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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 23, 2020
Lyle W. Cayce
Clerk

No. 20-50327
Summary Calendar

VICTOR J. EDNEY,

Plaintiff—Appellant,

versus

EONDRA LAMONE HINES; UNKNOWN ACCOMPLICE JOHN DOE; OFFICER JORDAN WENKMAN; OFFICER BOBBY KING; SERGEANT DAVID CONLEY; SERGEANT KEITH VAUGHAN,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas, Waco Division
USDC No. 6:18-CV-336

Before JOLLY, ELROD, and GRAVES, *Circuit Judges*.

PER CURIAM:*

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Victor J. Edney, proceeding *pro se* and *in forma pauperis*, appeals the district court's entry of final judgment in his lawsuit alleging violation of his civil rights. We AFFIRM.

I.

On April 24, 2018, City of Waco police received a report of a possible drowning and attempted suicide in a portion of the Brazos River that flows through a local park. When Officers Jordan Wenkman and Bobby King arrived, a crowd directed them to a man, later identified as Appellant Victor J. Edney, who was standing to his ankles in the water. Edney's mother and uncle, Eondra Hines, identified themselves and told the officers that Edney was a Marine veteran suffering from schizophrenia and PTSD who had not been taking his medication.

The officers, dressed in full patrol uniforms, identified themselves as Waco police officers and approached a seemingly "confused" Edney. Edney, apparently not believing them to be police officers despite their uniforms and announcement, asked the officers to identify themselves further. Eventually Edney came out of the water to the bank where the officers were. Once they were away from the water, Edney explained that he was in the water looking for his keys, though he was unable to explain how the keys wound up in the river and despite the fact that a set of keys were in his hand. Edney then explained that he was looking for a ball, and again contended that the officers were not actually police officers.

Because of Edney's disoriented behavior and explanations, as well as the initial report of a possible suicide, the officers decided to detain Edney while they attempted to determine if he posed a threat to himself or others. Officer Wenkman searched Edney before placing him in a patrol car and found a small unloaded firearm in his waistband and several ammunition rounds in his pocket. During the search, the officers observed that Edney

had become agitated and they suspected he was hallucinating. The officers gave Edney's wallet to his mother, and Edney complained, explaining that the woman "could be anyone wearing a suit or disguised to look like his mother."

After determining that Edney was neither a threat to himself or others and finding no other reason to take him into custody, the officers retrieved Edney's wallet from his mother and returned to him. However, because of his behavior, after verifying that Edney held a valid license to carry a firearm, his pistol was given to Hines with an understanding that it would be returned to Edney later. Following the incident, Appellant Sergeant Keith Vaughan submitted a revocation application to the Texas Department of Public Safety explaining that Edney's firearm had been seized out of concern for his mental health.[1]

Edney later filed a "citizen's complaint" with the Waco police department alleging police misconduct. After an investigation, the officers were exonerated, and Edney's complaint closed. Thereafter, Edney filed a lawsuit against Eondra Hines, an Unknown Accomplice John Doe, Officer Jordan Wenkman, Officer Bobby King, Sergeant David Conley, and Sergeant Keith Vaughan in federal district court alleging violations of his civil rights. In response to the lawsuit, Officer Wenkman, Officer King, Sergeant Conley, and Sergeant Vaughan filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) in which they raised the defense of qualified immunity.

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[1] Under Texas state law, any officer who believes that a reason to revoke a license to carry exists is required to prepare an affidavit on a form provided by the Texas Department of Public Safety explaining the reason for the revocation. *See* Tex. Gov't Code Ann. § 411.186(b).

The case was assigned to a magistrate judge who determined that because Edney failed to plead facts showing that the officers clearly violated Edney's established rights under the First, Fourth, Fifth, Sixth, or Eighth Amendments, the officers were entitled to qualified immunity. The magistrate judge further determined that references in Edney's pleadings to several sections of the Texas Civil Practices and Remedies Code, the Texas Tort Claims Act, the Texas Code of Criminal Procedure, and a Fifth Circuit case were all inapplicable to his claim that the officers violated his constitutional rights. Therefore, the magistrate judge determined that Edney failed to satisfy either prong of the qualified immunity analysis and recommended that the district court dismiss his claims with prejudice.

Edney filed a timely objection to the magistrate judge's report and recommendation. The district court overruled the objection, accepted and adopted the magistrate judge's report and recommendation, and entered an order dismissing Edney's claims against the officers with prejudice. Subsequently, Edney filed a motion for reconsideration of the district court's order and a motion for miscellaneous relief.[2] The officers filed a motion for entry of final judgement. The district court, finding no clear error in the magistrate judge's report and recommendation, again adopted the recommendation, declined to exercise jurisdiction over Edney's state law claims against Appellees Hines and John Doe, entered an order of final judgment, and denied Edney's motion of frivolous claims. This timely appeal followed.

[2] Edney's motion for miscellaneous relief alleged that relief should be granted via a "motion of frivolous claims" pursuant to Section 105.002 of the Texas Civil Practices and Remedies Code.

II.

We review a district court's grant of a motion to dismiss *de novo*. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). Under Federal Rule of Civil Procedure 12(b)(6), a federal court may dismiss a complaint that fails "to state a claim upon which relief can be granted." A court must accept as true all well-pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). "Although we liberally construe briefs of *pro se* litigants and apply less stringent standards to parties proceeding *pro se* than to parties represented by counsel, *pro se* parties must still brief the issues and reasonably comply with the standards of [Federal] Rule [of Appellate Procedure] 28." *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995).

Although Appellant Edney's brief is extremely difficult to follow, he appears to make several arguments, which we address in turn. We first address the district court's dismissal of Edney's claim for violations of his constitutional rights based on the officers' assertion of qualified immunity. Edney alleges a number of civil rights claims including a violation of his First Amendment rights because "the officers never gave him a chance to speak"; a violation of his Fourth Amendment rights when the officers "assaulted" him during his arrest, seized his firearm and detained him in the back of a police vehicle; a violation of his Fifth Amendment rights because the officers did not read his *Miranda* rights prior to detaining him; a violation of his Sixth Amendment rights when the officers "violated his constitutional law without assurance"; a violation of his Eighth Amendment rights when the officers were "crude" during their search of his person; and a violation of his rights when the officers committed "perjury" by submitting a frivolous affidavit of revocation to the Texas Department of Public Safety.

Once qualified immunity has been properly raised, the burden is on the plaintiff to negate it. *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009). Edney failed to meet this burden. In his reply brief, Edney states only that the district court's decision as to qualified immunity was "irrelevant and not applicable to the state of Texas Constitution." Edney does not seek to show that the officers violated any of his clearly established constitutional rights or that the officers' conduct was objectively unreasonable. *See Wyatt v. Fletcher*, 718 F.3d 496, 502–03 (5th Cir. 2013). Because Edney failed to raise any legal argument or identify any error in the district court judge's legal analysis or application, his claim regarding violations of his constitutional rights is deemed "abandoned." *Davis v. Maggio*, 706 F.2d 568, 571 (5th Cir. 1983); *see also Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Edney next contends that the district court erred when it declined to exercise jurisdiction over his claims of slander against Appellees Hines and John Doe. We hold that the district court did not err in declining to exercise jurisdiction over these state law claims.

Finally, Edney argues that the district court erred when it found that he failed to state a claim upon which relief could be granted, dismissed his lawsuit with prejudice, and denied his motion of frivolous claims. A "motion of frivolous claims" is a method of recovery under Texas state law. *See* Tex. Civ. Prac. & Rem. Code Ann. § 105.002 ("A party to a civil suit in a court of this state brought by or against a state agency in which the agency asserts a cause of action against the party . . . is entitled to recover."). The district court's dismissal of Edney's motion was therefore proper.

* * *

In view of the foregoing, Edney's request for oral argument is DENIED. The judgment of the district court is AFFIRMED.

FILED: 06/06/2020

No. 20-50327

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

BRIEF OF APPELLANT

The appellant's motion of frivolous claims for appeal from the United States District Court of the Western District in Texas - the Waco Division

VICTOR J. EDNEY, JR.,

Plaintiff – Appellant

v.

EONDRA LAMONE HINES; UNKNOWN ACCOMPLICE JOHN DOE; OFFICER JORDAN WENKMAN; OFFICER BOBBY KING; SERGEANT DAVID CONLEY; SERGEANT KEITH VAUGHAN,

Defendants - Appellees

Pro se: Victor J. Edney Jr.

P.O. Box 853

Waco Texas, 76703

(254) 424 – 6378

CERTIFICATE OF INTERESTED PERSONS

The appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 - have an interest in the outcome of this case. These representations are made for the judges of this Court to evaluate possible disqualifications or recusal:

1. Appellant-Plaintiff: Pro se' Victor J. Edney Jr.
2. Defendant-Eondra Lamone Hines
3. Defendant-Appellee: Texas Commission on Law Enforcement agency (TCOLE agency)/Waco Police Department (W.P.D.)
4. Defendant-Appellees: TCOLE officers/WPD; Jordan Wenkman, Bobby King, and Sergeant David Conley
5. Defendant-Appellee: TCOLE officer/Internal Affairs of W.P.D.; Sergeant Keith Vaughan
6. Counsel for Defendant-Appellee (TCOLE agents/WPD): Joe Rivera and Roy Lee Barrett; Naman Howell Smith & Lee, LLP

"s/"Victor J. Edney Jr.

Victor J. Edney Jr.

Pro se litigant of record

STATEMENT REGARDING ORAL ARGUMENT

Appellant - Pro se litigant Victor J. Edney Jr. requests an oral argument so that he can physically persuade the discretionary perspective of his case in clear view of the truth . . . while applying relevant practices and remedies of the Texas constitution - too surpass the unethical decision making of the lower court who favored the state licensed officers of the Texas Commission on Law Enforcement agency . . . who are under the Waco Police Department in this case.

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JURISDICTIONAL STATEMENT

The United States District Court of the Western District - the Waco Division had jurisdiction over this case numbered 6:18-CV-00336 in pursuant to 28 U.S.C. section 636 (b)(1)(c) which states, notwithstanding any provision of law to the contrary- the magistrate judge shall file his proposed findings and recommendations . . . while being designated by a judge to conduct pretrial matters; filed in the ROA.189. The district court in their final judgement declines to exercise jurisdiction over the case. . . With that stated: jurisdiction has just transited to the Court of Appeals in accordance to 28 U.S.C. 1291: Final decisions of district courts; which states - the courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. With the appeal now allotted, Plaintiff Edney Jr. will notate that he filed his notice of appeal timely and within the thirty-day period specified in the Federal Rules of Appellant Procedure 4(a)(1)(A). The notice of appeal was filed on April twenty, twenty-twenty in the ROA.218, and the final judgment was filed on March twenty-six, twenty-twenty noted in the ROA.204. Again, the appeal is for the final judgment in the district court - that dismissed the plaintiffs' motion of frivolous claims with prejudice against the defendants granted - motion for entry of final judgment.

A STATEMENT OF ISSUES PRESENTED FOR REVIEW

The plaintiff now presents the issues of the court: the report and recommendation of the United States Magistrate Judge that recommends the plaintiff's motion of frivolous

claims be denied: for certain reasons - docketed in ROA.189. In addition to that the court presented the order adopting the report and recommendation in ROA.202. The report and recommendation of the court denied the plaintiffs' motion of frivolous claims - for the following:

It is recommended that this Court deny Plaintiff's motion of frivolous claims. "A party to a civil suit in a court of this state brought by or against a state agency in which the agency asserts a cause of action against the party . . . is entitled to recover . . . a total amount not to exceed $1 million for fees, expenses, and reasonable attorney's fees incurred by the party in defending the agency's action." Tex. Civ. Prac. & Rem. Code § 105.002. Plaintiff filed this motion to recover costs under the Texas Civil Practice and Remedies Code. Pl.'s Mot. for Finding of Frivolous Claims, ECF No. 24. However, no state agency has asserted a cause of action against Plaintiff. The only claims in the present case are asserted by Plaintiff. There are no causes of action asserted against Plaintiff. Therefore, it is recommended that Plaintiff's Motion of Frivolous Claims should be denied in ROA.189.

Following the recommended issues of the Magistrate Judge orders - the plaintiff will present his motions of frivolous claims controversy to persuade for reversal of order given in the district court towards the TCOLE officers/WPD presented - beginning in ROA.156, 173, 181. In addition to all, the plaintiff sanctioned the defendant Hines under federal rules of civil procedure 55 – motion for default judgment located in ROA.116 but no verdict has been issued. . . that has been stated too clarify the frivolous action asserted by the TCOLE agents/WPD.

A STATEMENT OF THE CASE

On April 25, 2018, Plaintiff Edney Jr. - was brutalized and arrested for suicide by the TCOLE officers/W.P. D. . . . who acted immorally because some unknown person called the emergency services/911 stating that their cousin was trying to harm himself – in which was falsified statements reported – look in ROA.14-16. The plaintiff had no family at the park with him nor was he suicidal in this incident – check ROA.133-134. And too, add to that Defendant Hines who is of no relation to the plaintiff made false allegations to officers stating he was uncle in ROA.13. Hines and accomplice clarified that they were family and that the plaintiff was suicidal. Officers believed Hines and the unknown to be the plaintiffs' family and charged him with suicide in ROA.162-163. Later the plaintiff filed a citizen's complaint on the officers through the WPD Internal Affairs/TCOLE in ROA.6. The Internal Affairs agents then filed charges against him to the Texas Department of Public Safety Regulatory Division - pressing frivolous claims. . . and in fact - was led by presumption - check ROA.162-165. After the false allegations', the plaintiff then filed civil claims in the United States District Court for the Western District of Texas in the Waco Division ROA.1-225. So far, his claims . . . have been denied with prejudice although he presented relevant knowledge in ROA.156-160. The denial of his motion started in ROA.189, 202, 204. Now the plaintiffs' suit is in the United States Court of Appeals for the Fifth Circuit and he is pleading for the reversal of an erroneous decision in ROA.218.

A SUMMARY OF THE ARGUMENT

We are here together for the frivolous and unreasonable crime of suicide and negligible thoughts reported to the Texas Department of Public Safety (TDPS)

accusing the plaintiff of charges based upon the presumption of bad faith: from the TCOLE officers/Internal affairs and Professional standards" of WPD - whose mission is to establish and enforce standards to ensure that the people are served by highly trained and ethical law enforcement. The TCOLE officer/Internal affairs of WPD - gathered information that was falsely reported to fellow officers of the WPD involved - who pressed their assumption without any positive foundation leaving the plaintiff liable for acts he did not commit. And since the plaintiff did not commit any of the acts stated - a reversal of judgement should be awarded towards the plaintiff after this appeal.

THE ARGUMENT

The United States District Court for the Western District in the Waco Division has recommended and adopted – that the plaintiff's motion of frivolous claims be denied. United States Magistrate Judge Manske ordered in his report and recommendation under rule 636 (b)(1)(c) - reasons for denial - that is contrary. Later, the United States District Judge Albright adopted the order. With that stated, the plaintiff will now present his contentions based on why the motion of frivolous claims was denied - opposing the recommendations of the U.S. Magistrate that is clearly erroneous in the report and recommendation. Then he will persuade for reversal of order given in the district court through pleadings to recover in his motion of frivolous claim while clarifying on the cause of action asserted by the TCOLE officers/Waco Police Department. . . whose allegations are false in which entitles the plaintiff to recover in this appeal. Next the plaintiff will introduce the requirements of the motion of frivolous claims then he will follow with the contentions of the case, while voicing

factuality - fulfilling the trust of the motion.

Motion requirements

In the Texas civil practice and remedies section 105.003: motion of frivolous claim; states – (a) to recover under this chapter, the party must file a written motion alleging that the agency's claim is frivolous, unreasonable, or without foundation. The motion may be filed at any time after the filing of the pleadings in which the agency's cause is alleged. (b) The motion must set forth the facts that justify, the party's claim. (c) The motion must state that if the action is dismissed or judgment is awarded to the party, the party intends to submit a motion to the court to recover fees, expenses, and reasonable attorney's fees.

The district courts issue with controversy

The district court - argues: that no state agency has asserted a cause of action against the plaintiff in ROA.189-197.

The plaintiff objects: - The Waco police department (WPD), officers and it's "Internal Affairs Unit" being the governmental unit/state agency - who are licensed and serves for the Texas commission on law enforcement agency. . . has alleged the plaintiff with the frivolous and unreasonable crime of suicide that was falsely reported to WPD officers in which has been submitted in bad faith to the Texas department of public safety's regulatory services division in a revocation affidavit in the ROA.162-165.

TCOLE/WPD officers affidavit remarks and rebuttal from plaintiff

WPD and Internal Affairs unit: wrongfully accused the plaintiff in the affidavit. Stating: On 4-24-18 Waco Police Officers were called to a local park for a

drowning/attempted suicide. When officers arrived, they found Victor Edney still in the water. Family and friends of Edney were trying to talk him into getting out of the water but he did not get out until the officers talked him into getting out of the water ROA.139.

Now the plaintiff: I never attempted suicide and I never drowned on this day, but I was on the riverbank in the park - when I saw the WPD officers. Officers reported to the park based on false allegations of the unknown defendant who told the emergency services their cousin was drowning – who then stated – he is trying to commit suicide ROA.14-15. When officers arrived, the plaintiff knew nothing about them because he was at the park alone - meaning no family or friends ROA.133-134. In addition, no one negotiated with the plaintiff about getting out of the water for suicide. . . SUICIDE WAS NEVER A THOUGHT!

WPD: Edney told officers he did not think they were really the police even though they were in full police uniforms and identified themselves to him as being the police. Edney also did not recognize his friends and family and told officers that he did not think his mother was really his mother. He said that his mother was someone wearing a woman suit ROA.139.

The plaintiff: Edney never stated - he did not think they were the police. . . Just once Edney asked the police to identify themselves because it was dark, and they complied – ROA.8. Check their body warn cameras. Again, the plaintiff was at the park by himself and that is with no friends or family ROA.133-134. The police striped searched him and took his personal belongings - then detained him in a police vehicle just until the background check came back - then released him. Upon being released - Edney ask for

his person belongings and the police stated your family has them. Edney then told them. . . family - I did not come with family nor did you confirm any family with me. Again, he asked - why did you give my belongings to someone - that could be anyone: saying their family. For instance, in a later finding of this case: from officer Jordan Wenkman; stating, officer King gave Mr. Hines Mr. Edney's pistol in ROA.13. Although Hines in fact - was not a relative or uncle to the plaintiff ROA.133. In this case the plaintiff has sanction defendant Hines for default judgment, but the district court has done nothing ROA.116. The officers proceeded from assumption destroying the plaintiff's reputation.

WPD: Once Edney was secured officers they found him to have a .45 caliber derringer in the front of his pants. The weapon was unloaded but he had numerous rounds in his pant pockets. Edney did not tell officers he was armed, nor did he tell them he had a concealed carry permit ROA.139.

The plaintiff: During the securement of Edney - the officers found his weapon, then asked if he had a permit and he told them yes. This happened in front of the surveillance patrol vehicle. . . footage should be available.

WPD: Family members told officers that Edney was a Schizophrenic and has PTSD and he has not been talking his medicine for his mental condition. Family also told officers that Edney was in the Marines ROA.139.

The plaintiff: That is not true - family members did not stated that about Edney. . . it was a false statement to officers – for instance, Hines who the plaintiff sanction for not appearing - who was not family and who officers believed was Edney's uncle or the false cousin who called emergency services stating Victor Eden is drowning. . . then a

few minutes later stating he is trying to commit suicide. . . Or she doesn't know her cousin, so she stepped back. In which was stated in the dispatch sequence log in ROA.15.

And for the court: with frivolous claims like these asserted with in an affidavit that has been pleaded against the plaintiff for wrong doings that are non-factual. . . a reversal of order should be given towards the district courts discretion in this appeal to recover and the plaintiffs identity should be restored.

A SHORT CONCLUSION STATING THE PRECISE RELIEF SOUGHT

The plaintiff Victor J. Edney Jr. would like the court to grant this appeal by way of reversal in order - of the district court's decision for his motion of frivolous claims - that begins in ROA.156. If his motion of frivolous claims shall pass, he would like the court to grant relief through retribution, fines, and compensation. Retribution has been requested; for the unethical behavior of the TCOLE officers/WPD: to demote or fire. Fines have been applied because the officers should be charge for violating the plaintiff's civil rights. Officers Wenkman and King committed assault (Texas penal code section 22.01) by arresting the plaintiff for suicide without proof beyond a reasonable doubt ROA.137. In addition to that, Wenkman committed perjury (Texas penal code 37.02), he provided false statements to fellow officers in the WPD incident report that's' on record ROA.135-137. Next, is officer Conley (supervisor) who committed official oppression (Texas penal code 39.03) - he deprived the plaintiff of his liberty to speak and to resolve the issue at hand. And too have knowledge about the situation that occurred - like who stated the plaintiff was suicidal or how do you know my family – the plaintiff never got to tell who family was. Last is officer Vaughn, who

committed aggravated perjury (Texas penal code 37.03) - he sent the frivolous revocation affidavit to the Texas Department of Public Safety's Regulatory Division comprised of non-factual statements of all the stated officers in ROA.138-140. The plaintiff will now end with compensation; to recover - according to the Civil Practices and Remedies section 105.002 that states: the plaintiff must state if the action is dismissed or judgment is awarded to the party, the party intends to submit a motion to the court to recover fees, expenses, and reasonable attorney's fees. With that said, if judgement is awarded the plaintiff will submit a motion to recover.

June 6, 2020

"s/" Victor J. Edney Jr.

Victor J. Edney Jr.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the following on this 6th day of June 2020, to the clerk of the court - transmitted via email:

email- pro_se@ca5.uscourts.gov

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

"s/" Victor J. Edney Jr.

Victor J. Edney Jr.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CASE NO. 20-50327

VICTOR J. EDNEY, JR.,

Plaintiff – Appellant

V.

EONDRA LAMONE HINES; UNKNOWN ACCOMPLICE JOHN DOE; OFFICER JORDAN WENKMAN; OFFICER BOBBY KING; SERGEANT DAVID CONLEY; SERGEANT KEITH VAUGHAN,

Defendants - Appellees

APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS WACO DIVISION No. 6:18-CV-336

BRIEF OF CITY OF WACO APPELLEES

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CASE NO. 20-50327

VICTOR J. EDNEY, JR.,

Plaintiff – Appellant

V.

EONDRA LAMONE HINES; UNKNOWN ACCOMPLICE JOHN DOE; OFFICER JORDAN WENKMAN; OFFICER BOBBY KING; SERGEANT DAVID CONLEY; SERGEANT KEITH VAUGHAN,

---

Defendants - Appellees

Certificate of Interested Parties

Pursuant to Fifth Circuit Rule 28.2.1, Officer Jordan Wenkman, Officer Bobby King, Sergeant David Conley, and Sergeant Keith Vaughn ("the City of Waco Appellees") hereby identify those persons, associations of persons, or other entities that are, or may be interested in the outcome of this case. This certificate is made so that the Judges of this Court may evaluate any possible disqualification or necessary recusal.

Victor J. Edney, Jr.	Plaintiff/Appellant
	Defendants/Appellees
Officer Jordan Wenkman, Officer Bobby King, Sergeant David Conley, and Sergeant Keith Vaughn	

The City of Waco, Texas	Alleged employer of the above Appellees
Eondra Lamone Hines	Defendant/Appellee
Unknown accomplice John Doe	Defendant/Appellee

Counsel for the Parties:

Pro Se	Victor J. Edney, Jr.
Roy L. Barrett and Joe Rivera Naman, Howell, Smith & Lee, PLLC P.O. Box 1470 400 Austin Ave., Suite 800 Waco, Texas 76701	Officer Jordan Wenkman, Officer Bobby King, Sergeant David Conley, and Sergeant Keith Vaughn
Unknown	Eondra Lamone Hines
Unknown	Unknown accomplice John Doe

"s/" Joe Rivera

Joe Rivera

Statement Regarding Oral Argument

This case involves the application of well-established legal principles to allegations that are taken as true under the applicable standard. Thus, the City of Waco Appellees believe that no oral argument is necessary in this case.

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Cases

CASE NO. 20-50327

VICTOR J. EDNEY, JR.,

Plaintiff – Appellant

V.

EONDRA LAMONE HINES; UNKNOWN ACCOMPLICE JOHN DOE; OFFICER JORDAN WENKMAN; OFFICER BOBBY KING; SERGEANT DAVID CONLEY; SERGEANT KEITH VAUGHAN,

Defendants – Appellees

Brief on Behalf of City of Waco Appellees

Comes Now Counsel for Officer Jordan Wenkman, Officer Bobby King, Sergeant David Conley, and Sergeant Keith Vaughn ("the City of Waco Appellees") and file this, their Appellees' Brief. For the reasons set forth below, the City of Waco Appellees request that the Court affirm the District Court's dismissal of Plaintiff's case.

Statement of Jurisdiction

This is an appeal from a final judgment. ROA.209. The District Court entered a final judgment, dismissing Appellant's case under *Federal Rule of Civil Procedure* 12(b)(6). This Court has appellate jurisdiction to review such a final decision by a district court. 28 U.S.C. § 1291.

Statement of the Issues

Appellant's statement of the issues does not contain a list of discrete issues. The section of his brief entitled Statement of the Issues, and the following Statement of the Case, appear, to the best that the City of Waco Appellees can glean, to reflect the following issues on appeal.

I. **Appellant Was Not "Charged" With Suicide, Let Alone Unlawfully So**

II. **The Filing by Sgt. Vaughn With the Texas Department of Public Safety Was Proper**

III. **The City of Waco's Handing of Plaintiff's Internal Affairs Complaint Was Proper**

IV. **Plaintiff Is Not Entitled to Recover Under Texas Civil Practices & Remedies Code §§ 105.002-.003**

V. **The City of Waco Appellees Are Entitled to Qualified Immunity**

Statement of the Case

(a) COURSE OF PROCEEDINGS & DISPOSITION OF CASE BELOW

Appellant filed this lawsuit alleging violations of his civil rights. ROA.6-24. The City of Waco Appellees responded to the lawsuit by filing a motion to dismiss under *Federal Rule of Civil Procedure* 12(b)(6). ROA.47-66. United States Magistrate Judge Jeffrey Manske issued a report and recommendation, recommending that the City of Waco Appellee's motion be granted and that, due to the apparent inability of Appellant to plead a viable case, that the claims against

the City of Waco Appellees be dismissed with prejudice. ROA.89-102. United States District Judge Alan D. Albright later entered an order, adopting the report and recommendation and dismissing the case as against the City of Waco Appellees with prejudice. ROA 20-50327.116-117.

Appellant filed a motion to reconsider the dismissal. ROA.129-137. The City of Waco Appellees filed a response to Appellant's reconsideration arguments, ROA.171-177, ROA.183-185, and filed a motion for entry of judgment under *Federal Rule of Civil Procedure* 54, as there were unresolved claims against other defendants. ROA.148-151. Magistrate Judge Manske issued a report and recommendation that the motion for entry of judgment be granted. ROA.194-202. Judge Albright entered an order adopting that recommendation. ROA.207-208. Judge Albright then entered a final judgment. ROA.209-210. This appeal followed. ROA.223.

(b) STATEMENT OF FACTS

This lawsuit arises out of a welfare check conducted by City of Waco Police Officers. Per Appellant's pleadings and the documents attached to them, on April 24, 2018, Appellees Eondra Hines and an "accomplice" contacted the Waco police to report that Appellant was in the Cameron Park Zoo and was acting strangely, including by getting into the Brazos River, which flows through the park. ROA.8-9. Another person claiming to be Appellant's cousin reported that Appellant was in

the water and that he was concerned for Appellant. ROA.8-9; ROA.12[1]; ROA.19. The report as received by officers was of a possible "drowning in progress." ROA.17.

Defendant Officer Jordan Wenkman and Defendant Officer Bobby King were the first to arrive on scene. When the officers arrived, they were flagged down by a group of people who stated that there was a man in the water. ROA.17. One of the members of the group identified herself as Appelant's mother, Appellee Eondra Hines identified himself as Appellant's uncle, and the group told the officers that Appellant is a Marine veteran who suffers from schizophrenia and PTSD and who had not been taking his mediation. ROA.18; ROA.22.

The officers approached a man who was in the water, who turned out to be Appellant. ROA.18; ROA.22. Appellant appeared confused when the officers encountered him. ROA.18; ROA.22. The officers were in patrol officer uniforms and identified themselves as Waco police officers. ROA.13; ROA.18; ROA.22.

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[1] Appellant attached various documents to his Complaint, including a "Narrative of the Case" that he appears to have drafted, a Waco Police Department Citizen Complaint Form he appears to have completed and filed with the Waco PD, Waco Police Incident Reports, Police Sequence History report, a letter from Sgt. Vaughn of Waco PD Internal Affairs, a Revocation Affidavit regarding Appellant's gun license, and a letter by Sgt. Vaughn to Texas DPS. ROA.11-24. Because these documents were attached to Appellant's complaint and form the basis of his claims, it was proper for the district court to consider them and proper for this court to consider them under a Rule 12(b)(6) analysis. *See Fed. R. Civ. P.* 10(c); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996) ("Normally, in deciding a motion to dismiss for failure to state a claim, courts must limit their inquiry to the facts stated in the complaint

and the documents either attached to or incorporated in the complaint."); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (holding that a court is allowed to consider documents attached to pleadings).

Appellant asked the officers to identify themselves further, apparently not believing them to be police officers, despite their uniforms. ROA.12; ROA.17. Appellant came up from the water to where the officers were on the bank, followed them away from the water, and he and the officers began discussing why Appellant was in the water. ROA.18.

Appellant initially explained that he was looking for his keys, with no explanation as to how his keys wound up in the river and despite the fact that a set of keys could be seen in his hand. ROA.18. Appellant then said he was looking for a ball and then began again contending that the officers were not actually police officers. ROA.18. Based on the report of a possible suicide and Appellant's behavior and explanations, the officers decided to detain Appellant to develop further information. ROA.18. Additional officers arrived on scene and Appellant was taken to a patrol car. ROA.18.

Because he was being detained in relation to a possible suicide attempt and based on his disoriented behavior, Appellant was frisked before being placed in the patrol car. ROA.18. A pistol was found in Appellant's waistband and several .410 rounds (which fit the pistol) were found in his pockets. ROA.18. During this process, Appellant became agitated and officers suspected he was hallucinating. ROA.18. Appellant's belongings were given to the woman who had identified herself as his mother, in response to which Appellant complained the woman could

be anyone dressed in a suit to appear as his mother. ROA.18. Appellant said that it could be anyone wearing a suit or disguised to look like his mother. ROA.18.

Appellant has since explained that the group of people at the park were his associates, not his family or friends, and are part of a local gang, ROA.13. although nothing in Plaintiff's pleadings or the attached police records supports this. The officers determined that there was no reason to take Appellant into custody and retrieved Appellant's wallet from his mother and retuned the wallet to Appellant. ROA.18. Appellee Hines confirmed to the officers that Appellant held a license to carry a firearm. ROA.18. However, due to Appellant's behavior, the officers did not return the pistol to him, instead giving it to Hines. ROA.18.; ROA.13. Appellant was given information on how to contact the Waco Police Department, including on how to file a complaint, and the officers left without arresting or otherwise taking Plaintiff into custody. ROA.18.; ROA.13. Appellant filed a complaint with the police department and its Professional Standards / Internal Affairs Division disposed of the complaint, finding the offices "exonerated." ROA.11.

Summary of the Argument

As set forth below, Appellant has not in this appeal presented discernable discrete legal issues. However, it appears that Appellant's basic complaints in this appeal appear to be that he should not have been detained and that his pistol should

not have been confiscated. Appellant also complains that Appellee Sgt. Vaughn improperly made a report to the Texas Department of Public Safety, which resulted in Appellant's handgun license being revoked, and that Sgt. Vaughn and the Waco PD internal affairs mishandled Appellant's citizen complaint about the incident.

As set out below, Appellant has not alleged any facts or cited to any legal authority that would show that the dismissal of his case as to the City of Waco Appellees was not proper. Appellant was briefly detained due to the officers' legitimate concerns about his behavior based on reports by citizens and the officers' own observations. The information presented to the officers led them to reasonably believe that Appellant might present a threat to himself or others, and thus they briefly and appropriately detained him to gather further information.

In connection with this detention, the officers discovered that Appellant possessed a handgun, which they took from him and gave to a person at the scene who identified himself as Appellant's uncle. This was reasonable under the circumstances.

Appellant was a handgun license holder, and due to the officers' concern about Appellant's mental health a report was also made to the Texas Department of Public Safety. The report was not only appropriate, it was required by Texas law. And Texas law provides Appellant appropriate and adequate process, both to

recover his handgun and to reinstate his handgun license or apply for a new license.

Finally, Appellant cites *Tex. Civ. Prac. & Rem. Code* §§ 105.002-.003, which allow recovery of attorney fees and costs. However, these sections apply to a case brought in state court, involving a state agency, and in which the state agency brings a cause of action. This case was brought in federal court, does not involve any state agency, and does not involve a cause of action asserted against Appellant. Thus, this section simply does not apply to this case.

Accordingly, this Court should affirm the District Court's dismissal under Rule 12(b)(6) of the case against the City of Waco Appellees.

Standard of Review

This Court reviews a district court's granting of a motion to dismiss under *Federal Rule of Civil Procedure* 12(b)(6) *de novo,* applying the same standards as did the district court. *Toy v. Holder,* 714 F.3d 881, 883 (5th Cir. 2013). Under *Federal Rule of Civil Procedure* 12(b)(6), a federal court is authorized to dismiss a complaint that fails "to state a claim upon which relief can be granted." A court must accept as true all well-pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir. 1982)

A court need not, however, "accept as true a legal conclusion couched as factual allegation" nor "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Naked "the-defendant-unlawfully-harmed-me accusations," devoid of factual enhancement, are insufficient to survive a motion to dismiss. *Id.* (citing *Twombly*, 550 U.S. at 557).

Rather, the plaintiff must plead specific facts to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Indeed, the plaintiff must plead "enough facts to" demonstrate that he has a "claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). The Supreme Court has made clear this plausibility standard is not a "probability requirement," but imposes a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level, ..." *Id.* "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

Argument and Authorities

I. Appellant Was Not "Charged" With Suicide, Let Alone Unlawfully So

In his statement of the issues and of the case, Appellant contends that he was "charged" with suicide, that officers Wenkman and King assaulted him by detaining him, and that Conley engaged in official oppression by not allowing Appellant to speak about the incident.

The documents appended to Appellant's pleading show that he was not arrested, let alone charged with anything. Rather, he was briefly detained so the officers could assess the situation. ROA.13 (officers "Detained me"); ROA.18 ("A decision was made to detain Mr. Edney until we found out further information."). With regard to the detention, generally in assessing the reasonableness of an officer defendant's conduct, the court balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 390 (5th Cir. 1985).

In striking this balance courts, including the United State Supreme Court, have recognized a "community caretaking exception" to the requirements generally

imposed by the Fourth Amendment. *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Corbin v. State*, 85 S.W.3d 272, 276 (Tex. Crim. App. 2002). In *Cady*, the Court found that police officers are justified in performing certain brief detentions and searches while performing "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. Courts have also recognized an "emergency aid exception" to the Fourth Amendment, under which the need to assist persons who are seriously injured or threatened with injury obviates the need to comply with the otherwise applicable strictures of the Fourth Amendment. Appellant's allegations and the documents attached to them establish that Officers Wenkman and King were responding to a report of a possible suicide or drowning in progress. ROA.19-20 (dispatch log noting report of threatened suicide); ROA.17.

When officers arrived at the scene, they were flagged down by a group of concerned citizens. ROA.17. When the officers approached Appellant was in the water and appeared to be confused. ROA.17. When Appellant came up out of the water, he initially explained that he was in the water looking for his keys, but a set of keys were in his hand. ROA.18. Appellant then changed his explanation, stating that he was looking for a ball. ROA.18. Throughout this encounter, Appellant questioned whether the uniformed officers were in fact police officers. ROA.18.

Based on these facts, the officers became concerned about Appellant and a decision was made to detain him to gather further information. ROA.18. Such facts justified a concern that Appellant was a possible threat to himself, making both the community caretaking and emergency aid exceptions applicable. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (noting that under the emergency aid exception officers may go so far as to enter a home to render aid to one threatened with imminent injury); *United States v. Toussaint*, 838 F.3d 503, 507 (5th Cir. 2016) (noting that purpose of the "community caretaking function" is that police officers serve to ensure the safety of citizens"). Based on the circumstances, the officers acted reasonably to briefly detain Appellant to further assess him, and then released him at the scene. ROA.17-18; ROA.13. *See Fernandez v. California*, 571 U.S. 292, 298 (2014) (the ultimate touchstone of the Fourth Amendment is reasonableness).

Even if the Fourth Amendment was implicated by this encounter, it was not violated. Generally, there are three recognized categories of police/citizen encounters under the Fourth Amendment—a consensual encounter, a brief investigatory stop (aka, a "Terry stop"), and a custodial arrest. *United States v. Swatts-Estupinan*, No. EP-03-CR-391-DB, 2003 U.S. Dist. LEXIS 6596, at *5 (W.D. Tex. 2003) (collecting cases). An officer needs only "reasonable, articulable suspicion" to justify a brief detention, known as a "Terry stop." *United States v.*

Hensley, 469 U.S. 221, 227, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). The Fifth Circuit has recognized that the suspicion that justifies a detention of a person under the Fourth Amendment can be suspicion of a mental health episode and related danger to the detainee himself or the public. *See Cantrell v. City of Murphy*, 666 F.3d 911, 923 (5th Cir. 2012) (citing *Sullivan v. Cnty. of Hunt, Tex.*, 106 F. App'x 215 (5th Cir. 2004); *Martinez v. Smith*, 200 F.3d 816 (5th Cir. 1999)).

Specifically, the Fifth Circuit has recognized that under *Tex. Health & Safety Code* § 573.001, a Texas peace officer may, without a warrant, take a person into custody if the officer has probable cause to believe that the person has a mental illness and poses a substantial risk to that person or others. If an officer can take a person into custody based on probable cause to suspect the person is going through a mental health episode, an officer can detain a person based on reasonable suspicion of a mental health episode to assess the situation and to determine if probable cause for taking the person into custody exists. *U.S. v. Scroggins*, 599 F.3d 433, 441 (5th Cir. 2010) ("reasonable suspicion may 'ripen' or 'develop' into probable cause for an arrest if a Terry stop reveals further evidence of criminal conduct."). Under § 573.001, an officer can form the belief that a person is going through a mental health episode based on credible reports, based on the person's behavior, or on other circumstances. *See Tex. Health & Safety Code* § 573.001(b) and (c).

Here, according to Appellant's own pleadings and the attachments to them, people in the park reported that Appellant was attempting suicide, when officers arrived he was in the water, when officers spoke with Appellant he offered changing and illogical explanations for his being in the water, and behaved strangely (including disbelieving that the uniformed officers were in fact police officers, and claiming the woman at the park could be wearing a suit to appear to be his mother) and at times confrontationally, and when officers spoke with the people gathered at the scene they informed the officers they were Appellant's friends and family and that Appellant suffers from PTSD and schizophrenia and was not taking his medications,

Based on the reports made to the police by the people at the scene, and the observations made by the officers upon arriving, it was reasonable for the officers to briefly detain Appellant to assess the situation. During that detention, further facts developed, including Appellant's statements, Appellant's behavior, and the further reports by the group of people at the scene. These facts made it reasonable for the officers to continue to detain Appellant to assess the situation, including whether Appellant was a threat to himself or others. *See Cantrell*, 666 F.3d at 923 ("Ave's statements . . . could have provided a reasonable officer with a sufficient basis to conclude that she was in a condition that substantially impaired her 'emotional process' or judgment, and thus was mentally ill under Texas law. . . .

Accordingly, the officers had probable cause to detain Ave and take her into protective custody."); *Sullivan v. Cty. of Hunt*, 106 F. App'x 215, 218 (5th Cir. 2004) ("The above uncontested facts are sufficient to create a reasonable belief that plaintiff was in a precarious emotional condition and was a suicide risk. . . These facts are sufficient to establish probable cause to seize Sullivan under the 4th amendment.") (citing *Resendiz v. Miller*, 203 F.3d 902, 902 (5th Cir. 2000); *Anthony v. City of New York*, 339 F.3d 129, 137 (2d Cir. 2003)); *see also Gordon v. Neugebauer*, No. 1:14-CV-93-J, 2014 U.S. Dist. LEXIS 154593, 2014 WL 6892716, at *7 (N.D. Tex. Oct. 31, 2014) ("The Fifth Circuit has also noted that the existence of *Texas Health & Safety Code* § 573.001(a) provides further support for a finding that police officers act with probable cause when they arrest an individual for temporary detention . . . ." (citing *Martinez*, 1999 U.S. App. LEXIS 39365, 1999 WL 1095667, at *3)).

And given that a brief investigatory stop to assess the situation and Appellant's state of mind and whether he was a threat to himself or others was appropriate, so too was a pat-frisk type search of Appellant. "[A]fter making a proper Terry stop, the police are within their constitutional authority to pat down a party and to handcuff him for their personal safety even if probable cause to arrest is lacking." *United States v. Jordan*, 232 F.3d 447, 449 (5th Cir. 2000). Also, consistent with the community care taking exception to the Fourth Amendment,

courts have recognized the authority of police to seize a firearm to protect the public. *E.g., United States v. Martinez*, No. C-09-557-1, 2009 U.S. Dist. LEXIS 88407, at *22 (S.D. Tex. 2009); *see also United States v. Atchley*, 474 F.3d 840, 850 (6th Cir. 2007) ("[E]ven if a loaded handgun is legally possessed, because of its inherently dangerous nature, police may seize it if there are articulable facts demonstrating that it poses a danger.").

Beyond this general authority under the Fourth Amendment to frisk Appellant, under § 573.001, if a person detained has a firearm, the officer may confiscate the firearm. *Tex. Health & Safety Code* § 573.001(h). Importantly, Appellant conceded that the officers did not confiscate his pistol outright, admitting that they took it briefly and then gave it to Defendant Hines, who identified himself as Appellant's uncle. ROA.13.

For all of these reasons, no aspect of the officers' encounter with Appellant violated his Fourth Amendment rights or any other rights.

II. The Filing by Sgt. Vaughn With the Texas Department of Public Safety Was Proper

Appellant also complains that Sgt. Vaughn[1] report to the Texas Department of Public Safety was not lawful. To the extent that Appellant is claiming that Sgt. Vaughn's statements in the affidavit provided to the DPS are false, it appears Appellant is making a claim in the nature of defamation. Under Texas state law,

defamation is an intentional tort, against which the *Texas Tort Claims Act* specifically preserves governmental immunity. *Tex. Civ. Prac. & Rem. Code* § 101.057; *Perry v. City of Houston*, No. 01-01-00077-CV, 2005 Tex. App. LEXIS 3296, at *11 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Tex. Dep't of Health v. Rocha*, 102 S.W.3d 348, 353 (Tex. App.--Corpus Christi 2003, no pet.) (libel and slander are common law intentional torts and thus there is no waiver of governmental immunity to pursue such claims)).

Moreover, Sgt. Vaughn made the allegedly defamatory statements in connection with the provision of police services. Waco police were called to respond to a suspected suicide attempt, and officers came to be concerned that Appellant was a danger to himself or others and not fit to possess a gun. As is required by Texas law, Sgt. Vaughn reported this information to the Texas Department of Public Safety Regulatory Services Division to be considered in possibly revoking Appellant's handgun license. *See Tex. Gov't Code* § 411.186(b) (requiring report by a peace officer who has reason to believe a basis for revocation exists). There is no waiver of governmental immunity for such actions, taken in connection with the provision of police protection services. *See Tex. Civ. Prac. & Rem. Code* § 101.056.

Aside from governmental immunity, because Vaughn's statements were made in connection with a quasi-judicial proceeding, it is an absolutely privileged

communication and he cannot be liable based on them. *See Senior Care Res., Inc. v. OAC Senior Living, LLC*, 442 S.W.3d 504, 512 (Tex. App.—Dallas 2014, no pet.) (discussing absolutely privileged communications). The question of whether an alleged defamatory communication is related to a proposed or existing judicial or quasi-judicial proceeding, and is therefore absolutely privileged, is one of law to be determined by the court. *Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, L.L.P.*, 291 S.W.3d 448, 453 (Tex. App.—Fort Worth 2009, no pet.); *Russell v. Clark*, 620 S.W.2d 865, 870 (Tex. Civ. App.— Dallas 1981, writ ref'd n.r.e.). Two requirements must be met for the privilege to apply: (1) the governmental entity must have the authority to investigate and decide the issue—that is, it must exercise quasi-judicial power—and (2) the communication must relate to a pending or proposed quasi-judicial proceeding. *Perdue*, 291 S.W.3d at 452.

On the first element, Chapter 411, subchapter H, grants authority to the Texas Department of Public Safety to determine eligibility for a license to carry a handgun. *See Tex. Gov't Code* Ch. 411. This specifically includes the authority to conduct criminal background checks and to take other investigatory steps to determine whether an applicant is eligible to have a handgun license. *Tex. Gov't Code* § 411.176-177. It also includes the authority to revoke a license upon receiving information that a license holder is no longer eligible for a license,

including that the licensee is no longer able to exercise sound judgment with regard to a handgun. *Tex. Gov't Code* § 411.172. Thus, the Texas DPS has the authority, quasi-judicial in nature, to investigate and decide the issue of eligibility for a handgun license, and the first element of the absolute communication privilege is met.

Vaughn completed a revocation affidavit, a form provided by the Texas DPS, and attached a letter to it describing the encounter with Appellant. ROA.23-24. This form and letter were submitted to the DPS, as required by *Tex. Gov't Code* § 411.186(b). Section 411.186 requires that a peace officer make a report to the DPS if the officer has reason to believe a basis for revocation exists. Section 411.186 goes on to state that a license holder can request review of the revocation by a justice court. All of this demonstrates that Vaughn's statements in the revocation affidavit were made in connection with a quasi-judicial proceeding, and thus absolutely privileged. *Senior Care Res., Inc.*, 442 S.W.3d at 512 (collecting examples of governmental agencies that are quasi-judicial in nature for purposes of the privilege, including the NTSB, the FAA, and police internal affairs).

Further, to the extent that Appellant is complaining about his gun being taken or the handgun licensure process itself, he has not alleged any violation of his rights. *Tex. Health & Safety Code* § 573.001(h) authorizes an officer to confiscate a firearm from a person that the officer believes to be undergoing a

mental health episode. The officers did not confiscate the handgun, but instead provided the handgun to a person at the scene that identified himself as Appellant's uncle, who agreed to return the handgun after Appellant calmed down. ROA.18. Appellant has not alleged that he has requested return of the handgun from his uncle or that the uncle declined to return it, and thus has not alleged how this act by the officers caused him any damage.

Had the officers confiscated the gun, Section 573.001 references *Tex. Code Crim. Proc. Art.* 18.191, which provides a process for a person whose firearm is confiscated under § 573.001 to seek recovery of the firearm. Because Appellant has a process under state law to seek recovery of his firearm, his due process rights have not been violated by Section 573.001 or the officers' application of it. *See Wellman v. St. Louis Cty.*, 255 F. Supp. 3d 896, 907 (E.D. Mo. 2017) (finding that there was no due process violation where there was adequate process to allow detainee to recover seized firearm); *Richer v. Parmelee*, 189 F. Supp. 3d 334, 342 (D.R.I. 2016) (reaching same conclusion regarding firearm seized from mental health detainee).

Similarly, the process under *Tex. Gov't Code* Chapter 411 for obtaining and revoking a handgun license is constitutionally adequate and was not improperly applied to Appellant. As described elsewhere in this brief, the officers had reason to believe that Appellant had become subject to revocation of his handgun license

due to his mental health issues and had a legal obligation to report this to the DPS. *Tex. Gov't Code* § 411.186(b). If Appellant wanted to oppose the revocation, *Tex. Gov't Code* § 411.186(b) provided a process for him to do so by requesting a hearing in the local justice court. And a license holder whose license is revoked can apply for a new license after the passage of a statutorily required period and upon meeting certain conditions. *Tex. Gov't Code* § 411.186(c). Thus, Chapter 411 afforded adequate process to protect Appellant's rights, which were not violated by the application of the chapter in this case.

Most basically, regardless of immunities and privileges, Appellant has not alleged facts to support any liability against Vaughn (or any other City of Waco Appellee) under a defamation theory. The elements of defamation are (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages or that the claim is for defamation per se. *See In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (orig. proceeding). The degree of intent required to prove an allegedly defamatory statement about a private person is that the defendant knew or should have known the statement to be false. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 811, 819 (Tex. 1976); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 80, 82-83 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

Appellant has not, and cannot, allege facts to support these essential elements. Vaughn's statement to the DPS, a May 3, 2018 letter, is attached to Appellant's complaint. ROA.24. Vaughn's letter provides a factual account of the encounter with Plaintiff, none of which is false. And even to the extent some of the information in Vaughn's letter is allegedly inaccurate (and there is nothing to show that it is), there is nothing to show that Vaughn knew or should have known of any inaccuracy. To the contrary, the information relayed by Vaughn is information that was relayed to him through people who were at the scene.

Appellant does not even dispute the basic account of the events provided by Vaughn. Appellant's real complaint is with his family. In his pleading, Edney states "I personally question my family" for relaying information to the officers about Appellant's PTSD and schizophrenia. ROA.15. Consequently, Appellant's allegations do not plead a false statement by Vaughn or any other of the City of Waco Appellees, made with the requisite state of mind or that caused Appellant damages, and his claim related to the Chapter 411 revocation affidavit was properly dismissed.

III. The City of Waco's Handing of Plaintiff's Internal Affairs Complaint Was Proper

Similar to Appellant's allegations about the report to the Texas DPS, Appellant's claim about the Waco PD internal affairs department's handling of his

citizen complaint are barred. Appellant has not alleged facts or pointed to authority to show that he has any particular rights with regard to the internal affairs department's handling of a citizen complaint. To the extent his complaint is about his detention, his firearm, or the report to the DPS, as set out elsewhere in this brief Appellant's rights were not violated.

Further, an internal affairs department is also quasi-judicial in nature, meaning the absolute communication privilege applies to Vaughn's statements. *Senior Care Res., Inc.*, 442 S.W.3d at 512 (internal affairs department is a quasi judicial body). And Appellant has not shown how the division's handling of his complaint or its conclusion violated his rights. As set out elsewhere in this brief, none of Appellant's rights were violated by the officers, and thus there was no basis for any conclusion but exoneration.

IV. Plaintiff Is Not Entitled to Recover Under Texas Civil Practices & Remedies Code §§ 105.002-.003.

Appellant filed a Motion of Frivolous Claims, in which he raised Sections 105.002-.003 of the *Texas Civil Practices & Remedies Code*. Under Section 105.002 "A party to a civil suit *in a court of this state* brought by or against a state agency *in which the agency asserts a cause of action against the party* . . . is entitled to recover . . . a total amount not to exceed $1 million for fees, expenses,

and reasonable attorney's fees incurred by the party in defending the agency's action." *Tex. Civ. Prac. & Rem. Code* § 105.002 (emphasis added). The current lawsuit is not brought in a state court, meaning that Section 105.002 has no applicability. And as the magistrate judge observed, no state agency has brought any cause of action against Appellant in this case. Accordingly, any claim by Appellant for relief under these sections was properly dismissed.

V. The City of Waco Appellees Are Entitled to Qualified Immunity

The magistrate recommendation and report that was ultimately adopted by the district court found that the City of Waco Appellees are entitled to qualified immunity. ROA.98. By failing to brief the issue of qualified immunity, Appellant has waived his arguments on that issue and for this reason alone the dismissal of the City of Waco Appellees should be affirmed. *See Fed. R. App. P.* 28(a) (requiring substance of appellate arguments to be set out in the briefing); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) ("[Appellant] has abandoned these arguments by failing to argue them in the body of his brief.").

Beyond the waiver, nothing in any of Appellant's pleadings or briefing in this court or the trial court show that he can overcome the qualified immunity of the City of Waco Appellees. Although qualified immunity is an affirmative defense, "plaintiff has the burden to negate the assertion of . . . immunity once

properly raised." *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009). When the defense of qualified immunity is raised in a motion to dismiss, the complaint is subject to a heightened pleading requirement, which requires "claims of specific conduct and actions giving rise to a constitutional violation." *Cunningham v. City of Balch Springs*, No. 3:14-CV-59-L, 2015 U.S. Dist. LEXIS 80145 (N.D. Tex. June 19, 2015) (citing *Schultea v. Wood*, 47 F.3d 1427, 1432, 1434 (5th Cir. 1995) (en banc)). Qualified immunity involves a two-step analysis: (1) whether the facts alleged by the plaintiff demonstrate a violation of a clearly established constitutional right and (2) whether the defendant's conduct was objectively reasonable in light of the established right. *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013).

As set out above, Appellant has not pointed to factual allegations or legal authorities to show that any of the City of Waco Appellees violated his civil rights. Further, in reviewing the second aspect of qualified immunity, a Court reviews the officer's entitlement to qualified immunity "in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intention or motivation." Graham, 490 U.S. at 396-97. This standard "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). (internal quotations marks omitted). Appellant has not alleged any facts or

pointed to any legal authority to support the conclusion that an of the City of Waco Appellees' actions were so contrary to clearly established law that the officers could be said to have been acting in knowing violation of the law or plainly incompetently. *Cf. Hollins*, 551 F.3d at 326 (qualified immunity protects all but the plainly incompetent or those who knowingly violate the law).

Thus, Appellant has not met his burden to pled facts to overcome the City of Waco Appellees' qualified immunity, and their dismissal should be affirmed.

Conclusion

As set out above, the City of Waco Appellees respectfully request that the District Court's dismissal of Appellant's case be affirmed.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the foregoing was served according to *Fed. R. App. P.* 5 the 8th day of July 2020, as follows:

ViGtor J. Edney Jr.
P.O. Box 853
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AppellaNt - Pro Se

Via Certified Mail, Return
ReGeipt Requested and by
U.S. First Class Mail

"s/" Joe Rivera
Joe Rivera

Certificate Of Compliance

Pursuant to 5th Circuit Rule 32.2.7(C)(i), the undersigned certifies this brief complies with the type-volume limitations of 5th Circuit Rule 32.2.7(b).

1. Exclusive of the exempted portions in 5th Circuit Rule 32.2.7(b)(3), the Brief contains no more than 6,141 **words** in proportionally spaced typeface, including footnotes.

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and

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"s/" Joe Rivera

Joe Rivera

Attorney for Appellant

Filed: 07/27/2020

No. 20-50327

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

REPLY BRIEF OF APPELLANT

The appellant's motion of frivolous claims for appeal from the United States District Court of the Western District in Texas - the Waco Division

VICTOR J. EDNEY, JR.,

Plaintiff

v.

EONDRA LAMONE HINES; UNKNOWN ACCOMPLICE JOHN DOE; OFFICER JORDAN WENKMAN; OFFICER BOBBY KING; SERGEANT DAVID CONLEY; SERGEANT KEITH VAUGHAN,

Defendants - Appellees

Pro se: Victor J. Edney Jr.

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TABLE OF AUTHORITIES

A Texas tort claim; under Title Governmental Liability in the Civil Practice and Remedies:

THE ARGUMENT

The United States District Court for the Western District in the Waco Division has recommended and adopted – that the plaintiff's motion of frivolous claims be denied. United States Magistrate Judge Manske ordered in his report and recommendation under rule 636 (b)(1)(c) - reasons for denial – that are contrary in ROA.189-197. Later, the United States District Judge Albright adopted the order ROA.202-203. With that stated, the appellants argument will start with him introducing TCOLE. . . following that he will present his contentions or statements of issues presented for review based on the U. S. Magistrates report and recommendations about why the motion of frivolous claims are denied. Then the plaintiff will oppose the recommendations with clarified explanations to prove why the denial of the motion of frivolous claims are clearly erroneous. After that he will engage in the controversy of the appellees brief by replying to the defendants five discrete issues to prevail in this argument. Next the plead for reversal of order given in the district court will happened through factual pleadings to recover in this appealed motion of frivolous claims under the Texas constitution. . . too instill that the magistrates recommendations have been met and now are fulfilled through explanations in which if reviewed – the appellant will be entitled to relief at the end his appeal.

THE TEXAS COMMISSION ON LAW ENFORCEMENT (TCOLE)

TCOLE serves as the regulatory agency for all peace officers in Texas, which includes police officers. . .

THE CONTENTIONS

Here below are statements of issues presented for review by the U.S. Magistrate that denied the plaintiffs motion of frivolous claims. He recommended that this Court deny Plaintiff's motion of frivolous claims for the seven following reasons in ROA.189:

(1) "A party to a civil suit in a court of this state brought by or against a state agency in which the agency asserts a cause of action against the party . . . (2) is entitled to recover . . . a total amount not to exceed $1 million for fees, expenses, and reasonable attorney's fees incurred by the party in defending the agency's action." Tex. Civ. Prac. & Rem. Code § 105.002. (3) Plaintiff filed this motion to recover costs under the Texas Civil Practice and Remedies Code. Pl.'s Mot. for Finding of Frivolous Claims, ECF No. 24. (4) However, no state agency has asserted a cause of action against Plaintiff. (5) The only claims in the present case are asserted by Plaintiff. (6) There are no causes of action asserted against Plaintiff. (7) Therefore, it is recommended that Plaintiff's Motion of Frivolous Claims should be denied in ROA.189.

CONTENTIONS OPPOSED BY THE APPELLANT

Here to the United States Court of Appeals the Fifth Circuit - the plaintiff has been denied his motion of frivolous claims for the **seven** numbered contentions stated by U. S. Magistrate that will be opposed:

(1) A party to a civil suit in a court of this state brought by or against a state agency in which the agency asserts a cause of action against the party . . .

APPELLANT: This civil suit was initiated in a court of this state – the U.S. District Court for the Western District of Texas the Waco Division and is against a state agency - the Texas Commission on Law Enforcement agency/ Waco Police Department Officers in which the agency asserted a cause of action of frivolous claims presented in an affidavit to the Texas Department of Public Safety Regulatory Division against the appellant. . .

(2) is entitled to recover . . . a total amount not to exceed $1 million for fees, expenses, and reasonable attorney's fees incurred by the party in defending the agency's action." Tex. Civ. Prac. & Rem. Code § 105.002.

APPELLANT: and for the court in Tex. Civ. Prac. & Rem. Code sec. 105.002 – the plaintiff only can recover fees, expenses, and attorney's fees if the courts finds that the action is frivolous, unreasonable, or without foundation; and the action is dismissed or judgment is awarded to the party.

(3) Plaintiff filed this motion to recover costs under the Texas Civil Practice and Remedies Code. Pl.'s Mot. for Finding of Frivolous Claims, ECF No. 24.

APPELLANT: Yes, the plaintiff filed in his motion of frivolous claims – a statement to recover that is required by law from the Texas constitution under section

105.003. ©. Motion of Frivolous Claims. Which states: The motion must state if the action is dismissed or judgment is awarded to the party, the party intends to submit a motion to the court to recover fees, expenses, and reasonable attorney's fees.

(4) However, no state agency has asserted a cause of action against Plaintiff.

APPELLANT: Objection to the above, but these officers are licensed through the state of Texas state agency by name of the Texas Commission on Law Enforcement (TCOLE) agency and they are assigned to the Waco Police Department - they asserted and certified this cause of action with a commission notary Sheri Weber- a frivolous charging affidavit sent to the Texas Department of Public Safety, of suicide that has ruin the social reputation - against plaintiff Mr. Edney in ROA.18. . . At this time, the plaintiff will define state agency "word for word" under chapter 105.001. Definitions: (3) and following that he will clarify on the captions within the definitions.

"**State agency**" means a board, commission, department, office, or other agency that:

(A) is in the executive branch of state government;

(B) was created by the constitution or a statute of this state; and

(C) has statewide jurisdiction.

Now the plaintiff will define captions A, B, and C.:

(A) The TCOLE agency is in the executive branch of state government.

(B) TCOLE is a state agency created by an act of the 59th Legislature.

(C) TCOLE has statewide jurisdiction for all Texas peace or police officers.

(5) The only claims in the present case are asserted by Plaintiff.

APPELLANT: And for the court, the plaintiff asserted claims initially in the U.S. Western District of Texas in the Waco Division for suit after the defendants pressed their frivolous claims – in a charging affidavit from assumption to the Texas Department of Public Safety accusing him of being suicidal – and ruining his social identity.

(6) There are no causes of action asserted against Plaintiff ROA.189-197.

APPELLANT: objects, today were here for the frivolous and reasonable claims of suicide due to negligence of fellow state licensed officers of TCOLE who handled a false report of suicide in progress improperly. Through officers' beliefs and the failed judgement of the appellant citizens complaint in the hands of Waco P. D. Internal Affairs . . . officers decided to file immediate charges against the plaintiff to the TDPS without thoroughly investigating what happened ROA.162-165. Next the appellant filed affidavit remarks to defend against Waco P.D. Internal Affairs in his motion of frivolous claims in ROA.156-160.

(7) It is recommended that Plaintiff's Motion of Frivolous Claims should be denied in ROA.189.

Objection from the Plaintiff: With frivolous claims like these asserted with in an affidavit that has been pleaded against the plaintiff for wrong doings that are non-factual. . . a reversal of order should be given towards the district courts discretion in this appeal to recover and the plaintiffs identity should be restored.

As the appellant concludes his rebuttal from the seven reasons that denied his motion of frivolous claims by way of the U.S. Magistrate report and

recommendation, he would like for the court to adhere and grant his motion of frivolous claims due to the just causes that are factual.

Now the controversy of the appellees brief will being by stating the appellees five discrete issues argued and then the appellant will reply at the end of each one of them to prevail in this argument.

1. *Appellant was not "charged" with suicide, let alone unlawfully so.*

Appellees argue: appellant contends that he was "charged" with suicide. . . but he was not charged just briefly detain in favor of the "community caretaking exception" and "emergency aid exceptions". Also, replying their actions where based on credible reports.

Appellant argues: He was charged - the appellees accused him in a charging affidavit under law. . . in means of a written statement made upon oath before a officer authorized by law to administer on the alleging that the appellant committed the offense. Commission Sheri Webber administer the affidavit under oath ROA.17-19. With that stated, the defendants applied and present nonfactual information from non-credible reports. The appellant wants the appeals court to check the police sequence report for the cousin who does not know appellant who called in ROA.14-16 and after that look at the appellant's credible statements about who family is in ROA.133-134 then review defendant Hines statement and court history in ROA.13, 116, 118 . . . since defendants Hines, Wenkman, King, Conley, and Vaughn preside together.

2. *The filing by. Sgt. Vaughn with the Texas Department of public Safety was proper.*

Appellees argue: Appellant is claiming that Sgt. Vaughn's statements in the affidavit provided to the DPS are false, it appears appellant is making a claim in the nature of defamation. Also, stating the officers had reasons to believe that appellant had become subject to revocation of his handgun license due to his mental health issues and had a legal obligation to report this to the DPS.

Appellant argues: Sgt. Vaughn statements are false in the affidavit provided to the DPS and he had no legal obligation to report it to DPS without really investigating - he talked to no real family ROA.133-134. So, the appellant has now filed a relevant to law – motion of frivolous claims section 105.003 about the statements of Sgt. Vaughn that where gathered from assumption – without proof. . . Because the plaintiff does not have mental health issues and he did not try to commit suicide nor did his family call the police for any problem. In addition to what has been said, the appellants family did show up in the park - out of fright - from the appellees frivolous statements of suicide. Someone falsely called in the terroristic threat to the appellants family and the police - in which made this situation happened.

3. *The city of Waco's handing with plaintiff's internal affairs complaint was proper.*

Appellees argue: Appellant has not alleged facts or pointed to authority to show that he has any particular rights with regard to the internal affairs department's handling of a citizen complaint. To the extent his complaint is about his detention, his firearm, or the report to the DPS.

Appellant argues: The motion of frivolous claims section 105.003 will be the only authority used under law for the frivolous report of suicide to the DPS that has ruin the appellants reputation under his identification.

4. *Plaintiff is not entitled to recover under Texas civil practices & remedies code section 105.002-.003.*

Appellees argue: The current lawsuit is not brought in a state court, meaning that section 105.002 has no applicability. And as the magistrate judge observed, no state agency has brought any cause of action against appellant in this case. Accordingly, any claim by appellant for relief under these sections was properly dismissed.

Appellant argues: Section 105.002 states: a party to a civil suit in a court of this state brought by or against a state agency in which the agency asserts a cause of action against the party. . . is entitled to recover, in addition to all other costs allowed by law or rule, fees, expenses, and reasonable attorney's fees incurred by the party in defending the agency's action if: (1) the court finds that the action is frivolous, unreasonable, or without foundation; and (2) the action is dismissed or judgment is awarded to the party. With the above stated, this suit was brought in the U.S. District Court of the Western District the Waco Division. . . a court of this state – in which makes this section 105.002 applicable. And for the observed by the magistrate the appellant should have been more explainable during his presentment - for, his lack of stating who the officers and commission are licensed through and serve for and that is the Texas Commission on Law Enforcement (TCOLE). The TCOLE officers and commission joined and certified asserted

presumptions of frivolous claims and sent them to the Texas DPS. With this stated the appellant should be granted relief.

5. *The city of Waco appellees are entitled to qualified immunity.*

Appellees argue: The magistrate recommendation and report that was ultimately adopted by the district court found that the city of Waco appellees are entitled to qualified immunity. By failing to brief the issue of qualified immunity, appellant has waived his arguments on that issue for this reason alone the dismissal of the city of Waco appellees should be affirmed. Also, stating qualified immunity involves a two-step analysis: . . .

Appellant argues: Yes, the district courts magistrate judge report and recommendation found that the city of Waco appellees are entitled to qualified immunity, but the decision was irrelevant and is not applicable to the state of Texas Constitution. In ROA.84 the magistrate judge stated the court uses a two-prong analysis to determine whether an officer is entitled to qualified immunity. Then the defendants in their appeal brief stated qualified immunity involves a two-step analysis. . . Both the magistrate judge and the defendants qualified immunity claims are unlawful and theirs not a relevant statute for them. With all that has been stated the appellant should be granted his motion of frivolous claims for these frivolous acts.

July 26, 2020

"s/" Victor J. Edney Jr.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the following on this 26th day of July 2020, to the clerk of the court - transmitted via email:

email- pro_se@ca5.uscourts.gov

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE COURT

"s/"Victor J. Edney Jr.

Victor J. Edney Jr.

APPENDIX (ii): Opinion

FILED: 07/24/2019

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTREN DISTRICT OF TEXAS

WACO DIVISION

VICTOR J. EDNEY JR.,

Plaintiff,

v. **CASE NO. 6:18-CV-00336-ADA-JCM**

EONDRA LAMONE HINES, JOHN DOE, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, KEITH VAUGAN, and "INTERNAL AFFAIRS WACO POLICE DEPARTMENT",

Defendants.

REPORT AND RECOMMENDATION

OF THE UNITED STATES AGISTRATE JUDGE

TO: THE HONORABLE ALAN D ALBRIGHT

UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), FED. R. CIV. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the Court is Plaintiff's Motion for Sanctions, Pl.'s Mot. Sanctions,

ECF No. 15. For the following reasons, the undersigned recommends Plaintiff's Motion be **DENIED**.

Plaintiff initiated this litigation on November 8, 2018. P1.' s Compl., ECF No. 1. Plaintiff served Defendant Hines with Summons and the Complaint in person at a place of residence on January 9, 2019, ECF No. 5, and filed proof of service on January 11, 2019. Id. Thus, per Federal Rule of Civil Procedure 55, Defendant Hines' answer or other response was due January 30, 2019, twenty-one days from the date of service. Defendant Hines did not answer or otherwise defend this action.

On July 7, 2019, Plaintiff moved for sanctions against Defendant Hines. He argues the Court should sanction Defendant Hines for failing to appear after Plaintiff properly served Defendant Hines with process. Id. In support he cites Federal Rule of Civil Procedure 11 (c)(2) - regarding proper form for a motion for sanctions - and 5(a)(2) - excusing service on parties who fail to appear. Id. These rules, he argues, authorize sanctions against Defendant Hines. Id.

Courts liberally construe a pro se litigant's pleadings. Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981). However, "the right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law." Wright v. LBA Hospitality, 754 F. App'x 298, 299 (5th Cir. 2019) (quoting Hulsey v. Texas, 929 F.2d 168, 171(5th Cir. 1991)) (per curiam) (quotation marks omitted). "One who proceeds pro se with full knowledge and understanding of the risks involved acquires no greater rights than a litigant represented by a lawyer{.]" Birl, 660 F.2d at 593 (citing United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977)).

A pro se litigant instead "acquiesces in and subjects himself to the established rules of practice and procedure." Id. (citing Pinkey, 548 F.2d at 311).

Default judgment is the appropriate sanction for failing to appear. FED. R. Civ. P. 55(b)(2). Under this rule, Plaintiff must first request the Clerk enter Defendant Hines's default and support his request with competent evidence showing Defendant Hines "failed to plead or otherwise defend[.]" Id. If he properly serves Defendant Hines with his motion for default judgment, proves Defendant Hines is liable to him, and establishes the value of the alleged injury, the Court may then grant default judgment against Defendant Hines. Id.

Default judgment is the proper sanction for Defendant Hines's alleged failure to appear. Accordingly, it is **RECOMMENDED** the Court **DENY** Plaintiff's Motion for Sanctions as it does not request nor follows proper procedure for default judgment.

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are made. The District Court need not consider frivolous, conclusory, or general objections. Battle v. US. Parole Comm 'n, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of

unobjected-to proposed factual findings and legal conclusions accepted by the District Court. 28 U.S.C. § 636(b)(l)(C); Thomas v. Am, 474 U.S. 140, 150-53 (1985); Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED this 24th day of July, 2019.

"s/" Jeffery C. Manske

UNITED STATES DISTRICT JUDGE

FILED 03/09/2020

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

WACO DIVISION

VICTOR J. EDNEY JR.,

Plaintiff

v. **CASE NO. 6:18-CV-00336-ADA-JCM**

EONDRA LAMONE HINES, JOHN DOE, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, KEITHVAUGHN, and "INTERNAL AFFAIRS WACO POLICEDEPARTMENT",

Defendants

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ALAN D ALBRIGHT,

UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of

Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the Court are Defendants Keith Vaughn, Jordan Wenkman, Bobby King, David Conley, and Internal Affairs Waco Police Department's (collectively "City of Waco Defendants") Motion for Entry of Final Judgment (ECF No. 22) and Plaintiff Victor J. Edney Jr. Motion of Frivolous Claims (ECF No. 24). For the reasons stated below, the undersigned RECOMMENDS that this Court decline to exercise jurisdiction over the remaining two state law claims, Defendants' Motion for Entry of Final Judgment be GRANTED, and Plaintiff's Motion of Frivolous Claims be DENIED.

I. BACKGROUND

Plaintiff initiated this suit on November 8, 2018 and is proceeding pro se. Plaintiff's complaint is scant, but this matter arises out of an alleged interaction between Plaintiff and alleged members of the Waco Police Department. See Pl.'s Comp, ECF No. 1. Plaintiff generally alleges that his civil rights were violated during an interaction with officers who thought Plaintiff was suicidal. Id. Plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983 and names seven defendants: (1) Eondra Lamone Hines, alleged conspirator to Plaintiff's "arrest"; (2) John Doe, unknown accomplice to Hines; (3) Jordan Wenkman, Waco Police Officer; (4) Bobby King, Waco Police Officer; (5) David Conley, Waco Police Sergeant; (6) Keith Vaughan, Waco Police Sergeant; and (7) the "Internal Affairs Waco Police Department". Pl.'s Compl., ECF No. 1. Plaintiff alleges that Eondra Lamone Hines and accomplice John Doe made false statements which ended in Plaintiff's arrest.

Id. Specifically, Plaintiff alleges that the City of Waco Defendants violated Plaintiff's Fourth, Fifth, and Eighth Amendment rights. Id. The City of Waco Defendants filed a Motion to Dismiss on January 28, 2019. Defs.' Mot. to Dismiss, ECF No. 6. This Court granted the Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6) and dismissed the claims against the City of Waco Defendants with prejudice. Order Adopting Rep. and Recommendation, ECF No. 18. There are two remaining claims in this case: (1) Plaintiff's slander claim against Eondra Lamone Hines; and (2) Plaintiff's slander claim against John Doe, Eondra Lamone Hines' unidentified accomplice. The City of Waco Defendants filed a Motion for Entry of Final Judgment under Rule 54(b) on August 30, 2019. Defs.' Mot. for Entry of Judgment, ECF No. 22. Plaintiff Victor J. Edney Jr. filed a Motion for Finding of Frivolous Claims under Rule 57. Pl.'s Mot. for Finding of Frivolous Claims, ECF No. 24. The parties filed various responses and replies over the next three months while awaiting disposition of the Plaintiff's Motion for Finding of Frivolous Claims.

II. LEGAL STANDARD

A. Relevant Law for a Motion for Entry of Final Judgment under Rule 54(b).

"Rule 54(b) orders should not be entered as an accommodation to counsel . . . only in the infrequent harsh case." Ansam Associates, Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 445 (2d Cir. 1985). Rule 54(b) states, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon express determination that there is no just reason for delay and upon an express

direction for the entry of judgment." Fed. R. Civ. P. 54(b). "In making the 'express determination' required under Rule 54(b), district courts should not merely repeat the formulaic language of the rule, but rather should offer a brief, reasoned explanation." Ansam Associates, Inc., 760 F.2d at 445. "One of the primary policies behind requiring an articulated justification for a 54(b) certification is the desire to avoid 'piecemeal appeals.'" Id. In explaining the reasoning for a Rule 54(b) certification a district court should follow a two-step process. See Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1 (1980). The court must first determine whether the court is dealing with a final judgment, a decision upon a cognizable claim for relief that is the ultimate disposition of an individual claim. Id. Second, the court must determine if there is a just reason for delay. Id at 8. The Fourth Circuit also set out factors a court may consider in determining if there is a just reason for delay: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like . . . . MCI Constructors, LLC v. City Of Greensboro, 610 F.3d 849, 855 (4th Cir. 2010).

B. Relevant law for a Motion for Finding of Frivolous Claims under the Texas Civil Practice and Remedies Code § 105.003.

For a plaintiff to recover fees, expenses and reasonable attorney's fees incurred, the plaintiff must be a party to a civil suit by or against a state agency where the state agency asserts a cause of action against the Plaintiff. Tex. Civ. Prac. & Rem. Code § 105.002. The plaintiff must then file a motion where he alleges that the state agency's claim is frivolous. Tex. Civ. Prac. & Rem. Code § 105.003. The Texas Civil Practice & Remedies code defines a state agency as, "a board, commission, department, office, or other agency that: (A) is in the executive branch of the government; (B) was created by the constitution or a statute of this state; and (C) has statewide jurisdiction." Tex. Civ. Prac. & Rem. Code § 105.001.

III. DISCUSSION

A. The Court should refuse to exercise jurisdiction over the remaining, pendant state law claims.

This Court granted the City of Waco Defendant's Motion to Dismiss under Rule 12(b)(6), which dismissed all the claims against the City of Waco Defendants. See Order Adopting Rep. and Recommendation, ECF No. 18. However, Plaintiff's claims against Eondra Lamone Hines and the John Doe for slander remain. Pl.'s Compl., ECF No. 1. Slander is a state law claim which does not raise a federal question. See Lavergne v. Bergeran, 583 F. App'x. 409 (5th Cir. 2014) and Phelan v. Norville, 460 F. App'x. 376 (5th Cir. 2012). This Court should decline to exercise jurisdiction over the remaining two state law claims. Title 8 U.S.C. § 1367(a)

conveys pendent jurisdiction: Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. § 1367(a). Subsection (c), however, provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction . . . ." 28 U.S.C. § 1367(c). In exercising its discretion to decline jurisdiction under subsection (c), the Court should also consider "the common law factors of judicial economy, convenience, fairness, and comity." Brookshire Bros. Holding, Inc. v. Dayco Products, Inc., 554 F.3d 595, 602 (5th Cir. 2009) (quoting Mendoza v. Murphy, 532 F.3d 342, 346 (5th Cir. 2008)) "The general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial . . . ." Id. In Parker, a district court decided to retain jurisdiction over state law claims following dismissal of all federal law claims. Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 587–90 (5th Cir. 1992). The Fifth Circuit found that the district court abused its discretion by retaining jurisdiction over the state law claims because, inter alia: (1) the proceedings were at a relatively early state when the district court made its election to retain jurisdiction (the case had only been pending for nine months and discovery had not been completed); (2) trying the

remaining state issues in state court would not impose any significant additional burdens on the parties such as repeating the effort and expense of the discovery process; and (3) the relitigation of procedural matters in state court would not pose any undue hardship. Id. All the claims over which this Court has original jurisdiction have been dismissed, therefore 28 U.S.C. § 1367(c)(3) applies and the Court should evaluate the relevant common-law factors as instructed in Brookshire Bros. The Court has not invested a "significant amount of judicial resources" in the litigation of this case. Brookshire Bros., 554 F.3d at 602–03. As in Parker, this case is at a reasonably early stage of the litigation process. Parker, 972 F.2d at 587. Furthermore, trying the remaining state issues in an appropriate state court will not impose significant additional burdens on the parties or impose any undue hardship. Therefore, the undersigned recommends that Plaintiff's state law claims be dismissed without prejudice under the Court's discretionary authority granted by 28 U.S.C. § 1367(c).

B. The Court should grant the City of Waco Defendant's Motion for Entry of Final Judgment.

Regardless of the Court's decision on retaining jurisdiction, it is recommended that this Court grant the City of Waco Defendants' Motion for Entry of Final Judgment. "The court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). For the Court to direct the entry of a final

judgment the Court should follow the two-step process as explained in Curtiss-Wright Corp. First, the Court must determine if it is dealing with a final judgment, and second, the Court must then determine if there is any just reason for delay. Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 7-8 (1980). The previously dismissed claims against the City of Waco Defendants are best characterized as a final judgment. A final judgment "must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" Id at 7. The Court granted the City of Waco Defendants' Motion to Dismiss and dismissed Plaintiff's claims against the City of Waco Defendants with prejudice. Order Adopting Rep. & Recommendation, ECF #18. The order is a decision and an ultimate disposition of multiple, of all the claims against the City of Waco Defendants. Therefore, all the claims against the City of Waco Defendants are final judgments under the definition provided by the United States Supreme Court in Curtiss-Wright Corp. There is no just reason for delay. "One of the primary policies behind requiring an articulated justification for a 54(b) certification is the desire to avoid 'piecemeal appeals.'" Ansam Associates, Inc., 760 F.2d at 445. Here there is no risk of having a "piecemeal appeal" as the claims against the City of Waco Defendants deal with civil rights violations, and the remaining two claims against Hines and Joh Doe are both defamation claims. Pl.'s Compl., ECF No. 1. Other factors to consider when determining a Rule 54(b) certification are, "(1) the relationship between the adjudicated and unadjudicated claims; . . . (3) the

possibility that the reviewing court might be obliged to consider the same issue a second time." MCI Constructors, LLC, 610 F.3d at 855. There is no relation between the adjudicated and unadjudicated claims, and there is a low possibility that the reviewing court will be obliged to consider the same issue twice in the present case. The Court dismissed claims that implicate 42 U.S.C. § 1983, whereas the remaining claims are state created defamation claims and do not implicate federal civil rights. Order Adopting Rep. & Recommendation, ECF No. 18. Finally, judicial economy will best be served by entering a final judgment for the claims against the City of Waco Defendants. There is no reason to require the City of Waco Defendants to stay in this case and await the conclusion. The remaining claims are unrelated legally and factually to the claims against the City of Waco Defendants, and Plaintiff has not taken any action to identify or further his case against the John Doe. Thus, because this Court is dealing with final judgments and there is no just reason for delay, the City of Waco Defendant's Motion for Entry of Final Judgment should be granted.

C. It is recommended that this Court deny Plaintiff's motion of frivolous claims.

"A party to a civil suit in a court of this state brought by or against a state agency in which the agency asserts a cause of action against the party . . . is entitled to recover . . . a total amount not to exceed $1 million for fees, expenses, and reasonable attorney's fees incurred by the party in defending the agency's action." Tex. Civ. Prac. & Rem. Code § 105.002. Plaintiff filed this motion to recover costs under the Texas Civil Practice and Remedies Code. Pl.'s Mot. for Finding of

Frivolous Claims, ECF No. 24. However, no state agency has asserted a cause of action against Plaintiff. The only claims in the present case are asserted by Plaintiff. There are no causes of action asserted against Plaintiff. Therefore, it is recommended that Plaintiff's Motion of Frivolous Claims should be denied.

IV. RECOMMENDATION

After thoroughly reviewing the record, the undersigned RECOMMENDS that this Court refuse to exercise jurisdiction over the remaining state law claims. The Court also RECOMMENDS that the Defendant's Motion for Entry of Final Judgment be GRANTED. The Court also RECOMMENDS that Plaintiff's Motion of Frivolous Claims be DENIED. If the Court elects to adopt this Report and Recommendation, no claims remain in the above-captioned mater.

V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. See Battle v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal

conclusions accepted by the District Court. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140, 150-53 (1985); Douglass v. United Services Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc). SIGNED this 9th day of March, 2020.

"s/" Jeffery C. Manske

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

VICTOR J. EDNEY JR., *Plaintiff*	§	
v.	§	**CASE NO. 6:18-CV-00336-ADA-JCM**
EONDRA LAMONE HINES, JOHN DOE, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, KEITH VAUGHN, and "INTERNAL AFFAIRS WACO POLICE DEPARTMENT", *Defendants*	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ALAN D ALBRIGHT, UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

Before the Court are Defendants Keith Vaughn, Jordan Wenkman, Bobby King, David Conley, and Internal Affairs Waco Police Department's (collectively "City of Waco Defendants") Motion for Entry of Final Judgment (ECF No. 22) and Plaintiff Victor J. Edney Jr. Motion of Frivolous Claims (ECF No. 24). For the reasons stated below, the undersigned **RECOMMENDS** that this Court decline to exercise jurisdiction over the remaining two state law claims, Defendants' Motion for Entry of Final Judgment be **GRANTED,** and Plaintiff's Motion of Frivolous Claims be **DENIED.**

I. BACKGROUND

Plaintiff initiated this suit on November 8, 2018 and is proceeding pro se. Plaintiff's complaint is scant, but this matter arises out of an alleged interaction between Plaintiff and alleged members of the Waco Police Department. *See* Pl.'s Comp, ECF No. 1. Plaintiff generally alleges that his civil rights were violated during an interaction with officers who thought Plaintiff was suicidal. *Id.*

Plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983 and names seven defendants: (1) Eondra Lamone Hines, alleged conspirator to Plaintiff's "arrest"; (2) John Doe, unknown accomplice to Hines; (3) Jordan Wenkman, Waco Police Officer; (4) Bobby King, Waco Police Officer; (5) David Conley, Waco Police Sergeant; (6) Keith Vaughan, Waco Police Sergeant; and (7) the "Internal Affairs Waco Police Department". Pl.'s Compl., ECF No. 1. Plaintiff alleges that Eondra Lamone Hines and accomplice John Doe made false statements which ended in Plaintiff's arrest. *Id.*

Specifically, Plaintiff alleges that the City of Waco Defendants violated Plaintiff's Fourth, Fifth, and Eighth Amendment rights. *Id.* The City of Waco Defendants filed a Motion to Dismiss on January 28, 2019. Defs.' Mot. to Dismiss, ECF No. 6. This Court granted the Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6) and dismissed the claims against the City of Waco Defendants with prejudice. Order Adopting Rep. and Recommendation, ECF No. 18. There are two remaining claims in this case: (1) Plaintiff's slander claim against Eondra Lamone Hines; and (2) Plaintiff's slander claim against John Doe, Eondra Lamone Hines' unidentified accomplice.

The City of Waco Defendants filed a Motion for Entry of Final Judgment under Rule 54(b) on August 30, 2019. Defs.' Mot. for Entry of Judgment, ECF No. 22. Plaintiff Victor J.

Edney Jr. filed a Motion for Finding of Frivolous Claims under Rule 57. Pl.'s Mot. for Finding of Frivolous Claims, ECF No. 24. The parties filed various responses and replies over the next three months while awaiting disposition of the Plaintiff's Motion for Finding of Frivolous Claims.

II. LEGAL STANDARD

A. Relevant Law for a Motion for Entry of Final Judgment under Rule 54(b).

"Rule 54(b) orders should not be entered as an accommodation to counsel . . . only in the infrequent harsh case." *Ansam Associates, Inc. v. Cola Petroleum, Ltd.,* 760 F.2d 442, 445 (2d Cir. 1985). Rule 54(b) states, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). "In making the 'express determination' required under Rule 54(b), district courts should not merely repeat the formulaic language of the rule, but rather should offer a brief, reasoned explanation." *Ansam Associates, Inc.,* 760 F.2d at 445. "One of the primary policies behind requiring an articulated justification for a 54(b) certification is the desire to avoid 'piecemeal appeals.'" *Id.*

In explaining the reasoning for a Rule 54(b) certification a district court should follow a two-step process. *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980). The court must first determine whether the court is dealing with a final judgment, a decision upon a cognizable claim for relief that is the ultimate disposition of an individual claim. *Id.* Second, the court must determine if there is a just reason for delay. *Id at 8.* The Fourth Circuit also set out factors a court may consider in determining if there is a just reason for delay:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future

> developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like . . . .

MCI Constructors, LLC v. City Of Greensboro, 610 F.3d 849, 855 (4th Cir. 2010).

B. Relevant law for a Motion for Finding of Frivolous Claims under the Texas Civil Practice and Remedies Code § 105.003.

For a plaintiff to recover fees, expenses and reasonable attorney's fees incurred, the plaintiff must be a party to a civil suit by or against a state agency where the state agency asserts a cause of action against the Plaintiff. Tex. Civ. Prac. & Rem. Code § 105.002. The plaintiff must then file a motion where he alleges that the state agency's claim is frivolous. Tex. Civ. Prac. & Rem. Code § 105.003. The Texas Civil Practice & Remedies code defines a state agency as, "a board, commission, department, office, or other agency that: (A) is in the executive branch of the government; (B) was created by the constitution or a statute of this state; and (C) has statewide jurisdiction." Tex. Civ. Prac. & Rem. Code § 105.001.

III. DISCUSSION

A. The Court should refuse to exercise jurisdiction over the remaining, pendant state law claims.

This Court granted the City of Waco Defendant's Motion to Dismiss under Rule 12(b)(6), which dismissed all the claims against the City of Waco Defendants. *See* Order Adopting Rep. and Recommendation, ECF No. 18. However, Plaintiff's claims against Eondra Lamone Hines and the John Doe for slander remain. Pl.'s Compl., ECF No. 1. Slander is a state law claim which does not raise a federal question. *See Lavergne v. Bergeran,* 583 F. App'x. 409 (5th Cir. 2014) and *Phelan v. Norville*, 460 F. App'x. 376 (5th Cir. 2012). This Court should decline to exercise jurisdiction over the remaining two state law claims.

Title 8 U.S.C. § 1367(a) conveys pendent jurisdiction:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). Subsection (c), however, provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction . . . ." 28 U.S.C. § 1367(c). In exercising its discretion to decline jurisdiction under subsection (c), the Court should also consider "the common law factors of judicial economy, convenience, fairness, and comity." *Brookshire Bros. Holding, Inc. v. Dayco Products, Inc.*, 554 F.3d 595, 602 (5th Cir. 2009) (quoting *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008)) "The general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial . . . ." *Id.*

In *Parker*, a district court decided to retain jurisdiction over state law claims following dismissal of all federal law claims. *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 587–90 (5th Cir. 1992). The Fifth Circuit found that the district court abused its discretion by retaining jurisdiction over the state law claims because, inter alia: (1) the proceedings were at a relatively early state when the district court made its election to retain jurisdiction (the case had only been pending for nine months and discovery had not been completed); (2) trying the remaining state issues in state court would not impose any significant additional burdens on the parties such as repeating the effort and expense of the discovery process; and (3) the relitigation of procedural matters in state court would not pose any undue hardship. *Id.*

All the claims over which this Court has original jurisdiction have been dismissed, therefore 28 U.S.C. § 1367(c)(3) applies and the Court should evaluate the relevant common-law factors as instructed in *Brookshire Bros.* The Court has not invested a "significant amount of judicial resources" in the litigation of this case. *Brookshire Bros.*, 554 F.3d at 602–03. As in *Parker*, this case is at a reasonably early stage of the litigation process. *Parker,* 972 F.2d at 587. Furthermore, trying the remaining state issues in an appropriate state court will not impose significant additional burdens on the parties or impose any undue hardship. Therefore, the undersigned recommends that Plaintiff's state law claims be dismissed without prejudice under the Court's discretionary authority granted by 28 U.S.C. § 1367(c).

B. The Court should grant the City of Waco Defendant's Motion for Entry of Final Judgment.

Regardless of the Court's decision on retaining jurisdiction, it is recommended that this Court grant the City of Waco Defendants' Motion for Entry of Final Judgment. "The court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). For the Court to direct the entry of a final judgment the Court should follow the two-step process as explained in *Curtiss-Wright Corp.* First, the Court must determine if it is dealing with a final judgment, and second, the Court must then determine if there is any just reason for delay. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7-8 (1980).

The previously dismissed claims against the City of Waco Defendants are best characterized as a final judgment. A final judgment "must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Id*

at 7. The Court granted the City of Waco Defendants' Motion to Dismiss and dismissed Plaintiff's claims against the City of Waco Defendants with prejudice. Order Adopting Rep. & Recommendation, ECF #18. The order is a decision and an ultimate disposition of multiple, of all the claims against the City of Waco Defendants. Therefore, all the claims against the City of Waco Defendants are final judgments under the definition provided by the United States Supreme Court in *Curtiss-Wright Corp.*

There is no just reason for delay. "One of the primary policies behind requiring an articulated justification for a 54(b) certification is the desire to avoid 'piecemeal appeals.'" *Ansam Associates, Inc.,* 760 F.2d at 445. Here there is no risk of having a "piecemeal appeal" as the claims against the City of Waco Defendants deal with civil rights violations, and the remaining two claims against Hines and Joh Doe are both defamation claims. Pl.'s Compl., ECF No. 1.

Other factors to consider when determining a Rule 54(b) certification are, "(1) the relationship between the adjudicated and unadjudicated claims; . . . (3) the possibility that the reviewing court might be obliged to consider the same issue a second time." *MCI Constructors, LLC*, 610 F.3d at 855. There is no relation between the adjudicated and unadjudicated claims, and there is a low possibility that the reviewing court will be obliged to consider the same issue twice in the present case. The Court dismissed claims that implicate 42 U.S.C. § 1983, whereas the remaining claims are state created defamation claims and do not implicate federal civil rights. Order Adopting Rep. & Recommendation, ECF No. 18.

Finally, judicial economy will best be served by entering a final judgment for the claims against the City of Waco Defendants. There is no reason to require the City of Waco Defendants to stay in this case and await the conclusion. The remaining claims are unrelated legally and

factually to the claims against the City of Waco Defendants, and Plaintiff has not taken any action to identify or further his case against the John Doe. Thus, because this Court is dealing with final judgments and there is no just reason for delay, the City of Waco Defendant's Motion for Entry of Final Judgment should be granted.

C. It is recommended that this Court deny Plaintiff's motion of frivolous claims.

"A party to a civil suit in a court of this state brought by or against a state agency in which the agency asserts a cause of action against the party . . . is entitled to recover . . . a total amount not to exceed $1 million for fees, expenses, and reasonable attorney's fees incurred by the party in defending the agency's action." Tex. Civ. Prac. & Rem. Code § 105.002. Plaintiff filed this motion to recover costs under the Texas Civil Practice and Remedies Code. Pl.'s Mot. for Finding of Frivolous Claims, ECF No. 24. However, no state agency has asserted a cause of action against Plaintiff. The only claims in the present case are asserted by Plaintiff. There are no causes of action asserted against Plaintiff. Therefore, it is recommended that Plaintiff's Motion of Frivolous Claims should be denied.

IV. RECOMMENDATION

After thoroughly reviewing the record, the undersigned **RECOMMENDS** that this Court refuse to exercise jurisdiction over the remaining state law claims. The Court also **RECOMMENDS** that the Defendant's Motion for Entry of Final Judgment be **GRANTED**. The Court also **RECOMMENDS** that Plaintiff's Motion of Frivolous Claims be **DENIED.** If the Court elects to adopt this Report and Recommendation, no claims remain in the above-captioned mater.

V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED this 9th day of March, 2020.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE

ORDERS (ii)

FILED: 03/25/2020

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

VICTOR J EDNEY JR., **6:18-CV-00336-ADA-JMC**

Plaintiff,

v.

EONDRA LAMONE HINES, KEITH VAUGHN, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, AND "INTERNAL AFFAIRS WACO POLICE DEPARTMENT"

Defendants.

ORDER ADOPTING MAGISTRATE

JUDGE'S REPORT AND RECOMMENDATION

Before the Court is the Report and Recommendation of United States Magistrate Judge C. Jeffrey Mankse. ECF No. 30. The report recommends that this Court decline to exercise jurisdiction over the remaining state law claims, grant Defendants' Motion for Entry of Final Judgment, and deny Plaintiff's Motion for Frivolous Claims. The report and recommendation was filed on March 9, 2020. A

party may file specific, written objections to the proposed findings and recommendations of the magistrate judge within fourteen days after being served with a copy of the report and recommendation, thereby securing *de novo* review by the district court. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). As of today, neither party has filed objections. When no objections are timely filed, a district court reviews the magistrate judge's report and recommendation for clear error. *See* Fed. R. Civ. P. 72 advisory committee's note ("When no timely objection is filed, the [district] court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."). The Court has reviewed the report and recommendation and finds no clear error.

IT IS THEREFORE ORDERED that the Report and Recommendation of United States Magistrate Judge Manske, ECF No. 30, is **ADOPTED**. This Court will not exercise jurisdiction over the remaining state law claims.

IT IS FURTHER ORDERED that Defendant's Motion for Entry of Final Judgment (ECF No. 22) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Finding of Frivolous Claims (ECF No. 24) is **DENIED**. SIGNED this 26th day of March, 2020.

"s/" Alan Albright

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS WACO DIVISION

VICTOR J EDNEY JR.,

Plaintiff,

v. **6:18-CV-00336-ADA-JCM**

EONDRA LAMONE HINES, KEITH VAUGHN, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, AND "INTERNAL AFFAIRS WACO POLICE DEPARTMENT"

Defendants.

FINAL JUDGMENT

In accordance with the orders adopting the reports and recommendations of United States Magistrate Judge Jeffrey C. Manske (ECF Nos. 18, 32), this Court enters its Judgment as follows:

IT IS ORDERED that Defendant's Motion for Entry of Final Judgment (ECF No. 22) is **GRANTED**. In accordance with the Court's ruling on the Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6) by Defendants Keith Vaughn, Jordan Wenkman, Bobby King, David Conley, and "Internal Affairs Waco Police Department," Plaintiff's claims against the foregoing Defendants are **DISMISSED WITH PREJUDICE**.

This Court will not exercise jurisdiction over the remaining state law claims; they are **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Finding of Frivolous Claims

(ECF No. 24) is **DENIED**.

IT IS FINALLY ORDERED that any relief not specifically granted in this Judgment is **DENIED** and this case is **CLOSED**.

SIGNED this 26th day of March, 2020.

"S/" Alan Albright

UNITED STATES DISTRICT JUDGE

FILED: 10/16/2019

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISRTICT OF TEXAS

WACO DIVISION

VICTOR J. EDNEY JR.

Plaintiff,

v. **CASE NO. 6:18-CV-00336-ADA-JCM**

EONDRA LAMONE HINES, JOHN DOE, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, KEITH VAUGHAN, and "INTERNAL AFFAIRS WACO POLICE DEPARTMENT".

Defendants,

Motion of frivolous claims pursuant to federal rules of civil procedure 57 declaratory judgement

Now comes Victor J. Edney Jr., plaintiff pro se' who request the court to: grant this motion of frivolous claims by state agency pursuant to federal rules of civil procedure 57 declaratory judgement: in accordance to Texas codes annotated – civil practice and remedies section 105.003 motion of frivolous claim; which states: (a) To recover under this chapter, the party must file a written motion alleging that the agency's claim is frivolous, unreasonable, or without foundation. The motion may be filed at any time after the filing of the pleadings in which the agency's cause

of action is alleged. (b) The motion must set fourth the facts that justify, the party's claims. (c) The motion must state that if the action is dismissed or judgement is awared to the party, the party intends to submit a motion to the court to recover fees, expenses, and reasonable attorney's fees, and now the federal rules of civil procedure 57 declaratory judgement; that states: The rules govern the procedure for obtaining a declaratory judgement under 28 U.S.C. section 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgement that is otherwise appropriate. The court may order a speedy hearing of a declaratory judgement action. In accordance with these rules the demand of declaratory judgement has been brought against Waco Police Department (WPD) for their frivolous and unreasonable claims submitted in bad faith therefore judgement should be awarded to the plaintiff . . . . . Again to the honored court we are brought together for the frivolous and unreasonable crime of suicide and negligible thoughts reported to Texas Department of Public Safety (TDPS) accusing the plaintiff of charges based upon the presumption of bad faith: from the "Internal Affairs/Professional Standards" of WPD who gathered information from fellow officers involved who pressed their assumption without any positive foundation leaving the plaintiff liable for acts he did not commit. With that stated, now I will presented the frivolous and unreasonable facts sent from WPD to TDPS statement for statement with opposing facts from the plaintiff . . . a affidavit from WPD will be attached to this motion with truthful facts from the plaintiff and family uplifting the burden of false claims while pleading for declaratory judgement

about this controversy. Here's the untrue statements sent to Texas Department of Public Safety Regulatory Services Division by Keith Vaughn of McLennan County that was comprised of information from defendant officers Conley, Wenkman, and King – sworn on May 3, 2018 by commission Sheri Webber, with controversy of the plaintiff. It will be recited whereas the defendants statements will be stated then the plaintiffs factual statements cited – too prevail over the defendants during review.

Vaughn of WPD states; The license holder became ineligible for a license, based on the four following review:

(1.) On 4/24/18 Waco Police were called to a local park on a drowning/ attempted suicide. With officers arrived they found Victor still in the water. Family and friends of Edney were trying to talk him into getting out of the water but he did not get out until the officers talked him into getting out of the water . . . Now – on the other hand from the plaintiff, when the police arrived the plaintiff knew nothing about a drowning or attempted suicide stated against him. When he saw the police they questioned him like have you seen anyone in the water drowning – he stated no and then they asked him to come on the side of the river bank where they was so he did. And for family and friends having concerns with me being by the water their was none round at the time nor did any of my people call the police on me. Attached is a statement of the plaintiffs accused family with factual statements to prevail over the frivolous and unreasonable claims against the plaintiff.

(2.) Edney told officers he did not think they were really the police even though they were in full police uniforms and identifies themselves as being the police. Edney also did not recognize his friends and family and told officers that he didn't think his mother was really his mother. He said that his mother was someone wearing a woman suit . . . Now the other hand by the plaintiff – when the police identified themselves to the plaintiff after he asked them to because it was dark – he immediately began answering questions from them. The plaintiff never stated he did not think they where the police before and after they identified themselves. These officers where wearing body warn cameras – you should check the footage. In addition, Vaughn of WPD stated, I did not recognize my family or friends but that's frivolous I can recognize real in any situation – I was staring at the time – where are my belongings and Conley stated your family has them – I stated family – I did not come to the park with family – that could be anyone. He misconstrued the information. Attached is a factual statement from family to better understand the plaintiff. With these frivolous and unreasonable claims the plaintiff is accused of he should be awarded judgement.

(3.) Once Edney was secured of facts they found him to have a .45 caliber derringer in the front of his pants. The weapon was unloaded but he had numerous rounds in his pants pockets. Edney did not tell officers he was armed nor did he tell them he had a concealed carry permit . . . Now comes the plaintiff remarks – true I had the weapon in a controlled carry when they

searched me in front of the police vehicle. And of the police would have asked me – if I was armed before touching me – I would have told them with pride - like for instance, when they found my weapon and ask if the plaintiff had a license and he told them yes in my wallet. This factual statement took place in front of a surveillance vehicle and all the police who where around had body warn cameras attached to them too.

(4.) Family members told officers that Edney was schizophrenic and has PTSD and he has not been taking his medication for his mental condition. Family also told officers that Edney was in the Marines . . . Here's the other hand from the plaintiff – his family members did not state Edney was schizophrenic and has PTSD and he has not been taking his medication for his mental condition. With that stated, the plaintiffs has attached statements of family for the acts they did not commit. In addition to this my family stated they where interrogated when they arrived to the park about the back ground of the plaintiff when they showed up in fright of their family trying to kill himself. All because someone call them to the park stating their family is trying to kill himself.

Now the review of facts are finish – the plaintiff will now concluded with . . . the entirely of this motion that justifies the facts of both parties claims frivolous and non frivolous with an attached confirmation of assumed factual statements and a trueful act statement of family to prevail over the defendants and the defendants and proceed with his claim. If judgment is

awarded to the plaintiff – he intends to submit a motion under civil practices section 105.001 for recovery of fees, expenses, and attorney's fees.

Oct. 15, 2019

"s/" Victor J. Edney Jr.
Victor J. Edney Jr.
P.O. Box 853
Waco Tx. 76703
(254) 424-6378

CERTIFICATION OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the following on this 15th day of October 2019, to the attorney – by hand delivered mail to:

Namen, Howell, Smith & Lee, PLLC
Roy L. Barrett
400 Austin Avenue, Suit 800
P.O. Box 1470
Waco, Texas 76703
(254) 755-4100
Fax (254) 754-6331

"s/" Victor J. Edney Jr.
Victor J. Edney Jr.

FILED: 10/16/2019

Here is a witness statement inspired by Victor J. Edney Jr. and answered by his mother about untrue statements mad against him.

On 4/24/18 where you Marilyn Bell at a family gathering in Cameron Park with Victor J. Edney Jr.? NO

Did you Marilyn or any of your family call the police on Victor for trying to drowning himself or committed suicide? NO

Did you Marilyn or any of your family try in talk Victor out of the water? NO

Marilyn do you know a person by name of Eondra Lamone Hines? NO

Marilyn did you show up on the scene with your bother? NO

Did Victor deny your existence or any of your family in Cameron Park on 4/24/18? NO

Did you tell officers Victor was a schizophrenic and has PTSD and he has not been taking his medicine for his mental condition? NO

I declare that the above information is true.

08/13/2019 **"s/"Marilyn Bell**

"s/"Victor J. Edney Jr.

FILED 10/30/2019

IN THE UNITED STATES DISTRICT

COURT FOR THE WESTERN DISRTICT

OF TEXAS WACO DIVISION

VICTOR J. EDNEY JR.

Plaintiff,

v. **CIVIL NO. 6:18-CV-00336-ADA-JCM**

EONDRA LAMONE HINES, ET.AL.

Defendants,

RESPONSE OF DEFENDANTS KEITH VAUGHN, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, AND "INTERNAL AFFAIRS WACO POLICE DEPARTMENT" (COLLECTIVE REFERRED TO HEREIN AS "CITY OF WACO DEFENDANTS') TO PLAINTIFF'S "MOTION OF FRIVOLOUS CLAIMS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 57 DECLARATORY JUDGMENT"

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Defendants Keith Vaughn, Jordan

Wenkman, Bobby King, David Conley, and "Internal Affairs Waco Police Department" (collectively referred to herein as "City of Waco Defendants") and file this, their Response to Plaintiff's "Motion of Frivolous Claims Pursuant to Federal Rules of Civil Procedure 57 Declaratory Judgment" and in support would respectfully show the Court as follows:

BACKGROUND

This lawsuit arises out of the response by Waco police to a report of an attempted suicide. Law enforcement received a call reporting an attempted suicide and when Waco police arrived, Plaintiff was in the river. Plaintiff denied that the officers were police officers, despite their arrival in marked patrol cars and being in police uniforms. Plaintiff made strange claims that the person on scene who participated in the report to the officers was a man wearing a "woman suit" and that he was being harassed by a local gang. Plaintiff could not give a coherent explanation as to why he was in the river. Officers patted Plaintiff down, discovered a pistol with .410 shells and, based on their interactions with Plaintiff and their concern for Plaintiff and the public, confiscated the gun and shells. Plaintiff was released to go on his way.

In response to Plaintiff's filing this lawsuit, Defendants Keith Vaughn, Jordan Wenkman, Bobby King, David Conley, and "Internal Affairs Waco Police Department" ("the City of Waco Defendants") filed a motion to dismiss under Rule 12(b)(6). (Doc. #6.) The motion was referred to the Magistrate Judge, who recommended that the motion be granted. (Doc. #13.) Plaintiff objected to the report and recommendation (doc. #17), and this Court adopted the report and recommendation. (Doc. #18.) Because Plaintiff's claims against other defendants remain pending, the City of Waco Defendants filed a Rule 54(b) motion for entry of final judgment. (Doc. #22.) Plaintiff has now filed a motion for reconsideration (doc. #21) and a "Motion of Frivolous Claims Pursuant to Federal Rules of Civil Procedure 57 Declaratory Judgment." (Doc. #24.) Under any possible Rule, standard or analysis, the fact remains that this Court properly adopted the report and recommendation dismissing this case as against the City of Waco Defendants. The relief sought in these filings by Plaintiff should be denied and a Rule 54(b) final judgment should be entered in favor of the City of Waco Defendants.

AUTHORITIES AND ANALYSIS

A. NEITHER RULE 57 NOR ANY OTHER AUTHORITY CITED BY PLAINTIFF IN HIS MOTION OF FRIVOLOUS CLAIMS PROVIDES A BASIS FOR ANY RELIEF FOR PLAINTIFF

Plaintiff styles his motion as being filed under Rule 57. Rule 57 governs the procedure for seeking declaratory relief in federal court. Rule 57 is a procedural rule and does not provide a basis for substantive relief. *Harris Cnty. Tex. v. MERSCORP Inc.*, 791 F.3d 545, 553 (5th Cir. 2015).

Plaintiff cites *Tex. Civ. Prac. & Rem. Code* § 105.003, which is part of a chapter of the Texas Civil Practice & Remedies Code allowing recovery of fees and costs when a state agency files a frivolous claim or action. Plaintiff has not provided any authority to show that this provision can be used to recover fees or expenses in federal court. Even assuming that the section could apply in federal court, it would not apply to this case. None of the City of Waco Defendants is a state agency, the City of Waco Defendants did not file this action or any claim in it, and no filing by the City of Waco Defendants is this case is frivolous. *Cf. Tex.*

Civ. Prac. & Rem. Code §§ 105.001; 105.003. Plaintiff's own pleadings and the attachment to them show that the City of Waco Defendants' factual and legal positions in this case are correct and that this Court properly dismissed the case and claims against them.

B. PLAINTIFF'S FILINGS ARE NOT AN APPROPRIATE OBJECTION TO THE DISMISSAL OR A PROPER MOTION TO RECONSIDER

Plaintiff has filed a motion to reconsider and now has filed his "Motion of Frivolous Claims Pursuant to Federal Rules of Civil Procedure 57 Declaratory Judgment." These filings by Plaintiff largely rehash Plaintiff's factual positions and attempt to rebut those of the City of Waco Defendants, as well as attempt to show why his claims are meritorious. To the extent that Plaintiff intends by his filings to object to the report and recommendation that his case be dismissed, those objections were due within 14 days of the report and recommendation. Thus, his motion to reconsider and his "Motion of Frivolous Claims Pursuant to Federal Rules of Civil Procedure 57 Declaratory Judgment" are untimely. Even aside from the issue of the timing of the filings,

Plaintiff's filings do not provide any meaningful discussion of the facts of his case or legal analysis to show that the report and recommendation was not correct. *Cf. Battel V. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

Plaintiff is also not entitled to relief if his filings are analyzed as seeking reconsideration of this Court's adoption of the report and recommendation. "[T]he Federal Rules of Civil Procedure do not recognize a general motion for reconsideration " *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997). The United States Court of Appeals for the Fifth Circuit has explained that generally "a 'motion for reconsideration' . . . will be treated as either a motion 'to alter or amend' under Rule 59(e) or a motion for 'relief from judgment' under Rule 60(b)." *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir. 1991).

However, Rules 59 and 60 apply to final judgments and the City of Waco Defendants motion for entry of a Rule 54 judgment has not yet been granted. *De Olivera Dos Santos v. Bell Helicopter Textron, Inc.*, 651 F. Supp. 2d 550, 553 (N.D. Tex. 2009). Plaintiff cites no rule of procedure as the basis or authority for his motion and this Court's order on Defendants' motion to dismiss was interlocutory, not

final. *See Moody v. Seaside Lanes*, 825 F.2d 81, 85 (5th Cir. 1987) (explaining that only the resolution of the entire proceeding is "final"). A court reconsiders an interlocutory order under Rule 54(b). *See Fed. R. Civ. P.* 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."); *see also Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990) abrogated on other grounds by *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n.14 (5th Cir. 1994) (en banc); *De Olivera Dos Santos*, 651 F. Supp. 2d at 553.

Although the precise standard for evaluating a motion to reconsider under Rule 54(b) is not settled in the Fifth Circuit, it is clear that whether to grant such a motion rests within the discretion of the trial court, guided by considerations similar to those relevant under Rules 59 and 60. *See Livingston Down Racing Ass'n v. Jefferson Downs Corp.*, 259 F. Supp. 2d 471, 475 (M.D. La. 2002); *see also McLaughlin v. Unum Life Ins. Co. of Am.*, 212 F.R.D. 40, 41 (D. Me. 2002) (discussing the standard for review of an

interlocutory order). That is, considerations such as (1) whether the movant is attempting to rehash arguments previously made, (2) is attempting to raise an argument for the first time that could have been previously made; and (3) whether extraordinary circumstances are present, such as avoiding manifest injustice or correction of a clear error of law, bear upon whether a court should grant a Rule 54 motion to reconsider. *See McLaughlin*, 212 F.R.D. at 41; *also see Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989); *also cf. Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2009 U.S. Dist. LEXIS 3336, 2009 WL 129731, at *1 (N.D. Tex. Jan. 20, 2009) (stating a motion to reconsider is not the proper vehicle for rehashing old arguments or raising arguments that could have been presented earlier). As can be seen in Plaintiff's filings, all he is doing is rehashing factual allegations and arguments that have been made or could have previously been made. Nothing in Plaintiff's filings show any clear error or manifest injustice in this Court's ruling on the City of Waco Defendants' motion to dismiss or any other extraordinary circumstances that would warrant the Court revisiting that ruling.

Finally, Plaintiff's filings address factual details and contentions such that they could be read as seeking leave to amend his pleadings. But none of the facts alleged or arguments made by Plaintiff in his motion to reconsider and his "Motion of Frivolous Claims Pursuant to Federal Rules of Civil Procedure 57 Declaratory Judgment" shows that Plaintiff could avoid the effect of the arguments made by the City of Waco Defendants in their motion to dismiss or that he could otherwise state a valid, plausible claim for relief against any of the City of Waco Defendants. So, even if his filings are read as an attempt to raise new factual allegations or legal theories and thus a request for leave to amend, there would be no basis for granting such a request. *See Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (where plaintiff has alleged his best case, no need for leave to amend); *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872 (5th Cir. 2000) (leave to amend can be denied if futile).

III. CONCLUSION

Wherefore, premises considered, the City of Waco Defendants respectfully request that the Court deny any relief sought by Plaintiff in his motion for reconsideration and "Motion of Frivolous Claims Pursuant to Federal Rules of Civil Procedure 57 Declaratory Judgment" and grant the City of Waco Defendants' pending motion for rule 54(b) judgment so that this case can become final and the City of Waco Defendants can more expediently have a final resolution of this matter.

Respectfully submitted,

"s/" Roy L. Barrett

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the following on this 30th day of October 2019, as follows:

Victor J. Edney Jr.
P.O. Box 853
Waco, Texas 76703

Via Certified Mail, Return Receipt Requested
No. 7016 1370 0000 9943 0323 and First Class U.S. Mail

"s/" Roy L. Barrett

Roy L. Barrett

FILED: 11/19/2019

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS WACO DIVISION

VICTOR J. EDNEY JR.

Plaintiff,

v. **CASE NO. 6:18-CV-00336-ADA-JCM**

EONDRA LAMONE HINES, JOHN DOE, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, KEITH VAUGHN, and "INTERNAL AFFAIRS WACO POLICE DEPARTMENT."

Defendants

RESPONSE TWO – MOTION OF FRIVOLOUS CLAIMS PURSANT TO FEDERAL RULES OF CIVIL PROCEDURE 57 DECLARATORY JUDGMENT

Now comes Victor J. Edney Jr., plaintiff pro se' who request the court to: grant response two – motion of frivolous claims by state agency pursuant to federal rules of civil procedure 57 declaratory judgment. Response two is an up date narrative of how the claim started that also comments back to the defendants and the court about the claim to gain the approval or reversal of the order given that dismissed the case for some of the defendants who – claims are frivolous. The plaintiff will now ask for favor of the magistrate judge and the judge of the court to

dismiss these frivolous claims – and give a not guilty verdict to the plaintiff of the court: on the basis of ORDER. Order was stated, for example – of an order given on Jan. 4, 2019 that will be attached . . . ordering the motion granted to proceed In Forma Pauperis (IFP) and if the states is frivolous the case will be dismissed under 28 U.S.C. section 1915 (c) and the court in its discretion will impose costs of court at the conclusion of this lawsuit . . . with that example stated, the plaintiff status of poverty is true and since the ending of 2018 the plaintiff poverty rate has decreased due to issues that he could not control. With that stated, the defendants claims our erroneous towards the plaintiff and judgment has been entered in favor of the defendants who's claims are frivolous. The court should reconsider. And for the courts – according to 28 U.S.C. code section 636 (b)(1)(A) that's now implied concisely; A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judges order is clearly erroneous or contrary to law. . . This motion of frivolous claims clearly states and show the order given by the magistrate judge and court – is erroneous for the plaintiffs claims being dismissed in favor of the defendant for failure to stating a claim. With U.S. Codes like this and the defendants pleadings – stating the plaintiffs' factuality presented – the court should grant this response in light of the plaintiff.

NARRATIVE OF THE MOTION OF FRIVOLOUS CLAIMS

It states whereas the original plaintiff: Internal Affairs Waco P.D. – sent frivolous claims to Texas Department of Public Safety (T.D.P.S.) on – the true

defendant Edney Jr.. Defendants Victor when notified of the claim – stated trying to resolve the incident but was denied. Edney Jr. spoke with the chief of police about it . . . me . . . him and Vaughn met but Vaughn insisted that he could not take these claims back that was presented. Following that – I called and told T.D.P.S. about it and they told me to take the city of Waco police department to court if the claims are wrong. The defendants of the court also stated the plaintiff claims are factual in which the plaintiff provided.

Comments of the motion

Defendants stated two comments about the motion sectioned (A) (B) and are listed under authorities and analysis of their response.

Comment (A) from defendants state: Neither Rule 57 nor any other authority cited by plaintiff in his motion of frivolous claims provides a basis for any relief for plaintiff . . .

Now the plaintiff – with that noted, the defendants has just implied inconsisted statements for no reason. Rule 57 and frivolous claims provide a basis for proper judgment. Rule 57 was implied to terminate the controversy of the defendant – who states the plaintiff is factual according to the motion response and to allowed favor for the plaintiff while demanding for a jury trial. Now, here's the comment about the motion of frivolous claims – this claim alone provided the exact basis for any relief. The Texas constitution provided the civil practice and remedies that is used which states the motion may be filed at any time after filing of the pleading in which the agency's cause of action is alleged. In addition to that, it

states – the motion must state that if the action is dismissed or judgment is awarded to the party, the party intends to submit a motion to the court to recover fees, expenses, and reasonable attorney fees. With that stated, meaning the Texas constitutional authority to apply law – the plaintiff should be awarded. Because the court is now in favor . . . meaning the defendants – who just now addressed: finally, plaintiff filings address factual details ····· Also, stating plaintiffs' own pleadings and the attachment to them show that the city of Waco defendants factual and legal positions in this case are correct . . . when he was not frivolous.

Here's comment (B) from defendants: Plaintiffs filings are not an appropriate objection to the dismissed or a proper motion to reconsider.

Now from the plaintiff, excuse the defendants that's meritorious – that was inspired by your compliant sent to T.D.P.S.. With that noted, I will now comment about some controversy that was objected too in this motion. This defendants of the court states the plaintiff's motion to reconsider and his motion of frivolous claims pursuant to Federal Rules of Civil Procedure 57 declaratory judgment are untimely. That's erroneous the plaintiff did not file those claims together. The motion to reconsideration was filed on Aug. 16, 2019 and now the defendants untimely defense approved on Oct. 30, 2019 in a signed plea . . . that should have been commented on or about September of 2019. For the inconsisted statements of the defendants and the clarity of the plaintiff – the plaintiff should be awarded a favored judgment and the charges against the plaintiff should be dismissed for the frivolous claims sent to T.D.P.S..

And to the court thank you for hearing this motion response.

Nov. 19, 2019

"s/" Victor J. Edney Jr.

Victor J. Edney Jr.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the following on this 19th day of November 2019, to the attorney – by hand delivered mail to:

Namen, Howell, Smith & Lee, PLLC

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"s/" Victor J. Edney Jr.

Victor J. Edney Jr.

FILED: 12/02/2019

IN THE UNITED STATES DISTRICT

COURT FOR THE WESTERN DISTRICT

OF TEXAS WACO DIVISION

VICTOR J. EDNEY JR.

Plaintiff,

v. **CIVIL NO. 6:18-CV-00336-ADA-JCM**

EONDRA LAMONE HINES, *et al.*

RESONSE OF DEFENDANT KEITH VAUGHN, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, AND "INTERNAL AFFAIRS WACO POLICE DEPARTMENT" (COLECTIVELY REFERRED TO HEREIN AS "CITY OF WACO DEPARTMENT") TO PLAINTIFF'S "RESPONSE TWO – MOTION OF FRIVOLOUS CLAIMS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 57 DECLARATORY JUDGMENT"

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Defendants Keith Vaughn, Jordan Wenkman, Bobby King, David Conley, and "Internal Affairs Waco Police Department" (collectively referred to herein as "City of Waco Defendants") and file this, their Response to Plaintiff's "Response Two - Motion of Frivolous Claim Pursuant to Federal Rules of Civil

Procedure 57 Declaratory Judgment" and in support would respectfully show the Court as follows:

This lawsuit arises out of the response by Waco police to a report of an attempted suicide. The background is further detailed in the City of Waco Defendants' prior filings, including their motion to dismiss (doc. #6) and their response to Plaintiffs' prior "Motion of frivolous Claims Pursuant to Federal Rules of Civil Procedure 57 Declaratory Judgment" (doc. #24). As the court knows, the status of this case is that on June 27, 2019 Magistrate Judge Jeffery C. Manske made a Report and Recommendation that the Motion to Dismiss filed by the City of Waco Defendants be granted and that Plaintiff claims against the City of Waco Defendants be dismissed with prejudice. (doc. #13). By Order filed on July 23, 2019, U.S. District Judge Alan D. Albright adopted the Report and Recommendation of the Magistrate Judge and dismissed with prejudice Plaintiff claims against the City of Waco Defendants. (doc # 18). On August 30, 2019 the City of Waco Defendants filed a Motion for Entry of Final Judgment pursuant to Rule 54 because Plaintiff also sued another Defendant, Eondra Hines, and an alleged John Doe, which claims are still pending. (doc #22). That Motion for final judgment remains pending.

In his most recent filing – "Response Two – Motion of Frivolous Claims Pursuant to Federal Rules of Civil Procedure 57 Declaratory Judgment" – Plaintiff, citing 28 U.S.C. section 636, again appears to be arguing for reconsideration of the of the of the Magistrate Judge's recommendation that Plaintiff's claims against the City of Waco Defendants. But Rule 57 is a procedural rule and does not provide a

basis for substance relief. *Harris Cnty. Tex v. MERSCORP In.*, 791 F.3d 545, 553 (5th Cir. 2015).

Plaintiff also claims that the Texas Constitution gives him a claim against the City of Waco Defendants. But Plaintiff has not pointed to any particular provision of the Texas constitution, has not explained how the Texas constitution gives him a claim against the City of Waco Defendants, why such claim would be actionable in federal court, or why he has not previously raised such a claim and why the Court should consider it now. *See Livingston Down Racing Ass'n v. Jefferson Downs Corp.*, 259 F. Supp. 2d 471, 475 (M.D. La. 2002) (discussing review of interlocutory order); *see also McLaughlin v. Unum Life Ins. Co. of Am.*, 212 F.R.D. 40, 41 (D. Me. 2002) (discussing the standard for review of an interlocutory order). For these reasons, and those set out in the City of Waco Defendants prior filings, Plaintiff's Response Two – Motion of Frivolous Claims (doc. # 24) should be denied and the Motion for Final Judgment of the City of Waco Defendants (doc. # 22) should be granted and final judgment should be rendered in favor of the City of Waco Defendants dismissing with prejudice all Plaintiff's claims against them.

Respectfully submitted,

"s/"Roy L. Barrett

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CERTIFICATE OF SERVICE

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P.O. Box 853	No. 7016 1370 0000 9943 1863 and First Class
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"s/" Roy L. Barrett

Roy L. Barrett

FILED: 12/19/2019

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS WACO DIVISION

VICTOR J. EDNEY JR.,

Plaintiff,

v.

EONDRA LAMONE HINES, JOHN DOE, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, KEITH VAUGHAN, and "INERNAL AFFAIRS WACO POLICE DEPARTMENT."

Defendants,

Response three: motion of frivolous claim pursuant to federal rules of civil procedure 57 declaratory judgment

Now comes Victor J. Edney Jr., plaintiff pro se' who request the court to: grant this motion of frivolous claims by state agency; in accordance to Texas Codes Annotated – Civil Practice and remedies section 105.003 with a pursuant to federal rules of civil procedure 57 declaratory judgment for the defendants officers claims that has been submitted in bad faith – Again the city of Waco – police department (WPD) filed a affidavit of presumption destroying the plaintiffs reputation to the entirety stating Victor was committing suicide, was suicidal and

disrespecting family, also has been hospitalized for it. In this response three – a brief narrative of the case will be presented, then clarification of response two, and last a request to answer the compliant from the defendants.

Brief Narrative

Plaintiff filed the compliant on the defendant to defendants to restore his identification record that was injured by W.P.D., the defendants then filed a motion to dismiss under ··· federal rules of civil procedure 12(b)(6) – stating: the complaint fails to state a claim which the law will recognize as enforceable. The compliant was dismiss with prejudice even with answered recommendations of the court. Following that the plaintiff filed a motion to reconsider the compliant and a motion of frivolous claims that is recognized as enforceable by authority of the Texas constitution.

Clarification of this motion: Whereas defendants response then the plaintiff answer

(defendants stated): plaintiff claim is incorrect with Texas law and is furthermore not actionable in federal court ···· also stating rule 57 is void.

(plaintiff): more in Texas – the Texas constitutional civil practice and remedies section 105.003 has just been applied. This section is of legible authority for federal court . . . and for the plaintiff who resides in this jurisdiction and the city of Waco P.D. who filed there frivolous claims. Now the federal rule of civil procedure 57 raised ····· that was applied to demand for a trial – de novo if the defendants do not answer because it's our constitution right.

Request of answer

At this time, the plaintiff would like the defendants to file their answer about the complaint to the court for federal rules of civil procedure 8(e) construing pleadings. Which states – pleadings must be construed so as to do justice.

And for the court grant this . . .

12/19/2019

"s/" Victor J. Edney Jr.

Victor J. Edney Jr.

P.O. Box 853

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the following on this 19th day of December 2019, to the attorney; by hand delivery mail to:

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"s/" Victor J. Edney Jr.

Victor J. Edney Jr.

FILED: 07/02/2019

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS WACO DIVISION

VICTOR J. EDNEY JR.

v. **Civil No. 6:18-CV-00336-ADA-JMC**

HINES, et. al

Motion for sanction rule 11(c)(2) under rule 5(a)(2) by. VICTOR EDNEY JR.

Now comes Victor Edney Jr., plaintiff pro se; and request the court to: grant motion to sanction rule 11 (c) (2) under rule 5(a) (2) for HIINES failing ti answer summons. According to: United States District Court Western District of Texas, San Antonio Chapter of the Federal Bar Association and the Federal Courts Committee of the San Antonio Bar Association, Rev. Ed. Oct. 26, 2017; defendants have twenty-one calendar days to file an answer after they are served with the complaint. And if the U.S. or any of it's agencies or employees has sixty calendar days to file an answer. With that stated rule 11(b) of our Federal Rules of Civil Procedure has been violated and the courts order motion to sanction rule 11 (c)(2) for failing to answer summons about false statements (for example: Victor was trying to commit suicide, my uncle Mr. Edney has mental issue and is suffering) told Waco Police Department. I'am filing this under rule 5 (a)(2) for HINES demeanor of applying service then failing ti appear. The court now shall grant this sanction.

FILED: 08/14/2019

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTREN DISTRICT OF TEXAS

WACO DIVISION

VICTOR J. EDNEY JR.,

Plaintiff,

v. **CASE NO. 6:18-CV-00336-ADA-JCM**

EONDRA LAMONE HINES, JOHN DOE, JORDAN WENKMAN, BOBBY KING, DAVID CONLEY, KEITH VAUGAN, and "INTERNAL AFFAIRS WACO POLICE DEPARTMENT",

Defendants.

MOTION FOR DEFAULT JUDGMENT

Now comes Victor J. Edney Jr., plaintiff pro se, and request the court to: grant this motion of default judgment rule 55 of the Federal Rules of Civil Procedure to sanction rule 11(c) (2) under rule 5(a)(2) for defendant Hine's failing to answer summons. According to the United States, District Court Western District of Texas, San Antonio Chapter of the Federal Bar Association and the Federal Courts Committee of the San Antonio Bar Association, Rev. Ed. October 26, 2017 defendants have twenty-one calendar days to file an answer after they are served with the compliant. And if the United States or any of its agencies or employees you

have sixty calendar days to file an answer. With that stated, rule 11 (b) of our Federal rules of civil procedure has been violated and the court move to sanction rule 11 (c)(2) for defendants HINES failing to answer summons about this defamation claim of suicide due to negligence of him and accomplice (John Doe). Here's the defendants initial's stated claims to emergency services – for instance, there's a drowning in progress, saying her cousins just jumped in the water cousin is Victor Eden, other person in the vehicle is now saying the subject is trying to harm-himself, suicide threat/attmp, she doesn't know her cousin so she stepped back, the above is a detailed history of facts from the police sequence that will be attached to this motion which are not true. Following are facts from a incident report of Waco P.D. written by Officer Wenkman that's also attached stating – Hines is Victor uncle, Mr. Edney has mental issues and is suffering from P.T.S.D. and is not taking his medication. These facts presented where told to Waco PD officers and they are not true! The statements made to Waco PD officers had officers had officers under the presumption of suicidal acts occurring in which had the plaintiff's constitutional rights violated with out the burden of proof. With that being stated, I am filing this under rule 5 (a)(2) for HINES applying service and then failing to appear. The court now shall grant his sanction of default judgment on HINES. For the defamation claim or personal injury claim of suicide attached to the plaintiff's identification record and social media profile locally and state wide caused from negligence of defendants: HINES and accomplices who transmitted false statements to 911 Emergency services – who dispatched it to Waco PD and the

Fire department. I demand from the court relief of: retribution – in which to restore my identification and my social media status status back to it's original state, also fine – HINEs for disobeying penal code section 37.08 False Report to Peace Officer or Law Enforcement Employees/ Class B misdemeanor and penal code section 42.07 Harassment/ Class B misdemeanor under Texas Codes Annotated, and I will conclusion with compensation – of 300,000 Thousand dollars for involving me in a defamation act, harassment of me and my family, and also making false reports to peace officers.

"s/"Victor J. Edney Jr.

P.O. Box 853

Waco Tx. 76703

CERTIFICATE OF SERVICE

I Victor J. Edney Jr., plaint pro se, do here by certify that on the 13 Day of August 2019, a true and correct copy of the foregoing pleading was forwarded to, the attorney for HINES by Hand Delivery; Certified Mail at the following address:

CLERK, U.S. DISTRICT COURT

WESTERN DISTRICT OF TEXAS

UNITED STATES COURT HOUSE

800 FRANKLIN AVENUE, ROOM 380

WACO, TEXAS 76701

AUG. 13, 2019

"s/"VICTOR J. EDNEY JR.

FILED: 11/30/2020

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20-50327

VICTOR J. EDNEY JR.

Plaintiff-Appellant

versus

EONDRA LAMONE HINES; UNKNOWN ACCOMPLICE JOHN DOE; OFFICER JORDAN WENKMAN; OFFICER BOBBY KING; SERGEANT DAVID CONLEY; SERGEANT KEITH VAUGHAN,

Defendants-Appellees,

ON PETITION FOR REHEARING

AND REHEARING EN BANC

(Opinion 10/23/2020, 5 CIR.,_____,_____f.3D)

Before JOLLY, ELROD AND GRAVES, Circuit Judges.

PER CURIAM:

(/) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and 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 in avor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause En banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.