the act of giving legal advice may cause prosecutors to consider their advice more carefully, "'[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. Malley v. Briggs, 475 U.S. 335, 341 (1986)(quoting Harlow [v. Fitzgerald], 457 U.S. [800,] 819 [(1982)]). Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." Cf. Butz v. Economou, 438 U.S. 478, 505-506 (1978). Ironically, it would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not.

Id. at 495. In Burns, the Supreme Court determined that "absolute prosecutorial immunity ... [applied to the prosecutor's] participation in a probable cause hearing, which led to the issuance of a search warrant, ... [but not to the prosecutor's] legal

advice to the police regarding the use of hypnosis and the existence of probable cause to arrest the petitioner." Id. at 487, 496. Because the underlying traffic court proceeding is pending, the malicious prosecution claim in Count 13 is premature and should be dismissed without prejudice. Additionally, Mr. Guarch is entitled to absolute immunity in his hired role as a prosecutor on behalf of the City of Coral Gables in the traffic court proceeding. As the Supreme Court held in Burns, Mr. Guarch is entitled to qualified immunity for the legal advice that he allegedly gave to the officers and the claims against Mr. Guarch individually should be dismissed.

The Complaint also names Edward Hudak individually and in his official capacity as the Police Chief of the Coral Gables Police Department. The Supreme Court has held that official capacity claims are the same as claims against the government entity itself. Kentucky v. Graham, 473 U.S. 159, 165-66 (1989). "Because suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists a need to bring official-capacity actions against local government officials, because local government units can be sued directly (provided, of course, that the public entity receives notice and an opportunity to respond)." Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991) (affirming the directed verdict in favor of the officially named defendants where the city remained as a defendant). The Eleventh Circuit explained that "[t]o keep both the City and the officers sued in their official capacity as defendants in this case would have been redundant and possibly confusing to the jury." Id. Accordingly, this Court should dismiss Edward Hudak individually and as Police Chief because the City of Coral Gables is the proper

defendant. Chief Hudak also enjoys qualified immunity as discussed below.

C. Individual Defendants Entitled to Qualified Immunity

The doctrine of "[q]ualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." Lee v. Ferraro, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (quoting Thomas v. Roberts, 261 F.3d 1160, 1170 (11th Cir. 2001) (internal quotations omitted)); Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002). The doctrine protects from suit "all but the plainly incompetent or one who is knowingly violating the federal law." Vinyard, 311 F.3d at 1346. "Because qualified immunity is an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). As such, the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Id. at 232 (internal quotation marks omitted).

To be entitled to qualified immunity, a defendant must first show he or she was performing a discretionary function. Mercado v. City of Orlando, 407 F.3d 1152, 1156 (11th Cir. 2005) (citation omitted). In this case, it is undisputed that the police officers were acting within their discretionary capacity. In his Complaint, the plaintiff alleges that "[t]he actions of all the defendant police officers were pursuant to policies, practices and procedures directed by the defendant municipalities." Complaint at ¶ 87 (DE# 1, 1/1/16). Thus, "the burden then shifts to the plaintiff to show that the grant of qualified

immunity is inappropriate." Oliver v. Fiorino, 586 F.3d 898, 905 (11th Cir. 2009) (citations omitted). In meeting this burden, the plaintiff must show both that: (1) the defendant violated a constitutional right and (2) the right was clearly established at the time of the violation. Id. (citations omitted). "Courts are no longer required to address the two prongs of this test in any particular order." Williams v. Santana, 340 F. App'x 614, 617 (11th Cir. 2009) (citing Pearson v. Callahan,129 S. Ct. 808, 820-21 (2009)). If the plaintiff fails to meet one of these prongs, the officer is entitled to qualified immunity.

In this case, the law is clearly established that sobriety checkpoints are constitutional, and that police officers may issue orders at checkpoints including to lower the window, through the binding court decisions of Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (holding DUI checkpoints to be constitutional) and Rinaldo v. State, 787 So. 2d 208 (Fla. 4th DCA 2001) (holding that driver must comply with orders at checkpoint, including order to open window). "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions." Pearson,129 S. Ct. at 823.

The undersigned finds that the individual police officers, Chief Hudak and Mr. Guarch for the legal advice he provided to the officers are protected by the doctrine of qualified immunity and should be dismissed with prejudice.

D. DUI Checkpoint under Rinaldo

The plaintiff alleges that the sobriety checkpoint was conducted improperly, in an

overbroad manner, beyond the limits allowed by the United States Supreme Court. Complaint at ¶ 30-31. The plaintiff complains that the defendants' "practice in this checkpoint was to check the license of every stopped driver at the initial stop, which does nothing to address the stated purpose of sobriety or impairment." Id. at ¶ 32.

In Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450-51, 455 (1990), the Supreme Court found the "initial stop of each motorist passing through a [sobriety] checkpoint and the associated preliminary questioning and observation by checkpoint officers" to be "consistent with the Fourth Amendment." In contrast, the Supreme Court has held that a checkpoint set up for generalized crime control purposes would violate the Fourth Amendment absent special circumstances. City of Indianapolis v. Edmond, 531 U.S. 32 (2000). Edmond did not involve a DUI checkpoint. Edmond involved a checkpoint where police stopped vehicles to look for evidence of drug crimes committed by occupants of the vehicles. Id. at 41, 44. The allegation that police at the Coral Gables sobriety checkpoint were asking all drivers for their license does not transform the brief interaction into an unreasonable seizure under the Fourth Amendment. In United States v. Regan, 218 F. App'x 902, 905 (11th Cir. 2007), the Eleventh Circuit found that a DUI checkpoint where "every vehicle was stopped and every motorist was asked for documentation" was reasonable under the Fourth Amendment.

The controlling decision in Florida regarding a request for documentation as part of a DUI checkpoint is Rinaldo v. State, 787 So. 2d 208 (Fla. 4th DCA 2001). Florida intermediate appellate decisions are binding under Florida law. See Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court

decisions bind all Florida trial courts."); see also McMahon v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002)(citing Pardo for the proposition that it is "particularly appropriate" to look to intermediate appellate decisions to establish the law in Florida unless overruled by the Florida Supreme Court).

In Rinaldo, the intermediate appellate court explained that

> a driver who is lawfully stopped for a DUI checkpoint is under a legal obligation to respond to an officer's requests for certain information and documents, and the driver's refusal to respond to these requests may constitute the misdemeanor offense of obstructing or opposing an officer.

Rinaldo, 787 So. 2d at 212 (citing Fla. Stat. § 832.02) (1991) (other citations omitted). "Motorists are obligated to comply with an officer's reasonable requests at a valid roadblock and must 'accept the minor inconvenience which they may endure.'" Id. at 213. The Rinaldo court held that

> where an officer, after conducting a valid roadblock stop, develops reasonable suspicion that the driver has committed or is committing a criminal or traffic violation, the officer may lawfully order the driver to get out of the vehicle.

Rinaldo, 787 So. 2d 214. In Rinaldo, the appellate court upheld Rinaldo's judgments of conviction for carrying a concealed weapon and driving under the influence. The court affirmed the trial court's denial of Rinaldo's motion to suppress evidence gathered at the DUI roadblock. Id. at 215. Rinaldo ignored the officer's signal to pull over at a DUI roadblock and rolled past the officer. Another officer who saw Rinaldo roll past the roadblock pulled him over. Rinaldo refused to roll down his window and open his car door when asked by the officer. When the officer attempted to open the car door, Rinaldo pulled the door shut. After some delay, pursuant to the officer's request,

Rinaldo provided his driver's license and later produced his registration and insurance. The Rinaldo court found that "appellant enjoyed no *Popple* privilege to ignore the officer's request for documents or to thwart the officer's ability to observe him for signs of impairment." Id. at 213 (referencing Popple v. State, 626 So. 2d 185 (Fla. 1983) (finding that the officer did not have the reasonable suspicion necessary to authorize an investigatory stop to allow the officer to justify the officer's decision to order Popple out of the vehicle that was legally parked). The Rinaldo court concluded that the "appellant's conduct both before and during the roadblock was sufficient to raise reasonable suspicion that he was engaged in criminal activity, i.e., obstructing or attempting to obstruct or oppose an officer during the lawful execution of a duty." Id. at 214.

Under Florida law, the elements of the crime of obstruction of justice, or resisting officer without violence are: (1) the officer is engaged in the lawful execution of a legal duty; and (2) the arrestee's actions constitute obstruction or resistance of that lawful duty. Crapps v. State, 155 So. 3d 1242, 1246-47 (Fla. 4th DCA 2015). The Complaint alleges that the police repeatedly asked to see the plaintiff's driver license and that when the plaintiff simply pressed it against his window, the police advised him "that's not going to work" and "Defendant Escobar approached, knocked on the plaintiff's window, and again asked Plaintiff to lower the window and hand Escobar the driver license, asserting that such is required by state law." Complaint at ¶¶ 46-48, 52-54, 56-57. The allegations in the Complaint show that the plaintiff was on notice that his failure to comply with the defendants' request would be tantamount to a failure to obey a lawful

order. See Complaint at ¶ 60 (Escobar told the plaintiff that he would be arrested if he refused to hand over his license.).

As alleged in the Complaint, plaintiff's actions establish probable cause or arguable probable cause that the plaintiff committed the crime of obstruction of justice. Motion at 13 (DE# 33, 3/7/16). As the Rinaldo court explained: "if a driver engages in obstructive conduct, in violation of section 843.02 [of the Florida Statutes], then standard police detention and arrest procedures, rather than checkpoint guidelines, would govern the officer's handling of the situation." Rinaldo, 787 So. 2d at 212. "A driver who is lawfully stopped for a DUI checkpoint is under a legal obligation to respond to an officer's requests for certain information and documents." Id.

The plaintiff complains that "[Section 322.15 of the Florida Statutes] calls for police to issue a non-criminal non-moving traffic infraction for violation of the statute." Complaint at ¶ 131. The plaintiff argues that the defendants adopted and enforced a policy to arrest anyone who violates Section 322.15 under Section 843.02 as a misdemeanor. Motion at 2 (DE# 34, 3/20/16).

The defendants argue that "'subjective reliance on an offense for which no probable cause exists'" does not make an arrest unlawful where there is probable cause to arrest for a different offense. Lee v. Ferraro, 284 F.3d 1188, 1196 (11th Cir. 2002) (quoting United States v. Saunders, 476 F.2d 5, 7 (5th Cir. 1973)). Probable cause may be found where the officer reasonably believes that the suspect "had committed or was committing an offense," Gerstein v. Pugh, 420 U.S. 103, 111 91975), or where an individual had not actually violated the law but the officer was objectively

reasonable in believing that he or she had. See Arrington v. Kinsey, 512 F. App'x 956, 958 (11th Cir. 2013).

In the present case, the plaintiff's action in refusing to provide the driver license caused his stop at the sobriety checkpoint to be more than brief. See Wos v. Shehan, 57 F. App'x 694, 696 (7th Cir. 2002) (When Mr. Wos failed to produce a valid license upon request at a roadside checkpoint, deputies had probable cause to believe he had violated the law). Additionally, the plaintiff refused the officer's request that he roll down his window. Such obstructive conduct at a lawful roadblock subjected the plaintiff to standard police detention and arrest procedures rather than checkpoint guidelines. See Rinaldo, 787 So. 2d at 212.

D. Counts 1, 4, 5, 7, 8, 9, 10 and 15 Remain Subject to Defendants' Motion to Dismiss

1. Count 1 (Injunctive Relief)

The defendants seek dismissal of Count 1 on the ground that because the plaintiff cannot prove that a constitutional violation occurred in the past, "he is not entitled to enjoin behavior that has caused no harm." Motion at 11 (DE# 33, 3/7/16). The defendants argue that the plaintiff's specific requested relief that this Court enter an "order strictly limiting the scope of any checkpoints conducted by Defendants and limiting the manner in which such checkpoints are conducted" is problematic on at least two grounds. Complaint at 15 (DE# 1, 1/1/2016). First, to obtain an injunction against future conduct, a party must demonstrate a "real and immediate threat" of future injury accompanied by "continuing, present adverse effects." Elend v. Basham, 471 F.3d 1199, 1207-08 (11th Cir. 2006) (internal quotations omitted). Second, the request for an

injunction that commands a party to "obey the law," in this case, to not infringe upon constitutional protections, is improper and unnecessary. Id. at 1209; Burton v. City of Belle Glade, 178 F.3d 1175, 1200-01 (11th Cir. 1999) (finding the district court correctly refused to issue the requested injunction ordering the defendant city not to discriminate in its annexation process because such an injunction would be an order to "obey the law").

In his response, the plaintiff maintains that he "seeks injunctive relief regarding specifics of whether Defendants['] conduct checkpoints in the future at all and if so how they do so, including how they handle drivers who expressly invoke their rights in a checkpoint, and how they handle drivers who use recording devices to record such encounters." Response at 20 (DE# 34, 3/20/16). The plaintiff cites no case law to support his argument that dismissal of Count 1 for injunctive relief is premature. The undersigned acknowledges that the Supreme Court held that "[l]ocal governing bodies ... can be sued directly under § 1983 for monetary, declaratory, or *injunctive* relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Dep't of Social Servs. of New York, 436 U.S. 658, 690 (1978). Because the claim for constitutional violations against the City of Coral Gables is deficient and should be dismissed without prejudice as explained below, the claim for injunctive relief in Count 1 is premature and this Court should grant without prejudice the defendants' motion to dismiss Count 1.

2. Counts 4 (False Arrest - Fourth Amendment)
Count 5 (Excessive Force - Fourth Amendment)
Count 8 (Second Amendment)

The claims regarding false arrest and excessive force under the Fourth Amendment in Counts 4 and 5, as well as the alleged violation of the Second Amendment to bear arms in Count 8 are all based on the plaintiff's allegations that the police activity leading up to the arrest and the arrest itself are unlawful. See Response at 16 (DE# 34, 3/20/16). The plaintiff argues that the defendants used the checkpoint for generalized crime control in contravention of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000). The plaintiff further argues that the arrest is improper and unlawful because the defendants allegedly did not strictly follow the guidelines for the sobriety checkpoint. The plaintiff relies on Campbell v. State, 679 So. 2d 1168 (Fla. 1996) and Bressi v. Ford, 575 F.3d 891, 897 (9th Cir. 2009).

In Edmond, the Supreme Court "declined to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes." Id. The plaintiff also cites Bressi v. Ford, 575 F.3d 891, 897 (9th Cir. 2009), which held that the roadblock exceeded the scope of Edmond. The Ninth Circuit explained that "[i]f the roadblock were to be determined unconstitutional on remand, the result might taint the subsequent arrest and citations." Bressi, 575 F.3d at 899. The defendants distinguish Bressi on the ground that it involved whether the stop was random. That is not an issue in the present case. In Campbell, the Supreme Court of Florida found the limited written instructions issued to the police officers implementing the roadblock were insufficient because they did "not

limit police discretion and fall short of the discretion-limiting written set of guidelines specifically required by us in [State v. Jones, 483 So.2d 433 (Fla. 1986)]." Campbell, 679 So. 2d at 1170.

In the present case, the Complaint alleges that the defendants' "practice in this [sobriety] checkpoint was to check the license of every stopped driver at the initial stop, which does nothing to address the stated purpose of sobriety or impairment." Complaint ¶ 32. "Defendants[ ] had written guidelines for the checkpoint ... that did not require drivers to handover their license." Complaint ¶ 35. The guidelines required the officers to "determine if they have a driver's license and to observe if any indications of impairment are visible." Complaint ¶ 37. The guidelines "instructed the officers to ask the drivers 'May I see your driver's license.'" Complaint ¶ 37. The plaintiff complains that the defendants "employed a drug-sniffing dog at the checkpoint, which has nothing to do with the stated purpose of sobriety or impairment, and was not included in the guidelines for the checkpoint." Complaint ¶ 38. The plaintiff makes the conclusory allegation that the defendants "otherwise engaged in arbitrary behavior at the checkpoint." Complaint ¶ 39. The plaintiff also alleges that "[n]othing in the guidelines give[s] any instruction or requirement for drivers to crack open their windows, nor to physically hand over their license." Complaint ¶ 49.

In Count 4 of his Complaint, the plaintiff alleges in conclusory terms that the defendants deprived him of his right to be free from unlawful arrest "with malicious intent, ill will, spite, intent to injure, evil motive, wickedness, formed design to injure or oppress" and "with a reckless or callous indifference to Plaintiff's federally protected

rights." Complaint at ¶¶ 143-44 (DE# 34, 3/20/16). The Complaint does not allege facts to support the conclusory terms of malice and ill will regarding his alleged false arrest. Accordingly, Count 4 should be dismissed with prejudice as to the City of Coral Gables.

The plaintiff argues that his "Fourth Amendment excessive force claims turns on whether the force used was reasonable." Response at 16 (DE# 34, 3/20/16) (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). He argues further that "[s]ince the Complaint alleges that both the checkpoint and the arrest were unlawful and unreasonable, the force used by defendants was necessarily unreasonable." Id.

Despite his admittedly minor thumb injury,[2] during the hearing the plaintiff conceded that the force used to place him in handcuffs at the time of his arrest and for the duration of his three-hour custody was not excessive unless the arrest itself is improper and unlawful. The plaintiff explains that his excessive force claim is not raised under the Fourth Amendment rather than the Eighth Amendment and concedes that the plaintiff "does not contend that the officers conducting the arrest were malicious in their use of force nor that they were gratuitously violent, as would be required for an Eighth Amendment excessive force claim." Response at 16 (DE# 34, 3/20/16).

Unlike Campbell and Jones, in the present case, the Complaint alleges that there were written guidelines and that every car was stopped. The defendants argue that the plaintiff ignores Eleventh Circuit precedent which instructs that a checkpoint

[2]In his Complaint, the plaintiff alleges that he "experienced numbness on the side of his right thumb as a result of the handcuffs..." which was "diagnosed as a temporary nerve impingement and it resolved within a couple of weeks...." Complaint ¶¶ 91-92.

may have more than one purpose. Reply at 3 (DE# 39, 3/31/16). The defendants cite United States v. Regan, 218 F. App'x 902 (11th Cir. 2007), which found that the checkpoint was "designed to comply with the Constitution" even though it served both the "important state interest of ensuring compliance with the state's driver licensing and vehicle registration laws, and to check for drunk drivers." Id. at 905.

In Count 8, the plaintiff alleged that the defendants interfered with his Second Amendment right to keep and bear arms and to carry a concealed weapon. Complaint at ¶¶ 163-64. At the hearing, the plaintiff acknowledged that the officers who removed his loaded pistol from his pant pocket as a result of a search incident to an arrest cannot be liable for a constitutional violation of the plaintiff's Second Amendment rights unless the arrest is improper and unlawful.

Because the plaintiff has failed to plead the existence of a municipal custom, policy, or practice which caused the deprivation of her constitutional rights against false arrest (Count 4) and excessive force (Count 5) under the Fourth Amendment and the right to bear arms under the Second Amendment (Count 8), and instead has alleged only a single, isolated incident of alleged police misconduct, Counts 4, 5 and 8 should be dismissed without prejudice as to the City of Coral Gables.

3. Count 7 (First Amendment)

The defendants concede that the Eleventh Circuit has determined that citizens "have a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." See Motion to Dismiss at 10 (quoting Smith v. Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000)). The defendants

argue that the plaintiff "has not demonstrated [that] these Defendants violated that right or that any actions taken by the officers in the context of a DUI checkpoint were unreasonable." Id. In his Complaint, the plaintiff alleges that the defendant police officers interfered with his effort to record the events as they transpired by shining flashlights on cameras operated and/or owned by the plaintiff and by depriving the plaintiff of the ability to use a camera while he was in custody. See Complaint ¶¶ 156-157.

Taking the plaintiff's allegations as true, as this Court must for the purpose of a motion to dismiss, and recognizing that the Eleventh Circuit allows citizens to photograph or videotape police encounters under certain circumstances, the undersigned finds that the plaintiff may be able to state a cause of action for violations of his First Amendment rights concerning police interference with his ability to photograph or videotape his encounter with the police at the sobriety checkpoint. The plaintiff asserts violations of his First Amendment rights based on police interference with cameras inside and outside the vehicle that were not in the plaintiff's possession, but rather were manned by other third parties. Neither the motion nor the response addresses whether the plaintiff has standing to assert a constitutional violation of his First Amendment right based on such allegations. Additionally, the Complaint alleges that unidentified police officers, John Doe #8-15 of the City of Coral Gables Police Department shined the flashlights at cameras (Complaint ¶ 66), and "[o]ne of the Robert Moe Miami-Dade police defendants slapped the camera out of [Mr.] Stern's hand and slammed it onto the hood of the vehicle." (Complaint ¶ 75) This Court should

grant without prejudice the defendants' motion to dismiss Count 7 so that the plaintiff may overcome the deficiencies regarding the identification of the proper defendants and his improper incorporation by reference of all prior allegations in Count 7. The plaintiff should also be required to allege his standing to assert the claim for alleged interference with the photographing and videotaping of the plaintiff's sobriety checkpoint encounter by third parties.

4. Count 9 (Fourth Amendment - Stop)

Count 9 contains conclusory allegations regarding the lawfulness of the sobriety checkpoint. The plaintiff alleges that the defendants "conducted the checkpoint in an unlawful and overbroad manner, violating the principles set for in Indianapolis v. Edmond, 531 U.S. 32 (2000)." Complaint ¶ 166 (DE# 1, 1/1/16). The plaintiff further alleges that the plaintiff's "vehicle was stopped unlawfully and in violation of his Fourth Amendment right to be free from unreasonable seizures." Complaint ¶ 167. Count 9 also incorporates all previous allegations of the Complaint. The plaintiff alleges that "[n]othing in the guidelines give[s] any instruction or requirement for drivers to crack or open their windows, nor to physically hand over their license." Complaint ¶ 49. The plaintiff further alleges that the defendant "Escobar ignored the guidelines that he had prepared by insisting that Plaintiff hand over the license for inspection. Defendant Escobar threatened to arrest Plaintiff for 'obstruction' if Plaintiff did not hand over the license. He later indicated that Plaintiff would be arrested for 'resisting without violence.'" Complaint ¶¶ 59-60. Police vehicles moved into position to block the plaintiff's vehicle and approximately forty officers surrounded the vehicle. Complaint ¶¶

67-68.

The defendants seek dismissal of Count 9 because the Complaint expressly alleges a constitutionally permissible practice to "check the license of every stopped driver at the initial stop." Complaint ¶ 32. In United States v. Regan, 218 F App'x 902, 905 (11th Cir. 2007), the Eleventh Circuit held that a DUI checkpoint where "every vehicle was stopped and every motorist was asked for documentation" was reasonable under the Fourth Amendment. The defendants concede that the Supreme Court has held that a checkpoint set up for generalized crime control purposes would violate the Fourth Amendment, absent special circumstances. Edmond, 531 U.S. at 42 (holding that "[b]ecause the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment"). The defendants argue that the plaintiff's refusal to provide the requested driver's license caused his stop at the DUI checkpoint to be more than brief. Complaint ¶ 48. See Wos v. Shehan, 57 F. App'x 694, 696 (7th Cir. 2002) (when Mr. Wos failed to produce a valid license upon request at a roadside checkpoint, deputies had probable cause to believe he had violated the law and to arrest him). Because the stop occurred pursuant to written guidelines for a sobriety checkpoint that are constitutional under the Fourth Amendment, Count 9 fails to state a claim upon which relief may be granted and should be dismissed. Moreover, the police officers conducting the sobriety checkpoint enjoy qualified immunity as discussed above at 13-14. As the Complaint alleges, "[t]he actions of all the defendant police officers were pursuant to policies, practices and procedures directed by the defendant

municipalities." Complaint ¶ 87.

6. Count 10 (Fourth Amendment - Search)

The plaintiff alleges that the searches of his person as well as the search of the vehicle after his unlawful arrest violated his Fourth Amendment right to be free from unreasonable searches. Complaint ¶ 170. The defendant seeks dismissal of Count 10 on the ground that the search and inventory of the plaintiff's vehicle incident to his detention based on probable cause does not state a claim for violation of the Fourth Amendment.

The defendants justify the search of plaintiff's person incident to his arrest on the ground that they had probable cause. The defendants' reliance on Moreno v. Tuner, 572 F. App'x 852, 857 (11th Cir. 2014) to support their argument that arguable probable cause is sufficient to make a search of a vehicle incident to an arrest constitutional is misplaced. Additionally, Moreno is an unpublished decision of the Eleventh Circuit that is not binding on this Court. Finally, the Supreme Court's decision in Arizona v. Gant prohibits the search of a vehicle incident to an arrest unless the arrestee is within proximity of the passenger compartment or the police reasonably believe evidence of the crime for which the person was arrested exists in the vehicle.

In Arizona v. Gant, the Supreme Court held that the

> [p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement

applies.

Arizona v. Gant, 129 S. Ct. 1710, 1724 (2009).

Moreno did not involve a search of a vehicle. Moreno involved a tree trimming employee who directed traffic on the road who had an incident with a motorist who did not heed his indication to stop. Moreno allegedly struck the motorist's vehicle with his hand-held stop sign. In Moreno, the Eleventh Circuit found that the officer was entitled to search the plaintiff incident to his arrest based on arguable probable cause and seize his keys, cash, wallet and driver's license. Id. (citing Holmes v. Kucynda, 321 F.3d 1069, 1082 (11th Cir. 2003)).

In their motion, the defendants argue that the arrest was lawful because they had probable cause or at least arguable probable cause to arrest the plaintiff for his failure to follow the officer's instructions to roll down his window and provide his driver license. Motion at 27-29. Probable cause exists if "at the moment the arrest was made, 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing' that [the suspect] had committed or was committing an offense." Dahl v. Holley, 312 F.3d 1228, 1233 (11th Cir. 2002) (quoting Hunter v. Bryant, 502 U.S. 224, 228 (1991)). The defendant argues that the plaintiff's "actions, as described in the Complaint, establish probable cause or arguable probable cause that he committed the crime of obstruction of justice." Motion at 13 (DE# 33, 3/7/16). The allegations in the Complaint reveal that the plaintiff was on notice that his failure to comply with the defendants' requests for the plaintiff to hand over his license would be tantamount to

failure to obey a lawful order. See Complaint ¶ 58, 60. When the plaintiff refused to comply with the officers multiple requests, the defendant Escobar had probable cause or arguable probable cause to arrest the plaintiff for violation of Section 843.02 of the Florida Statutes.

Section 843.02 provides in pertinent part:

> Whoever shall resist, obstruct, or oppose any officer ... in the lawful execution of any legal duty, without offering or doing violence to the person of the officer shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.-82 or . 775.083.

Fla. Stat. § 843.02 (2014).

In Rinaldo v. State, the Florida appellate court explained that

> a driver who is lawfully stopped for a DUI checkpoint is under a legal obligation to respond to an officer's requests for certain information and documents, and the driver's refusal to respond to these requests may constitute the misdemeanor offense of obstructing or opposing an officer.

Rinaldo, 787 So. 2d 208, 212 (Fla. 4th DCA 200) (citing Fla. Stat. § 843.02) (1991) (other citations omitted).

The plaintiff argues that the defendants adopted and enforced a policy to arrest anyone who violates Section 322.15 under Section 843.02 as a misdemeanor. Section 322.15 provides that a violation of the statute is a non-criminal, non-moving traffic infraction. Section 322.15 provides in pertinent part:

> (1) Every licensee shall have his or her driver license, which must be fully legible ... in his or her immediate possession at all times when operating a motor vehicle and shall present or submit same upon the demand of a law enforcement officer or an authorized representative of the department. A licensee may present or submit a digital proof of driver license as provided in s. 322.032 in lieu of a physical driver license.
>
> ***
>
> (4) A violation of subsection (1) is a noncriminal traffic infraction,

punishable as a nonmoving violation as provided in chapter 318.

Fla. Stat. §322.15 (2014).

Without citing any case law, the plaintiff argues that "[e]ven if the arrest was lawful, there was no reason for the defendants to search the car. There was nothing about the incident to support any reason to hold the car or search it... There was no need to detain the vehicle and thus no need for an inventory search. [The owner of the vehicle] and a passenger [were] ready, willing and able to drive the car away." Response at 17. During the hearing, the defendants argued that the owner of the vehicle was on the scene but was not in the vehicle and that the officers conducted an inventory search of the vehicle. In support of their motion, the defendants rely on the Seventh Circuit decision in Wos, where the arrestee had no license and there was no one else available to drive the vehicle. Wos v. Shehan, 57 F. App'x 694, 696 (7th Cir. 2002). Wos is factually distinguishable. In the present case, the Complaint alleges that the owner of the vehicle and a passenger were present, ready, willing and able to drive the vehicle while the plaintiff was in custody.

Under Florida law, "[a] prime criterion to determine if the police have taken lawful custody of a motor vehicle is whether or not it is justifiable for the police, acting under routine police procedure, to become bailees of the vehicle." Altman v. State, 335 So. 2d 626, 629 (Fla. 2d DCA 1976). In Altman, the court found that underlying necessity for police custody of the vehicle did not exist where it was stipulated that the defendant desired and had the ability to have his car removed by someone without intervention of the police. The Florida court explained that its "comment on the prerequisite of

[n]ecessity for impoundment as the threshold to justify an inventory search is a timely caveat to law enforcement officers particularly in view of the ... opinion of the United States Supreme Court in South Dakota v. Opperman, 428 U.S. 364 (1976)." Although "Opperman was not primarily concerned with the authority of the police to take the car into custody, the Supreme Court mentioned several circumstances which do justify such an impoundment: to permit the flow of traffic, preserve evidence, or [remove] an illegally parked car which jeopardizes both public safety and the efficient movement of vehicular traffic." Id. (quoting Opperman, 96 S. Ct. 3092). None of the Opperman examples appear to exist in the present case.

During the hearing, the defendants argued that they conducted an inventory search of the vehicle. The plaintiff maintains that there was no reason for the police to conduct an inventory search because the owner and another passenger were present, willing and able to drive the vehicle while the plaintiff was in custody.

Based on the allegations of the Complaint, the officers detained the plaintiff based on his refusal to obey the officer's repeated requests to roll down his window and provide his driver license. The search of the plaintiff's person incident to his arrest does not violate the Fourth Amendment unless the underlying arrest was unlawful. Based on the allegations of the Complaint that the owner and another passenger were present, willing and able to drive the vehicle, the necessity of impoundment may not exist. Additionally, the defendant's argument that the search of the vehicle was justified because the officers had probable cause to arrest the plaintiff does not comport with the Supreme Court's decision in Gant. The defendants' motion to dismiss Count 10

should be denied on the merits, but should be granted in part to require the plaintiff to name the proper defendant and to correct the pleading deficiencies of Rule 8 and the shotgun style of the Complaint.

7. Count 15 (Monell Claim against City of [Coral Gables])

The defendants seek to dismiss Count 15 on the ground that the "Complaint fails to describe any cognizable constitutional deprivation and Plaintiff's claims against the City of Coral Gables fails on this basis alone." Motion at 22 (DE# 33, 3/7/16). Additionally, the defendants argue that the plaintiff fails to identify the City Attorney or the Police Department as the final policymaker. Id. at 23. Finally, the defendants argue that the plaintiff fails to identify a pattern of specific and similar incidents to Plaintiff's case which would implicate an unofficial policy regarding false arrest (Count 4), excessive force (Count 5), interference with recording policy activity (Count 7), violating the Second Amendment (Count 8), and conducting illegal searches (Count 10).

In his opposition to the defendant's motion to dismiss, the plaintiff argues that the defendants adopted and enforced a policy to arrest anyone who violates Section 322.15 under Section 843.02 as a misdemeanor notwithstanding that Section 322.15 provides that a violation of the statute is a non-criminal, non-moving traffic infraction. Response at 2 (DE# 34, 3/20/16); Complaint ¶ 26. The plaintiff argues further that he has alleged that his constitutional rights were violated and that the City of Coral Gables adopted checkpoint policies that constituted deliberate indifference to the Fourth Amendment rights of drivers in checkpoints and traffic stops. Additionally, the plaintiff argues that he notified the city that the policies were illegal and that the City of Coral

Gables persisted with such policies. See Complaint ¶¶ 27-29. Finally, the plaintiff maintains that his Complaint clearly identifies Defendants Leen and Hudak, who adopted these policies as final policymakers.

Municipal liability under section 1983 is limited. Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir. 1998). "There is no respondeat superior liability making a municipality liable for the wrongful actions of its police officers in making a false arrest." Id. (citing Monell v. Dept. of Social Services, 436 U.S. 658, 691 (1978)). "[A] municipality may be held liable for the actions of a police officer only when municipal 'official policy' causes a constitutional violation." Id. (citing Monell, id. at 694-95); see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993)("[A] municipality can be sued under [section] 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury."); Lewis v. City of West Palm Beach, 561 F.3d 1288, 1293 (11th Cir. 2009).

For Section 1983 liability to attach to a municipality, "a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004) (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)). A plaintiff may show a policy by identifying either 1) "an officially promulgated [city] policy or 2) an unofficial custom or practice of the [city] shown through repeated acts of a final policymaker of the [city]." Grech v. Clayton County, Ga., 335 F.3d 1326, 1329-30 (11th Cir. 2003) (citing Monell, 436 U.S. at 690-91). "Most plaintiffs ... must show that the

[city] has a custom or practice of permitting [a particular constitutional violation] and that the [city's] custom or practice is 'the "moving force [behind] the constitutional violation.'" Id. at 1330 (footnote omitted) (quoting City of Canton, 489 U.S. 378, 389 (1989) (alteration in original) (citing Monell, 436 U.S. at 694 and Polk County v. Dodson, 454 U.S. 312, 326 (1981)).

In Count 15 of the Complaint, the plaintiff fails to plead sufficient facts to state a claim for violation of civil rights pursuant to 42 U.S.C. § 1983 for his constitutional rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Reyes v. City of Miami Beach, 2008 WL 686958, *12 (S.D. Fla. 2008) (quoting Grech v. Clayton County, Ga., 335 F.3d 1326, 1330 (11th Cir. 2003)). This Court should grant without prejudice the defendants' motion to dismiss Count 15 (Monell Claim against City of [Coral Gables]) to comply with Rule 8, to eliminate the shotgun pleading deficiencies and to comply with the requirements of Monell.

CONCLUSION

Based on the foregoing Report and Recommendation, the undersigned respectfully recommends that the City of Coral Gables Defendants' Motion to Dismiss (DE# 33, 3/7/16) be **GRANTED**.

The Court should dismiss the claims that the plaintiff agreed to dismiss namely: Count 2 (False Arrest - Florida law), Count 3 (False Imprisonment - Florida law), Count 6 (Battery - Florida law), Count 11 (Fifth Amendment - Right to Remain Silent), Count 12 (Sixth Amendment - Counsel), Count 13 (Malicious Prosecution - Florida law), and Count 14 (Punitive Damages). Accordingly, Counts 2, 3, 6, 11, 12, 13, and 14 should

be **DISMISSED**.

Because the undersigned finds that the individual defendants enjoy qualified immunity, the undersigned recommends that this Court **dismiss with prejudice all individual defendants except** the individuals' whose conduct forms the basis of the plaintiffs claims for violations of his First Amendment right to record his encounter with police (Count 7 - First Amendment), his Fourth Amendment right to be free from an unreasonable search of his vehicle (Count 10 - Fourth Amendment - Search). The Court should require the plaintiff to allege his standing to assert the First Amendment violations.

Additionally, the claims for false arrest (Count 4 - Fourth Amendment), excessive force (Count 5 - Fourth Amendment), violations of the Second Amendment right to bear arms (Count 8) and violations of the Fourth Amendment right against unlawful stop (Count 9) should be **dismissed with prejudice** because the individual officers enjoy qualified immunity. If the constitutional violations of Counts 4, 5, 8 and 9 are based on a policy, procedure or unwritten widespread practice or custom of the City of Coral Gables, such constitutional violations should be alleged as part of the plaintiff's Monell claim.

The Court should allow the plaintiff to amend his Complaint to allege claims for injunctive relief (Count 1), First Amendment violations regarding photographing or recording his encounter with the police (Count 7), Fourth Amendment violations regarding the search of his vehicle (Count 10), and his claim for constitutional violations against the City of Coral Gables for municipal liability under Monell (Count 15). Any

amended complaint should comply with the notice pleading requirements of Rule 8 and should correct the shotgun pleading deficiencies by only including prior allegations that are necessary to state a particular claim.

The parties have fourteen (14) days from the date of receipt of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Judge Moreno, United States District Court Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. See LoConte v. Dugger, 847 F. 2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988); See Also, RTC v. Hallmark Builders, Inc., 996 F. 2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY SUBMITTED, in Chambers, at Miami, Florida, this **20th** day of May, 2016.

JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
United States District Judge Moreno
All Counsel of Record