IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10314

RHEASHAD LAMAR LOTT,

Plaintiff-Appellant

v.

E. OSEGUERA; JOHN BRIMMER,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-126

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:*

Rheashad Lamar Lott, Texas prisoner # 1596571, moves for leave to proceed in forma pauperis (IFP) following the dismissal of his 42 U.S.C. § 1983 complaint in which he alleged that Grand Prairie Police Department detectives falsely arrested him without a valid warrant and without probable cause. The district court sua sponte dismissed the complaint under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b) based on a determination that it was not timely filed. We construe Lott's motion as a challenge to the district court's

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

"APPENDIX A"

certification that the appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

Lott does not challenge the applicability of a two-year limitations period; nor does he deny that the alleged false arrest occurred in May 2008 and that his § 1983 complaint was filed in January 2019. Instead, he maintains that he is entitled to equitable tolling of the limitations period because he did not know of the existence of the cause of action until his attorney produced the State's file in November 2017. Lott, however, has failed to establish that he actively pursued his judicial remedies or otherwise acted diligently. *See Wallace v. Kato*, 549 U.S. 384, 394-96 (2007); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Hand v. Stevens Transp., Inc. Emp. Benefit Plan*, 83 S.W.3d 286, 293 (Tex. App. 2002). The district court therefore did not err or abuse its discretion in dismissing Lott's complaint as frivolous because it is time barred.

This appeal lacks arguable legal merit and is, therefore, frivolous. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). Lott's motion to proceed IFP is DENIED, and we DISMISS his appeal as frivolous. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2.

The district court's dismissal of the complaint and this court's dismissal of his appeal as frivolous count as two strikes under § 1915(g). *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). A prior § 1983 action filed by Lott was dismissed as frivolous and for failure to state a claim pursuant to § 1915(e). *See Lott v. Director, TDCJ-CID*, No. 1:17-cv-528 (E.D. Tex. Sept. 13, 2018). That dismissal also counts as a strike under § 1915(g). *See Adepegba*, 103 F.3d at 387-88. Because he now has three strikes, Lott is BARRED from proceeding IFP in any civil action or appeal filed in a court of the United States while he is incarcerated or detained in any facility unless he is under imminent danger

of serious physical injury. *See* § 1915(g); *Brewster v. Dretke*, 587 F.3d 764, 770 (5th Cir. 2009).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RHEASHAD LAMAR LOTT, #1596571, Plaintiff, VS. E. OSEGUERA, ET AL., Defendants.	)	CIVIL ACTION NO. 3:19-CV-0126-G (BH)

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After reviewing all relevant matters of record in this case, including the findings, conclusions, and recommendation of the U.S. Magistrate Judge and any objections thereto, in accordance with 28 U.S.C. § 636(b)(1), the court is of the opinion that the findings and conclusions of the magistrate judge are correct and they are accepted as the findings and conclusions of the court.

Accordingly by separate judgment, this action will be dismissed with prejudice under 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b).

If the plaintiff files a notice of appeal, he must pay the $505.00 appellate filing fee or submit a motion to proceed *in forma pauperis* and a properly signed certificate of inmate trust account.

" APPENDIX B"

SO ORDERED.

February 22, 2019.

A. JOE FISH
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RHEASHAD LAMAR LOTT, #1596571, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 3:19-CV-0126-G (BH)
E. OSEGUERA, ET AL.,	)	
Defendants.	)	

JUDGMENT

This action came on for consideration by the court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED, ADJUDGED** and **DECREED** that:

1. The plaintiff's complaint is **DISMISSED** with prejudice under 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). This dismissal will count as a "strike" or "prior occasion" within the meaning of 28 U.S.C. § 1915(g).

2. The clerk shall transmit a true copy of this judgment and the order accepting the findings and recommendation of the United States Magistrate Judge to all parties.

February 22, 2019.

A. Joe Fish

A. JOE FISH
Senior United States District Judge

3-3-19

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RHEASHAD LAMAR LOTT,	)	
#1596571,	)	
Plaintiff,	)	
vs.	)	**No. 3:19-CV-0126-G-BH**
	)	
E. OSEGUERA, et al.,	)	
Defendants.	)	**Referred to U.S. Magistrate Judge**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

By *Special Order No. 3-251*, this case has been automatically referred for findings, conclusions and recommendation. Based on the relevant filings and applicable law, the plaintiff's complaint should be **DISMISSED** with prejudice.

I. BACKGROUND

Rheashad Lamar Lott (Plaintiff) sues two Garland Police Department detectives under 42 U.S.C. § 1983 for alleged violation of his civil rights. (*See* doc. 3.) He claims that on May 27, 2008, one of the detectives entered a false arrest warrant for Plaintiff into the police database. Plaintiff was falsely arrested and taken for a photo lineup. After witnesses identified him, a magistrate judge issued another arrest warrant on May 29, 2008. Another detective issued a public media release that stated that Plaintiff was arrested on a valid probable cause arrest warrant on May 28, that he was a suspect in a case, and that he would be arraigned. Plaintiff was arraigned two days later. He appears to raise a claim of false arrest. (*See* doc. 3 at 4.)[1] He seeks monetary damages. (*See id.*) No process has been issued in this case.

II. PRELIMINARY SCREENING

As a prisoner seeking redress from an officer or employee of a governmental entity, Plaintiff's

[1] Citations to the record refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

"APPENDIX C"

complaint is subject to preliminary screening under 28 U.S.C. § 1915A. *See Martin v. Scott*, 156 F.3d 578, 579-80 (5th Cir. 1998) (per curiam). Because he is proceeding *in forma pauperis*, his complaint is also subject to screening under § 1915(e)(2). Both § 1915(e)(2)(B) and § 1915A(b) provide for *sua sponte* dismissal of the complaint, or any portion thereof, if the Court finds it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief against a defendant who is immune from such relief.

A claim is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A claim lacks an arguable basis in law when it is "based on an indisputably meritless legal theory." *Id.* at 327. A claim that falls under the rule announced in *Heck v. Humphrey*, 512 U.S. 477 (1994), "is legally frivolous unless the conviction or sentence at issue has been reversed, expunged, invalidated, or otherwise called into question." *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996). A claim fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. SECTION 1983

Plaintiff sues under 42 U.S.C. § 1983. It "provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). It "afford[s] redress for violations of federal statutes, as well as of constitutional norms." *Id.* To state a claim under § 1983, a plaintiff must allege facts that show (1) he has been deprived of a right secured by the Constitution and the laws of the United States; and (2) the deprivation occurred under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005).

IV. STATUTE OF LIMITATIONS

Courts "may raise the defense of limitations *sua sponte*." *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999). "[W]here it is clear from the face of a complaint filed *in forma pauperis* that the claims asserted are barred by the applicable statute of limitations, those claims are properly dismissed" under 28 U.S.C. § 1915(e)(2)(B). *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993); *accord*, *Stanley v. Foster*, 464 F.3d 565, 568 (5th Cir. 2006).

Federal courts look to the law of the forum state to determine the length of the statute of limitations applicable in § 1983 cases. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). The general statute of limitations governing personal injuries in the forum state provides the applicable limitations period. *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001). Texas has a two-year statute of limitations for personal injury claims, so Plaintiff had two years from the date his claims accrued to file suit. *Id.; accord Hatchet v. Nettles*, 201 F.3d 651, 653 (5th Cir. 2000).

While state law determines the length of the limitations period, federal law determines the accrual date. *Wallace*, 549 U.S. at 388; *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008). Generally, a claim accrues when the plaintiff has "a complete and present cause of action", or "when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (citation and internal quotation marks omitted).

> "Under federal law, the [limitations] period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'" A plaintiff's awareness encompasses two elements: "(1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions." A plaintiff need not know that she has a legal cause of action; she need know only the facts that would ultimately support a claim. Actual knowledge is not required "if the circumstances would lead a reasonable person to investigate further."

Piotrowski v. City of Houston, 237 F.3d 567, 576 (5th Cir. 2001) (citations omitted); *Walker*, 550 F.3d at 414. Plaintiff's cause of action accrued, and the limitations period began to run, when he knew or

had reason to know of the injury that is the basis of his action. *Gonzales v. Wyatt*, 157 F.3d 1016, 1020 (5th Cir. 1998). A false arrest claim accrues when the plaintiff "becomes detained pursuant to legal process." *Mapes v. Bishop*, 541 F.3d 582, 584 (5th Cir. 2008). Typically, that is when the plaintiff is "bound over by a magistrate or arraigned on charges." *Reed v. Edwards*, 487 F. App'x 904, 905 (5th Cir. 2012) (quoting *Wallace*, 549 U.S. at 389-90).

Here, Plaintiff was allegedly arrested on May 28, 2009, under the warrant a detective entered, and he was arraigned two days later, on May 30, 2008. The claims regarding his arrest accrued on May 30, 2008, when he was arraigned. His claims regarding the detective's May 28, 2008, statement also accrued no later than the date of arraignment on May 30, 2008. Because Plaintiff filed his complaint more than ten years later, on January 4, 2019, his claims are barred by the statute of limitations, absent equitable tolling.

The applicable limitations period may be equitably tolled in appropriate circumstances. *See Rotella v. Pederson*, 144 F.3d 892, 897 (5th Cir. 1998). "[W]hen state statutes of limitation are borrowed, state tolling principles are to be the 'primary guide' of the federal court. The federal court may disregard the state tolling rule only if it is inconsistent with federal policy." *See FDIC v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993) (citations omitted). Equitable tolling preserves a plaintiff's claims where strict application of the statute of limitations would be inequitable. *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 19956). However, federal law requires that litigants diligently pursue their actions before equitable tolling becomes available. *See Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999); *Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989) ("equity is not intended for those who sleep on their rights"). Equitable tolling is appropriate in cases where a plaintiff is actively misled by the defendant or is prevented in some extraordinary way from asserting his rights. *See Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996).

Plaintiff does not allege any basis for equitable tolling. He has not shown that he has diligently pursued his claims, and he has not shown extraordinary circumstances that warrant equitable tolling. A complaint that is barred by the statute of limitations is frivolous and fails to state a claim. *See Pantoja v. Fort Worth Texas Police Dept.*, 543 F. App'x 379, 379-80 (5th Cir. 2013) (affirming district court's dismissal of time-barred complaint as frivolous and for failure to state a claim).[2]

IV. RECOMMENDATION

Plaintiff's complaint should be dismissed with prejudice as frivolous and for failure to state a cause of action under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Such dismissal will count as a "strike" or "prior occasion" within the meaning 28 U.S.C. § 1915(g).[3]

SIGNED this 30th day of January, 2019.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

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[2] It is not clear whether Plaintiff was convicted of any offense as a result of the arrest, so the Court cannot determine whether the claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) (holding that when a successful civil rights action would necessarily imply the invalidity of a plaintiff's conviction or sentence, the complaint must be dismissed unless the plaintiff demonstrates that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus under 28 U.S.C. § 2254). Regardless, because the issues in this case are appropriate for early and final determination, consideration of whether *Heck* bars Plaintiff's claims is not required. *See Patton v. Jefferson Correctional Ctr.*, 136 F.3d 458, 462 n.6 (5th Cir. 1998) (when an action raises an issue of immunity, the court to the extent it is feasible to do so should determine that issue as early in the proceedings as possible); *Smithback v. Cockrell*, No. 3:01-CV-1658-M, 2002 WL 1268031, at *2 (N.D. Tex. June 3, 2002) (accepting recommendation that "[w]hen a plaintiff seeks relief unavailable under 42 U.S.C. § 1983 or sues individuals or entities who are not proper parties under § 1983, it also seems appropriate to have an early determination of those issues").

[3] Even if the prior dismissal of Plaintiff's claims against the prosecutors did not count as a strike, a dismissal of his remaining claims as *Heck*-barred would count as a strike. *See Hamilton v. Lyons,* 74 F.3d 99, 102 (5th Cir.1996) (stating that a § 1983 claim which falls under the rule in *Heck* is legally frivolous).

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RHEASHAD LAMAR LOTT,	)	
#1596571,	)	
Plaintiff,	)	
vs.	)	**No. 3:19-CV-0126-G-BH**
	)	
E. OSEGUERA, et al.,	)	
Defendants.	)	**Referred to U.S. Magistrate Judge**

ORDER GRANTING *IN FORMA PAUPERIS* STATUS AND DIRECTING PAYMENT OF FILING FEE AND INSTRUCTIONS TO PLAINTIFF

By *Special Order No. 3-251*, this *pro se* prisoner case has been automatically referred for full case management. Before the Court is the Application to Proceed in Forma Pauperis, with a certificate of inmate trust account, January 16, 2019 (doc. 4). As provided by 28 U.S.C. § 1915, the motion is **GRANTED,** and the plaintiff may proceed *in forma pauperis*.

The Prison Litigation Reform Act ("PLRA") requires a prisoner who brings a civil suit to pay the full filing fee, even if he is granted leave to proceed *in forma pauperis*. *See* 28 U.S.C. § 1915(b)(1). A prisoner who is granted leave to proceed *in forma pauperis* is allowed to pay the fee in installments that are withdrawn from his inmate trust account. *See* § 1915(b)(1) and (2). This order is entered, in part, to facilitate the payment of the $400 filing fee in installments.[1] It is **ORDERED** that:

1. The agency having custody of the plaintiff shall, when funds exist in his inmate trust account or institutional equivalent, forward to the Court an initial partial filing fee of 20% of the higher of the plaintiff's average monthly deposits or the average monthly balance for the six months immediately before the filing of suit. *See* § 1915(b)(1). Here, the initial partial payment is **$0.00**.

2. The plaintiff shall pay **$350.00**, the balance of the filing fee, in monthly installments of 20% of the prior month's deposits to his/her inmate trust account. *See* § 1915(b)(2). After payment of the initial partial filing fee, the agency having custody of the plaintiff shall forward payments to the Clerk of Court each time the account exceeds $10 until the filing fee is paid in full. *See* 28 U.S.C. § 1915(b)(2).

3. Service of process shall be withheld pending judicial screening as provided by 28 U.S.C. § 1915(e)(2) and/or 28 U.S.C. § 1915A.

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[1] As of May 1, 2013, a $50 administrative fee will be assessed in addition to the $350 filing fee, resulting in a total filing fee of $400 for a civil action in which the plaintiff has not sought or been granted leave to proceed *in forma pauperis*. *See* District Court Miscellaneous Fee Schedule. Where a prisoner plaintiff has been granted leave to proceed *in forma pauperis*, only the $350 filing fee will be deducted from the prisoner's account. *See id.* The $50 administrative fee will not be deducted. *Id.*

4. No amendments or supplements to the complaint shall be filed without prior Court approval. A complete amended complaint shall be attached to any motion to amend.

5. All discovery in this case is stayed until defendants are ordered to answer by the Court.

6. No motions for appointment of counsel shall be filed until the Court has completed its screening under § 1915(e)(2). This may include a hearing pursuant to *Spears v. McCotter,* 766 F.2d 179 (5th Cir. 1985), the issuance of a questionnaire pursuant to *Watson v. Ault,* 525 F.2d 886 (5th Cir. 1976), or other proceedings as deemed appropriate by the Court.

7. The plaintiff must notify the Court of any change of address by filing a written Notice of Change of Address with the Clerk. Failure to file a notice may result in this case being dismissed for want of prosecution under Fed. R. Civ. P. 41(b).

8. The Clerk shall serve a copy of this order on the inmate accounting office or other person(s) or entity with responsibility for assessing, collecting, and remitting to the Court the filing fee payments on behalf of inmates, as designated by the facility in which plaintiff is confined.

SO ORDERED this 17th day of January, 2019.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10314

RHEASHAD LAMAR LOTT,

Plaintiff - Appellant

v.

E. OSEGUERA; JOHN BRIMMER,

Defendants - Appellees

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

ON PETITION FOR REHEARING

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

Edith H. Jones

UNITED STATES CIRCUIT JUDGE

"APPENDIX D"

STATE BAR OF TEXAS

Office of the Chief Disciplinary Counsel

January 13, 2010

Rheashad Lott
#1596571, McConnell Unit
3001 S Emily Drive
Beeville, Texas 78102

Re: D0011039234 Rheashad Lott - Frank Ples Douglas, III

Dear Mr./Ms. Lott:

The Office of the Chief Disciplinary Counsel of the State Bar of Texas has received your grievance against the above named lawyer.

Lawyers licensed in Texas are governed by the Texas Disciplinary Rules of Professional Conduct, and may only be disciplined when their conduct is in violation of one or more of the disciplinary rules. After examining your grievance, this office has determined that the information alleged does not demonstrate any disciplinary rule violation on the part of the lawyer. Accordingly, this Grievance has been classified as an Inquiry and has been dismissed. The Office of Chief Disciplinary Counsel maintains as confidential the processing of Grievances.

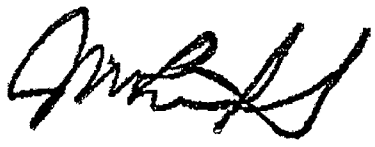
You may appeal this determination to the Board of Disciplinary Appeals. **Your appeal must be submitted directly to the Board in writing, using the enclosed form, within thirty (30) days of receipt of this notice.**

Instead of filing an appeal with the Board of Disciplinary Appeals, you may amend your grievance and re-file it with additional information, **within twenty (20) days** of receipt of this notice.

The State Bar of Texas maintains the Client-Attorney Assistance Program (CAAP). You may have already visited with the staff of that program prior to filing your Grievance. Pursuant to the State Bar Act, all dismissed grievances (other than where the person complained about is deceased, disbarred, or not a lawyer) shall be referred to CAAP. In accordance with that requirement, please be advised that CAAP can attempt to resolve your matter through mediation

or other dispute resolution procedures. CAAP is not a continuation of the attorney disciplinary process and participation by both you and the attorney is voluntary. Should you desire to pursue that process, you may contact CAAP at 1-800-932-1900.

Sincerely,



J.M. Richards
Senior Investigator
Office of the Chief Disciplinary Counsel
State Bar of Texas

Enclosure: BODA Appeal Form

CF1-9

STATE BAR OF TEXAS

Office of the Chief Disciplinary Counsel

February 8, 2010

Rheashad Lott
#1596571, McConnell Unit
3001 S Emily Drive
Beeville, Texas 78102

RE: D0011039234 Rheashad Lott - Frank Ples Douglas, III

Dear Mr./Ms. Lott:

Your request to appeal the classification decision in the above-referenced matter was received and has been forwarded to the Board of Disciplinary Appeals for their review.

The Board of Disciplinary Appeals will notify you of its decision and any further action to be taken.

Sincerely,

J.M. Richards
Senior Investigator
Office of the Chief Disciplinary Counsel
State Bar of Texas

CF7-4A.PRI

P. O. Box 12487, Austin, Texas 78711-2487, (512) 427-1350, (877) 953-5535, fax: (512) 427-4167

Additional material from this filing is available in the Clerk's Office.