Case No.: 19-12542-EE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

YOUSRY RIZK,

Plaintiff-Appellant,

vs.

SEMINOLE COUNTY SHERIFF,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida, Orlando Division
Case No.: 6:18-cv-1414-Orl-40GJK

BRIEF OF DEFENDANT-APPELLEE SHERIFF DENNIS LEMMA

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Case No.: 19-12542-EE

Yousry Rizk v. Seminole County Sheriff

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Bateman, Lauren – Counsel for Plaintiff-Appellant

Byron, Paul G. – U.S. District Judge in the case below

DeBevoise & Poulton, P.A. – Counsel for Defendant-Appellee

Florida Sheriffs Risk Management Fund – Liability Coverage for Defendant-Appellee

Hashimoto, Erica – Counsel for Plaintiff-Appellant

Holland, Abby – Student Counsel for Plaintiff-Appellant

Kelly, Gregory J. – U.S. Magistrate Judge in the case below

Lemma, Dennis M., Seminole County Sheriff – Defendant-Appellee

Marcin, Joshua – Counsel for Plaintiff-Appellant

Murphy, Daniel – Student Counsel for Plaintiff-Appellant

Rizk, Yousry – *Pro Se* Plaintiff-Appellant

Tueche, Erin M. – Lead Counsel for Defendant-Appellee

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-5, Defendant/Appellee Seminole County Sheriff Dennis M. Lemma has no corporations to disclose.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Sheriff Dennis Lemma does not request oral argument.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

Appellee Sheriff agrees that this Court has jurisdiction over an appeal from a final decision of the United States Middle District of Florida, Orlando Division, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in dismissing Appellant's claims against Sheriff with prejudice.

II. Whether the District Court erred in construing Appellant's claims under *Monell* as Appellant deliberately pled them.

STATEMENT OF THE CASE

I. Course of Proceedings and Dispositions in the Court Below.

On August 28, 2018, Appellant Yousry Rizk filed his Complaint with the United States District Court, Middle District of Florida. (Complaint, Doc. 1.) Appellant sued Sheriff Lemma for what amounted to 42 U.S.C. § 1983 claims for excessive force and deliberate indifference to serious medical needs, under the Fourteenth Amendment.[1]

Appellee Sheriff filed a Motion to Dismiss the Complaint on September 27, 2018, asserting that Appellant had not sufficiently pled claims for liability under *Monell*. (Motion to Dismiss Complaint, Doc. 9.) Appellant filed a response in opposition on October 2, 2018. (Response to Motion to Dismiss Complaint, Doc. 11.) Appellee Sheriff's Motion to Dismiss was granted without prejudice, and

[1] Appellant listed his claims in the original Complaint as claims for "claim for cruelty," "claim for excessive use of force," "claim for broken ribs," and "claim for delay or deny medical care, and indicated that they were made under the Eighth and Fourteenth Amendments. (Complaint, Doc. 1 at pp. 4, 8.) However, in the interest of liberal interpretation of *pro se* pleadings, Appellee Sheriff treats Appellant's claims as claims for excessive force and deliberate indifference to serious medical needs, and made under the Fourteenth Amendment. *See Martinez v. Orlando*, 2009 WL 30484868 *5 (M.D. Fla. 2009) (Explaining that *pro se* pleadings are afforded "liberal interpretation," but are still required meet applicable pleading standards) and *Spaulding v. Poitier*, 548 Fed.Appx. 587 (11th Cir. 2013) (Claims of the type made by Appellant in this case are properly brought under the Fourteenth Amendment). *See also Patel v. Lanier County Georgia*, 969 F.3d 1173, 1181-1182 (11th Cir. 2020) (citing *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)) (Since *Kingsley*, the Fourteenth Amendment standard for excessive force claims resembles the Fourth Amendment standards, as it is an objective reasonableness inquiry).

Appellant was allowed to file an Amended Complaint, which he did, on February 6, 2019. (*See* Report and Recommendation, and Order adopting same and Granting Motion to Dismiss, Docs. 34, 40; and *see* Amended Complaint, Doc. 42.) Among the grounds for dismissal of the original Complaint were that "Plaintiff fail[ed] to allege a policy or custom that caused his injuries."[2] (Report and Recommendation, Doc. 34, at p. 4.) Appellant's Amended Complaint again explicitly submitted all claims against Appellee Sheriff as *Monell* claims, with allegations including, "Excessive use of force when they follow the rule to use force and the rule in Sheriff regulation; and "under permission to use force, they can use force. Under the custom…it is the custom jail to show power []." (Amended Complaint, Doc. 42 at 4, 5.)

Appellee Sheriff filed a Motion to Dismiss Appellant's Amended Complaint on February 19, 2019, arguing that Appellant's *Monell* claims in the Amended Complaint suffered the same defects as in the original Complaint. (Motion to Dismiss, Doc. 44.) Appellant responded in opposition to this Motion, as well. (Plaintiff's Response/Motion to Deny Motion to Dismiss, Doc. 45.) Appellee

[2] Appellant's Complaint was also dismissed at that time because he did not name a defendant with legal capacity to be sued. This is because Appellant sued the Seminole County Sheriff Department, which he corrected in his Amended Complaint, where he named as a Defendant the Seminole County Sheriff in his official capacity. (Report and Recommendation, Doc. 34, at p. 4; Amended Complaint, Doc. 42.)

Sheriff's Motion to Dismiss the Amended Complaint was granted without prejudice, and Appellant was granted leave to file a Second Amended Complaint. (*See* Report and Recommendation, and Order adopting same and Granting Motion to Dismiss, Docs. 52, 61.) The Court noted that "Plaintiff again fails to allege a policy or custom that caused his injuries." (Report and Recommendation, Doc. 52, at p. 3.)

Before the Report and Recommendation had been adopted, Appellant filed an objection, again stressing his intent to sue the Sheriff under *Monell* instead of suing any individuals, referencing "The rule of using force in the book," attaching the Sheriff's Office General Order on Response to Resistance, and indicating that "If the sheriff has discipline the corrections officers [,] I may not file the case or file case in other state court." (Objection, Doc. 58 at 1, 2.)

Appellant filed his Second Amended Complaint on April 15, 2019. (Second Amended Complaint, Doc. 65.)[3] Again, Appellant expressed his intent to sue the official-capacity Sheriff under *Monell* in the Second Amended Complaint, stating

[3] Meanwhile, Appellant had been engaging in conduct such as refusing to sit for deposition and filing various pleadings and repeatedly disparaging counsel with the Court. (See Motion for Sanctions, Plaintiff's Response, and Order on same, Docs. 47, 53, 98; see Plaintiff's Motion to Deny Defendant Expert Rule 26, Motion for Sanctions, and Defendant's Response in Opposition to Motion to Deny Defendant's Expert Rule 26, and Defendant's Motion to Dismiss and exhibits, Docs. 59, 66, 67-2, 71-1, 74.) Appellant was ordered twice in district court, once in a *sua sponte* order, to cease this conduct. (Docs. 74, 98.) However, Appellant has continued the pattern before this Court. (See Appellant's Initial Brief, 07-29-2019 at pp. 10-11, 13; Public Communication: Letter from Pro Se Appellant, 08-09-2019; and Motion to Strike said Public Communication, 08-15-2019.)

"…new information and documents to prove that Monel [sic] liability prove that a rule and regulation is the force for the deprivation," and "…Correction offices [sic] had to used (SCSO) procedure. This is an indiction [sic] that there is regulatin [sic]. And that procedure is permission to use the force." (*Id*. at 7.) Appellant even attached the Sheriff's Office General Order on Response to Resistance, citing it as the policy under which alleged should impose *Monell* liability. (*Id*. at 65.)

Appellee Sheriff filed a Motion to Dismiss Appellant's Second Amended Complaint, this time asking for dismissal with prejudice. (Motion to Dismiss, Doc. 72.) Appellant responded with a Motion to Deny Defendant's Motion to Dismiss. (Doc. 75.) Like all iterations of his Complaint, it contained factual allegations related to the actions of individuals on the Jail staff related to the incident and the investigation of his complaint regarding the incident. (*Id*.) There were conclusory allegations of a cover-up, lack of training, and a policy or custom at the Jail, but no factual support for these allegations. (*Id*.)

While the Motion to Dismiss the Second Amended Complaint was pending and with the dispositive motions deadline looming, Appellee Sheriff also filed a Motion for Summary Judgment. (Motion for Summary Judgment and supporting documents, Docs. 83, 83-1, 83-2, 83-3, 83-4, 83-5, 83-6, 84, 85, 86, 87, 88, 89, 90, 95.) The Motion for Summary Judgment did not receive a substantive ruling, because Appellee Sheriff's Motion to Dismiss with Prejudice was granted. (Report

and Recommendation granting Defendant's Motion to Dismiss, and Order adopting same, Docs. 97, 109.) The district court noted, "Plaintiff has failed for the third time to allege a policy or custom that caused his injuries." (Report and Recommendation regarding Motion to Dismiss and Order adopting same, (Doc. 97 at p. 3, Doc. 109.)

II. Statement of the Facts.

As this is an appeal of an Order of Dismissal under Federal Rule of Civil Procedure 12(b)(6), the discussion of facts is concerned only with those alleged in the operative Complaint, and their failure to meet applicable pleading standards. *See Adinolfe v. United Technologies Group*, 768 F.3d 1161, 1164 (11th Cir. 2014). Appellate review of a district court order dismissing a complaint for failure to state a claim upon which relief could be granted "accept[s] the allegations in the complaint as true and construe[es] them in the light most favorable to the plaintiff." *Financial Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282 (11th Cir. 2007). Though Appellee Sheriff disputes these facts, these are the material factual allegations that were taken as true by the district court in dismissing Appellant's Fourteenth Amendment *Monell* claims against Appellee Sheriff for failure to state a claim upon which relief could be granted.

Appellant's allegations are taken from the original Complaint, and from the

Second Amended Complaint,[4] and are as follows. Appellant alleges that he was a 70-year-old man with kidney and stomach problems, hypertension, and gout. (Complaint, Doc. 1, at 5; Second Amended Complaint, Doc. 65, at 8.) Appellant states that he was escorted to the Seminole County jail by a police officer named "Macintash" who improperly arrested him, and discussed Appellant with the Jail staff, who then developed a dislike of Appellant; perhaps because he is white, and perhaps because of what Macintash said to them. (Second Amended Complaint, Doc. 65, at 26.) According to Appellant, they decided to torture and assault Appellant. (Complaint, Doc. 1, at 4; Second Amended Complaint, Doc. 65, at 27.)

Appellant states that several deputies took him to an isolation room with no video. (Complaint, Doc. 1, at 4; Second Amended Complaint, Doc. 65, at 8.) In a departure from "normal routine," they asked Appellant to change his clothes in a private room, he alleges. (Complaint, Doc. 1, at 4, 5.) Appellant then claims that Dep. Pugh, a 400 pound deputy, threw him on the floor, placed his legs on Appellant's ribs and broke them, squeezed Appellant's bladder and forced him to urinate, and affected Appellant's kidney and a tendon in his right arm. (Complaint, Doc. 1, at 4-5.) Appellant also alleged that he suffered hyperkalemia and rhabdomyolysis from this. (Complaint, Doc. 1, at 5, 11.)

[4] The factual allegations in the Second Amended Complaint are severely disjointed and nearly impossible to follow; and Appellant refers to the original Complaint several times in the Second Amended Complaint.

Appellant alleges that they left him on the floor, locked the door, and laughed. (Complaint, Doc. 1, at 5.) Appellant was left in the room alone for hours, and he requested to go to the hospital, but was denied, he states. (Complaint, Doc. 1, at 5; Second Amended Complaint, Doc. 65, at 9.) Appellant claims that he spoke to an unqualified nurse at the Jail, who ignored his complaints of severe pain. (Complaint, Doc. 1, at 7.) After leaving the Jail, Appellant went to the hospital, he states. (Complaint, Doc. 1, at 5; Second Amended Complaint, Doc. 65, at 9.) Appellant alleges that he called the Sheriff's Office to discuss the incident, his statement was taken, and the Sheriff's Office personnel he spoke with engaged in a cover up of the incident. (Complaint, Doc. 1, at 6, 7, 9; Second Amended Complaint, Doc. 65, at 27-28.) Appellant claims that deputies made up a story to cover up the incident as well, and that the nurse prepared documentation to cover up the incident. (*Id*.)

In the various iterations of his complaints, Appellant has made vague and conclusory allegations about policies, customs, cover-ups, and failure to train, but they contain no factual specifics, and no factual support. Appellant did not in his Complaints, and does not on appeal, point to any specific policies or training deficiencies, or to any incidents similar to his that indicate a pattern of conduct causing the violation of his Constitutional rights.

III. Statement of the Standard or Scope of Review For Each Contention.

"This Court reviews *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Marantes v. Miami-Dade County*, 649 Fed.Appx. 665, 669 (11th Cir. 2016) (citing *Edwards v. Prime Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010)). With regard to this, "[a]lthough a plaintiff's complaint need not provide detailed factual allegations, the basis for relief in the complaint must state "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The complaint must introduce facts that plausibly establish each essential element of the asserted cause of action." *Id.* (citing *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 713 (11th Cir. 2014)).

"And while we liberally construe pro se pleadings, this leniency does not give courts license to serve as de facto counsel or permit them to rewrite an otherwise deficient pleading." *Gurrera v. Palm Beach County Sheriff's Office*, 657 Fed.Appx. 886, 888-889 (11th Cir. 2016) (citing *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014)).

When it comes to arguments related to amendment of Appellant's complaint to add parties, these issues should not be reviewed on appeal at all, as they were not raised in the district court. "[A]n issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Novero v. Duke*

Energy, 753 Fed.Appx. 759, 767 n. 2 (11th Cir. 2018) (quoting *Access Now, Inc*. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004). In the event that refusal to grant leave to amend is considered on appeal it is reviewed for abuse of discretion, while futility of amendment is reviewed *de novo*. *SFM Holdings, Ltd. v. Banc of America Securities, LLC*, 600 F.3d 1334 (11th Cir. 2010).

SUMMARY OF THE ARGUMENT

Appellant's claims for excessive force and for deliberate indifference to serious medical needs were properly dismissed with prejudice by the district court. As required to state a claim against a municipal defendant, Appellant alleged no specific policy or custom of excessive force or of deliberate indifference to his serious medical needs at the Sheriff's Office. Appellant also did not provide any factual support for his allegations that his Fourteenth Amendment rights were violated through the use of excessive force and deliberate indifference to serious medical needs through a failure to investigate or to train, or a policy or custom to "cover-up" such practices.

The district court properly dismissed Appellant's claims with prejudice. Appellant was given three chances to state *Monell* claims against Appellee Sheriff and each version of the Complaint suffered the same deficiencies. Furthermore, the district court did not err in construing Appellant's claims under *Monell*, as they were brought by Appellant as *Monell* claims.

On appeal, Appellant argues that the district court should have a) construed Appellant's complaints as bringing individual capacity claims against individual deputies or nurses, or b) should have directed or suggested to Appellant that he do so. But, it is not the role of the district court to construe a complaint to include defendants who are not so identified by the Appellant as defendants. Moreover, it

is not the role of the district court to suggest, or direct, Appellant on who he *ought* to sue. Here, Appellant repeatedly stated he was bringing his claims as *Monell* claims. There is no reason to pretend or fabricate that the claim was anything other than what it was, and dismissal was appropriate.

ARGUMENT AND CITATIONS OF AUTHORITY

Appellant argues on appeal that the district court erred in dismissing his *Monell* claims because he stated well-pleaded claims under *Monell*. Appellant argues on appeal that he sufficiently pleaded a policy or custom that caused a constitutional violation, based on theories of failure to supervise, failure to train, failure to investigate/discipline, and cover-up.

I. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S *MONELL* CLAIM FOR EXCESSIVE FORCE AGAINST SHERIFF.

Appellant's Second Amended Complaint in this case was correctly dismissed with prejudice because he repeatedly failed to allege that a policy or custom of the Sheriff caused him to suffer a violation of his constitutional rights. (*See* Report and Recommendation, Doc. 97 at 3, and Order, Doc. 109.) "To survive a Rule 12(b)(6) motion to dismiss, a complaint must plead enough facts to state a claim to relief that is plausible on its face. 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." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016) (quoting *Twombly*, 550 U.S. at 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation and quotations omitted)).

A. Basic *Monell* Liability: Dismissal was Proper for Failure to Allege Policy or Custom.

Even taken as true for purposes of dismissal under 12(b)(6), the facts alleged in Appellant's Second Amended Complaint, as well as earlier versions of his Complaint, do not plead any facts supporting *Monell* liability. "In *Monell*, the Supreme Court held that a local-government entity cannot be held liable under § 1983 using a respondeat superior theory for injuries caused solely by its employees. Instead, to impose municipal liability under § 1983, a plaintiff must allege facts showing: (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." *Gurrera*, 657 Fed.Appx. at 892-893 (11th Cir. 2016) (citing *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Further, "[t]he custom or policy must be the moving force behind the constitutional deprivation for a court to find sufficient causation. *Id.* At 893.

If liability is based on practice or custom rather than official policy, then the offending practice "must be so widespread as to have the force of law." *Id.* (quoting *Bd. of Cty. Comm'rs of Bryan Cty, Ok. v. Brown*, 520 U.S. 397, 404 (1997)). "A pattern of similar constitutional violations is ordinarily necessary, because a single violation is not so pervasive as to amount to a custom." *Id.* (internal punctuation and citations omitted). Further, in order to survive a 12(b)(6) challenge, a *Monell* claim

a plaintiff must plead specific facts to support a claim that there is a policy, custom or widespread practice that caused the Constitutional violations he claims occurred – conclusory comments with no supporting facts do not suffice, nor do allegations of a single incident. *See Grider v. Cook*, 590 Fed.Appx. 876, 882 (11th Cir. 2014) (Affirming dismissal of *pro se* Plaintiff's *Monell* claim because he "failed to plead sufficient facts of a custom or policy to state § 1983 claims against the municipal defendants," in that "[his] allegations are all conclusory and lack any specific facts" about policies or widespread practices.)

Here, in his operative Complaint and in this appeal, Appellant alleged that excessive force was inflicted on him by a deputy at the Seminole County Jail in violation of the Fourteenth Amendment. As explained above, Appellant made several factual allegations related to the use of force on him, as well as vague accusations as to the character of the deputy involved, and the character of the Sheriff's Office.

The only targeted allegation related to policy, custom, or widespread practice in Appellant's operative Complaint was a conclusory allegation that there is a Sheriff's Office procedure that allows the use of force. (Second Amended Complaint, Doc. 65 at 7.) Appellant actually incorporated and referred to that policy in his Second Amended Complaint. (*Id*. At 7, 35.) In fact, the policy highlighted by

Appellant shows that the Sheriff's Office official policy allows only for the *reasonable* use of force, as stated under Section II, "SCOPE," where it reads:

> Only that degree of force reasonably necessary to accomplish lawful objectives, and not to use force against any person…except when necessary, is authorized for purposes of self-defense, in defense of another, to overcome physical resistance to arrest, to prevent the escape of an arrested person, or to restore order in the correctional facility.

Appellant made no factual allegations to support a claim that there was a custom or widespread practice of the use of excessive force at the Sheriff's Office. Appellant alleged only that excessive force was inflicted on him during one incident on January 19. 2018, and provides nothing further in his Opening Brief with this Court either, as to allegations of other incidents or actual indications of widespread practice.

In Appellant's brief, he refers again to his conclusory allegation that "the Sheriff persistently failed to supervise, discipline, and adequately train deputies who committed the types of constitutional violations Mr. Rizk experienced." (Appellant's Opening Brief at 45.) Appellant follows this by referring to the conclusion that "Deputies operating in this 'environment' knew they could get away with violating detainees' rights." (Id. at 45.) Conclusory allegations without supporting facts will not suffice to state a claim for *Monell* liability. *See Frone v. City of Riverdale*, 521 Fed.Appx. 789, 791 (11th Cir. 2013) (affirming district court's dismissal of claim against municipal defendant under Rule 12(b)(6) for failure to state a claim upon

which relief may be granted, stating the plaintiff did not adequately state a claim "[] because he has not alleged any facts that would implicate a city custom or policy responsible for his injury.")

A single incident is rarely a valid basis for a claim of *Monell* liability based on a policy, custom, or widespread practice. *See Gurrera*, 657 Fed.Appx. 886, 893 (11th Cir. 2016) (affirming dismissal of *Monell* claims against Palm Beach County Sheriff when plaintiff's allegations did not support his conclusory assertions related to patterns of conduct leading to constitutional violation or ratification of misconduct, stating "Setting aside these conclusory allegations, Appellant fails to identify any examples beyond his own arrest of widespread unconstitutional conduct.")

Appellant did not in this appeal, nor did he in any version of his Complaint, plead any facts supporting an allegation that there was a policy or custom of using excessive force at the Sheriff's Office, nor that there were widespread incidents of excessive force. Appellant seeks to place liability on Appellee Sheriff for his single incident of alleged excessive force, along with conclusory allegations of policy or custom with no supporting facts. This is akin to respondeat superior liability, which *Monell* expressly disavows. The district court did not err, and properly dismissed Appellant's *Monell* claim for excessive force. Appellant has provided no adequate grounds for reversal of this ruling on appeal.

B. Failure to Allege Policy or Custom Under Failure to Investigate Theory.

Appellant also attempted to assess liability on Appellee Sheriff based on a claim of "cover up," or lack of satisfactory investigation, and argues on appeal that the district court did not look at this. (Doc. 65 at 7-9; and *see* Appellant's Opening Brief at 33.) Again, Appellant's single incident of alleged lack of investigation and claim of cover up in his operative Complaint and in this appeal do not meet the *Monell* standard.

Citing to just the one alleged occurrence involving Appellant does nothing to show a policy, custom, or widespread practice at the Sheriff's Office of refusing to investigate, or covering up excessive force incidents. Nor does Appellant's characterization of the alleged failure to investigate as a show of power. (Appellant's Opening Brief at 46.) In fact, Appellant makes lengthy arguments as to the investigation of the incident involving Appellant in his Opening Brief, alleging that it was investigated; Appellant just does not agree with the result of the investigation. The district court was correct in dismissing this claim. *See Marantes*, 649 Fed.Appx. 665 (11th Cir. 2016).

In *Marantes*, this Court affirmed the district court's dismissal of a *Monell* claim based on the theory "the Miami–Dade County Police Department's internal affairs process is ineffective, which in turn sends an implicit message to police officers that they can abuse civilians without punishment." *Id.* At 673. The plaintiff

in *Marantes* "pointed to only one incident, however, to show that the internal affairs process was ineffectual by custom—his own experience," and only two alleged excessive force incidents. *Id.* In affirming dismissal of the *Monell* claim, this Court agreed that "[t]hese allegations do not show that the County had a longstanding and widespread practice" of encouraging excessive force… Nor do they show that the alleged custom was the moving force behind [the alleged excessive force incident]." *Id.* (internal citation and punctuation omitted).

This Court rejected a theory of liability based on an alleged single incident of cover-up as well in *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1328 (11th Cir. 2015). In affirming dismissal of *Monell* claim based on an excessive force cover-up theory of liability, this Court stated, "[T]he complaint does not plausibly allege that the Sheriff's Office has had a policy of using internal affairs investigations to cover up the use of excessive force against the mentally ill. The only facts that it alleges in support of that claim are about [the involved deputies'] own conduct after the shooting coupled with the naked assertion that the internal affairs investigation into the administrative complaint that [plaintiff] filed sought only to uncover misconduct on the part of [plaintiff] and his father." *Id.* At 1329-1330 (internal punctuation omitted). "A complaint does not suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* At 1330.

Appellant has not alleged facts involving a widespread practice of failure to investigate or cover-up, or even any incidents of cover-up other than the single incident he alleges involving him in January 2018. Appellant's *Monell* claim for excessive force was correctly dismissed, and Appellant provides no grounds here for this Court to reverse that ruling on appeal based on a failure to investigate, discipline, or "cover up."

C. Failure to Allege Policy or Custom Under Ratification Theory.

Appellant also insinuates that there is liability under a single-incident ratification theory, because the use of force incident was investigated by personnel at the Sheriff's Office and was not found to be improper. (Complaint, Doc. 1, at 6, 7, 9, Second Amended Complaint, Doc. 65 at 8, Appellant's Initial Brief at 38.) Based on this, Appellant also argues that the Sheriff condoned this use of force and therefore is liable in his official capacity under *Monell*.

"When plaintiffs are relying not on a pattern of unconstitutional conduct, but on a single incident, they must demonstrate that local government policymakers had an opportunity to review the subordinate's decision and agreed with both the decision and the decision's basis before a court can hold the government liable on a ratification theory." *Salvato v. Miley*, 790 F.3d 1286, 1296 (11th Cir. 2015). Importantly, "a local government may be held liable for a constitutional tort when

policymakers have had the opportunity to review subordinates' decisions *before* they become final." *Id.* (emphasis in original).

Appellant does not allege in the operative Complaint or in this appeal that Appellee Sheriff or a final policymaker investigated or approved the use of force, much less approved the force before it occurred. In *Salvato*, this Court explained that in order to impose *Monell* liability based on ratification of a single incident, "[t]he sheriff must cause the constitutional violation; that is, he must "officially sanction or order the action." 790 F.3d at 1296 (11th Cir. 2015) (internal punctuation omitted) (further explaining that the sheriff did not cause the violation, because sheriff "did not order" the force). Appellant certainly has not alleged in this case that Sheriff Lemma ordered force to be used on him, so this theory does not apply, given Appellant's allegations.

Appellant argues that there was an approval of the use of force by a final policymaker because Chief Bedard of the Sheriff's Office approved the force. Appellant bases this assertion on a Sheriff's Office policy that states that when there is "disagreement" among the chain of command, the Major and/or Chief Deputy "shall make a final determination" as to the deputy's actions. This argument is also inapplicable because there is no allegation or indication anywhere that there was a disagreement among the chain of command as to the use of force. There is also no allegation that Chief Bedard's findings related to the incident here were not subject

to review by the final policymaker. *See Maschmeier v. Scott*, 269 Fed. Appx. 941, 943 (11th Cir. 2008) (citing *Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir. 1997)). ("A municipal official is not a final policymaker when his or her decisions are subject to meaningful administrative review. Automatic review of the official's decisions is not required for the review to be meaningful; an opportunity for meaningful review is sufficient.") (internal citation omitted).

Still Appellant cites *Salvato* for the proposition that "what happens after an incident can shed some light on what policies existed when the constitutional deprivation occurred." (Appellant's Opening Brief at 47) (quoting *Salvato*, 790 F.3d at 1297 (11th Cir. 2015). Appellant urges that as a result of the investigation that reached the conclusion that no wrongful force occurred, the Sheriff "condoned what happened to him." (Appellant's Opening Brief at 47.) However, *Salvato* goes on to state, "But the inferences to be made from these post-event facts merely lend weight to a finding that there was a policy behind the actions which led to the constitutional violation. Again, no party contests that a persistent failure to take disciplinary action against officers can give rise to the inference that a municipality has ratified conduct. But an isolated incident is, by definition, not a persistent failure." *Id.* at 1296 (internal citations and punctuation omitted).

Appellant has not successfully alleged *Monell* liability under a ratification theory, and provides no grounds for reversal of the district court's dismissal.

D. Failure to Allege Policy or Custom under Failure to Train or Supervise Theory.

"In limited circumstances, a local government's decision not to train certain employees to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Weiland*, 792 F.3d at 1328 (11th Cir. 2015) (internal punctuation omitted). "But a pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* (internal punctuation omitted). "Without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise." *Derossett v. Ivey*, 2020 WL 4547780 (M.D. Fla. 2020) (quoting *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998)). Evidence of previous incidents is not required to establish city policy if the need to train and supervise in a particular area is so obvious that liability attaches for a single incident. *Weiland.* 792 F.3d at 1329.

In this case, Appellant argues on appeal that he pled a *Monell* claim based on "fail[ure] to train staff on conflict de-escalation or on the constitutional limits of using physical force against an arrestee." (Appellant's Opening Brief at 49.) In his operative Complaint, Appellant made only vague and general allegations, such as "poor training is another reason for Seminole county to be liable." And "they should have a training to deal with the issue objectively rather subjectively," and allegations that deputies should be trained that bodies are delicate, and to evaluate issues "based

in fact and regardless of the race or irresponsible comments from [his arresting officer].” (Doc. 65 at 9-10.) Appellant made no allegations that there has been a pattern of similar constitutional violations by Sheriff’s Office employees, because of a failure to train. Likewise, Appellant did not allege facts to indicate that he suffered constitutional violations caused by a failure to train that is “so obvious that liability attaches for a single incident.”

Factual support is required in order to plead *Monell* liability under a failure to train theory. *See Weiland,* 792 F.3d at 1329 (11th Cir. 2015) (Eleventh Circuit upheld district court’s dismissal of *Monell* claim failure to train in the proper use of force when plaintiff made only the “conclusory allegation that the Sheriff's Office was ‘on notice’ of the need to ‘promulgate, implement, and/or oversee’ policies pertaining to the ‘use of force’ appropriate for ‘the seizure of mentally ill persons and their transportation to mental health facilities,’ but “no facts [were] alleged to support that conclusion.”) *See* also *Id.* (Eleventh Circuit also rejecting liability based on failure to train regarding use of force on the “so obvious” theory, when [t]he complaint [did] not allege that the need for specialized training in the constitutional restrictions on the use of force when dealing with mentally ill citizens is ‘so obvious’ that the failure to provide such training amounts to deliberate indifference.”)

Appellant relies on *Thomas v. Cumberland County*, 749 F.3d 217, a case out of the Third Circuit in 2017, and on *Grandstaff v. City of Borger*, 767 F.2d 161 out

of the Fifth Circuit in 1985, to support his argument that his conclusory allegations regarding training were sufficient. In *Thomas*, the plaintiff had supplied evidence of incidents similar to the one he alleged. In *Grandstaff*, a jury trial had occurred where evidence had been submitted of repeated incidents of police misconduct. Nothing of the sort is submitted or alleged here.

Appellant has provided no factual basis for this Court to find that Appellee Sheriff was on notice that there was an inadequacy in training that caused deputies to engage in violations similar to the violation Appellant claims here, or that there was a specific need for training that was so obvious that Appellee Sheriff should have known. Again, the district court was correct in dismissing Appellant's excessive force claim and Appellant does not show that it should be reversed based on a failure to train theory.

Appellant has not provided any sufficient grounds for this Court to reverse the district court's ruling that Appellant did not state a *Monell* claim for excessive force against Appellee Sheriff. Dismissal of this claim should stand.

II. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S *MONELL* CLAIM FOR DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS AGAINST SHERIFF.

A. Basic *Monell* Liability: Dismissal was Proper for Failure to Allege Policy or Custom.

"To … prevail on a claim of deliberate indifference to a serious medical need, [Plaintiff] must show (1) a serious medical need, (2) the Defendants' deliberate

indifference to that need, and (3) causation between that indifference and [Plaintiff's] injury." *Denham v. Corizon Health Inc.*, 675 Fed.Appx. 935, 940 (11th Cir. 2017) (citing *Craig v. Floyd Cty*., 643 F.3d 1306, 1310 (11th Cir. 2011). When the claim is brought against an official-capacity Defendant under *Monell*, as it is here, the plaintiff must also show "[]that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right," and "that the policy or custom caused the violation." *Id*.

"Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Stepanovich v. City of Naples*, 728 Fed.Appx. 891, 897 (11th Cir. 2018) (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)). "In other words, a municipality must have actual or constructive notice that its policy was likely to result in a constitutional deprivation like the one alleged by the plaintiff." *Id.* (quoting *Connick*, 563 U.S. at 61 (2011)). "To demonstrate the notice required for deliberate indifference, a pattern of similar constitutional violations is ordinarily necessary." *Id*. (quoting *Connick*, 563 U.S. at 62 (2011) (internal punctuation omitted)). "A pattern like this establishes the municipality's culpability because the "continued adherence to an approach that it knows or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences

of its action—the 'deliberate indifference'—necessary to trigger municipal liability." *Id.* At 897-898 (quoting *Brown*, 520 U.S. at 407 (1997)).

Here, the district court did not make a determination of whether Appellant's Constitutional rights were violated as a result of deliberate indifference to serious medical needs. Appellant's *Monell* claim for deliberate indifference to serious medical needs against Appellee Sheriff was dismissed because he failed to allege any basis for *Monell* liability with supporting facts. As stated above, "A complaint does not suffice if it tenders naked assertions devoid of further factual enhancement." *Weiland,* 792 F.3d at 1330 (11th Cir. 2015). Conclusory allegations without supporting facts will not suffice to state a claim for *Monell* liability. *See Frone*, 521 Fed.Appx. at 791 (11th Cir. 2013).

Appellant makes no factual allegations to support his claim that the Sheriff is liable for deliberate indifference to his serious medical needs occurring at the Seminole County Jail. Appellant's allegations in the operative Complaint are generally that he was refused medical care by a nurse (Doc. 65 at 4, 27.) Plaintiff has not alleged any facts to support a claim that the Sheriff's Office had a policy of deliberate indifference to serious medical needs, which caused Appellant to suffer an unconstitutional deliberate indifference to his serious medical needs. Appellant has likewise not alleged that the Sheriff had "actual or constructive notice that its

policy was likely to result in a constitutional deprivation like the one alleged by the plaintiff."

On appeal, the only argument Appellant advances in regards to *Monell* liability for deliberate indifference to serious medical needs is that he has claimed that his medical requests were denied in an effort to cover up the use of force incident. (Appellant's Opening Brief at 46, 49.). This allegation does not state a claim for *Monell* liability. In *Marantes*, 649 Fed.Appx. 665 (11th Cir. 2016), the plaintiff unsuccessfully made similar allegations that an alleged cover-up provided a basis for *Monell* liability. The plaintiff in *Marantes* claimed that excessive force was used on him. The plaintiff went on to claim that officers, as well as the police department, "acted to cover-up their wrongdoing" because one officer erased a cell phone video of the incident, and because the agency's internal investigation process was biased in the officers' favor. *Id.* at 667-668. This Court found that "[t]hese allegations do not show that the County had a longstanding and widespread practice" of encouraging excessive force. Nor do they show that the alleged custom was the moving force behind [the force incident]."

Likewise here, Appellant does not sufficiently plead a *Monell* claim. Appellant must plead that a policy or pattern of deliberate indifference to serious medical needs, which caused his serious medical needs to be met with deliberate indifference. Appellant's allegation that his medical needs were disregarded in a

one-time cover-up effort does not accomplish this. Dismissal of this claim should be upheld.

B. Failure to Allege Policy or Custom Under Failure to Investigate Theory.

For the same reason Appellant's excessive force claim fails based on a theory of failure to investigate or a cover-up of wrongdoing, Appellant's claim for deliberate indifference to serious medical needs under this theory must also fail.

Appellant makes nothing but bald accusations that a cover-up occurred, on the part of the nurse that treated him after the use of force. There is no allegation of a pattern of similar incidents, or of a policy of the Sheriff's Office directing staff to cover up injuries and treat inmates' medical ailments with deliberate indifference. There is no factual support for a claim, nor is there even an allegation that Appellee Sheriff participated in or was aware of any type of widespread medical cover-up scheme, or even that he was aware of the alleged cover-up involving Appellant's treatment. *See Denham*, 675 Fed.Appx. at 941 (11th Cir. 2017) (Affirming summary judgment for defendant on claim for deliberate indifference to serious medical needs, when the plaintiff argued that [the municipality] had a custom of falsifying records to cover up the officer's failure to perform watches every fifteen minutes as required, but she fail[ed] to establish that any policymaker at [the municipality] knew about this practice.").

As in *Denham*, Appellant makes nothing but conclusory allegations and provides no supporting facts to establish *Monell* liability based on failure to investigate or cover-up. Appellant does not provide grounds to reverse dismissal of his deliberate indifference to serious medical needs claim based on this ground.

C. Failure to Allege Policy or Custom under Failure to Train Theory.

Analyzed under the standards cited above *Supra* at p. 20-21, Appellant's claim for deliberate indifference to serious medical needs under a failure to train theory also fails. Appellant does not allege anywhere that there was a pattern of violations by untrained employees similar to the violation Appellant allegedly suffered here. Appellant makes no allegation of specific training that was obviously needed at the Sheriff's Office or that the absence of specific training caused his Constitutional rights to be violated. Appellant does not allege facts demonstrating that a policy or custom of failure to train caused his rights to be violated. Appellant's claim for deliberate indifference to serious medical needs was properly dismissed, and Appellant does not show grounds for reversal on appeal.

III. DISMISSAL OF THE SECOND AMENDED COMPLAINT WITH PREJUDICE WAS APPROPRIATE.

As explained by the district court, Appellant was provided two chances to amend his complaint to make cognizable claims, and he failed to do so. His subsequent complaints continued to suffer the same defects as his original complaint.

(Doc. 97 at 3, Doc. 109.) The district court properly dismissed Appellant's Second Amended Complaint with prejudice.

"[A]lthough we are to give liberal construction to the pleadings of pro se litigants, we nevertheless have required them to conform to procedural rules. *Albra v. Advan, Inc.*, 490 F.3d 825, 829 (11th Cir. 2007) (quoting *Loren v. Sasser*, 309 F.3d 1296, 1304 (11th Cir. 2002) (internal quotations omitted)). Appellant was given three chances to file a pleading that contained sufficient allegations to state the claims he sought to state against Appellee Sheriff, and he failed to do so. It was appropriate for the district court to dismiss Appellant's claims against the Sheriff with prejudice. *See Anderson v. Vanguard Car Rental USA, Inc.*, 304 Fed.Appx. 830 (11th Cir. 2008) (Upholding district court's dismissal with prejudice of third amended complaint when *pro se* plaintiff "had two opportunities to amend his complaint but failed to cure its deficiencies each time," and also commenting that under the facts alleged, amendment would be futile to state a claim.) *See* also *Frone*, 521 Fed.Appx. at 792 (11th Cir. 2013) (Upholding a district court's dismissal of a *pro se* plaintiff's *Monell* claims and denial of leave to amend his complaint even once, stating amendment would be futile, and plaintiff has not shown how he would amend his complaint to properly state a claim).

Here, Appellant was given two chances to amend his complaint to state a claim, but he continued to repeat his same allegations and plead with the same

deficiencies each time. The district court correctly dismissed Appellant's Second Amended Complaint with prejudice, and Appellant has not provided grounds to reverse that ruling.

IV. PLAINTIFF'S CLAIMS WERE PROPERLY CONSTRUED AS *MONELL* CLAIMS.

Appellant devotes much of his Opening Brief to the argument that, even though he clearly brought only *Monell* claims in this case, the district court should have construed Plaintiff's operative complaint as having brought individual-capacity claims against numerous individuals, including Dep. Pugh, Nurse Varghese, Chief Bedard, Sheriff Lemma, unspecified "other deputies" who allegedly failed to intervene during the use of force, and anyone identified in his three Complaints. Given this assertion, Appellant argues that the district court should have allowed Appellant to amend his operative complaint to add these individuals as Defendants. This argument is without merit.

A. Issue Not Raised in District Court.

Appellant did not seek to amend his complaint to add any individual-capacity Defendants in the court below. Each time Appellee Sheriff moved to dismiss for insufficient *Monell* allegations, Appellant responded with arguments advancing a theory of *Monell* liability. (*See* Plaintiff's Response to Motion Dismiss, Doc. 11 at p. 1, "The case of monell v. department of social services and liability of municipality for my case is clearly established," "the theory of respondent [sic]

superior is not applied in my case because the correctional officer follows the guide line of Seminole county jail book. And it is the policy," "the sheriff office is liable,"; and *See* Plaintiff's Motion to Deny Defendant's Motion to Dismiss, Doc. 45 at p. 2, "the letter issued by office of professional standard indicate that no violation and deputies according to rule and regulation of sheriff office. How dare the defendant attorney say no [sic] enough evidence of Monell liability"). At no point did Appellant ask the court to allow him to amend to add additional parties, in particular, individual-capacity Defendants. Appellant sought to amend pleadings, but not to add any additional parties. (See Docs 27, 30, seeking leave to amend to add claims related to privacy, cruelty, and sexual assault.)

"This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Novero v. Duke Energy*, 753 Fed.Appx. 759, 767 n. 2 (11th Cir. 2018) (quoting *Access Now*, 385 F.3d at 1331 (11th Cir. 2004) (Declining to consider new arguments made by *pro se* litigant on appeal). Appellant did not raise the issue of amendment with the district court, and so this issue is not properly before this Court on appeal.

B. Amendment Is Not Appropriate

Even if this Court were to consider the issue of amendment, Appellant's arguments in favor of it should fail. Appellant complains that he was not given the opportunity to amend his complaint to add as Defendants "individuals identified in

the body of his complaints." (Appellant's Opening Brief at 34.) Appellant urges that this was simply an "omission of their names from the caption," and characterizes it as a procedural defect as to the title of the complaint. (*Id*. at 35.) This is a mischaracterization of the way Appellant repeatedly pled and litigated this lawsuit in the lower court.

Appellant correctly points out on appeal that when he first brought this lawsuit, he brought it against the "Seminole County Sheriff Dept.," which is not an entity with the capacity to be sued. (*Id*. at 34.) Consistent with the principles in Rule 15(a), Federal Rules of Civil Procedure cited by Appellant in his Brief, the district court granted Appellant leave to amend. (*See* Docs. 34, 40.) When Appellant amended for the first time, he correctly named the Seminole County Sheriff, and continued to pursue *Monell* liability.

There is no indication in the record that Appellant brought, or intended to bring, individual-capacity claims. That court-appointed counsel now think he should have done so is no grounds to claim that the district court should have inferred such claims or suggested them to Plaintiff. It is not a fair characterization of the sequence of events here to say that Plaintiff brought *Monell* claims only because was mistaken, or because he merely forgot to add a litany of individual defendants to the caption of his complaint. Appellant clearly listed the one intended Defendant in each version

of his Complaint and used language referencing *Monell* in all versions of his Complaint, as well.

"Although leave to amend shall be freely given when justice so requires, a motion to amend may be denied on numerous grounds such as undue delay, undue prejudice to the defendants, and futility of the amendment." *Johnson v. Georgia Department of Veterans Service*, 791 Fed. Appx. 113, 116 (11th Cir. 2019) (citing Fed. R. Civ. P. 15(a)(2)). There is no sufficient basis on which to read into Appellant's pleadings an intent to have brought individual-capacity claims against the Sheriff or any additional defendants.

In the Civil Rights Complaint Forms found on the United State District Court's Middle District's website and used by Appellant in bringing these claims, there are clear instructions when it comes to naming Defendants. Under heading I(B), "The Defendant(s)," Appellant was instructed as follows:

> Provide the information below for each defendant named in the complaint, whether the defendant is an individual, a government agency, an organization, or a corporation. For an individual defendant, include the person's job or title (if known) and check whether you are bringing this complaint against them in their individual capacity, official capacity, or both.
>
> (Docs. 1, 42, and 65; each at p. 2.)

Underneath this instruction, there are headings for "Defendant No. 1," "Defendant No. 2," and so on. (*Id.*) Under each heading, there are boxes to check for either "Individual Capacity" or "Official Capacity." (*Id.*) In the original

Complaint, Appellant filled out "Defendant No. 1," listing "Seminole County Sheriff Dept," and did not list any additional Defendants, despite the Complaint Form's invitation to do so. (Doc. 1 at 2.) In the Amended Compliant, Appellant similarly only listed one Defendant, this time correctly naming "Dennis M. Lemma," with the Title "Seminole County Sheriff." (Doc. 42 at 2.) The only change Appellant made in the third installation of his Complaint, was to check "Official Capacity," where in the previous Complaints, he declined to check either "Individual Capacity" or "Official Capacity." (*See* Docs. 1, 42, and 65, each at p. 2.)

Furthermore, after Appellant's original Complaint, each subsequent version made allegations (albeit insufficient, conclusory allegations) that were obviously intended to impose *Monell* liability. (*See* Amended Complaint, Doc. 42, "Excessive use of force when they follow the rule to use force and the rule in Sheriff regulation; and "under permission to use force, they can use force. Under the custom…it is the custom jail to show power []."; *See* Second Amended Complaint, Doc. 65, "…new information and documents to prove that Monel [sic] liability prove that a rule and regulation is the force for the deprivation," and "…Correction offices [sic] had to used (SCSO) procedure. This is an indiction [sic] that there is regulatin [sic]. And that procedure is permission to use the force." (*Id.* at 7.) Appellant even attached the Sheriff's Office General Order on Response to Resistance to his Second Amended

Complaint, citing it as the policy under which alleged should impose *Monell* liability. (Doc. 65 at 35.)

Appellant cites *Woldeab v. Dekalb County Bd. Of Educ*., 885 F.3d 1289, 1292 (11th Cir. 2018) in arguing that Appellant should be given a third opportunity to amend the Complaint. This case does not apply here. In *Woldeab*, the plaintiff wrongly named an entity not capable of being sued, and his complaint was dismissed with prejudice based on that defect. *Woldeab* advised that "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." 885 F.3d at 1291 (11th Cir. 2018) (citing *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991).

In this case, when Appellant originally wrongly named the Sheriff's Dept., which is not an entity capable of being sued, the district court did allow amendment, at which point Appellant cured this defect, naming the Sheriff. Further, Appellant in this case was allowed two amendments. (*See* Docs. 42, 65.)

Appellant also cites *Santiago v. Wood*, 904 F.2d 673, 676 (11th Cir. 1990), in which this Court reversed denial of a motion for relief from judgment when the plaintiff had incorrectly named the Elementary School as a defendant instead of the School Board, which would have been the proper defendant. The Court noted that the substance of the claims would be the same if the correct entity were named.

However, in this case, there is a substantial legal difference between suing the Sheriff in his official capacity versus suing individual capacity jail employees. This is not a matter of Appellant arguing that he named the wrong defendant by mistake. Appellant is arguing that he should be allowed to name at least four additional defendants in their individual capacities, in a situation where he has only brought official-capacity claims. *See Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018 (11th Cir. 1989) (In allowing late amendment to complaint to add individual defendants to render the complaint in compliance with the Eleventh Amendment, the court commented, "Since the members were sued in their official capacity, they could only assert defenses available to the state agencies, not any personal defenses.") In this case, Appellant argues he should be allowed a third amended complaint to add individual-capacity defendants, which involves a separate set of personal defenses, namely qualified immunity. *See Jones v. Fransen*, 857 F.3d 843, 851-852 (11th Cir. 2017) (Qualified immunity shields public officials sued in their individual capacities for actions taken in their discretionary authority, which do not violate clearly established constitutional rights).

Appellant provides no authority on appeal for the proposition that he should now be allowed to amend his complaint to add parties, when he was already granted leave to amend twice in the lower court, and never indicated an intent to bring claims against individual-capacity defendants. Appellant was given three chances

to state a cognizable claim in this case, and to name and bring claims against the defendants he intended. Two of these opportunities were on amendment. Appellant chose to bring claims against only the Sheriff in his official capacity. Appellant argues that justice requires that he, as a *pro se* litigant, be allowed to amend a third time to add additional defendants. However, "A pro se litigant is subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure. *Faulkner v. Monroe County Sheriff's Dept*., 523 Fed.Appx. 696, 702 (11th Cir. 2013) (quoting *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir.1989)).

Appellant also argues that, had he named several individuals as individual-capacity defendants, his operative Complaint would have stated plausible claims against these defendants. These include Dep. Pugh, Nurse Varghese, Chief Bedard, and Sheriff Lemma.[5] This argument is irrelevant on appeal, as these individuals are not Defendants in this action. However, with respect to the vast majority of the individuals he seeks for the first time on appeal to bring into this lawsuit, Appellant supplies scant allegations, with no allegations of personal involvement other than

[5]Appellant is not clear as to every individual that he believes the district court should have construed as a Defendant. He makes reference in his Opening Brief to Dep. Pugh, Nurse Varghese, Chief Bedard, Sheriff Lemma, and "other [unspecified] deputies," but he also argues that he should have the opportunity to now name as Defendants "the individuals identified in the body of his complaints." (Appellant's Opening Brief at 35, 38.) Plaintiff referenced also: Captain Latisha Howard, Officer Macintash of the Casselberry police department, inspector Thomas, MS Nicole Nelson, inspector Johnson, Shannon Smith, Ms. Hayward, Sgt. Rios, MS Amy Law, (Doc. 1 at 4-9; Doc. 42 at 5; Doc 65 at 8, 10.)

participation in the investigation of the use of force incident. *See Franklin v. Curry*, 738 F.3d 1246, 1249 (11th Cir. 2013) ("[T]o establish supervisory liability under § 1983, a plaintiff must allege that the supervisor personally participated in the alleged unconstitutional conduct or that there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation."

Appellant argues that the district court should have construed that potentially thirteen individuals had claims brought against them in the lower court, because he identified them in the body of his complaints. This is an example of why, even though *pro se* litigants are granted latitude, courts must require *pro se* litigants to conform to the Rules of Civil Procedure. "Courts show leniency to pro se litigants, however, pro se litigants are still required to conform to procedural rules, and the court is not required to rewrite deficient pleadings." *Jacox v. Department of Defense*, 291 Fed.Appx. 318, 318 (11th Cir. 2008) (citing *GJR Investments, Inc. v. County of Escambia, Fla*., 132 F.3d 1359, 1369 (11th Cir. 1998)).

Federal Rule of Civil Procedure 10(a) requires that "[t]he title of the Complaint must name all parties." *See* also *Williams v. University of Georgia Athletics Dept*., 2010 WL 53510170 *1 (M.D. Ga. 2010) ("To the extent that a person may be mentioned in the Complaint in passing but not specifically named as a defendant, the Court finds that those persons are not properly named defendants. While Court should construe pro se pleadings liberally, it is not the Court's duty to

determine who exactly of the numerous mentioned persons are actually supposed to be defendants to Plaintiff's action.") And see *Burch v. Wyeth, Gallagher Bassett Services, Inc*., 2009 WL 10712249 *2 (N.D. Ga. 2009) (If the caption of a complaint fails to identify an individual or entity as a party, that individual or entity is not a defendant in the lawsuit.")

Appellant's complaints should not be construed as having brought claims against any individual-capacity defendants. Appellant deliberately brought only official-capacity claims, and did not add any individual capacity defendants, despite being given two opportunities to amend his Complaint. Appellant has not shown that he should now be permitted to seek amendment of his Complaint to add numerous individual-capacity defendants for the first time on appeal. Appellant's proposed resolution of this issue would place on the district court the burden of deciphering *pro se* pleadings to identify for the benefit of the Appellant who he ought to sue and under what theory. It is one thing to say that *pro se* pleadings ought to be liberally construed to determine whether the facts alleged support a claim to relief even if not quite correctly articulated by Appellant. But it is quite another to say that the district court ought to add defendants on its own because it can see how a claim might have been brought against them, or coach the Plaintiff on who he is better off suing.

CONCLUSION

For the foregoing reasons, the district court's entry of judgment in favor of Appellee Sheriff should be affirmed, and Plaintiff should not be granted any further amendments to his operative Complaint.

Dated this 12th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and 11th Cir. R. 32-4, I hereby certify the Brief of Defendant-Appellee Sheriff complies with the type-volume limitation of Rule 32(a)(7)(B) in that this Brief contains **9546** words, excluding the portions which do not count toward the type-volume limitation.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of April, 2021, the foregoing brief was electronically filed and a copy has been served by U.S. Mail to: Erica Hashimoto, Esquire, Lauren Batemen, Esquire, Joshua Marcin, Esquire and Abby Holland, Student Counsel and Daniel Murphy, Student Counsel, Georgetown University Law Center, Appellate Litigation Program, 111 F Street NW, Suite 306, Washington, DC 20001.

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