19-5689

no._____

ORIGINAL

In The

United States Supreme Court

October Term, 2019

Benjamin Oshea Calhoun
Petitioner

Vs.

Tony Villa-officer, G.D. Rogers-officer, Z.J. Mathis-officer, Martha Montalvo-Houston Police Department Chief of Police, City of Houston, J.A. Devereux-OFFICER, S.L. Sievert

Respondents

Petition For Writ of Certiorari To The
United States Court Of Appeals For
The Fifth Circuit

Brief of Petitioner

Pro-se Petitioner: Benjamin Oshea Calhoun

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Questions Presented For Review

Rather the Appellant courts ruling to uphold the District Courts order which granted defendants motions to dismiss conflicts with the Supreme courts prior decision on reasons a court should grant motions to dismiss for failure to state a claim for which relief could be granted ?

The United States Southern Texas District Court and U. S. Fifth Circuit Court of Appeals has decided the issue of granting motion to dismiss for failure to state a claim in a manner that has so far departed from the accepted and usual course of proceeding such as to call for an exercise of judicial supervision , when both courts added then considered false statements which was material to granting defendants motion to dismiss and finding that probable cause was not at issue for a jury to decide?

Rather the Fifth Circuit opinion in favor of the District Court adding three new claims of defense for the defendants conflicts with Federal Rules of Civil Procedure 12 and Federal Rules of Evidence 605 ?

Rather the Fifth Circuit ruling in favor of District court order granting motions to dismiss for failure to state a claim for which relief could be granted where the defendants did not provide a statute that authorized Calhoun's arrest conflicts with Texas law and the Fifth Circuits prior Texas rulings on legal authority to make warrantless arrest of defendant in Texas ?

Rather the Circuit Court order affirming judge Bennett's decision not to recuse himself conflicts with 28 U.S.C. 144 and this courts ruling in ,Sao Paolo State of Federative Republic of Braz. v. Am Tabacco Co., 535 U.S. 229, 232-33 (2002) ?

The Parties to the Proceeding

The parties to the proceeding oor as followed:

Petitioner: Benjamin Oshea Calhoun

Respondents: Tony Villa - officer, G.D. Rogers - officer, Z.J. Mathis - officer, Martha Montalvo - Houston Police Department Chief of Police, City of Houston, J.A. Devereux - officer, S.L. Sievert

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Opinions Below

The decision of the Court of appeals denying rehearing en-banc (opinion not published) is attached as app. 10A – 11A . The decision of the panel court of appeals affirming the district court order dismissing the case (opinion not published) is attached as app. 2A - 8A. The memorandum by the Southern District Court of Texas recommending that case be dismissed (opinion not published) is attached as app. 13A - 23A. The district court order adopting the memorandum and dismissing the case (opinion not published) is attached as 25A. The district court order denying motion for reconsideration (opinion not published) is attached as 27A.

Jurisdiction

On February 14, 2019 the court of appeals issued its memorandum and opinion denying appellants appeal. On March 15 The appellant court denied appellants suggestion for rehearing en-banc. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1)

Statutory and Constitutional Provisions

28USC 144 which provides: Whenever a party to any proceeding in a District Court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filled not less than ten

days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of council of record stating that it is made in good faith.

Federal Rules of Civil Procedure 12(b)(6):

"Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (6) failure to state a claim upon which relief can be granted."

42 USC 1983 which provides that Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Fourth Amendment to The U.S. Constitution which provides: "The Right of the people to be secure in their persons, houses,

papers, and affects, against unreasonable search 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."

The other statues and laws involved or attached as appendix H.

Statement of The Case

On October 6, 2016 this case began when plaintiff, Calhoun filed a 1983 and 1985 suit for civil Rights violations. The suit was filed against the city of Houston, the former chief of police for the city Martha Montalvo, and five HPD officers. The complaint alleged on 5-20-2016 and 8-28-2016 Calhoun was false arrested, and false imprisoned by city of Houston police officers. The complaint also alleged malicious prosecution , and failure of the city and the cities chief to provide equal protection . On August 24, 2016 The U.S . Southern District Court Of Texas entered a order dismissing the complaint against all of the defendants for failure to state a claim for which relief could be granted pursuant to Federal Rules Of Civil Procedure 12(b)(6).

Calhoun appealed the case to the Fifth Circuit Court of Appeals . On February 14, 2019 The appellant court entered a seven page unsigned opinion and order in favor of the defendants which affirmed the district court memorandum and order dismissing the case. The decision to Affirm the district court order rest on an erroneous view of : (A.) 28 U.S.C. 144; (B) Federal rules of civil procedure 12; (c) Texas state law; and (d) the facts of this case.

1). **Background.** The first incident giving rise to the civil suit in the Southern District Court accrued on or about 5-20-2016 around 2:00 p.m. when Mr. Calhoun was stopped by defendant's Tony Villa and G. D. Rogers as he walked down Freeman street (app. 64A). When the officers jumped out of the H.P.D patrol car Officer G. D. Rogers had his pistol drawn. Calhoun in fear for his life jumped on to the ground and spread his arms and legs (app. 64A). Officer G. D. Rogers got on top of Calhoun and placed hand cuffs on him, willfully placed Calhoun under arrest. Calhoun did not consent to the arrest . When Calhoun asked whether he had did something wrong he was told by officer G. Rogers that that he was being placed under arrest and taken in to custody for walking along a street where a side walk was provided (app. 64A). The crime which he was accursed of violating Texas Transportation code sec. 552.006 is a class c. misdemeanor punishable by a fine. Texas penal code 12.23 states that an individual adjudged guilty of a class c misdemeanor shall be punished by a fine not to exceed $500. Minutes later Six additional H.P.D officers arrived as Calhoun sate in the back of the patrol car. After being informed by Calhoun of the class c. misdemeanor citation which Calhoun was being arrested for the same day that the citation was issued, not one of the officers attempted to stop the officers from false arresting plaintiff. On 5-21-2016 the charges against Calhoun were dropped and the case was dismissed (app. 64A) .

The second incident which gave rise to the civil suit accrued On 8-28-2016 at the 1700 block of Cullen st. when Calhoun was

approached by Sgt. S. L. Sievert (app. 64A). Sgt. Sievert over his loud speaker told Calhoun to get off of the rail road track. Three to four seconds latter he announced that he was coming to get Mr. Calhoun (app. 65A). Calhoun jumped on to the , ground, placed his arms above his head and spread his arms and legs. Sgt. Sievert jumped out of his patrol truck and then jumped on to Calhoun's back. Sgt. Sievert then unnecessarily placed his knee in to Calhoun back, applying pleasure while hand cuffing him. After Calhoun was hand cuffed Sgt. Sievert then unnecessarily pulled out his flash light and began to shine it in to plaintiff's face blinding plaintiff while yelling profanity at plaintiff (app. 65A)

Three additional H.P.D. officers arrived. Not one of them protested to plaintiff being arrested for a class c misdemeanor citation (Texas Transportation Code 28.07(b)(2)(A)). On 9-29-2016 the charges against Calhoun were dropped and the case was dismissed. The two arrest on 5-20-2016 , 8-28-2016 and past false arrest for class c misdemeanors make four separate times by different groups of officers that the H.P.D. supervisors has allow to happen to Calhoun (app. 65A - 66A) . Each time Calhoun was false arrested and imprisoned he was transported to the city of Houston jail for a class c misdemeanor he was excepted in to the jail by the H.P.D employees who worked within the city jail (app. 66A) . This happened at both the MYKAWA ROAD jail and the city jail on 61 RIESNER ST. ,even though the jail blotter sheet which one of the arresting officers was required to filed out when turning Mr. Calhoun over to the city jail clearly showed that (a) the arrest was made for a class c citation; (b) the class c citation is

punishable by a fine ; and (c) the citation was issued the same day that plaintiff was taken in to custody. Before the filing of the civil suit and before the arrest made on 5-20-2016 and 8-28-2016 Calhoun reported police misconduct to the internal affairs (app. 66A) . Each time in the past he was mailed a letter stating that no disciplinary actions would be taken against the officer reported. On 5-27-2016 Calhoun asked to speak with a supervisor. Sgt. David Milligan took Calhoun's complaint (app. 67A) . Calhoun explained in detail to Sgt. Milligan the false arrest that took place on 5-20-2016. He then notified Sgt. Milligan that officer Tony Villa and G. D. Rogers were both wearing body cameras. Calhoun then provided Sgt. Milligan with a written affidavit. Calhoun also provided Sgt. Milligan with a copy of the Jail booking blotter sheet, court copy of the citation and order of dismissal. Despite the evidence which Mr. Calhoun provided to the City of Houston Police Departments internal affairs and the fact that the officers were wearing body cameras which captured the illegal abuse of authority, less than a week latter Calhoun was mailed a letter that stated in part that the complaint would be dismissed (app. 67A) .

One to two days a week The city council and mayor holds a public meeting called "pop off". The meeting is televised and broadcasted on Houston Stations: Comcast ch.16, tv max ch.16, phonoscope ch.2, sudden link 14, AT&T U verse ch.99, and houstontx.gov.-online (app. 68A). Prior to the two false arrest on 5-20-2016 and 8-28-2016 Calhoun notified former Mayor Anise Parker and the city council of a past false arrest. Calhoun was sent to speak with the police working within the city hall .The officers were who false arrested

Calhoun were not disciplined or retrained on making a warrantless arrest (app. 69A) . After being false arrested by Officer Villa, and Officer Rogers, Calhoun went on to notified the current Mayor, Sylvester Turner and the city of Houston city council of the false arrest and of prior false arrest by the H.P.D at one of the televised meetings.

Calhoun notified the Mayor and city council that officer Tony Villa and G. D. Rogers both where wearing body cameras. The mayor then sent Calhoun to a H.P.D. officer who worked within the city hall. Calhoun notified the municipality that in the past he was sent to speak with a H.P.D officer about H.P.D. misconduct and no one was punished or retrained on making warrantless arrest. After Calhoun explained this to mayor Turner and the city of Houston council he was still sent back to report the misconduct by H.P.D to an H.P.D police officer with less rank and policy making authority than the internal affairs and H.P.D (app. 69A). On 8-28-2016 over a month after plaintiff reported the abuse of authority to city council and the mayor, plaintiff was false arrested again (app. 69A).

2). **Initial proceedings in the District Court.** Petitioner who is a resident of the city of Houston and State of Texas, filed his original suit on October 6, 2016 and amended it as a matter of course on November 21, 2016 (app. 62A – 78A). The civil suit was filed in The U.S. District court for the Southern District Of Texas. The suit was one for false arrest, false imprisonment, malicious prosecution, and failure of the city of Houston and city's police

chief to provide equal protection. The suit was filed under 42USC 1983 and 42USC 1985. The District Court had jurisdiction under 28USC 1332. In response to the allegations of false imprisonment within the complaint filed by Calhoun the defendant's filed three motions to dismiss pursuant to rule 12(b)(6) for failure to state a claim for which relief could be granted. None of the defendants motions to dismiss stated a statute which authorized the arrest of appellant. Each motion cited and misapplied Supreme court decision in Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557 (2001) as justification for the warrantless arrest of Mr. Calhoun (app. 79A -81A). On July 3, 2017 pursuant to 28 U.S.C. 636 (b)(1)(A) all pending nondispositive motions in the case were referred to U.S. Magistrate judge Stacy for determination. Additionally, pursuant to 28 U.S.C. 636 (b)(1)(B) all pending dispositive motions were also referred to the judge for a memorandum and recommendation. On August 7, 2017 Judge Stacy issue a memorandum and recommendation that the court rule in favor of the defendants by granting the motion to dismiss for failure to state a claim for which relief could be granted pursuant to Federal Rules of Civil Procedure 12(b)(6) (app. 13A - 23A). The complaint was dismissed with prejudice.

In support of the recommendation to rule in favor of the defendants who requested that the case be dismissed within the memorandum Judge Stacy who provided the memorandum and recommendation to judge Bennett added three new claims of defense for the defendants. The three new claims of defense which consist of two state statues which the defendants had not claimed

and a false statement are as followed: (a.) Tx. transportation code 543.001. (app. 18A) ; (b.) Texas Criminal Code 14.01(b). (app. 18A) and In support of the recommendation that the case should also be dismissed because probable cause was not at issue magistrate judge added the following false statement which was not contained within appellants complaint :(c)

"As For Calhoun's claim that the officers who arrested him lacked probable cause to support the arrest Calhoun's own allegation in his complaint (Document No.3 at 12, 28, 29), that the officers witnessed him-both in the street when there was a nearby sidewalk, and one the railroad tracks- defeat his claim." (app. 19A)

On August 11, 2017 Calhoun filed a motion requesting that judge Alfred Bennett recuse himself from the case (app. 85A – 88A). Calhoun pointed out that he did not fill that judge Bennett would weigh the evidence fairly based off past rulings and refusing to rule which were biasly in favor of defendants. (app. 88A) . (Within this action the judge has made three rulings on motions filed. The three rulings along with the motions which the judge has refused to rule on and the negative affect it has had violates plaintiff's right to a fair and impartial trial and makes it likely that he will rule biasly in the defendants favor for the memorandum recommended.....) On 8-24-2017 District judge Bennett adopted the memorandum by magistrate judge Frances Stacy and issued an order dismissing all pending motions and granting the defendants three motion to dismiss the case for failure to state a claim for which relief could be granted (app. 23A).

On 4-13- 2018 after judge Bennett ruled on the motion for reconsideration which Calhoun had filed almost eight months earlier the Southern District Court excepted Appellants notice of appeal to the Fifth Circuit and the case was appealed .

3). **The Court of Appeals Decisions.** On appeal ,The appeal was heard without oral hearing. Within Calhoun's principal brief which was filed on June 1, 2018 and pursuant to letter dated June 7, 2018 ,from Fifth Circuit deputy Clerk Christina Gardener the principal brief and appendix was amended on June 20, 2018 (app. 29A - 59A). Through the brief Calhoun notifies The Fifth Circuit Court that within the three separate motions to dismiss which the district court granted the city of Houston police and its six named employees , the Defendants do not state one state or federal statute which authorizes Calhoun's arrest with the motion(s) to dismiss. (app.35A) Under Texas law A defendant has legal authority to arrest a plaintiff without a warrant only when a statute provides for a warrantless arrest. Texas v. Parson, 988 S.W.2d 264, 266 (Tex. App.-San Antonio 1998, no pet.) ; U.S. v. Sealed juvenile 1, 255 F.3d 213 (Tex.)(5th Cir. 2001) . (Under Texas law, law enforcement officer can make warrantless arrest only if federal or state statute imbues him with that authority.) (app. 35A) . Calhoun goes on to argue within the principal brief that Instead of a state or federal statute as a defense within all three motions to dismiss defendants state that quote "plaintiff has failed to state a claim for violation of his constitutional rights because the United States Supreme Court has held that it is not unconstitutional to arrest an individual for a low level misdemeanor, even one

punishable by a fine only" citing and misapplying Atwater v. City Of Lago Vista, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557 (2001). (app. 35A).

Within the brief to the appellant court Calhoun also argued that the District Courts order and opinion which he was appealing was also erroneous because magistrate judge Stacy abused her discretion by adding three new claims of defense for the defendants, which were not a part of the defendants defensive pleading. The three new claims of defense were material in the court concluding that the defendants were entitled to the granting the defendants motions to dismiss and without them the motions along were insufficient in granting motion to dismiss for failure to state a claim for which relief could be granted. The three new claims of defense are as followed: (1) transportation code 543.001.; (2) Texas Criminal Code 14.01(b).(note penal code 14.01 was an error by Calhoun) ; and in support of finding that probable cause was not at issue the district court added the following false statement which was not raised by either the plaintiff or the defendants:

"As For Calhoun's claim that the officers who arrested him lacked probable cause to support the arrest Calhoun's own allegation in his complaint (Document No.3 at 12, 28, 29), that the officers witnessed him-both in the street when there was a nearby sidewalk, and one the railroad tracks- defeat his claim."(app. 19A)

on February 14, 2019 the Circuit panel considered and excepted the two new state statutes and false statement within the District Court's memorandum added by the District court and upheld the District Courts decision to dismiss the case for failure to state a

claim for which relief could be granted (app. 2A - 8A). The Circuit panel also upheld judge Bennett's decision not to recuse himself.

Addressing the claims of the Texas statutes penal code 14.01 and Trans. Code 543.001 which Calhoun claimed that the District court had erroneously added, the bottom of page 4 of the opinion by the Circuit panel provides in relevant part quote:

"The magistrate judge did supply the applicable statutes in the memorandum and recommendation, as adopted by the district court. Calhoun contends that the magistrate judge cannot supply the statute when the defendants failed to do so. We disagree."(app. 5A)

In addition to excepting the District Courts adding then considering the two statutes which was not a part of the defendants defense pleadings, the Fifth Circuit court did not address the false statement added by the District Court which was material to finding that probable cause was not at issue for a jury to decide. Rather that address the false statement added by the District Court directly the Fifth Circuit court added a false statement of their own. Page two of the opinion the panel provides in relevant part quote: On May 20, 2016 Calhoun was arrested for jay walking by officer Villa and G. Rogers" and "On August 28, 2016 Calhoun was arrested by sergeant Sievert for standing on railroad tracks and refusing to leave after being so directed."(app. 3A)

The entire statement on page 2 of the memorandum pertaining to statements the court claimed Calhoun made within his complaint about the arresting officers for the May 20, 2016 arrest and the

August 28, 2016 arrest are false and were not a part of the appellant record from the district court or Calhoun's complaint. Both the November 21, 2016 complaint and the complaint from March 3, 2017 were within the appendix to the brief, which Calhoun provided to assist the court in reviewing the appeal. Even more unusual The Fifth Circuit court within the opinion did not provide a page number that the statements that they claimed made within his complaint which defeated any claims that the officers arresting Calhoun did not have probable cause for the arrest, could be found within the complaint to help Calhoun to understand how they came to the conclusion. The false statements pertaining to Calhoun's arrest which the Appellant court added then considered were material to the court concluding that their was no issue of rather the police had probable cause to arrest Calhoun for a jury to decide. Calhoun pointed out within the motion for rehearing En-Banc that the false statements pertaining to Calhoun's arrest which the panel court claimed could be found within Calhoun's complaint was not within the complaint (app.60A).

Last is the question of rather judge Bennett should have recused himself from the case. (app. 54A – 58A)

On the issue of recusal page 6-7 of the Circuit Court opinion in relevant part the court provides quote:

"Finally, we address Calhoun's appeal of the denial of his motion to recuse judge Bennett. First Calhoun's motion, filed ten months after he filed the lawsuit, was untimely. A motion to recuse must be

filed ten days of the term beginning when the case is to be considered , unless the movant can show good cause for delay. See Patterson, 335 F.3d at 483. Calhoun did not argue good cause for delay. Second, the substance of his argument in favor of recusal was based on judge Bennett's adverse rulings in other cases, which is not sufficient to require recusal. Liteky v. United States, 510 U.S. 540, 556 (1994)." (app. 7A -8A)

The appellant court concluded that district judge Bennett did not abuse his discretion in not recusing . Calhoun disagree's.

Reason that the writ should be granted

I.

Summary of the argument on why the writ should be granted. The writ should be granted and the case should be reversed back to the District Court for trial because , The United States Southern District Court and U. S. Fifth Circuit Court of Appeals has decided the issue of granting motion to dismiss for failure to state a claim in a manner that has so far departed from the accepted and usual course of proceeding such as to call for an exercise of judicial supervision. Both courts did so by adding false statements to their memorandum. On page seven of the District Court memorandum dismissing the case in favor of the defendants, the district court added then considered the following false statement quote:

"As For Calhoun's claim that the officers who arrested him lacked probable cause to support the arrest Calhoun's own allegation in his complaint (Document No.3 at 12, 28, 29), that the officers

witnessed him-both in the street when there was a nearby sidewalk, and one the railroad tracks- defeat his claim."

(app. 19A)

Calhoun informed the appellant court of this fact within the principal brief. (app. 32A and 49A) the Circuit Court did not directly address the issue of the false statement being added by the district court in favor of the defendants instead On page 2 of the seven page panel memorandum dismissing the appeal in favor of defendants the Fifth Circuit added then considered the following false statement which was not a part of the record:

"On May, 20, 2016 Calhoun was arrested for jay walking by officer Villa and G. Rogers" and "On August 28, 2016 Calhoun was arrested by sergeant Sievert for standing on railroad tracks and refusing to leave after being so directed." (app. 3A)

Calhoun brought up the fact that the statement on page 2 of the panels memorandum pertaining to the two arrest was not a part of the record within the motion for En Banc reconsideration filed on 2-28-2019 which was denied (app. 60A).

The Fifth Circuits adding the false statement in support of finding that probable cause for the arrest of Calhoun was not at issue conflicted with this court because they did not read the facts alleged in the complaint in the light most favorable" to the plaintiff and accept the factual allegations as true. *See* H.J. Inc. v. Northwestern Bell Tel. Co. 492 U.S. at 249, 109 S. Ct. 2893.

Additionally the judges adding the false statements and statutes also violates Fed. R. Evid. 605, 12(h), and 12(b).

The Fifth Circuit court decision to affirm the District Court order dismissing the case for failure to state a claim for which relief could be granted should be reversed because the complaint was sufficient and did provide a claim for which relief could be granted. The complaint provides defendants with factual allegations to support the false imprisonment claim along with the elements of a false imprisonment violation which entitled plaintiff to relief. The elements of false imprisonment which needs to be alleged for a plaintiff to state a claim to which relief could be granted under Texas law are (1) willful detention, (2) without consent, and (3) without authority of law. Wal-Mart Stores, Inc. v Cockrell 774 (Tex. App.-Corpus Christi 2001). Calhoun alleged each of these elements along with supporting facts within the complaint .*See* (app. p.64A – 65A). Within Calhoun's complaint he alleged that defendant's acted under color of the statutes, policy, customs, ordinances, and usage of the state of Texas, the city of Houston (app. 63A) and The City of Houston Police violated plaintiff's constitutional rights which are protected under the Fourth ,Fifth, Sixth, and Fourteenth Amendment to the U.S. Constitution (app.70A) along with factual allegations to support the claims(app. 64A -69A) as required for plaintiff to have stated a claim to which relief could be granted for 1983 suit. The U.S. Fifth Circuit Court Decision to uphold the District Courts order granting defendants motions to dismiss for failure to state a claim for which relief could be granted conflicts with state of Texas and federal laws because the defendants did not provide a statute that authorized the arrest as required by law. *See*, Texas v. Parson

988 S.W. 2d 264 266 (Tex. App. San Antonio 1998 no pet.); U.S. v. Sealed Juvenile 1, 255 F.3d 213 (Tex) (5th Circuit 2001).

On the issue of judge Bennett refusing to recuse himself the question to the appellant court on that issue was " rather judge Bennett abused his discretion in refusing to recuse himself" from the case. (app. 30A) This was because in this case that would limit review of the judges bias conduct to the substance of the motion. In this case judge Bennett showed bias both before and after the motion for recusal was filed and he had a duty to recuse himself with or without request from a case which he had bias in favor of one of the parties. Judge Bennett had a duty to recuse himself from any case which he knew he had a personal bias against one of the parties involved or in favor of one of the parties to the proceeding at any time of the proceeding but did not. *See* , Sao Paolo State of Federative Republic of Braz. v. Am Tabacco Co., 535 U.S. 229, 232-33 (2002).(If a judge has a personal bias or prejudice against a party, in favor of an adverse party, or about the subject matter of the suit, the judge should recuse himself or herself)

Which provides :Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The Fifth Circuits memorandum which found that judge Bennett did not abuse his discretion in not recusing himself should be reversed in part because judge Bennett showed bias in favor of defendants in dismissing the case after being informed through objections to memorandum (app. 91A-92A) , and motion for

recusal(app.87A), that defendants had not provided a statute which authorized Calhoun's arrest or any other motion before the case was dismissed and that within District Court memorandum recommending that the defendants be granted their motions to dismiss the case Magistrate judge Stacy had added a false statement and two statutes to defendants defense. Judge Bennett then dismissed the case on August 24, 2017 without a hearing on the motions to dismiss as required by 12(i). Once Calhoun filed a motion for reconsideration on September 5, 2017 (amended on September 6,2017) judge Bennett further demonstrated his bias by refusing to rule on the motion for reconsideration for seven months causing delaying in the appellate process .The long delay in ruling on the motion was an abuse of discretion and bias in favor of the defendants in part because the motion present any new, novel or challenging question of law . Judge Bennett who denied the motion ignored Calhoun's argument which reiterated that the memorandum which he adopted contained a false statement and two new statutes added by judge Stacy as claims of defense for the defendants .(app. 95A – 96A). The Fifth Circuit court of Appeals opinion and order affirming Judge Bennett's decision not to recuse himself should also be vacated because prior to the case being dismissed Calhoun filed a motion requesting that judge Bennett recuse himself under 28 U.S.C. 144 , along with a certificate that the motion was being filed in good faith and a affidavit with judge Bennett . Rather than transfer the case to another judge, judge Bennett violated 28 U.S.C. 144 and bused his discretion in dismissing the case days latter.

The Circuit panel added and considered a false statement in support of their opinion that Calhoun's motion for recusal was groundless. (app. 7A - 8A). The false statement within the opinion in support of affirming District judge Bennett's decision to deny motion for recusal in part provides quote:

"Second, the substance of his argument in favor of recusal was based on judge Bennett's adverse rulings in other cases, which is not sufficient to require recusal. Liteky v. United States, 510 U.S. 540, 556 (1994)." (app. 7A – 8A)

The statement is false. No where within the brief did Calhoun argue about the complaint which is the part of Calhoun's complaint that Calhoun bring up judge Bennett's adverse rulings in other cases. Again the court provided no page number which they felt that Calhoun argued about "judge Bennett's adverse rulings in other cases" to help under stand how they came to this conclusion.

II.

The Appellant Courts ruling upholding the District Courts order which granted defendants motions to dismiss conflicts with the Supreme courts prior decision on reasons a court should grant motions to dismiss for failure to state a claim for which relief could be granted

This court has held that : "A motion to dismiss under Fed. R. Civ. P. 12(b)(6) is appropriate only if the plaintiff has not provided fair notice of its claim and factual allegations that-when accepted-as true are plausible and rise above mere speculation". Emphasis added, *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007) . A plaintiff suing

state officials under 1983 can establish a prima facia case by alleging: (1) a violation to constitutional or statutory right and (2) that the violation was committed by an individual acting under the color of state law. *See* 42 U.S.C. 1983 ; Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995) The Fifth Circuit court decision to affirm the district court order dismissing the case for failure to state a claim for which relief could be granted should be reversed because the complaint was sufficient and did provide a claim for which relief could be granted. Within Calhoun's complaint he alleged that defendant's acted under color of the statutes, policy, customs, ordinances, and usage of the state of Texas, the city of Houston (app. 63A) and The City of Houston Police violated plaintiff's constitutional rights which are protected under the Fourth ,Fifth, Sixth, and Fourteenth Amendment to the U.S. Constitution (app.70A) along with factual allegations to support the claims(app. 64A -69A) as required for plaintiff to have stated a claim to which relief could be granted for 1983 suit. The complaint provides defendants with factual allegations to support the false imprisonment claim along with the elements of a false imprisonment violation which entitled plaintiff to relief. The elements of false imprisonment which needs to be alleged for a plaintiff to state a claim to which relief could be granted under Texas law are (1) willful detention, (2) without consent, and (3) without authority of law. Wal-Mart Stores, Inc. v Cockrell 774 (Tex. App.-Corpus Christi 2001). Calhoun alleged each of these elements along with supporting facts within the complaint .*See* (app. p.64A – 65A). If the allegations within the complaint are taken as true at that stage of the litigation before Calhoun have had a

chance to conduct discovery defendants were not shielded by Qualified immunity. *see* Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 815, 172 L.Ed.2d 565(2009) (Qualified immunity protects government officials sued in their individual capacity from liability under Section 1983 if they perform "discretionary functions" and "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")

Policy Practice Or Custom. The defendant's statement within the motion to dismiss which was granted in part that :

" Plaintiff fails to state plausible factual allegation showing that Houston had a policy, practice or that a policy or custom was a moving force and constituted deliberate indifference resulting in a deprivation of Calhoun's constitutionally protected right." *See* (app. p.79A)

Calhoun disagrees. Under our law, unconstitutional policies or customs can take three forms: (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a "custom or usage" with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority. *See* Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003).Within the complaint by Calhoun he alleged and provided defendants with notice that : "H.P.D had a unwritten custom or policy of refusing to discipline officers for abusing their authority and violating plaintiff's rights". (app. p.66A) To establishing an unwritten policy are custom of tolerating the

false arrest of Calhoun and refusing to discipline officers for abusing their authority ,the complaint gave Defendants notice that :

" the two false arrest for class c citations stated above and the two false arrest in the past equal four false arrest by separate groups of officers that the supervisors knew of but did nothing. Each time he was transported to the city of Houston jail for a class c misdemeanor he was excepted in to the jail by the H.P.D employees who worked within the city jail. Each time plaintiff was arrested in the past one of the officers were required to turn in a police report of the arrest to an supervisor. Each time the supervisors did nothing to insure that it did not happen again .Each time that plaintiff was false arrested and imprisoned in the past and present for class c misdemeanors the officers arresting plaintiff were required to file out and turn in with the jail a document which in part stated the crime for which plaintiff was arrested at the city of Houston jail on Makawa Road and Risner St.. Each time plaintiff was excepted in to the jail even though the government document which one of the arresting officers was required to filed out when turning plaintiff over to the city jail clearly showed that (a) the arrest was made for a class c citation; (b) the class c citation is punishable by a fine ; and (c) the citation was issued the same day that plaintiff was taken in to custody. Calhoun would notify the H.P.D officers within the city of Houston jail that he was being illegally arrested for a citation which was issued the same day. On 5-27-2016 he filed a report of the false arrest with H.P.D.'s central internal affairs. Plaintiff received a letter that stated that the officers had did nothing wrong. Each time that he made complaints including complaints made along with evidence which backs up his claims" . (app. 65A – 66A).

Two further demonstrate a policy or custom Calhoun alleged that after being false arrested by Tony Villa and G.D. Rogers:

"Minutes latter six additional officers arrived as plaintiff sate in the back of the patrol car. Plaintiff notified the additional officers that he was being arrested for a class c misdemeanor citation the same day it was issued. Not one of the officers attempted to stop the officers from false arresting plaintiff. (app. 64A)

When he was false arrested : three additional HPD officers arrived . Not one of the officers attempted to see to it that he was released by Sgt. Sievert." (app. 64A)

A custom is shown by evidence of a persistent, widespread practice of government 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 government policy. Id. *See,* 5th Cir. court opinion for case No. 06–20763(5th Cir.2008) GATES v. TEXAS Dept. OF PROTECTIVE AND REGULATORY SERVICES. The allegations stated above which were alleged within the complaint were detailed accounts of what took place and if those allegations were taken as true the Fifth Circuit court affirmation of the trial court order which ruled that Calhoun has made no specific, plausible factual allegation showing that Houston had a policy, practice or that a policy or custom was a moving force and constituted deliberate indifference resulting in a deprivation of Calhoun's constitutionally protected right." Is wrong and should be reversed. The memorandum adopted by judge Bennett and affirmed by the Fifth Circuit Court also found that Calhoun did not state a claim to which relief could be granted against the any of the defendants. (app. 23A) Calhoun disagrees. Calhoun stated a claim for relief against the city and the chief within the complaint by alleging and giving the defendants notice of the allegations stated above and also by alleging the following within the complaint:

"Each time that plaintiff made a report to central internal affairs defendant police chief had or should have had notice of the unlawful arrest and police misconduct of H.P.D. personnel aimed at him. (app. 69A)

Calhoun received a letter from the Houston Police Department which stated in part that the complaint would be dismissed. The

letter served to confirm the existence of an unstated "policy" of toleration of illegal arrest of him. (app. 69A).

III.

The United States Southern Texas District Court and U. S. Fifth Circuit Court of Appeals has decided the issue of granting motion to dismiss for failure to state a claim in a manner that has so far departed from the accepted and usual course of proceeding such as to call for an exercise of judicial supervision , when both courts added then considered false statements which was material to granting defendants motion to dismiss and finding that probable cause was not at issue for a jury to decide.

The United States Southern District Court and U. S. Fifth Circuit Court of Appeals has decided the issue of granting motion to dismiss for failure to state a claim in a manner that has so far departed from the accepted and usual course of proceeding such as to call for an exercise of judicial supervision. Both courts did so by adding false statements to their memorandum. On page seven of the District Court memorandum dismissing the case in favor of the defendants, the district court added then considered the following false statement quote:

"As For Calhoun's claim that the officers who arrested him lacked probable cause to support the arrest Calhoun's own allegation in his complaint (Document No.3 at 12, 28, 29), that the officers witnessed him-both in the street when there was a nearby sidewalk, and one the railroad tracks- defeat his claim."

(app. 19A)

Calhoun informed the appellant court of this fact within the principal brief. (app. 32A and 49A) On page 2 of the seven page panel memorandum dismissing the appeal in favor of defendants

the Fifth Circuit added then considered the following false statement which was not a part of the record:

"On May, 20, 2016 Calhoun was arrested for jay walking by officer Villa and G. Rogers" and "On August 28, 2016 Calhoun was arrested by sergeant Sievert for standing on railroad tracks and refusing to leave after being so directed." (app. 3A)

In addition to adding then considering the false statement the District Court within the memorandum dismissing the case also added the following statutes which was not raised by the defendants:

In support of the recommendation that the arrest for transportation code 552.006 on the same day that the citation was written was lawful the judge added Tx. Transportation code 543.001 (app. 18A).

In support of the recommendation that the arrest for transportation code 28.07(b)(2)(A) on the same day that the citation was written was lawful the judge added Texas Code Criminal Procedure 14.01(b). (app. 18A).

Within the principal brief Calhoun informed the Circuit court of the false statement and two new statutes erroneously added to the defendants defense by magistrate judge Stacy and adopted by judge Bennett. Calhoun pointed out that the statement was false and not a part of any petition by him .He also pointed out that the false statement by the district court pertaining to his arrest and the arresting officers was not a part of any of the defendants pleadings. The statement which the district court claimed was made by

Calhoun pertaining to his arrest and the arresting officers, was not within the original petition filed on October 6, 2019 or the amended petition filed on November 21, 2019 and Calhoun provided the court with copies of both petitions within his appendix to the fifth circuit brief. The Fifth Circuit within their opinion addressed the two statutes directly. In relevant part the Fifth circuit added quote:

"The magistrate judge did supply the applicable statutes in the memorandum and recommendation, as adopted by the district court. Calhoun contends that the magistrate judge cannot supply the statute when the defendants failed to do so. We disagree."(app. 5A)

As for the third claim of defense added to page 6 of the District Court memorandum which was quote:

"As For Calhoun's claim that the officers who arrested him lacked probable cause to support the arrest Calhoun's own allegation in his complaint (Document No.3 at 12, 28, 29), that the officers witnessed him-both in the street when there was a nearby sidewalk, and one the railroad tracks- defeat his claim."(app. 19A)

The appellant court did not directly address the third claim of defense added by the District Court Instead of directly addressing the false statement the appellant court addressed the issue of the false statement by adding a false statement of their own.

Within the seven page memorandum dismissing the case the Fifth Circuit added then considered the following false statement which was not a part of the District Court record : "On May, 20, 2016 Calhoun was arrested for jay walking by officer Villa and G. Rogers" and "On August 28, 2016 Calhoun was arrested by

sergeant Sievert for standing on railroad tracks and refusing to leave after being so directed."

The district court memorandum and The Fifth Circuit court in adding a false statement to the circuit court memorandum in support of affirming the District Courts memorandum which contained a false statement was so fare from the usual course of proceedings in ruling on motions to dismiss as to call for judicial supervision First because the lower courts did not following the accepted and usual course of proceeding an read the facts alleged in the complaint in the light most favorable" to the plaintiff and accept these factual allegations as true. See H.J. Inc. 492 U.S. at 249, 109 S. Ct. 289. (In applying this standard, a district court must "read the facts alleged in the complaint in the light most favorable" to the plaintiff and accept these factual allegations as true.)

Neither Court provided a page number where the statement which they claimed Calhoun made within the complaint could be found and neither court provided no statute , case law or set of guiding rules which they relied on in making the decision that the district court could add two new statutes for the defendants.

Both courts were informed of the errors in adding false statments to enable them to review the petition by Calhoun ,then see that the statements which they claimed were made within his petition were wrong. Allowing them to correct the error within the memorandum if adding the false statements were a mistake. The district court was informed that the statement was not a part of the petition first through an objection to Magistrate judge Stacys

recommendation memorandum. Then through the motion for recusal Calhoun brought it up again the court refused to correct the error. Then last through a motion for reconsideration.

The fifth circuit court was informed of the false statement which the panel added through a motion for rehearing or rehearing en-banc which the court declined.

The Fifth Circuit panel affirmation of the lower courts ruling should be reversed because Calhoun within his complaint requested a trial by jury not by judge (app.63A) , so the District Court was wrong to add the false statement in support of deliberating on rather the police did or did not personally witness Calhoun violate the misdemeanor crimes which he was accused of . Rather the police did or did not personally witness Calhoun violating the misdemeanor crimes which are punishable by a fine is an issue for a jury to decide not the judge. In deciding a motion to dismiss, the district courts duty " is merely to asses the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000); Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985).

iv.

The Fifth Circuit opinion in favor of the District Court adding three new claims of defense for the defendants conflicts with Federal Rules of Civil Procedure 12 and Federal Rules of Evidence 605

Additionally Because the two statues and the false statements pertaining to Calhoun's complaint were not raised by the defendants

in the District Court the Fifth Circuit order affirming the District Court order should be reversed because the District Court adding then considering of the two statutes not raised by the defendants, plus the false statements by the District Court added to page 6 of the District Court memorandum (app.22A), and additionally the false statement by the Circuit Court added to page 2 of the Fifth Circuit Courts memorandum (app. 3A), all conflicts with the following Federal

Statutes :

Federal Rules of Civil Procedure 12(b) : which in relevant part provides that every response to a claim for relief in any pleading must be asserted in the response pleading (app.49A) .

Federal Rules of Civil Procedure 12(h) (1) A party waives any defense listed in Rule–(5) by:(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or(B) failing to either:(i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course (app.50A and 93A).

The lower courts actions of adding the false statement and two new statutes which were material to finding that probable cause for the arrest were not at issue for a jury to decide violated Federal Rules of Evidence 605: the presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue. (app. 49A and 93A)

V.

The Fifth Circuit ruling in favor of District court order granting motions to dismiss for failure to state a claim for which relief could be granted where the defendants did not provide a statute that authorized Calhoun's arrest conflicts with Texas law and the Fifth Circuits prior rulings on legal authority to make warrantless arrest of defendant in Texas

The court upholding the defendants motions to dismiss also conflicts with state of Texas law and federal case law, because the Defendants did not provide a statute which authorized the arrest. Under Texas Law A defendant has legal authority to arrest a plaintiff without a warrant only when a statute provides for a warrant less arrest. Texas v. Parson, 988 S.W.2d 264, 266 (Tex. App.-San Antonio 1998, no pet.) ; U.S. v. Sealed juvenile 1, 255 F.3d 213 (Tex.)(5th Cir. 2001) . (Under Texas law, law enforcement officer can make warrantless arrest only if federal or state statute imbues him with that authority.) (app. 35A). Instead of a state or federal statute as a defense defendants state that quote "plaintiff has failed to state a claim for violation of his constitutional rights because the United States Supreme Court has held that it is not unconstitutional to arrest an individual for a low level misdemeanor, even one punishable by a fine only" citing and misapplying Atwater v. City Of Lago Vista, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557 (2001) (app.38A). The difference between Atwater's case and Mr. Calhoun's in part is ,(1) Atwater plead no contest to the offense, Calhoun's case was dismissed in his favor ; (2) unlike Calhoun Atwater does not dispute that the officers had probable cause to arrest her; (3) Unlike Calhoun's arrest a state statute authorized Atwater's arrest (Texas Transportation Code sec. 543.001) and (4) unlike this case the defendants raised the statute which authorized the arrest as a defense . See, Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557 (2001). Calhoun informed defendants of the need to add a statute in plaintiff's response to defendants motions to dismiss(app. 82A-83A). They had the opportunity to correct this error once Calhoun informed them of the need for a statute which authorized the arrest but refused to. Further Under Texas law once the plaintiff proves that an arrest

or detention without a warrant, the burden is on the defendant to show legal authority for the arrest or detention. Walmart Store v. Odem, 929 S.W.2d 513, 519 (Tex. App.-San Antonio 1996). (app. 50A)The defendants never contested that the arrest accrued and did not provide a state or federal statute that authorized the arrest.

vi.

The Circuit Court order affirming judge Bennett's decision not to recuse himself conflicts with 28 U.S.C. 144 and this courts ruling in ,Sao Paolo State of Federative Republic of Braz. v. Am Tabacco Co., 535 U.S. 229, 232-33 (2002).

Last is the question of "rather judge Bennett abused his discretion in refusing to recused himself from the case". (app. 30A)

On the issue of recusal page 6-7 of the circuit court opinion in relevant part the court provides quote:

"Finally, we address Calhoun's appeal of the denial of his motion to recuse judge Bennett. First Calhoun's motion, filed ten months after he filed the lawsuit, was untimely. A motion to recuse must be filed ten days of the term beginning when the case is to be considered , unless the movant can show good cause for delay. See Patterson, 335 F.3d at 483. Calhoun did not argue good cause for delay.(app. 7A- 8A). Calhoun respectfully disagree with the Appellant courts opinion.

First the appellant court errored in limiting review to only the motion for recusal .

The questions presented to the Appellant court for review was: "rather judge Bennett abused his discretion in refusing to recuse

himself" ,rather than the question of rather judge Bennett showed bias in refusing to grant motion for recusal . This was because judge Bennett showed bias both before and after the motion for recusal was filed and to ask rather judge Bennett showed bias in refusing to grant motion for recusal limits the scope of review by the appellant court to only the motion for recusal rather than judge Bennett's bias behavior before and after the motion was filed. Second the court's limiting the scope of review only to the motion for recusal was erroneous because judge Bennett had a duty to recuse himself with or without request from a case which he had bias in favor of one of the parties. Judge Bennett had a duty to recuse himself from any case which he knew he had a personal bias against one of the parties involved or in favor of one of the parties to the proceeding at any time of the proceeding but did not. *See* , Sao Paolo State of Federative Republic of Braz. v. Am Tabacco Co., 535 U.S. 229, 232-33 (2002).(If a judge has a personal bias or prejudice against a party, in favor of an adverse party, or about the subject matter of the suit, the judge should recuse himself or herself)

Prior to the case being appealed and almost 10 months after October 6, 2016, the day that Calhoun first filed the suit on July 3, 2017 , judge Bennett referred all pending nondispositive motions in the case to U.S. Magistrate judge Frances Stacy for determination pursuant to 28 U.S.C. 636(B)(1)(A). Additionally, pursuant to 28 U.S.C. 636(b)(1)(B), all pending dispositive motions were also referred to judge Stacy for a memorandum and

recommendation to judge Bennett. On August 7, 2017 judge Stacy issued a memorandum and recommendation that the court rule in favor of the defendants by granting the three motions to dismiss for failure to state a claim for which relief could be granted pursuant to Federal Rules of Civil Procedure 12(b)(6), (app. 23A).Judge Bennett adopted the memorandum and the case was dismissed with prejudice on August 24, 2017.

Judge Bennett adopted the memorandum and ruled in favor of granting the motions to dismiss even though The defendants motions to dismiss did not state a statute which authorized the arrest of Calhoun as required by Texas law and federal law. *See.* U.S. v. Sealed juvenile 1, 255 F.3d 213 (Tex.)(5th Cir. 2001) (Under Texas law, law enforcement officer can make warrantless arrest only if federal or state statute imbues him with that authority.) *See also, Walmart Store v. Odem, 929 S.W.2d 513, 519 (Texas App.-San Antonio 1996) (*Under Texas law when a plaintiff is arrested or detained without an arrest warrant warrant, there is no presumption that the arrest or detention was legal. Once the plaintiff proves that an arrest or detention without a warrant the burden is on the defendant to show legal authority for the arrest or detention.) The defendants never contested that the arrest of Calhoun accrued barred the burden of providing a statute that authorized the arrest not the court.

The memorandum by judge Stacy which judge Bennett adopted, added a false statement and two new statutes in support of recommending that the defendants motions to dismiss be granted.

The false statement added by judge Stacy on page 6 of the District Court memorandum and recommendation was quote:

"As For Calhoun's claim that the officers who arrested him lacked probable cause to support the arrest Calhoun's own allegation in his complaint (Document No.3 at 12, 28, 29), that the officers witnessed him-both in the street when there was a nearby sidewalk, and one the railroad tracks- defeat his claim."(app. 19A)

The two new statutes added by the judge are: (a) Texas criminal Code 14.01(b) and (b) Tx. Transportation code 543.001.(app.18A)

Judge Bennett showed bias in adopting the memorandum because he had access to the complaints filed by Calhoun for 10 months before transferring the case to judge Stacy for a recommendation, So he new or should have new that the statements on page 7 of the District Court memorandum pertaining to admissions of guilt , of the charges from 5-20-2016 or 8 -29-2016 was false and made up by judge Stacy to support her recommendation that probable cause was not at issue for a jury to decide . On August 24, 2017 when the case was dismissed Judge Bennett should have new that no were within the defendant's motion to dismiss or any other pleading did the defendants claimed that Calhoun had stated that he was walking within the street on 5-20-2016 or on the railroad track on 9-29-2016. Judge Bennett should have new that defendants never claimed Criminal code 14.01 or Transportation code 543.001 as a defense because he had access to the motions to dismiss for seven months before referring the case to judge Stacy for a recommendation and second because Calhoun informed the court and defendants that the defendants only claimed a Atwater v. city

of lago vista as a defense to the false arrest claims within a response to the motions to dismiss which was filed on December 27, 2016 six months before the case was referred to judge Stacy for recommendation (app .83A - 84A)

Before the memorandum was adopted and the case was dismissed , Calhoun filed a objection to the memorandum pursuant to 28 U.S.C. 636(b)(1)(C) and Federal Rules Of Civil Procedure 72(b)(2). Within the objection Calhoun informed judge Bennett of the fact that judge Stacy had added the false statements on page 7 of the district court memorandum which she claimed Calhoun made within his complaint about the arresting officers and the two arrest in support of finding that probable cause was not at issue for a jury to decide (app. 92A) Judge Bennett still adopted the memorandum and granted defendants request to dismiss the case. Favorable or unfavorable predisposition can serve to be characterized as "bias" or "prejudice" requiring recusal because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment; that is the "pervasive bias exception" to the extrajudicial source doctrine. *See*, Liteky v. U.S. 510 U.S. 540 ,551 (1994) ; *See also* , Whitehurst v. Wright, 592 F.2D 834 (5TH Cir. Ala. 1979)(General rule that bias sufficient to disqualify judge must stem from extrajudicial source, but there is exception where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against party.) Prior to the case being dismissed on August 11, 2017 Calhoun filed a motion requesting that judge Bennett recuse himself from the case for showing bias in favor of the defendants.

The motion was filed pursuant to 28 U.S.C. 144 which in relevant part provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

A party can only file one motion for recusal pursuant to 28 U.S.C. 144 in a suit. In order to be legally sufficient the motion must contain a valid affidavit alleging personal bias or prejudice either against him or in favor of any adverse party, be accompanied with a statement certifying that the motion is being filed in good faith and the motion must be filed at least 10 days before trial or a hearing. U.S. v Sibla, 624 F.2d 864, 867 (9th Cir. 1980). If the Challenged judge determines that the affidavit and certificate are legally sufficient and timely she must recuse herself and the case will be assigned to another judge. U.S v. Sibla, 624 F.2d at 867 (9th Cir. 1980). When reviewing the affidavit the judge reviewing it must assume the facts stated in the affidavit are true, even if the judge knows them to be false. U.S. v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985)(The reviewing judge must assume the facts stated in the affidavit are true, even if the judge knows them to be false.) According to the plain language of the statute 28 U.S.C. 144 when Calhoun filed a timely and sufficient affidavit that the judge before whom the matter was pending had a personal bias or prejudice in favor of the defendants along with a certificate that the motion was being filed in good faith the judge must go no further in the case and another judge shall be assigned to here the proceedings. Rather than transferring the case to another judge, judge Bennett

ruled biasly in favor of granting defendants insufficient motions to dismiss. Within the recusal motion Calhoun pointed out that he did not fill that judge Bennett would weigh the evidence fairly based off past rulings and refusing to rule which were biasly in favor of defendants. (app. 88A) . (Within this action the judge has made three rulings on motions filed. The three rulings along with the motions which the judge has refused to rule on and the negative affect it has had violates plaintiff's right to a fair and impartial trial and makes it likely that he will rule biasly in the defendants favor for the memorandum recommended.....) Within the motion for recusal judge Bennett was informed for the third time , of that Tx. Criminal Code 14.01(b) , Transportation code 543.001 and false statement added by magistrate judge Stacy to page 7 of the District Court memorandum which she claimed Calhoun made within his complaint about the arresting officers and the two arrest (app. 91A). Judge Bennett dismissed the motion for recusal and the case without a hearing on the motion to dismiss as required by rule 12(i), days latter. On 9-5-2017 Calhoun filed a motion for reconsideration . The motion presented the same argument judge Bennett had jest ruled on when he denied the objection to the memorandum ,motion for recusal and granted defendants motions to dismiss with the exception of Calhoun informing judge Bennett that he had errored in dismissing the case without providing Calhoun a hearing under Rule 12(i), or 12(d) (app. 93A) After Calhoun filed the motion for reconsideration Judge Bennett farther demonstrated his bias against Calhoun and in favor of defendants by refusing to rule on the motion for

reconsideration that did not present any novel or challenging question of law until April 2, 2018, seven months after the motion was filed, causing delaying in the appellate process.

Conclusion

For these reasons Calhoun respectfully request that the Fifth circuits ruling in favor of granting motion to dismiss and in favor of judge Bennett refusing to recuse himself be vacated. That the case be reversed back to the district court and that the defendants be required to pay Calhoun's cost for appealing the case to the Fifth Circuit back to him within 30 days of the courts ruling.

Pro-se signature Benjamin Calhoun date 8-15-2018