APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40415

[Filed April 3, 2019]

JERI LYNN RICH, as representative for Gavrila Covaci Dupuis-Mays, an incapacitated person,
Plaintiff–Appellee,

versus

MICHAEL PALKO; KEITH DUANE HUDGENS,
Defendants–Appellants.

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

Before KING, SMITH, and WILLETT, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Jeri Rich sued Michael Palko and Keith Hudgens of the McKinney Police Department ("MPD") on behalf of her adopted son, Gavrila Dupuis-Mays, who has been declared an incapacitated person by the State of Texas. Rich sought damages under 42 U.S.C. § 1983, alleging that the officers had violated Dupuis-Mays's Fourth and Fourteenth Amendment rights. The district court

denied the officers' motion for summary judgment based on qualified immunity ("QI"). We reverse and render a judgment of dismissal with prejudice.

I.

Dupuis-Mays sustained a brain injury as an infant and has cerebral palsy, mental retardation, bi-polar disorder, depression, ADHD, and epilepsy. On July 2, 2015, he was admitted for inpatient psychiatric evaluation for depressed ideation. He was released on July 10, 2015, and returned to a group home in McKinney, Texas, where he had been living.

Between July 10 and 11, MPD was called to the group home four times because Dupuis-Mays kept trying to run away. The final of those visits stemmed from a 911 call made by Dupuis-Mays's caseworker, Rhonda Holley, on Saturday July 11 at 2:01 a.m.[1] Holley asked police to transport Dupuis-Mays to Green Oaks Hospital, explaining that Dupuis-Mays needed inpatient care because he was "in a psychotic phase, where he is verbally and physically aggressive towards staff." Holley confirmed that Dupuis-Mays had not hit anyone that night but was "covered in feces and refusing to bathe." Holley told the 911 operator that she had initially called Green Oaks, and they recommended that she call 911.

---

[1] Most of the facts come from an audio recording of the 911 call made by Holley; a video showing a waiting room at Green Oaks; videos showing the Green Oaks triage room from two angles; and Hudgens's audio feed while at the group home and Green Oaks.

Palko and Hudgens responded. When they arrived at the group home, they briefly conversed with one of Dupuis-Mays's caretakers, who reported that Dupuis-Mays was becoming increasingly psychotic and that Green Oaks directed the group home staff to bring him in for care. She further explained that neither she nor other staff members felt safe transporting Dupuis-Mays to Green Oaks: He was "threatening" Holley, and "he just threatened our children," who were present that night.

The officers approached Dupuis-Mays, who was covered in feces, and dialogued with him at length. At the officers' urging, Dupuis-Mays eventually agreed to shower and change clothes. Holley told the officers what had precipitated her 911 call. Dupuis-Mays had defecated on himself and had removed his clothes and put them on the porch. He had scattered tables in the home's backyard and refused to follow staff instructions. Staff members also reported that Dupuis-Mays's aggression had been increasing and that his psychiatrist told the staff that their only option until Monday was to transport Dupuis-Mays back to Green Oaks for an assessment. Dupuis-Mays's doctors had called Dupuis-Mays "unstable."

Once Dupuis-Mays had showered and dressed, he voluntarily approached the officers and smoked a cigarette while talking with them. After about ten minutes, the officers told Dupuis-Mays that he would be going for a ride in the police car; they handcuffed and led him to the police car. The three talked casually during the ride to Green Oaks and arrived without incident.

The officers led Dupuis-Mays, still handcuffed, into the Green Oaks waiting room and seated him in a chair near the door to the triage room. Dupuis-Mays eventually stood up from the chair and began talking to the officers, saying, among other things, "I'll be glad you go to hell [*sic*]," and "I hate police officers." At least two other patients were in the waiting room. After Dupuis-Mays refused to sit down, the officers retuned him to his chair. A few seconds later, Dupuis-Mays spat toward Palko's face. The officers turned away from the spitting before approaching Dupuis-Mays, moving his head between his legs, and holding him in that position for about five minutes. The video and audio indicate that Dupuis-Mays continued spitting at and berating the officers, even with his head between his legs.

Dupuis-Mays was called back to the triage room, where quarters were tight: He was seated in a chair in one corner of the room with a small file cabinet directly to his right and the triage nurse's desk to the right of the cabinet. A second file cabinet was in the corner opposite Dupuis-Mays, about three to four feet in front of him. The officers stood by a door catty-corner from Dupuis-Mays. Because of the file cabinets' positioning, the corridor from the officers to Dupuis-Mays was narrow.

After a couple of minutes, Dupuis-Mays grew agitated and began saying, "I hate police officers! I hate 'em!" The triage nurse urged him to "stay calm," but Dupuis-Mays retorted, "Hell no!" The officers tried to pacify him, encouraging him that they were being nice. Dupuis-Mays continued, however, in escalating

volume, "I hate police officers! F*** them police officers! I hope cops die!" "Do you really mean what you say?" Palko queried, to which Dupuis-Mays responded, "I hope you die!" "That's really mean of you to say," Palko answered calmly.

The nurse left the room, leaving the officers with Dupuis-Mays. About twenty seconds later, Dupuis-Mays spat toward Detective Palko, who stepped back, and told him, "Don't spit on me, Bud." Dupuis-Mays then leaned forward, stared at Palko, and spat directly at his face.

Palko stepped across the room toward Dupuis-Mays through the opening left by the two file cabinets. Palko placed both of his hands on Dupuis-Mays's head and began moving him down and diagonally from his chair to the middle of the room. Palko stood with his body in front of the corner filing cabinet, his left foot in front of and parallel with the cabinet's side. Palko's eyes were consistently directed downward—not toward the file cabinet. Hudgens also approached and placed his right hand on Dupuis-Mays's shoulder blade and his left hand on Dupuis-Mays's handcuffed hands. Midway to the ground, Dupuis-Mays's torso began to turn toward the corner cabinet, his foot apparently caught behind the file cabinet directly to the right of his chair. Palko was still in front of the corner cabinet. As Dupuis-Mays twisted, Palko's left elbow bumped the corner cabinet, his hand fell off Dupuis-May's head, and Dupuis-Mays's head fell into the corner cabinet. Notably, Palko did not have a hand on Dupuis-Mays's head as Dupuis-Mays fell into the cabinet.

The officers promptly helped Dupuis-Mays up and carefully moved him to a seated position on the floor. They did not apply additional force. Dupuis-Mays's head was bleeding significantly, and he sustained a five-inch gash.

Hudgens filed a post-incident report with MPD. That report did not comport with the video from the triage room, so MPD began an internal affairs investigation, during which MPD Sergeant Agan spoke to Palko, who accurately recalled and recounted the events. Hudgens later watched the video, listened to the audio, and corrected his report.

Rich sued Palko and Hudgens under § 1983, claiming that they had violated Dupuis-Mays's Fourth, Eighth, and Fourteenth Amendment rights.[2] The officers moved to dismiss for failure to state a claim, and the district court granted the motion respecting Rich's Eighth Amendment claim. But the court deferred the remaining claims for disposition after discovery on whether the officers were entitled to QI. Following discovery, the officers moved for summary judgment on grounds of QI. The district court, adopting the report and recommendation of the magistrate judge, denied QI, and the officers appealed.

---

[2] Rich also sued the City of McKinney, alleging that it "employs a policy, practice, or custom that permits police officers to use excessive force and file false police reports." The city is not a party to this appeal.

II.

We have jurisdiction to consider this interlocutory appeal because the "general rule" that "[a]n order denying a motion for summary judgment is generally not a final decision within the meaning of § 1291 and is thus generally not immediately appealable . . . does not apply when the summary judgment motion is based on a claim of [QI]." *Plumhoff v. Rickard*, 572 U.S. 765, 771 (2014) (citations omitted). But "we have jurisdiction only to decide whether the district court erred in concluding as a matter of law that officials are not entitled to [QI] on a given set of facts." *Cantrell v. City of Murphy*, 666 F.3d 911, 921 (5th Cir. 2012) (internal quotation marks and citation omitted).

We review *de novo* the legal issue whether the district court erred in denying a motion for summary judgment based on QI. *Escobar v. Montee*, 895 F.3d 387, 393 (5th Cir. 2018). Although we "review the *materiality* of any factual disputes," we do not review "their *genuineness*." *Curran v. Aleshire*, 800 F.3d 656, 660 (5th Cir. 2015) (quoting *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000)). If there are factual disputes, "we view the facts in the light most favorable to the nonmoving party." *Plumhoff*, 572 U.S. at 768.[3]

[3] We will not, however, accept a plaintiff's version of the facts "for purposes of [QI] when it is 'blatantly contradicted' and 'utterly discredited' by video recordings.'" *Curran*, 800 F.3d at 664 (quoting *Scott v. Harris*, 550 U.S. 372, 380–81 (2007)).

III.

A plaintiff makes out a § 1983 claim if he "show[s] a violation of the Constitution or of federal law, and then show[s] that the violation was committed by someone acting under color of state law." *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008) (internal quotation marks and citation omitted). But government officials performing discretionary duties can assert QI. *See, e.g.*, *Haverda v. Hays Cty.*, 723 F.3d 586, 598 (5th Cir. 2013). Once an officer invokes the defense, the plaintiff must rebut it by establishing (1) that the officer violated a federal statutory or constitutional right and (2) that the unlawfulness of the conduct was "clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

To identify whether the law was clearly established when the officers acted, "we must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Morgan v. Swanson*, 659 F.3d 359, 371–72 (5th Cir. 2011) (en banc) (internal quotation marks and citations omitted). Though "a case directly on point" is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).[4] "This

[4] *See also Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 578–79 (5th Cir. 2009) (quoting *Pierce v. Smith,* 117 F.3d 866, 882 (5th Cir. 1997)) ("[P]re-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for

demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Wesby*, 138 S. Ct. at 589 (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)). In sum, QI "represents the norm, and courts should deny a defendant immunity only in rare circumstances." *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (internal quotation marks and citations omitted). "It is the plaintiff's burden to find a case in his favor that does not define the law at a high level of generality." *Vann v. City of Southaven*, 884 F.3d 307, 310 (5th Cir. 2018) (per curiam) (internal quotation marks and citation omitted).

Rich alleges that the officers violated Dupuis-Mays's Fourth Amendment rights through unlawful detention, excessive force, and false reporting. The officers assert QI on each claim.

A.

The officers insist that they are entitled to QI on Rich's claim that the officers violated Dupuis-Mays's constitutional rights by unlawfully detaining and transporting him to Green Oaks. "The probable cause standard applies in the context of a seizure of the mentally ill." *Cantrell*, 666 F.3d at 923 n.8. An officer has probable cause to detain if the two requirements for emergency detention under Texas law are satisfied: "(1) [T]he officer has reason to believe and does believe that a person is mentally ill and because of that illness there is a substantial risk of serious harm to the person or to others unless the person is immediately

---

every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*.").

restrained; and (2) believes that there is not sufficient time to obtain a warrant before taking the person into custody." *Id.* at 923 (citing TEX. HEALTH & SAFETY CODE ANN. § 573.001).

The parties do not dispute that Dupuis-Mays is "mentally ill" under Texas law.[5] They focus, instead, on whether he posed a substantial risk of serious harm to himself or others. That sort of substantial risk "may be demonstrated by[ ] (1) the person's behavior; or (2) evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty." TEX. HEALTH & SAFETY CODE ANN. § 573.001(b). An officer may base his belief that the person meets the statutory criteria for apprehension either on "a representation of a credible person[,] or . . . on the basis of the conduct of the apprehended person or the circumstances under which the apprehended person is found." *Id.* § 573.001(c)(1)–(2). An officer who detains a person under those provisions "shall immediately" take him to "the nearest appropriate inpatient mental health facility" or an otherwise designated mental health or emergency facility. *Id.* § 573.001(d)(1)(A)–(B).

The video and audio evidence supports that the officers relied on the representations of credible

---

[5] A person is mentally ill under Texas law if he has "an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that[ ] (A) substantially impairs [his] thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior." TEX. HEALTH & SAFETY CODE ANN. § 571.003(14).

persons to believe that Dupuis-Mays met the statutory criteria for apprehension. According to the group home staff, Dupuis-Mays's behavior posed a substantial risk of harm to others. His caretakers stated that he was in a "psychotic episode," "verbally and physically aggressive towards staff." He had threatened staff members and children, disturbed property in the backyard, soiled and refused to clean himself, and ignored the instructions of the staff, who were so frightened that they refused to transport him. Further, a treating psychiatrist—as well as staff at the Green Oaks hospital—had recommended that Dupuis-Mays be taken to the hospital for psychiatric evaluation.

Dupuis-Mays's conduct and the circumstances in which the officers found him also allowed them reasonably to conclude that Dupuis-Mays was experiencing "severe emotional distress and deterioration in [his] mental condition to the extent that [he could not] remain at liberty." *Id.* § 573.001(b)(2). The officers found him covered in feces, refusing to bathe, and ignoring instructions. Dupuis-Mays, moreover, responded to Palko's exhortation to clean himself, because the feces covering him could make him "feel bad," by saying that he wanted to feel bad.[6] Additionally, Dupuis-Mays had attempted to run away from the group home several times that evening.

Rich suggests that the officers did not have sufficient evidence to detain Dupuis-Mays lawfully

---

[6] Palko asked Dupuis-Mays, "You don't want to feel bad, right?" "I do," Dupuis-Mays replied. Palko rejoined, "Why is that?" And Dupuis-Mays responded, "I just do."

because this court's cases concerning lawful detention of a mentally ill person under Texas law all involve a suicide threat.[7] That is so, but nothing in those cases suggests that a suicide risk is a prerequisite for detention under Texas law. Indeed, holding so would nullify the statute's allowance for detention if the mentally ill person poses a substantial risk of harm to others.[8]

Based on the representations of credible persons and their own observations, the officers reasonably concluded that Dupuis-Mays was mentally ill and

---

[7] *See Cantrell*, 666 F.3d at 923 (concluding that officers had probable cause to detain woman making suicidal statements); *Sullivan v. Cty. of Hunt*, 106 F. App'x 215, 218 (5th Cir. 2004) (probable cause to detain where psychiatrist indicated that the person "was a suicide risk"); *Martinez v. Smith*¸ 1999 WL 1095667, at *1–2 (5th Cir. Nov. 4, 1999) (unpublished) (probable cause to detain where individual had told an acquaintance that she was suicidal and avoided contact with officers by shutting the door on and running from them).

[8] Texas caselaw confirms that a mentally ill person may be lawfully detained without a warrant even where he is not threatening suicide. *See, e.g.*, *In re M.R.*, No. 02-15-00221-CV, 2015 LEXIS 11297, at *2 (Tex. App.—Fort Worth Nov. 3, 2015, no pet.) (mem. op.) (discussing the lawful detention and transport, pursuant to Texas law, of a mentally ill patient who "evidenced a substantial risk of serious harm to himself or others" in that he was disoriented, hallucinating, grunting, not bathing, soiling himself, and not taking his medication); *In re J.M.*, No. 02-14-00398-CV, 2015 LEXIS 1420, at *2 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op.) (describing the lawful detention under Texas law of a mentally ill person who was physically aggressive toward her parents, behaving recklessly, and experiencing psychosis and paranoia).

posed a substantial risk of serious harm to himself or others.[9] They accordingly had a lawful basis to detain him under the Texas Health and Safety Code and complied with the Code's requirements by taking him directly to Green Oaks. The officers did not violate Dupuis-Mays's constitutional rights and are entitled to QI on the unlawful-detention claim.

Even assuming the officers violated Dupuis-Mays's constitutional rights, Rich has failed to demonstrate that clearly established law put the officers on notice that their conduct was illegal. In fact, established law in this circuit suggests that the officers were acting legally by relying on the representations of credible persons that Dupuis-Mays met the statutory requirements for apprehension.[10] Rich points to no case

---

[9] The magistrate judge's report and recommendation, fully adopted by the district court, found the officers' detention of Dupuis-Mays unlawful in part based on MPD's internal investigation of the events, in which Agan suggested that the officers had no lawful basis to detain Dupuis-Mays. Whatever Agan concluded, "probable cause exists where the facts and circumstances within the officer's knowledge at the time of the seizure are sufficient for a reasonable person to conclude that an individual is mentally ill and poses a substantial risk of serious harm." *Cantrell*, 666 F.3d at 923. The video and audio indicate that there was enough evidence to believe the statutory criteria for detention had been satisfied.

[10] *See Sullivan*, 106 F. App'x at 221 (holding that officers who took a man into custody to commit him for a mental screening at the behest of their supervisor, who was relying on the statements of a psychiatrist, lawfully detained the man under Texas law); *see also Martinez*, 1999 WL 1095667, at *2 (holding that officers "had probable cause to take [plaintiff] into protective custody" "[b]ased on the Texas statute, the information from a third party, and their own observations").

even suggesting that staff at a group home for disabled persons, who have been told by a hospital and a psychiatrist that a patient should be taken to the hospital, are not credible persons under the Texas Health and Safety Code. The district court erred in denying QI on the claim of unlawful detention.

B.

The officers also assert QI on Rich's claim that the officers violated Dupuis-Mays's Fourth Amendment rights by using excessive force to restrain him in the triage room. We may "decid[e] which of the two prongs of the [QI] analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). For the excessive force claim, we start and end with the second prong: "whether the right at issue was clearly established at the time of [the officers'] alleged misconduct." *Id.* at 232.

Rich has not demonstrated that the officers violated clearly established law by moving Dupuis-Mays—who was increasingly aggravated, repeatedly spitting at the officers, and failing to comply with instructions to stop—to the floor, even though he collided with a cabinet on the way down. The cases Rich cites on appeal do not implicate the situation Palko and Hudgens faced and certainly do not put it "beyond debate," *al-Kidd*, 563 U.S. at 741, that the officers' actions violated Dupuis-Mays's rights. Instead, those decisions concern the use of deadly force,[11] repeatedly

[11] *Cole v. Carson*, 905 F.3d 334, 343 (5th Cir. 2018), *vacated for reh'g en banc*, 915 F.3d 378 (5th Cir. 2019).

striking an arrestee,[12] tackling an arrestee and pummeling him with the officers' "knees and fists,"[13] slamming a subdued arrestee into a car window with enough force to break two teeth,[14] tackling a moving suspect,[15] and catching a fleeing suspect and then repeatedly tasing him and slamming him on the ground.[16]

Rich has failed to identify precedent clearly establishing that the officers' conduct violated Dupuis-Mays's constitutional rights on the excessive force claim. The officers are entitled to QI.

---

[12] *Brown v. Lynch*, 524 F. App'x 69, 72–73 (5th Cir 2013) (unpublished).

[13] *Trammell v. Fruge*, 868 F.3d 332, 342 (5th Cir. 2017).

[14] *Bush v. Strain*, 513 F.3d 492, 496 (5th Cir. 2008).

[15] *Goodson v. City of Corpus Christi*, 202 F.3d 730, 733–34 (5th Cir. 2000).

[16] *Anderson v. McCaleb*, 480 F. App'x 768, 769 (5th Cir. 2012) (per curiam). The district court found that *Brady v. Louisiana*, No. 92-3904, 1993 U.S. App. LEXIS 39564 (5th Cir. 1993) (unpublished but precedential), "along with several other cases in this Circuit, provide clearly established law that lesser levels of force are excessive *against restrained, nonthreatening persons*." Rich cites those "other cases," and we have already found them inapposite. *Brady* involved a prison guard's hitting a restrained inmate, *id.* at *2, and does not provide the kind of precedent "that defines the contours of the right in question with a high degree of particularity," *Morgan*, 659 F.3d at 372.

C.

The officers contend that they deserve QI on Rich's claim that the officers violated Dupuis-Mays's constitutional rights by preparing false police reports "to support the unlawful arrest." Neither the district court nor Rich has identified which of Dupuis-Mays's constitutional rights was violated. The court explained only that "these reporting falsities obstructed the investigation regarding the incident and continue to serve as a potential basis for the justification of the alleged unlawful detention and use of excessive force," and accordingly, "are proper matters for a jury to review."[17]

Rich's theory appears to be that Hudgens's inaccurate post-incident report was designed to provide probable cause to support a warrantless detention. But Rich fails to identify a single case suggesting that an individual has a right to be free from inaccuracies in an after-the-fact police report or that an inaccurate report serves as a sort of continuing constitutional violation, as the district court suggested. The only case from this circuit that the magistrate judge cited is to the contrary.[18] Consequently, Rich has not shown a

---

[17] The magistrate judge similarly found "these reporting falsities to be consequential to Plaintiff's unlawful detention and excessive force claims, and that a jury could find the false statements were intentionally made by Defendant Officers."

[18] *See Smith v. Patri*, 99 F. App'x 497, 498 (5th Cir. 2004) (per curiam) ("[T]here is no right to a completely accurate police report."). Other circuits have also recognized that false or inaccurate police reports do not pose a constitutional violation. *See,*

violation of a clearly established constitutional right, and the officers are entitled to QI.

The order denying QI is REVERSED, and a judgment of dismissal with prejudice is RENDERED.

---

e.g., *Jarrett v. Twp. of Bensalem*, 312 F. App'x 505, 507 (3d Cir. 2009) ("[T]he mere existence of an allegedly incorrect police report fails to implicate constitutional rights.").

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CASE NO. 4:16CV870
Judge Mazzant/Judge Johnson

[Filed March 13, 2018]

JERI LYNN RICH, AS REPRESENTATIVE, FOR GAVRILA COVACI DUPUIS-MAYS, AN INCAPACITATED PERSON,
Plaintiff,

V.

MICHAEL PALKO, KEITH HUDGENS, and THE CITY OF MCKINNEY,
Defendants.

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. On January 8, 2018, the report of the Magistrate Judge was entered containing proposed findings of fact and

recommendations (the "Report") (*see* Dkt. #70) that Defendants Michael Palko ("Palko" or "Defendant Palko") and Keith Hudgens's ("Hudgens" or "Defendant Hudgens") (collectively, "Defendant Officers") Motion for Summary Judgment on Qualified Immunity (Dkt. #60) be **DENIED**.

I. PROCEDURAL BACKGROUND

On January 12, 2018, Defendant Officers filed objections to the Report (*see* Dkt. #71). On January 17, 2018, Defendant Officers filed a Motion for Hearing on Defendant Officers' objections (*see* Dkt. #73). Upon order of the Court, Plaintiff filed a response to Defendant Officers' objections (*see* Dkt. #75). Defendant Officers filed a supplemental reply to Plaintiff's response (*see* Dkt. #76). The Court has made a *de novo* review of the objections, Plaintiff's response, and Defendant Officers' supplemental reply, and is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections are without merit as to the ultimate findings of the Magistrate Judge.[1] The Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court.

[1] The Court also considered Defendant Officers' Motion for Hearing on their objections (Dkt. #73).

II. DISCUSSION

A. GENERAL OBJECTIONS TO THE REPORT

1. Unlawful Detention

Defendant Officers first object to the Magistrate Judge's finding that there is a genuine issue of material fact as to whether Defendant Officers understood Gavrila Covaci Dupuis-Mays ("Dupuis-Mays") was a danger to himself or others as required for detention under Texas law. *See* Dkt. #71 at 2-3. In support of this objection, Defendant Officers contend the Report "disregards other evidence" demonstrating there is no genuine issue of material fact. As Plaintiff notes, however, Defendant Officers have never provided sworn testimony in support of this argument or their Motion at all. Additionally, Defendant Officers cannot dispute that the record includes conflicting internal reports from Sergeant Randy Agan regarding whether the seizure of Dupuis-Mays was lawful. Moreover, the Magistrate Judge correctly noted that the audio and video evidence, internal investigation documentation, and conflicting internal reports all provide evidence that there is a genuine issue of material fact on this issue. *See* Dkt. #70 at 13-14. For these reasons, the Court finds no error in the Magistrate Judge's finding that there is a genuine issue of material fact as to whether the seizure of Dupuis-Mays's was unlawful, and thus, Defendant Officers' objection is overruled.

Defendant Officers next object that "the right [to be free from detention under the circumstances] was not clearly established," arguing that based on Dupuis-

Mays's psychiatric history, Defendant Officers reasonably concluded he was a danger to himself and/or others. *See* Dkt. #71 at 3-4. First, the Court notes that Defendant Officers have not made this argument prior to their objections to the Report. The Fifth Circuit has held that issues raised for the first time in objections to the report of a magistrate judge are not properly before the Court. *See Finley v. Johnson*, 243 F.3d 215, 218 n. 3 (5th Cir. 2001) (citing *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992)). Even considering Defendant Officers' argument, the Court finds two fatal flaws: first, Defendant Officers, pursuant to the record before the Court, did not have Dupuis-Mays's "psychiatric history" at any time during the incident. The record contains Dupuis-Mays's Medical Records from Medical City Dallas Hospital (Dkt. #65-1 at 8-10); however, such records were obtained during the subsequent investigation *after* the incident. Second, Defendant Officers have admitted that Dupuis-Mays was not violent when they arrived at the scene and throughout the extended period of time prior to being detained. *See* Dkt. #71 at 3-4. Furthermore, Defendant Officers cite no case law for the proposition that, based on a person's behavioral and psychiatric *history*, police officers may lawfully detain a non-violent person.

As the Magistrate Judge noted, case law discussing emergency detention clearly establishes there must be a substantial risk of serious harm for a person to be lawfully detained under the provisions of the Texas Health and Safety Code. *See* Dkt. #70 at 14. Defendant Officers' contentions as to their decision to detain Dupuis-Mays based on his personal history is a

question of fact best left for a jury. Thus, the Court finds no error in the Magistrate Judge's conclusion, and this objection is likewise overruled.

2. Excessive Force

Defendant Officers next object to the Magistrate Judge's finding that Defendant Officers' use of force against Dupuis-Mays was objectively unreasonable and met the standard of excessive force. *See* Dkt. #71 at 4-5. In support, Defendant Officers offer a new and different interpretation of the video evidence before the Court, now arguing that "Dupuis-Mays's own movement and momentum result[ed] in his accidentally striking the filing cabinet." *See id.* at 5. The Court again notes that Defendant Officers have not made this argument prior to their objections, and thus, the issue is not properly before the Court. *See Finley*, 243 F.3d at 218 n. 3 (citing *Armstrong*, 951 F.2d at 630). Even considering Defendant Officers' argument, however, the Magistrate Judge found a jury could find Defendant Officers' videotaped use of force was unreasonable, especially when viewed in conjunction with Sergeant Agan's report. *See* Dkt. # 70 at 17-18. Although Defendant Officers now offer a different description of the events seen on the video, this does not change the objective video evidence: a seated, handcuffed, and disabled person was forcibly brought to the ground by two police officers and suffered a serious laceration to the head. Accordingly, the Court finds no error in the Magistrate Judge's conclusion, and this objection is likewise overruled.

Defendant Officers also object to the Magistrate Judge's finding that the right to be free from excessive

force was clearly established. *See* Dkt. #71 at 5-6. Defendant Officers first rely on three cases in making this objection: one from Pennsylvania, one from Missouri, and one from Arkansas. *See id.* at 5. The Court does not find any of these cases persuasive in this matter.

Defendant Officers next argue that the Magistrate Judge's reliance on Fifth Circuit case law was misplaced because the force described therein was different than the force used in the instant matter. *See id.* at 5-6. Defendant Officers appear to have misinterpreted the basis for the Magistrate Judge's reliance on *Brady v. Louisiana*, 1993 WL 277008 (5th Cir. 1993). As noted in the Report, *Brady*, along with several other cases in this Circuit, provide clearly established law that lesser levels of force are excessive *against restrained, non-threatening persons.* Indeed, the Magistrate Judge found that the "clearly excessive" force threshold is less in situations where, as in this case, the person is restrained and not physically threatening. *See* Dkt. #70 at 18. Thus, the Court finds no error in the Magistrate Judge's conclusion, and this objection is likewise overruled.

3. <u>False Reporting</u>

Defendant Officers next object to the Magistrate Judge's finding that their reporting falsities were consequential to Dupuis-Mays's unlawful detention and excessive force claims. *See* Dkt. # 71 at 6-7. Defendant Officers rely on the timing of the submitted reports to argue they could not have possibly contributed to any deprivation of Dupuis-Mays's constitutional rights. *See id.* Namely, Defendant Officers state they submitted

their reports "long after Dupuis-Mays was tak[en] into custody. . . ." *See id.* at 7. As the Magistrate Judge stated, however, these reporting falsities obstructed the investigation regarding the incident and continue to serve as a potential basis for the justification of the alleged unlawful detention and use of excessive force. *See* Dkt. #71 at 20-21. For this reason, they are proper matters for a jury to review. Thus, the Court finds no error in the Magistrate Judge's conclusion, and this objection is likewise overruled.

B. OBJECTIONS TO DISCOVERY ORDERS

Defendant Officers object that the Court improperly limited qualified immunity discovery in previous orders (Dkts. #53, #59). Defendant Officers argue that information from the discovery requests they proposed would have supported the reasonableness of both the detention and the use of force. *See* Dkt. #71 at 8. Additionally, Defendant Officers rely on case law stating that "limited discovery may be undertaken by both parties, tailored to the issue of qualified immunity." *Geter v. Fortenberry*, 882 F.2d 167, 170 (5th Cir. 1989).

First, the Court finds that Defendant Officers' argument regarding the value of the information from the proposed discovery is entirely speculative. The voluminous record before the Court provided adequate basis for the Magistrate Judge's findings. Moreover, Defendant Officers incorrectly argue the Court's orders regarding discovery were improperly narrow. As noted in *Geter*, a Court has discretion regarding the scope of discovery when addressing the issue of qualified immunity. *See Geter*, 882 F.2d at 170. Although

Defendant Officers may not agree with the Magistrate Judge's denial of certain discovery requests (like the request for Plaintiff's deposition), such decisions were made within the Court's sound discretion. Thus, the Court finds no error in the Magistrate Judge's discovery orders (Dkts. #53, #59), and Defendant Officers' objection is overruled.

C. REQUEST FOR ORAL HEARING

Defendant Officers also submitted a Motion for Oral Hearing on their objections (the "Motion for Oral Hearing") (Dkt. #73). Upon consideration, the Court **DENIES** Defendant Officers' Motion for Oral Hearing (Dkt. #73).

III. CONCLUSION

Based on the foregoing, Defendant Officers' Motion for Summary Judgment on Qualified Immunity (Dkt. #60) is **DENIED**.

Further, Defendant Officers' Motion for Oral Hearing (Dkt. #73) is **DENIED**.

IT IS SO ORDERED.
SIGNED this 13th day of March, 2018.

/s/ Amos L. Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Civil Action No.: 4:16-cv-00870

[Filed January 8, 2018]

JERI LYNN RICH, AS REPRESENTATIVE, FOR GAVRILA COVACI DUPUIS-MAYS, AN INCAPACITATED PERSON,
Plaintiff,

v.

MICHAEL PALKO, KEITH HUDGENS, and THE CITY OF MCKINNEY,
Defendants.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendants Michael Palko ("Palko" or "Defendant Palko") and Keith Hudgens's ("Hudgens" or "Defendant Hudgens") (collectively, "Defendant Officers") Motion for Summary Judgment on Qualified Immunity (the "Motion") (Dkt. 60). Upon review of the Motion, associated briefing, and limited discovery materials (*see* Dkts. 60, 60-2, 65, 65-1,

66), the Court recommends the Motion (Dkt. 60) be **DENIED**.

I. BACKGROUND

Plaintiff Jeri Lynn Rich ("Plaintiff") brings this suit as representative and registered guardian of her adopted son, Gavrila Covaci Dupuis-Mays ("Dupuis-Mays"). *See* Dkts. 1 at ¶ 7; 65-1 at 11. Dupuis-Mays suffered a brain injury as an infant, has been diagnosed with cerebral palsy and mental retardation, and has been declared an incapacitated person by the State of Texas. *See* Dkts. 1 at ¶ 7; 60-2 at 62-73. At the time of the underlying events, Dupuis-Mays lived in a group home in McKinney, Texas (the "Group Home"), which is staffed and operated by D&S Community Services ("D&S"). *See* Dkts. 1 at ¶ 8; 60 at 5. A copy of the D&S "In-Service" report documents various physical and mental conditions of which D&S staff were to be aware regarding Dupuis-Mays, including (among others): limited utilization of his left hand, bi-polar disorder, depression, traumatic brain injury, ADHD, epilepsy, GERD, legal blindness (no peripheral vision), and use of disposable briefs. *See* Dkt. 60-2 at 60-61.

On July 11, 2015, Dupuis-Mays's caseworker, Rhonda Holley ("Caseworker Holley"), called the McKinney Police Department and requested that police officers be sent to the Group Home to transport Dupuis-Mays to Green Oaks Hospital ("Green Oaks"), as he was in need of inpatient care. *See* Dkts. 1 at ¶ 9; 60 at 5. Defendant Officers submitted an audio recording of the July 11, 2015, call, wherein Holley stated Dupuis-Mays was "in a psychotic phase, where

he is verbally and physically aggressive towards staff" and "covered in feces and refusing to bathe." *See* Defendant Officers' Appendix, Disk 1, file: 911 Call 7.11.15- 15-006403 MENTAL OPC 2512 TIMBERBROOK TRL 07 11 2015 NON EMERG CALL 0202.[1] When the 9-1-1 operator inquired further about Dupuis-Mays's physical aggression, Holley replied that Dupuis-Mays had not hit anybody. *See id.* Holley ended the call by stating, "I called Green Oaks, and they told me to call y'all." *See id.*

Shortly after the call, Defendant Officers arrived at the Group Home. *See* Dkt. 1 at ¶ 10. Defendant Officers submitted an audio and video recording (the "Hudgens Dashcam Video") of their arrival to the Group Home, their interaction with Dupuis-Mays and D&S staff, and the subsequent transport of Dupuis-Mays to Green Oaks. *See* Defendant Officers' Appendix, Disk 2, file: KeithHudgens_201507110212_1315_53578230. The Hudgens Dashcam Video shows that, when Defendant Officers arrived at the Group Home, they had a brief conversation with one of Dupuis-Mays's caretakers. *See id.* at 0:58-1:53. The caretaker (whose name is unclear in the audio) stated that Dupuis-Mays was becoming increasingly psychotic and reported that Green Oaks told the Group Home staff to bring him in for care. *See*

---

[1] The Court notes that Defendant Officers submitted several audio and video files pursuant to Local Rule CV-5(a)(6) and CV-56(d). *See* Dkt. 62. Although courts view evidence in the light most favorable to the nonmoving party on motion for summary judgment, they give greater weight, even at the summary judgment stage, to the facts evident from video or audio recordings regarding the incident in question. *See Griggs v. Brewer*, 841 F.3d 308, 312 (5th Cir. 2016) (citing *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011)).

id. The caretaker continued on to say that Dupuis-Mays was covered in feces and that she and other staff did not feel safe transporting him to Green Oaks and that they had their children with them. *See id.* Next, Defendant Officers approached Dupuis-Mays and had an extended interaction with him, talking with him about what was happening that night and urging him to shower and change clothes. *See id.* at 1:54-9:35. During this interaction, Dupuis-Mays remained calm and eventually agreed to shower and put on clean clothes. *See id.*

While Dupuis-Mays showered, personnel at the Group Home spoke with Defendant Officers about the events leading up to their arrival. *See id.* at 9:36-30:18. Specifically, Caseworker Holley stated that Dupuis-Mays had defecated on himself, removed his clothes, and put them on the porch of the Group Home. *See id.* She also stated that although Dupuis-Mays had not been physically aggressive that particular night, he had been physically aggressive in the past and was generally being verbally aggressive and non-compliant with the Group Home's rules before Defendant Officers arrived. *See id.* The record before the Court shows that McKinney Police officers were also called to the Group Home two times earlier that same night in response to calls about Dupuis-Mays's non-compliant behavior. *See* Dkts. 60-2 at 42, 45; 65-1 at 23-24.

Once Dupuis-Mays finished showering, he walked back to Defendant Officers on his own volition. *See* Defendant Officers' Appendix, Disk 2, file: KeithHudgens_201507110212_1315_ 53578230, at 30:31. Defendant Officers then allowed Dupuis-Mays to

smoke a cigarette outside, where they laughed and talked casually for approximately ten minutes. *See id.* at 30:31-38:50. After the conversation, and nearly forty minutes after arriving at the Group Home, Defendant Officers told Dupuis-Mays he would be going for a ride in the police car. *See id.* at 38:00-38:50. Defendant Officers handcuffed Dupuis-Mays and told him he would need to remain handcuffed while riding in the police car. *See id.* Before entering the police car, Dupuis-Mays asked Defendant Officers if they could remove the handcuffs. Defendant Officers told him they could not. *See id.*, at 38:45-38:55. Dupuis-Mays also repeatedly asked if he was going to jail, and Defendant Officers assured him he was not. *See id.*, at 30:31-38:55.

As Defendant Officers transported Dupuis-Mays from the Group Home to Green Oaks, they talked casually with Dupuis-Mays, asked him about his favorite types of music, and listened to the radio. *See id.* at 39:00-1:10:50. Defendant Officers arrived at Green Oaks with Dupuis-Mays without any issue about thirty minutes after leaving the group home. *See id.* at 1:10:50.

Defendant Officers guided Dupuis-Mays into the waiting room about twenty minutes after arriving at the Green Oaks parking lot. *See* Defendant Officers' Appendix, Disk 1, file: PES Parking 71115, at 18:08. Dupuis-Mays remained in handcuffs and walked on his own, following Defendant Officers as they entered the Green Oaks waiting room. *See id.* Once inside the Green Oaks waiting room, Dupuis-Mays remained handcuffed and was placed in a chair near the door to

the triage room. *See id.*, file: Blacked Out Edit. After about fifteen minutes, Dupuis-Mays stood up from the chair and began speaking to Defendant Officers. *See id.* at 17:49. The video shows that after a few minutes of this interaction, Defendant Officers pushed Dupuis-Mays back down to the chair to restrain him. *See id.* at 18:59. About ten seconds after being placed in the chair, Dupuis-Mays appeared to spit towards Defendant Officers. *See id.* at 19:08. Defendant Officers immediately turned away from the spitting then turned back towards Dupuis-Mays, grabbed his head, and pushed it down between his legs. *See id.* at 19:10. Defendant Officers held Dupuis-Mays in this position for nearly five minutes. *See id.* at 19:10-24:06. A few minutes later, a nurse came out from the triage room to bring Dupuis-Mays in for further examination. *See id.* at 25:50. For this entire period, Dupuis-Mays remained handcuffed. *See id.*

Inside the Green Oaks triage room, after being in handcuffs for nearly one-and-a-half hours, Dupuis-Mays grew increasingly agitated and began making angry expressions, such as "I hate cops" and "I hope the cops die." *See* Defendant Officers' Appendix, Disk 1, file: Body Mocrophone Audio – Hudgens, Keith_ 20150711_1010_e83229 aac18745ad8ee0db6d01c9e46d, at 9:28-9:40. During this time, the triage nurse was attempting to calm Dupuis-Mays down and assess his medical needs; eventually, the triage nurse left the room after Dupuis-Mays responded that he would not calm down. *See id.* at 9:43. When Dupuis-Mays was left in the triage room alone with Defendant Officers, he remained irritated and spit either in the direction of or

on Defendant Palko.[2] Immediately after this, the video shows that Defendant Palko stepped towards Dupuis-Mays, grabbed him by the head, and took him towards the ground with both hands; Defendant Hudgens also moved towards Dupuis-Mays and assisted in taking him to the ground. *See* Defendant Officers' Appendix, Disk 1, file: PES AR 2-2 71115, at 3:45-4:00. On the way to the ground, Dupuis-Mays's head was pushed into a metal file cabinet, causing his head to bleed; the video shows blood stains on the wall and on Dupuis-Mays's face and clothing. *See id.*, file: PES AR 2-1 71115, at 3:58-4:40. After the incident, Defendant Officers falsely told Green Oaks staff that Dupuis-Mays "bumped his head while they were not in the room." *See* Dkt. 60-2 at 10; *see also* Dkt. 1 at ¶ 23. Plaintiff submitted a photo of the resulting injury to Dupuis-Mays; the photo shows that Dupuis-Mays suffered a large laceration to his head which required numerous staples. *See* Dkt. 65-1 at 35.

Soon after the incident, Green Oaks staff contacted Officer Terry Qualls of the McKinney Police Department ("McKinney PD") because they "wished to report some concerns involving two McKinney Police Officers over the weekend." *See* Dkt. 60-2 at 10. In response, an internal investigation was initiated by the McKinney PD Internal Affairs Division and Sergeant Randy Agan ("Sergeant Agan") was assigned to conduct the investigation. *See* Dkt. 60-2 at 6. On July 13, 2015,

---

[2] The video is unclear as to whether Dupuis-Mays actually spit *on* Defendant Palko rather than *at* him; Plaintiff claims he spit "in the direction of" Defendant Palko, whereas Defendant Officers claim Plaintiff spit "on" Defendant Palko.

Green Oaks staff reiterated their concerns to Sergeant Agan, stating "that a review of the video showed more than what was reported [by Defendant Officers] and requested that [he] come view the video." *See id.* According to Sergeant Agan's report, that same day, he met with the Green Oaks management team to review "the video of the incident that gave them concern." *See id.*

Based on a review of the evidence, Sergeant Agan's "Administrative Investigation" report contains a synopsis and analysis of the July 11, 2015, incident involving Defendant Officers and Dupuis-Mays. *See* Dkt. 60-2 at 10-18. Sergeant Agan's report stated that, after reviewing the audio and video of the incident, he had numerous concerns with the incident as reported by Defendant Officers. *See id.* at 10-13. Specifically, Sergeant Agan stated that "[i]t is not clear other than violating house rules why Officers Hudgens and Palko took Mays into custody" and "[t]he report does not describe how Mays was a danger to himself or others and if not taken into custody how he posed such a threat." *See id.* at 12. Further, Sergeant Agan stated he "did not see anything in the video to substantiate [the claim that Dupuis-Mays was being aggressive towards Defendant Officers in the Green Oaks triage room] as Mays was sitting cuffed with his hands behind his back and appeared to be talking." *See id.* at 13.

On November 11, 2016, Plaintiff filed suit against Defendant Officers and McKinney for violations of 42 U.S.C. § 1983 pursuant to the Fourth, Eighth, and Fourteenth Amendment of the United States Constitution. *See* Dkt. 1 at ¶¶ 46-47. On April 11, 2017,

the Court deferred in part and granted in part Defendant Officers' Motion to Dismiss for Failure to State a Claim (Dkt. 11). *See* Dkt. 34; *see also* Dkt. 43. Specifically, the Court dismissed Plaintiff's claim under the Eighth Amendment and deferred the remaining claims for disposition only after narrowly tailored discovery. *See* Dkt. 34 at 17.

II. LEGAL STANDARD

A. SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat summary judgment; the requirement is that there be no genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is "material" if a dispute

over it might affect the outcome of a suit under governing law; factual disputes that are "irrelevant or unnecessary" do not affect the summary judgment determination. *See id.* at 248. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See id.*

B. SECTION 1983 AND QUALIFIED IMMUNITY STANDARD

Claims under 42 U.S.C. § 1983 may be brought against persons in their individual capacity or official capacity, or against a governmental entity. *See Goodman v. Harris Cty.*, 571 F.3d 388, 395 (5th Cir. 2009). Section 1983 provides that "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. Section 1983 does not create substantive rights, rather it is simply a procedural vehicle that provides a remedy for violation of the rights that it designates. *See Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997). Therefore, "an underlying constitutional or statutory violation is a predicate to liability under § 1983." *Id.*

The doctrine of qualified immunity provides that government officials performing discretionary functions generally are shielded from liability for civil damages to the extent that their conduct does not violate clearly established statutory or constitutional rights of which

a reasonable person would have known. *See Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 380 (5th Cir. 2005); *see also Hudspeth v. City of Shreveport*, 2006 WL 3747446, at *5 (W.D. La. 2006), *aff'd*, 270 F. App'x 332 (5th Cir. 2008). Qualified immunity provides the right not to stand trial or confront other burdens of litigation, "conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Davis*, 406 F.3d at 380 (internal citation omitted). Qualified immunity is more than a mere defense to liability. *See id*. Rather, the doctrine provides immunity from suit. *See id*. The Fifth Circuit has reasoned that before a district court adjudicates the merits of a plaintiff's claims, the plaintiff must overcome the bar of qualified immunity. *See id*. Once the issue of qualified immunity is raised, a plaintiff has the burden of rebutting the defense by demonstrating that the government official's allegedly wrongful conduct violated clearly established law. *See id*. The government official is not required to demonstrate that he did not violate clearly established federal rights because Fifth Circuit precedent places such burden upon the plaintiff. *See id*. "Qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id*. The qualified immunity shield is broad and protects actions—even mistakes—that are reasonable under the existing law. *See Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992).

The Court conducts a two-prong inquiry in order to determine whether qualified immunity applies. In order to defeat qualified immunity on a motion for

summary judgment, a plaintiff must sufficiently allege that: (1) a constitutional right would have been violated on the facts shown; and (2) "the right was clearly established" at the time of the violation. *See Fontenot v. Cormier*, 56 F.3d 669, 673 (5th Cir. 1995); *Siegert v. Gilley*, 500 U.S. 226 (1991). The Fifth Circuit has stated that "[i]f reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." *Fraire*, 957 F.2d at 1273.

In *Saucier v. Katz*, the Supreme Court instructed that the inquiries for constitutional violations and qualified immunity remain distinct. *Johnson v. Waters*, 317 F. Supp. 2d 726, 731 (E.D. Tex. 2004), dismissed, 120 F. App'x 555 (5th Cir. 2005) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). The Court opined that "it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. *Id*. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id*. (quoting *Saucier*, 533 U.S. at 205). In that case, qualified immunity operates as a shield to protect officers if, in fact, a constitutional violation has been committed, but the officer's mistaken belief was reasonable in light of established law. *Id*. (citing *Saucier*, 533 U.S. at 205-06). The defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the plaintiff's constitutional right. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Cozzo v.*

Tangipahoa Parish Council, 279 F.3d 273 (5th Cir. 2002) (citing *Thompson v. Upshur Cnty.*, 245 F.3d 447, 457 (5th Cir. 2001)).

When reviewing a summary judgment motion on immunity, courts view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in his favor. *See Griggs v. Brewer*, 841 F.3d 308, 312 (5th Cir. 2016) (citing *Deville v. Marcantel*, 567 F.3d 156, 163-64 (5th Cir. 2007)). Although courts view evidence in the light most favorable to the nonmoving party, they give greater weight, even at the summary judgment stage, to those facts evident from video recordings taken at the scene. *See Griggs*, 841 F.3d at 312 (citing *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011)).

III. EVIDENCE PRESENTED

Defendant Officers have offered the following summary judgment evidence in support of the Motion:

1. Dkt. 60-2 at 3-5: Declaration of Erik Johnson and Exhibit "A;"
2. Dkt. 60-2 at 6-9: Declaration of Sergeant Randy Agan;
3. Dkt. 60-2 at 10-44: McKinney PD Internal Affairs Investigation 15-00640;
4. Dkt. 60-2 at 45-58: McKinney PD Internal Affairs Investigation 15-00640A; and
5. Two (2) compact disks containing video and audio files from July 11, 2015.

Plaintiff has offered the following summary judgment evidence in opposition to the Motion:

1. Dkt. 65-1 at 3-7: Defendants' Supplemental Response to Interrogatory No. 2;
2. Dkt. 65-1 at 8-10: Medical Records from Medical City Dallas Hospital;
3. Dkt. 65-1 at 11: Letters of Guardianship;
4. Dkt. 65-1 at 12-34: Excerpts from Defendants' MSJ Appendix; and
5. Dkt. 65-1 at 35-37: Photos of Dupuis-Mays Injuries.

IV. ANALYSIS

Plaintiff's claims against Defendant Officers fall into three categories: (1) unlawful detention of Dupuis-Mays; (2) excessive force used on Dupuis-Mays; and (3) violation of constitutional rights regarding false reporting of the incident.

A. PLAINTIFF'S UNLAWFUL DETENTION CLAIMS AGAINST DEFENDANT OFFICERS

1. Plaintiff Sufficiently Alleged Unlawful Detention on the Facts Shown

The Fifth Circuit has held that police officers are entitled to qualified immunity when they act lawfully in performing their duties under the Texas Health and Safety Code. *See Cantrell v. City of Murphy*, 666 F.3d 911, 923 (5th Cir. 2012). The Texas Health and Safety Code states that a police officer may, without a warrant, place a person in custody if: (1) the officer has

reason to believe and does believe that (A) the person in question is a person with mental illness; and (B) because of that illness, there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained; and (2) believes there is not sufficient time to obtain a warrant before taking the person into custody. *See* Tex. Health & Safety Code § 573.001(a); *Cantrell*, 666 F.3d at 922-23. A "substantial risk of serious harm to the person or others" may be shown by either: (1) the person's behavior; or (2) evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. *See* Tex. Health & Safety Code § 573.001(b). The police officer may form the belief that the person meets the criteria for apprehension either: (1) from a representation from a credible person; or (2) on the basis of the conduct of the apprehended person or the circumstances under which the apprehended person is found. *See id.* § 573.001(c). A police officer that takes a person into custody must immediately transport that person to the nearest appropriate inpatient mental health facility, or one deemed suitable by the local mental health authority. *See* § 573.001(d).

Plaintiff alleges there was no probable cause to detain Dupuis-Mays as outlined in the Texas Health and Safety Code. *See* Dkt. 65 at 16-19. Defendant Officers conversely contend they are entitled to qualified immunity because they acted lawfully under the Texas Health and Safety Code. *See* Dkt. 60 at 11-13.

In support of her position, Plaintiff relies on Sergeant Agan's report (Dkt. 60-2 at 10-18) along with the video and audio evidence submitted by Defendant Officers. *See* Dkt. 65 at 16-19. Plaintiff claims that a jury could conclude there was no danger to Dupuis-Mays or others because he bathed and complied with Defendant Officers' requests. *See id.* at 18. Plaintiff also claims that the long delay and extended discussion between Defendant Officers and Dupuis-Mays negates Defendant Officers' claim that there was a need for "immediate detention." *See id.* Additionally, Plaintiff points to Sergeant Agan's report, wherein Sergeant Agan stated there was no evident physical aggression in the video when Dupuis-Mays was handcuffed in the triage room. *See id.* at 17; *see also* Dkt. 60-2 at 13.

Defendant Officers argue that the 9-1-1 call to the McKinney PD stating that Dupuis-Mays was "in a psychotic phase" and "verbally and physically aggressive towards staff" provided initial evidence that Defendant Officers had probable cause to detain Dupuis-Mays. *See* Dkt. 60 at 11. Defendant Officers further argue that Caseworker Holley's communications to Defendant Officers that she was concerned for the safety of her children if she were to transport Dupuis-Mays herself to Green Oaks also evidenced that Dupuis-Mays was a danger to himself and/or others. *See* Dkt. 60 at 12.

At the Motion to Dismiss stage of the litigation, the Court found that Plaintiff sufficiently pleaded a claim for unlawful detention partially based on Sergeant Agan's investigation report. *See* Dkt. 34 at 8. In his report, Sergeant Agan stated that he could not see how

Dupuis-Mays was a danger to himself or others and how, if not taken to Green Oaks, he would pose such a threat. *See* Dkt. 60-2 at 10-18. Since then, Defendant Officers have presented a Declaration of Randy Agan (the "Agan Declaration") (Dkt. 60-2 at 6-9) for the record. In the Agan Declaration, Sergeant Agan essentially retracted his statements from the investigation report by stating, "upon review of all the relevant evidence, it was clear to me that probable cause did exist for Hudgens and Palko to detain and transport Dupuis-Mays for mental health care." Dkt. 60-2 at 7. While the Court recognizes the reasoning presented for Sergeant Agan's modification, there remains other evidence sufficient to overcome the qualified immunity defense at the motion for summary judgment stage. Indeed, as stated in the Court's Memorandum Adopting the undersigned's Report and Recommendations, "while Sergeant Agan's report is relevant, it is not dispositive." Dkt. 43 at 6. Similarly here, Sergeant Agan's Declaration, while relevant, is not dispositive. Based on the audio and video evidence and the internal investigation documentation, including Sergeant Agan's investigation report and subsequent Declaration, there is a genuine issue of material fact as to whether Dupuis-Mays was unlawfully detained on July 11, 2015.

2. The Right was Clearly Established at the Time of the Violation

In the few cases where courts have found probable cause for detaining a person under the Texas Health and Safety Code, the detainments have been based on suicidal statements causing the officer to believe the

detainee was mentally ill and posed a substantial risk of serious harm. *See Cantrell*, 666 F.3d at 923; *Martinez v. Smith*, 1999 WL 1095667, at *1 (5th Cir. Nov. 4, 1999); *Lawson v. Marion Cnty., Tex.*, 2014 WL 5761121, at *6 (E.D. Tex. Nov. 5, 2014). Defendant Officers contend there is not clearly established Texas jurisprudence that emergency detentions are reserved for only suicidal persons based on a decision in *Nieman v. Helton*, 2017 U.S. Dist. LEXIS 50686 (N.D. Tex. Feb. 6, 2017). In *Nieman*, the police officers who determined a person should be detained under the Texas Health and Safety Code observed that the person had impaired judgment, physical control, and memory, and was disoriented with a strong odor of alcohol. *See id.* at *15-*17. While Defendant Officers correctly note that *Nieman* did not involve suicidal statements, it also did not address the issue of "mental illness." As previously mentioned, Tex. Health & Safety Code § 573.001 requires an officer to believe that a person is mentally ill *in addition to* posing a substantial risk of serious harm to themselves or others; the *Nieman* case does not include information regarding whether the person detained was mentally ill and therefore, is not instructive. Under instructive law, Defendant Officers were on notice that detaining Dupuis-Mays was objectively unreasonable.

Namely, evidence in the record shows that, beginning with the 9-1-1 call, Defendant Officers never had evidence that Dupuis-Mays was being physically aggressive or dangerous towards anyone on the night of the incident. *See* Defendant Officers' Appendix, Disk 1, file: 911 Call 7.11.15- 15-006403 MENTAL OPC 2512 TIMBERBROOK TRL 07 11 2015 NON EMERG CALL

0202. The 9-1-1 caller assured the dispatch that Dupuis-Mays had not hit anyone; instead, Dupuis-Mays was disobeying house rules. *See id.* When Defendant Officers arrived on the scene, Dupuis-Mays remained calm and complied with their requests. *See* Defendant Officers' Appendix, Disk 2, file: KeithHudgens_201507110212_1315_53578230. Moreover, Dupuis-Mays never became physically aggressive with Defendant Officers for the nearly forty-five minutes they spent with him while attempting to get him cleaned and compliant with house rules. *See id.*

Separately, when Defendant Officers asked the Group Home workers why they could not take Dupuis-Mays to Green Oaks themselves, they responded they had brought their children with them to work and they were afraid. *See* Dkt. 60 at 12. Defendant Officers attempt to use these statements as evidence that Dupuis-Mays was dangerous. Despite these statements, however, the Court finds that based on the objective evidence that Dupuis-Mays was never physically aggressive to anyone on the date of the incident, including, but not limited to, Defendant Officers, and the multiple, extended interactions with Dupuis-Mays and Defendant Officers, wherein Dupuis-Mays was calm and compliant, there is a fact issue as to whether Defendant Officers were on notice that detaining Dupuis-Mays, when he was not being aggressive, remained calm, and complied with Defendant Officers' requests, was objectively unreasonable. Accordingly, this issue is not appropriate for summary judgment and should be decided by a trier of fact.

B. PLAINTIFF'S EXCESSIVE FORCE CLAIM

1. Plaintiff Sufficiently Alleged Excessive Force on the Facts Shown

To prevail on a Fourth Amendment excessive force claim, Plaintiff must show that Dupuis-Mays (1) suffered an injury, which (2) "resulted directly and only from the use of force that was clearly excessive to the need," and (3) "the force used was objectively unreasonable." *See Cass v. City of Abilene*, 814 F.3d 721, 731 (5th Cir. 2016) (quoting *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000)). The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The analysis must also embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *See id.* at 396-97.

Ultimately, the question is whether Defendant Officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *See id.* at 397. Factors to consider are: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396. Excessive force claims are thus necessarily fact intensive and depend on the facts and circumstances of

each particular case. *See Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012).

As to element (1)—whether the individual suffered an injury—it is undisputed that Dupuis-Mays suffered a serious injury. *See* Defendant Officers' Appendix, Disk 1, file: PES AR 2-1 71115, at 3:45-4:40. The video clearly shows that Dupuis-Mays was slammed to the ground and was bleeding from his head. *See id.* To support Plaintiff's allegation that Dupuis-Mays required staples to repair the laceration, Plaintiff offers multiple photos with staples located in the same place the video shows Dupuis-Mays struck his head. *See* Dkt. 65-1 at 35-36. Plaintiff has sufficiently pleaded the first element.

As to element (2)—whether the injury resulted directly and only from the use of force that was clearly excessive to the need—the Court again refers to the undisputed video evidence. *See* Defendant Officers' Appendix, Disk 1, file: PES AR 2-1 71115, at 3:45-4:40. The video shows Defendant Officers grab Dupuis-Mays by the head while he is seated in handcuffs in a triage room, shove him to the ground, and slam his head into a metal file cabinet, resulting in Dupuis-Mays lacerating his head and bleeding on the wall, his face, and his clothes. *See id.* There is no evidence that Dupuis-Mays's injury occurred from anything other than the force used by Defendant Officers. Moreover, there is no evidence that Dupuis-Mays was offering any physical resistance at the time Defendant Officers decided to take him to the ground; instead, Dupuis-Mays was seated and handcuffed. Accordingly, Plaintiff has sufficiently pleaded the second element.

Finally, as to element (3)—whether the Defendant Officers' actions were objectively reasonable—the Court finds that Plaintiff has sufficiently demonstrated facts that Defendant Officers' actions were not reasonable under the circumstances. The video from inside the Green Oaks triage room shows that Dupuis-Mays was still handcuffed[3] and sitting across the room[4] from Defendant Officers; Defendant Officers have not claimed, nor does the video show, there was any immediate threat of safety to the officers or others. *See* Defendant Officers' Appendix, Disk 1, file: PES AR 2-1 71115. Additionally, the video shows that Dupuis-Mays was not resisting arrest or attempting to evade arrest. *See id.* Furthermore, Sergeant Agan's own investigation concluded, "Detective Palko used poor tactics and did not follow McKinney Police Department procedures in dealing with Dupuis-Mays' spitting." *See* Dkt. 60-2 at 8. While a hand-cuffed Dupuis-May's spitting may have been unpleasant and unsanitary, it remains far from an action that was threatening or potentially harmful to Defendant Officers, and a jury could find it was unreasonable to use the level of force applied here by Defendant Officers. The video evidence combined with the conclusions from Sergeant Agan's

---

[3] At this point, Dupuis-Mays had been handcuffed for nearly an hour-and-a-half.

[4] The video from inside the triage room shows that Defendant Officers were standing about three (3) to seven (7) feet from the corner of the room where Dupuis-Mays was seated and handcuffed. *see* Defendant Officers' Appendix, Disk 1, file: PES AR 2-2 71115, at 3:45.

report demonstrate that Plaintiff has sufficiently pleaded the third element.

2. The Right was Clearly Established at the Time of the Violation

The Fourth Amendment creates a "right to be free from excessive force during a seizure." *Trammell v. Fruge*, 2016 U.S. Dist. LEXIS 84223 (5th Cir. 2017); *see also Darden v. City of Fort Worth*, 2016 U.S. Dist. LEXIS 105926 (5th Cir. 2017). Defendant Officers argue that several courts have held that a police officer may use force to restrain an individual when spitting is involved. *See* Dkt. 60 at 14. Plaintiff argues there is clearly established law showing the amount of force used by Defendant Officers in response to Dupuis-Mays's spitting was excessive. *See* Dkt. 65 at 22. The Court agrees with Plaintiff. Specifically, a directly analogous incident was described in *Brady v. Louisiana*, 1993 WL 277008 (5th Cir. 1993). In *Brady*, a prisoner spat at a correctional officer and the officer responded by hitting the prisoner in the face. *Id.* at *1. The Fifth Circuit concluded it was unnecessary for the officer to hit the prisoner because it was intended to stop the prisoner from spitting, and there was no threat to be reasonably perceived by the officers since the prisoner was already restrained. *See id.* at *2. Therefore, *Brady*, along with several other cases in the Fifth Circuit, constitute clearly established law to show that the amount of force Defendant Officers used in response to Dupuis-Mays's spitting was excessive, in light of the fact that Dupuis-Mays was handcuffed and no reasonable officer would find Dupuis-Mays posed a threat. *See id.*; *Anderson v. McCaleb*, 480 Fed. App'x

768, 773 (5th Cir. 2012) (finding clearly established law put the officers on notice that they could not beat the plaintiff once he stopped resisting arrest and that they could not slam the plaintiff to the ground after he was handcuffed); *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (finding officers were on notice, under clearly established law, that slamming a plaintiff's face into a vehicle when she was not resisting arrest or trying to flee violated her Fourth Amendment rights); *Sanchez v. Hialeah Police Dept.*, 357 Fed. App'x 229, 232 (11th Cir. 2009) (consistently allowing an excessive force claim to go forward where an arrestee was handcuffed, posed no risk of danger to the officer, and was not resisting arrest). The Court thus finds that Defendant Officers have not met their summary judgment burden regarding qualified immunity on Plaintiff's excessive force claim, and this claim should proceed to trial.

C. PLAINTIFF'S FALSE REPORTING CLAIM

Defendant Officers lastly argue there is no liability under 42 U.S.C. § 1983 "solely for the filing of an inaccurate or false report and nothing more." *See* Dkt. 60 at 16. In support, Defendant Officers cite to a Fifth Circuit case stating, "there is no right to a completely accurate police report." *Smith v. Patri*, 99 Fed. App'x. 497, 498 (5th Cir. 2004). The Court, however, will not consider *Smith* as binding precedent for several reasons. First, in *Smith*, the Fifth Circuit expressly stated that "[p]ursuant to 5TH CIR. R. 475" the opinion "should not be published and is not precedent. . . ." *See id.* at 497. Second, upon further review, the case does not stand for the proposition cited to by Defendant Officers. In *Smith*, the allegedly

inaccurate report involved a minor detail that was ultimately inconsequential to the ultimate question in the case. *See id.* at 499. Third, the jailer that submitted the allegedly false report eventually testified at trial that he could not recall the full details as he had reported, *i.e.*, the inaccuracy was not intentional. Finally, *Smith* involved a dissimilar set of underlying facts which are not analogous to this case. Accordingly, the Court will not consider *Smith* as binding precedent regarding the false reporting claim at issue.

Instead, the Court considers instructive, *Seibert v. Cannaday*, wherein that court found that a police officer "did not have an official duty to create and relay lies about Plaintiff." 2005 WL 646048, at *8 (N.D. Tex. Mar. 18, 2005). In *Seibert*, the defendant police officer falsely communicated that the plaintiff had previously attempted suicide to the Irving police department. *See id.* The court determined that this false communication "taint[ed] the decision to arrest Plaintiff." *See id.* The court ultimately held the defendant police officer was not entitled to qualified immunity regarding the claims under § 1983. *See id.*

Regarding Defendant Officers' arguments, the Court first notes they mistakenly narrow Plaintiff's false communications allegations to the "filing of a false report and nothing more." *See* Dkt. 60 at 16. In fact, Plaintiff alleges that Defendant Officers *falsely reported the events of the entire night* both to Green Oaks and to the McKinney PD. *See* Dkt. 65 at 24; *see also* Dkt. 1 at 4-7. Specifically, per Sergeant Agan's investigative report and contrary to the undisputed video evidence, Defendant Officers told Green Oaks

staff that Dupuis-Mays "bumped his head while they were not in the room." *See* Dkt. 60-2 at 10; *see also* Dkt. 1 at ¶ 23. Additionally, Defendant Hudgens provided an inaccurate written report, which falsely stated that D&S staff told Defendant Officers that Dupuis-Mays "struck the in house staff several times when they attempted to enforce the house rules" and "[w]hile enroute to Green Oaks, Mays became increasingly agitated. . . ." *See* Dkt. 60-2 at 50. The Court finds these reporting falsities to be consequential to Plaintiff's unlawful detention and excessive force claims, and that a jury could find the false statements were intentionally made by Defendant Officers.[5]

As in *Seibert*, Defendant Officers did not have any official duty to create and relay such lies about Dupuis-Mays. *See* 2005 WL 646048, at *8. Through their false statements to Green Oaks staff and inaccurate written responses during Sergeant Agan's investigation, Defendant Officers did just that. While Defendant Officers contend that these falsities were merely "regrettable," in actuality, the falsities obstructed the investigation regarding the July 11, 2015, incident and improperly contributed to the alleged unlawful detention of and use of excessive force on, Dupuis-Mays. Accordingly, Plaintiff is entitled to present this issue to a jury, along with her other Section 1983 claims.

---

[5] Defendant Officers did not offer affidavits addressing these statements.

V. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the Court recommends that Defendants Michael Palko and Keith Hudgens's Motion for Summary Judgment on Qualified Immunity (Dkt. 60) be **DENIED**, and Plaintiff's unlawful detention, excessive force, and false reporting claims should proceed to trial.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). The parties are directed to Local Rule CV-72(c) for page limitations on objections.

A party is entitled to a *de novo* review by the district court of the findings and conclusions contained in this report only if specific objections are made, and failure to timely file written objections to any proposed findings, conclusions, and recommendations contained in this report shall bar an aggrieved party from appellate review of those factual findings and legal conclusions accepted by the district court, except on grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *Id.*; *Thomas v. Arn*, 474 U.S. 140 (1985); *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 8th day of January, 2018.

/s/ Kimberly C. Priest Johnson
KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40415

[Filed May 7, 2019]

JERI LYNN RICH, as representative for Gavrila Covaci Dupuis-Mays, an incapacitated person,
Plaintiff –Appellee,

v.

MICHAEL PALKO; KEITH DUANE HUDGENS,
Defendants –Appellants.

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

ON PETITION FOR REHEARING EN BANC

(Opinion 4/3/19 , 5 Cir., __, __ F.3d ___)

Before KING, SMITH, and WILLETT, 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:

/s/
UNITED STATES CIRCUIT JUDGE