APPENDICES

APPENDIX A

[Filed October 2, 2019]

REVISED October 2, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20223
Summary Calendar

STEPHANIE JONES,

Plaintiff – Appellant

v.

JEREMY EDER, in his individual capacity; J. DALE, in his individual capacity; B. BAKER, in his individual capacity; R. NG, in his individual capacity; FORT BEND COUNTY,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CV-2919

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges. PER CURIAM:*

On January 31, 2014, Defendant-Appellee police officer Jeremy Eder led a search of Plaintiff-Appellant Stephanie Jones' home. Eder had a warrant authorizing officers to search for and seize cocaine and any illicit contraband, as described in an attached affidavit. During the search, another officer drew Eder's attention to one-and-one-half pills outside of their prescription containers on Jones' windowsill. Eder identified the pills as hydrocodone and alprazolam (Xanax) through consultation with representatives of a poison control center. After learning that, police seized the pills, arrested Jones, and charged her with two counts of possession of a controlled substance in a school zone.[1] Unbeknownst to the officers, Jones had a valid prescription for hydrocodone, and her father, who lived in the home, had a valid prescription for Xanax. Although Jones was indicted by a grand jury, her case was later dismissed due to insufficient evidence.

Jones filed suit, pursuant to 42 U.S.C. § 1983, alleging in the operative complaint seven claims

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] In her complaint, Jones alleged the officers also seized six-hundred dollars in cash from her home; however, on appeal, Jones neither raises nor briefs this issue. Accordingly, this claim is waived. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) (citing FED. R. APP. P. 28(a)(9)(A)).

against Eder, three other police officers, and Fort Bend County.[2] The claims rested on violations of the Fourth Amendment for unlawful seizure of Jones' person and property; violations of the Fourteenth Amendment for failure to protect her rights to privacy and to be free from unreasonable seizure; and, Fort Bend County's failure to train, supervise, and discipline its officers, *see Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Defendants filed motions to dismiss for failure to state a claim. On August 31, 2016, the district court dismissed the right-to- privacy and failure-to-protect claims, as well as all claims against Fort Bend County.[3] Thereafter, Jones filed a motion for leave to amend her complaint for a second time. The district court granted leave, and Jones filed her second amended complaint, reasserting *Monell* claims against Fort Bend County. Defendants filed motions for summary judgment. On March 20, 2018, the district court granted summary judgment for all claims against the three other police officers, leaving only the Fourth Amendment claims against Eder and the Monell claims against Fort Bend County remaining. Jones then sought leave to amend her complaint for a third time. On March 21, 2019, the district court, after a second round of motions practice, granted summary judgment on all remaining claims

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[2] The three other police officers named as defendants are Raymond Ng, Joshua Dale, and Bryan Baker.

[3] In this order, as well as the other orders and rulings at issue on appeal, the district court based its decision largely on the detailed findings and recommendations submitted by the magistrate judge.

against defendants, denied Jones' motion for leave to file a third amended complaint, and entered a final judgment.[4]

On appeal, Jones asserts the district court erred in dismissing her Fourteenth Amendment claims, granting summary judgment on her remaining claims, and denying her motion for leave to file a third amended complaint. We disagree. After thorough review of the record, we find the district court committed no reversible error. Accordingly, the judgment is AFFIRMED, essentially on the basis carefully explained in the magistrate's recommendations and district court's orders adopting them.

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[4] Jones also filed a motion for summary judgment, challenging the constitutionality of Texas Health and Safety Code § 481.117(a), which criminalizes possession of a controlled substance without a valid prescription. The district court denied her motion for summary judgment and concluded that ruling on such a matter would be improper and would constitute an advisory opinion. We agree. Accordingly, the district court's denial of Jones' motion for summary judgment is AFFIRMED.

APPENDIX B

[Filed March 21, 2019]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHANIE JONES,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-15-2919
	§	
JEREMY EDER, J. DALE, B. BAKER, R. NG, and FORT BEND COUNTY	§	

MEMORANDUM OPINION AND ORDER

Having reviewed the Magistrate Judge's Memorandum and Recommendation {Docket Entry No. 82), Defendant (Jeremy] Eder's Objections to Magistrate Judge's Report Regarding Defendant Eder's Motion for Summary Judgment (Docket Entry No. 83), Plaintiff's Objections to the Honorable Magistrate's Memorandum and Recommendation (Docket Entry No. 84), Defendant Eder's Opposition to Plaintiff's Objections to Magistrate Judge's Report and Recommendations Regarding Defendant Eder's Motion for Summary Judgment (Docket Entry No. 85), and Plaintiff's Reply in Support of Her Objections (Dkt. 84) to the Honorable Magistrate's Memorandum

and Recommendation (Docket Entry No. 86), the court is of the opinion that said Memorandum and Recommendation should be adopted by this court. It is, therefore, **ORDERED** that the Memorandum and Recommendation is **ADOPTED** by the court.

In her original complaint plaintiff alleged constitutional claims pursuant to the Fourth and Fourteenth Amendments, alleging that the officers unlawfully arrested her and wrongfully seized currency inside her home.[1] After defendant Jeremy Eder filed an early motion to dismiss, plaintiff filed an amended complaint in which she added constitutional claims that the officers unlawfully seized a hydrocodone pill, violated her right to privacy, and failed to protect her and that defendant Fort Bend County maintained a policy of inadequately training, supervising, and/or disciplining its officers.[2]

After considering defendants' motions to dismiss, the court dismissed the right-to-privacy and failure-to-protect claims and dismissed all claims against defendant Fort Bend County for failure to state a claim for relief.[3] On August 24, 2016, before the court's consideration of the objections to the Memorandum and Recommendation, plaintiff filed a motion for leave to amend her complaint for a second

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[1] See Plaintiff's Original Complaint, Docket Entry No. 1.

[2] See Defendant Eder's Motion to Dismiss Plaintiff's Claims Due to Plaintiff's Failure to State a Claim for Relief, Docket Entry No. 7; Plaintiff's First Amended Complaint, Docket Entry No. 8.

[3] See Memorandum and Recommendation, Docket Entry No. 19; Order Adopting Magistrate Judge's Memorandum and Recommendation, Docket Entry No. 26, pp. 15-19.

time to add allegations concerning the interpretation and enforcement of Texas Health and Safety Code § 481.117(a) and to add more specific facts regarding defendant Fort Bend County's policies.[4] At the time the court had not entered a docket control order. The court granted leave, and on October 4, 2016, the court entered a docket control order that set October 28, 2016, as the deadline for amending pleadings and adding new parties.[5]

On May 22, 2017, plaintiff again sought leave to amend her complaint to reassert policy claims against defendant Fort Bend County.[6] The court denied the motion because plaintiff failed to establish good cause for amending seven months after the expiration of the deadline for amendment.[7] After the issuance of a memorandum recommending dismissal of all of plaintiff's remaining claims, plaintiff now seeks to amend her pleading to add an as-applied constitutional challenge to Texas Health and Safety Code § 481.117(a).[8] When a scheduling order deadline has expired, Fed. R. Civ. P. 16(b) governs amendment of the pleadings. S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, NA, 315 F.3d 533, 536

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[4] See Plaintiff's Opposed Motion for Leave to File a Second Amended Complaint, Docket Entry No. 25.

[5] See Order, Docket Entry No. 29; Docket Control Order, Docket Entry No. 35.

[6] See Plaintiff's Opposed Motion for Leave to File an Amended Complaint, Docket Entry No. 42.

[7] See Amended Memorandum, Recommendation, and Order, Docket Entry No. 62, pp. 17-20.

[8] See Plaintiff's Memorandum in Support of Opposed Motion for Leave to File Amended Pleading, Docket Entry No. 87.

(5th Cir. 2003). Rule 16(b) (4) allows modification of the scheduling order "only for good cause and with the judge's consent." Good cause is satisfied upon a showing of the movant's inability to meet the court's deadlines "despite the diligence of the party needing the extension." Id. at 535 (quoting 6A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 1522.1 (2d ed. 1990)

Plaintiff has repeatedly sought leave to amend her complaint. Now, nearly two and one-half years after the expiration of the deadline to amend, plaintiff asserts that her proposed amendment is designed to resolve a presumed pleading deficiency, that is, to add factual allegations and another cause of action.[9] Plaintiff asserts that good cause warrants the amendment because neither the defendants nor the court "ever alleged Plaintiff's pleading suffered from a defect in form prior to February 11.[10] Because the court concludes that plaintiff has failed to show good cause for allowing yet another amendment, Plaintiff's Memorandum in Support of Opposed Motion for Leave to File Amended Pleading (Docket Entry No. 87) is **DENIED.**

SIGNED at Houston, Texas, on this the 21st day of March, 2019.

[handwritten signature]
SIM LAKE
UNITED STATES DISTRICT JUDGE

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[9] See Plaintiff's Memorandum in Support of Opposed Motion for Leave to File Amended Pleading, Docket Entry No. 87, p. 1 ¶ 4.

[10] Id. at 3 ¶ 8.

APPENDIX C

[Filed February 11, 2019]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHANIE JONES,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-15-2919
	§	
JEREMY EDER, J.	§	
DALE, B. BAKER,	§	
R. NG, and	§	
FORT BEND COUNTY	§	

MEMORANDUM AND RECOMMENDATION

Pending before the court[1] are: (1) Defendant Fort Bend County's ("Fort Bend") Motion for Summary Judgment (Doc. 69); (2) Defendant Jeremy Eder's ("Eder") Second Motion for Summary Judgment (Doc. 70); and (3) Plaintiff's Motion for Summary Judgment Concerning the Constitutionality of Texas Health and Safety Code § ("Section") 481.117(a) (Doc. 71). The

[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. See Doc. 11, Ord. Dated Dec. 28, 2015.

court has considered the motions, as well as the respective responses and replies, all other relevant filings, and the applicable law. For the reasons set forth below, the court **RECOMMENDS** that Defendant Fort Bend's motion be **GRANTED**, that Defendant Eder's motion be **GRANTED**, and that Plaintiff's motion be **DENIED**.

I. Case Background

Plaintiff filed this civil rights action pursuant to 42 U.S.C. § 1983 ("Section 1983"), alleging that four peace officers violated her constitutional rights when they arrested her and seized her property during a search of her home. Following the court's rulings on an initial round of motions for summary judgment, "[t]he claims remaining in this action are Plaintiff's 42 U.S.C. § 1983 claims against Defendant Eder for illegally seizing the alprazolam and hydrocodone pills and for illegally arresting Plaintiff and Plaintiff's claims against Defendant Fort Bend for its policies and/or customs on training, supervising, and disciplining officers."[2]

A. Factual Background[3]

The four individual defendants originally in

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[2] Doc. 67, Ord. Adopting in Part & Reversing in Part Magis. Judge's Am. Mem., Recom., & Ord. & Ordering Add'l Briefing Dated Mar. 20, 2018 p. 4.

[3] This account of the events is an edited version of the factual background in the Amended Memorandum, Recommendation, and Order dated February 21, 2018. The court cites summary judgment evidence submitted with the initial round of motions.

this action were members of Defendant Fort Bend's Narcotics Task Force ("Task Force").[4] Defendant Eder, the only remaining individual defendant, was assigned to the Task Force by the Rosenberg Police Department.[5] Defendant Eder reported to the Task Force that "he had developed reliable information that Plaintiff's husband, Sherman McAndrew Jones [("Sherman Jones"),] was apparently operating a crack cocaine sales and distribution business out of [his and Plaintiff's] residence," which was located within 1,000 feet of an elementary school.[6] On January 29, 2014, Defendant Eder obtained an arrest warrant for Sherman Jones and a search warrant for the residence based on Defendant Eder's affidavit detailing an investigation into Sherman Jones' illegal activity.[7] The search warrant

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[4] See Doc. 38-3, Ex. 3 to Defs. Eder & Raymond Ng's ("Ng") Mot. for Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 5; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 5; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 5.

[5] Doc. 39-1, Ex. 1 to Defs. Brian Baker ("Baker") & Dale's Mot. for Summ. J., Aff. of Def. Josh Dale ("Dale") ¶ 6; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 6.

[6] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 12; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 12.

[7] See Doc. 38-3, Ex. 3, to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 5; Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Warrant & Aff. in Support of Warrant; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 13; Doc. 39-2, Ex. 2 to Defs.

authorized entry into the residence without knocking or announcing the officers' purpose in order to search for "illicit contraband, namely **Cocaine**, and **any illicit contraband, as described in said affidavit**."[8] In the supporting affidavit, Defendant Eder identified "Cocaine" as the only drug targeted in the search.[9]

On January 31, 2014, the Task Force, in coordination with Defendant Fort Bend's Regional SWAT (Special Weapons and Tactics) team, executed the search and arrest warrants.[10]

Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 13.

8 Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Warrant; see also Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 13-14; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 13-14; cf. Doc. 30, Pl.'s 2 Am. Compl. p. 7 (stating that a county district court issued the warrant that allowed a search for "illicit items (including Cocaine)" and "other specific items"); Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2 Am. Compl. pp. 11-12 (admitting that the warrant allowed a search for "illicit items (including Cocaine)" and "other specific items" but denying that the other items were not relevant to Plaintiff's arrest as alleged in Plaintiff's amended complaint); Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. pp. 3-4 (admitting that the warrant allowed a search for "contraband and illegal drugs").

9 Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Def. Eder's Aff. in Support of Warrant pp. 3-4.

10 See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 5; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 14-15; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 15.

Defendant Eder was in charge of the operational aspects of the investigation into Sherman Jones and "led the execution of a search warrant upon Plaintiff's residence."[11] The officers escorted Plaintiff outside the residence where she remained throughout the search.[12]

During the search, Detective M. Hammons ("Hammons"), a nonparty to this lawsuit, found one and one-half pills in a small dish on a windowsill in a bedroom where Plaintiff and her husband slept.[13] Defendant Eder consulted with representatives of a poison control center to confirm that the partial pill was alprazolam and the whole pill was hydrocodone.[14] One of the nonparty Task Force members "seized and collected all narcotic evidence" ostensibly "under the authority of the search warrant," including the alprazolam and hydrocodone

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[11] Doc. 30, Pl.'s 2d Am. Compl. p. 1; see also Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. p. 8; Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. p. 2; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 8, 19; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 8, 19.

[12] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 34, 35; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. pp. 21, 107.

[13] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 6; Doc. 39-3, Ex. 3-B-3 to Defs. Baker & Dale's Mot. for Summ. J., Photograph.

[14] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 7.

tablets.[15] Defendants Eder and Raymond Ng ("Ng") also searched the residence for labels or pill containers for the pills but found none.[16] In addition to the alprazolam and hydrocodone pills, the officers discovered, among other items, a digital scale, a police radio, cell phones, miscellaneous papers, and a glass beaker.[17]

At the scene, no officer asked Plaintiff whether the alprazolam and hydrocodone pills belonged to her or someone else, inquired whether anyone possessed a prescription for the pills, or even mentioned the pills to her at all.[18] Plaintiff asked why she and Sherman Jones were outside during the search and what was happening, but Defendant Eder responded that she "needed to be quiet and let them do their job."[19] Defendant Eder alone made

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[15] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 27; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 27.

[16] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 7; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 7.

[17] See Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Search Warrant Return & Inventory; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 33; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 33.

[18] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. Of Pl. p. 37; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 107; Doc. 41-6, Ex. F to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Decl. of Pl. p. 1.

[19] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. 19 pp. 35-37.

the decision to arrest and effectuated the arrest of Plaintiff for jointly possessing the alprazolam and hydrocodone pills.[20] No officer notified Plaintiff of the charge on which she was being arrested.[21]

A grand jury was empaneled to hear the evidence against Plaintiff on the charge of possession of a controlled substance in Penalty Group 3 in a drug-free zone.[22] Neither Plaintiff nor Defendant Eder appeared before the grand jury.[23] At the time of the

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[20] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 12; see also Doc. 30, Pl.'s 2d Am. Compl. p. 8 (stating that she was "charged with two counts of possession of a controlled substance in a school zone"); Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 11 (stating that Defendant Eder made the decision to arrest Plaintiff); Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Indictment (listing charge as "POSS CS PG 3 <28G DRUG FREE"); Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 34 (stating that Defendant Eder made the decision to arrest Plaintiff for joint possession); Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 34 (stating that Defendant Eder made the decision to arrest Plaintiff for joint possession).

[21] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. p. 37; Doc. 41-6, Ex. F to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Decl. of Pl. p. 1.

[22] See Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Indictment (listing charge as "POSS CS PG 3 <28G DRUG FREE").

[23] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 10; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 9; Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. p. 108; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for

grand jury hearing, Plaintiff had not provided her attorney with the label from the original container for either pill found in her home, and Defendant Eder did not know that she was claiming that she had a prescription for hydrocodone and her father had a prescription for alprazolam.[24] On February 17, 2014, the grand jury returned a true bill finding probable cause for the felony charge that Plaintiff "knowingly and intentionally possess[ed] a controlled substance" within 1,000 feet of an elementary school.[25] On October 20, 2014, the presiding judge dismissed the charges against Plaintiff on the prosecutor's motions for lack of evidence to prove the case beyond a reasonable doubt.[26] A handwritten notation on the

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Summ. J., Aff. of Def. Dale ¶ 38; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 38.

[24] Doc. 38-1, Ex. 1 to Defs. Eder & Ng's Mot. for Summ. J., Pl.'s Resps. to Defs. Eder & Ng's Reqs. for Admiss. No. 18; see also Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 11; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 10; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 39; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 39.

[25] Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Indictments; see also Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 10; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 38; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 38.

[26] Doc. 38-5. Ex. 5 to Defs. Eder & Ng's Mot. For Summ. J., Mots. To Dismiss & Ords. Of Dismissal; see also Doc. 30, Pl.'s 2d Am. Compl. p. 9; Doc. 32, Defs. Baker & Dale's Ans. To Pl.'s 2d Am. Compl. P. 13; Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. P. 4.

motions stated "INSUFF LINKS BETWEEN DEFENDANT AND DRUGS."[27]

Plaintiff testified that she did not learn that the alprazolam and hydrocodone pills served as the basis for her arrest until she read the indictment.[28] Plaintiff also testified that she possessed a valid prescription for the hydrocodone and that her father possessed a valid prescription for the alprazolam.[29] Plaintiff represented that she had given the alprazolam prescription and the prescription bottles for both alprazolam and hydrocodone to her criminal defense attorney but, as of the date of her deposition, had not attempted to have them returned to her.[30]

In discovery for this case, Plaintiff produced a prescription for Lortab (a narcotic pain reliever containing hydrocodone and acetaminophen), which was prescribed for pain associated with a facial abscess in January 13, 2013, and which provided for fifteen pills with no refills.[31] Plaintiff also produced a

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[27] Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Mots. to Dismiss & Ords. of Dismissal.

[28] Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 107.

[29] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 10-20; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 9; see also Doc. 41-2, Ex. B to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Prescription; Doc. 41-3, Ex. C to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Progress Note Dated May 16, 2013.

[30] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 12-15, 20-21.

[31] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. Of Pl. pp. 83-84 (describing her medical

medical note pertaining to James Jackson's visit to an emergency room on May 16, 2013.[32] The note included a prescription for Xanax (brand name for alprazolam) to be taken once or twice per day as needed.[33] The prescription was for sixty pills with no refill.[34] Plaintiff testified that her father occasionally lived in the residence, and, when he did, he stayed in her sons' room.[35]

B. Procedural Background

Plaintiff filed her complaint on October 5, 2015, alleging unreasonable seizures of her person and property (pills and currency) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.[36] On July 19, 2016, the court entered a memorandum and recommendation on three motions to dismiss.[37]

In the Memorandum and Recommendation, the

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issue as an ear infection); Doc. 41-2, Ex. B to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Prescription; Doc. 41-8, Ex. H to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., After Care Instructions p. 2.

32 See Doc. 41-3, Ex. C to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Progress Note Dated May 16, 2013.

33 See id.

34 See id.

35 See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 25-27, 70-71.

36 See Doc. 1, Pl.'s Compl.

37 See Doc. 19, Mem. & Recom. Dated July 19, 2016.

court made legal findings of continuing importance.[38] One is that the warrant did not authorize the seizure of the alprazolam and hydrocodone pills.[39] The court also determined that alprazolam and hydrocodone are included in Penalty Group 3 and are covered by Section 481.117(a),[40] which states:

> Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

The court interpreted the statute to mean that "possession of a controlled substance via a prescription is not a crime; it is the possession of a controlled substance in the absence of a prescription that is proscribed by the statute."[41] The court therefore concluded that the absence of a prescription is an element of the crime, not "an affirmative defense that may be disregarded when an officer is assessing the legality of possessing one hydrocodone pill found on a nightstand in that person's residence."[42] On

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38 See id. pp. 11-15

39 See id. pp. 11-12.

40 See id. p. 12.

41 Id. p. 15 (citing Section 481.117 and Burnett v. Texas, 488 S.W.3d 13, 920 (Tex. App.—Eastland 2016)).

42 Id. p. 15.

August 31, 2016, the district judge adopted the Memorandum and Recommendation over objections.[43]

On September 16, 2016, the court granted Plaintiff leave to amend.[44] After amendment, Plaintiff's pleading raised claims against Defendant Fort Bend for county liability in connection with the following causes of action: (1) Fourth Amendment unreasonable seizure of her person (count 1); and (2) Fourth Amendment unreasonable seizure of her property (count 2).[45] With regard to these claims, Plaintiff alleged that Defendant Fort Bend had "a policy, procedure, custom, practice, or protocol of inadequately training, supervising, and/or disciplining its officers" and could be expected to violate Fourth Amendment rights by taking:

> the unconstitutional official position that its officers need not establish the sine qua non of a criminal offense (in this case, the lack of a prescription); instead, Defendants unconstitutionally believe that said element is an affirmative defense which may be disregarded by officers in the field when they seek to determine probable cause.[46]

Plaintiff asserted that Defendant Fort Bend "created an extremely high risk that constitutional violations

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43 See Doc. 26, Ord. Dated Aug. 31, 2016.

44 See Doc. 29, Ord. Dated Sept. 16, 2016.

45 See Doc. 30, Pl.'s Second Am. Compl. pp. 31-34.

46 Id. pp. 31-32 (emphasis omitted).

would ensue from its failures to inform its peace officers ... of their relevant constitutional duties."[47] At that time, Defendant Fort Bend did not file an answer to Plaintiff's Second Amended Complaint.

On April 21, 2017, Defendants Eder and Raymond Ng ("Ng") jointly filed a motion for summary judgment, as did Defendants Brian Baker ("Baker") and Josh Dale ("Dale").[48] The court entered a Memorandum, Recommendation, and Order on January 8, 2018, and, on February 21, 2018, amended the Memorandum, Recommendation, and Order to address a new legal theory that Defendant Eder raised in his objections.[49]

On March 20, 2018, the district judge adopted in part and reversed in part the Amended Memorandum, Recommendation, and Order.[50] The court allowed the parties to submit a final round of motion practice limited to twenty-five or fewer pages and the following topics: (1) Defendant Eder on "qualified immunity, paying particular attention to . . . the application of Arizona v. Hicks, [480 U.S. 321] (1987), and the effects of an illegal seizure on the legality of the subsequent arrest;" (2) Defendant Fort

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47 Id. p. 34.

48 See Doc. 38, Defs. Eder & Ng's Mot. for Summ. J.; Doc. 39, Defs. Baker & Dale's Mot. for Summ. J.

49 See Doc. 52, Mem., Recom., & Ord. Dated Jan. 8, 2018; Doc. 62, Am. Mem., Recom., & Ord. Dated Feb. 21, 2018.

50 See Doc. 67, Ord. Adopting in Part & Reversing in Part Magis. Judge's Am. Mem., Recom., & Ord. & Ordering Add'l Briefing Dated Mar. 20, 2018.

Bend "on its liability, paying particular attention to Defendant Eder's membership in Defendant Fort Bend['s] . . . Narcotics Task Force;" and (3) Plaintiff "on the constitutionality of [Section] 481.117(a), as applied."[51] The parties timely filed their motions for summary judgment on April 9, 2018.[52]

II. Summary Judgment Standard

Summary judgment is warranted when the evidence reveals that no genuine dispute exists regarding any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Stauffer v. Gearhart, 741 F.3d 574, 581 (5th Cir. 2014). A material fact is a fact that is identified by applicable substantive law as critical to the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 271 F.3d 624, 626 (5th Cir. 2001). To be genuine, the dispute regarding a material fact must be supported by evidence such that a reasonable jury could resolve the issue in favor of either party. See Royal v. CCC & R Tres Arboles, L.L.C., 736 F.3d 396, 400 (5th Cir. 2013) (quoting Anderson, 477 U.S. at 248.

The movant must inform the court of the basis for the summary judgment motion and must point to

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51 Id. pp. 4-5.

52 See Doc. 69, Def. Fort Bend's Mot. for Summ. J.; Doc. 70, Def. Eder's 2d Mot. for Summ. J.; Doc. 71, Pl.'s Mot. for Summ. J. Concerning the Constitutionality of Section 481.117(a).

relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of genuine factual issues. Celotex Corp., 477 U.S. at 323; Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992). If the movant carries its burden, the nonmovant may not rest on the allegations or denials in the pleading but must respond with evidence showing a genuine factual dispute. Stauffer, 741 F.3d at 581 (citing Hathaway v. Bazany, 507 F.3d 312, 319 (5th Cir. 2007)).

III. Defendants' Motions for Summary Judgment

The parties' pending motions address three distinct topics. The court finds that the best approach is to address Plaintiff's contention that the state statute upon which her arrest was based is unconstitutional as applied before turning to Defendant Eder's motion on qualified immunity and Defendant Fort Bend's motion on county liability.

A. Constitutionality As Applied

An as-applied constitutional challenge asserts that, even though the statute is constitutional on its face, its application to the challenger was/is unconstitutional in the circumstances at issue. Cf. Catholic Leadership Coalition of Tex. v. Reisman, 764 F.3d 409, 425-26 (5th Cir. 2014)(quoting Doe v. Reed, 561 U.S. 186, 194 (2010)(differentiating as-applied and facial constitutional challenges by whether "the claim and the relief that would follow" are limited to

the particular circumstances of the challenger or extend beyond the challenger). If the "claim and relief that would follow . . . reach beyond the particular circumstances of [the] plaintiffs[,] . . . [t]hey must . . . satisfy our standards for a facial challenge to the extent of that reach." Doe, 561 U.S. at 194 (applying this rule to find that plaintiffs who sought "an injunction barring the secretary of state 'from making referendum petitions available to the public'" asserted a facial challenge, not an as-applied challenge); see also Catholic Leadership Coalition of Tex., 764 F.3d at 426 (quoting Doe, 561 U.S. at 194). In her live pleading, Plaintiff made no claim that Section 481.117(a) is unconstitutional, as applied or on its face. In fact, Plaintiff did not mention that statute or any other specific Texas statute. Plaintiff asserted only that "[n]o Texas statute even arguably authorized Defendants to arrest Plaintiff for her conduct."[53] In addition to asserting that she committed no crime, Plaintiff alleged that Defendant Eder's arrest was not constitutional because it was not supported by probable cause to believe she had committed a crime and that Defendant Fort Bend permitted its officers to make arrests inside homes without first discerning whether the possession of controlled substances was supported by a prescription. In other words, Plaintiff focused on Defendants' application of the statute as inconsistent with its plain language and violative of her Fourth Amendment rights,[54] not on any inherent aspect of the

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[53] Doc. 30, Pl.'s 2d Am. Compl. p. 10.

[54] Plaintiff confirms this position in her motion. See Doc. 71, Pl.'s Mot. for Summ. Concerning the

statute that lent itself to unconstitutional operation as to Plaintiff's particular circumstances. Additionally, the relief Plaintiff sought in her live pleading consists of monetary damages, not injunctive or declaratory relief that could remedy the unconstitutional application of the statute.

Plaintiff's motion also fails to meet the substantive requirements of an as-applied challenge. In support of Plaintiff's position that Section 481.117(a) is unconstitutional as applied, Plaintiff offers the following arguments: (1) "it allows officers to impermissibly utilize their discretion and to conduct warrantless arrests for possession of substances which the People are permitted to possess;" (2) "it is vague;" (3) "it is preempted by federal law;" and (4) "it violates the Interstate Commerce Clause."[55] These are not as-applied challenges because they reach beyond Plaintiff's own circumstances. Although Plaintiff discusses the facts of her case at points in her motion, she also speaks for the "People," stating, for example, that: (1) the statute "does not provide any notice that the People are subject to arrest even when they obtain the substance via a valid prescription or that governmental agents can ignore the existence of a prescription[;]" and (2) "persons of ordinary intelligence have no idea that they can be arrested in their homes for possessing

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Constitutionality of Section 481.117(a) J. p. 4 ("Defendants' application violates the Fourth Amendment because it subjects the People to unreasonable arrests without a warrant anywhere at any time despite the fact that they have committed no crime.")

[55] Id. at pp. 3-5, 7 (emphasis omitted).

controlled substances even when they have prescriptions therefor."[56]

Having given this issue and the parties' arguments much consideration, the court finds that, regardless of whether Plaintiff's challenge to the statute falls under the as-applied or facial category,[57] a ruling on the issue would not give Plaintiff the relief she seeks. Based on the allegations in her pleading, the remedy available to Plaintiff, if successful, is civil damages based on her allegations that Defendant Eder violated her Fourth Amendment right by arresting her without probable cause and that Defendant Fort Bend tolerated an unconstitutional custom of allowing officers to arrest individuals for possession of controlled substances with or without a legal prescription. For the court to venture into the constitutionality of Section 481.117(a) would stretch its rulings to matters not properly before the court and would constitute an advisory opinion. This, the court should not do.

B. Qualified Immunity

In order to prevail on a claim under Section 1983, a plaintiff must establish that the defendant deprived the plaintiff of her constitutional rights while acting under the color of state law. Moody v. Farrell, 868 F.3d 348, 351 (5th Cir. 2017).

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[56] Id. at pp. 4-5.

[57] Plaintiff expressly does not assert a facial challenge to Section 481.117(a). See id. p. 4 (referring to "the facial validity and clarity of said statute").

Government officials have qualified immunity from Section 1983 "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity protects an officer even for reasonable mistakes in judgment. See id. (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004)) ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"); Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

By invoking qualified immunity, a summary judgment movant shifts the burden to the nonmovant to rebut the movant's assertion. Cantrell v. City of Murphy, 666 F.3d 911, 918 (5th Cir. 2012). In order to overcome an assertion of qualified immunity, a plaintiff must produce evidence that the alleged conduct violated a statutory or constitutional right and that the right was clearly established at the time of the challenged conduct. See Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011). The Supreme Court held that the order in which these two considerations are addressed is at the court's discretion. See Pearson, 555 U.S. 236-42.

Plaintiff's remaining claims of unreasonable seizures of person and property arise pursuant to the protections of the Fourth Amendment. The Fourth

Amendment,[58] applied to state actors through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects[] against unreasonable searches and seizures." U.S. Const. amend. IV. Reasonableness is the ultimate measure of the constitutionality of a seizure of person or property. See Trent v. Wade, 776 F.3d 368, 377 (5th Cir. 2015)(quoting Fernandez v. California, 571 U.S. 292, 298, 134 S.Ct. 1126, 1132 (2014)).

A warrantless arrest must be supported by "probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004). The standard for the existence of probable cause is an objective one requiring that the officer draw a reasonable conclusion from the facts available to him at the time of the arrest. Id.

A warrantless seizure of evidence in plain view is reasonable when the officer is legally in the location from which he viewed the item seized and the "incriminating nature of the item [is] 'immediately apparent.'" United States v. Turner, 839 F.3d 429,

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58 The full text of the Fourth Amendment is:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

433 (5th Cir. 2016)(quoting Horton v. California, 496 U.S. 128, 136 (1990), & Hicks, 480 U.S. at 326). "The incriminating nature of an item is immediately apparent if the officers have probable cause to believe that the item is either evidence of a crime or contraband." Id. (quoting United States v. Buchanan, 70 F.3d 818, 826 (5th Cir. 1995)). Probable cause as it relates to seizure of evidence requires that the officer determine the existence of a "practical, nontechnical probability that incriminating evidence is involved." Id. (quoting United States v. Espinoza, 826 F.2d 317, 319 (5th Cir. 1987))

Turning to the specific issues raised in this round of motions, the court has reconsidered the application of Threlkeld v. Texas, 558 S.W.2d 472 (Tex. Ct. Crim. Appeals 1977), in light of the parties' recent briefing. Unfortunately for Plaintiff, the court does not change the ruling articulated in the Amended Memorandum, Recommendation, and Order. Threlkeld held

> Prior to the enactment of the Controlled Substances Act [the] argument [that possession under the provision was "not illegal per se but becomes illegal only when not obtained directly from, or pursuant to, a valid prescription of a practitioner"] would have been well taken. The traditional rule upon which appellant relies, however, is no longer applicable to indictments charging possession of controlled substances. [Section 481.184(a)'s predecessor] expressly removed the burden of negating in an

> indictment any exemptions or exceptions under the act and placed the burden of going forward with the evidence with respect to such exemptions or exceptions upon the defendant.

Id. at 473.

In this round of briefing Plaintiff again failed to bring any more recent case to the court's attention that called into question this holding. On the other hand, Defendant Eder pointed the court to cases that followed Threlkeld. See, e.g., Dowden v. Texas, 455 S.W.3d 252, 255 (Tex. App.—Fort Worth 2015, no pet.)(following Threlkeld) Moore v. Texas, Nos. 12-13-00041-CR, 12-13-00042-CR, 2014 WL 2521537, at *2 (Tex. App.—Tyler May 30, 2014, pet. ref'd) (unpublished)(same); Francois v. Texas, No. 14-97-00419-CR, 1998 WL 148333, at *3 (Tex. App.—Houston [14th Dist.] Apr. 2, 1998, no pet.)(unpublished)(same). The Dowden opinion leaves no question that this court's prior interpretation of Section 481.117(a) was against precedent.[59] There,

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[59] In the original Memorandum, Recommendation, and Order on the summary judgment motions, the court pointed out that it had previously interpreted Section 481.117(a) as prohibiting possession of a controlled substance *without a prescription*, not as merely prohibiting the possession of the controlled substance. See Doc. 52, Mem., Recom., & Ord. Dated Jan. 8, 2018 p. 12. The court's interpretation implicitly held that the possession of a prescription was not an exemption or an exception but, rather, the lack of a prescription was an element of the

the court stated, "But the lack of a valid prescription or order is not an element of the offense that the State must prove; it is an exception that the defendant has the burden to present evidence on." Dowden, 455 S.W.3d at 255 (addressing Section 481.116(a), which uses the same language as Section 481.117(a) in proscribing possession of Group 2 controlled substances). It is not this court's place to question state appellate courts' construction of their state law.

As possession alone was sufficient to give rise to probable cause that Plaintiff violated Section 481.117(a), it is immaterial that Defendant Eder lacked any information that could have given him reason to believe that Plaintiff did not have valid prescriptions for the pills. Plaintiff has not raised a fact issue concerning whether Defendant Eder had reason to believe that Plaintiff possessed the pills. Their location alone gave rise to probable cause that she constructively possessed them.

In her objections to the court's Amended Memorandum, Recommendation, and Order, Plaintiff raised another issue. Finding the facts here analogous to those under consideration in Hicks, Plaintiff argued:

> Here, police officers saw two pills in plain view. One of the Defendants called poison control in an attempt to identify the pills. After learning what they were, he seized the items and arrested Plaintiff. Plaintiff was subsequently indicted.

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crime.

> Plaintiff respectfully avers the absence of evidence tending to demonstrate probable cause to arrest Plaintiff for objects in plain view is aptly demonstrated by his call to poison control.
>
> Additionally, if Defendants believed they might have discovered evidence of a crime but recognized they needed to take additional steps before they could conduct a warrantless arrest, the Fourth Amendment prohibited arrest because they had to conduct an investigation that was separate and apart from the warrant.
>
> In other words, Defendants' warrant for cocaine was not even arguably a license to investigate a completely unrelated alleged crime inside Plaintiff's home where Defendants themselves had no evidence that the conduct in question was a crime. Here, there is no procedural safeguard once police entered Plaintiff's home; instead, Defendants impermissibly utilized their discretion. As a result, they are not entitled to qualified immunity.[60]

The court ordered Defendant Eder to pay particular attention, in his final motion for summary judgment, to the application of Hicks and the effects of an illegal seizure on the legality of the ensuing arrest. Apparently while contemplating the issue, Defendant Eder recalled additional details about the

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[60] Doc. 65, Pl.'s Objs. to the Am. Mem., Recom., & Ord. pp. 8-9 (footnotes omitted).

incident. In connection with his motion, he provides additional testimony in support of the new legal theory that his search and seizure of the pills fell within the authority granted by the cocaine search warrant. He submits the following previously undisclosed insight into his actions:

> 3. I had no reason to believe any other controlled substances were inside the residence and I did not anticipate finding other illegal drugs there. During that limited search for cocaine and the other items specifically identified in the warrant, Detective M. Hammons directed my attention to two pills in open view on a window sill adjacent to the bed we found Stephanie Jones occupying in her bedroom. I knew from my training and experience as a narcotics investigator that cocaine can be packaged in pill form and I considered that one or both pills could be cocaine.
>
> 4. Without closer inspection of these pills, I could not determine if they were cocaine, but it was immediately apparent to me the pills were either controlled substances, possibly cocaine, or dangerous drugs; both of which are illicit contraband. I had been trained that both controlled substances and dangerous drugs are illegal to possess in the circumstances I found these two pills so probable

cause supported my search, specifically by further inspecting the pills I observed in open view. I was unable to determine the pills were not cocaine until after I discovered the pills were controlled substances hydrocodone and alprazolam, through consultation by telephone with representatives of a poison control center.

5. I inadvertently discovered the controlled substances hydrocodone and alprazolam while performing a search for cocaine authorized by the search warrant. I did not perform a separate search for any controlled substance other than cocaine. At the moment I discovered these two pills were not cocaine, I knew they were the controlled substances hydrocodone and alprazolam. Since the pills were controlled substances that [Plaintiff] apparently possessed illegally, I believed probabl[e] cause existed for me to seize the controlled substances.

6. I understood the search warrant to authorize me to search the pills to determine whether they were cocaine. At the same time I discovered the pills were not cocaine, it was immediately apparent to me, without any further search or inspection, that the pills were the

> controlled substances hydrocodone and alprazolam. The pills were not in a pill bottle and I found no pill bottle label that matched the hydrocodone and alprazolam, or which showed for whom the controlled substances were prescribed. I had been trained that I had legal authority to seize the controlled substances under the plain view doctrine enunciated by the United States Supreme Court.[61]

Although the court appreciates Defendant Eder's newly offered revelations on his state of mind, they strain credulity as they were not raised in the intervening years since the lawsuit was filed even though they relate closely to issues addressed by the court more than once. In addressing the motions to dismiss nearly three years ago, the court held that the warrant did not authorize the seizure of the alprazolam and hydrocodone pills.[62] Yet, Defendant Eder did not object to that finding or offer his insight at that time.[63] The court may not disregard the unchallenged testimony of an affiant based on a lack of credibility, but the court does not find good cause to change its prior determination that the warrant did

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61 Doc. 70-15, Ex. 15 to Def. Eder's 2nd Mot. For Summ. J., Def. Eder's Suppl. Decl. pp. 2-3.

62 See Doc. 19, Mem. & Recom. Dated July 19, 2016 p. 12.

63 In fact, in the twenty-eight years as a U.S. Magistrate Judge reviewing complaints, search warrants, and other related criminal filings, the court has never heard that cocaine or crack cocaine has been pressed into tablet form.

not cover the pills based solely on Defendant Eder's last-minute recollections.

Returning to Plaintiff's suggestion that the Hicks decision can inform the court's consideration of whether Defendant Eder is entitled to qualified immunity, the court first recounts the facts of that case. There, a man was injured by a bullet that had been fired from above through the ceiling of his apartment. See Hicks, 480 U.S. at 323. Police officers entered the upper-floor apartment "to search for the shooter, for other victims, and for weapons." Id. One of the officers noticed expensive stereo equipment and, finding the rest of the apartment to be "squalid and otherwise ill-appointed[,]" suspected that the components had been stolen. Id. He moved some of the equipment, including a turntable, in order to gain access to the serial numbers. Id. Reporting the information he discovered to headquarters, the officer learned that the turntable had been stolen in an armed robbery and seized it immediately. Id.

The officers' presence in the apartment was lawful pursuant to "the exigent circumstance of the shooting." Id. at 324. The U.S. Supreme Court determined that the "mere recording of the serial numbers did not constitute a seizure" but that the moving of the components did constitute a search Id. The search of the stereo equipment was "separate and apart" from the search that was justified by the shooting. Id. at 324-25. The Court explained:

> Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no

> additional invasion of respondent's privacy interest. But taking actions, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry. That is why . . . the distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment. . . . A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Id. at 325 (internal citations and quotation marks omitted).

The Court then turned to the question whether the search of the stereo equipment was reasonable. See id. That determination, the Court held, depended on whether probable cause existed to believe that the equipment had been stolen. See id. at 326 (ruling in the first instance that "probable cause is required in order to invoke the 'plain view' doctrine"). By concession, the officer was determined to have possessed "something less than probable cause." Id. The Court concluded, "In short, whether legal authority to move the equipment could be found only as an inevitable concomitant of the authority to seize it, or also as a consequence of some independent power to search certain objects in plain view, probable cause to believe the equipment was stolen was required." Id.

at 328.

Plaintiff's observation that similarities exist between this case and Hicks is well-taken, but one distinction eviscerates her argument. Unlike the officer discussed in Hicks who conducted a search by moving the equipment to gain access to additional information, no evidence here indicates that any officer moved Plaintiff's pills in order to examine them. According to the evidence, Detective Hammons directed Defendant Eder to the pills, and Defendant Eder contacted a poison control center to confirm his suspicion that the pills were controlled substances based on the information available in plain view.

Plaintiff misses the point of Hicks when suggesting that officers may not conduct investigations to determine the legality of an item found in plain view. In Hicks, the Court did not find that the officer violated the rights of the apartment occupant by contacting headquarters for information. Contacting police headquarters or a poison control center is not a search or a seizure. The constitution does not require probable cause, or even reasonable suspicion, as support for those actions. The point is that officers are limited to the information that is in plain view as the basis for an investigation when relying on the "plain view" doctrine. If it is necessary to examine underneath or some other unseen portion of the item, the officer must possess "probable cause to believe that the item [was] either evidence of a crime or contraband." Turner, 839 F.3d at 433.

After Defendant Eder spoke with a poison control center, he drew the reasonable conclusion that he possessed probable cause to believe that Plaintiff was committing the criminal offense of possession of a

controlled substance because state case law excused him from making any further inquiry. Plaintiff's arrest and the seizure of the pills occurred after he acquired the necessary confirmation that the pills were controlled substances. Defendant Eder is therefore entitled to qualified immunity from liability on Plaintiff's remaining claims.

C. County Liability

A county may be held liable under Section 1983 only if it subjects the plaintiff to a deprivation of constitutional rights or causes the plaintiff to be subjected to the deprivation. Connick v. Thompson, 563 U.S. 51, 60 (2011). To succeed on a claim under Section 1983, the plaintiff must demonstrate that an official policy promulgated by the county policymaker was the moving force behind the alleged constitutional violation. Peña v. City of Rio Grande City, 879 F.3d 613, 621 (5th Cir. 2018). Official policy "includes the decisions of a government's law makers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." Id. at 621-22 (quoting Connick, 563 U.S. at 61).

The evidence does not support a constitutional claim for false arrest. Regardless of Plaintiff's allegations regarding Defendant Fort Bend's policies, Plaintiff cannot seek liability against Defendant Fort Bend in the absence of evidence of a constitutional violation.

Plaintiff's claims against Defendant Fort Bend also cannot survive.

IV. Conclusion

Based on the foregoing, the court

RECOMMENDS that Defendant Fort Bend's motion be **GRANTED**, that Defendant Eder's motion be **GRANTED**, and that Plaintiff's motion be **DENIED**.[64]

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 11th ~~day~~ of February, 2019.

[handwritten signature]
U.S. MAGISTRATE JUDGE

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[64] In making these recommendations, the court in no way seeks to condone the decisions of Defendant Eder in pursuing an arrest and Defendant Fort Bend in obtaining a felony indictment based on two prescribed pills found in Plaintiff's home. Not every wrong, though, rises to the level of a constitutional violation.

APPENDIX D

[Filed March 20, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHANIE JONES,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-15-2919
	§	
JEREMY EDER, J. DALE B. BAKER, R. NG, and FORT BEND COUNTY	§	

ORDER ADOPTING IN PART AND REVERSING IN PART MAGISTRATE JUDGE'S AMENDED MEMORANDUM, RECOMMENDATION, AND ORDER AND ORDERING ADDITIONAL BRIEFING

Having reviewed the Magistrate Judge's Amended Memorandum, Recommendation, and Order (Docket Entry No. 62) dated February 21, 2018; Defendant[s] J. Dale's and B. Baker's Joint Objections to the Magistrate Judge's Amended Recommendation to Partially Deny Defendant's Motion for Summary Judgment (Docket Entry No. 63); Defendant Ng's and

Eder's Objections to Magistrate Judge's Amended Report and Recommendations Regarding Defendants' Motion for Summary Judgment (Docket Entry No. 64); Plaintiff's Objections to the Magistrate Judge's Report and Recommendations (Dkt. #62) (Docket Entry No. 65); and Defendant[s] J. Dale's and B. Baker's Joint Responses to Doc. 65, Plaintiff's Objections to the Magistrate Judge's Amended Report and Recommendations (Docket Entry No. 66), the court concludes that the Magistrate Judge's Amended Memorandum, Recommendation, and Order should be adopted in part and reversed in part

The court must review de novo portions of the Magistrate Judge's proposed findings and recommendations on dispositive matters to which the parties have filed specific, written objections. See Fed. R. Civ. P. 72(b); 28 u.s.c. § 636(b)(1). The court must also consider timely objections to a Magistrate Judge's order on any nondispositive matter and "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); see also 28 U.S.C. § 636(b)(1)(A).

Defendants Josh Dale, Brian Baker, Jeremy Eder, and Raymond Ng all object to the Magistrate Judge's recommendation that their motions for summary judgment be denied with regard to Plaintiff's claim that they illegally seized $600 in currency from a shirt pocket in her closet on the day of the search. The court concludes that Plaintiff's testimony regarding the disappearance of the money is speculative and is not sufficient to create a genuine issue of material fact. These objections are **SUSTAINED.** Defendants', Ng and Eder, Motion for Summary Judgment (Docket Entry No. 38) and Defendant Sheriff Deputies J. Dale's and B. Baker's

Joint Motion for Summary Judgment (Docket Entry No. 39) are **GRANTED** with respect to this claim.

Plaintiff objects to the Magistrate Judge's recommendation that the motions for summary judgment be granted with regard to her claim that the individual defendants illegally seized the alprazolam and hydrocodone pills and illegally arrested her. The court concludes that Plaintiff failed to produce any evidence that Defendants Dale, Baker, and Ng participated in the seizure of the pills or made the decision to arrest Plaintiff. Plaintiff's objections raise legal issues regarding the constitutionality of Defendant Eder's warrantless seizure of the pills, which calls into question the constitutionality of his decision to arrest Plaintiff based on the seized pills. Plaintiff's objections are **OVERRULED IN PART** regarding Defendants Dale, Baker, and Ng and **SUSTAINED IN PART** regarding Defendant Eder. Defendants' , Ng and Eder, Motion for Summary Judgment (Docket Entry No. 38) is **GRANTED IN PART** with respect to Plaintiff's claims of illegal seizure of the pills and of her person as to Defendant Ng and **DENIED IN PART** with respect to those claims as to Defendant Eder. Defendant Sheriff Deputies J. Dale's and B. Baker's Joint Motion for Summary Judgment (Docket Entry No. 39) is **GRANTED** with respect to Plaintiff's claims of illegal seizure of the pills and of her person.

The court must also address the Magistrate Judge's observation that Defendant Fort Bend County could not be held liable for maintaining a policy leading to unconstitutional arrests in the absence of evidence that Plaintiff had suffered an unconstitutional arrest. Defendant Fort Bend County is a defendant pursuant to Plaintiff's Second Amended

Complaint (Docket Entry No. 30), which alleges that Defendant Fort Bend County's policy or custom of inadequately training, supervising, and/or disciplining its officers was the moving force behind Plaintiff's allegedly unconstitutional arrest. Defendant Fort Bend County never moved for summary judgment on this issue, and it remains a defendant with regard to Plaintiff's claims arising from her arrest.

The Magistrate Judge's rulings striking Plaintiff's Motion to Exclude Defendants' Summary-Judgment Evidence (Dkt. 38-2 and 39-3 Exhibit A) and Memorandum in Support (Docket Entry No. 40) and denying Plaintiff's Opposed Motion for Leave to File an Amended Complaint (Docket Entry No. 42) are neither clearly erroneous nor contrary to law. Those rulings are **ADOPTED.** Plaintiff's motion to exclude (Docket Entry No. 40) is **STRICKEN** and Plaintiff's motion for leave (Docket Entry No. 42) is **DENIED.**

The claims remaining in this action are Plaintiff's 42 U.S.C. § 1983 claims against Defendant Eder for illegally seizing the alprazolam and hydrocodone pills and for illegally arresting Plaintiff and Plaintiff's claims against Defendant Fort Bend County for its policies and/or customs on training, supervising, and disciplining officers.

The court recognizes the Magistrate Judge has performed yeoman's work in this case addressing the parties' conflicting and meandering arguments. The court will allow the parties to put forth their last and best effort in a final round of motion practice pursuant to the following guidelines:

(1) Defendant Eder may file a motion for summary judgment on qualified immunity, paying

particular attention to the arguments in Plaintiff's most recent objections regarding the application of Arizona v. Hicks, 107 S. Ct. 1149 (1987), and the effects of an illegal seizure on the legality of the subsequent arrest.

(2) Defendant Fort Bend County may file a motion for summary judgment on its liability, paying particular attention to Defendant Eder's membership in Defendant Fort Bend County's Narcotics Task Force.

(3) Plaintiff may file a motion for summary judgment on the constitutionality of Texas Health and Safety Code § 481.117(a), as applied.

The court will allow the parties twenty (20) days from the date of this Order to file final motions for summary judgment not to exceed twenty-five pages that address these issues. Responses will be due twenty days after the filing of the summary judgment motions, and any replies will be due ten days after the responses are filed. No delays or additional briefing will be allowed.

SIGNED at Houston, Texas, on this the 20th day of March, 2018.

[handwritten signature]
UNITED STATES DISTRICT JUDGE

Appendix E

[Filed February 21, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHANIE JONES,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-15-2919
	§	
JEREMY EDER, J. DALE B. BAKER, R. NG, and FORT BEND COUNTY	§	

AMENDED MEMORANDUM, RECOMMENDATION, AND ORDER

Pending before the court[1] are (1) Defendants Jeremy Eder ("Eder") and Raymond Ng's ("Ng") Motion for Summary Judgment (Doc. 38); (2) Defendants Brian Baker ("Baker") and Josh Dale's ("Dale") Motion for Summary Judgment (Doc. 39); (3) Plaintiff's Motion to Exclude Defendant Officers'

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[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. See Doc. 11, Ord. Dated Dec. 28, 2015.

Summary Judgment Evidence (Doc. 40); and (4) Plaintiff's Opposed Motion for Leave to File an Amended Complaint (Doc. 42). The court has considered the motions, the responses, all other relevant filings, and the applicable law. The court DENIES Plaintiff's motion for leave to amend and STRIKES Plaintiff's motion to exclude. Furthermore, for the reasons set forth below, the court RECOMMENDS that Defendants Eder and Ng's motion be GRANTED IN PART AND DENIED IN PART and Defendants Baker and Dale's motion be GRANTED IN PART AND DENIED IN PART.

The original Memorandum, Recommendation, and Order is amended in light of Defendant Eder's change of course from the reliance on inapplicable state law to the citation of applicable state law that alters the court's qualified-immunity analysis.

I. Case Background

Plaintiff filed this civil rights action pursuant to 42 U.S.C. § 1983 ("Section 1983"), alleging that four peace officers violated her constitutional rights when they arrested her and seized her property during a search of her home.

A. Factual Background

The four individual defendants (collectively "Defendant Officers") in this action were members of Defendant Fort Bend County's ("Fort Bend") Narcotics Task Force ("Task Force").[2] Defendant

[2] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 5; Doc.

Officers represented three local law-enforcement agencies: Defendant Eder worked for the Rosenberg Police Department; Defendant Ng worked for the Sugar Land Police Department; Defendants Baker and Dale worked for Defendant Fort Bend's Sheriff's Office.[3] Defendant Dale served as the Task Force's supervisor, and Defendant Baker served as the assistant supervisor.[4]

Defendant Eder reported to the Task Force that "he had developed reliable information that Plaintiff's husband, Sherman McAndrew Jones [("Sherman Jones"),] was apparently operating a crack cocaine sales and distribution business out of [his and Plaintiff's] residence," which was located within 1,000 feet of an elementary school.[5] On January 29, 2014, Defendant Eder obtained an arrest warrant for Sherman Jones and a search warrant for the

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39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 5; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 5.

[3] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶¶ 2, 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶¶ 2, 5; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 3-4, 7; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 3-4, 7.

[4] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 6; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 6.

[5] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 12; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 12.

residence based on Defendant Eder's affidavit detailing an investigation into Sherman Jones' illegal activity.[6] The search warrant authorized entry into the residence without knocking or announcing the officers' purpose in order to search for "illicit contraband, namely Cocaine, and any illicit contraband, as described in said affidavit."[7] In the supporting affidavit, Defendant Eder identified "Cocaine" as the only drug targeted in the search and listed currency among the types of evidence "relative to the trafficking of narcotics."[8]

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[6] See Doc. 38-3, Ex. 3, to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 5; Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Warrant & Aff. in Support of Warrant; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 13; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 13.

[7] Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Warrant; see also Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 13-14; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 13-14; cf. Doc. 30, Pl.'s 2d Am. Compl. p. 7(stating that a Fort Bend district court issued the warrant that allowed a search for "illicit items (including Cocaine)" and "other specific items"); Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. pp. 11-12 (admitting that the warrant allowed a search for "illicit items (including Cocaine)" and "other specific items" but denying that the other items were not relevant to Plaintiff's arrest as alleged in Plaintiff's amended complaint); Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2dAm. Compl. pp. 3-4 (admitting that the warrant allowed a search for "contraband and illegal drugs").

[8] Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ.

On January 31, 2014, the Task Force, in coordination with Defendant Fort Bend's Regional SWAT (Special Weapons and Tactics) team, executed the search and arrest warrants.[9] Defendant Eder was in charge of the operational aspects of the investigation into Sherman Jones and "led the execution of a search warrant upon Plaintiff's residence."[10] The officers escorted Plaintiff outside the residence where she remained throughout the search.[11]

During the search, a nonparty officer found one and one-half pills in a small dish on a windowsill in a bedroom where Plaintiff and her husband were sleeping[12] Defendant Eder consulted with

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J., Def. Eder's Aff. in Support of Warrant pp. 3-4.

[9] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 5; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 14-15; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 15.

[10] Doc. 30, Pl.'s 2d Am. Compl. p. 1; see also Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. p. 8; Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. p. 2; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 8, 19; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 8, 19.

[11] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 34, 35; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. pp. 21, 107.

[12] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for

representatives of a poison control center to confirm that the partial pill was alprazolam and the whole pill was hydrocodone.[13] One of the nonparty Task Force members "seized and collected all narcotic evidence" ostensibly "under the authority of the search warrant," including the alprazolam and hydrocodone tablets.[14] Defendants Eder and Ng also searched the residence for labels or pill containers for the pills but found none.[15] In addition to the alprazolam and hydrocodone pills, the officers discovered, among other items, a digital scale, a police radio, cell phones, miscellaneous papers, and a glass beaker.[16] Defendant Eder did not list any currency in the search inventory, and Defendant Officers all denied that they

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Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 6; Doc. 39-3, Ex. 3-B-3 to Defs. Baker & Dale's Mot. for Summ. J., Photograph.

[13] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 7.

[14] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 27; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 27.

[15] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 7; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 7.

[16] See Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Search Warrant Return & Inventory; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 33; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 33.

seized any currency.[17]

At the scene, no officer asked Plaintiff whether the alprazolam and hydrocodone pills belonged to her or someone else, inquired whether anyone possessed a prescription for the pills, or even mentioned the pills to her at all.[18] Plaintiff asked why she and Sherman Jones were outside during the search and what was happening, but Defendant Eder responded that she "needed to be quiet and let them do their job."[19] Plaintiff did not communicate or interact "in any substantive way" with Defendants Baker and Dale.[20] Defendant Eder alone made the decision to arrest and effectuated the arrest of Plaintiff for jointly

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[17] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 13; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 13; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 41; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 41; see also Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Search Warrant Return & Inventory.

[18] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. p. 37; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 107; Doc. 41-6, Ex. F to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Decl. of Pl. p. 1.

[19] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 35-37.

[20] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 32, 36; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 32, 36.

possessing the alprazolam and hydrocodone pills.[21] No officer notified Plaintiff of the charge on which she was being arrested.[22] When Plaintiff returned to the residence after being released from the jail facility, she noticed that $600 in currency was missing from the pocket of a shirt hanging in the closet.[23]

A grand jury was empaneled to hear the evidence against Plaintiff on the charge of possession of a controlled substance in Penalty Group 3 in a drug-free zone.[24] Neither Plaintiff nor any of Defendant

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[21] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 12; see also Doc. 30, Pl.'s 2d Am. Compl. p. 8 (stating that she was "charged with two counts of possession of a controlled substance in a school zone"); Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 11 (stating that Defendant Eder made the decision to arrest Plaintiff); Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Indictment (listing charge as "POSS CS PG 3 <28G DRUG FREE"); Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 34 (stating that Defendant Eder made the decision to arrest Plaintiff for joint possession); Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 34 (stating that Defendant Eder made the decision to arrest Plaintiff for joint possession).

[22] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. p. 37; Doc. 41-6, Ex. F to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Decl. of Pl. p. 1.

[23] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. For Summ. J., Dep. of Pl. pp. 44-45, 48-49, 75. Plaintiff alleged that Defendant Officers seized the $600. See Doc. 30, Pl.'s 2d Am. Compl. p. 6.

[24] See Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for

Officers appeared before the grand jury.[25] At the time of the grand jury hearing, Plaintiff had not provided her attorney with the label from the original container for either pill found in her home, and Defendant Officers did not know that she was claiming that she had a prescription for hydrocodone and her father had a prescription for alprazolam.[26]

Summ. J., Indictment (listing charge as "POSS CS PG 3 <28G DRUG FREE").

[25] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 10; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 9; Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. p. 108; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 38; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 38.

[26] Doc. 38-1, Ex. 1 to Defs. Eder & Ng's Mot. for Summ. J., Pl.'s Resps. to Defs. Eder & Ng's Reqs. for Admiss. No. 18; See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 11 ("I could not have informed the [g]rand [j]ury that Plaintiff claimed to have a prescription for the hydrocodone or claimed her father had a prescription for the alprazolam because Plaintiff never made that representation to me and no one informed me Plaintiff had ever so contended."); Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 10 (same); Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 39 ("I could not have informed the [g]rand [j]ury that Plaintiff was claiming to have a prescription for the hydrocodone (or that she was claiming that her father had a prescription for the alprazolam) because Plaintiff never made that representation to me. In fact, no one ever informed me that Plaintiff had ever made either of those claims until after she filed this suit."); Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff.

On February 17, 2014, the grand jury returned a true bill finding probable cause for the felony charge that Plaintiff knowingly and intentionally possess[ed] a controlled substance" within 1,000 feet of an elementary school.[27] On October 20, 2014, the presiding judge dismissed the charges against Plaintiff on the prosecutor's motions for lack of evidence to prove the case beyond a reasonable doubt.[28] A handwritten notation on the motions

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of Def. Baker ¶ 39 (same).

[27] Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Indictments; see also Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 10; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 38; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 38.

[28] Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Mots. To Dismiss & Ords. of Dismissal; see also Doc. 30, Pl.'s 2d Am. Compl. p. 9 (stating that the dismissal order noted that the evidence was insufficient to prove the beyond a reasonable doubt and that the links between Plaintiff and the drugs were insufficient); Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. p. 13 (admitting, with regard to the dismissal of the charges, only that the prosecutor dismissed them "with leave to refile"); Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. p. 4 (admitting that "an assistant district attorney exercised prosecutorial discretion and withdrew the criminal charges the same district attorney's office found were supported by probable cause and warranted criminal charges [and] . . . that an assistant district attorney formed the opinion that[,] although the charges filed against Plaintiff were supported by probable cause, the prosecutor was of the opinion that State of Texas could not prove the

stated "INSUFF LINKS BETWEEN DEFENDANT AND DRUGS."[29]

Plaintiff testified that she did not learn that the alprazolam and hydrocodone pills served as the basis of her arrest until she read the indictment.[30] Plaintiff also testified that she possessed a valid prescription for the hydrocodone and that her father possessed a valid prescription for the alprazolam.[31] Plaintiff represented that she had given the alprazolam prescription and the prescription bottles for both alprazolam and hydrocodone to her criminal defense attorney but, at the time of her deposition, had not attempted to have them returned to her.[32]

In discovery for this case, Plaintiff produced a prescription for Lortab (a narcotic pain reliever containing hydrocodone and acetaminophen), which

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charges in criminal court under the heightened burden of beyond reasonable doubt").

[29] Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Mots. to Dismiss & Ords. of Dismissal.

[30] Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 107.

[31] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 10-20; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 9; see also Doc. 41-2, Ex. B to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Prescription; Doc. 41-3, Ex. C to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Progress Note Dated May 16, 2013.

[32] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 12-15, 20-21.

was prescribed for pain associated with a facial abscess in January 13, 2013, and which provided for fifteen pills with no refills.[33] Plaintiff also produced a medical note pertaining to James Jackson's visit to an emergency room on May 16, 2013.[34] The note included a prescription for Xanax (brand name for alprazolam) to be taken once or twice per day as needed.[35] The prescription was for sixty pills with no refill.[36] Plaintiff testified that her father occasionally lived in the residence, and, when he did, he stayed in her sons' room.[37]

B. Procedural Background

Plaintiff filed her complaint on October 5, 2015, alleging unreasonable seizures of her person and property (pills and currency) in violation of the Fourth and Fourteenth Amendments to the United States

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[33] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 83-84 (describing her medical issue as an ear infection); Doc. 41-2, Ex. B to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Prescription; Doc. 41-8, Ex. H to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., After Care Instructions p. 2.

[34] See Doc. 41-3, Ex. C to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Progress Note Dated May 16, 2013.

[35] See id.

[36] See id.

[37] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 25-27, 70-71.

Constitution.[38] Eder filed a motion to dismiss.[39] On November 2, 2015, Defendant Plaintiff filed an amended complaint on November 23, 2015, and, on December 2, 2015, Eder filed a supplemental motion arguing that Plaintiff's amended complaint also failed to state a claim for relief.[40] On February 24, 2016, Defendant Ng filed a motion to dismiss.[41] On April 11, 2016, Defendants Fort Bend, Baker, and Dale filed a motion to dismiss.[42]

On July 19, 2016, the court entered a memorandum recommending that Defendants' motions to dismiss be granted in part and denied in part.[43] The court interpreted Plaintiff's privacy and failure-to-protect claims as alleging violations of substantive due process and found those claims unavailable as a matter of law.[44] The court additionally found that Plaintiff failed to state a claim against Defendant Fort Bend because the factual allegations were inadequate with regard to Plaintiff's assertion that Defendant Fort Bend maintained a

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38 See Doc. 1, Pl.'s Compl.

39 See Doc. 7, Def. Eder's Mot. to Dismiss.

40 See Doc. 8, Pl.'s Am. Compl.; Doc. 9, Def. Eder's Suppl. Mot. to Dismiss.

41 See Doc. 15, Def. Ng's Mot. to Dismiss.

42 See Doc. 17, Defs.' Mot. to Dismiss.

43 See Doc. 19, Mem. & Recom. Dated July 19, 2016.

44 See id. pp. 15-19.

policy of failing to train, discipline, or supervise its officers.[45] The court suggested that more specific allegations regarding how the county's training policy was inadequate could remedy Plaintiff's allegations against Defendant Fort Bend.[46] As to Plaintiff's claims of wrongful seizure of person and property under the Fourth Amendment, the court recommended denying the motions.[47]

In the Memorandum and Recommendation, the court made legal findings of continuing importance.[48]

One is that the warrant did not authorize the seizure of the alprazolam and hydrocodone pills.[49] The court also determined that alprazolam and hydrocodone are included in Penalty Group 3 and are covered by Texas Health and Safety Code § ("Section") 481.117(a),[50] which states:

> Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or

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45 See id. pp. 19-25.

46 Id. p. 23.

47 See id. pp. 8-15.

48 See id. pp. 11-15.

49 See id. pp. 11-12.

50 See id. p. 12.

> order of a practitioner acting in the course of professional practice.

The court interpreted the statute to mean that "possession of a controlled substance via a prescription is not a crime; it is the possession of a controlled substance in the absence of a prescription that is proscribed by the statute."[51] The court therefore concluded that the absence of a prescription is an element of the crime, not "an affirmative defense that may be disregarded when an officer is assessing the legality of possessing one hydrocodone pill found on a nightstand in that person's residence."[52]

Plaintiff and Defendants Eder and Ng filed objections to the Memorandum and Recommendation.[53] On August 24, 2016, prior to the district court's consideration of the objections, Plaintiff filed a motion for leave to amend her complaint for a second time.[54] At the time of her

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[51] Id. p. 15 (citing Section 481.117 and *Burnett v. Texas*, 488 S.W.3d 913, 920 (Tex. App.—Eastland 2016)). The court discussed Section 483.041 only in its analysis of Kelly v. State, Nos. 09-09-00151-CR, 09-09-00152-CR, 09-09-00153-CR, 2010 WL 1478907, at **1, 3-4 (Tex. App.—Beaumont Apr. 14, 2010)(unpublished), which addressed a conviction for possession of a dangerous drug without a prescription under Section 483.041 and did not mention Section 481.117. See Doc. 19, Mem. & Recom. Dated July 19, 2016 p. 13.

[52] Id. p. 15.

[53] See Doc. 21, Defs. Eder & Ng's Objs.; Doc. 22, Pl.'s Objs.

[54] See Doc. 25, Pl.'s Opposed Mot. for Leave to File a

motion, the court had not yet entered a scheduling order. Plaintiff sought leave to amend her complaint to add the following allegations: (1) that Defendant Officers knew or should have known that Plaintiff and another resident possessed valid prescriptions for the pills found in the residence; (2) that Defendant Officers did not inquire whether Plaintiff had a prescription; (3) that Defendant Fort Bend had a policy, practice, procedure, custom, or training which permitted its officers to conduct an arrest inside a home without first discerning whether an individual had a prescription for the substance(s) found; (4) that Defendants' position on the possession of a valid prescription as an affirmative defense is unconstitutional and was the moving force behind Plaintiff's arrest; and (5) that Defendant Officers did not inform her of the charge for possession of a controlled substance in a school zone.[55]

Plaintiff sought to make a few other modifications to her complaint but proposed no changes to either the privacy or failure-to-protect claim.[56]

On August 31, 2016, the district judge adopted the Memorandum and Recommendation, effectively dismissing the privacy and failure- to-protect claims as legally insufficient and the claims against Defendant Fort Bend as factually insufficient.[57]

On September 16, 2016, two days after Plaintiff's motion for leave to amend was submitted to

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2d Am. Compl.

[55] See id. pp. 1-2.

[56] See id.

[57] See Doc. 26, Ord. Dated Aug. 31, 2016.

the court pursuant to Local Rule 7.3, the court granted Plaintiff's motion for leave to amend.[58]

Federal Rule of Civil Procedure 15(a)(2), which applies in the absence of a scheduling order, advises the court grant leave freely "when justice so requires." Here, justice required leave be granted because, despite the recommendation and its adoption, Plaintiff filed for leave while the undersigned's recommendation was pending before the district court and sought to rectify the pleading deficiencies upon which Defendant Fort Bend's motion had been granted. At the time, the case was in its nascent stages.

As the court granted Plaintiff's motion for leave to amend with no exceptions, the court allowed Plaintiff to make all of the changes requested in her motion, including the additional factual allegations against Defendant Fort Bend.[59] That is, the court found the amended allegations regarding Defendant Fort Bend's policy or custom to be sufficient to state a claim against Defendant Fort Bend, thus reinstating the county as a defendant. In contrast, Plaintiff did not seek leave to amend the privacy and failure-to-

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[58] See Doc. 29, Ord. Dated Sept. 16, 2016.

[59] See id. No final judgment was requested or entered on behalf of Defendant Fort Bend prior to the court's granting of leave to amend. Federal Rule of Civil Procedure 54(b) states that, absent a final judgment, any order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

protect claims, which were dismissed on legal grounds. Those claims could not have been remedied through additional factual detail (had Plaintiff offered any) and were not revived by the court's order granting leave to amend.[60] No party objected to the order granting Plaintiff leave to amend.

After amendment, Plaintiff's pleading raised the following causes of action: (1) Fourth Amendment unreasonable seizure of her person (count 1); and (2) Fourth Amendment unreasonable seizure of her property (count 2). With regard to these claims, Plaintiff alleged that Defendant Fort Bend had "a policy, procedure, custom, practice, or protocol of inadequately training, supervising, and/or disciplining its officers" and could be expected to violate Fourth Amendment rights by taking:

> the unconstitutional official position that its officers need not establish the sine qua non of a criminal offense (in this case, the lack of a prescription); instead, Defendants unconstitutionally believe that said element is an affirmative defense which may be disregarded by officers in the field when they seek to

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[60] In count 3, Plaintiff alleged violations of a right to privacy with regard to Plaintiff's prescription medication inside her home, and, in counts 4 - 6, Plaintiff alleged violations of a right to protection from unreasonable seizure inside her home, from unreasonable seizure of her papers and effects inside her home, and from unreasonable intrusions into her privacy. See Doc. 30, Pl.'s 2d Am. Compl. pp. 17-31.

determine probable cause.[61]

Plaintiff asserted that Defendant Fort Bend "created an extremely high risk that constitutional violations would ensue from its failures to inform its peace officers . . . of their relevant constitutional duties."[62] Defendant Fort Bend did not file an answer to Plaintiff's Second Amended Complaint.[63]

On September 21, 2016, Defendants Baker and Dale filed an answer to the amended complaint, asserting twenty-two defenses.[64] They also "reurge[d] and incorporate[d] . . . by reference their previously filed [j]oint [m]otion to [d]ismiss."[65] This one-sentence motion to dismiss fails to challenge the sufficiency of the additional facts alleged, to explain how the amendments affect the causes of action alleged against them, or to raise any new argument for dismissal. Absent new, applicable arguments for dismissal, the court finds that this one-sentence effort is not a legitimate motion to dismiss that requires the court's consideration. It is therefore stricken from the

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61 Id. pp. 31-32 (emphasis omitted).

62 Id. p. 34.

63 Without discussing the legal effect of the court's order granting leave to amend, Defendants Baker & Dale repeatedly stated in their answer that Defendant Fort Bend had been dismissed. See, e.g., Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. pp. 10, 15, 24.

64 See Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. pp. 1-8.

65 Id. pp. 1-2 (emphasis omitted).

record.

On September 30, 2016, Defendants Eder and Ng filed an amended answer, asserting three defenses.[66] Shortly thereafter, the court held a scheduling conference, and among the deadlines set were October 28, 2016, for amending pleadings and April 21, 2017, for filing dispositive and nondispositive motions.[67]

On April 21, 2017, Defendants Eder and Ng jointly filed a motion for summary judgment, as did Defendants Baker and Dale.[68] In addition to filing a timely response, Plaintiff filed a motion to exclude summary judgment evidence, specifically, the expert report of Kurt Sistrunk ("Sistrunk"), which both pairs of Defendant Officers cited in their motions for summary judgment.[69]

On May 22, 2017, while the briefing continued on the motions for summary judgment, Plaintiff filed a motion for leave to amend her claim a third time.[70]

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66 See Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. pp. 1-2.

67 See Doc. 34, Min. Entry Ord. Dated Oct. 4, 2016; Doc. 35, Docket Control Ord. Dated Oct. 4, 2016.

68 See Doc. 38, Defs. Eder & Ng's Mot. for Summ. J.; Doc. 39, Defs. Baker & Dale's Mot. for Summ. J.

69 See Doc. 38-2, Ex. 2 to Defs. Eder & Ng's Mot. for Summ. J., Report of Sistrunk; Doc. 39-3, Ex. 3-A to Defs. Baker & Dale's Mot. for Summ. J., Report of Sistrunk; Doc. 40, Pl.'s Mot. to Exclude Defs.' Summ. J. Evid.; Doc. 41, Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J.

70 See Doc. 42, Pl.'s Opposed Mot. for Leave to File an Amended Complaint.

Plaintiff filed the motion based on testimony obtained through discovery suggesting that Defendant Fort Bend intentionally maintained a policy of treating a prescription for a controlled substance as an "affirmative defense[] to a crime (which can be ignored by both officers in the field and the State)."[71] Plaintiff sought to amend her complaint to reassert claims against Defendant Fort Bend, which she agreed had been dismissed months earlier.[72]

Plaintiff cited evidence and statements from Defendant Officers' motions for summary judgment in support of her allegation that Defendant Fort Bend's policy was to consider possession of a prescription to be an affirmative defense.[73] As the motion was filed months after the court's deadline for amending pleadings, Plaintiff argued that leave to amend should be freely given upon a showing of good cause.[74]

Plaintiff argued that, in her Second Amended Complaint, she had made "a good faith allegation that Defendant Fort Bend County was subject to [imputed] liability," but she "could neither have guessed nor responsibly alleged that Defendants' purported authority to arrest Plaintiff was the county- wide application of a facially inapplicable statute and said statu[t]e is not listed in any charging instrument."[75]

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71 Id. p. 1.

72 See id. p. 2.

73 See id. pp. 2-7.

74 See id. p. 7.

75 Id. p. 8.

In her motion, Plaintiff presented a lengthy discussion of the factors routinely considered in determining whether good cause for amendment exists.[76]

As discussed above, the court previously granted Plaintiff leave to amend in order to add factual allegations that Defendant Fort Bend maintained a policy or tolerated a custom of allowing arrests for possession of controlled substances without determining whether the arrestees possessed the relevant prescriptions. That theory was the primary point of Plaintiff's earlier motion for leave to amend, and Plaintiff's Second Amended Complaint contains sufficiently detailed allegations to put Defendant Fort Bend on notice as to the nature of Plaintiff's claim of imputed liability. The evidence Plaintiff has amassed in support of her theory of county liability becomes relevant at the summary-judgment stage of this action, not at the pleading stage.

To repeat, Plaintiff's Second Amended Complaint was sufficient to establish a claim against Defendant Fort Bend based on its policy or custom of shifting an element of the relevant possession crime to the defendant in the form of an affirmative defense. Because she was able to sufficiently plead the same factual basis for the claim against Defendant Fort Bend in August 2016, her assertion that she did not have a basis to make the allegation until discovery simply rings untrue. As a result, the court finds that Plaintiff fails to establish good cause for amending, and her motion must be denied.[77]

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[76] See id. pp. 7-21.

[77] To be clear, the court finds the amendment

The parties completed discovery earlier this year, and Defendant Officers filed motions for summary judgment, which are fully briefed. Before addressing those motions, the court considers Plaintiff's motion to exclude the expert testimony of Sistrunk.

II. Plaintiff's Motion to Exclude Summary Judgment Evidence

This motion targets the expert report of Kurt Sistrunk. Plaintiff argues that the report: (1) presents an improper legal opinion; (2) is irrelevant; (3) draws prejudicial conclusions from the evidence; (4) is not based on reliable principles, methods, or application to the facts; (5) is inadmissible under Federal Rule of Evidence 403 because it either will mislead or confuse the jury or will be cumulative of the court's instructions; and (6) contains hearsay. Defendants argue that it is an untimely filed Daubert[78] motion.

An expert's opinion is admissible in evidence if the expert's knowledge will help the jury understand the evidence and the opinion "is based on sufficient facts or data," "reliable principles and methods," and the reliable application of "the principles and methods to the facts of the case." Fed. R. Evid. 702. In addition to launching one clear Daubert challenge to Sistrunk's report, Plaintiff adds several other challenges

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unnecessary because Plaintiff's Second Amended Complaint is the live pleading, which alleges constitutional claims against Defendant Fort Bend pursuant to the same theory as in her proposed amendment.

[78] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

pursuant to the Federal Rules of Evidence.

Plaintiff cites Daubert in her motion but, in her reply, offers a rather confusing non-Daubert description of the motion: "[I]t is designedly a motion to exclude for the purposes of summary judgment evidence so that Plaintiff can wield it as evidence against Fort Bend County."[79]

Plaintiff's alternative description fails to avoid the obvious—that the motion is an untimely filed Daubert motion. The deadline for filing nondispositive motions was April 21, 2017.[80] Plaintiff filed this motion on May 12, 2017.[81] Plaintiff spends little effort toward showing good cause for missing the deadline. She argues in her reply that Plaintiff's counsel did not and could not have fully comprehended "the nature of Defendants' argument invoking Texas Health and Safety Code § 483.001[,] et[ ] seq. . . . until after Defendants filed their motions for summary judgment."[82]

This statement does not come close to satisfying Federal Rule of Civil Procedure 16's good cause requirement. Importantly, no evidence indicates that Plaintiff was charged under the provisions of Chapter 483 of the Texas Health and Safety Code, and, as explained in a subsequent section, possession of

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79 Doc. 48, Pl.'s Consol. Reply to Defs.' Resps. to Pl.'s Mot. to Exclude Summ. J. Evid. p. 1.

80 See Doc. 35, Docket Control Ord. Dated Oct. 4, 2016.

81 See Doc. 40, Pl.'s Mot. to Exclude Defs.' Summ. J. Evid.

82 See Doc. 48, Pl.'s Consol. Reply to Defs.' Resps. to Pl.'s Mot. to Exclude Summ. J. Evid. p. 2.

alprazolam and hydrocodone does not fall within that statute's coverage.

Plaintiff's motion to exclude is untimely and must be stricken.

III. Defendant Officers' Motions for Summary Judgment

Defendants Eder and Ng argue that the evidence fails to show that they violated Plaintiff's constitutional rights or that they are not entitled to qualified immunity. Specifically, they argue that Defendant Eder arrested Plaintiff with probable cause, that Defendant Ng did not arrest Plaintiff, and that no evidence supports the allegation that they seized currency from Plaintiff.

Defendants Baker and Dale argue that the evidence shows that they were not personally involved in the constitutional violations alleged by Plaintiff. They specifically contend that they had no knowledge whether valid prescriptions covered the alprazolam and hydrocodone pills, that they did not influence the grand jury or withhold information from the grand jury, and that they did not seize the currency.

In their motion, they based their probable-cause argument entirely on Texas Health and Safety Code Chapter 483.

Plaintiff responds that Defendant Eder did not have probable cause to arrest her and that the other Defendant Officers permitted Defendant Eder to arrest her without probable cause. She also contends that she was not asked whether she possessed a prescription for the pills, that she was not notified of the charge on which her arrest was based, and that the grand jury's indictment was not based on all

relevant facts.

The admissibility of certain evidence is disputed. After outlining the applicable law, the court addresses the evidentiary issues before turning to the merits of Defendant Officers' dispositive motions.

A. Applicable Law

Procedural law and substantive law guide the court's review of the pending dispositive motions.

1. Summary Judgment

Summary judgment is warranted when the evidence reveals that no genuine dispute exists regarding any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Stauffer v. Gearhart, 741 F.3d 574, 581 (5th Cir. 2014). A material fact is a fact that is identified by applicable substantive law as critical to the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 271 F.3d 624, 626 (5th Cir. 2001). To be genuine, the dispute regarding a material fact must be supported by evidence such that a reasonable jury could resolve the issue in favor of either party. See Royal v. CCC & R Tres Arboles, L.L.C., 736 F.3d 396, 400 (5th Cir. 2013)(quoting Anderson, 477 U.S. at 248).

The movant must inform the court of the basis for the summary judgment motion and must point to relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of genuine factual

issues. Celotex Corp., 477 U.S. at 323; Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992). The movant may meet this burden by demonstrating an absence of evidence in support of one or more elements of the case for which the nonmovant bears the burden of proof. See Celotex Corp., 477 U.S. at 322; Exxon Corp. v. Oxxford Clothes, Inc., 109 F.3d 1070, 1074 (5th Cir. 1997). If the movant carries its burden, the nonmovant may not rest on the allegations or denials in the pleading but must respond with evidence showing a genuine factual dispute. Stauffer, 741 F.3d at 581 (citing Hathaway v. Bazany, 507 F.3d 312, 319 (5th Cir. 2007)).

2. Section 1983 and Fourth Amendment

In order to prevail on claim under Section 1983,[83] a plaintiff must establish that the defendant deprived the plaintiff of her constitutional rights while acting under the color of

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[83] The provision reads, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

state law. Moody v. Farrell, 868 F.3d 348, 351 (5th Cir. 2017). Government officials have qualified immunity from Section 1983 "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity protects an officer even for reasonable mistakes in judgment. See id. (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004))("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"); Ashcroft v. Al-Kidd, 563 U.S. 731, 743 (2011)("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

By invoking qualified immunity, a summary judgment movant shifts the burden to the nonmovant to rebut the movant's assertion. Cantrell v. City of Murphy, 666 F.3d 911, 918 (5th Cir. 2012). In order to overcome an assertion of qualified immunity, a plaintiff must produce evidence that the alleged conduct violated a statutory or constitutional right and that the right was clearly established at the time of the challenged conduct.See Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011). The Supreme Court held that the order in which these two considerations are addressed is at the court's discretion. See Pearson, 555 U.S. 818-21.

Plaintiff's remaining claims of unreasonable seizure of person and property arise pursuant to the protections of the Fourth Amendment. The Fourth

Amendment,[84] applied to state actors through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Reasonableness is the ultimate measure of the constitutionality of a seizure of person or property. See Trent v. Wade, 776 F.3d 368, 377 (5th Cir. 2015)(internal quotation marks omitted)(quoting Fernandez v. California, ___ U.S. ___, 134 S.Ct. 1126, 1132 (2014)).

A warrantless arrest must be supported by "probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004). The standard for the existence of probable cause is an objective one requiring that the officer draw a reasonable conclusion from the facts available to him at the time of the arrest. Id.; see also Blackwell v. Barton, 34 F.3d 298, 303 (5th Cir. 1994)(stating that probable cause exists if a reasonable person, based on the facts available at the time, would believe that an offense has been committed and that the individual being arrested is the guilty party).

A warrantless seizure of evidence in plain view is reasonable when the officer is legally in the location from which he viewed the item seized and the

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[84] The full text of the Fourth Amendment is:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"incriminating nature of the item [is] immediately apparent." United States v. Turner, 839 F.3d 429, 433 (5th Cir. 2016)(quoting Horton v. California, 496 U.S. 128, 136 (1990), and Arizona v. Hicks, 480 U.S. 321, 326 (1987)). "The incriminating nature of an item is immediately apparent if the officers have probable cause to believe that the item is either evidence of a crime or contraband." Id. (quoting United States v. Buchanan, 70 F.3d 818, 826 (5th Cir. 1995)).

Probable cause as it relates to seizure of evidence requires that the officer determine the existence of a "practical, nontechnical probability that incriminating evidence is involved." Id. (quoting United States v. Espinoza, 826 F.2d 317, 319 (5th Cir. 1987)).

These constitutional standards were clearly established at the time of Plaintiff's arrest, which leaves the court only to consider whether Plaintiff produced sufficient evidence that Defendant Officers' conduct violated Plaintiff's constitutional rights to be free from unreasonable arrests and seizures.

B. Discussion on Evidentiary Issues

A party must support its factual positions on summary judgment by citing to particular evidence in the record. Fed. R. Civ. P. 56(c)(1). An affidavit or declaration is competent summary judgment evidence if it is based "on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Conclusory allegations, unsubstantiated assertions, improbable inferences, and speculation are not competent evidence. Roach v. Allstate Indem. Co., 476 F. App'x

778, 780 (5th Cir. 2012)(unpublished)(citing S.E.C. v. Recile, 10 F.3d 1093, 1097 (5th Cir. 1993)).

Federal Rule of Civil Procedure 56(c)(2) allows a movant to object to exhibits that contain material that "cannot be presented in a form that would be admissible in evidence" under the Federal Rules of Evidence. Cf. Lee v. Offshore Logistical & Transp., L.L.C., 859 F.3d 353, 355 (5th Cir. 2017)(explaining that the rule seeks "[t]o avoid the use of materials that lack authenticity or violate other evidentiary rules"). The proponent of the challenged exhibit must prove admissibility. See id. (quoting Fed. R. Civ. P. 56, Advisory Comm. Notes, 2010 Amendment, as stating that the proponent may show that the exhibit is admissible as presented or that it can be presented in admissible form). The trial court has discretion to determine whether "to admit or exclude evidence." See MCI Comm'ns Servs., Inc. v. Hagan, 641 F.3d 112, 117 (5th Cir. 2011)(stating that the standard of review for evidentiary decisions is abuse of discretion).

Only relevant evidence is admissible. Fed. R. Evid. 402. Relevant evidence has a "tendency to make a fact more or less probable than it would be without the evidence" and relates to a fact "of consequence in determining the action." Fed. R. Evid. 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Hearsay is not admissible evidence. Fed. R. Evid. 802.

Hearsay is a statement, not made while testifying in the current litigation, that is offered for "the truth of the matter asserted in the statement." Fed. R. Evid. 801. The Federal Rules of Evidence list

twenty-nine exceptions to the rule against hearsay. Fed. R. Evid. 803-804, 807.

1. Plaintiff's Objections

Plaintiff objects to statements in the declarations of Defendants Eder and Ng and the affidavits of Defendants Baker and Dale. Plaintiff also challenges the admissibility of the grand jury indictment, the search and arrest warrants, and Defendant Eder's Offense Report.[85] Plaintiff contends that evidence related to the following topics is irrelevant and/or more prejudicial than valuable: (1) Defendant Officers' licensure and training; (2) the investigation into Sherman Jones, Plaintiff's husband, including information regarding the confidential informant and cocaine sales; (3) the arrest and search warrants; (4) the grand jury indictment; (5) the guidance of prosecutors and judges on the interpretation of the criminal law on which Defendant Eder relied; and (6) any searches performed by Defendant Officers for prescription bottles or labels. The grand jury indictment and the searches for prescription bottles go to the key issue of whether probable cause existed to support Plaintiff's arrest. The other topics are more tangentially relevant but, at the very least, provide background and/or provide insight into the course of events.

None of the above topics is more prejudicial

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[85] Defendants Eder and Ng withdrew Defendant Eder's Offense Report as an exhibit, mooting all of Plaintiff's objections thereto. See Doc. 43, Defs. Eder & Ng's Objs. & Reply to Pl.'s Resp. to Defs.' Mot. for Summ. J. p. 7.

than valuable with the possible exception of the details of the investigation into Sherman Jones, which provides the justification for the search of Plaintiff's residence. That investigation is unrelated to her arrest and the seizure of the alprazolam and hydrocodone pills. That said, the court is not prejudiced by the information on summary judgment and will leave consideration of what evidence should be presented at trial to the trial judge. These objections are overruled.

Plaintiff objects to statements on other topics made by Defendants Baker and Dale in their affidavits: (1) details of the execution of the search warrant, including interaction with the children present, the discovery of the alprazolam and hydrocodone pills, and other evidence found; (2) their lack of involvement in thetransportation of Plaintiff to the jail or any other interaction with her; (3) discussion of the criminal classification of the pills found; (4) their opinions on whether the arrest was reasonable and whether they legally carried out their duties. The details of the execution of the search warrant are relevant to the legality of Plaintiff's arrest. Defendants Baker and Dale's lack of contact with Plaintiff is relevant to whether they played any role in arresting her, and their opinions on the reasonableness and legality of Defendant Officers' actions speak to qualified immunity. The other statements factually meet the liberal relevance standard in that they provide background and context. These objections are overruled.

Plaintiff complains that the Defendant Officers' statements about the nonparty officer's discovery of the pills and the identification of those pills with the assistance of a poison control center amounted to

hearsay, of which they lacked personal knowledge. Plaintiff continues this line of objections to the conclusion that no evidence exists to prove that an alprazolam was found in Plaintiff's bedroom. This is an absurd argument in light of the absence of a dispute about either the discovery of the alprazolam or the identification of the types of pills found. Plaintiff alleged in her complaint that Defendant Officers "found one and a half prescription pills," that she "was the ultimate user of the hydrocodone on her nightstand," and that her "father was the ultimate user of the alprazolam seized by Defendant [Officers]."[86] These objections are overruled.

Plaintiff objects to several statements in Defendants Baker's and Dale's affidavits as offering inadmissible legal conclusions, in part, because they were not identified as experts. One of the statements expresses the opinion that a reasonable officer would not have believed that the arrest was unconstitutional based on the facts and circumstances facing Defendant Eder. Another of the challenged statements concludes that the officers were legally in the home and the alprazolam and hydrocodone pills were in plain view. The third discusses the criminal statute regarding possession of controlled substances. In fact, Defendants Baker and Dale did identify themselves as non-retained experts.[87] These statements, to the extent that they are legal conclusions are within these officers' expert knowledge. These objections are overruled.

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86 See Doc. 30, Pl.'s 2d Am. Compl. pp. 8, 10.

87 See Doc. 37, Defs. Baker & Dale's Designation of Expert Witnesses pp.4-5.

Several statements are inadmissible. Both Defendants Baker and Dale stated in their affidavits that, in their experiences, "local criminals, upon being made aware of a law enforcement raid having been made upon a suspected drug house, will often break into that house as soon as possible after law enforcement leaves the scene, in order to search for any leftover weapons, money, and/or drugs."[88] That opinion is speculative, as are the remaining statements of similar effect in their affidavits regarding what they believe happened to the $600 that Plaintiff alleged was taken from her home. Additionally, Defendants Baker and Dale made statements in their affidavits about Plaintiff's deposition testimony regarding the extent of her knowledge of her husband's involvement in drug activity. They have no personal knowledge of that topic. Finally, Defendants Eder and Ng both stated that they do not believe that any law enforcement officer seized the $600. These statements are also speculative. These objections are sustained.

2. Defendants Eder and Ng's Objection

Defendants Eder and Ng object to Plaintiff's Exhibit C, the medical note pertaining to James Jackson's visit to an emergency room that included a prescription for alprazolam. Plaintiff cites this prescription as proof that her father possessed a

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[88] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 42; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 42.

prescription for the partial pill found in her bedroom during the search.[89] The note, which is supported by a business records affidavit, passes the lenient test for relevance in that it arguably has a slight tendency to make more probable than not that Plaintiff's father (assuming her father's name is James Jackson) had a prescription for alprazolam. Defendants Eder & Ng's objection is overruled.

C. Discussion on Summary Judgment Issues

The remaining causes of action are based on the seizure of Plaintiff's person by arrest and the seizures of $600 in currency and the alprazolam and hydrocodone pills.

1. Arrest

Defendant Eder, as the arresting officer, is in a different position vis-à-vis liability than the other Defendant Officers. The court first addresses the evidence against him.

a. Defendant Eder

Defendant Eder originally argued that Section § 483.041 supported Plaintiff's arrest and that the only element of the crime was possession of a dangerous drug. Similar to the language of Section

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[89] See Doc. 41, Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J. pp. 2, 15.

481.117(a),[90] Section 483.041(a) reads:

> A person commits an offense if the person possesses a dangerous drug unless the person obtains the drug from a pharmacist acting in the manner described by Section 483.042(a)(1) or a practitioner acting in the manner described by Section 483.042(a)(2).

"Dangerous drug" is defined as "a device or a drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act)." Tex. Health & Safety Code § 483.001(2). Section 483.042(a)(1) refers to drugs delivered by pharmacists pursuant to a prescription, and Section 483.042(a)(2) refers to practitioners acting in the course of practice. Alprazolam and hydrocodone are in Penalty Group 3 and do not fall within the coverage of Section 483.041(a). See Tex. Health & Safety Code § 481.104(a)(2),(4). Accordingly, Section 483.041(a) cannot justify Plaintiff's arrest for possession of alprazolam and hydrocodone.[91]

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[90] Section 481.117(a) states:

> Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

[91] Moreover, no evidence indicates that Plaintiff was

In the original Memorandum, Recommendation, and Order on the summary judgment motions, the court pointed out that it had previously interpreted Section 481.117(a) as prohibiting possession of a controlled substance *without a prescription*, not as merely prohibiting the possession of the controlled substance.[92] Despite that earlier ruling, Defendant Eder persisted in arguing on summary judgment that Section 483.041(a) supported Plaintiff's arrest. In his objections, Defendant Eder switches statutes, arguing that Section 481.184(a) places the burden on the defendant to negate any exemption or exception allowed by the Texas Controlled Substances Act. Section 481.184(a) states:

> The state is not required to negate an exemption or exception provided by this chapter in a complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this chapter. A person claiming the benefit of an exemption or exception has the

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arrested pursuant to Section 483.041(a) or that the grand jury considered that provision. In fact, the evidence is undisputed that Plaintiff was charged under Section 481.117(a). The court stated as much in its July 2016 Memorandum and Recommendation that addressed Defendants' motions to dismiss.

[92] See Doc. 19, Mem. & Recom. Dated July 19, 2016 p. 15 (citing Burnett, 488 S.W.3d at 920, as stating that, although the State had represented that it was illegal to carry pills outside of their prescription containers, the court could find no such law).

> burden of going forward with the evidence with respect to the exemption or exception.

The court's interpretation implicitly held that this provision did not apply because the possession of a prescription was not an exemption or an exception but the lack of a prescription was an element of the crime. Defendant Eder points the court to Threlkeld v. Texas, 558 S.W.2d 472, 473 (Tex. Ct. Crim. Appeals 1977), which held:

> Prior to the enactment of the Controlled Substances Act [the] argument [that possession under the provision was "not illegal per se but becomes illegal only when not obtained directly from, or pursuant to, a valid prescription of an practitioner"] would have been well taken. The traditional rule upon which appellant relies, however, is no longer applicable to indictments charging possession of controlled substances. [Tex. Health & Safety Code 481.184(a)'s predecessor] expressly removed the burden of negating in an indictment any exemptions or exceptions under the act and placed the burden of going forward with the evidence with respect to such exemptions or exceptions upon the defendant.

Neither Plaintiff nor the court's own research

uncovered any more recent cases that call into question Threlkeld's holding.

Faced with this applicable law, the court must reconsider its analysis of probable cause. Plaintiff does not dispute that the presence of the controlled substances in her shared bedroom arguably gave rise to probable cause that she knowingly or intentionally possessed the pills (jointly with her husband).[93] As possession alone was enough to give Defendant Eder probable cause existed to believe that Plaintiff violated Section 481.117(a), Plaintiff has failed to raise a fact issue on her constitutional claim of false arrest against Defendant Eder.

b. Defendants Baker, Dale, and Ng

Absent evidence that Defendant Eder, the arresting officer, unconstitutionally seized Plaintiff, the other Defendant officers cannot be held liable. Defendant Officers stated under oath that Defendant Eder arrested Plaintiff based only on his own assessment of probable cause. Plaintiff produced no evidence contradicting this conclusion. No evidence suggests that Defendant Eder requested or received any input from any of the other Defendant Officers or even places the other Defendant Officers in proximity to Plaintiff and Defendant Eder at the time of Plaintiff's arrest. Absent personal involvement in any aspect of Plaintiff's arrest, Defendants Baker, Dale, and Ng could not be held liable for false arrest, even if

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[93] She also does not contend that probable cause was lacking with regard to possession within 1,000 feet of a school.

Defendant Eder had lacked probable cause. Plaintiff's claims of supervisory or bystander liability also fail in the absence of evidence of a false arrest.

Plaintiff's Fourth Amendment claim that her right to be free from unreasonable arrest was violated cannot survive summary judgment.

2. Seizure of Property

Plaintiff's unconstitutional seizure of property concerns the seizure of the alprazolam and hydrocodone pills and the disappearance of $600.

As the court previously held, the warrant did not authorize the seizure of the alprazolam and hydrocodone pills. The constitutionality of the seizure therefore rests on whether the circumstances gave rise to "probable cause to believe that the item [was] either evidence of a crime or contraband." Turner, 839 F.3d at 433. Because Defendant Eder had probable cause to believe that Plaintiff was committing the criminal offense of possession of a controlled substance, seizure of the pills was constitutional. Regarding Plaintiff's claim that Defendant Officers illegally seized $600 in currency, Plaintiff testified that it disappeared from a shirt pocket in her closet on the day of the search. The evidence indicates that it was not seized pursuant to the search warrant as it was not listed on the inventory that was returned to the court. Defendant Officers also deny that they "seized" the currency and make no argument that probable cause existed for the seizure of that money. Nevertheless, Plaintiff's testimony regarding the disappearance of the $600 raises a fact question whether Defendant Officers were responsible for the disappearance of the funds during their search of the

residence. If so, their actions clearly violated Plaintiff's constitutional right to be free from unreasonable seizures. The jury will have to resolve this dispute.

This claim survives summary judgment as to all Defendant Officers.

3. Liability of Defendant Fort Bend

A county may be held liable under Section 1983 only for its own illegal acts, not pursuant to a theory of vicarious liability. Connick v. Thompson, 563 U.S. 51, 60 (2011). To succeed on a claim under Section 1983, the plaintiff must demonstrate that an official policy promulgated by the county policymaker was the moving force behind the alleged constitutional violation. Peña v. City of Rio Grande City, F.3d , 2018 WL 386661, at *5 (5th Cir. 2018).

The evidence does not support a constitutional claim for false arrest. Regardless of Plaintiff's allegations regarding Defendant Fort Bend's policies, Plaintiff cannot seek liability against Defendant Fort Bend in the absence of a constitutional violation. With regard to Plaintiff's only remaining constitutional claim for illegal seizure of cash, Plaintiff made no allegation and produced no evidence of a policy or widespread custom of officers' taking currency without probable cause from the scenes of arrests.

Plaintiff's claims against Defendant Fort Bend cannot survive.

IV. Conclusion

Based on the foregoing, the court **RECOMMENDS** that Defendants Eder and Ng's

motion be **GRANTED IN PART AND DENIED IN PART** and Defendants Baker and Dale's motion be **GRANTED IN PART AND DENIED IN PART**. The court **DENIES** Plaintiff's motion for leave to amend and **STRIKES** Plaintiff's motion to exclude.

The following claim must proceed to trial: Plaintiff's claim against Defendants Baker, Dale, Eder, and Ng for unconstitutional seizure of Plaintiff's currency.

The Clerk shall send copies of this Amended Memorandum, Recommendation, and Order to the respective parties who have fourteen days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 21 day of February, 2018.

[handwritten signature]
U.S. MAGISTRATE JUDGE

APPENDIX F

[Filed January 8, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHANIE JONES,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-15-2919
	§	
JEREMY EDER, J. DALE B. BAKER, R. NG, and FORT BEND COUNTY	§	

MEMORANDUM, RECOMMENDATION, AND ORDER

Pending before the court[1] are (1) Defendants Jeremy Eder ("Eder") and Raymond Ng's ("Ng") Motion for Summary Judgment (Doc. 38); (2) Defendants Brian Baker ("Baker") and Josh Dale's ("Dale") Motion for Summary Judgment (Doc. 39); (3) Plaintiff's Motion to Exclude Defendant Officers'

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[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. See Doc. 11, Ord. Dated Dec. 28, 2015.

Summary Judgment Evidence (Doc. 40); and (4) Plaintiff's Opposed Motion for Leave to File an Amended Complaint (Doc. 42). The court has considered the motions, the responses, all other relevant filings, and the applicable law. The court **DENIES** Plaintiff's motion for leave to amend and **STRIKES** Plaintiff's motion to exclude. Furthermore, for the reasons set forth below, the court **RECOMMENDS** that Defendants Eder and Ng's motion be **GRANTED IN PART AND DENIED IN PART** and Defendants Baker and Dale's motion be **GRANTED IN PART AND DENIED IN PART**.

I. Case Background

Plaintiff filed this civil rights action pursuant to 42 U.S.C. § 1983 ("Section 1983"), alleging that four peace officers violated her constitutional rights when they arrested her and seized her property during a search of her home.

A. Factual Background

The four individual defendants (collectively "Defendant Officers") in this action were members of the Fort Bend County ("Fort Bend") Narcotics Task Force ("Task Force").[2] Defendant Officers represented

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[2] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 5; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 5; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's

three local law-enforcement agencies: Defendant Eder worked for the Rosenberg Police Department; Defendant Ng worked for the Sugar Land Police Department; Defendants Baker and Dale worked for Defendant Fort Bend's Sheriff's Office.[3] Defendant Dale served as the Task Force's supervisor, and Defendant Baker served as the assistant supervisor.[4]

Defendant Eder reported to the Task Force that "he had developed reliable information that Plaintiff's husband, Sherman McAndrew Jones[("Sherman Jones"),] was apparently operating a crack cocaine sales and distribution business out of [his and Plaintiff's] residence," which was located within 1,000 feet of an elementary school.[5] On January 29, 2014, Defendant Eder obtained an arrest warrant for Sherman Jones and a search warrant for the residence based on Defendant Eder's affidavit detailing an investigation into Sherman Jones' illegal

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Mot. for Summ. J., Aff. of Def. Baker ¶ 5.

[3] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of 3 Def. Eder ¶¶ 2, 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶¶ 2, 5; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 3-4, 7; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 3-4, 7.

[4] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 6; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 6.

[5] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 12; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 12.

activity.[6] The search warrant authorized entry into the residence without knocking or announcing the officers' purpose in order to search for "illicit contraband, namely **Cocaine**, and **any illicit contraband, as described in said affidavit**."[7] In the supporting affidavit, Defendant Eder identified "Cocaine" as the only drug targeted in the search and listed currency among the types of evidence "relative to the trafficking of narcotics."[8]

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[6] See Doc. 38-3, Ex. 3, to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 5; Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Warrant & Aff. in Support of Warrant; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 13; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 13.

[7] Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Warrant; see also Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 13-14; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 13-14; cf. Doc. 30, Pl.'s 2d Am. Compl. p. 7(stating that a Fort Bend district court issued the warrant that allowed a search for "illicit items (including Cocaine)" and "other specific items"); Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. pp. 11-12 (admitting that the warrant allowed a search for "illicit items (including Cocaine)" and "other specific items" but denying that the other items were not relevant to Plaintiff's arrest as alleged in Plaintiff's amended complaint); Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. pp. 3-4 (admitting that the warrant allowed a search for "contraband and illegal drugs").

[8] Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Def. Eder's Aff. in Support of Warrant pp. 3-4.

On January 31, 2014, the Task Force, in coordination with the Fort Bend Regional SWAT (Special Weapons and Tactics) team, executed the search and arrest warrants.[9] Defendant Eder was in charge of the operational aspects of the investigation into Sherman Jones and "led the execution of a search warrant upon Plaintiff's residence."[10] The officers escorted Plaintiff outside the residence where she remained during the search.[11]

During the search, a nonparty officer found one and one-half pills in a small dish on a windowsill in a bedroom where Plaintiff and her husband were sleeping.[12] Defendant Eder consulted with

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[9] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 5; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 14-15; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 15.

[10] Doc. 30, Pl.'s 2d Am. Compl. p. 1; see also Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. p. 8; Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. p. 2; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 8, 19; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 8, 19.

[11] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 34, 35; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. pp. 21, 107.

[12] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 6; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 6; Doc. 39-3, Ex. 3-B-3 to Defs. Baker & Dale's Mot. for Summ. J.,

representatives of a poison control center to confirm that the partial pill was alprazolam and the whole pill was hydrocodone.[13] One of the nonparty Task Force members "seized and collected all narcotic evidence" ostensibly "under the authority of the search warrant," including the alprazolam and hydrocodone tablets.[14] Defendant Eder and Ng also searched the residence for labels or pill containers for the pills but found none.[15] In addition to the alprazolam and hydrocodone pills, the offices discovered, among other items, a digital scale, a police radio, cell phones, miscellaneous papers, and a glass beaker.[16] Defendant Eder did not list any currency in the search inventory, and Defendant Officers all denied they seized any currency.[17]

Photograph.

[13] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 7.

[14] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 27; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 27.

[15] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 7; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 7.

[16] See Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Search Warrant Return & Inventory; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 33; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 33.

[17] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 13; Doc. 38-4, Ex. 4 to Defs. Eder &

At the scene, no officer asked Plaintiff whether the alprazolam and hydrocodone pills belonged to her or someone else, inquired whether anyone possessed a prescription for the pills, or even mentioned the pills to her at all.[18] Plaintiff asked aloud why she and Sherman Jones were outside during the search and what was happening, but Defendant Eder responded that she "needed to be quiet and let them do their job."[19] Plaintiff did not communicate or interact "in any substantive way" with Defendants Baker and Dale.[20]

Defendant Eder alone made the decision to arrest and effectuated the arrest of Plaintiff for jointly possessing the alprazolam and hydrocodone pills.[21] No

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Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 13; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 41; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 41; see also Doc. 38-6, Ex. 6 to Defs. Eder & Ng's Mot. for Summ. J., Search Warrant Return & Inventory.

[18] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. p. 37; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 107; Doc. 41-6, Ex. F to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Decl. of Pl. p. 1.

[19] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 35-37.

[20] Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 32, 36; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 32, 36.

[21] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ.

officer notified Plaintiff of the charge on which she was being arrested.[22] When Plaintiff returned to the residence after being released from the jail facility, she noticed that $600 in currency was missing from the pocket of a shirt hanging in the closet.[23]

A grand jury was empaneled to hear the evidence against Plaintiff on the charge of possession of a controlled substance in Penalty Group 3 in a drug-free zone.[24] Neither Plaintiff nor any of Defendant

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J., Decl. of Def. Eder ¶ 12; see also Doc. 30, Pl.'s 2d Am. Compl. p. 8 (stating that she was "charged with two counts of possession of a controlled substance in a school zone"); Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 11 (stating that Defendant Eder made the decision to arrest Plaintiff); Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Indictment (listing charge as "POSS CS PG 3 <28G DRUG FREE"); Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 34 (stating that Defendant Eder made the decision to arrest Plaintiff for joint possession); Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 34 (stating that Defendant Eder made the decision to arrest Plaintiff for joint possession).

[22] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. p. 37; Doc. 41-6, Ex. F to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Decl. of Pl. p. 1.

[23] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp.44-45, 48-49, 75. Plaintiff alleged that Defendant Officers seized the $600. See Doc. 30, Pl.'s 2d Am. Compl. p. 6.

[24] See Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Indictment (listing charge as "POSS CS PG 3 <28G DRUG FREE").

Officers appeared before the grand jury.[25] At the time of the grand jury hearing, Plaintiff had not provided her attorney with the label from the original container for either pill found in her home, and Defendant Officers did not know that she was claiming that she had a prescription for hydrocodone and her father had a prescription for alprazolam.[26] On February 17, 2014,

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[25] See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 10; Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 9; Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. p. 108; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 38; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 38.

[26] Doc. 38-1, Ex. 1 to Defs. Eder & Ng's Mot. for Summ. J., Pl.'s Resps. to Defs. Eder & Ng's Reqs. for Admiss. No. 18; See Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 11 ("I could not have informed the [g]rand [j]ury that Plaintiff claimed to have a prescription for the hydrocodone or claimed her father had a prescription for the alprazolam because Plaintiff never made that representation to me and no one informed me Plaintiff had ever so contended."); Doc. 38-4, Ex. 4 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Ng ¶ 10 (same); Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 39 ("I could not have informed the [g]rand [j]ury that Plaintiff was claiming to have a prescription for the hydrocodone (or that she was claiming that her father had a prescription for the alprazolam) because Plaintiff never made that representation to me. In fact, no one ever informed me that Plaintiff had ever made either of those claims until after she filed this suit."); Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 39 (same).

the grand jury returned a true bill finding probable cause for the felony charge that Plaintiff "knowingly and intentionally possess[ed] a controlled substance" within 1,000 feet of an elementary school.[27] On October 20, 2014, the presiding judge dismissed the charges against Plaintiff on the prosecutor's motions for lack of evidence to prove the case beyond a reasonable doubt.[28] A handwritten notation on the motions stated "INSUFF LINKS BETWEEN

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[27] Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Indictments; see also Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 10; Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 38; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 38.

[28] Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Mots. to Dismiss & Ords. of Dismissal; see also Doc. 30, Pl.'s 2d Am. Compl. p. 9 (stating that the dismissal order noted the evidence was insufficient to prove the beyond a reasonable doubt and that the links between Plaintiff and the drugs); Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. p. 13 (admitting, with regard to the dismissal of the charges, only that the prosecutor dismissed them "with leave to refile"); Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. p. 4 (admitting that "an assistant district attorney exercised prosecutorial discretion and withdrew the criminal charges the same district attorney's office found were supported by probable cause and warranted criminal charges [and] . . . that an assistant district attorney formed the opinion that[,] although the charges filed against Plaintiff were supported by probable cause, the prosecutor was of the opinion that State of Texas could not prove the charges in criminal court under the heightened burden of beyond reasonable doubt").

DEFENDANT AND DRUGS."[29]

Plaintiff testified that she did not learn that the alprazolam and hydrocodone pills served as the basis of her arrest until she read the indictment.[30] Plaintiff also testified that she possessed a valid prescription for the hydrocodone and that her father possessed a valid prescription for the alprazolam.[31] Plaintiff represented that she had given the alprazolam prescription and the prescription bottles for both alprazolam and hydrocodone to her criminal defense attorney but, at the time of her deposition, had not attempted to have them returned to her.[32]

In discovery for this case, Plaintiff produced a prescription for Lortab (a narcotic pain reliever containing hydrocodone and acetaminophen), which was prescribed for pain associated with a facial abscess in January 13, 2013, and which provided for fifteen pills with no refills.[33] Plaintiff also produced a

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[29] Doc. 38-5, Ex. 5 to Defs. Eder & Ng's Mot. for Summ. J., Mots. to Dismiss & Ords. of Dismissal.

[30] Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 107.

[31] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 10-20; Doc. 41-1, Ex. A to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Dep. of Pl. p. 9; see also Doc. 41-2, Ex. B to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Prescription; Doc. 41-3, Ex. C to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Progress Note Dated May 16, 2013.

[32] Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 12-15, 20-21.

medical note pertaining to James Jackson's visit to an emergency room on May 16, 2013.[34] The note included a prescription for Xanax (brand name for alprazolam) to be taken once or twice per day as needed.[35] The prescription was for sixty pills with no refill.[36] Plaintiff testified that her father occasionally lived in the residence, and, when he did, he stayed in her sons' room.[37]

B. Procedural Background

Plaintiff filed her complaint on October 5, 2015, alleging unreasonable seizures of her person and property (pills and currency) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.[38] On November 2, 2015, Defendant Eder

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[33] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 83-84 (describing her medical issue as an ear infection); Doc. 41-2, Ex. B to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Prescription; Doc. 41-8, Ex. H to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., After Care Instructions p. 2.

[34] See Doc. 41-3, Ex. C to Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J., Progress Note Dated May 16, 2013.

[35] See id.

[36] See id.

[37] See Doc. 38-8, Ex. 8 to Defs. Eder & Ng's Mot. for Summ. J., Dep. of Pl. pp. 25-27, 70-71.

[38] See Doc. 1, Pl.'s Compl.

filed a motion to dismiss.[39] Plaintiff filed an amended complaint on November 23, 2015, and, on December 2, 2015, Eder filed a supplemental motion arguing that Plaintiff's amended complaint also failed to state a claim for relief.[40] On February 24, 2016, Defendant Ng filed a motion to dismiss.[41] On April 11, 2016, Defendants Fort Bend, Baker, and Dale filed a motion to dismiss.[42]

On July 19, 2016, the court entered a memorandum recommending that Defendants' motions to dismiss be granted in part and denied in part.[43] The court interpreted Plaintiff's privacy and failure-to-protect claims as alleging violations of substantive due process and found those claims unavailable as a matter of law.[44] The court additionally found that Plaintiff failed to state a claim against Defendant Fort Bend because the factual allegations were inadequate with regard to Plaintiff's assertion that Defendant Fort Bend maintained a policy of failing to train, discipline, or supervise its officers.[45] The court suggested that more specific

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39 See Doc. 7, Def. Eder's Mot. to Dismiss.

40 See Doc. 8, Pl.'s Am. Compl.; Doc. 9, Def. Eder's Suppl. Mot. to Dismiss.

41 See Doc. 15, Def. Ng's Mot. to Dismiss.

42 See Doc. 17, Defs.' Mot. to Dismiss.

43 See Doc. 19, Mem. & Recom. Dated July 19, 2016.

44 See id. pp. 15-19.

allegations regarding how the county's training policy was inadequate could remedy Plaintiff's allegations against Defendant Fort Bend.[46] As to Plaintiff's claims of wrongful seizure of person and property under the Fourth Amendment, the court recommended denying the motions.[47]

In the Memorandum and Recommendation, the court made legal findings of continuing importance.[48] One is that the warrant did not authorize the seizure of the alprazolam and hydrocodone pills.[49] The court also determined that alprazolam and hydrocodone are included in Penalty Group 3 and are covered by Texas Health and Safety Code § 481.117(a) ("Section 481.117"),[50] which states:

> Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

The court interpreted the statute to mean that

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45 See id. pp. 19-25.

46 Id. p. 23.

47 See id. pp. 8-15.

48 See id. pp. 11-15.

49 See id. pp. 11-12.

50 See id. p. 12.

"possession of a controlled substance via a prescription is not a crime; it is the possession of a controlled substance in the absence of a prescription that is proscribed by the statute."[51] The court therefore concluded that the absence of a prescription is an element of the crime, not "an affirmative defense that may be disregarded when an officer is assessing the legality of possessing one hydrocodone pill found on a nightstand in that person's residence."[52]

Plaintiff and Defendants Eder and Ng filed objections to the Memorandum and Recommendation.[53] On August 24, 2016, prior to the district court's consideration of the objections, Plaintiff filed a motion for leave to amend her complaint for a second time.[54] At the time of her

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[51] Id. p. 15 (citing Section 481.117 and Burnett v. Texas, 488 S.W.3d 913, 920 (Tex. App.—Eastland 2016)). The court discussed Texas Health and Safety Code § 483.041 ("Section 483.041") only in its analysis of Kelly v. State, Nos. 09-09-00151-CR, 09-09-00152-CR, 09-09-00153-CR, 2010 WL 1478907, at **1, 3-4 (Tex. App.—Beaumont Apr. 14, 2010)(unpublished), which addressed a conviction for possession of a dangerous drug without a prescription under Section 483.041 and did not mention Section 481.117. See Doc. 19, Mem. & Recom. Dated July 19, 2016 p. 13.

[52] Id. p. 15.

[53] See Doc. 21, Defs. Eder & Ng's Objs.; Doc. 22, Pl.'s Objs.

[54] See Doc. 25, Pl.'s Opposed Mot. for Leave to File a 2d Am. Compl.

motion, the court had not yet entered a scheduling order. Plaintiff sought leave to amend her complaint to add the following allegations: (1) that Defendant Officers knew or should have known that Plaintiff and another resident possessed valid prescriptions for the pills found in the residence; (2) that Defendant Officers did not inquire whether Plaintiff had a prescription; (3) that Defendant Fort Bend had a policy, practice, procedure, custom, or training which permitted its officers to conduct an arrest inside a home without first discerning whether an individual had a prescription for the substance(s) found; (4) that Defendants' position on the possession of a valid prescription as an affirmative defense is unconstitutional and was the moving force behind Plaintiff's arrest; and (5) that Defendant Officers did not inform her of the charge for possession of a controlled substance in a school zone.[55] Plaintiff sought to make a few other modifications to her complaint but proposed no changes to the privacy or failure-to-protect claim.[56]

On August 31, 2016, the district judge adopted the Memorandum and Recommendation, effectively dismissing the privacy and failure- to-protect claims as legally insufficient and the claims against Defendant Fort Bend as factually insufficient.[57] On September 16, 2016, two days after Plaintiff's motion for leave to amend was submitted to the court pursuant to Local Rule 7.3, the court granted

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55 See id. pp. 1-2.

56 See id.

57 See Doc. 26, Ord. Dated Aug. 31, 2016.

Plaintiff's motion for leave to amend.[58]

Federal Rule of Civil Procedure 15(a)(2), which applies in the absence of a scheduling order, advises the court grant leave freely "when justice so requires." Here, justice required leave be granted because, despite the recommendation and its adoption, Plaintiff filed for leave while the undersigned's recommendation was pending before the district court and sought to rectify the pleading deficiencies upon which Defendant Fort Bend's motion had been granted. At the time, the case was in its nascent stages.

As the court granted Plaintiff's motion for leave to amend with no exceptions, the court allowed Plaintiff to make all of the changes requested in her motion, including the additional factual allegations against Defendant Fort Bend.[59] That is, the court found the amended allegations regarding Defendant Fort Bend's policy or custom to be sufficient to state a claim against Defendant Fort Bend, thus reinstating the county as a defendant. In contrast, Plaintiff did not seek leave to amend the privacy and failure-to-protect claims, which were dismissed on legal

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[58] See Doc. 29, Ord. Dated Sept. 16, 2016.

[59] See id. No final judgment was requested or entered on behalf of Defendant Fort Bend prior to the court's granting of leave to amend. Federal Rule of Civil Procedure 54(b) states that, absent a final judgment, any order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

grounds. Those claims could not have been remedied through additional factual detail (had Plaintiff offered any) and were not revived by the court's order granting leave to amend.[60]

After amendment, Plaintiff's pleading raised the following causes of action: (1) Fourth Amendment unreasonable seizure of her person (count 1); and (2) Fourth Amendment unreasonable seizure of her property (count 2). With regard to these claims, Plaintiff alleged that Defendant Fort Bend had "a policy, procedure, custom, practice, or protocol of inadequately training, supervising, and/or disciplining its officers" and could be expected to violate Fourth Amendment rights by taking:

> the unconstitutional official position that its officers need not establish the sine qua non of a criminal offense (in this case, the lack of a prescription); instead, Defendants unconstitutionally believe that said element is an affirmative defense which may be disregarded by officers in the field when they seek to determine probable cause.[61]

Plaintiff asserted that Defendant Fort Bend "created

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[60] In count 3, Plaintiff alleged violations of a right to privacy with regard to Plaintiff's prescription medication inside her home, and, in counts 4- 6, Plaintiff alleged violations of a right to protection from unreasonable seizure inside her home, from unreasonable seizure of her papers and effects inside her home, and from unreasonable intrusions into her privacy. See Doc. 30, Pl.'s 2d Am. Compl. pp. 17-31.

[61] Id. pp. 31-32 (emphasis omitted).

an extremely high risk that constitutional violations would ensue from its failures to inform its peace officers . . . of their relevant constitutional duties."[62] Defendant Fort Bend did not file an answer to Plaintiff's Second Amended Complaint.[63]

On September 21, 2016, Defendants Baker and Dale filed an answer to the amended complaint, asserting twenty-two defenses.[64] The also "reurge[d] and incorporate[d] . . . by reference their previously filed [j]oint [m]otion to [d]ismiss."[65] This one-sentence motion to dismiss fails to challenge the sufficiency of the additional facts alleged, to explain how the amendments affect the causes of action alleged against them, or to raise any new arguments for dismissal. Absent new, applicable arguments for dismissal, the court finds that this one-sentence effort is not a legitimate motion to dismiss that requires the court's consideration. It is therefore stricken from the record.

On September 30, 2016, Defendants Eder and Ng filed an amended answer, asserting three

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62 Id. p. 34.

63 Without discussing the legal effect of the court's order granting leave to amend, Defendants Baker & Dale repeatedly stated in their answer that Defendant Fort Bend had been dismissed. See, e.g., Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. pp. 10, 15, 24.

64 See Doc. 32, Defs. Baker & Dale's Ans. to Pl.'s 2d Am. Compl. pp. 1-8.

65 Id. pp. 1-2 (emphasis omitted).

defenses.[66] Shortly thereafter, the court held a scheduling conference, and among the deadlines set were October 28, 2016, for amending pleadings and April 21, 2017, for filing dispositive and nondispositive motions.[67]

On April 21, 2017, Defendants Eder and Ng jointly filed a motion for summary judgment, as did Defendants Baker and Dale.[68] In addition to filing a timely response, Plaintiff filed a motion to exclude summary judgment evidence, specifically, the expert report of Kurt Sistrunk ("Sistrunk"), which both pairs of Defendant Officers cited in their motions for summary judgment.[69]

On May 22, 2017, while the briefing continued on the motions for summary judgment, Plaintiff filed a motion for leave to amend her claim a third time.[70] Plaintiff filed the motion based on testimony obtained through discovery suggesting that Defendant Fort

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66 See Doc. 33, Defs. Eder & Ng's Ans. to Pl.'s 2d Am. Compl. pp. 1-2.

67 See Doc. 34, Min. Entry Ord. Dated Oct. 4, 2016; Doc. 35, Docket Control Ord. Dated Oct. 4, 2016.

68 See Doc. 38, Defs. Eder & Ng's Mot. for Summ. J.; Doc. 39, Defs. Baker & Dale's Mot. for Summ. J.

69 See Doc. 38-2, Ex. 2 to Defs. Eder & Ng's Mot. for Summ. J., Report of Sistrunk; Doc. 39-3, Ex. 3-A to Defs. Baker & Dale's Mot. for Summ. J., Report of Sistrunk; Doc. 40, Pl.'s Mot. to Exclude Defs.' Summ. J. Evid.; Doc. 41, Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J.

70 See Doc. 42, Pl.'s Opposed Mot. for Leave to File an Amended Complaint.

Bend intentionally maintained a policy of treating a prescription for a controlled substance as an "affirmative defense[] to a crime (which can be ignored by both officers in the field and the State)."[71] Plaintiff sought to amend her complaint to reassert claims against Defendant Fort Bend, which she agreed had been dismissed months earlier.[72]

Plaintiff cited evidence and statements from Defendant Officers' motions for summary judgment in support of her allegation that Defendant Fort Bend's policy was to consider possession of a prescription to be an affirmative defense.[73] As the motion was filed months after the court's deadline for amending pleadings, Plaintiff argued that leave to amend should be freely given upon a showing of good cause.[74] Plaintiff argued that, in her Second Amended Complaint, she had made "a good faith allegation that Defendant Fort Bend County was subject to [imputed] liability," but she "could neither have guessed nor responsibly alleged that Defendants' purported authority to arrest Plaintiff was the county- wide application of a facially inapplicable statute and said statu[t]e is not listed in any charging instrument."[75] In her motion, Plaintiff presented a lengthy discussion

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71 Id. p. 1.

72 See id. p. 2.

73 See id. pp. 2-7.

74 See id. p. 7.

75 Id. p. 8.

of the factors routinely considered in determining whether good cause for amendment exists.[76]

As discussed above, the court previously granted Plaintiff leave to amend in order to add factual allegations that Defendant Fort Bend maintained a policy or tolerated a custom of allowing arrests for possession of controlled substances without determining whether the arrestees possessed the relevant prescriptions. That theory was the primary point of Plaintiff's earlier motion for leave to amend, and Plaintiff's Second Amended Complaint contains sufficiently detailed allegations to put Defendant Fort Bend on notice as to the nature of Plaintiff's claim of imputed liability. The evidence Plaintiff has amassed in support of her theory of county liability becomes relevant at the summary-judgment stage of this action, not at the pleading stage.

To repeat, Plaintiff's Second Amended Complaint is sufficient to establish a claim against Defendant Fort Bend based on its policy or custom of shifting an element of the relevant possession crime to the defendant in the form of an affirmative defense. Because she was able to sufficiently plead the same factual basis for the claim against Defendant Fort Bend in August 2016, her assertion that she did not have a basis to make the allegation until discovery simply rings untrue. As a result, the court finds that Plaintiff fails to establish good cause for amending, and her motion must be denied.[77]

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[76] See id. pp. 7-21.

[77] To be clear, the court finds the amendment unnecessary because Plaintiff's Second Amended Complaint is the live pleading, which alleges constitutional claims against Defendant Fort Bend pursuant to the same

The parties completed discovery earlier this year, and Defendant Officers filed motions for summary judgment, which are fully briefed. Before addressing those motions, the court considers Plaintiff's motion to exclude the expert testimony of Sistrunk.

II. Plaintiff's Motion to Exclude Summary Judgment Evidence

This motion targets the expert report of Kurt Sistrunk. Plaintiff argues that the report: (1) presents an improper legal opinion; (2) is irrelevant; (3) draws prejudicial conclusions from the evidence; (4) is not based on reliable principles, methods, or application to the facts; (5) is inadmissible under Federal Rule of Evidence 403 because it either will mislead or confuse the jury or will be cumulative of the court's instructions; and (6) contains hearsay. Defendants argue that it is an untimely filed Daubert[78] motion.

An expert's opinion is admissible in evidence if the expert's knowledge will help the jury understand the evidence and the opinion "is based on sufficient facts or data," "reliable principles and methods," and the reliable application of "the principles and methods to the facts of the case." Fed. R. Evid. 702. In addition to launching one clear Daubert challenge to Sistrunk's report, Plaintiff adds several other challenges pursuant to the Federal Rules of Evidence. Plaintiff cites Daubert in her motion but, in her reply, offers a rather confusing non-Daubert description of the motion: "[I]t is designedly a motion to exclude for the

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theory as in her proposed amendment.

[78] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

purposes of summary judgment evidence so that Plaintiff can wield it as evidence against Fort Bend County."[79]

Plaintiff's alternative description fails to avoid the obvious—that the motion is an untimely filed Daubert motion. The deadline for filing nondispositive motions was April 21, 2017.[80] Plaintiff filed this motion on May 12, 2017.[81] Plaintiff's spends little effort toward showing good cause for missing the deadline. She argues in her reply that Plaintiff's counsel did not and could not have fully comprehended "the nature of Defendants' argument invoking Texas Health and Safety Code § 483.001[,] et[] seq. . . .until after Defendants filed their motions for summary judgment."[82] This statement does not come close to satisfying Federal Rule of Civil Procedure 16's good cause requirement.

Importantly, no evidence indicates that Plaintiff was charged under the provisions of

Chapter 483 of the Texas Health and Safety Code, and, as explained in a subsequent section, possession of alprazolam and hydrocodone does not fall within that statute's coverage.

Plaintiff's motion to exclude is untimely and

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79 Doc. 48, Pl.'s Consol. Reply to Defs.' Resps. to Pl.'s Mot. to Exclude Summ. J. Evid. p. 1.

80 See Doc. 35, Docket Control Ord. Dated Oct. 4, 2016.

81 See Doc. 40, Pl.'s Mot. to Exclude Defs.' Summ. J. Evid.

82 See Doc. 48, Pl.'s Consol. Reply to Defs.' Resps. to Pl.'s Mot. to Exclude Summ. J. Evid. p. 2.

must be stricken.

III. Defendant Officers' Motions for Summary Judgment

Defendants Eder and Ng argue that the evidence fails to show that they violated Plaintiff's constitutional rights or that they are not entitled to qualified immunity. Specifically, they argue that Defendant Eder arrested Plaintiff with probable cause, that Defendant Ng did not arrest Plaintiff, and that no evidence supports the allegation that they seized currency from Plaintiff.

Defendants Baker and Dale argue that the evidence shows that they were not personally involved in the constitutional violations alleged by Plaintiff. They specifically contend that they had no knowledge whether valid prescriptions covered the alprazolam and hydrocodone pills, that they did not influence the grand jury or withhold information from the grand jury, and that they did not seize the currency.

Plaintiff responds that Defendant Eder did not have probable cause to arrest her and that the other Defendant Officers permitted Defendant Eder to arrest her without probable cause. She also contends that she was not asked whether she possessed a prescription for the pills, that she was not notified of the charge on which her arrest was based, and that the grand jury's indictment was not based on all relevant facts.

The admissibility of certain evidence is disputed. After outlining the applicable law, the court addresses the evidentiary issues before turning to the merits of Defendant Officers' dispositive motions.

A. Applicable Law

Procedural and substantive law guide the court's review of the pending dispositive motions.

1. Summary Judgment

Summary judgment is warranted when the evidence reveals that no genuine dispute exists regarding any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Stauffer v. Gearhart, 741 F.3d 574, 581 (5th Cir. 2014). A material fact is a fact that is identified by applicable substantive law as critical to the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 271 F.3d 624, 626 (5th Cir. 2001). To be genuine, the dispute regarding a material fact must be supported by evidence such that a reasonable jury could resolve the issue in favor of either party. See Royal v. CCC & R Tres Arboles, L.L.C., 736 F.3d 396, 400 (5th Cir. 2013)(quoting Anderson, 477 U.S. at 248).

The movant must inform the court of the basis for the summary judgment motion and must point to relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of genuine factual issues. Celotex Corp., 477 U.S. at 323; Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992). The movant may meet this burden by demonstrating an absence of evidence in support of one or more elements of the case for which the nonmovant bears the burden of proof. See Celotex Corp., 477 U.S. at 322; Exxon

Corp. v. Oxxford Clothes, Inc., 109 F.3d 1070, 1074 (5th Cir. 1997). If the movant carries its burden, the nonmovant may not rest on the allegations or denials in the pleading but must respond with evidence showing a genuine factual dispute. Stauffer, 741 F.3d at 581 (citing Hathaway v. Bazany, 507 F.3d 312, 319 (5th Cir. 2007)).

2. Section 1983 and Fourth Amendment

In order to prevail on a claim under Section 1983,[83] a plaintiff must establish that the defendant deprived the plaintiff of her constitutional rights while acting under the color of state law. Moody v. Farrell, 868 F.3d 348, 351 (5th Cir. 2017).

Government officials have qualified immunity from Section 1983 "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

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[83] The provision reads, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity protects an officer even for reasonable mistakes in judgment. See id. (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004))("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"); Ashcroft v. Al-Kidd, 563 U.S. 731, 743 (2011)("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

By invoking qualified immunity, a summary judgment movant shifts the burden to the nonmovant to rebut the movant's assertion. Cantrell v. City of Murphy, 666 F.3d 911, 918 (5th Cir. 2012). In order to overcome an assertion of qualified immunity, a plaintiff must produce evidence that the alleged conduct violated a statutory or constitutional right and that the right was clearly established at the time of the challenged conduct.See Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011). The Supreme Court held that the order in which these two considerations are addressed is at the court's discretion. See Pearson, 555 U.S. 818-21.

Plaintiff's remaining claims of unreasonable seizures of person and property arise pursuant to the protections of the Fourth Amendment. The Fourth Amendment,[84] applied to state actors through the

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[84] The full text of the Fourth Amendment is:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Reasonableness is the ultimate measure of the constitutionality of a seizure of person or property. See Trent v. Wade, 776 F.3d 368, 377 (5th Cir. 2015)(internal quotation marks omitted)(quoting Fernandez v. California, 134 S.Ct. 1126, 1132 (2014)).

A warrantless arrest must be supported by "probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004). The standard for the existence of probable cause is an objective one requiring that the officer draw a reasonable conclusion from the facts available to him at the time of the arrest. Id.; see also Blackwell v. Barton, 34 F.3d 298, 303 (5th Cir. 1994)(stating that probable cause exists if a reasonable person, based on the facts available at the time, would believe that an offense has been committed and that the individual being arrested is the guilty party).

A warrantless seizure of evidence in plain view is reasonable when the officer is legally in the location from which he viewed the item seized and the "incriminating nature of the item [is] immediately apparent." United States v. Turner, 839 F.3d 429, 433 (5th Cir. 2016)(quoting Horton v. California, 496 U.S. 128, 136 (1990), and Arizona v. Hicks, 480 U.S. 321, 326 (1987)). "The incriminating nature of an item is

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> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

immediately apparent if the officers have probable cause to believe that the item is either evidence of a crime or contraband." Id. (quoting United States v. Buchanan, 70 F.3d 818, 826 (5th Cir. 1995)). Probable cause as it relates to seizure of evidence requires that the officer determine the existence of a "practical, nontechnical probability that incriminating evidence is involved." Id. (quoting United States v. Espinoza, 826 F.2d 317, 319 (5th Cir. 1987)).

These constitutional standards were clearly established at the time of Plaintiff's arrest, which leaves the court only to consider whether Plaintiff produced sufficient evidence that Defendant Officers' conduct violated Plaintiff's constitutional rights to be free from unreasonable arrests and seizures.

B. Discussion on Evidentiary Issues

A party must support its factual positions on summary judgment by citing to particular evidence in the record. Fed. R. Civ. P. 56(c)(1). An affidavit or declaration is competent summary judgment evidence if it is based "on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Conclusory allegations, unsubstantiated assertions, improbable inferences, and speculation are not competent evidence. Roach v. Allstate Indem. Co., 476 F. App'x 778, 780 (5th Cir. 2012) (unpublished)(citing S.E.C. v. Recile, 10 F.3d 1093, 1097 (5th Cir. 1993)).

Federal Rule of Civil Procedure 56(c)(2) allows a movant to object to exhibits that contain material that "cannot be presented in a form that would be admissible in evidence" under the Federal Rules of

Evidence. Cf. Lee v. Offshore Logistical & Transp., L.L.C., 859 F.3d 353, 355 (5th Cir. 2017)(explaining that the rule seeks "[t]o avoid the use of materials that lack authenticity or violate other evidentiary rules"). The proponent of the challenged exhibit must prove admissibility. See id. (quoting Fed. R. Civ. P. 56, Advisory Comm. Notes, 2010 Amendment, as stating that the proponent may show that the exhibit is admissible as presented or that it can be presented in admissible form). The trial court has discretion to determine whether "to admit or exclude evidence." See MCI Comm'ns Servs., Inc. v. Hagan, 641 F.3d 112, 117 (5th Cir. 2011)(stating that the standard of review for evidentiary decisions is abuse of discretion).

Only relevant evidence is admissible. Fed. R. Evid. 402. Relevant evidence has a "tendency to make a fact more or less probable than it would be without the evidence" and relates to a fact "of consequence in determining the action." Fed. R. Evid. 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Hearsay is not admissible evidence. Fed. R. Evid. 802. Hearsay is a statement, not made while testifying in the current litigation, that is offered for "the truth of the matter asserted in the statement." Fed. R. Evid. 801. The Federal Rules of Evidence list twenty-nine exceptions to the rule against hearsay. Fed. R. Evid. 803-804, 807.

1. Plaintiff's Objections

Plaintiff objects to statements in the declarations of Defendants Eder and Ng and the affidavits of Defendants Baker and Dale. Plaintiff also challenges the admissibility of the grand jury indictment, the search and arrest warrants, and Defendant Eder's Offense Report.[85]

Plaintiff contends that evidence related to the following topics is irrelevant and/or more prejudicial than valuable: (1) Defendant Officers' licensure and training; (2) the investigation into Sherman Jones, Plaintiff's husband, including information regarding the confidential informant and cocaine sales; (3) the arrest and search warrants; (4) the grand jury indictment; (5) the guidance of prosecutors and judges on the interpretation of the criminal law on which Defendant Eder relied; and (6) any searches performed by Defendant Officers for prescription bottles or labels. The grand jury indictment and the searches for prescription bottles go to the key issue of whether probable cause existed to support Plaintiff's arrest.

The other topics are more tangentially relevant but, at the very least, provide background and/or provide insight into the course of events.

None of the above topics is more prejudicial than valuable with the possible exception of the

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[85] Defendants Eder and Ng withdrew Defendant Eder's Offense Report as an exhibit, mooting all of Plaintiff's objections thereto. See Doc. 43, Defs. Eder & Ng's Objs. & Reply to Pl.'s Resp. to Defs.' Mot. for Summ. J. p. 7.

details of the investigation into Sherman Jones, which provides the justification for the search of Plaintiff's residence. That investigation is unrelated to her arrest and the seizure of the alprazolam and hydrocodone pills. That said, the court is not prejudiced by the information on summary judgment and will leave consideration of what evidence should be presented at trial to the trial judge. These objections are overruled.

Plaintiff objects to statements on other topics made by Defendants Baker and Dale in their affidavits: (1) details of the execution of the search warrant, including interaction with the children present, the discovery of the alprazolam and hydrocodone pills, and other evidence found; (2) their lack of involvement in the transportation of Plaintiff to the jail or any other interaction with her; (3) discussion of the criminal classification of the pills found; (4) their opinions on whether the arrest was reasonable and whether they legally carried out their duties. The details of the execution of the search warrant are relevant to the legality of Plaintiff's arrest. Defendants Baker and Dale's lack of contact with Plaintiff is relevant to whether they played any role in arresting her, and their opinions on the reasonableness and legality of Defendant Officers' actions speak to qualified immunity. The other statements factually meet the liberal relevance standard in that they provide background and context. These objections are overruled. Plaintiff complains that the Defendant Officers' statements about the nonparty officer's discovery of the pills and the identification of those pills with the assistance of a poison control center amounted to hearsay, of which they lacked personal knowledge. Plaintiff continues

this line of objections to the conclusion that no evidence exists to prove that an alprazolam was found in Plaintiff's bedroom. This is an absurd argument in light of the absence of a dispute about either the discovery of the alprazolam or the identification of the types of pills found. Plaintiff alleged in her complaint that Defendant Officers "found one and a half prescription pills," that she "was the ultimate user of the hydrocodone on her nightstand," and that her "father was the ultimate user of the alprazolam seized by Defendant [Officers]."[86] These objections are overruled.

Plaintiff objects to several statements in Defendants Baker's and Dale's affidavits as offering inadmissible legal conclusions, in part, because they were not identified as experts. One of the statements expresses the opinion that a reasonable officer would not have believed that the arrest was unconstitutional based on the facts and circumstances facing Defendant Eder. Another of the challenged statements concludes that the officers were legally in the home and the alprazolam and hydrocodone pills were in plain view. The third discusses the criminal statute regarding possession of controlled substances. In fact, Defendants Baker and Dale did identify themselves as non-retained experts.[87] These statements, to the extent that they are legal conclusions are within these officers' expert knowledge. These objections are overruled.

Several statements are inadmissible. Both

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86 See Doc. 30, Pl.'s 2d Am. Compl. pp. 8, 10.

87 See Doc. 37, Defs. Baker & Dale's Designation of Expert Witnesses pp.

Defendants Baker and Dale stated in their affidavits that, in their experiences, "local criminals, upon being made aware of a law enforcement raid having been made upon a suspected drug house, will often break into that house as soon as possible after law enforcement leaves the scene, in order to search for any leftover weapons, money, and/or drugs."[88] That opinion is speculative, as are the remaining statements of similar effect in their affidavits regarding what they believe happened to the $600 that Plaintiff alleged was seized from her home.

Additionally, Defendants Baker and Dale made statements in their affidavits about Plaintiff's deposition testimony regarding the extent of her knowledge of her husband's involvement in drug activity. They have no personal knowledge of that topic. Finally, Defendants Eder and Ng both stated that they do not believe that any law enforcement officer seized the $600. These statements are also speculative. These objections are sustained.

2. Defendants Eder and Ng's Objection

Defendants Eder and Ng object to Plaintiff's Exhibit C, the medical note pertaining to James Jackson's visit to an emergency room that included a prescription for alprazolam. Plaintiff cites this prescription as proof that her father possessed a prescription for the partial pill found in her bedroom

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[88] Doc. 39-1, Ex. To Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶ 42; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶ 42.

during the search.[89] The note, which is supported by a business records affidavit, passes the lenient test for relevance in that it arguably has a slight tendency to make more probable than not that Plaintiff's father (assuming her father's name is James Jackson) had a prescription for alprazolam. Defendants Eder & Ng's objection is overruled.

C. Discussion on Summary Judgment Issues

The remaining causes of action are based on the seizure of Plaintiff's person by arrest and the seizure of $600 in currency and the alprazolam and hydrocodone pills.

1. Arrest

Defendant Eder, as the arresting officer, is in a different position vis-à-vis liability than the other Defendant Officers. The court first addresses the evidence against him.

a. Defendant Eder

Defendant Eder argues that Texas Health and Safety Code § 483.041 ("Section 483.041") applies to Plaintiff's arrest and that the only element of the crime is possession of a dangerous drug.[90] Section

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[89] See Doc. 41, Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J. pp. 2, 15.

[90] See Doc. 38, Defs. Eder & Ng's Mot. for Summ. J. p. 7 (citing Texas Health and Safety Code § 483.071, which states that exceptions, excuses, provisos, and exemptions

483.041(a) reads:

> A person commits an offense if the person possesses a dangerous drug unless the person obtains the drug from a pharmacist acting in the manner described by Section 483.042(a)(1) or a practitioner acting in the manner described by Section 483.042(a)(2).

"Dangerous drug" is defined as "a device or a drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act)." Tex. Health & Safety Code § 483.001(2). As previously noted by the court, the parties do not dispute that alprazolam and hydrocodone are in Penalty Group 3.[91] See Texas Health & Safety Code § 481.104(a)(2),(4). As they are in Penalty Group 3, alprazolam and hydrocodone do not fall within the coverage of Section 483.041(a). Accordingly, Section 483.041(a) cannot justify Plaintiff's arrest for possession of alprazolam and hydrocodone.

Moreover, no evidence indicates that Plaintiff

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need not be negated by the State. Defendants Baker and Dale, on the other hand, testified that Section 481.117 applied to the pills found in Plaintiff's residence. See Doc. 39-1, Ex. 1 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Dale ¶¶ 30-31; Doc. 39-2, Ex. 2 to Defs. Baker & Dale's Mot. for Summ. J., Aff. of Def. Baker ¶¶ 30-31.

[91] See Doc. 19, Mem. & Recom. Dated July 19, 2016 p. 12.

was arrested pursuant to Section 483.041(a) or that the grand jury considered that provision. The evidence is undisputed that Plaintiff was charged under Section 481.117(a). As this court found in its prior memorandum, that statute, properly interpreted, prohibits possession of a controlled substance without a prescription, not merely the possession of the controlled substance.[92]

Plaintiff does not dispute that the presence of the controlled substances in her shared bedroom arguably gave rise to probable cause that she jointly possessed the pills.[93] The key issue is whether Defendant Eder had reason to find probable cause that Plaintiff did not have prescriptions at the time of the arrest. Critical to Defendant Eder's probable cause assessment was whether any facts in his possession showed probable cause to believe that Plaintiff did not possess prescriptions for alprazolam and hydrocodone.

The undisputed evidence is that Defendant Eder did not inquire whether Plaintiff had a prescription for either medication; nor did he notify her of the charge against her, much less explain that it involved the two pills found in her bedroom.[94] The

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92 See Doc. 19, Mem. & Recom. Dated July 19, 2016 p. 15 (citing Burnett, 488 S.W.3d at 920, as stating that, although the State had represented that it was illegal to carry pills outside of their prescription containers, the court could find no such law).

93 She also does not contend that probable cause was lacking with regard to possession within 1,000 feet of a school.

94 Defendant Eder's Offense Report stated that, after

only investigation into the existence of prescriptions, according to the evidence, was Defendants Eder and Ng's fruitless search for labels and/or containers for the pills.[95] Defendant Eder admitted that he had no actual knowledge whether Plaintiff had any prescription, stating that neither Plaintiff nor anyone else gave him that information.[96] Viewing the evidence most favorably to Plaintiff as the court must, she had no opportunity to provide that information or any reason to believe that Defendant Eder needed that information.

To compound matters, Defendant Eder admitted that he had filed several cases based on his understanding that Texas law allowed him "to arrest a person who[m] [he] found possessing hydrocodone or alprazolam that was not kept in the prescription

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being transported to the jail, Plaintiff and her husband declined to make a statement about "the narcotics located inside their residence." Doc. 38-13, Ex. 13 to Defs. Eder & Ng's Mot. for Summ. J., Offense Rep. Defendants Eder and Ng withdrew this report from the summary judgment evidence. See Doc. 43, Defs. Eder & Ng's Objs. & Reply to Pl.'s Resp. to Defs.' Mot. for Summ. J. p. 7. The court finds no evidence that even suggests Defendant Eder spoke with Plaintiff about the alprazolam and hydrocodone before arresting her.

[95] The court questions whether the plain-view discovery of the alprazolam and hydrocodone pills authorized Defendants Eder and Ng to perform a warrantless search for prescription labels and pill containers.

[96] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶ 11.

bottle in which it was dispensed that identified the individual the drug was prescribed for and delivered to."[97] No doubt, Defendant Eder's clear misinterpretation of Texas law clouded his investigation and probable cause assessment. Regardless, the question is whether a reasonable person in Defendant Eder's position would have believed, at the time of the arrest, that probable cause existed to find that Plaintiff possessed alprazolam and hydrocodone without prescriptions, that is, probable cause that she was committing a crime. See Devenpeck, 543 U.S. at 152 (stating that probable cause must be judged on the information known at the time of the seizure); Blackwell, 34 F.3d at 303 (stating that probable cause is based on the facts available at the time).

The evidence known to Defendant Eder at the time he arrested Plaintiff was only that: (1) one and one-half pills in Penalty Group 3 were in a small dish on the windowsill in a bedroom Plaintiff shared with her husband in their residence; (2) the warrants justifying Defendant Eder's presence in the residence were based on an investigation into illegal sales of crack cocaine (not alprazolam or hydrocodone); and (3) no prescription information was found in the residence. The court finds that a reasonable jury could conclude that these facts are insufficient to establish even arguable probable cause to believe that a criminal offense was being committed. A jury must make that determination, considering the small quantity of commonly prescribed controlled substances found outside of their prescription bottle

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[97] Doc. 38-3, Ex. 3 to Defs. Eder & Ng's Mot. for Summ. J., Decl. of Def. Eder ¶¶ 8-9.

by the bedside, the failure to inquire about prescriptions, and the lack of a connection between the suspected illegal activity and the pills.

Even if Defendant Eder lacked probable cause, the grand jury indictment could break the chain of causation on his liability. Under the independent intermediary doctrine, an officer cannot be held liable when a grand jury hears all of the facts supporting the warrant and finds probable cause. See Buehler v. City of Austin/Austin Police Dep't, 824 F.3d 548, 554 (5th Cir. 2016)(quoting Hand v. Gary, 838 F.2d 1420, 1427 (5th Cir. 1988)).

This court previously found that, taking Plaintiff's allegations as true, if information regarding the existence of valid prescriptions had been presented to the grand jury, the true bill would not have issued.[98] The evidence now before the court suggests that Plaintiff possessed a prescription for the hydrocodone, and her father, who occasionally lived in Plaintiff's residence, possessed a prescription for the alprazolam. The court cannot guess what the grand jury may have decided if presented with that evidence, but other evidence suggests that the grand jury was given no instruction about prescriptions, including that a crime was committed only if they were lacking. Under such circumstances, it cannot be said that the grand jury received all of the relevant facts or instruction on the relevant law. Accordingly, the independent intermediary doctrine does not apply to protect Defendant Eder from liability.

An officer who is mistaken about the law may still be entitled to qualified immunity; however, the mistake must be a reasonable one. See Al-Kidd, 563

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98 Doc. 19, Mem. & Recom. Dated July 19, 2016 p. 10.

U.S. at 743. In this case, Defendant Eder was mistaken about the interpretation of Section 481.117(a) in that he misunderstood that, in order to justify Plaintiff's arrest, he needed probable cause to believe that Plaintiff did not possess prescriptions for the alprazolam and hydrocodone. Thus, his entitlement to qualified immunity depends on whether his interpretation of that statute was reasonable.

Defendant Eder offered the testimony of Sistrunk as evidence of a reasonable interpretation of Section 483.041, a statute this court has found both legally and factually inapplicable to Plaintiff's arrest. Sistrunk's testimony, therefore, does not support a finding that Defendant Eder reasonably misinterpreted Section 481.117(a). In fact, the court has determined that the text of Section 481.117(a) leaves no debate that the crime of possession of a controlled substance is committed, not by possession alone, but by possession without a prescription. The testimony of the other Defendant Officers may support a finding of reasonableness but their testimony cannot justify qualified immunity when the correct interpretation is so plainly apparent on the face of the statute.

Fact questions remain both as to whether a reasonable person in Defendant Eder's position would have determined that probable cause justified Plaintiff's arrest (constitutionality determination) and as to whether Defendant Eder's misinterpretation of the law supporting the arrest was reasonable (qualified-immunity determination).

b. Defendants Baker, Dale, and Ng

The evidence here is unequivocal on the identity of the arresting officer. Defendant Officers stated under oath that Defendant Eder arrested Plaintiff based only on his own assessment of probable cause. Plaintiff produced no evidence contradicting this conclusion. No evidence suggests that Defendant Eder requested or received any input from any of the other Defendant Officers or even places the other Defendant Officers in proximity to Plaintiff and Defendant Eder at the time of Plaintiff's arrest. Absent personal involvement in any aspect of Plaintiff's arrest, Defendants Baker, Dale, and Ng cannot be held liable, even if Defendant Eder lacked probable cause.

Plaintiff contends that, although they had no personal involvement, Defendants Baker and Dale admitted that they assumed a supervisory role at the scene. Plaintiff argues that they are therefore subject to supervisory liability as a matter of law and liable under Section 1983 because they allowed Defendant Eder to arrest Plaintiff under inapplicable law.[99] Plaintiff misunderstands supervisory liability. Supervisors cannot be held liable merely on a theory of vicarious liability; they must have affirmatively participated in the unconstitutional conduct by failing to supervise or train in a way that led to the violation of the plaintiff's rights and demonstrated deliberate indifference to those rights. See Roberts v. City of

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[99] The court notes again that no evidence suggests that Defendant Eder arrested Plaintiff under any law other than Section 481.117(a). The "inapplicable law" to which Plaintiff refers is Section 483.041(a), which was raised as part of Defendant Eder's after-the-fact legal arguments.

Shreveport, 397 F.3d 287, 292 (5th Cir. 2005). As previously stated, Plaintiff points to no evidence of Defendants Baker and Dale's participation in Plaintiff's arrest and makes no allegation that their supervisory activities led to the alleged constitutional violation.

With regard to their supervisory roles, Plaintiff also raises the theory of liability based on failure to protect. The court previously found that Plaintiff failed to assert a plausible substantive due process claim against Defendants Baker, Dale, and Ng for failure to protect Plaintiff from the allegedly unlawful arrest.[100] Plaintiff's argument in opposition to summary judgment simply restates this doomed claim.

Although Plaintiff did not plead her claims against Defendants Baker, Dale, and Ng pursuant to the theory of bystander liability, she cites cases discussing bystander liability in a footnote of her response in support of the assertion that the failure to protect amounts to personal involvement.[101]

"[A]n officer may be liable under [Section] 1983 under a theory of bystander liability where the officer (1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." Whitley v. Hanna, 726 F.3d 631, 646 (5th Cir. 2013)(internal quotation marks omitted)(quoting

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[100] Doc. 19, Mem. & Recom. Dated July 19, 2016 pp. 17-19.

[101] See Doc. 41, Pl.'s Consol. Resp. to Def. Officers' Mots. for Summ. J. p. 22 n.74.

Randall v. Prince George's Cty., Md., 302 F.3d 188, 204 (4th Cir. 2002)). To be liable, the officer must have been present when constitutional violation occurred and must have acquiesced in its perpetration. See id.

The evidence fails to demonstrate that Defendants Baker, Dale, and Ng knew that Defendant Eder was violating Plaintiff's constitutional rights but, rather, indicates that they believed he was not. Plaintiff points to no evidence that Defendant Eder consulted the other Defendant Officers, that they were in the immediate vicinity at the time of the arrest, or that they acquiesced in any affirmative way to her arrest.

Plaintiff's Fourth Amendment claims of an unconstitutional arrest against Defendants Baker, Dale, and Ng cannot survive summary judgment.

2. Seizure of Property

Plaintiff's unconstitutional seizure of property concerns the seizure of the alprazolam and hydrocodone pills and disappearance of $600.

As the court previously held, the warrant did not authorize the seizure of the alprazolam and hydrocodone pills.[102] The constitutionality of the seizure therefore rests on whether the circumstances

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[102] See Doc. 19, Mem. & Recom. Dated July 19, 2016 p. 12. The court questions whether Defendant Eder had the authority to seize the pills under the plain-view doctrine. Under the court's interpretation of Section 481.117(a), the alprazolam and hydrocodone pills were only incriminating if possessed without a prescription.

gave rise to "probable cause to believe that the item [was] either evidence of a crime or contraband." Turner, 839 F.3d at 433. That determination rests in turn on whether Defendant Eder had probable cause to believe that Plaintiff was committing the criminal offense of possession of a controlled substance.

As discussed above regarding the constitutionality of Plaintiff's arrest, a fact issue precludes the court's deciding the matter of whether Defendant Eder had probable cause to believe that Plaintiff was committing a crime. Therefore, the court also cannot decide whether the seizure of the pills was constitutional without first allowing the jury to do its job.

An interesting point is that Plaintiff did not sue the officer responsible for collecting and seizing the evidence. However, as Defendant Eder made the decision to arrest Plaintiff, he may be constitutionally liable if the seizure of the pills was not supported by probable cause. The evidence does not suggest that Defendants Baker, Dale, and Ng were involved to any degree in the seizure of the pills or, as explained above, the underlying arrest.

Plaintiff's claim of unreasonable seizure of the pills survives summary judgment, but only against Defendant Eder. Regarding Plaintiff's claim that Defendant Officers seized $600 in currency, Plaintiff testified that it disappeared from a shirt pocket in her closet on the day of the search. The evidence indicates that it was not seized pursuant to the search warrant as it was not listed on the inventory that was returned to the court. Defendant Officers also deny that they "seized" the currency and make no argument that probable cause existed for the seizure of that money. Nevertheless, Plaintiff's

testimony regarding the disappearance of the $600 raises a fact question whether Defendant Officers were responsible for the disappearance of the funds during their search of the residence. If so, their actions clearly violated Plaintiff's constitutional right to be free from unreasonable seizures. The jury will have to resolve this dispute.

This claim survives summary judgment in its entirety.

IV. Conclusion

Based on the foregoing, the court **RECOMMENDS** that Defendants Eder and Ng's motion be **GRANTED IN PART AND DENIED IN PART** and Defendants Baker and Dale's motion be **GRANTED IN PART AND DENIED IN PART**. The court **DENIES** Plaintiff's motion for leave to amend and **STRIKES** Plaintiff's motion to exclude.

The following claims must proceed to trial: Plaintiff's claims against Defendant Eder for unconstitutional seizures of her person, her pills, and her currency; Plaintiff's claim against Defendants Baker, Dale, and Ng for unconstitutional seizure of Plaintiff's currency; and Plaintiff's policy claim against Defendant Fort Bend for unconstitutional seizures of her person and her pills.[103]

The Clerk shall send copies of this Memorandum, Recommendation, and Order to the respective parties who have fourteen days from the

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[103] Plaintiff made no allegation and produced no evidence of a policy or widespread custom of officers' taking currency without probable cause from the scenes of arrests.

receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 8th day of January, 2018.

[handwritten signature]
U.S. MAGISTRATE JUDGE

Appendix G

[Filed July 19, 2016]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHANIE JONES,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-15-2919
	§	
JEREMY EDER, J. DALE	§	
B. BAKER, R. NG,	§	
and FORT BEND	§	
COUNTY	§	

MEMORANDUM AND RECOMMENDATION

Pending before the court[1] are Defendants Jeremy Eder ("Eder"), Raymond Ng ("Ng"), and Fort Bend County ("Fort Bend") and Defendants J. Dale ("Dale") and B. Baker's ("Baker") Motions to Dismiss (Docs. No. 7, 15, 17). The court has considered the motions, the responses, and the applicable law. For the reasons set forth below, the court

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[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. Doc. 11.

RECOMMENDS that Defendants' motions be **GRANTED IN PART** and **DENIED IN PART**.

I. Case Background

Plaintiff filed this civil rights action against a police officer, three Fort Bend deputies, and Fort Bend for violating Plaintiff's constitutional rights. The allegations arise out of Plaintiff's arrest following the search of her home subsequent to a search warrant.

A. Factual History

The following factual account is derived from Plaintiff's live complaint.

Plaintiff and her family reside in Rosenberg, Texas.[2] Defendant Eder, a City of Rosenberg police officer, signed an affidavit based on his alleged knowledge of illegal activity at the home, and the 240th District Court of Fort Bend County issued a search warrant for a search of Plaintiff's home.[3] The search warrant authorized officers to search and seize cocaine and contraband as described in the affidavit.[4]

On the morning of January 31, 2014, Eder and the other defendant officers executed the warrant, holding Plaintiff and her children, aged eleven and twelve, at gunpoint.[5] The officers found one-and-one-half pills outside of their prescription containers: one hydrocodone pill on Plaintiff's nightstand and half of

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[2] See Doc. 8, Pl.'s Am. Compl. p. 6.

[3] See id.

[4] See id. p. 6; Doc. 7-1, Ex. 1 to Def. Eder's Mot. to Dismiss, Search Warrant signed Jan. 29, 2014.

[5] See Doc. 8, Pl.'s Am. Compl. pp. 6-7.

a single alprazolam ("Xanax") pill somewhere in the home, as well as six- hundred dollars in cash.[6] At the time of the search, Plaintiff had a valid prescription for hydrocodone, and her father, who lived in the home, but was not present during the search, had a valid prescription for Xanax.[7] The prescription information for both the hydrocodone and Xanax were located in the home at the time of the search.[8] Plaintiff was arrested and charged with felony possession of controlled substances within a school zone.[9] The seizure of the six hundred dollars was not recorded by the officers.[10]

Although Plaintiff was indicted by a grand jury, her case was dismissed due to insufficient evidence on October 20, 2014.[11] At the time this lawsuit was filed, Plaintiff had not recovered either the pills or the money seized during the search.[12]

II. Legal Standard

B. Procedural History

Plaintiff filed her complaint on October 15, 2015, alleging unreasonable search and seizure of her property in violation of the Fourth and Fourteenth Amendments to the United States Constitution

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6 See id. p. 7. Plaintiff's complaint states only that she was "not in possession" of the Xanax pill, but does not state where the pill was found. See id. p. 7.

7 See id. pp. 7, 9.

8 See id. p. 12.

9 See id.

10 See id. p. 7.

11 See id. p. 8.

12 See id. p. 7.

pursuant to 42 U.S.C. § 1983 ("Section 1983").[13] On November 2, 2015, Defendant Eder filed a motion to dismiss.[14] Plaintiff filed an amended complaint on November 23, 2015, adding claims that Defendant officers failed to protect Plaintiff's right to privacy and arrested her without probable cause and that Fort Bend failed to train its officers.[15] Eder filed a supplemental brief arguing that Plaintiff's amended complaint still failed to state a claim for relief on December 2, 2015.[16] Plaintiff filed a response to Eder's motion on December 20, 2015.[17]

On February 24, 2016, Defendant Ng filed a motion to dismiss.[18] Plaintiff filed a response on March 16, 2016.[19] On April 11, 2016, Defendants Fort Bend, Dale, and Baker filed a motion to dismiss.[20] Plaintiff filed a response on May 2, 2016.[21]

A. Dismissal Standard

Pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), dismissal of an action is appropriate whenever the complaint, on its face, fails to state a claim upon which relief can be granted. When considering a motion to dismiss, the court should

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13 See Doc. 1, Pl.'s Compl.

14 See Doc. 7, Def. Eder's Mot. to Dismiss.

15 See Doc. 8, Pl.'s Am. Compl.

16 See Doc. 9, Suppl. to Def. Eder's Mot. to Dismiss.

17 See Doc. 10, Pl's Resp. to Def. Eder's Mot. to Dismiss.

18 See Doc. 15, Def. Ng's Mot. to Dismiss.

19 See Doc. 16, Pl.'s Resp. to Def. Ng's Mot. to Dismiss.

20 See Doc. 17, Defs.' Mot. to Dismiss.

21 See Doc. 18, Pl.'s Resp. to Defs.' Mot. to Dismiss.

construe the allegations in the complaint favorably to the pleader and accept as true all well-pleaded facts. Sullivan v. Leor Energy, LLC, 600 F.3d 542, 546 (5th Cir. 2010).

A complaint need not contain "detailed factual allegations" but must include sufficient facts to indicate the plausibility of the claims asserted, raising the "right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Plausibility means that the factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. A plaintiff must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. In other words, the factual allegations must allow for an inference of "more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678.

B. Qualified Immunity

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Gentilello v. Rege, 627 F.3d 540, 547 (5th Cir. 2010) (finding qualified immunity applied in a suit brought by a professor against university supervisors).

While qualified immunity is an affirmative defense, a plaintiff "has the burden to negate the

assertion of qualified immunity once properly raised." Collier v. Montgomery, 569 F.3d 214, 217 (5th Cir. 2009). A plaintiff can meet this burden by alleging facts showing that the defendant committed a constitutional violation and that the defendant's actions were objectively unreasonable in light of the clearly established law at the time those actions were taken. Atteberry v. Nocono General Hosp., 430 F.3d 245, 253 (5th Cir. 2005). The Fifth Circuit has stated that upon an assertion of qualified immunity, a plaintiff must meet a heightened pleading standard to explain why the defendant cannot maintain the defense. Schultea v. Wood, 47 F.3d 1427, 1433-34 (5th Cir. 1995).

III. Analysis

Defendants move to dismiss all of Plaintiff's claims. Defendants argue that Plaintiff fails to state a claim under either the Fourth or Fourteenth Amendment. Defendant officers assert that qualified immunity protects them from any liability. Defendant Fort Bend contends that Plaintiff has failed to allege any plausible facts that show there is a custom or policy which could have been the moving force behind any constitutional violation. Defendants Baker and Dale additionally argue that Plaintiff's complaint fails to state any personal involvement against them. The court considers Defendants' arguments in turn.

A. Section 1983 Standard

A plaintiff can establish a prima facie case

under Section 1983[22] for the deprivation of civil rights by establishing: (1) a violation of a federal constitutional or statutory right; and (2) that the violation was committed by an individual acting under the color of state law. Doe v. Rains Cty. Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995). The statute creates no substantive rights but instead provides remedies for deprivations of rights created under federal law. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

"A municipality is liable only for acts directly attributable to it through some official action or imprimatur." Valle v. City of Houston, 613 F.3d 536, 541 (5th Cir. 2010) (citation omitted). To establish municipal liability under Section 1983, a plaintiff must prove three elements: "1) a policymaker; 2) an official policy; and 3) a violation of constitutional rights whose moving force is the policy or custom." Zarnow v. City of Wichita Falls, 614 F.3d 161, 166 (5th Cir. 2010). A local government may be sued under Section 1983 "if it is alleged to have caused a constitutional tort through a policy statement,

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[22] The provision reads, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .
>
> 42 U.S.C. § 1983.

ordinance, regulations, or decision officially adopted and promulgated by that body's officers." Id. (quoting City of St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988) (plurality opinion)). "Alternatively, official policy is a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Brown v. Bryan Cty., Okla., 219 F.3d 450, 457 (5th Cir. 2000).

B. Fourth Amendment Liability

Plaintiff argues that Defendants violated her Fourth Amendment rights by wrongfully arresting for possession of a controlled substance after finding two legally prescribed pills outside of their prescribed containers in her residence. Defendants respond that they are entitled to qualified immunity because they found the pills pursuant to a search warrant. They further argue that a grand jury indictment independently establishes probable cause, and therefore probable cause necessarily existed when the officers found pills outside their prescribed containers.

The Fourth Amendment states that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "Probable cause exists where the facts and circumstances within the officer's knowledge at the time of the arrest 'are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense.'" Freeman v. Gore, 483 F.3d 404, 413 (5th Cir. 2007) (quoting United States v. Levine, 80 F.3d 129,

132 (5th Cir. 1996)). "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." Fields v. City of South Houston, 922 F.2d 1183, 1189 (5th Cir. 1991) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)); see also Levine, 80 F.3d at 132 ("The presence of probable cause is a mixed question of fact and law").

A grand jury indictment is usually sufficient to establish probable cause. See Gerstein v. Pugh, 420 U.S. 103, 117 (1975). When facts supporting an arrest "are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." Cuadra v. Houston Indep. Sch. Dist., 626 F.3d 808, 813 (5th Cir. 2010). The chain of causation remains intact, however, if "it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant." Hand v. Gary, 838 F.2d 1420, 1428 (5th Cir. 1988). In other words, "the chain of causation is broken only where all the facts are presented to the grand jury, where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary...." Id. at 1427–28.

Defendants argue that probable cause existed because Plaintiff was indicted by a grand jury, noting that the eventual dismissal was "without prejudice to refile." Plaintiff responds that a grand jury indictment breaks the chain of causation only when all the evidence is presented to a grand jury. Plaintiff argues that if Defendant officers had included all information in their reports and in their grand jury testimony, no reasonable grand jury would have indicted her for

possession of a prescription medication that she had a legal right to possess.

In their motion to dismiss, Defendants have provided a copy of the grand jury indictment, along with notice that the charges were subsequently dismissed for insufficient evidence. Accepting Plaintiff's well-pleaded allegations as true, the court agrees that if all relevant facts were presented to a grand jury, namely, that Plaintiff and her father had valid prescriptions for the prescription medications in her home at the time of the search, that a grand jury would not have indicted her. The Fifth Circuit has held that officers may not rely on qualified immunity when they deliberately conceal exculpatory evidence. Hernandez v. Terrones, 397 F. App'x 954, 965 (5th Cir. 2010) (unpublished) (quoting Geter v. Fortenberry, 849 F.2d 1550, 1162 (5th Cir. 1989) for the proposition that an officer may not willfully ignore exculpatory evidence). Based on the complaint's allegations, Defendants are not entitled to qualified immunity at this time. See Basler v. Barron, 2016 WL 1672573, *4 (S.D. Tex. Apr. 27, 2016) (holding that allegation of withheld information was sufficient to deny qualified immunity in Rule 12(b)(6) context).

Defendants next argue that the officers are entitled to qualified immunity because the complaint concedes that the seizure of the pills and Plaintiff's subsequent arrest were pursuant to a valid search warrant. The parties disagree whether the search warrant authorized the seizure of the prescription medication as Defendants characterize the pills as "illegal drugs" found during a legal search and Plaintiff argues that her possession of the pills was

legal.[23]

The warrant authorized officers to seize cocaine and "any illicit contraband" as described in the affidavit.[24] The affidavit, in turn, describes contraband including equipment, currency, telephones, and firearms.[25] Defendants argue that the pills were "illegal drugs" based on Section 481.117 of the Texas Health and Safety Code and that probable cause for Plaintiff's arrest was therefore "necessarily extant."

The court does not agree. Section 481.117(a) states that:

> Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

Tex. Health & Safety Code § 481.117(a). The parties do not dispute that Xanax and hydrocodone are included in Penalty Group 3. See Tex. Health & Safety Code § 481.117(a)(2), (4) (listing "alprazolam" and "dihydrocodeinone"). But, by the statute's language,

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[23] See Doc. 7, Def. Eder's Mot. to Dismiss p. 4; Doc. 15, Def. Ng's Mot. to Dismiss p. 4; Doc. 17, Defs.' Mot. to Dismiss p. 11.

[24] See Doc. 7-1, Ex. 1 to Def. Eder's Mot. to Dismiss, Search Warrant signed Jan. 29, 2014.

[25] See Ex. 7-1, Doc. 7-1, Ex. 1 to Def. Eder's Mot. to Dismiss, Aff. of Def. Eder pp. 2-3.

hydrocodone and Xanax are not "illegal drugs" when they are obtained by valid prescriptions. See Tex. Health & Safety Code § 481.117(a). Nor are they "contraband" as defined by the warrant.

Finding that seizure of prescription medication was not included in the warrant, the court must consider whether qualified immunity nonetheless applies to Plaintiff's arrest. The issue to be decided is whether Plaintiff has alleged that Defendants' actions were objectively unreasonable in light of the clearly established law at the time of their action. See Atteberry, 430 F.3d at 253.

"[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004). "[I]f a reasonable officer could have concluded that there was probable cause upon the facts then available to him, qualified immunity will apply." Brown v. Lyford, 243 F.3d 185, 190 (5th Cir. 2001).

Defendants argue that the presence of any controlled substance outside of its pharmacy-labeled bottle is sufficient to establish probable cause to arrest Plaintiff and in support cite the court to Kelly v. State, 2010 WL 1478907, at *1, 3-4 (Tex. App.–Beaumont 2010). There, the defendant challenged his conviction for possession of a dangerous drug without a prescription on the grounds of insufficient evidence, claiming that he had a prescription for the drug.[26]

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[26] There, the defendant was charged with violating Texas Health and Safety Code §§ 483.041(a), and 483.042(2)(1), (2).

The court first considered that the Texas Health and Safety Code prohibits possession of a controlled substance except as prescribed by a licensed practitioner. Section 483.041(a) states, "A person commits an offense if the person possesses a dangerous drug unless the person obtains the drug from a pharmacist acting in the manner described by Section 483.042(a)(1) or a practitioner acting in the manner described by Section 483.042(a)(2)."

Dovetailing with Section 481.117(a) quoted above, Section 482.042 requires that any prescription drug must have a label attached to the immediate container in which the drug is delivered or offered to be delivered to the ultimate consumer of the drug. Tex. Health and Safety Code § 483.042(a)(1)(B).

Although Kelly testified that he had prescriptions for the drugs seized from his person at the time of his arrest, other facts suggested that his possession of the medications was not legal. Kelly could not produce an original prescription bottle for any of the drugs found on his person and could not recall the name of the prescribing physician or the pharmacy that filled the prescriptions. Some pills were found in several plastic bags stuffed in his boots; some pills were commingled in an unlabeled pill bottle also found in a boot. Kelly also falsely claimed to the arresting officer that he had the pills because was working undercover.

In light of this testimony, the court found that the evidence was legally sufficient to sustain a verdict for possession of dangerous drugs without a prescription. Notably, the court did not hold that the mere presence of a controlled substance outside of its labeled container was sufficient to sustain a conviction for this offense. Thus, Kelly does not provide the

Defendant officers a reasonable basis to arrest Plaintiff for possessing a controlled substance outside of its pharmacy bottle.

Defendants next argue that although Plaintiff's complaint states that she held a prescription and was the ultimate user of the hydrocodone and that her father was the ultimate user of the Xanax, these are affirmative defenses and therefore do not apply Defendant officers' probable cause determination. However, as explained above, possession of a controlled substance via a prescription is not a crime; it is the possession of a controlled substance in the absence of a prescription that is proscribed by the statute. See Tex. Health & Safety Code § 481.117 (stating that a "person commits an offense . . . unless the person obtains the substance directly from . . . a valid prescription."). See also Burnett v. State, 2016 WL 1723035 at *4 (Tex. App.–Eastland Apr. 29, 2016) (stating that although the State had represented that it was illegal to carry pills outside of their prescription containers, the court could find no such law.)

Thus, the court cannot agree that an individual's valid prescription for a controlled substance is an affirmative defense that may be disregarded when an officer is assessing the legality of possessing one hydrocodone pill found on a nightstand in that person's residence.[27]

The court finds that Defendant officers are not entitled to qualified immunity based on the allegations in Plaintiff's complaint. It is **RECOMMENDED** that Defendants' motions to

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[27] If this were the case, then many citizens risk a warrantless arrest for placing their prescribed medications in a weekly pill container.

dismiss Plaintiff's Fourth Amendment claims be **DENIED** at this time.

C. Due Process Violation

Plaintiff additionally argues that Defendants violated her Fourteenth Amendment right to privacy concerning her storage of prescription medication and that Defendants failed to protect her medical privacy from unreasonable intrusions. Defendants respond that Plaintiff has not stated a claim under the Fourteenth Amendment because she cannot bring a Fourteenth Amendment due process claim when her claim was more properly brought under the Fourth Amendment.

The Supreme Court has consistently held that when a "more specific" provision exists, a constitutional claim must be considered under the provision, not the more general standard of traditional due process. Cty. of Sacramento v. Lewis, 523 U.S. 833, 834-44 (1998); Albright v. Oliver, 510 U.S. 266, 273 (1994). The Fourth Amendment states that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." U.S. Const. amend. IV.

Plaintiff responds that her claim is not based on an unlawful arrest, which she admits would be precluded by the Fourth Amendment, but is instead based on Defendants' violation of her Fourteenth Amendment right to privacy. The court characterizes this claim of a right to privacy as a substantive due process claim as it relates to certain personal decisions for her medical care.

In Whalen v. Roe, 429 U.S. 589 (1977), the

Supreme Court recognized that the Fourteenth Amendment's substantive due process protection covered both "the individual interest in avoiding disclosure of personal matters," and the "interest in independence in making certain kinds of important decisions." Id. at 599. The Supreme Court has found that the latter protection applies to personal decisions "relating to marriage, procreation, contraception, family relationships, child rearing, and education." Lawrence v. Texas, 539 U.S. 558, 573-74 (2003).

Plaintiff contends that she has a "clearly established" Fourteenth Amendment right to privacy concerning her storage and use of prescription medication. Although Plaintiff avers that her right is clearly established, the court can find no cases that support the proposition that the government may not invade a plaintiff's privacy with regard to her storage and use of medication. While there is a due process right protecting the disclosure of an individual's prescription medication, there is no clearly established analogous right protecting an individual's method of storage and use of the medication. See Whalen, 429 U.S. at 599-600 (acknowledging the right of privacy over the disclosure of personal matters). The court accordingly **RECOMMENDS** that Plaintiff's substantive due process claim be **DISMISSED**.

D. Failure to Protect

Plaintiff alleges that Defendants failed to protect her from an "unreasonably unlawful arrest," a substantive due process claim under the Fourteenth Amendment. Defendants argue there are no allegations of conduct that create a plausible claim

based on the officers' failure to protect Plaintiff.

Ordinarily, a state official has no constitutional duty to protect an individual from private violence. See DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 197, (1989) (holding that state's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause"). In DeShaney, however, the Court clarified that this general rule is not absolute: "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." Id. at 198. When the state affirmatively acts to restrain an individual's freedom to act on his own behalf "through incarceration, institutionalization, or other similar restraint of personal liberty," the state creates a "special relationship" between the individual and the state which imposes upon the state a constitutional duty to protect that individual from dangers, including, in certain circumstances, private violence. Id. at 200.

In addition to instances of a "special relationship," several courts have read the Court's opinion in DeShaney to suggest a second exception to the general rule against state liability for private violence. Several circuits have interpreted the Supreme Court's language in DeShaney to suggest that state officials may have a duty to protect an individual from injuries inflicted by a third party if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury. The Fifth Circuit, however, has repeatedly stated that it does not recognize the "state-created danger" theory of liability under DeShaney. See Scanlan v. Texas A&M Univ., 343 F.3d 533, 537

(5th Cir. 2003); Piotrowski v. City of Houston, 237 F.3d 567, 584 (5th Cir. 2001).

Here, Plaintiff alleges that Defendants failed to protect her from an unreasonable arrest. Plaintiff does not allege that any private violence occurred; she instead argues that Defendants failed to protect Plaintiff from being arrested by the officers themselves. Although Defendants' arrest of Plaintiff creates a special relationship, Plaintiff does not assert that she suffered any injury during or after her arrest. To the extent that Plaintiff complains that her arrest was unlawful, the "more specific provision" of the Fourth Amendment, not the due process standard of the Fourteenth Amendment, applies. See Cty. of Sacramento, 523 at 834-44.

Plaintiff has not asserted a plausible claim that Defendants failed to protect her from arrest. The court accordingly **RECOMMENDS** that Plaintiff's failure to protect claim be **DISMISSED**.

E. Fort Bend's Motion to Dismiss

Defendant Fort Bend argues that Plaintiff cannot maintain a claim against it based on a policy or custom responsible for her alleged constitutional violation. Plaintiff responds that she has pleaded a viable failure-to-train claim against Fort Bend.

A county may be held liable under Section 1983 only for its own illegal acts, not pursuant to a theory of vicarious liability. Connick v. Thompson,563 U.S. 51, 60 (2011). To succeed on a claim under Section 1983, a plaintiff must demonstrate that the county "had some inadequate custom or policy that acted as the moving force behind a constitutional violation." Forgan v. Howard Cty.,494 F.3d 518, 522 (5th Cir.

2007)(citing Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690-91 (1978)); see also Connick, 563 at 60-61. "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." Connick, 563 at 61.

Courts have recognized that, under limited circumstances, the failure to train or to supervise its employees may give rise to local-government liability under Section 1983. See id.; Zarnow, 614 F.3d at 169-70 (5th Cir. 2010). In failure-to-train cases, a plaintiff must prove: (1) the inadequacy of the procedures; (2) the policymaker's deliberate indifference; and (3) causation. Zarnow, 614 F.3d at 170.

A local government can be held liable only when its failure to train or to supervise amounted to deliberate indifference to the constitutional rights of its citizens. Connick, 131 S. Ct. at 1359 (quoting City of Canton v. Harris, 489 U.S. 378, 388 (1989)). In order to show deliberate indifference by the municipality, a plaintiff must generally show a pattern of similar constitutional violations by untrained employees. Connick, 131 S. Ct. at 1359. To rely on a "single incident" exception to the general rule, a "plaintiff must prove that the 'highly probable' consequence of a failure to train would result in the specific injury suffered, and that the failure to train represents the moving force behind the Constitutional violation." Estate of Davis ex rel. McCully v. City of N. Richland Hills, 406 F.3d 375, 385-86 (5th Cir. 2005). To survive a motion to dismiss, a plaintiff must allege either a pattern of similar acts or that the highly probable consequence of a failure to train would result in injury to the plaintiff. Id. at 381-86.

Where the question is not whether the officers received any training in the constitutional requirements, but whether the officers received adequate training, a plaintiff cannot rely on proof that additional training would have created a better officer or would have reduced the likelihood of a constitutional violation but must prove that the "officers were so untrained as to be unaware" of constitutional limitations. Pineda v. City of Houston, 291 F.3d 325, 333 (5th Cir. 2002); see also Canton, 489 U.S. at 391. The Supreme Court has cautioned, "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Connick, 131 S. Ct. at 1359.

However, this court has found that at the motion to dismiss stage, a plaintiff "need not specifically state what the policy is. . . but may be more general." Thomas v. City of Galveston, 800 Supp. 2d 826, 843 (S.D. Tex. 2011). A plaintiff must still "provide fair notice to the defendant, and this requires more than generically restating the elements of municipal liability." Id. Such allegations could include "past incidents of misconduct to others, multiple harms that occurred to the plaintiff, misconduct that occurred in the open, the involvement of multiple officials in the misconduct, or the specific topic of the challenged policy or training inadequacy." Id.

Here, Plaintiff argues that Fort Bend failed to train its officers based on its failure to discipline Defendant officers following Plaintiff's arrest. Citing the standard in Davis, Plaintiff states that Fort Bend's failure to train its officers was deliberately indifferent to her constitutional rights despite highly predictable dangers, and that the county's failure was

the moving force behind Defendant officers' actions. See Davis, 406 F.3d at 385. Fort Bend responds that Plaintiff has failed to establish a policy or custom or a policymaker and has not stated any constitutional violation against Defendant.

Fort Bend is incorrect that Plaintiff has not alleged a policymaker; Plaintiff specifically notes that Fort Bend's Sheriff or its Commissioner's Court is the final policymaker. Fort Bend also argues that Plaintiff fails to assert a policy or custom. Fort Bend is correct that Plaintiff never explicitly states any custom or policy that was the moving force behind the alleged deprivation of her rights. In her response, Plaintiff contends that her pleading, which alleges that Fort Bend failed to train, discipline, or supervise its officers in conformity with the Fourth and Fourteenth Amendments is sufficient to state a policy.

The court disagrees.

In Plaintiff's explanation of Fort Bend's failure to train, Plaintiff states that Fort Bend was "deliberately indifferent" to Plaintiff's constitutional rights despite the "obvious, known, and highly predictable" dangers of such failures.[28] Although Plaintiff alleges via these statements that Fort Bend was deliberately indifferent, Plaintiff does not allege or explain how Fort Bend's training policy was inadequate. See Zarnow, 614 F.3d at 170. Absent an allegation that the municipality's training was inadequate, Plaintiff cannot plead that any such inadequate training actually caused her injury. See id.; Almanza v. Salazar, 33 F. Supp. 3d 747, 753 (holding that even under the single- incident exception, a plaintiff must allege inadequacies of

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[28] See Doc. 8, Pl.'s Am. Compl. p. 32.

training with particularity and show that inadequacies were moving force for actual injury).

Although Plaintiff is not required to raise specific facts proving the existence of a policy, Plaintiff's vague allegations are insufficient to meet the necessary standard to find a municipality liable for the actions of individual officers. See Thomas, 800 F. Supp. 2d at 844-45; see also Harvey v. Montgomery Cty., 881 F. Supp. 2d 785, 798 (S.D. Tex. 2012) (holding that a plaintiff could not maintain a failure to train claim against a municipality when officers arrested and injured an individual without probable cause).

Plaintiff also states that if the policymaker is familiar with inadequate policies, he has ratified Defendant officers' conduct. The Fifth Circuit has found that an authorized policymaker's approval of a subordinate's decision may create a ratification chargeable to the municipality. Peterson v. City of Ft. Worth, 588 F.3d 838 (5th Cir. 2009). Such a claim may only be based on "extreme factual situations." Id.; see also Snyder v. Trepagnier, 142 F.3d 791, 798 (5th Cir. 1998) (holding that an "extreme factual situation" did not exist when police officer shot a fleeing suspect). A "mere failure to investigate" a subordinate's discretionary decisions cannot support such a theory. Milam v. City of San Antonio, 113 F. App'x 622, 626-27 (5th Cir. 2004) (unpublished)(citing Praprotnik, 485 U.S. at 130).

Here, Plaintiff posits only that if Fort Bend's policymaker knew of the county's deficient training, then it ratified the officers' conduct because Defendant officers were not investigated by the county for misconduct. Under Fifth Circuit precedent, this is insufficient to maintain a ratification theory of

liability.

Finding that Plaintiff has failed to state a claim under either a policy or custom or a ratification of Defendant officers' conduct, the court accordingly **RECOMMENDS** that Plaintiff's claims against Fort Bend be **DISMISSED**.

F. Personal Involvement of Officers

Defendants Dale and Baker argue that the claims against them should be dismissed because the current pleadings fail to specify actual personal involvement. Plaintiff responds that alleged that all officers entered her home and arrested her without probable cause.

Personal involvement is an essential element of a civil rights case. Thompson v. Steele, 709 F.2d 381, 382 (5th Cir. 1983). Personal involvement limits a supervisory official's liability to situations where they "affirmatively participate in acts that cause constitutional deprivation" or when they "implement unconstitutional policies that causally result in plaintiff's injury." Mouille v. City of Live Oak, 977 F.2d 924, 929 (5th Cir. 1992).

Here, Plaintiff alleges that officers, including Defendants Dale and Baker, physically entered her home subject to a warrant, seized money without reporting it, and arrested Plaintiff without probable cause. Defendants are not supervisors and Plaintiff has alleged specific acts sufficient to establish personal involvement. Accordingly, the court **RECOMMENDS** that Defendants Dale and Baker's motion be **DENIED**.

IV. Conclusion

Based on the foregoing, the court **RECOMMENDS** that Defendants' motions to dismiss be **GRANTED IN PART** and **DENIED IN PART** and that Defendant Fort Bend County be **DISMISSED**.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 19th day of July, 2016.

[handwritten signature]
U.S. MAGISTRATE JUDGE

APPENDIX H

[Filed December 12, 2019]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20223

STEPHANIE JONES,

Plaintiff – Appellant

v.

JEREMY EDER, in his individual capacity; J. DALE, in his individual capacity; B. BAKER, in his individual capacity; R. NG, in his individual capacity; FORT BEND COUNTY,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CV-2919

ON PETITION FOR REHEARING EN BANC

(Opinion 10/02/2019 , 5 Cir., _____, ___ F.3d ___)

Before HIGGINBOTHAM, HO, and ENGELHARDT, 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

Appendix I

[Filed April 21, 2017]

Defendants', Ng and Eder,
Motion for Summary Judgment

[Excerpt]

17. The only elements necessary to support a criminal charge are a person's possession of a dangerous drug. See TEX. HEALTH & SAFETY CODE § 483.071; *Swain v. Hutson*, 2011 Tex. App. LEXIS 10078 **29-31, 2011 WL 6415118 (Tex. App.—Fort Worth 2011, no pet.); *Kelly v. State*, 2010 Tex. App. LEXIS 2573 **10-12; 2010 WL 1478907 (Tex. App.—Beaumont, 2010, no pet.). While having obtained the drug from a pharmacist or a practitioner who dispensed the drug, in a proper container with an appropriate label, to the person who possessed it for his personal use is a potential defense the possessor could raise in a criminal prosecution, TEX. HEALTH & SAFETY CODE §§ 483.041-483.042 and Kelly supra at *10, the State – and therefore an investigating police officer - is not obligated to even respond to the defense until after it is affirmatively raised by a person accused of illegally possessing a dangerous drug. TEX. HEALTH & Safety Code § 483.071.

18. "The [criminal] defendant has the burden of proving the exception, excuse, proviso, or exemption." TEX. HEALTH & SAFETY CODE § 483.071(b). Stated differently, "[w]hile the possession of dangerous drugs offense does not apply to drugs obtained from either a pharmacist or a practitioner, these exceptions are not prima facie elements of the

offense." *Swain supra* at *29. "Police officers can be expected to have a modicum of knowledge regarding the fundamental rights of citizens." *Saldana v. Garza*, at 1164, 1165 (5th Cir. 1982). "However, in holding our law enforcement personnel to an objective standard of behavior, [] judgment must be tempered with reason." *Id*. "Certainly (a court) cannot expect our police officers to [possess] a legal scholar's expertise in constitutional law." *Id*. Any objective investigator on the scene during the service of the search warrant could reasonably have interpreted these Texas statutes to authorize arresting Plaintiff.

Appendix J

[Filed May 22, 2017]

Defendants', Ng and Eder, Objections and Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment

[Excerpt]

12. Moreover, it is a crime to possess *any* prescription medication outside a pill container that identifies the drug and who it was prescribed for, and dispensed to, and it is a crime to possess a drug prescribed to another person, so it would have been immediately apparent to any objective officer that reasonable suspicion existed to investigate further and identify the precise type of drug found in plain view. The testimony in ¶ 7 of Lieutenant Eder's and Investigator Ng's declarations evidence that Lieutenant Eder, thereafter, contacted a representative of the poison control center who confirmed identification of the drugs through a common method for doing so. *See Garcia v. State*, 2012 Tex. App. LEXIS 2173, 2012 WL 983114 (Tex.App.—San Antonio 2012, no pet.); *State v. Beal*, 2016 Tex. Dist. LEXIS 32163, Cause No. 16-DCR-073233 (Tex. Dist. Fort Bend County 2016). There is no evidence the identification of the drugs is inaccurate or that they were not recovered from the windowsill next to Plaintiff's bed. Accordingly, Plaintiff's objections are insupportable.

13. Furthermore, even if Lieutenant Eder and the drug expert from the poison control center had erred

in identifying the drugs, such an error would not have invalidated Lieutenant Eder's or Investigator Ng's reasonable beliefs that probable cause existed to arrest Plaintiff for illegally possession drugs.

Appendix K

[Filed June 24, 2019]

Respondent Eder's Brief to the United States Court of Appeals for the Fifth Circuit

[Excerpt]

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943 (2006). The Supreme Court has explained that one of the reasonable exceptions to a warrant requirement "'plain view' is perhaps better understood … simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." *Texas v. Brown*, 460 U.S. 730, 738-39, 103 S. Ct. 1535, 1541 (1983). "The principle is grounded on the recognition that when a police officer has observed an object in 'plain view,' the owner's remaining interests in the object are merely those of possession and ownership." *Id.*