# APPENDICES

**APPENDIX A**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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No. 18-40434

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DANIEL ENRIQUE CANTÚ,

Plaintiff-Appellant

v.

JAMES M. MOODY; ERIN S. LABUZ, also known as Erin S. Hayne; NATHAN HUSAK; DAVID DE LOS SANTOS; RYAN PORTER; ROSA LEE GARZA; ALFREDO BARRERA; UNITED STATES OF AMERICA; CHRISTOPHER LEE,

Defendants-Appellees

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

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Before CLEMENT, GRAVES, and OLDHAM, Circuit Judges.

ANDREW S. OLDHAM, Circuit Judge:

Daniel Enrique Cantú is a member of the Texas Mexican Mafia. He says the U.S. Constitution and federal civil rights laws afford him money damages against state and federal law enforcement officers for claims arising from a drug bust. We disagree.

I.

A.

This case arises from a transnational drug-trafficking investigation. In 2010, the federal government began investigating the Texas Mexican Mafia. As part of its investigation, the government identified Jesus Rodriguez Barrientes as the gang's leader in the Rio Grande Valley. Working with state and local law enforcement, the FBI planned a sting operation as part of Barrientes's regular heroin purchases from Mexican drug smugglers.

FBI agents convinced Juan Pablo Rodriguez, a member of the Texas Mexican Mafia, to work as an informant. When Barrientes's heroin shipment arrived, Rodriguez would meet the drug smugglers at the border and then drive everyone to a drop-off location. There Rodriguez would deliver the heroin to whomever Barrientes designated as his authorized recipient.

On the morning of August 10, 2011, things went mostly according to plan. Rodriguez, accompanied by an undercover police officer, drove to the Rio Grande where he met the drug smugglers. Then, at 7:30 a.m., Rodriguez called Cantú and asked him to come to an H-E-B parking lot so they could talk in person. According to Cantú, Rodriguez did not say what he wanted to talk about.

When Cantú arrived, he parked to the left of Rodriguez's car and rolled down his passenger-side window. Rodriguez then got out of his car, went to the trunk, took out a cooler, and placed it through Cantú's open window and onto the passenger seat. "I need you to do me a favor," Rodriguez allegedly said. Cantú says he had time to ask only one question—"What are

you doing?"—before forty-five law enforcement officers descended on his vehicle. One of the officers, FBI Agent David de los Santos, pulled Cantú from his car, searched him, and placed him under arrest. The cooler contained nearly two kilograms of heroin.

Although Cantú says he remained in his car the whole time and never touched the cooler, two federal agents swore otherwise in affidavits. FBI Agent James Moody said Cantú exited his vehicle and personally took the cooler from Rodriguez's trunk. FBI Agent Erin LaBuz said Rodriguez handed the cooler to Cantú, who personally placed it in his passenger seat.

A federal grand jury indicted Cantú, Barrientes, his wife, and two smugglers for possession of heroin with intent to distribute and conspiracy. Barrientes, his wife, and one of the smugglers pleaded guilty and were sent to federal prison. Cantú elected to stand trial. On October 31, 2013, a federal jury acquitted him. By that time, he had spent more than two years in jail.

B.

Cantú then sued a slew of defendants under *Bivens*, the Federal Tort Claims Act, § 1983, § 1985, and state law. In the complaint, he alleged twenty-one claims under the Fourth Amendment, Fifth Amendment, Fourteenth Amendment, and various tort theories—like malicious prosecution, false arrest, false imprisonment, assault, civil conspiracy, conversion, and negligence. And he offered his theory of how he went from his bed to a grocery store to a jail cell: Forty-five officers jeopardized a sophisticated, multi-year, multi-jurisdictional sting operation aimed at a transnational gang to frame an otherwise-innocent member of

the Texas Mexican Mafia in an effort "to improve each of their professional arrest and conviction rate records against drug traffickers." However far-fetched that might seem, we take Cantú's well-pleaded allegations as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009).

Cantú alleges he was never the intended recipient of the heroin. He says Rodriguez, while driving to the H-E-B, tried and failed to get in touch with the actual recipient. So he called Cantú instead. The gravamen of Cantú's complaint is that officers who were privy to Rodriguez's audible—and Cantú's professed ignorance about why he was being called to the grocery store—knew Cantú was not the guy who was supposed to show up that morning. Yet they permitted him to be arrested and then doubled down, fabricating facts about Cantú's behavior to create the impression he *was* the guy.

After several hearings, the district court dismissed all of Cantú's claims against all fifteen federal, state, and county defendants. It also granted Cantú's motion to voluntarily dismiss (with prejudice) his claims against the only remaining defendant—the private company that operated the prison where he was housed before trial. The court further denied Cantú's request to file a Fourth Amended Complaint. It later filed four separate dismissal orders. Cantú appealed the orders dismissing the federal, state, and county defendants.[1]

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[1] In his notice of appeal, Cantú says "FINAL JUDGMENT has not been entered." But in his opening brief he argues we have jurisdiction pursuant to a final judgment. Cantú does not explain the discrepancy, nor do the defendants. It's possible Cantú thought the four dismissal orders did not satisfy the separate-judgment requirement of Federal

II.

In his briefs before our Court, Cantú pursues only a subset of his claims against only a subset of the defendants—FBI Agent James Moody, FBI Agent Erin LaBuz, FBI Agent David de los Santos, and Texas DPS Officer Alfredo Barrera. He has forfeited everything else. *See United States v. Vazquez*, 899 F.3d 363, 380 n.11 (5th Cir. 2018) (holding appellant's "failure to clearly identify [an issue] as a potential basis for relief forfeits the argument on appeal").

We review the dismissal of Cantú's claims *de novo*. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). We start with his § 1985 claim against the federal officers. It fails under Federal Rule of Civil Procedure 12(b)(6). Second, we address his § 1983 claims against Barrera. They fail under the same standard. Third, we hold the purported

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Rule of Civil Procedure 58(a). But it doesn't matter that each "order [was] denominat[ed] as an 'order,' rather than a 'judgment.'" *Local Union No. 1992 of Int'l Bhd. of Elec. Workers v. Okonite Co.*, 358 F.3d 278, 285 (3d Cir. 2004). And in all events, parties are "free to waive" Rule 58, as they have here. *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 384 (1978); see also FED. R. APP. P. 4(a)(7)(B); *Orr v. Plumb*, 884 F.3d 923, 931 (9th Cir. 2018). The real restriction on our jurisdiction is § 1291, which is entirely distinct from Rule 58(a). *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981); 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2785 (3d ed. 2019) ("Rule 58 states how a judgment is entered. It does not speak to whether a judgment entered in this fashion is a 'final judgment' for purposes of appeal."). Like the parties, we have no doubt the district court's dismissal orders constitute its "final decision" under § 1291.

*Bivens* claim against Moody and LaBuz is not cognizable.

A.

Cantú alleges the federal defendants—Moody, LaBuz, and de los Santos—conspired to violate his civil rights under 42 U.S.C. § 1985(3). But he has two problems. Under our precedent, § 1985(3) does not cover every kind of defendant. And its plain text doesn't cover every kind of conspiracy.

Our precedent holds § 1985(3) does not apply to federal officers. In *Mack v. Alexander*, 575 F.2d 488 (5th Cir. 1978) (per curiam), we concluded § 1983 and § 1985 "provide a remedy for deprivation of rights under color of state law and do not apply when the defendants are acting under color of federal law." Id. at 489; *accord Bethea v. Reid*, 445 F.2d 1163, 1164 (3d Cir. 1971). Other circuits have criticized that holding for failing to grapple with Supreme Court precedent. *See, e.g., Iqbal v. Hasty*, 490 F.3d 143, 176 n.13 (2d Cir. 2007), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009); Ogden v. United States, 758 F.2d 1168, 1175 n.3 (7th Cir. 1985). And the Supreme Court recently assumed § 1985(3) applies to federal officers. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1865–69 (2017). *Mack* may not have aged well, but we need not decide whether it remains binding on us.

Even if we were inclined to ignore *Mack*, Cantú's claim would fail for an independent reason. The relevant text of § 1985(3) criminalizes only conspiracies that involve depriving someone of "equal protection of the laws"or "equal privileges and immunities under the laws." 42 U.S.C. § 1985(3); *see Griffin v. Breckenridge*, 403 U.S. 88, 102–03 (1971). This kind of con-

spiracy requires some form of class-based discrimination. *United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 834–35 (1983).

Cantú says "he belongs to a class of individuals who have felony convictions and/or were previously incarcerated." But the Supreme "Court . . . has never held that nonracial animus is sufficient." *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 281 n.2 (5th Cir. 1998). And we have held racial animus is required: "[I]n this circuit . . . the only conspiracies actionable under section 1985(3) are those motivated by racial animus." *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 757 (5th Cir. 1987); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–74 (1993); *Scott*, 463 U.S. at 835–38; *Griffin*, 403 U.S. at 104–05 (noting that § 1985(3) was passed pursuant to the Thirteenth Amendment).

Even assuming § 1985(3) covers Cantú's proffered class—convicted felons—Cantú's claims still can't survive a Rule 12(b)(6) motion. First, Cantú can't cross from "the factually neutral [to] the factually suggestive" because he doesn't link his conspiracy allegations to his status. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 n.5 (2007). At most, he alleges Moody and LaBuz were aware of his prior felony conviction. But the rest of his allegations suggest officers fabricated evidence against him to save the sting operation. He does not allege Moody and LaBuz's motivations were "directed specifically at [felons] as a class" or that their actions were motivated "*by reason of*" his prior conviction. *Bray*, 506 U.S. at 270. Second, Cantú can't cross from "the conclusory [to] the factual." *Twombly*, 550 U.S. at 557 n.5. His allegation that Moody and LaBuz "[d]iscussed and willfully and

knowingly agreed with other DEFENDANTS to fabricate evidence . . . in order to have [Cantú] convicted" is conclusory. It amounts to "nothing more than a formulaic recitation of the elements" of his claim. *Iqbal*, 556 U.S. at 681 (quotation omitted).

There's an even easier answer for Agent de los Santos. Cantú singles him out as the officer who removed Cantú from his vehicle, arrested and searched him, and then drove him to the FBI building. Cantú makes no allegation—not even a conclusory one—that de los Santos formed any kind of agreement with Moody, LaBuz, or anyone else. He doesn't even allege that de los Santos was privy to Rodriguez's last-minute change of plans to call Cantú. By Cantú's own account, de los Santos was simply the tip of the spear in the final phase of the sting operation. The district court was correct to dismiss the § 1985(3) claims.

B.

Cantú presses several § 1983 claims against Texas DPS Officer Barrera. First, he argues Barrera conspired to violate Cantú's civil rights. He alleges Barrera helped federal officers conduct the larger investigation and identified someone other than Cantú as "the person to receive the heroin" on the morning of the sting operation. As with his § 1985(3) claim against de los Santos, however, Cantú nowhere alleges Barrera formed any kind of agreement with anyone. Nor does he say Barrera learned about what transpired on the phone call between Rodriguez and Cantú.

Next, Cantú argues Barrera maliciously prosecuted him in violation of the Fourth Amendment and fabricated evidence against him in violation of the

Fourth and Fourteenth Amendments.[2] Both claims against Barrera fail for the same reason the conspiracy claim does. Cantú claims Barrera "[m]aliciously initiated a criminal case against [him] . . . without probable cause." He also claims Barrera intentionally or recklessly falsified facts "in order to fabricate evidence and/or establish probable cause." These are all conclusions without any factual allegations to support them. *See Iqbal*, 556 U.S. at 681. Cantú never says *how* Barrera falsified evidence or participated in the

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[2] Litigants (and courts) often write and speak about § 1983 claims as if the plaintiff asserts a common-law tort action, like malicious prosecution. This habit is not a profile in precision. In a § 1983 case, the plaintiff must assert someone violated the Constitution or other federal law. *See* 42 U.S.C. § 1983. And we have no federal general common law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). That's why "[t]he first step in any [§ 1983] claim is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion); *see also Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc) (holding "no such freestanding constitutional right to be free from malicious prosecution exists"). Courts consider common law tort analogues to constitutional claims because those analogues may furnish things like the accrual rules for the applicable limitations period. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) ("In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts."). Although Cantú brings a "fabrication of evidence" claim and a "malicious prosecution" claim, he is really arguing Barrera violated the Fourth Amendment in two different ways. *See id.* at 921–22 (recognizing the claim fell under the Fourth Amendment regardless of whether it should be likened to malicious prosecution or false arrest).

decision to prosecute him. What's more, his only concrete allegations point the other way because Barrera briefed investigators on nabbing someone else—the unknown intended recipient.

We need not decide whether Cantú can bring a separately cognizable Fourteenth Amendment claim for fabrication of evidence against Barrera after *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), and *Jauch v. Choctaw County*, 874 F.3d 425 (5th Cir. 2017). It's unclear whether he appealed or forfeited that claim. And his allegations are conclusory and hence insufficient in any event.

C.

Cantú also brings a would-be cause of action against Moody and LaBuz under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He says they violated the Fourth Amendment by fabricating evidence against him.[3] From a pleading standpoint, Cantú's strongest allegations are that Moody and LaBuz lied to justify seizing him. But *Bivens* does not provide a vehicle to bring that claim.

1.

As the Supreme Court recently reminded us, *Bivens* is the byproduct of an "*ancien regime*." *Ziglar*

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[3] Cantú also sued Moody and LaBuz under the Fifth-Amendment-by-way-of-*Bivens*. We reject that claim for the same reason we reject his Fourteenth Amendment claim against Barrera: It is unclear whether he appealed the Fifth Amendment claim at all; the phrase "Fifth Amendment" appears nowhere in the argument of his opening brief. And his allegations to support that claim are conclusory in all events.

*v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quotation omitted). In 1971, the Court recognized an implied cause of action to sue federal officers for violating an arrestee's "rights of privacy" by "manacl[ing] petitioner in front of his wife and children," "threaten[ing] to arrest the entire family," and strip searching him. *Bivens*, 403 U.S. at 389–90. In the next nine years, the Court recognized two more implied causes of action under *Bivens*: a Fifth Amendment equal protection claim for employment discrimination by a congressman, *see Davis v. Passman*, 442 U.S. 228 (1979), and an Eighth Amendment claim for inadequate medical care by federal jailers, *see Carlson v. Green*, 446 U.S. 14 (1980).

Since 1980, however, "the Court has refused" every *Bivens* claim presented to it. *Abbasi*, 137 S. Ct. at 1857; *see also ibid*. (collecting cases). The Court has emphasized that *Bivens*, *Davis*, and *Carlson* remain good law. *See id*. at 1856–57. At the same time, "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Id.* at 1856. And it has admonished us to exercise "caution" in the "disfavored judicial activity" of extending *Bivens* to any new set of facts. *Id.* at 1857 (quotations omitted).

So, before allowing Cantú to sue under *Bivens*, we must ask two questions. First, do Cantú's claims fall into one of the three existing *Bivens* actions? Second, if not, should we recognize a new *Bivens* action here? The answer to both questions is no.

Cantú purports to address the first question. And he thinks he's home free because his malicious-prosecution-type-claim alleges a violation of his Fourth Amendment right to be free from unlawful seizures—the same right recognized in *Bivens*. That's wrong.

Courts do not define a *Bivens* cause of action at the level of "the Fourth Amendment" or even at the level of "the unreasonable-searches-and-seizures clause." *See FDIC v. Meyer*, 510 U.S. 471, 484 n.9 (1994).

Here's an example. No one thinks *Davis*—which permitted a congressional employee to sue for unlawful termination in violation of the Due Process Clause—means the entirety of the Fifth Amendment's Due Process Clause is fair game in a *Bivens* action. The Supreme Court rejected a claim under the same clause of the same amendment nine years later. *See Schweiker v. Chilicky*, 487 U.S. 412, 420 (1988) (denying a *Bivens* action under the Fifth Amendment's Due Process Clause for wrongful denial of Social Security disability benefits). Not even the *Schweiker* dissenters suggested *Davis* settled the question before the Court. *See id.* at 431–32 (Brennan, J., dissenting).

What if a plaintiff asserts a violation of the same clause of the same amendment *in the same way*? That still doesn't cut it. In *Chappell v. Wallace*, 462 U.S. 296 (1983), the Supreme Court rejected a Fifth Amendment Due Process claim for unlawful termination (the claim at issue in *Davis*) because the plaintiff was a military servicemember rather than a congressional employee. *Id.* at 305. The Court has done the same thing in the Eighth Amendment cruel-and-unusual-punishment context. *Compare Carlson*, 446 U.S. at 17–18 (recognizing *Bivens* action—against federal prison officials—for failure to provide medical treatment), *with Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (rejecting *Bivens* action—against private prison officials—for failure to provide medical treatment). Naturally, these principles apply in the Fourth Amendment context too. *See, e.g., Alvarez v. ICE*, 818 F.3d 1194, 1199, 1206 (11th Cir. 2016) (treating plaintiff's *Bivens* claim for unreasonable seizure as a "new"

one); *id.* at 1218 n.12 (Pryor, J., concurring in part and dissenting in part) (same); *De La Paz v. Coy*, 786 F.3d 367, 375 (5th Cir. 2015) (same); *cf. Arevalo v. Woods*, 811 F.2d 487, 489–90 (9th Cir. 1987) (barring plaintiff's *Bivens* claim for unreasonable search and seizure).

The Supreme Court recently addressed this threshold question. And it rejected just this sort of "same right" reasoning. In *Abbasi*, the Second Circuit had created a two-part test to determine whether a *Bivens* claim was novel: "First, it asked whether the asserted constitutional right was at issue in a previous *Bivens* case. Second, it asked whether the mechanism of injury was the same mechanism of injury in a previous *Bivens* case." 137 S. Ct. at 1859 (citation omitted); *see Turkmen v. Hasty*, 789 F.3d 218, 235 (2d Cir. 2015) (concluding plaintiffs' condition-of-confinement claim "stands firmly within a familiar *Bivens* context"). The Court rejected that approach, pointing to *Chappell* and *Malesko*. "The proper test," it said, is simply whether "the case is different in a meaningful way from previous *Bivens* cases." *Abbasi*, 137 S. Ct. at 1859.

The Court then provided a non-exhaustive list of "differences that are meaningful enough to make a given context a new one":

> A case might differ in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer

> was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or [7] the presence of potential special factors that previous *Bivens* cases did not consider.

*Id.* at 1859–60. In the wake of *Abbasi*, our Court and at least one of our sister circuits have rejected new Fourth Amendment claims under *Bivens*. *See Hernandez v. Mesa*, 885 F.3d 811, 816–17 (5th Cir. 2018) (en banc); *Tun-Cos v. Perrotte*, 922 F.3d 514, 517–18 (4th Cir. 2019).

2.

By any measure, Cantú's claims are meaningfully different from the Fourth Amendment claim at issue in *Bivens*. He does not allege the officers entered his home without a warrant or violated his rights of privacy. Rather, Cantú alleges Moody and LaBuz violated the Fourth Amendment by falsely stating in affidavits that Cantú willingly took possession of the cooler . . . to suggest he knowingly participated in a drug transaction . . . to induce prosecutors to charge him . . . to cause Cantú to be seized. *See Wilkie v. Robbins*, 551 U.S. 537, 552 n.6 (2007). This claim involves different conduct by different officers from a different agency. The officers' alleged conduct is specific in one sense: They allegedly falsified affidavits. But it's general in another: Cantú claims Moody and LaBuz induced prosecutors to charge him without any basis, which led to unjustified detention. The connection between the officers' conduct and the injury thus involves intellectual leaps that a textbook forcible seizure never does. *See Hartman v. Moore*, 547 U.S. 250, 259–62 (2006). "Judicial guidance" differs across the various kinds of Fourth Amendment violations—like seizures by deadly force, searches by wiretap, *Terry*

stops, executions of warrants, seizures without legal process ("false arrest"), seizures with wrongful legal process ("malicious prosecution"), etc. This is therefore a new context, and Cantú's claims cannot be shoehorned into *Bivens*, *Davis*, or *Carlson*.

The second question is whether we should engage in the "disfavored judicial activity" of recognizing a new *Bivens* action. *Id.* at 1857 (quotation omitted). Again, no. There are legion "special factors" counseling that result. One is the existence of a statutory scheme for torts committed by federal officers. *See* 28 U.S.C. § 2680(h); *Abbasi*, 137 S. Ct. at 1858 (noting "that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action"). Another is the length of time Congress has gone without statutorily creating a *Bivens*-type remedy for this context. Because Congress has long been on notice that the Supreme Court is disinclined to extend *Bivens* to new contexts, *see Abbasi*, 137 S. Ct. at 1857, its "failure to provide a damages remedy" here suggests "more than mere oversight," *id.* at 1862; *see also De La Paz*, 786 F.3d at 377 (noting Congress had not created a damages remedy against immigration agents despite legislative attention to immigration matters).

A final special factor counseling hesitation is the nature of the underlying federal law enforcement activity. While *Bivens* involved an investigation into seemingly local conduct, this case involves a multijurisdictional investigation into transnational organized crime committed by a violent gang that has wreaked havoc along our border with Mexico. This case therefore implicates the security of our international border. *Cf. Abassi*, 137 S. Ct. at 1861 (identifying national security as a special factor); *Meshal v. Higgenbotham*, 804 F.3d 417, 430–31 (D.C. Cir. 2015) (Kavanaugh, J., concurring) (same). If members of the

Texas Mexican Mafia want a damages suit—including potentially burdensome discovery—regarding complicated investigations such as this one, that request must be made to Congress not the courts. *See Abbasi*, 137 S. Ct. at 1860–61 (discussing discovery and litigation costs as a special factor).

In the face of these considerations, "courts may not create [a cause of action], no matter how desirable that might be as a policy matter." *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001); *see also Malesko*, 534 U.S. at 75 (Scalia, J., concurring).[4]

## III.

Finally, Cantú appeals the denial of leave to file a fourth amended complaint. The district court denied leave because Cantú already had numerous opportunities to amend his complaint, and the proposed amended complaint contained claims that Cantú's counsel previously agreed to remove. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (noting that "undue

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[4] Our dissenting colleague takes issue with our analysis in two ways. First, Judge Graves notes this case is factually distinguishable from *Abbasi*. *See post*, at 15–17 (Graves, J., dissenting in part). But mere distinguishability is irrelevant; were it otherwise, federal courts would be free to infer *Bivens* actions in any case not involving post-9/11 detention policies. And we know that's wrong. *See Abbasi*, 137 S. Ct. at 1857 (noting such lawmaking is a "'disfavored' judicial activity"). Second, Judge Graves notes the FTCA might not provide a remedy to Cantú. *See post*, at 17 (Graves, J., dissenting in part). Fair enough. But the Supreme Court has said that possibility is insufficient to warrant the judicial creation of a *Bivens* action—after all, it could be evidence that Congress chose not to afford a remedy. *See Abbasi*, 137 S. Ct. at 1858–59, 1865.

delay," "bad faith," "dilatory motive," and "repeated failure to cure deficiencies by amendments previously allowed" are grounds for denying leave to amend a complaint). The district court did not abuse its discretion in denying Cantú's motion.

AFFIRMED.

JAMES E. GRAVES, JR., Circuit Judge, dissenting in part:

I respectfully dissent from the majority's opinion insofar as it concludes there is no *Bivens* cause of action for fabrication of evidence.

I agree with the majority's conclusion that Cantú's claim of malicious prosecution/fabrication of evidence presents a "new context" for a *Bivens* claim under Supreme Court precedent. However, while the majority concludes several special factors counsel against recognizing a new claim, I would reach the opposite conclusion and determine no such factors dictate against recognizing a new *Bivens* action here.

*Abbasi* instructs courts to focus the "special factors" inquiry "on maintaining the separation of powers: 'separation-of-powers principles are or should be central to the analysis.'" *Hernandez v. Mesa*, 885 F.3d 811, 818 (5th Cir. 2018) (*en banc*) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)), *cert. granted*, No. 17-1678, 2019 WL 2257285 (U.S. May 28, 2019). Essentially, courts need to consider whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Abassi*, 137 S. Ct. at 1858. If there are, "the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.*

Some of the factors the Supreme Court considered in *Abassi* which counseled against recognizing a *Bivens* action were that the plaintiffs were suing high level Executive Officials for the acts of their subordinates, the lawsuit challenged "the formulation and

implementation of a general policy," and the claim implicated "sensitive issues of national security." *Id.* at 1860–61. These factors meant the plaintiffs were going beyond challenging "standard 'law enforcement operations'" and were challenging "major elements of the Government's whole response to the September 11 attacks." *Id.* at 1861. As a result, the Court found it prudent to decline to create a new claim and instead deferred to the Executive Branch's authority in military and national security affairs, as well as to Congress' ability to designate a specific channel for the courts to review such authority. *Id.*

No such concerns are present in this case. Here, Cantú seeks to hold accountable two individual law enforcement officers who allegedly lied to support a finding of probable cause and a grand jury indictment, thereby leading to his prosecution and two years of imprisonment. This is exactly the type of run-of-the-mill "law enforcement overreach" claim *Abassi* emphasized could still be recognized under *Bivens*. *Abassi*, 137 S. Ct. at 1862. In the instant case, there are no national security concerns,[1] no broad governmental policies at stake, and no high-level executive

[1] While the majority characterizes the investigation at issue in this case as a multijurisdictional investigation into transnational organized crime necessarily involving the security of our international border, the Government has not argued that this case implicates any national security interests. In fact, the Government's main argument against recognizing a *Bivens* action here is that Cantú could have filed suit under the Federal Tort Claims Act. *See* discussion *infra*. Given the Government's ability to articulate its own interests, I would decline to create a national security concern where the Government has not alleged one.

officials being sued for the actions of their subordinates. Nor is the giving of affidavits by law enforcement officials a heavily regulated area closely overseen by Congress so as to suggest Congress prefers courts not to interfere. *See Hernandez*, 885 F.3d at 820 (noting Congressional silence may be relevant "especially where 'Congressional interest' in an issue 'has been frequent and intense'" (quoting *Abassi*, 137 S.Ct. at 1862)). Lastly, the legal standards for adjudicating this type of claim are well established and easily administrable," meaning it is a "workable cause of action." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007); *see also Lanuza v. Love*, 899 F.3d 1019, 1033 (9th Cir. 2018) (discussing judicial administrability of a *Bivens* claim for fabrication of evidence in an immigration context); *Engel v. Buchan*, 710 F.3d 698, 708 (7th Cir. 2013) (discussing judicial administrability of a *Bivens* claims for *Brady* violations).

Moreover, while the Government argues that Cantú may have other remedies available through the Federal Tort Claims Act ("FTCA"), the FTCA does not provide remedies for constitutional violations. *See* 28 U.S.C. § 2679(b)(2)(A) (stating FTCA "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States . . . ."). Nor would an injunction here remedy the alleged constitutional violation, assuming Cantú even had standing to pursue one. This is essentially a "damages or nothing" case, where the very nature of Cantú's allegations "are difficult to address except by way of damages after the fact." *Abassi*, 137 S. Ct. at 1862. While recognizing a *Bivens* claim may be a "disfavored judicial remedy" these days, it is still a judicial remedy, available in certain circumstances where special factors are not present. *See Lanuza*, 899 F.3d at 1021 (recognizing

the availability of new *Bivens* claims even after *Abassi*). Such is the case here.

Having recognized a *Bivens* cause of action, I would then conclude that Cantú adequately alleged such a claim. Accordingly, I dissent from the majority's opinion on this issue.

**APPENDIX B**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**MC ALLEN DIVISION**

| | | |
|---|---|---|
| DANIEL ENRIQUE CANTU,<br><br>Plaintiff,<br><br>vs.<br><br>JAMES M MOODY, ET AL.,<br><br>Defendants. | ) | CASE NO: 7:15-CV-00354<br>CIVIL<br><br>McAllen, Texas<br><br>Thursday, July 7, 2016<br>(4:11 p.m. to 4:53 p.m.) |

**HEARING RE: MOTION TO DISMISS**

**BEFORE THE HONORABLE RICARDO H. HINOJOSA,**
**CHIEF UNITED STATES DISTRICT JUDGE**

APPEARANCES: Continued (Next Page)

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| | |
|---|---|
| | Corpus Christi, TX 78480-8668<br>(361) 949-2988 |
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| Federal Defendants: | DAVID L. GUERRA, ESQ.<br>Office of the U.S. Attorney<br>1701 W. Highway 83,<br>Suite 600<br>McAllen, TX 78501 |
| Hidalgo County and Sheriff Defendants: | REX N. LEACH, ESQ.<br>Atlas Hall & Rodriguez, LLP<br>818 Pecan<br>McAllen, TX 78501 |
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**McAllen, Texas; Thursday, July 7, 2016; 4:11 p.m.**

**(Call to order)**

**THE COURT:** Please be seated. Civil Action Number M-15-354, *Daniel Enrique Cantu versus James M. Moody and others*. And can we have announcements for all the parties as to who's here?

**MR. FRIEDMAN:** Jerold Friedman for the Plaintiff.

**MR. GUERRA:** David Guerra here on behalf of the Federal Defendants.

* * *

**THE COURT:** Okay, the next is the Federal Defendants' motions to dismiss and/or for summary judgment, which is Docket Entry Number 60. Go ahead, Mr. Guerra.

**MR. GUERRA:** Your Honor, I will start also with the limitations defense because I think that does allow the Court to focus on something that potentially could wipe out the entire panoply of claims against the United States and the other individual Federal Defendants. I think it's --

**THE COURT:** Well, I --

**MR. GUERRA:** -- it turns on --

**THE COURT:** -- didn't hear that from the State Defendants, but you think the statute of limitations would take out everything?

**MR. GUERRA:** I believe it does resolve everything because everything has a two-year limitations appropriate to it. The only disputed fact regarding that two-year -- the application of that two-year statute of limitations and the -and its application here is the one that was raised in response. He said he was--

**THE COURT:** Well, that he was incarcerated and that therefore --

**MR. GUERRA:** That he was incarcerated and --

**THE COURT:** -- that he was disabled from that.

**MR. GUERRA:** -- somehow he was not able to access legal counsel, that we somehow interfered with his ability. I would point out first of all, your Honor, there's no affidavit or other testimony to that effect. And while this is at the early stage, we did submit and we are submitting to the Court, and we pled alternatively, a summary judgment request here. We -- and so if the contention is that he was prohibited in some way, I think for a lawyer to stand there and say that without any support whatsoever for it is not going to I think meet the standard that's required in this situation. But assuming -setting aside that problem, we're not -- the Southern District of Texas has been accused of a lot of things in terms of perhaps the heat and other problems with -- but no one's ever accused the legal system down here, at least on the Federal side, of being comparable to Uzbekistan. This man had a lawyer. He met with him frequently. He was before the Court numerous times for various hearings during his criminal cases. There is no reason why in the world he couldn't have said, I need you -- they're keeping me from getting a civil lawyer in a civil case, I need you to help me in this regard. And he could have gotten that help. It's not as though we had him literally in a case somewhere in a place where he had an access to anybody outside that limited area. He frequently met with a lawyer, and it would have been very easy for him to say "help me." Now, if it -- I have no doubt that from time to time he may have grumbled to the court, as he did once when he was pro se in this case, that I can't find a civil lawyer to take my case. But that's not

the same thing as saying the United States government somehow prohibited me and these individual Defendants somehow prohibited me from accessing a civil lawyer. That -- one is truly a basis arguably for somehow implying the government is at fault and therefore should be estopped from asserting a defense if the government literally did keep him in a situation, in a place where he didn't have access to the outside. The other is totally unrelated to us. The fact he can't find a lawyer to take his -- a frivolous case, which we believe it to be in this situation, is not the responsibility of the Federal government and we should not be estopped from asserting the two-year statute of limitations because of that. And so as I said, your Honor knows that he was here before the Court many times with his criminal lawyer and so he had access to a lawyer. And there's no reason why he couldn't at some point. And as I said, there's no evidence that we somehow burned his letters that he's tried to send out, that we -- he's making assumptions about that. Again, but you cannot base -in the absence of even an affidavit -- even if there were an affidavit, it's an assumption that has no underlying basis in fact. And so I think that limitations should eliminate all these claims on every level, the tort claims against the United States, whether there are *Bivens* cases against the individuals, all of them are subject to the statute of limitations and all - - and this suit was filed long after it was expired; except that he could argue estoppel because we kept him somehow from doing that, and I don't think there's any evidence of that. And, in fact, the evidence the Court can take judicial notice of, it was to the contrary, that he was frequently in contact with an attorney and could have raised that issue or concern and gotten himself a lawyer if one were willing to take his case.

Now, we've also argued -- in addition to the statute of limitations, we have argued as well that initially the pleadings here are so deficient that the -- under the recent case law, the Supreme Court addressing similar situations, that the Court should not allow this level of generality and this level of conclusory sort of allegations to survive, in light of those cases. There was a time when you could just say, as the Plaintiff has in this case, well, we've made allegations. The Court now says you can't do that anymore, you've got to be much more specific. Some of these Defendants, there isn't -- they haven't been -- for example, there's a -- the one female Defendant in this case, we don't know why she's in there.

She's not law enforcement in the sense of actually having done anything with the arrest. We -- I don't know that she had any role whatsoever. And there's nothing in the specific complaint that identifies how she specific -- instead, what we have is a bunch of allegations, the Defendants did this, Defendants did that. At best, he breaks it down by Federal Defendants and maybe County Defendants or State Defendants. But to survive a *Bivens* claim, a plaintiff must show that each individual actor that they're seeking to bring before the Court somehow did something that violated someone's constitutional rights. And I don't think these pleadings come anywhere near satisfying that standard that's required under the Supreme Court cases of *Iqbal* and --

**THE COURT:** *Twombly*.

**MR. GUERRA:** And *Twombly*. So I -- it sounds like a technicality, your Honor, but I don't believe so in this case. I think it's important that Defendants right -- because these are individuals who have, you know, bank accounts could potentially -- their lives

have been disrupted and will be disrupted as long as this case is pending out there. And, again, if this was a legitimate case where you have violence against someone or something has been done that warrants a constitute (sic) claim, that's the cost of doing business. But in this case here where we have pleadings that just throw out generalities like this, I don't think it's fair that these individuals should be subjected to the litigation that they're facing now in light of these very conclusory and general allegations of wrongdoing. It really is a case of he had one - - initially filed a suit against Mr. Moody and that didn't go very far because it's clear Mr. Moody had nothing to do with the Grand Jury and subsequent proceedings in this case.

There's an affidavit to that effect. The only thing he ever had anything to do with was is one or two days when the arrest -- he didn't arrest the Defendant, but he supplied a statement in support of the complaint, the criminal complaint. But subsequent to that, about ten days later, there was a Grand Jury presentation, a Grand Jury indictment, that he had no role whatsoever in. And there's no dispute about that. He didn't come in with any affidavits that said to the contrary. And so we have a situation where he originally sued Moody and probably realized, well, I can't go anywhere with that and so now we've got it against a bunch of other people. But we do have, again, a Grand Jury, a Grand Jury that did step in and make this -- now, he refers to Labuz making some false statements. But Labuz has submitted an affidavit in this case where she denies that. And if you read the actual affidavit that they're claiming supported that, which is in the public records, it can be accessed through PACER, it's clear she doesn't make a false statement. She said that it was put inside the car but she didn't say it was put inside the car by this defendant. In any

event, she states affirmatively that that was not presented to the Grand Jury, that no statement about that was presented to the Grand Jury. And so it's kind of a rabbit -- false, I don't know, expression. I'm getting so old that sometimes my analogies get confused. But the Court --

**THE COURT:** I think you mean to say rabbit trail.

**MR. GUERRA:** Rabbit trail. He's trying to get off on a rabbit trail which isn't really there. So I also don't -- we also have raised, but I don't know that we need to initially get into the details, but I think that the discretionary function exception does apply here because there is a recent case law, Judge Atlas in Houston, applying in a similar context did say that while the law is somewhat unsettled on some of these issues, in the end she says the Fifth Circuit -- and this was a decision entered I think within a few months ago -- that in this circuit at least, even assuming the unsettled aspects are in favor of the defendant, that discretionary function would apply to an incarceration and a prosecution -- in that case it was actually an incarceration, false arrest, and false imprisonment. And so I do feel -- we haven't talked about it and I didn't -- and I don't necessarily want to go into details, but say I think it does apply, your Honor.

The last thing I would say with regard to the issue of what occurred while he was incarcerated, the claim is that his air conditioner would cut off from time to time and that produced an intolerably hot environment and deprived him of his -- of something. I'm not sure what because actually in terms of the *Bivens* cases, none of those deal with his incarceration. Those all deal with more generic claims for the prosecution or with the arrest or whatever. The aspect associated

with the incarceration in that facility that didn't allegedly have air conditioning from time to time, that all falls under the -- in terms of the Federal Defendants, the claim against the United States under the Tort Claims Act. In order to have a claim under the Tort Claims Act, you have to have a Federal employee acting in the course and scope of employment. And in this case we have a separate corporate entity, independent contractor, providing these services. And under the case law cited in the brief, the United States isn't the proper defendant in that case. The proper defendant is the contractor who allegedly didn't have the air conditioning going at all times and produced the unpleasant environment. So I do feel like the entire case can and should be disposed of at this point, and that we have presented valid graces for each of the points he's raised. And I don't think the response that we somehow did something that was so terrible that the limitations should be ignored is appropriate here when we don't have any sort of affidavit or statement from the defendant and when we don't have any true evidence of that. In fact, it's contrary to the -- what the Court knows to be the situation. His frequent communications with an attorney representing him in the criminal case and his ability to communicate any concerns about that to that lawyer that would have allowed him to assert his rights within the limitations period.

**THE COURT:** Do you want to respond to the Federal motion, Mr. Friedman?

**MR. FRIEDMAN:**

* * *

All right, so with Federal Defendants, first, of course I take issue with what he says about us not having a legitimate case. We know that my client was

acquitted, we know that he spent more than two years in Federal custody. And we allege with facts that the Federal Defendants knew he committed no crime. So putting my client in jeopardy of 25 years to life, I'm sorry if their clients are inconvenienced by a lawsuit, but 25 years to life, this is not comparable.

So this is motion for dismissal and all affidavits and all external evidence should be struck. So anything about what any of the Defendants say and any of the Plaintiff's failure to make a affidavit I think is a rabbit trail.

On the -- on all of the Federal tort claims, statute of limitations are not violated on Federal tort claims. We filed a timely claim against the Federal government, both against the FBI and against the Marshals. And we filed our case against the Federal government in both instances in a timely manner.

Our -- and I have this much more clear in writing, but our pleadings are not deficient. I went through cause of action one through 20; 21 is moot because that's against the private prison. I went through every cause of action and I showed a minimum of facts that we've alleged, not every fact that we've alleged, that supports each cause of action.

They're not conclusory.

And about even Defendants like Rose Garza, I think she's the Defendant, she's -- that the Federal attorney is referring to. She -- the information we have is she was a photographer so she's a witness to everything. She's part of either the actual conspiracy to put my client in jail or she somehow didn't report what was going on. She supplied photographs to the prosecution that had nothing to do with anything with my client, so she is part of this government effort to put

my client in jail. And this I think is clear in our complaint. So other than what I've put in writing, I think that we have all of these issues covered, even the discretionary function exception. Again, I cite to case law. There is no discretion that a Federal employee has to violate somebody's civil rights. It's just not there. And so if our allegations meet legal muster, if they meet *Iqbal* and *Twombly*, then we should proceed.

* * *

**THE COURT:** And I guess other than the Federal Defendants, the other two motions are just motions to dismiss. They're not motions for summary judgment.

**MR. LEACH:** That is correct.

**MR. GUERRA:** Your Honor, the rules do allow a defendant to supply affidavits even at this stage, and the Court is permitted to treat them at -- as a motion for summary judgment. We specifically asked in the alternative that the motion be viewed in such --

**THE COURT:** Well, you haven't filed a motion to dismiss, any alternative motion for summary judgment --

**MR. GUERRA:** Correct, for the United States.

**THE COURT:** -- is what you've done with yours.

**MR. GUERRA:** Correct, your Honor. The other thing I wanted to mention, your Honor, is that I do not believe the Plaintiff is accurate in his statement that the Defendant was a photographer. The -- Rose Garza --

**THE COURT:** That the Plaintiff was a -- oh, that the --

**MR. GUERRA:** I mean, I'm sorry, the Defendant Rose Garza --

**THE COURT:** Rose Garza.

**MR. GUERRA:** -- was the photographer. I don't know where he got that from or -- but, first of all, there's no allegations of that in his pleading. There's no mention of that, that she was -- Rose Garza was a photographer?

**MR. FRIEDMAN:** Yeah, it's in there.

**MR. GUERRA:** Well, I stand corrected then. I was going to make a statement about that but I don't recall that statement. And then I don't see how that all ties together. But I do think that there are reasons why qualified immunity is allowed to be asserted this early on, before any discovery, the reasons why that someone whose defense in that regard is denied is allowed to immediately take it up on appeal, it is our burden associated with it then I think in this case to allow Plaintiff to keep these individuals involved in this case with these generic, conclusory allegations of, oh, they knew that he was innocent and they still prosecuted him anyway. There's nobody in jail I think that doesn't feel like they were innocent or at least make the allegation that they were innocent. And if we were to allow every defendant to bring a claim like claims like these just because they were not convicted, well then it would be hard -- it would really put a chill on prosecutions and criminal investigations when we expose, you know, agents and investigative officials to personal liability for every time an individual is found not guilty. And I think at best what we have here is the desire on the part of Plaintiff to find evidence in support of his claim. He's throwing out the allegations and he's saying let me prove it by finding something that will support these allegations. But when you look at whatever he -- the facts that he has now said, what you have is one thing and two things that have nothing to do with the actual prosecution. And so I just don't feel like it's appropriate to allow a plaintiff to try

to develop a case through discovery that he doesn't have at the time he filed his lawsuit.

* * *

**MR. FRIEDMAN:** So estoppel against the State and County for that matter, we know that something happened at his arrest and people -- the government agents, Defendants, we don't know who, some of them actively conspired to put my client in jail. Some people knew that he did not commit any crime. We are not yet at the level where we understand who knew what or -- I mean, this is a conspiracy. This was what I argue in my brief, that some conspiracies are so intricate, we don't know where ever chain link goes. We don't know that yet. But as far as a *Twombly* and *Iqbal* pleading, I am sure we meet that standard. We have alleged that both under Moody specifically and both under -- and Labuz specifically, that Moody and Labuz agreed with other Defendants to violate my client's rights. We have those allegations in there.

* * *

**THE COURT:** Okay, well, on August 30th at 4:00, there's going to be a telephone conference. You all -- if anybody wants to attend in the courtroom, they can. But other than that, if you need to attend by phone, that's fine. And the Court will rule on all these motions one way or another.

**MR. FRIEDMAN:** All right, appreciate it.

**THE COURT:** Thank you.

* * *

**(This proceeding was adjourned at 4:53 p.m.)**

## CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

January 27, 2018

**TONI HUDSON, TRANSCRIBER**

**APPENDIX C**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**MC ALLEN DIVISION**

| | | |
|---|---|---|
| DANIEL ENRIQUE CANTU, | ) | CASE NO: 7:15-CV-00354 |
| Plaintiff, | ) | CIVIL |
| vs. | ) | McAllen, Texas |
| JAMES M. MOODY, ET AL., | ) | Wednesday, March 29, 2017 |
| Defendants. | ) | (4:17 p.m. to 4:55 p.m.) |

**TELEPHONIC CONFERENCE**
**BEFORE THE HONORABLE RICARDO H. HINOJOSA,**
**CHIEF UNITED STATES DISTRICT JUDGE**

APPEARANCES: Continued (Next Page)

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| APPEARANCES FOR: | (Continued) |
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| Hidalgo County and Sheriff Defendants: | REX N. LEACH, ESQ.<br>Atlas Hall & Rodriguez, LLP<br>818 Pecan<br>McAllen, TX 78501 |
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| LCS: | RICHARD W. CREWS, JR., ESQ.<br>Hartline Dacus et al.<br>800 N. Shoreline, Suite 2000<br>North Tower<br>Corpus Christi, TX 78401 |

**McAllen, Texas; Wednesday, March 29, 2017; 4:17 p.m.**

**(Telephonic appearances)**

**(Call to Order)**

**THE COURT**: Please be seated.

Civil Action Number M-15-354, *Daniel Enrique Cantu versus James M. Moody and others*. Can we have announcements for the parties as to who is here?

**MR. FRIEDMAN**: Jerold Friedman, attorney for Plaintiff, Daniel Cantu.

* * *

**MR. GUERRA**: And David Guerra, your Honor, on behalf of the federal defendants.

* * *

**THE COURT**: Well, I'm not -- I'm going to the federal defendants.

**MR. LEACH**: Okay.

**THE COURT**: Go ahead.

**MR. GUERRA**: David Guerra, your Honor, on behalf of the federal defendants. That includes the United States, and there are seven individual agents of the Federal Bureau of Investigation who have also been sued. The federal government was sued, apparently, under -- under the theory that there were state torts that were committed here, so it would be subjected to the -- the --

* * *

**MR. GUERRA**: My sense is that the case against the federal government was brought under the Federal Tort Claims Act and is, therefore, subject to the constraints of the Federal Tort Claims Act, because that is the only waiver of sovereign immunity that would be applicable here. And as to the individuals,

they have been sued for the -- under *Bivens* for allegedly violating the plaintiff's constitutional rights under, I think, the Fourth and maybe the Fifth Amendment.

With regard to the federal government claims, the -- I guess, or actually with regard to all of the claims, the United States has first presented in its motion the argument that the -- the pleadings here are so deficient that they don't pass muster under the Supreme Court rulings, recently under the *Iqbal* case, that identify -- or did away with the former standard that had said that any reasonable -- any -- that the motion to dismiss should be denied if there was any -- any conceivable way that the -- the claims could give rise to a -- to a cause of action against the defendants. Now the standard is much higher. There has to be a plausible presentation of facts that are specific enough to identify the individuals and what they did and what they did wrong to -- to survive a motion to dismiss. And we do feel like that all of the allegations contained in this complaint, third amended complaint, are essentially conclusory allegations that they didn't have probable cause. He doesn't say why. Now we're talking a little bit more; he's -- it's basically alleging that the arrest itself, the officers should have known that there -¬that it was improper. But -- but, again, it's a conclusion as opposed to the explanation of some of the facts that would have been -- would have allowed someone to conclude that these pleadings do give rise to a cause of action or could give rise to a cause of action.

It appears more likely that what's going on here is that there is a fishing expedition on the part of the plaintiff to throw out the allegations, and then he hopes to find in the course of maybe discovery something that would allow him to actually contend that

there is the evidence in support of the claims. But -- but in the absence of anything other than the generic allegations that we have here, we don't feel that the -- that the pleadings are sufficient, particularly with regard to the type of claims that are brought against the individuals, because the -- it's clear that under -- under *Bivens* you cannot be vicariously liable. You have to have done something yourself that violated someone's civil rights. And here they're just labeled as, you know, "the agents did this." He doesn't say who did what, and we don't know if any of them participated, and, in fact, we -- in our response we deny that they actually participated in the actual arrest. Mr. Moody, for example, all he did was -- was arrest one of the other individuals in the case, not this particular individual, at the time of the arrest. And, so -- and there's -- there is a woman identified, one of the agents that's identified, that we don't exactly know, because he doesn't say, what she did at all. There's no allegations that she did anything. I'm not talking about Labuz, but the other individual.

The point being that the allegations are so deficient that they shouldn't -- the defendants are not in a position where they -- they're even capable of responding and defending and proving why they didn't do this, because we don't know --it's generic allegations. So, now, that's as to the pleadings deficiency.

As to the merits of the case, we do feel like limitations are applicable here as to all these defendants. We most specifically (indiscernible) Mr. Moody, because Mr. Moody was sued in -- was the only one named originally. Mr. Moody was named as a defendant, and we responded, and he has a declaration attached to our motion where he identifies the only thing he did in this whole case early on was he was there at the scene but wasn't involved in the arrest of

this plaintiff. He did supply an affidavit in a criminal complaint that had one misstatement that had no bearing on anything, as it turns out, because this was presented to a grand jury almost immediately, without that misstatement, by another individual. So, Mr. Moody's involvement ended more than two years prior to the time this suit was -- was brought, and -- and -- but that's also true of really all of the people involved here with regard to the false arrest and false imprisonment.

For the same reason the Court ruled as to the other defendants that were identified in Docket Number 58, we feel like the -- that that would preclude any false arrest or false imprisonment case against the federal agents here for those two claims.

And with regard to the allegations that there was --there was a wrongful prosecution here, well, I guess the main argument on that with regard to individuals is that the qualified immunity defense would apply if there was any -- he has to show that we knew or should have known that what we were doing at that time was violating -- was in violation of someone's rights. And given the information available to all the -- again, hard to tell which ones he's talking about because he didn't identify who knew what and how they were involved and some of the -- some of them were supervisors that weren't even in the country at the time that this -- this thing occurred. But, anyway, he has to -- he has to -- he has to produce evidence of some sort that the individuals that he's sued under *Bivens* knew that this was a -- was an improper arrest, knew that this individual was not guilty of the crimes that he was being charged, and nonetheless continued to prosecute him throughout the trial. And, your Honor,

I just --the absence of any evidence and just the generic allegations, I don't think that they would survive a qualified immunity assertion at this point.

The -- with regard to the defendant, the federal government, I think as I mentioned earlier, the discretionary function exception would preclude liability under that scenario -- for wrongful prosecution because the decision to prosecute involves the type of discretionary function that the Court's intended to insulate from -- from potential liability on the part of the Government, that's why it's identified, and there are some cases that are cited in the motion that discuss the -- the applicability of discretionary function. There was an opinion by Judge Atlas, I believe, in 2015, where she essentially discusses in a very similar context the allegations that the Government wrongfully prosecuted an individual who was found not guilty, and the Court did hold that the discretionary function exception to the FTCA did apply.

So, in sum, your Honor, we feel like that the -- for the same reasons that the Court ruled earlier, that the -- that the limitations applied also apply to the federal defendants in this case, and, in addition, we feel like the -- the allegations here are not specific enough as to these individuals to survive the motion to dismiss and that the -- the qualified immunity doctrine is certainly applicable and strong enough in this case here to override the rather broad allegations that these individuals somehow must have known that this was an improper prosecution, that this man was innocent, and that he, nonetheless, was -- was wrongfully prosecuted.

**THE COURT**: Okay. Is there anything else from anyone on that issue?

**MR. FRIEDMAN**: For the plaintiff, yes. This is Jerry Friedman.

**THE COURT**: Sure.

**MR. FRIEDMAN**: Mr. Guerra indicates that there is a limitations problem. There was no limitations problem. The claims were all timely filed, both against the FBI and later against the U.S. Marshals.

He argues about the discretionary function, but there's applicable case law which I cited that says there is no discretionary function to violate a person's civil rights in this way to manufacture probable cause and then to have them arrested.

**THE COURT**: Well, but you just say that, but there is nothing to indicate that anything was manufactured other than it's a claim that really doesn't really survive *Iqbal* and *Twombly* other than to just say, "I want to say that they manufactured something."

**MR. FRIEDMAN**: Well, your Honor, I -- I put in there that --

**THE COURT**: I mean, there is no way to defend yourself on this other than just to say something was manufactured. Well, the only thing that was possibly a mistake was corrected quickly with regards to the issue of Mr. Moody saying something with regards to what he had observed based on what he heard from somebody else, but that's the only thing that anybody has indicated that anybody just made up. And he has an explanation as to how this happened, and the minute he found out it was an error, it was corrected; it wasn't relied on by anybody, wasn't used. And, so, therefore, the idea that somehow because I just want to go out and say all of a sudden that everything's manufactured and this was horrible and this was mean and it was lies, but without identifying something, it's really -- it really gets to the point where you

can't really even survive the *Iqbal Twombly* because it's generalities of, "I didn't like it and I was acquitted, and, so, therefore, that must mean something was fabricated."

**MR. FRIEDMAN**: Yeah, but, actually, your Honor --

**THE COURT**: And I understand the defendant's -- the plaintiff's viewpoint with regards to, "I was acquitted," but it takes more than just being acquitted to, therefore, say, "My constitutional rights were violated and things were made up and they lied about things." And I think that we have statute of limitations issues, we have *Iqbal-Twombly* issues with this, and then, even if we got to the point of the discretionary function, we also have that issue.

**MR. FRIEDMAN**: Yeah, there's more --

**THE COURT**: And certainly with qualified immunity, that just saying they acted unconstitutionally but not indicating how they could possibly have acted unconstitutionally or with some constitutional violation, other than the fact that, "Because I was acquitted, therefore, they must have violated some kind of constitutional right that I had." And this is difficult when you have a grand jury indictment and you have third parties issuing warrants or whatever else was done by other third -- independent third parties to, therefore, say, "There must have been something wrong," without any identification of what it was that was wrong other than the -- the Moody statement, which was really corrected quickly the minute that was found to be incorrect.

**MR. FRIEDMAN**: So, your Honor, I think there's more substance there in the pleading, because not only was the Moody statement wrong, but it also roughly matched the statement by the federal officer

Labuz. And, so, Labuz made that material misstatement and never corrected it, and it seems to me that Moody then copied that statement, which suggests a conspiracy when both of these --

**THE COURT**: Yeah, but -- but it was corrected --

**MR. FRIEDMAN**: -- affidavits are put --

**THE COURT**: It was corrected by Mr. --

**MR. FRIEDMAN**: -- are put together.

**THE COURT**: Mr. Moody corrected it. I mean, it was done. It was before anything was used by -- by it, and really the minute that he found out this was in error it was corrected. And that -- that -- that that --

**MR. FRIEDMAN**: I don't believe that's correct, your Honor. I don't believe it was corrected the minute he figured it out.

**THE COURT**: Well, soon enough.

**MR. FRIEDMAN**: And if that was -- and if that was the case, if it was corrected, then that should have been presented to the grand jury, but it wasn't.

**THE COURT**: But it --

**MR. GUERRA**: Well, the error wasn't presented.

**THE COURT**: But there was never -- the grand jury never even heard the mistaken statement.

**MR. GUERRA**: Exactly.

**THE COURT**: So, this -- what would you tell them? "Oh, by the way, there was a mistake and you didn't hear about it, but now we're going to repeat it to you"?

**MR. FRIEDMAN**: But if -- but if the -- if Labuz said that these things happened which didn't happen, that my --

**THE COURT**: It's not "these things." It's one thing.

**MR. FRIEDMAN**: -- that my client actually took --

**THE COURT**: It is one thing that was said. And it was not presented to the --

**MR. FRIEDMAN**: And it was -- and it --

**THE COURT**: It was not presented to the grand jury. The grand jury did not rely on this at all. Nobody relied on it.

**MR. FRIEDMAN**: It was presented -- it was presented by Labuz.

**MR. GUERRA**: No, your Honor. That's not correct.

**THE COURT**: No, it was not.

**MR. GUERRA**: That's not correct.

**MR. FRIEDMAN**: The information I have is it was.

**THE COURT**: Who --

**MR. FRIEDMAN**: I don't know any information to the contrary, because there were two statements --

**THE COURT**: Who gave you that information --

**MR. FRIEDMAN**: -- two affidavits.

**THE COURT**: -- and where can you point to something that it was? And if you -- if you find that information and want to file a motion to reconsider, do that.

**MR. FRIEDMAN**: Okay.

**THE COURT**: But if you can give me that information -- but there is nothing in this file that indicates that it was presented to any -- by anybody to the grand jury. And if you have that information, I will be glad to look at a motion to reconsider.

**MR. FRIEDMAN**: Okay.

**MR. GUERRA**: And, your Honor, Labuz in her declaration specifically denies that that was presented to the grand jury. And, again, what she said --

**THE COURT**: Well, I know. So, I -- I have that information, that it wasn't presented to the grand jury. If he has some fact that somehow can prove that that was a false, so it will -- we can consider it. But right now there is nothing to indicate that this was presented to the grand jury other than the plaintiff's attorney's statement that has just been said that, "I have" -- "I think it was," or that, "I have information that it is but cannot point to any information that's on this file here that indicates that it was." And, but I'm not cutting him off from it if he has it. Please present it to me, and I'll reconsider here.

**MR. FRIEDMAN**: Okay.

**THE COURT**: The Court -- the Court is ready to go ahead and rule on the motion of the federal defendants. For the same reasons as we've --

* * *

**THE COURT**: And with regards to the statute of limitations, for the same reasons I did with regards to the state defendants, I am going to find that the motion to dismiss should be granted with regards to the statute of limitations with regards to those particular claims, and with regards to any other claim, the Court's also going to find that the defense of qualified immunity applies here. There has been no constitutional violation that would have clearly been a constitutional violation by any federal law enforcement official under *Bivens* that would indicate that there was an issue here as to any of the actions that they took.

With regards to if there was any FTCA claims that would survive, if there were, but there really aren't, it

would certainly appear to the Court that the discretionary function would apply here and that those cases -- those causes of action should also be dismissed. And, so, it's based on statute of limitations, based on *Iqbal* and *Twombly*, and based on qualified immunity with regards to any of the federal defendants, there should be a dismissal of the causes of action against them.

* * *

**(Proceeding was adjourned at 4:55 p.m.)**

## CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

April 5, 2017

**TONI HUDSON, TRANSCRIBER**

**APPENDIX D**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**MC ALLEN DIVISION**

| | | |
|---|---|---|
| DANIEL ENRIQUE CANTU,<br>Plaintiff,<br>vs.<br>JAMES M MOODY, ET AL.,<br>Defendants. | ) | CASE NO: 7:15-CV-00354<br>CIVIL<br>McAllen, Texas<br>Wednesday, October 11, 2017<br>(4:04 p.m. to 4:30 p.m.) |

**TELEPHONIC MOTION HEARING**

**BEFORE THE HONORABLE RICARDO H. HINOJOSA,**
**CHIEF UNITED STATES DISTRICT JUDGE**

APPEARANCES: Continued (Next Page)

For Plaintiff: JEROLD D. FRIEDMAN, ESQ.
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| | |
|---|---|
| APPEARANCES FOR: | (Continued) |
| Federal Defendants: | DAVID L. GUERRA, ESQ.<br>Office of the U.S. Attorney<br>1701 W. Highway 83,<br>Suite 600<br>McAllen, TX 78501 |
| Hidalgo County and Sheriff Defendants: | REX N. LEACH, ESQ.<br>Atlas Hall & Rodriguez, LLP<br>818 Pecan<br>McAllen, TX 78501 |
| Daniel Martinez, Donicio Arigullin, Alfredo Barrera: | SETH B. DENNIS, ESQ.<br>Office of the Texas Attorney General<br>P. O. Box 12548<br>Austin, TX 78711-2528 |
| LCS: | RICHARD W. CREWS, JR., ESQ.<br>Hartline Dacus et al.<br>800 N. Shoreline, Suite 2000<br>North Tower<br>Corpus Christi, TX 78401 |

**McAllen, Texas; Wednesday, October 11, 2017; 4:04 p.m.**

**(Call to order)**

**THE COURT:** Civil action Number M-15-354, *Daniel Enrique Cantu versus James M. Moody and others*. Can we have announcements for the parties as to who's present?

**MR. FRIEDMAN:** Jerold Friedman for Plaintiff, Daniel Cantu.

**MR. GUERRA:** David Guerra on behalf of the Federal Defendants.

* * *

**THE COURT:** Okay, the Court had already granted summary judgment with regards to the State Defendants, as well as the Federal Defendants. That leaves the County Defendants as well as LCS as far as what's left with regards to this case. And I had explained the reasons and the rulings for the Court on that. There is a motion on the part of the Plaintiffs with regards to reconsideration with regards to that -- those rulings of the Court. And I guess I'm having a hard time understanding what the motion for reconsideration, what the purpose of it. What am I supposed to reconsider?

**MR. FRIEDMAN:** Just a few things, your Honor. This is Jerry Friedman. That the extrinsic evidence was improper at this early stage. We have not gone through discovery and your rulings were -- for summary judgment were largely based --

**THE COURT:** My rulings were based strictly on the complaint itself and, frankly, on statute of limitations grounds.

* * *

**MR. FRIEDMAN:** * * *

So this would be the first amendment filed based on pleading defects. And I would ask to clean up the complaint, dismiss the parties that we have a remote claim against, let me file a fourth amended complaint. And I sincerely don't want to waste my time, the Court's time, or any of the Defendants' time, but my client was in jail on a false arrest for more than two years and that wrong --

**THE COURT:** He was in jail --

**MR. FRIEDMAN:** -- has to be righted.

**THE COURT**: -- for during that period of time as a result of a Grand Jury indictment that is totally independent of the actions of any of these people.

**MR. FRIEDMAN:** And that Grand Jury indictment -- your Honor, this is Jerry Friedman again. That Grand Jury indictment, I alleged, was tainted by --

**THE COURT:** Well, the --

**MR. FRIEDMAN:** -- and I -- and we have evidence of --

**THE COURT:** -- alleged tainting was quite clear that it's -- you cannot even allege that the Grand Jury was tainted with that because all -- the Grand Jury was told that there had been an error and it was corrected.

**MR. FRIEDMAN:** I believe that's false, your Honor, and that's not in the complaint, that's not what we have in the complaint, and that's not --

**THE COURT:** So what is it that you would complain about? I mean, none of us would possibly know what you would be complaining about the Grand Jury indictment. You made it about the Moody affidavit,

which was totally corrected before the Grand Jury indictment and before the Grand Jury. And so what would you be complaining about?

**MR. FRIEDMAN:** Yeah, that has been corrected before the Grand Jury, mere (phonetic) facts that are not in evidence. And I would just want to again dismiss the irrelevant parties --

**THE COURT:** They have presented information but you have presented nothing to indicate that that information is incorrect.

**MR. FRIEDMAN:** I submitted in this --

**THE COURT:** In fact, I think you've ordered copies of everything here, have you not? And do you have some evidence that somehow that is -- it's not even evidence. You can't even make the allegation because there is no such allegation to the contrary.

**MR. GUERRA:** David Guerra, your Honor, on behalf of the Federal Defendants. And I think that's the -- that's exactly the problem here that we have is just speculation, just allegations, just claims not supported in any way by any evidence that would be considered conflicting. We don't have -- even though this is again the fifth time we've had a -there's already been five prior pleadings. There's a request now to come in with a -- with what would be I guess there's been four and then the original suit, so this may be the fifth time that --

**THE COURT:** This would be the fifth time.

**MR. GUERRA:** -- they're seeking a -- and in all that time, we haven't seen a declaration, an affidavit from the Plaintiff here that would -- that even that might raise a fact issue, or even if it wasn't accurate or true, we still haven't seen -- and even if it countered the what is known to be about the case and facts and details that are without dispute. And so I think we're

looking at a situation where he's again done a good job of trying to stir the waters, but you shouldn't be allowed to go find a case after you file it. You've got to have something that supports a -- especially in a situation where countervailing evidence has been presented indicating that the allegations are untrue. At that point, I don't think a defendant can just say, well, I have my pleadings because we have argued limitations which hasn't been addressed by the way in the motion to reconsider, the limitations issue wasn't -- didn't produce anything that was new. And I think on the motions along this line, you're supposed to -- you just can't ask the judge to reconsider because you think he ruled wrongly. You have to some grounds for doing so. And everything that's been asserted has been already previously asserted in the case I believe. So the bottom line I believe, your Honor, is that we are talking about a situation in which the Plaintiff after all this time is still trying to find something, but has done nothing but make allegations and has not produced any evidence that would be in support of -- that would counter the facts that we already know about the case.

**THE COURT:** Well, first of all, we have the statute of limitations problem. But nevertheless, what -- who were you willing to say that you're going to not proceed against?

* * *

**THE COURT:** Right, but there was a Grand Jury indictment and there was nothing to indicate that there was a problem with regards to the Grand Jury indictment.

**MR. FRIEDMAN:** Your Honor, this is Jerry Friedman again. Your Honor, on that Grand Jury indictment, Moody did submit an affidavit that --

**THE COURT:** Right, but you -- but the -- what has been presented, which you have no argument other than I just want to say it, that there is any evidence whatsoever that that wasn't corrected before the Grand Jury. You have presented nothing that indicates that that did not occur.

**MR. FRIEDMAN:** So, your Honor, I -- this is Jerry Friedman again. I don't mean to test your patience, I'm sorry. But the -- what Mr. Moody testified to recently in his affidavit, said that he didn't -- his complaint was not presented to the Grand Jury. And yet on one of the attachments I provided to you has an Exhibit A sticker and it looks to me like that was in fact presented to the Grand Jury. So it looks to me like the affidavit of Moody is improper and it should be -- and it's wrong for that reason. And further because this motion should have been a motion to dismiss and external -- and extrinsic evidence should not have been considered, then Moody's affidavit saying that he wasn't involved is irrelevant.

**THE COURT:** Mr. Guerra, did you want to respond to that?

**MR. GUERRA:** I'm sorry, did you ask if the government wants, your Honor?

**THE COURT:** Yes.

**MR. GUERRA:** Your Honor, David Guerra on behalf of Moody and the Federal Defendants. What Mr. Friedman is referring to is on some of the dockets, on some of the -- on a docket (indiscernible) some sort there was a reference to

Mr. Moody. It's pretty clear that that reference arises out of the fact that at one point, the case originally began under -- with a -- not the Grand Jury but I think it was on an indictment -- on a criminal complaint, I'm sorry, on a criminal complaint. And at that

point it appears that that was never corrected as the -- when they listed the agency involved, it said "Federal Bureau of Investigation, James Moody." But again, that arose very early on. There were four -- there were five defendants in the case. And he's -- and I don't think that the Plaintiff, Mr. Cantu, has in any way linked that with this particular Defendant, other than the fact that the name was listed as the agency, which of course would be the case either way if it began under a criminal complaint. And so I don't think that raises a -- that -- what he's doing here is what often criminal defense lawyers do in trying to make it look like something is significant that's not. The fact that at one point on one document early on in the indictment here that there was a listing --

**THE COURT:** Well, it's not the --

**MR. GUERRA:** -- for the FBI that included --

**THE COURT:** -- indictment. The indictment had not occurred, according to you. It was --

**MR. GUERRA:** Right.

**THE COURT:** -- a criminal complaint.

**MR. GUERRA:** I'm sorry, I meant the complaint. That would -- that does not raise a fact issue in light of the strength of the statement of Mr. Moody that he had zero participation in the Grand Jury proceedings and in fact had zero participation in the trial proceedings, that he had -- that any mistake that he made was not presented with -- to the Grand Jury because his testimony was in no way used as part of the Grand Jury proceedings. And so I think that the fact that the agency listed -- included the Federal Bureau of Investigations and his name was listed there and the criminal complaint number listed that -- to that doesn't change the fact that it went through a Grand

Jury proceeding that was unrelated to the initial mistake that Mr. Moody had made.

* * *

**THE COURT:**

* * *

The Federal Defendants' motions for summary judgment for -- not for summary judgment, their motions to dismiss all have already been granted. On the Federal Defendants, they did have in the alternative a motion for summary judgment. And frankly on summary judgment, there was no evidence to the contrary. However, what -- the only thing I'll do for you is you can go ahead and explain in a better way, file something that indicates to you (phonetic) why you -- what it is you're trying to say that you have a right to file a fourth amended complaint.

* * *

**THE COURT:** -- today has granted the summary judgment -- the motions to dismiss of the State Defendants, the County Defendants. I've already done that with regards to the Federal Defendants. You want to be left open because you say you want to file a fourth amended complaint. But you're going to have to give the Court more information as to why you should be allowed to file a fourth amended complaint at this point, other than just some verbal statement at this point. You can file something to that effect within a week from today indicating to the Court what it is that you would be doing with regards to a fourth amended complaint here that you've convinced the Court that somehow the Court should not continue with the dismissal that it already has done with regards to the Federal Defendants. And also whether --

**MR. FRIEDMAN:** This is Jerry --

**THE COURT:** -- it would convince the Court also with regards to LCS here.

**MR. FRIEDMAN:** This is Jerry Friedman. I have the answer for that, your Honor, in my reply to --

**THE COURT:** I don't think that your answer is sufficient. I think you're going to have to be clearer to the Court as to what it is that is -- that would in any way indicate that you have anything different to allege here than you've already alleged in the third amended complaint.

**MR. FRIEDMAN:** Your Honor, I'm grateful for a week to file that document.

**THE COURT:** Okay, and if the Court needs a hearing besides what we've already had, I will certainly let you know. But -- and what you need to do is you really need to amend your motion to leave to file a proposed complaint with better information than you have now. In fact, what I'm asking you to do is attach a proposed complaint with your motion for leave. It's very difficult to grant somebody a motion to leave without really seeing the complaint and having all of us, first the Court itself and then the other parties, try to determine what would be added here that hasn't already been put in a complaint beforehand that really has any basis whatsoever.

**MR. FRIEDMAN:** I understand, your Honor.

**THE COURT:** Does everybody else understand that?

**MR. SPEAKER:** Yes, your Honor.

**MR. SPEAKER:** Yes, your Honor.

**THE COURT:** Okay, and if anybody wants to respond to it, you can do so within ten days after he files

it. If you all don't have anything else, you all can be excused. Thank you all.

* * *

(This proceeding was adjourned at 4:30 p.m.)

**CERTIFICATION**

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

January 27, 2018

**TONI HUDSON, TRANSCRIBER**

**APPENDIX E**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**MC ALLEN DIVISION**

| | |
|---|---|
| DANIEL ENRIQUE CANTU,<br>Plaintiff,<br>vs.<br>JAMES M MOODY, ET AL.,<br>Defendants. | CASE NO: 7:15-CV-00354<br>CIVIL<br>McAllen, Texas<br>Wednesday, December 13, 2017<br>(4:05 p.m. to 4:11 p.m.) |

**HEARING ON MOTION TO AMEND COMPLAINT**

**BEFORE THE HONORABLE RICARDO H. HINOJOSA,**
**CHIEF UNITED STATES DISTRICT JUDGE**

APPEARANCES: Continued (Next Page)

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| | |
|---|---|
| | Corpus Christi, TX 78480-8668<br>(361) 949-2988 |
| APPEARANCES FOR: | (Continued) |
| Federal Defendants: | DAVID L. GUERRA, ESQ.<br>Office of the U.S. Attorney<br>1701 W. Highway 83,<br>Suite 600<br>McAllen, TX 78501 |
| Hidalgo County and Sheriff Defendants: | REX N. LEACH, ESQ.<br>Atlas Hall & Rodriguez, LLP<br>818 Pecan<br>McAllen, TX 78501 |
| Daniel Martinez, Donicio Arigullin, Alfredo Barrera: | SETH B. DENNIS, ESQ.<br>Office of the Texas Attorney General<br>P. O. Box 12548<br>Austin, TX 78711-2528 |
| LCS: | RICHARD W. CREWS, JR., ESQ.<br>Hartline Dacus et al.<br>800 N. Shoreline, Suite 2000<br>North Tower<br>Corpus Christi, TX 78401 |

**McAllen, Texas; Wednesday, December 13, 2017; 4:05 p.m.**

**(Call to order)**

**THE COURT:** This is Civil Action Number M-15-354, *Daniel Enrique Cantu versus James M. Moody and others*. Can we -- some people are here in person, others are on the phone, so can we have announcements for the parties first, those that are here in person?

* * *

**MR. GUERRA:** David Guerra, your Honor, with the U. S. Attorney's Office on behalf of the seven named-Federal Defendants and the United States.

**THE COURT:** And those on the phone?

**MR. FRIEDMAN:** Jerold Friedman for Plaintiff.

* * *

**THE COURT:** * * *

I will note that that leaves the fourth amended -- the motion for leave to file the fourth amended complaint. The last several hearings, the Court has considered motions to dismiss and/or for summary judgment filed by Defendants. These motions have been revised to address prior amendments of the Plaintiff because the -- he's already -- there's already been more than one amendment to the original pleadings. The Court considered the pleadings, the motions on file, the responses and replies, as well as the arguments of the counsel on all sides here. The Court had granted those motions, except for the one on LCS which is no longer, it is now moot because of the fact that they have settled. And I had granted the motions on the grounds asserted, mainly because of limitations, because of qualified immunity, because there was no recognized such claim, or simply because the Plaintiff

failed to state a claim for relief. I stated those reasons on the record.

The Plaintiff requested the Court revisit its rulings, which again after consideration of the pleadings on file, the motions, responses, and replies, the Court refused to do so and changed its opinion as to what it had already ruled on.

The Plaintiff now wishes to amend the complaint for the firth time here -- fourth time here which as it's called which would make it the fifth here, and perhaps the sixth overall. I've granted the motion to dismiss LCS, so that matter is no longer before the Court. The Plaintiff indicated at the last hearing he would no longer urge claims against the County Defendants, claims against the State Department, save Defendant Barrera, that he would drop bystander claims and claims accruing at the time of the arrest. It would appear to the Court that only the malicious prosecution claims and the claims against LCS would have been urged -- would -- and the LCS obviously would not be urged anymore because that's over. Despite Plaintiff's representation at the last hearing, the proposed amended complaint adds more than that. I have seen the motions, I have seen the responses on this one motion that's pending before the Court. Does anybody need to add anything else to this?

**MR. GUERRA:** No, your Honor.

* * *

**THE COURT:** Okay, well, nevertheless, the Court has already dismissed the malicious prosecution claims. The Court is of the belief probable cause to arrest existed, an independent Grand Jury indicted, and a case with sufficient evidence to go to a jury was presented. There is no evidence to support Plaintiff's claim that the prosecution was a result of

fabricated evidence. The Court continues to make the following and makes the following rules.

Despite the liberal standard applied to motions for leave to amend, given this would be the fifth pleading, actually sixth after an early voluntary dismissal of a predecessor action in M-15-43, given the dismissals of virtually of all the claims, whether upon limitations, qualified immunity, or general failure to state a claim grounds, given the representation that Plaintiff was abandoning certain claims, and given the amendment, present claims already addressed in the prior motions, the post-dismissal attempt at reviving the claims should be and is hereby denied. And I therefore believe that all the claims of the action should be dismissed, have, and will continue to be dismissed. And all the claims have been disposed of as far as the Court is concerned and, therefore, this action should be dismissed and there should be an order to that effect. If you all don't have anything else, you all can be excused. Thank you all very much.

**MR. LEACH:** Thank you, your Honor.

**MR. FRIEDMAN:** This is Jerry Friedman. Under Rule 56, motion for summary judgment, could you have a written opinion for those Defendants who were dismissed by summary judgment?

**THE COURT:** There will be a written order of dismissal, a judgment, but the opinion will be what I've said before on the record.

* * *.

**(This proceeding was adjourned at 4:11 p.m.)**

## CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

January 27, 2018

**TONI HUDSON, TRANSCRIBER**

**APPENDIX F**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**McALLEN DIVISION**

| | | |
|---|---|---|
| DANIEL ENRIQUE CANTU,<br><br>Plaintiff,<br>VS.<br><br>JAMES M MOODY, *et al,*<br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. 7:15-CV-354 |

**ORDER GRANTING MOTION OF FEDERAL DEFENDANTS TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT AND/OR ALTERNATIVELY FOR SUMMARY JUDGMENT ON ALL CLAIMS AGAINST FEDERAL DEFENDANTS IN PLAINTIFF'S THIRD AMENDED COMPLAINT**

On the 29th day of October, 2017, came on to be heard the Motion of Defendants United America, James M. Moody, Erin LaBuz (formerly Erin Hayne), Nathan Husak, Christopher Lee, David De Los Santos, Ryan Porter and Rosa Garza to Dismiss Plaintiff's Third Amended Complaint and/or for Summary Judgment on all claims stated against these Defendants in the Third Amended Complaint (Docket Entry Number 60), and the Court, after having reviewed the Motion, the pleadings on file, and the arguments of counsel, was of the opinion that said Motion should be granted for the reasons stated on the record. The Court heard various arguments on the pleadings at hearings on May 4, 2016, on July 7, 2016, March 29, 2017, October

11, 2017, and December 13, 2017. The Court notes that Plaintiff was granted leave multiple times to replead in this action and had filed a similar action previously in this Court, M-15-043 (voluntarily dismissed). The Court did consider evidence presented outside the pleadings and available for a considerable period of time to all parties. The Court, therefore, treated Defendants' Motion as one for summary judgment under Rule 56. See *Isquith v. Middle South Utilities Inc.*, 847 F.2d 186 (5th Cir.1988) *cert. denied* 488 U.S. 926, 109 S.Ct. 310 (1988). The Court agreed with Defendants that the defenses of sovereign immunity, limitations, qualified immunity, and failure to state a claim required dismissal of and/or judgment upon Plaintiff's causes of action asserted against these Defendants. It is, therefore,

ORDERED, ADJUDGED AND DECREED that Defendants' Motion is hereby GRANTED, and Plaintiff's causes of action against Defendants United States of America, James M. Moody, Erin LaBuz (formerly Erin Hayne), Nathan Husak, Christopher Lee, David De Los Santos, Ryan Porter and Rosa Garza are hereby DISMISSED.

DONE on this 29th day of March, 2018, at McAllen, Texas.

(handwritten signature)
Ricardo H. Hinojosa
UNITED STATES
DISTRICT JUDGE

**APPENDIX G**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 18-40434

---

DANIEL ENRIQUE CANTÚ,

Plaintiff-Appellant

v.

JAMES M. MOODY; ERIN S. LABUZ, also known as Erin S. Hayne; NATHAN HUSAK; DAVID DE LOS SANTOS; RYAN PORTER; ROSA LEE GARZA; ALFREDO BARRERA; UNITED STATES OF AMERICA; CHRISTOPHER LEE,

Defendants-Appellees

---

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

---

ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____ , _____ F.3d _____ )

Before CLEMENT, GRAVES, and OLDHAM, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
(handwritten signature)
UNITED STATES CIRCUIT JUDGE