“APPENDIX A”

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 2:19-cv-14461-KMM

JOEL BARCELONA,

Plaintiff,

v.

M. ESCOTTO RODRIGUEZ, *et al.*,

Defendants.
_____/

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Plaintiff Joel Barcelona's ("Plaintiff") Amended Complaint pursuant to 42 U.S.C. § 1983. ("Am. Compl.") (ECF No. 9). The Court referred the matter to the Honorable Lisette M. Reid, United States Magistrate Judge, who issued a Report and Recommendation recommending that the Amended Complaint be DISMISSED. ("R&R") (ECF No. 10). Plaintiff filed Objections. ("Objs.") (ECF No. 13). The matter is now ripe for review. As set forth below, the Court ADOPTS the R&R.[1]

The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The Court "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). A *de novo* review is therefore required if a party files "a proper, specific objection" to a factual finding contained in the report. *Macort v. Prem,*

[1] The Court adopts the R&R with the following alterations: on page three, line six, the quoted material should state, "to state a claim to relief that is plausible on its face."; on page five, lines fourteen to fifteen, the citation should read, in part, "614 F.3d 1288, 1304"; and on page eight, lines nine to ten, the citation should read, "*Danley v. Allen*, 540 F.3d 1298, 1310 (11th Cir. 2008), *overruled in part on other grounds by Randall v. Scott*, 610 F.3d 701 (11th Cir. 2010) (citing *Goebert v. Lee Cty.*, 510 F.3d 1312, 1326 (11th Cir. 2007))".

Inc., 208 F. App'x 781, 784 (11th Cir. 2006). "It is critical that the objection be sufficiently specific and not a general objection to the report" to warrant *de novo* review. *Id.*

Plaintiff is incarcerated at Northwest Florida Reception Center. Am. Compl. at 9. On December 12, 2019, Plaintiff filed the Amended Complaint. *See generally id.* Therein, Plaintiff alleges claims against three employees at Martin Correctional Institution, his former place of incarceration. *See id.* at 3. Specifically, Plaintiff alleges the following: On September 16, 2019 at 9:00pm, Plaintiff and other inmates at Martin Correctional Institution were ordered by Defendant M. Escotto Rodriguez ("Rodriguez") to return to their cells before they were finished eating their meals. ("Am. Compl. Decl.") (ECF No. 9–1) at 1. In response, the inmates refused to return to their cells until they were finished eating. *Id.* Thereafter Rodriguez came to Plaintiff's cell, where to Plaintiff had since returned, and ordered Plaintiff's cell mate to return to his cell, but his cell mate refused. *Id.* Rodriguez again ordered his cell mate to return to his cell and his cell mate complied. *Id.* at 2. Nonetheless, Rodriguez "sprayed a deadly gas" on his cell mate, which "hit the wall toward [Plaintiff's] bed and hit [Plaintiff's] face," resulting in Plaintiff suffering shortness of breath, eye pain, and other ailments. *Id.*

Plaintiff also alleges that after the incident, he yelled for a "medical emergency" but was ignored by Defendant Officer Jean-Pierre ("Jean-Pierre"), and that subsequently Defendant Captain Martin ("Martin") was made aware of the incident. *Id.* at 2–3. Accordingly, Plaintiff claims that Defendants violated his Eighth Amendment rights. *Id.*

On November 26, 2019, Plaintiff filed a Motion for Leave to Proceed *In Forma Pauperis*, (ECF No. 4), which the Court granted, (ECF No. 6). Because Plaintiff is incarcerated and proceeding *in forma pauperis*, his Amended Complaint is subject to screening pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A. R&R at 1.

As set forth in the R&R, Magistrate Judge Reid finds that Plaintiff's Amended Complaint fails to state a claim. *See generally id.* First, Magistrate Judge Reid finds that Plaintiff's claim against Rodriguez for excessive force fails to state a claim because (1) Plaintiff does not allege facts supporting his conclusory statements that Rodriguez's actions were an "excessive use of deadly force" or that the spray was deadly; and (2) he fails to make the required showing of a "sufficiently culpable state of mind" necessary to meet the heightened standards of an excessive force claim. *Id.* at 6. Second, Magistrate Judge Reid finds that Plaintiff's claim for excessive force against Martin fails because Martin was not involved in the incident and was only informed of the incident after the fact. *Id.* at 7. Further, Magistrate Judge Reid finds that Plaintiff's claim against Martin for supervisory liability fails because Plaintiff does not allege facts showing a causal connection between Martin and the incident. *Id.* Third, Magistrate Judge Reid finds that Plaintiff's claim for excessive force against Jean-Pierre fails because he was not involved in the deployment of the spray. *Id.* at 8. Further, Magistrate Judge Reid finds that Plaintiff's claim for deliberate indifference against Jean-Pierre also fails because Plaintiff does not articulate any theory or facts demonstrating causation between Jean-Pierre's action and an injury to Plaintiff. *Id.* Accordingly, Magistrate Judge Reid recommends that the Court dismiss the Amended Complaint. *Id.* at 9. This Court agrees.

Plaintiff's Objections consist of new arguments based on additional facts not alleged in the Amended Complaint, general objections to the R&R, and rehashing of arguments that Magistrate Judge Reid already addressed, which are improper objections not warranting *de novo* review. *See Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009) ("[A] district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge."); *Macort*, 208 F. App'x at 781; *Marlite, Inc. v. Eckenrod*, No. 10–23641–CIV, 2012 WL

3614212, at *2 (S.D. Fla. Aug. 21, 2012) (finding that objections that are nothing more than a rehashing of arguments presented in the original papers are improper). Therefore, the Court need not conduct a *de novo* review of the R&R.

Nonetheless, even if the Court were to consider the new arguments based on additional facts that Plaintiff asserts in the Objections, Plaintiff's allegations fails to state a claim. First, Plaintiff states in the Objections that his cell mate did not resist and that after Plaintiff was sprayed, Plaintiff was left in a small, poorly ventilated cell for more than an hour without being allowed to decontaminate. *See* Objs. at 8. A claim of excessive force under the Eighth Amendment's cruel and unusual punishment clause "requires a two-prong showing: an objective showing of a deprivation or injury that is 'sufficiently serious' to constitute a denial of the 'minimal civilized measure of life's necessities' and a subjective showing that the official had a 'sufficiently culpable state of mind.'" *Thomas v. Bryant*, 614 F.3d 1288, 1304 (11th Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). "Excessive-force claims . . . require a showing of a heightened mental state--that the defendants applied force 'maliciously and sadistically for the very purpose of causing harm.'" *Id.* (citing *Wilson v. Seiter*, 501 U.S. 294, 302 (1991)) (internal citations omitted). Even if the Plaintiff's allegations could state a claim as to the objective prong, Plaintiff fails to allege that any Defendant had a sufficiently culpable state of mind because Plaintiff alleges Defendants did not know that Plaintiff was calling for help due to being sprayed. *See* Objs. at 4. Therefore, Plaintiff's claim of excessive force fails to state a claim even considering the additional facts.

Second, Plaintiff alleges that Defendants deprived the inmates, including Plaintiff, of "basic human needs, such as food," in violation of the Eighth Amendment. Objs. at 1. To state a claim for an Eighth Amendment violation, a plaintiff must satisfy an objective and subjective

component. *See Chandler v. Crosby*, 379 F.3d 1278, 1288–1290 (11th Cir. 2004). First, under the "objective component," a prisoner must prove that the condition he complains of is sufficiently serious to violate the Eighth Amendment. *Id.* at 1289 (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)). The challenged condition must be "extreme." *Id.* (citing *Hudson*, 503 U.S. at 9). Second, the prisoner must show that the defendant prison officials "acted with a sufficiently culpable state of mind" with regard to the condition at issue. *Id.* (citing *Hudson*, 503 U.S. at 8). The proper standard is deliberate indifference. *Wilson*, 501 U.S. at 303. Although Plaintiff alleges that the Defendants deprived him and other the inmates of finishing a meal on the evening of the incident, deprivation of one meal does not rise to level of a constitutional violation. *See Johnson v. Merriman*, No. 1:13–cv–00087–MP–GRJ, 2015 WL 1409529, at *4 (N.D. Fla. Mar. 26, 2015) (citing cases) ("The failure to serve [a] few meals is not sufficiently severe to rise to the level of a constitutional violation."). Further, Plaintiff does not allege that Defendants had the requisite "sufficiently capable state of mind" as to any deprivation. Therefore, Plaintiff's Eighth Amendment claim for depriving Plaintiff of food or other basic human needs fails to state a claim.

Third, Plaintiff alleges that Defendants were deliberately indifferent to Plaintiff's serious medical needs because they did not respond to his calls for help after he was sprayed. Objs. at 4. To plead deliberate indifference "a plaintiff must show: (1) a serious medical need; (2) the defendants' deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury." *Danley v. Allen*, 540 F.3d 1298, 1310 (11th Cir. 2008), *overruled in part on other grounds by Randall v. Scott*, 610 F.3d 701 (11th Cir. 2010) (citing *Goebert v. Lee Cty.*, 510 F.3d 1312, 1326 (11th Cir. 2007)). Deliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999). Here,

Plaintiff alleges that Defendants did not know that Plaintiff was calling for help because he had been sprayed. Objs. at 4. Therefore, accepting Plaintiff's allegations as true, Defendants were not deliberately indifferent and Plaintiff's claim against Defendants for deliberate indifference fails to state a claim even considering the additional facts in the Objections.

Because the Court previously granted Plaintiff leave to file an amended complaint, *see* (ECF No. 7), and Plaintiff's allegations fail to state a claim even if the Court considers the additional facts Plaintiff sets forth in his Objections, further amendment of the Amended Complaint is futile. Therefore, dismissal of this case with prejudice is appropriate. *See Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004) (citation omitted) ("The law in this Circuit is clear that 'a district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile.'").

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Magistrate Judge Reid's R&R (ECF No. 10) is ADOPTED and Plaintiff's Complaint (ECF No. 9) is DISMISSED WITH PREJUDICE. The Clerk of the Court is instructed to CLOSE this case. All pending motions, if any, are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of April, 2020.

K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

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INMATE INITIALS

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

JOEL BARCELONA,
Plaintiff/Appellee,

v.

CASE NO: 2:19-cv-14461-KMM

M.E. RODRIGUEZ, et al.,
Defendant/Appellant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, that JOEL BARCELONA, the Plaintiff in the above named case, hereby appeal to the United States Court of Appeals for the Eleventh Circuit (✓) from the final judgment (__) from an order *(describe order)* DISMISSED THE CASE entered in this action on the 10TH day of April, 2020.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Notice of Appeal has been placed into the hands of institutional staff at Northwest Florida Reception Center for delivery by U.S. mail to: THE United States District Court FOR THE SOUTHERN District OF Florida. OFFICE OF THE Clerk - Rm. 8N09. 400 N. Miami Avenue, Miami, Florida 33128 on this 1ST day of May, 2020.

/s/ JOEL BARCELONA, pro se
DC# 144 50331
Northwest Florida Reception Center
4455 Sam Mitchell Drive
Chipley, Florida. 32428

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 28, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-11760-GG
Case Style: Joel Barcelona v. M. Rodriguez, et al
District Court Docket No: 2:19-cv-14461-KMM

Eleventh Circuit Rule 31-1 requires that APPELLANT'S BRIEF BE SERVED AND FILED ON OR BEFORE October 7, 2020. INCARCERATED PRO SE PARTIES ARE NOT REQUIRED TO FILE AN APPENDIX.

This is the only notice you will receive concerning the due date for filing the brief. See Fed. R. App. P. 28, 31, 32 and the corresponding circuit rules for further information.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joseph Caruso, GG
Phone #: (404) 335-6177

BR-1CIV Civil appeal briefing ntc issued

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Case Number: _____

Joel Barcelona / Jonathan Holmes
(Write the full name of the plaintiff)

vs.
M. Escotto-Rodriguez
Capt. Martin
Ofc. Jean-Pierre

(Write the full name of the defendant/s in this case)

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

I. Party Information

A. Plaintiff: Joel Barcelona / Jonathan Holmes
Address: NWFRC. 4455 Sam Mitchell Drive, Chipley, Fla. 32428
Inmate/Prison No.: M50331 / O-001312
Year of Birth: 1954 (Do not include day or month, pursuant to Fed. R. Civ. P 5.2)
(Write your name, address and prison/inmate number, if applicable)

vs.

B. Defendant: M. Escotto-Rodriguez Defendant: Capt. Martin
Official Position: Corr. Officer Official Position: Captain
Place of Employment: Martin C.I. Place of Employment: Martin C.I.
(Write the full name of each defendant, official position and place of employment. Attach a separate page if you need additional space for additional defendants.)
Officer Jean-Pierre - Corr. Officer - Martin C.I.

II. Statement of Claim

Briefly describe the facts of your case. Describe how each defendant is involved, names of other persons involved, and dates and pl aces. Each claim should be stat ed in a separately num bered paragraph. Please use short and plain statements, with separately numbered paragraphs indicating why the relief requested should be granted. Do not include legal arguments or cite cases or statutes. Attach additional pages, if necessary.

PLAINTIFF WAS DEPRIVED OF A RIGHT SECURED UNDER THE U.S. CONST. OR FEDERAL LAW; AND SUCH DEPRIVATION OCCURRED UNDER COLOR OF STATE LAW OR LOCAL LAW.

STATEMENT OF FACTS

ON SEPTEMBER 11, 2019 WEDNESDAY MARTIN C.I. WAS ON LOCK-DOWN DUE TO FOUR (4) INMATES GOT STABBED.

ON SEPTEMBER 16, 2019, MONDAY AT 9:00 P.M. WHILE WE ARE WAITING FOR DINNER AT THE DIRECTION OF CAPT. MARTIN IN-CHARGE, OFC. M. ESCOTTO-RODRIGUEZ CAME IN AT QUAD E3-

SEE ATTACH ADDITIONAL PAGES-

III. Relief Requested

Briefly state what you are requesting from the Court (what do you want the Court to do). Do not include legal arguments or cite cases or statutes. Attach additional pages, if necessary.

PLAINTIFF IS SEEKING COMPENSATORY DAMAGES AS A LIABILITY OF THE NAMED DEFENDANTS ACTED UNDER COLOR OF STATE LAW. A VIOLATION OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS IS A SERIOUS INJURY. EXCESSIVE USE OF DEADLY FORCE IN VIOLATION OF THE EIGHT AMEND-MENTS PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE AMOUNT OF $300,000.00 AND A PUNITIVE DAMAGES BY INTENTIONALLY HURTING US

III- Cont'd Relief Requested.

excluding our pain and suffering, emotional distress and mental anguish for the total amount of $500,000.00.

and announced its count time. All inmates replied, we are not going in unless we eat. He came in front of our cell at Room 3102 where we are assigned. I was already inside our cell. My cell_mate Jonathan Holmes_DC#0_001312 was sitting in front of our cell. My cell_mate refuse to go inside our cell because why Ofc. M. Escotto_Rodriguez called count that we have not eaten our Dinner at the direction of Capt. Martin. Ofc. M. Escotto_Rodriguez said! I will count one, my cell_mate Jonathan Holmes stood up and step_inside our cell. Ofc. M. Escotto_Rodriguez "sprayed a deadly gas" to my cell_mate on the face inside our cell after my cell_mate obeyed his order to go inside our cell.

Ofc. M. Escotto_Rodriguez "excessive use of deadly force" violates the Eight Amendment's prohibition against cruel and unusual punishment where my cell_mate obeyed his order and already inside our cell. Ofc. M. Escotto_Rodriguez's action violates the Eight Amendment to the U.S. Constitution.

Ofc. M. Escotto_Rodriguez's "excessive use of deadly gas spray" inside our cell, hit the wall toward my bed and hit my face. The result of the "deadly gas spray", I suffered a shortness of breath, eye pain,

runny nose for several days, because I've been battling for a severe abdominal and stomach pain, fatigue, weak, spell of dizziness, loss of balance that I nearly pass-out because I cannot breath.

I was screaming for "medical emergency" but I was ignored by Ofc. Jean-Pierre.

The decision of Capt. Martin and Ofc. M. Escotto-Rodriguez to place inmate Holmes in a hand-cuff and taken to the confinement was unjustified and unlawful. Inmate Holmes had spend 7-days in a confinement suffering for headache, vomiting, watery eyes and runny nose as a result of "excessive use of deadly force" by using a deadly Gas spray.

After the incident, Capt. Martin had review the "Video Camera". Ofc. M. Escotto-Rodriguez's action "excessive use of deadly force" in violation of the Eight Amendment to the U.S. Constitution.

Further, inmates Joel Barcelona and Jonathan Holmes had provided sufficient evidence to show that Ofc. M. Escotto-Rodriguez violated the inmates Eight Amendment rights by "excessive use of deadly force" by using a deadly Gas spray to the inmates after the inmates obeyed an order and the inmates

are already inside cell. The conduct of Ofc. M. Escotto-Rodriguez facially violated the Eight Amendment and violated a clearly established law.

The plaintiffs was deprived of a right secured under the U.S. Const. or Federal Law; and such deprivation occurred under color of State Law.

1. M. Escotto-Rodriguez - employed by F.D.C. as a Corr. Officer at Martin C.I. in his individual capacity acted under color of State law.
2. Capt. Martin - employed by F.D.C. as Captain at Martin C.I. in his individual and Official capacity acted under color of State Law.
3. Officer Jean-Pierre - employed by F.D.C. as a Corr. Officer at Martin C.I. in her individual capacity acted under color of State Law.

On October 10, 2019, I was transferred to Northwest Florida Reception Center to prevent from filing a non-frivolous complaint.

OF AN UNJUSTIFIED and unlawful conduct BY EXCES-
SIVE USE OF deadly FORCE IN THE amount OF $200,000.00
SEE EXTRA PAGE

IV. Jury Demand

Are you demanding a jury trial? ✓ Yes ___ No

Signed this 21ST day of NOVEMBER, 2019

Signature of Plaintiff

I declare under penalty of perjury that the foregoing is truce and correct.

Executed on: NOVEMBER 21, 2019

Signature of Plaintiff

APPENDIX – B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11760-G

JOEL BARCELONA,

Plaintiff-Appellant,

versus

M. ESCOTTO RODRIGUEZ,
Correction Officer,
CAPT. MARTIN,
OFFICER JEAN-PIERRE,
Correction Officer,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Joel Barcelona, a Florida prisoner, filed a pro se 42 U.S.C. § 1983 civil rights complaint against three employees at Martin Correctional Institution. The District Court dismissed Mr. Barcelona's complaint for failure to state a claim. Mr. Barcelona filed a notice of appeal from the District Court's order dismissing his complaint, as well as a motion for leave to proceed in forma pauperis ("IFP") on appeal. The District Court denied his motion for leave to proceed IFP. On appeal,

Mr. Barcelona has consented to paying the appellate filing fee. Therefore, the only remaining issue is whether an appeal would be frivolous. See 28 U.S.C. § 1915(e)(2)(B).

I.

Mr. Barcelona alleges in his amended complaint that on September 16, 2019, he and other inmates were ordered by Officer Rodriguez to return to their cells before they were given a chance to have dinner. Mr. Barcelona and the other inmates refused, stating that they would not go back to their cells until they had an opportunity to eat. Following this exchange, Mr. Barcelona's cellmate, Jonathon Holmes, remained seated in front of their cell, while Mr. Barcelona was inside of it. Officer Rodriguez ordered Mr. Holmes to enter the cell, and Holmes refused. Officer Rodriguez repeated his order, and this time, Mr. Holmes complied. Nonetheless, Officer Rodriguez sprayed a "deadly gas" into the cell. The gas hit the wall toward Mr. Barcelona's bed and got into Mr. Barcelona's face, resulting in shortness of breath, eye pain, and an inability to breathe that nearly caused Mr. Barcelona to pass out. Mr. Barcelona screamed for a "medical emergency," but was ignored by Officer Jean-Pierre, who was also present.

Mr. Barcelona's complaint alleges that Officer Rodriguez violated his Eighth Amendment rights by using of excessive deadly force maliciously and sadistically to cause harm. Mr. Barcelona also asserted that Captain Martin was made aware of

the incident and shown a recording, but failed to take any action. Accordingly, Mr. Barcelona asserts: (1) an excessive force claim against Officer Rodriguez; (2) a deliberate-indifference claim against Officer Jean-Pierre; and (3) a supervisor-liability claim against Captain Martin.

A Magistrate Judge performed an initial screening of Mr. Barcelona's complaint, under 28 U.S.C. § 1915A, and entered a report and recommendation ("R&R"), recommending that Mr. Barcelona's § 1983 complaint be dismissed for failure to state a claim. Specifically, the R&R determined that Mr. Barcelona's excessive force claim against Officer Rodriguez failed because (a) he did not provide any facts to support his assertion that Officer Rodriguez had acted maliciously, and (b) he failed to allege that Officer Rodriguez had acted with a culpable state of mind toward him, as the alleged use of force had been directed at Mr. Barcelona's cellmate. The magistrate also held that Mr. Barcelona's supervisor-liability claim against Captain Martin failed because Barcelona did not allege that Captain Martin personally participated in the conduct or that there was a causal connection between Captain Martin's actions and the alleged constitutional deprivation. Finally, the magistrate recommended dismissal of Mr. Barcelona's deliberate-indifference claim against Officer Jean-Pierre because Barcelona did not show causation between Officer Jean-Pierre's indifference and his injury.

Mr. Barcelona objected to the R&R, asserting that, after Officer Rodriguez sprayed him with the gas, the officers left him in a poorly ventilated cell without decontaminating him for more than one hour, nearly causing him to pass out. He further responded that the officers demonstrated deliberate indifference to his medical needs because they "did not believe [he] was sprayed directly" and they "did not know that [he] was yelling in the cell for [a] medical emergency because he was expose[d] with a deadly gas spray." The District Court entered an order overruling Mr. Barcelona's objections, holding that Barcelona failed to allege an excessive force claim because he conceded in his objections that the officers did not know that he was calling for help. Thus, the District Court adopted the R&R and dismissed Mr. Barcelona's § 1983 complaint for failure to state a claim.

II.

"[A]n action is frivolous if it is without arguable merit either in law or fact." Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002) (quotation marks omitted). We liberally construe pro se pleadings. Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam).

We "review de novo a District Court's sua sponte dismissal for failure to state a claim, pursuant to § 1915(e)(2), using the same standards that govern Federal Rule of Civil Procedure 12(b)(6) dismissals." Farese v. Scherer, 342 F.3d 1223, 1230 (11th Cir. 2003). Allegations in a complaint are accepted as true and construed in

the light most favorable to the plaintiff. Leib v. Hillsborough Cty. Pub. Transp. Comm'n, 558 F.3d 1301, 1305 (11th Cir. 2009). To avoid dismissal under Rule 12(b)(6), the plaintiff must allege sufficient facts to state a claim for relief that is "plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1964–65 (2007). "[A] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

The use of force by prison officials against convicted inmates is governed by the Eighth Amendment's proscription of cruel and unusual punishment. Campbell v. Sikes, 169 F.3d 1353, 1374 (11th Cir. 1999). A viable claim for excessive force consists of both a subjective and objective component. Hudson v. McMillian, 503 U.S. 1, 7–8, 112 S. Ct. 995, 999–1000 (1992). Subjectively, a plaintiff must establish that force was applied "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline." Id. at 6, 112 S. Ct. at 998 (quotation omitted). To determine whether force was applied maliciously and sadistically to cause harm, we consider: (1) the need for the application of force, (2) the relationship between that need and the amount of force used, (3) the extent of the prisoner's injuries, (4) the threat reasonably perceived by

the officials, and (5) efforts made to temper the severity of the force. Cockrell v. Sparks, 510 F.3d 1307, 1311 (11th Cir. 2007).

Mr. Barcelona has an issue of arguable merit as to whether he alleged sufficient facts to plausibly state an excessive force claim. The District Court dismissed the excessive force claim based on its conclusion that Mr. Barcelona failed to allege any facts demonstrating that Officer Rodriguez acted with a sufficiently culpable state of mind. However, Mr. Barcelona alleged that (1) Officer Rodriguez administered the spray after Mr. Holmes already had complied with the order to return to his cell; and (2) the officers left Mr. Barcelona in his cell after spraying him without decontaminating him for over an hour, ignoring his pleas for a "medical emergency." Although Mr. Barcelona's allegations can be interpreted to suggest that Officer Rodriguez acted maliciously toward Mr. Holmes rather than Mr. Barcelona, courts must, at the pleading stage, construe allegations in the light most favorable to the plaintiff. See Twombly, 550 U.S. at 570, 127 S. Ct. at 1964–65. Construing the allegations in the light most favorable to Mr. Barcelona, it is at least plausible that Officer Rodriguez acted maliciously toward both Mr. Barcelona and Mr. Holmes by spraying into their shared cell. And while Mr. Barcelona said in his objections to the R&R that Officer Rodriguez did not believe he was suffering a medical emergency, this does not defeat his excessive force claim because he also alleged that Officer Rodriguez failed to decontaminate his cell for one hour. See

Danley v. Allen, 540 F.3d 1298, 1308 (11th Cir. 2008) (holding that "subjecting a prisoner to special confinement that causes him to suffer increased effects of environmental conditions—[t]here . . . pepper spray lingering in the air and on him—can constitute excessive force"), overruled in part on other grounds as recognized by Randall v. Scott, 610 F.3d 701 (11th Cir. 2010).

III.

Therefore, Mr. Barcelona has an issue of arguable merit as to whether the facts in his complaint, when liberally construed and viewed in the light most favorable to him, alleged a plausible excessive force claim. See Napier, 314 F.3d at 531; Tannenbaum, 148 F.3d at 1263. In light of the above, Mr. Barcelona's motion for leave to proceed is GRANTED.

Beverly B. Martin

UNITED STATES CIRCUIT JUDGE

APPENDIX - C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11760
Non-Argument Calendar

D.C. Docket No. 2:19-cv-14461-KMM

JOEL BARCELONA,

Plaintiff-Appellant,

versus

M. ESCOTTO RODRIGUEZ,
Correction Officer,
CAPT. MARTIN,
OFFICER JEAN-PIERRE,
Correction Officer,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 9, 2021)

Before JORDAN, BRASHER, and EDMONDSON, Circuit Judges.

PER CURIAM:

Plaintiff Joel Barcelona, a Florida prisoner proceeding pro se,[1] appeals the district court's dismissal -- pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) -- of his 42 U.S.C. § 1983 civil action. In his amended complaint, Plaintiff alleged that defendant prison officials -- Captain Martin, Officer Rodriguez, and Officer Jean-Pierre -- violated the Eighth Amendment. No reversible error has been shown; we affirm.

Plaintiff's complaint arises from an incident that occurred on 16 September 2019, while Plaintiff was confined at the Martin Correctional Institution. At Captain Martin's instruction, Officer Rodriguez ordered all prisoners to return to their cells for counting before the prisoners completed eating dinner. Plaintiff returned to his cell. Plaintiff's cellmate (J.H.), however, sat in front of the cell and refused to enter until he had eaten. Officer Rodriguez approached Plaintiff's cell and again ordered J.H. to return to his cell.

Although J.H. complied with this second order, Officer Rodriguez "sprayed a deadly gas" at J.H. -- when J.H. was inside the cell. The spray also hit the wall

[1] We construe liberally pro se pleadings. Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

near Plaintiff's bed and hit Plaintiff's face. As a result, Plaintiff experienced discomfort, including shortness of breath, eye pain, and a painful runny nose. After being sprayed, J.H. was handcuffed and taken away.

Plaintiff says that Officer Jean-Pierre -- who was in front of Plaintiff's cell during the incident -- ignored Plaintiff's calls for a "medical emergency." Plaintiff also says that Captain Martin later viewed the surveillance footage of the incident.

The magistrate judge issued a report and recommendation ("R&R") in which she recommended that Plaintiff's complaint be dismissed -- pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) -- for failure to state a claim. After considering Plaintiff's objections to the R&R, the district court adopted the magistrate judge's recommendation and dismissed with prejudice Plaintiff's complaint.[2]

We review de novo a district court's sua sponte dismissal under section 1915(e)(2)(B)(ii) for failure to state a claim. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1253 (11th Cir. 2017). In reviewing a dismissal under section

[2] The district court acted within its discretion in declining to consider factual allegations and arguments Plaintiff presented for the first time in his objections to the R&R. See Williams v. McNeil, 557 F.3d 1287, 1292 (11th Cir. 2009). The district court also determined that further amendment of the complaint would be futile because Plaintiff's new factual allegations still failed to state a claim under the Eighth Amendment.

On appeal, Plaintiff raises no challenge to the district court's refusal to consider facts not alleged in his amended complaint or the district court's determination that another amendment would be futile. Accordingly, we will not consider those new factual allegations and arguments in deciding this appeal.

sadistically for the very purpose of causing harm" instead of "in a good faith effort to maintain or restore discipline." Id. at 1374.

The district court committed no error in dismissing Plaintiff's claim for excessive force under the Eighth Amendment. Plaintiff alleged no facts supporting his conclusory allegation that Officer Rodriguez acted maliciously and sadistically to cause Plaintiff harm. Plaintiff never alleged -- nor can we infer reasonably -- that Officer Rodriguez intended to spray or to otherwise harm Plaintiff. That some of the spray aimed at J.H. hit the wall near Plaintiff's bed and injured Plaintiff is insufficient to establish that Officer Rodriguez had the requisite intent to cause harm to Plaintiff. Cf. Lumley v. City of Dade City, 327 F.3d 1186, 1196 (11th Cir. 2003) (explaining that a "showing of mere negligence" is insufficient to establish an unconstitutional use of excessive force). Plaintiff has thus stated no plausible claim for excessive force against Officer Rodriguez.

To state a claim for deliberate indifference to a serious medical need, a plaintiff must allege "(1) a serious medical need; (2) the defendants' deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury." Danley v. Allen, 540 F.3d 1298, 1310 (11th Cir. 2008). To satisfy the intent element, a plaintiff must allege that the prison official had

"subjective knowledge of a risk of serious harm" and disregarded that risk "by conduct that is more than [gross] negligence." Id. at 1312 (alteration in original).

The district court dismissed properly Plaintiff's claim for deliberate indifference. We have said that exposure to pepper spray without adequate decontamination can constitute a serious medical need. See Danley, 540 F.3d at 1310-11. Even if we accept that Plaintiff alleged sufficiently a serious medical need, he has alleged no facts that would support an inference that Officers Rodriguez or Jean-Pierre acted with deliberate indifference to that need. On appeal, Plaintiff says expressly that Officers Rodriguez and Jean-Pierre did not know that Plaintiff had been sprayed directly and did not know that Plaintiff was yelling for a medical emergency because Plaintiff had been exposed to the "deadly gas." Absent allegations that Officers Rodriguez and Jean-Pierre had subjective knowledge of a risk of serious harm to Plaintiff, Plaintiff can state no plausible claim for deliberate indifference.

Because Plaintiff has failed to state a claim for violation of the Eighth Amendment against Officers Rodriguez and Jean-Pierre, he can state no claim for supervisory liability against Captain Martin. See Beshers v. Harrison, 495 F.3d 1260, 1264 n.7 (11th Cir. 2007) (declining to address a claim for supervisory liability when plaintiff had proved no underlying constitutional violation).

AFFIRMED.