Orders Being brought on Certiorari
Appendix "A"
Opinion Below

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14846-C

LEROY BANKS,

Plaintiff-Appellant,

versus

DEPUTY ANTHONY TERRY,
Bibb County Sheriff's Department,
et al.,

Defendants,

DEPUTY STEPHEN FIELDS,
Bibb County Sheriff's Department,
TERRY ANTHONY,
Officer, Bibb County Sheriff's Department,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

Before: WILSON and NEWSOM, Circuit Judges.

BY THE COURT:

Leroy Banks has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of the April 27, 2020, order denying his motion for leave to proceed *in forma pauperis* in his appeal from the district court's orders dismissing his 42 U.S.C. § 1983 complaint and denying his motion for reconsideration of that order. Because Banks has not alleged any points of law or fact that were overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14846-C

LEROY BANKS,

Plaintiff-Appellant,

versus

DEPUTY ANTHONY TERRY,
Bibb County Sheriff's Department,
et al.,

Defendants,

DEPUTY STEPHEN FIELDS,
Bibb County Sheriff's Department,
TERRY ANTHONY,
Officer, Bibb County Sheriff's
Department,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

ORDER:

On November 26, 2018, Leroy Banks, a former Georgia prisoner, filed a *pro se* 42 U.S.C. § 1983 complaint against two police officers, alleging that the defendants used excessive force in arresting him, and he was falsely arrested and imprisoned. As background, Mr. Banks filed an identical complaint when he still was in prison, in April 2018, but it was dismissed before the defendants were served, pursuant to the "three strikes provision" of 28 U.S.C. § 1915(g). The

district court granted the defendants' motion to dismiss and denied Mr. Banks leave to proceed *in forma pauperis* ("IFP") on appeal, which he now seeks in this Court.

Because Mr. Banks moves for IFP status, his appeal is subject to a frivolity determination. *See* 28 U.S.C. 1915(e)(2)(B). An action is frivolous if it is without arguable merit either in law or fact. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

Federal courts apply their forum state's statute of limitations for personal injury actions to actions brought pursuant to § 1983. *Uboh v. Reno*, 141 F.3d 1000, 1002 (11th Cir. 1998). "[T]he proper limitations period for all Section 1983 actions in Georgia is the two-year limitations period set forth in O.C.G.A. § 9-3-33." *Mullinax v. McElhenney*, 817 F.2d 711, 716 n.2 (11th Cir. 1987). Nonetheless, federal law governs when a § 1983 action accrues. *Id.* at 716. Under federal law, "the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Rozar v. Mullis*, 85 F.3d 556, 561-62 (11th Cir. 1996) (quotation marks omitted).

The statute of limitations for false arrest and false imprisonment claims also is governed by Georgia's two-year limitations period. *See Wallace v. Kato*, 549 U.S. 384, 387 (2007). The accrual of those claims for limitations purposes begins when the alleged false imprisonment ends. *Id.* at 389. A false imprisonment ends once the victim is held pursuant to legal process, "when, for example, he is bound over by a magistrate or arraigned on charges." *Id.*

Georgia's renewal statute concerns plaintiffs who filed a case within the limitations period but discontinued or dismissed it, and it allows those plaintiffs to recommence the case within six months after the discontinuance or dismissal, even if that falls after the limitations period. *See* O.C.G.A. § 9-2-61(a). However, that renewal statute only applies to actions that are

valid prior to dismissal, including having been served on the defendants. *See Scott v. Muscogee Cty.*, 949 F.2d 1122, 1123 (11th Cir. 1992).

Here, Mr. Banks's excessive force claims accrued on October 18, 2016, when he was allegedly handcuffed too tightly and placed in an excessively hot patrol car. *See Rozar*, 85 F.3d at 561-62. Mr. Banks's false arrest and imprisonment claims accrued on November 7, 2016, when he was "bound over by [the] magistrate" on charges. *See Wallace*, 549 U.S. at 389. Thus, Mr. Banks's claims were time-barred after October 18, 2018, and November 7, 2018, respectively. *See Mullinax*, 817 F.2d at 716 n.2. Further, Georgia's renewal statute did not apply to him because his previous action never was "valid," as it never was served on the defendants. *See Scott*, 949 F.2d at 1123. Accordingly, the complaint was time-barred, and, for the same reasons, the district court properly denied Mr. Banks's motion for reconsideration. Mr. Banks's IFP motion is DENIED.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 05, 2020

Clerk - Middle District of Georgia
U.S. District Court
475 MULBERRY ST
MACON, GA 31201

Appeal Number: 19-14846-C
Case Style: Leroy Banks v. Stephen Fields, et al
District Court Docket No: 5:18-cv-00435-MTT-CHW

The enclosed copy of the Clerk's Entry of Dismissal for failure to prosecute in the above referenced appeal is issued as the mandate of this court. See 11th Cir. R. 41-4.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-2 Letter and Entry of Dismissal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14846-C

LEROY BANKS,

Plaintiff - Appellant,

versus

DEPUTY ANTHONY TERRY,
Bibb County Sheriff's Department,
et al.,

Defendants,

DEPUTY STEPHEN FIELDS,
Bibb County Sheriff's Department,
TERRY ANTHONY,
Officer, Bibb County Sheriff's
Department,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Leroy Banks has failed to pay the filing and docketing fees to the district court within the time fixed by the rules., effective August 05, 2020.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Walter Pollard, C, Deputy Clerk

FOR THE COURT - BY DIRECTION

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 14, 2020

Leroy Banks
2029 LOWE ST
MACON, GA 31206

Appeal Number: 19-14846-C
Case Style: Leroy Banks v. Stephen Fields, et al
District Court Docket No: 5:18-cv-00435-MTT-CHW

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov.

The enclosed order has been ENTERED.

Pursuant to Eleventh Circuit Rule 42-1(b) you are hereby notified that upon expiration of fourteen (14) days from this date, this appeal will be dismissed by the clerk without further notice unless you pay to the DISTRICT COURT clerk the docketing and filing fees, with notice to this office.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C/csg.
Phone #: (404) 335-6186

MOT-2 Notice of Court Action

Petitioner's

Appendix B and C

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LEROY BANKS, III,	
Plaintiff,	
v.	
	No. 5:18-cv-00435-MTT-CHW
DEPUTY ANTHONY TERRY, *et al.*,	
Defendants.	

ORDER & RECOMMENDATION

Plaintiff Leroy Banks, III, filed a *pro se* civil rights complaint under 42 U.S.C. § 1983. Compl., ECF No. 1. He also moved for leave to proceed without prepayment of the filing fee or security therefor pursuant to 28 U.S.C. § 1915(a). Mot. For Leave to Proceed *In Forma Pauperis*, ECF No. 2. When he filed those documents, Plaintiff stated that he was currently confined in the Riverbend Correctional Facility, *see* Compl. 1, ECF No. 1, and listed that facility as his address on a certificate of interested persons, *see* Attach. to Compl. 1, ECF No. 1-1, although he listed a private address on the signature page of his complaint. *See* Compl. 6, ECF No. 1. Thereafter, mail sent to Plaintiff at the Riverbend Correctional Facility was returned to this Court as undeliverable. Mail Returned, Dec. 10, 2018, ECF No. 5.

As a result of the returned mail, this Court entered an order directing Plaintiff to show cause why this case should not be dismissed for failure to keep the Court apprised of Plaintiff's current address. Order to Show Cause, ECF No. 6. That order was also sent

to Plaintiff at the Riverbend Correctional Facility and was returned to this Court as undeliverable, with a notation that Plaintiff had been released. Mail Returned, Jan. 9, 2019, ECF No. 7. Thereafter, Plaintiff submitted a notice of change of address, stating that, when he filed this case, he was no longer incarcerated at Riverbend or at any other facility within the Georgia Department of Corrections. Notice of Change of Address, ECF No. 8. Thus, he asked that all future mail be addressed to his private residence. *Id.*

Plaintiff also submitted a response to the show cause order, stating that he had filed his complaint and motion to proceed *in forma pauperis* in person and had provided the clerk with his home address, but that Riverbend had been mistakenly listed as his address when the case was docketed. Response to Court Order, ECF No. 9. Plaintiff asked that his notice of change of address be construed as a response to the show cause order and that his case not be dismissed. *Id.* at 1-2. As Plaintiff has provided this Court with his current address and has demonstrated that he intends to proceed with the case, dismissal for want of prosecution is not recommended at this time.

Having considered Plaintiff's filings, as discussed below, Plaintiff's motion for leave to proceed *in forma pauperis* is **GRANTED**. Additionally, because Plaintiff is proceeding *pro se* and because his claims arise under 42 U.S.C. § 1983 and relate to his incarceration, the complaint is subject to a preliminary review under 28 U.S.C. § 1915(e).

Upon initial review, Plaintiff's false arrest and false imprisonment claims will be allowed to proceed against Defendants Officer Anthony Terry and Officer Stephen Fields. Additionally, Plaintiff's excessive force claim against Officer Terry will be allowed to

proceed with regard to whether Officer Terry used excessive force by placing and holding Plaintiff in a hot, unventilated patrol car. It is **RECOMMENDED** that all of Plaintiff's remaining claims against Officers Terry and Fields, as well has his claims against Sheriff David Davis, Deputy T. Edwards, Lt. C. Penalton, District Attorney K. David Cooke, Jr., Assistant District Attorneys Thomas C. Williams and Benjamin Conkling, Investigator Scott Chapman, the Bibb County Defendants, and the John Doe law enforcement officer and assistant district attorney, be **DISMISSED WITHOUT PREJUDICE**.

I. Motion to Proceed *In Forma Pauperis*

Any court of the United States may authorize the commencement of a civil action, without prepayment of the required filing fee (*in forma pauperis*), if the plaintiff shows that he is indigent and financially unable to pay the court's filing fee. *See* 28 U.S.C. § 1915(a). As permitted by this provision, Plaintiff has moved for leave to proceed *in forma pauperis* in this case. Mot. for Leave to Proceed *In Forma Pauperis*, Aug. 10, 2018, ECF No. 2; Mot. for Leave to Proceed *In Forma Pauperis*, Oct. 29, 2018, ECF No. 7. Upon review of his submissions, Plaintiff's motion is **GRANTED**. Thus, Plaintiff's complaint is ripe for preliminary screening.

II. Authority & Standard for Preliminary Screening

Because Plaintiff is a former prisoner "seeking redress from a governmental entity or [an] officer or employee of a governmental entity," the Court is required to conduct a preliminary review of Plaintiff's complaint. *See* 28 U.S.C. § 1915(e) (regarding *in forma pauperis* proceedings). When performing this review, the district court must accept all

factual allegations in the complaint as true. *Brown v. Johnson*, 387 F.3d 1344, 1347 (11th Cir. 2004). *Pro se* pleadings are also "held to a less stringent standard than pleadings drafted by attorneys," and thus, *pro se* claims are "liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). Still, the Court must dismiss a prisoner complaint if it "(i) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (ii) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. §1915(e)(2)(B).

A claim is frivolous if it "lacks an arguable basis either in law or in fact." *Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008) (internal quotation marks omitted). The Court may dismiss claims that are based on "indisputably meritless legal" theories and "claims whose factual contentions are clearly baseless." *Id.* (internal quotation marks omitted). A complaint fails to state a claim if it does not include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations in a complaint "must be enough to raise a right to relief above the speculative level" and cannot "merely create[] a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (first alteration in original). In other words, the complaint must allege enough facts "to raise a reasonable expectation that discovery will reveal evidence" supporting a claim. *Id.* at 556. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

To state a claim for relief under §1983, a plaintiff must allege that (1) an act or omission deprived him of a right, privilege, or immunity secured by the Constitution or a statute of the United States; and (2) the act or omission was committed by a person acting under color of state law. *Hale v. Tallapoosa Cty.*, 50 F.3d 1579, 1582 (11th Cir. 1995). If a litigant cannot satisfy these requirements or fails to provide factual allegations in support of his claim or claims, the complaint is subject to dismissal. *See Chappell v. Rich*, 340 F.3d 1279, 1282-84 (11th Cir. 2003).

A. Plaintiff's Complaint

In his complaint, Plaintiff asserts that, on October 18, 2016, he called 911 to have his girlfriend, Laverne Johnson, and her son, Jarquize Johnson, removed from his home.[1] Attach. to Compl. 3, ECF No. 1-1. Defendants Officer Anthony Terry and Officer Stephen Fields arrived at Plaintiff's home, and Plaintiff informed them that Laverne and her son had kicked in the door to his house armed with a gun, demanded money and other items, and struck Plaintiff in the head. *Id.* at 3-4. Plaintiff had then run out of the house

[1]Plaintiff identifies Laverne Johnson as a potential Plaintiff in this case. Attach. to Compl. 1, ECF No. 1-1. He also lists a person by the name of Tavaris Johnson. *See id.* No allegations are made in the body of the complaint concerning anyone named Tavaris, and it is not clear from the complaint whether Tavaris may be Laverne's son, Jarquize, or if he is a different individual. *See id.* at 1, 3. Regardless, Plaintiff is the only party who signed the complaint or filed a motion to proceed *in forma pauperis*. Moreover, even if the other named individuals had met these procedural requirements, Plaintiff, a non-lawyer, does not have authority or standing to bring claims on behalf of other plaintiffs. *See Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1116 (11th Cir. 2003) (explaining that "a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court"). Thus, only Plaintiff's individual claims are considered in this order.

to call 911. *Id.* at 4.

Plaintiff alleges the officers conspired to falsify the police report to say that Plaintiff and Laverne had been involved in a domestic dispute and that she was the one who had called the police. *Id.* The officers charged both Plaintiff and Laverne with possession of the gun, which Jarquize had thrown in Plaintiff's yard. *Id.* During the events, Plaintiff told Officer Terry that Plaintiff had a disability relating to his "arm and head on the right side," but Officer Terry put Plaintiff in handcuffs that were unnecessarily tight, which hurt Plaintiff. *Id.* at 10. Plaintiff alleges this was an excessive use of force.

Officer Terry then put Plaintiff in the patrol car head first, with further disregard for Plaintiff's disability and his safety. *Id.* In the patrol car, Terry turned up the heat and refused to crack the windows, hurting Plaintiff and putting him in danger. *Id.* In particular, the heat in the car was so extreme that Plaintiff felt as though he could not breathe. *Id.* The officers took Plaintiff to jail, where he was booked based on charges of possession of a firearm by a convicted felon and a purported arrest warrant for Plaintiff, which Plaintiff later learned was actually for a white male with a different social security number from Plaintiff, although the warrant was made out in Plaintiff's name. *Id.* at 3-4.

The next day, defendant Officer T. Edwards called Newton County to confirm the arrest warrant, demonstrating that Officer Terry had not confirmed the warrant before arresting Plaintiff. *Id.* at 4-5. Plaintiff asserts that Officer Terry's action in failing to confirm the warrant and fabricating the possession of a firearm charge violated Plaintiff's rights not to be arrested without probable cause; to be free from false arrest and

imprisonment; to be free from cruel and unusual punishment, specifically the infliction of pain through excessive force; and to have due process and equal protection of the law. *Id.* at 5-6.

Plaintiff was taken before the Bibb County Magistrate for a first appearance and was given a bond amount that day. *Id.* at 6. Plaintiff asked for a commitment hearing, which was first scheduled for November 2, 2016, and was then rescheduled for November 7, 2016. *Id.* At the commitment hearing, Officer Terry changed his statement to say that Plaintiff was the only individual who had been charged. *Id.* Terry testified that when the officers arrived at the scene, Laverne had stated that she and Plaintiff had been in an argument and that Plaintiff had gotten a gun and started waiving it around. *Id.* Additionally, Terry stated that Plaintiff had a warrant in Newton County. *Id.* At the conclusion of the commitment hearing, the magistrate judge raised Plaintiff's bond and bound the case over to the Bibb County Superior Court. *Id.* at 6-7.

Plaintiff contends defendants Bibb County District Attorney K. David Cooke, Jr. and Assistant District Attorneys Thomas C. Williams and Benjamin Conkling[2] began maliciously prosecuting Plaintiff on November 17, 2016, when they conspired with Terry, Fields, and the Bibb County Sheriff to charge Plaintiff as the only defendant with possession of a firearm by a convicted felon. *Id.* at 7, 14. On December 2, 2016, Plaintiff asked to be taken to Newton County to handle a false probation warrant for him there, to

[2]Plaintiff also names an unidentified district attorney.

which Conkling objected. *Id.*

Plaintiff was initially taken to Newton County on December 2, 2016, but was then brought back to Bibb County on December 12 or 13, 2016, at which point Plaintiff pleaded not guilty to the possession of a firearm charge in Bibb County. *Id.* He was taken back to Newton County on January 31, 2017, when he learned that he had missed an arraignment hearing while he was in custody in Bibb County. *Id.* at 7, 14-15. Plaintiff contends that this scheduling issue was orchestrated to give Officer Terry time to appear and testify at the Newton County hearing. *Id.* at 15.

Although Plaintiff maintains that the Newton County arrest warrant was fabricated, he was apparently charged with a probation violation for which there was a hearing. *Id.* at 7, 15. Officer Terry testified at that hearing regarding the pending possession of a firearm charge against Plaintiff in Bibb County. *Id.* Ultimately, Plaintiff's Newton County probation was revoked and Plaintiff was sentenced to three years in Georgia State Prison based on the false charges filed by Officer Terry in Bibb County. *Id.* Plaintiff seems to admit to technical violations of his Newton County probation, but asserts that he would only have been incarcerated for ninety days for those violations if not for the firearms charge filed against him by Terry. *Id.*

In May or June 2017, Plaintiff was brought back to Bibb County from Georgia State Prison for a trial and calendar call. *Id.* at 7-8. Plaintiff decided to proceed *pro se* in Bibb County because he did not believe the public defender was providing him with effective assistance of counsel. *Id.* at 8, 15. Plaintiff's motion to proceed *pro se* was granted, and

he was prepared to proceed at trial on June 19, 2017. *Id.* Trial began on June 20, 2017. *Id.* at 15.

Before the trial started, Plaintiff asked the judge, in the presence of Williams, whether Plaintiff had a codefendant, and the judge stated that he did not. *Id.* at 15-16. Plaintiff alleges Terry again gave false testimony at the trial, consistent with his prior statements that Plaintiff was the only person charged with possession of a firearm, although he did admit that Plaintiff had reported a crime and that Terry had failed to help Plaintiff with regard to that report. *Id.* at 8.

Laverne testified at the trial that she had been arrested for the same charge of possession of a firearm on the night of the incident. *Id.* When Laverne did not say that she had been released without being charged, as the prosecutors wanted her to, she was excused from the witness stand and then was subsequently arrested and booked on the possession of a firearm charge as soon as she left the courtroom. *Id.* at 16. Plaintiff asserts that this arrest shows that he actually did have a codefendant and that both he and Laverne were maliciously prosecuted based on racial profiling. *Id.* At the conclusion of the trial, the jury found Plaintiff not guilty of the charge of possession of a firearm by a convicted felon. *Id.* at 8, 17. Three days later, the charges against Laverne were also dropped. *Id.* at 17.

Plaintiff asserts that, in addition to Officers Terry and Fields, he is suing their supervisor Lieutenant Penalton and the Bibb County Sheriff David Davis for failing to respond to Plaintiff's letters demanding that they investigate these matters and resolve his

claims. *Id.* at 10-11. Moreover, Plaintiff asserts that the Bibb County Board of Commissioners is a defendant because the Commissioners are "insurers of Macon."[3] *Id.* at 11. Finally, Plaintiff asserts that District Attorney Investigator Scott Chapman conspired with Conkling and Williams to violate Plaintiff's constitutional rights. *Id.* at 17.

1. Officer Anthony Terry

In the complaint, Plaintiff asserts that Defendant Officer Anthony Terry responded to Plaintiff's 911 call, but then conspired with Defendant Officer Stephen Fields to falsely charge Plaintiff with possession of a firearm by a convicted felon. Additionally, Plaintiff claims Officer Terry brought Plaintiff in on an unverified warrant that bore Plaintiff's name but different identifying details. Officer Terry also testified against Plaintiff in his commitment hearing, his Newton County probation violation hearing, and his possession of a firearm trial.

Based on these allegations, Plaintiff asserts that Officer Terry falsely arrested Plaintiff without probable cause, falsely imprisoned Plaintiff, and violated Plaintiff's rights to due process and equal protection. Plaintiff also contends that Officer Terry violated the Americans With Disabilities Act (the "ADA") and Plaintiff's Eighth Amendment rights when Officer Terry handcuffed Plaintiff too tightly despite Plaintiff's disability, forced Plaintiff head first into the patrol car, and nearly suffocated Plaintiff in the patrol car by

[3]Plaintiff further asserts that these individuals and entities should be criminally prosecuted based on the claims contained in this complaint. *Id.* at 11-13, 16.

running the heat and refusing to crack a window. These claims are addressed in turn below.

a. False Arrest

i. Lack of Probable Cause for Handgun Charge

"An arrest without a warrant and lacking probable cause violates the Constitution and can underpin a § 1983 claim, but the existence of probable cause at the time of arrest is an absolute bar to a subsequent constitutional challenge to the arrest." *Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 734 (11th Cir. 2010). "Probable cause exists where the facts within the collective knowledge of law enforcement officials, derived from reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that a criminal offense has been or is being committed. *Id.*

When a plaintiff brings separate claims for false arrest and false imprisonment, the claims are condensed into a single false arrest claim when the false imprisonment claim arises from "a detention of the basis of [the] false arrest." *Hill v. Macon Police Dep't*, No. 5:10-cv-472 (CAR), 2013 WL 594200, at *6 (M.D. Ga. Feb. 15, 2013). Thus, to the extent that Plaintiff alleges that false imprisonment as the result of the alleged false arrest, the Court subsumes the false imprisonment claim into the false arrest claim. *Id.*

According to Plaintiff's allegations, Officer Terry responded to a 911 call made by Plaintiff reporting that he had been assaulted by Laverne and her son. Sometime after arriving at Plaintiff's home, the officers apparently found a gun in Plaintiff's yard. Then, knowing that the gun had been put there by Laverne's son, Officer Terry reported that

Plaintiff had been the one with the gun and charged him with possession of a firearm by a convicted felon. These allegations, accepted as true and construed in Plaintiff's favor, state that Officer Terry did not have probable cause to arrest Plaintiff on the possession of a handgun charge.

ii. Mistaken Identity on the Warrant

According to the complaint, Officer Terry also detained Plaintiff on an alternative basis, namely, the Newton County arrest warrant. The Eleventh Circuit has recognized a separate false imprisonment claim based on an arrest founded on a mistake as to the arrestee's identity. *See id.* (discussing *Rodriguez v. Farrell*, 200 F.3d 1341, 1345-46 (11th Cir. 2002)

In this regard, Plaintiff appears to acknowledge that the arrest warrant bore Plaintiff's name, but asserts that it was not for Plaintiff, but for a white man whose social security number was different from Plaintiffs. The question of "whether the mistaken arrest of one person (for whom no probable cause to arrest existed) based upon the misidentification of that person as a second person (for whom probable cause to arrest existed) violated the Constitution," turns on whether the police "reasonably mistake" the second person for the first. *Rodriguez*, 200 F.3d at 1345-46 (quoting *Hill v. California*, 401 U.S. 797, 802 (1971)). The same standard applies when the police have a valid warrant for arrest, but mistakenly arrest another person instead. *Id.* at 1346.

In determining the reasonableness of the mistake, the Court looks to the totality of the circumstances. *Id.* at 1347. When holding that the totality of the circumstances must

be considered, the Eleventh Circuit declined to adopt a broad standard providing that a police officer acts reasonably based solely on a determination that the name of the person arrested matches the name on the outstanding arrest warrant. *See id.* at 1346-47.

Here, although Plaintiff's allegations are minimal, the Court must accept those allegations as true and construe them in Plaintiff's favor. As Plaintiff has alleged that the warrant was for an individual of a different race and with a different social security number, he has set forth sufficient facts from which it could be concluded that Officer Terry's mistake in arresting Plaintiff was unreasonable. Because Plaintiff has alleged that Terry lacked probable cause to arrest Plaintiff on the handgun charge and unreasonably mistook Plaintiff for the subject of a warrant, Plaintiff's false arrest and false imprisonment claims against Officer Terry will be allowed to proceed for further factual development.

b. Excessive Force

i. Handcuffing

The Fourth Amendment's prohibition against unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989). In order to determine whether the amount of force used by a police officer was proper, a court must ask "whether a reasonable officer would believe that this level of force is necessary in the situation at hand." *McCullough v. Antolini*, 559 F.3d 1201, 1206 (11th Cir. 2009) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002)).

Plaintiff alleges that Officer Terry placed the handcuffs on Plaintiff too tightly,

knowing that Plaintiff had a disability in his arm; that Officer Terry forced him, handcuffed, into the back seat of the patrol car headfirst; and that Officer Terry turned the heat up in the patrol car and made Plaintiff stay in the car without cracking a window. The Eleventh Circuit has concluded that "[p]ainful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal." *Rodriguez*, 280 F.3d at 1352. Conversely, handcuffing that "intentionally and gratuitously" causes "serious and substantial injury" to a person of "ordinary vulnerability" may constitute excessive force. *See Sebastian v. Ortiz*, 918 F.3d 1301, 1309 (11th Cir. 2019).

Although Plaintiff alleges that he had a disability, which meant that he was caused additional pain during the handcuffing, Plaintiff does not allege that he suffered any lasting injury beyond temporary pain while he was handcuffed, much less that he suffered an injury that was serious and substantial. Thus, he has not stated an excessive force claim with regard to the handcuffing. *See Rodriguez*, 280 F.3d at 1352. Thus, it is **RECOMMENDED** that Plaintiff's excessive force claim against Officer Terry based on handcuffing be **DISMISSED WITHOUT PREJUDICE**.

ii. Placement in Hot, Unventilated Car

As to his being forced into the car head first, Plaintiff's allegations are minimal, but it appears that his allegations could support the conclusion that Officer Terry used more force than necessary to put Plaintiff into the patrol car. Moreover, as to his confinement in the hot vehicle, courts have held that unnecessary detention in extreme temperatures may violate the Fourth Amendment's prohibition against unreasonable searches and

seizures. *See Burchett v. Kiefer*, 310 F.3d 937, 945 (6th Cir. 2002). In this regard, the Supreme Court has held that, under certain circumstances, "unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks" may violate the Eighth Amendment's prohibition on "unnecessary and wanton infliction of pain." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). These actions therefore would likewise violate the Fourth Amendment, which requires a showing only of objective unreasonableness, rather than a particular subjective motivation. *Burchett*, 310 F.3d at 945.

Plaintiff does not state how long he was kept in the hot, unventilated patrol car, but he does say that it came to a point where he could barely breathe. Accepting this allegation as true and construing it in his favor, Plaintiff has sufficiently alleged a Fourth Amendment violation with regard to his placement and confinement in the patrol car to allow this claim to proceed against Officer Terry past the preliminary review stage.

c. Americans With Disabilities Act

To state a claim under Title II of the ADA, a plaintiff must show "(1) that he is a qualified individual with a disability; (2) that he was either excluded from participating in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability. *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1083 (11th Cir. 2007) (internal citation omitted). "Whether an individual has a 'disability' within the ADA's purview turns on a determination of whether the individual

has: a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or is regarded as having such an impairment." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997) (internal citations omitted).

Plaintiff generally alleges that he had "disability physical conditions to [his] arm and head on the right side" but does not provide any specific information about these alleged disability conditions. In particular, Plaintiff does not include any allegations describing the nature of these conditions or suggesting that Plaintiff's conditions limit one or more of his major life activities. Plaintiff's general allegation that he has a disability, without specific factual allegations in support of this claim, are insufficient to state a claim in this regard. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Accordingly, it is **RECOMMENDED** that Plaintiff's ADA claim be **DISMISSED WITHOUT PREJUDICE** for failure to state a claim.

d. Due Process

The Fourteenth Amendment's Due Process Clause confers substantive and procedural due process rights on individuals. *Albright v. Oliver*, 510 U.S. 266, 272 (1994). With regard to substantive due process, the Supreme Court has held that, if a particular constitutional amendment "provides an explicit textual source of constitutional protection" against a specific government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these

claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989). Because Plaintiff's false arrest claim is governed by the Fourth Amendment's prohibition against unreasonable search and seizure, he cannot state a substantive due process claim on the same grounds. *See id.*

As to procedural due process, to prevail on a procedural due process claim, a plaintiff must establish: "(1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation." *Bank of Jackson Cty. v. Cherry*, 980 F.2d 1362, 1366 (11th Cir. 1993). The protections of procedural due process do not attach, however, until an arrest is completed, the plaintiff has been released from the arresting officer's custody, and pretrial detainment begins. *See Garrett v. Athens-Clarke Cty.*, 378 F.3d 1274, 1279 n.11 (11th Cir. 2004) (citing *Gutierrez v. Cty. of San Antonio*, 139 F.3d 441, 452 (5th Cir. 1998)). To the extent Plaintiff seeks to raise a procedural due process claim against Officer Terry relating to the arrest itself, this claim necessarily fails. It is therefore **RECOMMENDED** that Plaintiff's due process claim against Officer Terry be **DISMISSED WITHOUT PREJUDICE** for failure to state a claim.

e. Equal Protection

The Fourteenth Amendment's Equal Protection Clause provides that no state shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A plaintiff bringing an equal protection claim must prove either that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," *Village of Willowbrook v. Olech*, 528 U.S.

562, 564 (2000), or that he "was treated differently than similarly situated persons [and] the defendant unequally applied [a] facially neutral statute for the purpose of discriminating against the plaintiff." *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996).

Plaintiff has not alleged any specific, plausible facts to indicate that Officer Terry treated Plaintiff differently from any similarly situated individuals. Thus, he has not stated an equal protection claim. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1207 (11th Cir. 2007) (recognizing that, whether a claim asserts a traditional equal protection claim or a "class of one" claim, an equal protection claim will fail in the absence of an allegation that the plaintiff was treated dissimilarly to other similarly situated individuals). Accordingly, it is **RECOMMENDED** that this claim be **DISMISSED WITHOUT PREJUDICE** for failure to state a claim.

f. Testimony

It also appears that Plaintiff may be attempting to state a claim against Officer Terry based on Terry's testimony in Plaintiff's criminal proceedings. The Supreme Court has held, however, that police officers who testify as witnesses in criminal proceedings are, like all witnesses, absolutely immune from damages liability for claims based on such testimony. *See Briscoe v. LaHue*, 103 S. Ct. 1108, 1113-21 (1983). Thus, Plaintiff cannot state a claim against Officer Terry based on his testimony in Plaintiff's criminal proceedings, and it is therefore **RECOMMENDED** that any such claim be **DISMISSED WITHOUT PREJUDICE**.

2. Officer Stephen Fields

Plaintiff alleges that Defendant Officer Stephen Fields falsely arrested Plaintiff for possession of a firearm by a convicted felon. Construed in Plaintiff's favor, the Complaint alleges that Officer Fields arrested Plaintiff knowing that Plaintiff had not possessed the gun and without verifying the purported warrant out of Newton County. For the same reasons that the false arrest and false imprisonment claim will be allowed to proceed against Officer Terry, this claim will also be permitted to proceed as to Officer Fields. To the extent that Plaintiff intended to state a due process or equal protection claim against Officer Fields, it is **RECOMMENDED** that those claims be **DISMISSED WITHOUT PREJUDICE** for the reasons discussed with regard to Officer Terry above.

3. Sheriff David Davis and Lieutenant C. Penalton

The only allegations that Plaintiff brings against Defendants Sheriff David Davis and Lieutenant C. Penalton are that these defendants were Officers Terry and Fields' supervisors and that they failed to respond to letters Plaintiff sent them demanding that his complaints be addressed.

A prisoner cannot state a § 1983 claim based on a theory of respondeat superior or vicarious liability. *Miller v. King*, 384 F.3d 1248, 1261 (11th Cir. 2004). Instead, to state a claim against a supervisory official, a prisoner must allege facts showing either that the supervisor personally participated in the alleged constitutional violation or that there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation. *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1086-87 (11th Cir.

1986). This may be done by alleging that the official either "(1) instituted a custom or policy which resulted in a violation of the plaintiff's constitutional rights; (2) directed his subordinates to act unlawfully; or (3) failed to stop his subordinates from acting unlawfully when he knew they would." *Gross v. White*, 340 F. App'x 527, 531 (11th Cir. 2009) (per curiam) (citing *Goebert v. Lee County*, 510 F.3d 1312, 1331 (11th Cir. 2007)).

Plaintiff does not allege that Sheriff Davis or Lt. Penalton was personally involved in the alleged constitutional violation, nor does he allege any facts showing that the false arrest was a result of a custom or policy initiated by either of these defendants, that either of these defendants directed Officers Terry and Fields to violate Plaintiff's rights, or that either of these defendants knowingly failed to stop Officer Terry or Officer Fields from violating Plaintiff's rights. Accordingly, Plaintiff has not stated a claim against either of these defendants, and it is **RECOMMENDED** that the claims against them be **DISMISSED WITHOUT PREJUDICE**.

4. Deputy T. Edwards

Plaintiff's only allegation as to Deputy T. Edwards is that this defendant called Newton County the day after Plaintiff's arrest to confirm the warrant against him there. Plaintiff does not allege that Deputy Edwards was involved in the initial arrest or that he otherwise violated Plaintiff's constitutional or other federal rights. As such, Plaintiff has not stated a claim against Deputy Edwards, and it is **RECOMMENDED** that the complaint be **DISMISSED WITHOUT PREJUDICE** as to this defendant. *See LaMarca v. Turner*, 995 F.2d 1526, 1538 (11th Cir. 1993) ("[S]ection 1983 requires proof of an affirmative

causal connection between the actions taken by a particular person under color of state law and the constitutional deprivation." (internal quotation marks and citations omitted)).

5. K. David Cooke, Jr., Thomas C. Williams, and Benjamin Conkling

Plaintiff asserts that Defendants District Attorney K. David Cooke, Jr., and Assistant District Attorneys Thomas C. Williams and Benjamin Conkling maliciously prosecuted him for possession of a firearm by a convicted felon based on his race. Prosecutors are absolutely immune from liability under 42 U.S.C. § 1983 when they are engaged in prosecutorial functions – i.e., those actions that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976). The decision to bring or drop charges against an arrestee is a prosecutorial function. *See Anderson v. Simon*, 217 F.3d 472, 475-76 (7th Cir. 2000). Thus, these defendants cannot be sued for damages under § 1983 for their decision to prosecute Plaintiff.

Prosecutors are not, however, immune from claims for declaratory and injunctive relief. *See Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000). To state a claim for declaratory or injunctive relief, a plaintiff must allege (1) the violation of a right, (2) that there is a serious risk of continuing irreparable injury if relief is not granted, and (3) that no adequate remedy at law exists. *See id.* Here, the criminal case against Plaintiff has concluded, and Plaintiff has not alleged any facts that suggest that there is a potential for ongoing injury based on any actions of these defendants. Declaratory or injunctive relief is therefore unwarranted. Accordingly, it is **RECOMMENDED** that all of Plaintiff's claims against Cooke, Williams, and Conkling be **DISMISSED WITHOUT**

PREJUDICE.

6. Investigator Scott Chapman

Plaintiff alleges that Defendant Investigator Scott Chapman conspired with the prosecutors to violate Plaintiff's rights. Other than this general and conclusory allegation, however, Plaintiff does not allege any specific facts against Chapman, much less any facts demonstrating that Chapman was actually involved in any violation of Plaintiff's rights. Because Plaintiff has not stated a claim against Chapman, it is **RECOMMENDED** that Plaintiff's claims be **DISMISSED WITHOUT PREJUDICE** as to this defendant. *See Iqbal*, 556 U.S. at 678; *LaMarca*, 995 F.2d at 1538.

7. Bibb County Defendants

Plaintiff includes the Bibb County Board of Commissioners, the Risk Management Department, and other officers and employees of Bibb County as defendants to this action. In so doing, Plaintiff states that he names these defendants as the "insurers" of Bibb County. To state a claim against a municipality, a plaintiff must assert facts showing that the municipality had a "policy or custom" of deliberate indifference that led to the constitutional violations. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). "Because municipalities rarely have an official policy that endorses a constitutional violation," a plaintiff generally must show that the municipality had "a custom or practice" of allowing the violation, and that the custom or practice caused the violation. *Craig v. Floyd Cty., Ga.*, 643 F.3d 1306, 1310 (11th Cir. 2011). Because Plaintiff has not alleged any facts suggesting that a policy or custom instituted or held by Bibb County led to the

alleged constitutional violations, it is **RECOMMENDED** that Plaintiff's claims against the Bibb County Defendants be **DISMISSED WITHOUT PREJUDICE**.

8. John Doe Bibb County Officer and Assistant District Attorney

Plaintiff also names two John Doe defendants, a Bibb County law enforcement officer and an Assistant District Attorney. Generally, fictitious party pleading, *i.e.*, bringing claims against John Doe defendants, is only permitted in federal court when the plaintiff's description of the defendant is so specific that the party may be identified for service even though his or her actual name is unknown. *See Richardson v. Johnson*, 598 F.3d 734, 738 (11th Cir. 2010). Plaintiff has not included any identifying information to allow the Court to identify these defendants. Even if he had included any such information, Plaintiff has not made any specific factual allegations with regard to these defendants. As Plaintiff has not stated a claim against the unidentified law enforcement officer or the unidentified assistant district attorney, it is **RECOMMENDED** that any claims against these John Doe defendants be **DISMISSED WITHOUT PREJUDICE**.

B. Conclusion

For the reasons discussed above, Plaintiff's false arrest and false imprisonment claims will be allowed to proceed against Defendants Officer Anthony Terry and Officer Stephen Fields. Plaintiff's excessive force claim against Officer Terry will also be allowed to proceed with regard to whether Officer Terry used excessive force by placing and holding Plaintiff in a hot, unventilated patrol car. It is **RECOMMENDED** that all of Plaintiff's remaining claims against Officers Terry and Fields, as well has his claims

against Sheriff David Davis; Deputy T. Edwards; Lt. C. Penalton; Assistant District Attorneys K. David Cooke, Jr., Thomas C. Williams, and Benjamin Conkling; Investigator Scott Chapman; the Bibb County Defendants; and the John Doe law enforcement officer and assistant district attorney, be **DISMISSED WITHOUT PREJUDICE**.

III. Right to File Objections

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to any recommendation with the United States District Judge to whom this case is assigned **WITHIN FOURTEEN (14) DAYS** after being served with a copy of this Order and Recommendation. The parties may seek an extension of time in which to file written objections, provided a request for an extension is filed prior to the deadline for filing written objections. Failure to object in accordance with the provisions of § 636(b)(1) waives the right to challenge on appeal the district judge's order based on factual and legal conclusions to which no objection was timely made. *See* 11th Cir. R. 3-1.

IV. Order for Service

For those reasons discussed above, it is hereby **ORDERED** that service be made on **DEFENDANTS OFFICER ANTHONY TERRY and OFFICER STEPHEN FIELDS**, and that they file an Answer, or other response as appropriate under the Federal Rules, 28 U.S.C. § 1915, and the Prison Litigation Reform Act. Defendants are also reminded of the duty to avoid unnecessary service expenses, and the possible imposition of expenses for failure to waive service.

DUTY TO ADVISE OF ADDRESS CHANGE

During this action, all parties shall at all times keep the Clerk of this Court and all opposing attorneys and/or parties advised of their current address. Failure to promptly advise the Clerk of any change of address may result in the dismissal of a party's pleadings.

DUTY TO PROSECUTE ACTION

Plaintiff must diligently prosecute his Complaint or face the possibility that it will be dismissed under Rule 41(b) for failure to prosecute. Defendants are advised that they are expected to diligently defend all allegations made against them and to file timely dispositive motions as hereinafter directed. This matter will be set down for trial when the Court determines that discovery has been completed and that all motions have been disposed of or the time for filing dispositive motions has passed.

FILING AND SERVICE OF MOTIONS, PLEADINGS, AND CORRESPONDENCE

It is the responsibility of each party to file original motions, pleadings, and correspondence with the Clerk of Court. A party need not serve the opposing party by mail if the opposing party is represented by counsel. In such cases, any motions, pleadings, or correspondence shall be served electronically at the time of filing with the Court. If any party is not represented by counsel, however, it is the responsibility of each opposing party to serve copies of all motions, pleadings, and correspondence upon the unrepresented party and to attach to said original motions, pleadings, and correspondence filed with the Clerk of Court a certificate of service indicating who has been served and

where (i.e., at what address), when service was made, and how service was accomplished (i.e., by U.S. Mail, by personal service, etc.).

DISCOVERY

Plaintiff shall not commence discovery until an answer or dispositive motion has been filed on behalf of Defendant from whom discovery is sought by Plaintiff. Defendants shall not commence discovery until such time as an answer or dispositive motion has been filed. Once an answer or dispositive motion has been filed, the parties are authorized to seek discovery from one another as provided in the Federal Rules of Civil Procedure. Plaintiff's deposition may be taken at any time during the time period hereinafter set out, provided that prior arrangements are made with his custodian. Plaintiff is hereby advised that failure to submit to a deposition may result in the dismissal of his lawsuit under Fed. R. Civ. P. 37 of the Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that discovery (including depositions and the service of written discovery requests) shall be completed within 90 days of the date of filing of an answer or dispositive motion by Defendants (whichever comes first) unless an extension is otherwise granted by the Court upon a showing of good cause therefor or a protective order is sought by Defendants and granted by the Court. This 90-day period shall run separately as to each Defendant beginning on the date of filing of each Defendant's answer or dispositive motion (whichever comes first). The scheduling of a trial may be advanced upon notification from the parties that no further discovery is contemplated or that discovery has been completed prior to the deadline.

Discovery materials shall not be filed with the Clerk of Court. No party shall be required to respond to any discovery not directed to him or served upon him by the opposing counsel/party. The undersigned incorporates herein those parts of the Local Rules imposing the following limitations on discovery: except with written permission of the Court first obtained, INTERROGATORIES may not exceed TWENTY-FIVE (25) to each party, REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS under Rule 34 of the Federal Rules of Civil Procedure may not exceed TEN (10) requests to each party, and REQUESTS FOR ADMISSIONS under Rule 36 of the Federal Rules of Civil Procedure may not exceed FIFTEEN (15) requests to each party. No party is required to respond to any request which exceed these limitations.

REQUESTS FOR DISMISSAL AND/OR JUDGMENT

Dismissal of this action or requests for judgment will not be considered by the Court in the absence of a separate motion accompanied by a brief/memorandum of law citing supporting authorities. Dispositive motions should be filed at the earliest time possible, but no later than one hundred-twenty (120) days from when the discovery period begins.

CONCLUSION

Thus, for the reasons discussed above, Plaintiff's false arrest and false imprisonment claims will be allowed to proceed against Defendants Officer Anthony Terry and Officer Stephen Fields. Additionally, Plaintiff's excessive force claim against Officer Terry will be allowed to proceed with regard to whether Officer Terry used excessive force by placing and holding Plaintiff in a hot, unventilated patrol car. On the other hand, it is

RECOMMENDED that all of Plaintiff's remaining claims against Officers Terry and Fields, as well has his claims against Sheriff David Davis; Deputy T. Edwards; Lt. C. Penalton; Assistant District Attorneys K. David Cooke, Jr., Thomas C. Williams, and Benjamin Conkling; Investigator Scott Chapman; the Bibb County Defendants; and the John Doe law enforcement officer and assistant district attorney, be **DISMISSED WITHOUT PREJUDICE**.

SO ORDERED and RECOMMENDED, this 15th day of May, 2019.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

Other Orders

5:18-cv-00435-MTT-CHW
BANKS v. TERRY, et al

HDS,PRO SE

U.S. District Court [LIVE AREA]

Middle District of Georgia

Notice of Electronic Filing

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Case Name: BANKS v. TERRY, et al
Case Number: 5:18-cv-00435-MTT-CHW
Filer:
Document Number: 10

Docket Text:
ORDER granting [2] Motion for Leave to Proceed in forma pauperis; ORDER Directing Service on Officer Anthony Terry and Officer Stephen Fields; REPORT AND RECOMMENDATION that Plaintiff's claims against Sheriff David Davis; Deputy T. Edwards; Lt. C. Penalton; Assistant District Attorneys K. David Cooke, Jr., Thomas C. Williams, and Benjamin Conkling; Investigator Scott Chapman; the Bibb County Defendants; and the John Doe law enforcement officer and assistant district attorney, be DISMISSED WITHOUT PREJUDICE re [1] Complaint filed by LEROY BANKS, III. Only Plainiff's false arrest and false imprisonment claims will be allowed to proceed against Defendants Officer Anthony Terry and Officer Stephen Fields, It is Recommended that all remaining claims against officers Terry and Fields be Dismissed without Prejudice. Ordered by US MAGISTRATE JUDGE CHARLES H WEIGLE on 05/15/2019. (cma)

5:18-cv-00435-MTT-CHW Notice has been electronically mailed to:

5:18-cv-00435-MTT-CHW On this date, a copy of this document, including any attachments, has been mailed by United States Postal Service to any non CM/ECF participants as indicated below::

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Address Unknown

LEROY BANKS, III
2029 LOWE STREET
MACON, GA 31204

TAVARIS JOHNSON
Address Unknown

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Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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] [2876b4307363e55cdb2ca95d2727ef723e051e5b9afe3ce9b065877c7c1fd128681
1323cf9e5586e509e318b89c066a0d3a6af276d334b9269877913821b9777]]

Plaintiff Exhibit "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LEROY BANKS, III, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:18-CV-435 (MTT)**
	)	
	)	
Deputy ANTHONY TERRY, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER

After reviewing Plaintiff Leroy Banks' complaint pursuant to 28 U.S.C. § 1915A, United States Magistrate Judge Charles H. Weigle recommends allowing the Plaintiff's false arrest claims against Defendants Deputy Anthony Terry and Officer Stephen Fields and his excessive force claim pertaining to placing and holding the Plaintiff in a hot, unventilated patrol car against Defendant Terry to go forward. Doc. 10. The Magistrate Judge further recommends dismissing without prejudice the Plaintiff's remaining claims and dismissing Plaintiffs Laverne Johnson and Tavaris Johnson. *Id.* The Plaintiff has objected to the Recommendation. Doc. 19. Pursuant to 28 U.S.C. § 636(b)(1), the Court has reviewed the Plaintiff's objection and has made a de novo determination of the portions of the Recommendation to which the Plaintiff objects.

In his objection, the Plaintiff has asserted additional facts to his excessive force claim pertaining to Defendant Terry placing handcuffs on the Plaintiff too tightly. Doc. 19 at 11. Therefore, the Court will construe these parts of the objection as a motion to

amend the complaint. *See Newsome v. Chatham Cty. Det. Ctr.*, 256 F. App'x 342, 344 (11th Cir. 2007) ("Although the form of those additional allegations were objections to the recommendation of dismissal, the collective substance of them was an attempt to amend the complaint. Because courts must construe pro se pleadings liberally, the district court should . . . consider [the plaintiff's] additional allegations in the objection as a motion to amend his complaint and grant[] it."). Accordingly, that motion (Doc. 19 at 11) is **GRANTED**.

The Magistrate Judge recommended dismissing the Plaintiff's excessive force claim against Defendant Terry for handcuffing the Plaintiff too tightly because the Plaintiff did not allege "that he suffered an injury that was serious and substantial." Doc. 10 at 14. In his objection, the Plaintiff alleged an additional fact that he must undergo surgery as a result of the handcuffs being placed on him too tightly. Doc. 19 at 11. The Plaintiff has thus alleged a substantial injury, and his excessive force claim against Defendant Terry may proceed. *See Sebastian v. Ortiz*, 918 F.3d 1301, 1309 (11th Cir. 2019).

The Plaintiff's objection to the dismissal of remaining claims appear to restate prior allegations. *Compare* Doc. 1, *with* Doc. 19. "A general objection, or one that merely restates the arguments previously presented[,] is not sufficient to alert the court to alleged errors on the part of the magistrate judge. An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Carolina Cas. Ins. Co. v. Ark. Transit Homes, Inc.*, 2012 WL 1340107, at *5 (N.D. Ala. 2012) (alterations in original) (internal quotation marks and citation

omitted). Accordingly, the remaining claims are **DISMISSED without prejudice** for the reasons stated in the Recommendation.

The Court has reviewed the Recommendation and accepts the findings, conclusions, and recommendations of the Magistrate Judge. The Recommendation is **ADOPTED** and made the order of this Court. Accordingly, the Plaintiff's false arrest claims against Defendants Terry and Fields and both of his excessive force claims against Defendant Terry may go forward. The Plaintiff's remaining claims are **DISMISSED without prejudice**, and the Clerk is **DIRECTED** to remove Laverne Johnson and Tavaris Johnson as Plaintiffs in this case.

SO ORDERED, this 18th day of June, 2019.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LEROY BANKS, III,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	**No. 5:18-cv-00435-MTT-CHW**
DEPUTY TERRY ANTHONY, *et al.*,	:	
	:	
Defendants.	:	
	:	

ORDER

Plaintiff Leroy Banks, III, filed a *pro se* 42 U.S.C. § 1983 civil rights complaint, Compl., ECF No. 1, and a motion for leave to proceed *in forma pauperis*. Mot. for Leave to Proceed *In Forma Pauperis*, ECF No. 2. On preliminary review, Plaintiff Banks was allowed to proceed on false arrest and false imprisonment claims against Defendants Officer Terry Anthony and Officer Stephen Fields, as well as an excessive force claim against Officer Anthony. Order, May 15, 2019, ECF No. 10; Order Adopting R. & R., June 18, 2019, ECF No. 25. The preliminary screening Order noted that Plaintiff Banks had identified additional potential plaintiffs to this case but that those potential plaintiffs had not appeared on their own behalf and could not be represented by Plaintiff Banks. Order 5 n.1, ECF No. 10. Thus, they were dismissed as plaintiffs in this action. Order Adopting R. & R., ECF No. 25.

Laverne Johnson, one of the potential plaintiffs identified by Plaintiff Banks, has now filed a motion to be joined in this action on behalf of herself and her minor child, Tavoris Johnson. Mot., June 18, 2019, ECF No. 27. Ms. Johnson has also moved to proceed in this action *in forma pauperis*. Mot. & Aff. for Leave to Proceed *In Forma*

Pauperis, ECF No. 26. Because Ms. Johnson's documentation demonstrates that she is unable to pay the Court's filing fee, her motion to proceed *in forma pauperis* is now **GRANTED**.

With regard to Ms. Johnson's request to be joined as a party plaintiff, two or more people may be joined as plaintiffs in the same action under Federal Rule of Civil Procedure Rule 20(a)(1), if "(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." Based on her filings, it appears that Ms. Johnson intends to assert a right to relief "arising out of the same transaction, occurrence, or series of transactions or occurrences" as the claims submitted by Plaintiff Banks. Further, it appears likely that Ms. Johnson's claims will raise a question of law or fact in common with Plaintiff Banks's claims.

Ms. Johnson has not, however, identified in her motion the specific claims that she wishes to raise on her own behalf.[1] Instead, Ms. Johnson requested leave to file a supplement to the complaint in order to set forth the facts supporting her claims. Mot., June 18, 2019, ECF No. 27. Under the circumstances, Ms. Johnson's motion to be added as a plaintiff and her request to file a supplement (ECF No. 27) are **GRANTED**. To that

[1]As noted above, Ms. Johnson asserted an intent to bring claims on behalf of her minor child. "[P]arents who are not attorneys may not bring a *pro se* action on their child's behalf." *Devine v. Indian River Cty. Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997), overruled in part on other grounds by *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007). Thus, Ms. Johnson may only raise claims on her own behalf in this action.

end, Ms. Johnson is now **ORDERED** to file a complaint on her own behalf setting forth her claims in this action. Ms. Johnson shall have **TWENTY-ONE (21) DAYS** from the date of this order to submit a new complaint setting forth her claims to the Clerk of Court. Her failure to comply with this order may result in her dismissal from this action.

The Clerk of Court is **DIRECTED** to forward a non-prisoner 42 U.S.C. § 1983 complaint form together with a copy of this Order (both showing the civil action number) to Ms. Johnson. There shall be no service with regard to Ms. Johnson's claims pending further order of the Court.

SO ORDERED and DIRECTED, this 17th day of July, 2019.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

Other Orders

5:18-cv-00435-MTT-CHW
BANKS v. TERRY, et al

HDS,PRO SE

U.S. District Court [LIVE AREA]

Middle District of Georgia

Notice of Electronic Filing

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Case Name: BANKS v. TERRY, et al
Case Number: 5:18-cv-00435-MTT-CHW
Filer:
Document Number: 28

Docket Text:
ORDER to Recast Complaint; granting [26] Motion for Leave to Proceed in forma pauperis; granting [27] Motion for Leave to File. Ms. Johnson shall have TWENTY-ONE (21) DAYS from the date of this order to submit a new complaint setting forth her claims to the Clerk of Court. The Clerk of Court is DIRECTED to forward a non-prisoner 42 U.S.C.§1983 complaint form together with a copy of this Order (both showing the civil action number) to Ms. Johnson. Ordered by US MAGISTRATE JUDGE CHARLES H WEIGLE on 07/17/2019. (cma)

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5:18-cv-00435-MTT-CHW On this date, a copy of this document, including any attachments, has been mailed by United States Postal Service to any non CM/ECF participants as indicated below::

LAVERNE JOHNSON
2029 LOWE ST
MACON, GA 31204

LEROY BANKS, III
2029 LOWE STREET
MACON, GA 31204

TAVARIS JOHNSON(Terminated)
Address Unknown

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LEROY BANKS, III, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Case No. 5:18-cv-00435-MTT-CHW**
	:	
DEPUTY ANTHONY TERRY, *et al.*,	:	
	:	**Proceedings Under 42 U.S.C. § 1983**
Defendants.	:	**Before the U.S. Magistrate Judge**
	:	

ORDER AND RECOMMENDATION

Before the Court are two motions to dismiss filed by Defendants Terry Anthony and Stephen Fields, both deputies of the Bibb County Sheriff's Department, on the ground that Plaintiff Leroy Banks's complaint is barred by Georgia's two-year statute of limitations. (Docs. 31, 33). Because Plaintiff's complaint is untimely, it is **RECOMMENDED** that the motions be **GRANTED** and the complaint be **DISMISSED with prejudice**. It is also **ORDERED** that Plaintiff's motion to subpoena duces tecum (Doc. 37) be **DENIED as moot**.

I. BACKGROUND

Plaintiff Leroy Banks, III, proceeding *pro se*, filed a complaint pursuant to 42 U.S.C. § 1983, alleging, among other things, that he was falsely arrested and falsely imprisoned by Defendants Terry and Fields and that Defendant Terry used excessive force in arresting him. (Doc. 1-1).

The events on which Plaintiff's claims are based occurred on October 18, 2016, following Plaintiff's call for police assistance to have his girlfriend, Laverne Johnson, and her 23-year-old son, Jarquize Johnson, removed from his home. (*Id.*, p. 3). Jarquize Johnson had allegedly kicked in the door to Plaintiff's house while armed with a gun, demanded money and other items, and

struck Plaintiff in the head. (*Id.*, pp. 3–4). Once Deputies Terry and Fields arrived on the scene, both Plaintiff and Laverne Johnson were charged with possession of the gun, which Plaintiff claims Jarquize had thrown in the grass in Plaintiff's yard while fleeing the scene. (*Id.*).

Plaintiff alleges that he suffers from a disability relating to his "arm and head on the right side" and that he had informed Deputy Terry about the issue during his arrest. (*Id.*, p. 10). Nevertheless, Deputy Terry proceeded to place Plaintiff in handcuffs that were unnecessarily tight, which, Plaintiff claims, caused "unb[e]arable pain to [Plaintiff's] disability" and required surgery to his right wrist and arm. (*Id.*; Doc. 9, p. 11). Plaintiff was then placed in an excessively hot and unventilated patrol car by Deputy Terry. (Doc. 1-1, p. 10). Plaintiff claims that Deputy Terry's actions in handcuffing him too tightly and placing him in a hot patrol car were excessive and violated the Fourth Amendment.

Plaintiff also claims that Deputies Terry and Fields falsely arrested him for possession of a firearm by a convicted felon and then falsely imprisoned him based on an arrest warrant that was in fact issued for a different individual. (*Id.*, pp. 4–5, 7). He also claims that they conspired to fabricate the police report to make it appear as if Plaintiff and his girlfriend had had a domestic dispute. (*Id.*, p. 4). Although Plaintiff was acquitted in a jury trial, at which he represented himself, of the offense of possession of a firearm by a convicted felon, his Newton County probation was revoked for three years allegedly as a result of Deputy Terry's false statements. (*Id.*, pp. 8, 15).

II. STATUTE OF LIMITATIONS

Plaintiff's claims against Defendants Terry and Fields are time-barred. A plaintiff may only bring suit under 42 U.S.C. § 1983 within the period stated in the applicable state statute of limitations for personal injury suits. *See Wallace v. Kato*, 549 U.S. 384, 387 (2007). In Georgia, the applicable period is two years after the right of action accrues. *Height v. Olens*, 736 F. App'x

249, 250 (11th Cir. 2018) (citing O.C.G.A. § 9-3-33). Federal law governs when the right of action accrues. *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003). Under federal law, the limitations period begins to run when the plaintiff knew or should have known both (1) that he had suffered the injury that forms the basis of his complaint and (2) who had inflicted the injury. *Pyburn v. Dole*, No. 18-11446-F, 2018 WL 4859519, at *2 (11th Cir. Sept. 4, 2018) (quoting *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003)). In other words, the right accrues when "the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Lovett*, 327 F.3d at 1182 (internal quotation marks omitted) (quoting *Rozar v. Mullis*, 85 F.3d 556, 561–62 (11th Cir. 1996)). "This rule requires a court first to identify the alleged injuries, and then to determine when [the] plaintiff[] could have sued for them." *Rozar*, 85 F.3d at 562.

The statute of limitations for false arrest and false imprisonment claims[1] is governed by Georgia's two-year limitations period. *Wallace*, 549 U.S. at 387–88. The accrual of those claims for limitations purposes begins when the alleged false imprisonment ends. *Id.* at 389. A false imprisonment ends once the victim is held pursuant to legal process, "when, for example, he is bound over by a magistrate or arraigned on charges." *Id.*

The limitations period on Plaintiff's excessive force claims against Defendant Terry began to run on October 18, 2016, when, upon his arrest, he was allegedly handcuffed too tightly and placed in an excessively hot and unventilated patrol car by Defendant Terry. (Doc. 1-1, pp. 3, 10). The limitations period on Plaintiff's false arrest claim against Defendants Terry and Fields accrued slightly later, on November 7, 2016, at the latest, when he was bound over by the state magistrate judge to the Bibb County Superior Court. (*Id.*, pp. 6–7). Plaintiff filed his complaint on November

[1] Since an alleged false arrest is considered "a species" of a false imprisonment claim, the two torts are generally considered together for limitations purposes as a false imprisonment claim. *Wallace*, 549 U.S. at 388.

26, 2018,[2] over two years after the accrual of his respective claims against Defendants Terry and Fields. (Doc. 1). Accordingly, pursuant to Georgia's two-year statute of limitations, Plaintiff's claims are untimely and thus subject to dismissal.

Georgia's renewal statute does not save Plaintiff's claims from dismissal for untimeliness. Georgia's renewal statute provides:

> When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of Code Section 9-11-41; provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.

O.C.G.A. § 9-2-61(a).

Plaintiff previously filed an identical complaint in this Court on April 16, 2018.[3] *Banks v. Bibb County Sheriff's Office*, 5:18-cv-00139 (M.D. Ga. 2018). The case was dismissed on July 12, 2018, under 28 U.S.C. § 1915(g), known as the "three strikes provision," since Plaintiff had already filed at least three complaints in federal court that were dismissed as frivolous, malicious, or for failure to state a claim. *Id.*, Doc. 6. Plaintiff filed the instant suit on November 26, 2018, well within the renewal statute's six-month filing period.

Plaintiff cannot benefit from Georgia's renewal statute for two reasons. First, the complaint in the original suit did not constitute a "valid action." "Whether a lawsuit can be renewed after it has suffered a non-merits dismissal is governed by state law." *Journey-Bush v. Cty. of Macon*, Georgia, No. 5:06-CV-349 (CAR), 2007 WL 1390723, at *2 (M.D. Ga. May 9, 2007). It is well

[2] Plaintiff filed his complaint with the Clerk of Court in person shortly after his release from incarceration. (Doc. 9, p. 1). Therefore, as he was no longer a prisoner at the time he filed the complaint, the prison mailbox rule, which would have set his filing date at November 24, 2018, the date on which he executed the complaint does not apply. *See Daker v. Comm'r, Georgia Dep't of Corr.*, 820 F.3d 1278, 1286 (11th Cir. 2016).

[3] As Plaintiff was a prisoner at the time he filed the complaint in the original action, the filing date is recorded as the date on which he signed the document. *See Daker*, 820 F.3d at 1286.

settled in Georgia that its renewal statute applies only to actions that are valid prior to dismissal. *See Scott v. Muscogee Cty.*, 949 F.2d 1122, 1123 (11th Cir. 1992) (citing *Acree v. Knab*, 180 Ga. App. 174, 174 (1986)). An action is valid if it was served personally on the defendants. *See Geary v. City of Snellville*, 205 F. App'x 761, 762 (11th Cir. 2006) (quoting *Stephens v. Shields*, 271 Ga. App. 141, 142 (2004)). Since the original action, *Banks*, 5:18-cv-00139, was dismissed before service was ordered on the defendants, the action is void and the renewal statute does not apply. *Id.*

Second, Plaintiff failed to pay the court costs of the dismissed action. Georgia code section 9-11-41(d) provides: "If a plaintiff who has dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the plaintiff shall first pay the court costs of the action previously dismissed." O.C.G.A. § 9-11-41(d). An indigent plaintiff is not excused from the cost-payment requirement unless the plaintiff obtained pauper status as to those costs. *See Hancock v. Cape*, 875 F.3d 1079, 1087–88 (11th Cir. 2017). Plaintiff was denied *in forma pauperis* status in the original action and informed that he would be required to pay a $400 filing fee upon refiling. *Banks*, 5:18-cv-00139, Doc. 6, p. 5. By refiling without pre-payment of the requisite filing fee, Plaintiff has not met the cost-payment requirement of § 9-11-41(d). Absent payment of those court costs, Plaintiff cannot enjoy the benefits of Georgia's renewal statute. *See Hancock*, 875 F.3d at 1088.

CONCLUSION

For failing to file within the applicable two-year statute of limitations, it is **RECOMMENDED** that Defendants' respective motions to dismiss (Docs. 31, 33) be **GRANTED** and Plaintiff's claims against be **DISMISSED with prejudice**. *See Justice v. United States*, 6 F.3d 1474, 1482 n.15 (11th Cir. 1993) (holding that when an "order 'has the effect of precluding

[plaintiff] from refiling his claim due to the running of the statute of limitations . . . [t]he dismissal [is] tantamount to a dismissal with prejudice.'" (quoting *Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. 1981)).

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge will make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO ORDERED AND RECOMMENDED, this 9th day of October, 2019.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

Other Orders

5:18-cv-00435-MTT-CHW
BANKS v. TERRY, et al

HDS,PRO SE

U.S. District Court [LIVE AREA]

Middle District of Georgia

Notice of Electronic Filing

The following transaction was entered on 10/10/2019 at 10:04 AM EDT and filed on 10/10/2019
Case Name: BANKS v. TERRY, et al
Case Number: 5:18-cv-00435-MTT-CHW
Filer:
Document Number: 43

Docket Text:
REPORT AND RECOMMENDATION to GRANT [31] MOTION to Dismiss Complaint re Notice of Deficiency [1] Complaint filed by TERRY ANTHONY and GRANT [33] MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by STEPHEN FIELDS ; ORDER finding as moot [37] Motion. Ordered by US MAGISTRATE JUDGE CHARLES H WEIGLE on 10/09/2019. (cma)

5:18-cv-00435-MTT-CHW Notice has been electronically mailed to:

VIRGIL LOUIS ADAMS vadams@adamsjordan.com, sturner@adamsjordan.com

THOMAS F RICHARDSON trichardson@chrkglaw.com, wwatford@chrkglaw.com

FRANCES CLAY fclay@chrkglaw.com

DAWN M LEWIS dlewis@adamsjordan.com

CHRISTINA CURRELI ccurreli@chrkglaw.com

5:18-cv-00435-MTT-CHW On this date, a copy of this document, including any attachments, has been mailed by United States Postal Service to any non CM/ECF participants as indicated below::

LAVERNE JOHNSON(Terminated)
2029 LOWE ST
MACON, GA 31204

LEROY BANKS, III
2029 LOWE STREET
MACON, GA 31204

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LEROY BANKS, III, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO. 5:18-CV-435 (MTT)**
	)	
Deputy ANTHONY TERRY, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER

United States Magistrate Judge Charles H. Weigle recommends granting Defendants Fields' and Terry's motions to dismiss (Docs. 31; 33) for filing the complaint outside the statute of limitations. Doc. 43. The Plaintiff has objected.[1] Doc. 44. Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), the Court has considered the Plaintiff's objection and has made a *de novo* determination of the portions of the Recommendation to which the Plaintiff objects. The Plaintiff's objections lack merit. The Court has reviewed the Recommendation, and the Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge. The Recommendation (Doc. 43) is **ADOPTED** and made the order of this Court. Accordingly, the Plaintiff's claims are **DISMISSED without prejudice**.

SO ORDERED, this 31st day of October, 2019.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

[1] After filing his objection, the Plaintiff filed a motion to amend/correct his objection. Doc. 45. Specifically, the Plaintiff wishes to substitute certain language on page 11 of his objection. *Id.* That motion (Doc. 45) is **GRANTED**. However, that substituted language makes no difference in the Court's determination.

U.S. District Court [LIVE AREA]

Middle District of Georgia

Notice of Electronic Filing

The following transaction was entered on 10/31/2019 at 11:25 AM EDT and filed on 10/31/2019

Case Name: BANKS v. TERRY, et al
Case Number: 5:18-cv-00435-MTT-CHW
Filer:
Document Number: 46

Docket Text:
ORDER GRANTING [45] Motion to Amend/Correct Objection; ADOPTING [43] Report and Recommendations; GRANTING [31] Motion to Dismiss Complaint; and GRANTING [33] Motion to Dismiss for Failure to State a Claim. Plaintiff's claims are DISMISSED without prejudice. Ordered by US DISTRICT JUDGE MARC THOMAS TREADWELL on 10/31/2019. (kat)

5:18-cv-00435-MTT-CHW Notice has been electronically mailed to:

VIRGIL LOUIS ADAMS vadams@adamsjordan.com, sturner@adamsjordan.com

THOMAS F RICHARDSON trichardson@chrkglaw.com, wwatford@chrkglaw.com

FRANCES CLAY fclay@chrkglaw.com

DAWN M LEWIS dlewis@adamsjordan.com

CHRISTINA CURRELI ccurreli@chrkglaw.com

5:18-cv-00435-MTT-CHW On this date, a copy of this document, including any attachments, has been mailed by United States Postal Service to any non CM/ECF participants as indicated below::

LEROY BANKS, III
2029 LOWE STREET
MACON, GA 31204

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LEROY BANKS, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:18-CV-435 (MTT)**
	)	
	)	
TERRY ANTHONY, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

On October 10, 2019, United States Magistrate Judge Charles Weigle recommended granting Defendants Terry Anthony's and Stephen Fields' motions to dismiss (Docs. 31; 33). Doc. 43. Plaintiff Leroy Banks objected. Docs. 44; 45. On October 31, the Court adopted the Magistrate Judge's Recommendation and dismissed the Plaintiff's claims. Doc. 46. On November 7, the Plaintiff moved for reconsideration of the Court's October 31 order.[1] Doc. 48.

Pursuant to Local Rule 7.6, "Motions for Reconsideration shall not be filed as a matter of routine practice." M.D. Ga. L.R. 7.6. "Reconsideration is appropriate only if the movant demonstrates (1) that there has been an intervening change in the law, (2) that new evidence has been discovered which was not previously available to the parties in the exercise of due diligence, or (3) that the court made a clear error of law." *Bingham v. Nelson*, 2010 WL 339806, at *1 (M.D. Ga. 2010) (quotation marks and citation omitted). "In order to demonstrate clear error, the party moving for

[1] The Plaintiff labeled this filing as a "Motion for Reconsideration and/or Request for Certificate of Appealability." Doc. 48-3 at 1. However, a COA is not a prerequisite to an appeal of a 42 U.S.C. § 1983 action. Accordingly, the Plaintiff's motion for a COA (Doc. 48) is **DENIED as moot**.

reconsideration must do more than simply restate his prior arguments, and any arguments which the party inadvertently failed to raise earlier are deemed waived." *McCoy v. Macon Water Auth.*, 966 F. Supp. 1209, 1223 (M.D. Ga. 1997).

The Plaintiff contends that the Court made a clear error dismissing his false arrest and false imprisonment claims because they are time-barred. *See generally* Docs. 43; 48-3. This argument was not raised in his previous objections. *See generally* Docs. 44; 45. "Denial of a motion for reconsideration is proper 'when the party has failed to articulate any reason for the failure to raise an issue at an earlier stage in the litigation.'" *Beeders v. Gulf Coast Collection Bureau*, 2009 WL 3013502, at *2 (M.D. Fla. 2009) (quoting *Lussier v. Dugger*, 094 F.2d 661, 667 (11th Cir. 1990) (citations omitted)). Because the Plaintiff did not raise his statute-of-limitations argument in his objections and has not stated why he failed to argue this previously, denial of his motion is appropriate.

Even if the Plaintiff had previously raised this argument, he cannot show clear error. The Plaintiff states that the Defendants falsely arrested him in October 2016 and falsely imprisoned him until October 2018. Docs. 48-3 at 2; 48-1 at 1. He argues that because he was imprisoned and unable to file a claim until his release in October 2018, his claims should be tolled and his complaint was thus timely filed on November 26, 2018. *See generally* Docs. 48-3 (citing O.C.G.A. § 9-3-99); 1. As stated in the Recommendation, "[t]he accrual of those claims for limitations purposes begins when the alleged false imprisonment ends[,]" and false imprisonment ends when a plaintiff "'is bound over by a magistrate judge or arraigned on charges.'" Doc. 43 at 3 (citing and quoting *Wallace v. Kato*, 549 U.S. 384, 387–89 (2007) (citations omitted)). The Plaintiff "was bound over by the state magistrate judge to the Bibb County Superior Court" on

November 7, 2016. *Id.* (citing Doc. 1-1 at 6–7). Pursuant to Georgia's two-year statute of limitations, his claims should have been brought no later than November 7, 2018, and his claims filed on November 26, 2018 are thus time-barred. O.C.G.A. § 9-3-33.

Accordingly, the Plaintiff's motion for reconsideration (Doc. 48) is **DENIED.**

SO ORDERED, this 20th day of November, 2019.

s/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

U.S. District Court [LIVE AREA]

Middle District of Georgia

Notice of Electronic Filing

The following transaction was entered on 11/20/2019 at 2:25 PM EST and filed on 11/20/2019
Case Name: BANKS v. TERRY, et al
Case Number: 5:18-cv-00435-MTT-CHW
Filer:
WARNING: CASE CLOSED on 11/01/2019
Document Number: 49

Docket Text:
ORDER DENYING [48] Motion for Reconsideration ; and DENYING as moot [48] Motion for Certificate of Appealability. Ordered by US DISTRICT JUDGE MARC THOMAS TREADWELL on 11/20/2019. (kat)

5:18-cv-00435-MTT-CHW Notice has been electronically mailed to:

VIRGIL LOUIS ADAMS vadams@adamsjordan.com, sturner@adamsjordan.com

THOMAS F RICHARDSON trichardson@chrkglaw.com, wwatford@chrkglaw.com

FRANCES CLAY fclay@chrkglaw.com

DAWN M LEWIS dlewis@adamsjordan.com

CHRISTINA CURRELI ccurreli@chrkglaw.com

5:18-cv-00435-MTT-CHW On this date, a copy of this document, including any attachments, has been mailed by United States Postal Service to any non CM/ECF participants as indicated below::

LAVERNE JOHNSON(Terminated)
2029 LOWE ST
MACON, GA 31204

LEROY BANKS, III
2029 LOWE STREET
MACON, GA 31204

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LEROY BANK, III, et al.,	*	
Plaintiffs,	*	
v.	*	Case No. 5:18-CV-435-MTT
DEPUTY ANTHONY TERRY, et al.,,	*	
Defendants.	*	

JUDGMENT

Pursuant to this Court's Orders dated June 18, 2019 and October 31, 2019 , having accepted the recommendations of the United States Magistrate Judge, in its entirety, JUDGMENT is hereby entered dismissing this action.

This 1st day of November, 2019.

David W. Bunt, Clerk

s/ Cheryl M. Alston, Deputy Clerk

Other Events/Judgments

5:18-cv-00435-MTT-CHW
BANKS v. TERRY, et al

HDS,PRO SE

U.S. District Court [LIVE AREA]

Middle District of Georgia

Notice of Electronic Filing

The following transaction was entered on 11/1/2019 at 2:06 PM EDT and filed on 11/1/2019
Case Name: BANKS v. TERRY, et al
Case Number: 5:18-cv-00435-MTT-CHW
Filer:
WARNING: CASE CLOSED on 11/01/2019
Document Number: 47

Docket Text:
JUDGMENT in favor of BIBB COUNTY BOARD OF COMMISSIONERS, BIBB COUNTY GEORGIA, ANTHONY TERRY, BENJAMIN CONKLING, C PEANALTON, DAVID DAVIS, JOHN AND OR JANE DOE, JOHN AND OR JANE DOES, K DAVID COOKE, JR, SCOTT CHAPMAN, STEPHEN FIELDS, T EDWARDS, TERRY ANTHONY, THOMAS C WILLIAMS against LAVERNE JOHNSON, LEROY BANKS, III, TAVARIS JOHNSON (cma)

5:18-cv-00435-MTT-CHW Notice has been electronically mailed to:

VIRGIL LOUIS ADAMS vadams@adamsjordan.com, sturner@adamsjordan.com

THOMAS F RICHARDSON trichardson@chrkglaw.com, wwatford@chrkglaw.com

FRANCES CLAY fclay@chrkglaw.com

DAWN M LEWIS dlewis@adamsjordan.com

CHRISTINA CURRELI ccurreli@chrkglaw.com

5:18-cv-00435-MTT-CHW On this date, a copy of this document, including any attachments, has been mailed by United States Postal Service to any non CM/ECF participants as indicated below::

LAVERNE JOHNSON(Terminated)
2029 LOWE ST
MACON, GA 31204

LEROY BANKS, III
2029 LOWE STREET
MACON, GA 31204

TAVARIS JOHNSON(Terminated)
Address Unknown

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1071512857 [Date=11/1/2019] [FileNumber=3305137-0
] [516b0a7762512bbde6c97fad045b820618556a3551c0ccca7d19665d9d0c7e36666
f70769984fe52cb94d643b56ab26dc5b6df3174594e49fb20fe340c71dea9]]

Petitioner's Appendix "C"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 01, 2020

Leroy Banks III
2029 LOWE ST
MACON, GA 31204

Appeal Number: 20-13266-H
Case Style: Leroy Banks, III v. Georgia State Board of Pardons, et al
District Court Docket No: 1:19-cv-05495-TCB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov.

The referenced case has been docketed in this court. Please use the appellate docket number noted above when making inquiries.

Pursuant to Rule 11(a) of the Rules Governing Section 2254 and 2255 cases for the United States District Courts, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. The order on appeal did not contain such language. We, therefore, await such a ruling from the district court.

Upon receipt of the district court's order concerning whether a certificate of appealability will be issued, we will advise you regarding further requirements.

Every motion, petition, brief, answer, response and reply filed must contain a Certificate of Interested Persons and Corporate Disclosure Statement (CIP). Appellants/Petitioners must file a CIP within 14 days after the date the case or appeal is docketed in this court; Appellees/Respondents/Intervenors/Other Parties must file a CIP within 28 days after the case or appeal is docketed in this court, regardless of whether appellants/petitioners have filed a CIP. See FRAP 26.1 and 11th Cir. R. 26.1-1.

On the same day a party or amicus curiae first files its paper or e-filed CIP, that filer must also complete the court's web-based CIP at the Web-Based CIP link on the court's website. Pro se

filers (except attorneys appearing in particular cases as pro se parties) are **not required or authorized** to complete the web-based CIP.

Attorneys who wish to participate in this appeal must be admitted to the bar of this Court, admitted for this particular proceeding pursuant to 11th Cir. R. 46-3, or admitted pro hac vice pursuant to 11th Cir. R. 46-4. In addition, all attorneys (except court-appointed counsel) who wish to participate in this appeal must file an Appearance of Counsel form within 14 days. The Application for Admission to the Bar and Appearance of Counsel Form are available at www.ca11.uscourts.gov. The clerk generally may not process filings from an attorney until that attorney files an appearance form. See 11th Cir. R. 46-6(b).

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H/ so
Phone #: (404) 335-6182

Enclosure(s)

HAB-1 Ntc of dktg COA IFP pndg DC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LEROY BANKS, III,

Petitioner,

v.

GEORGIA PARDON AND PAROLE, GEORGIA DEPARTMENT OF COMMUNITY SERVICES, and P.O. MR. BOWMAN,

Respondents.

CIVIL ACTION FILE

NO. 1:19-cv-5495-TCB

ORDER

This case comes before the Court on Petitioner Leroy Banks's motion [29] for a certificate of appealability and application [31] to appeal in forma pauperis.

On August 19, 2020, this Court adopted the final report and recommendation of Magistrate Judge Russell G. Vineyard, which recommended granting Respondent Bowman's motion [5] to dismiss all

Respondents for lack of jurisdiction and denying a certificate of appealability ("COA").

Although Banks now seeks a certificate of appealability, the Court denied him a COA in its previous order. Moreover, Banks has indicated to the Court his desire that his motion for a certificate of appealability be construed as a notice of appeal. Accordingly, his motion [29] is denied as moot.

For good cause shown, his motion [31] to appeal in forma pauperis is granted.

IT IS SO ORDERED this 1st day of September, 2020.

Timothy C. Batten, Sr.
United States District Judge

Orders on Motions

1:19-cv-05495-TCB Banks v. Georgia Pardon and Parole et al **CASE CLOSED on 08/19/2020**

0months,2254,APPEAL,CLOSED,HABEAS,SLC5,SUBMDJ

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered on 9/1/2020 at 10:52 AM EDT and filed on 9/1/2020

Case Name: Banks v. Georgia Pardon and Parole et al
Case Number: 1:19-cv-05495-TCB
Filer:
WARNING: CASE CLOSED on 08/19/2020
Document Number: 35

Docket Text:
ORDER denying as moot [29] Motion for Certificate of Appealability; granting [31] Application to Appeal in forma pauperis. Signed by Judge Timothy C. Batten, Sr. on 9/1/2020. (dmb)

1:19-cv-05495-TCB Notice has been electronically mailed to:

Paula K. Smith psmith@law.ga.gov

1:19-cv-05495-TCB Notice has been delivered by other means to:

Leroy Banks, III
2029 Lowe Street
Macon, GA 31204

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1060868753 [Date=9/1/2020] [FileNumber=11142975-0
] [6d0498dab802bf5417ae7ee6f12d30d4e5ca2f62494915ca1f25bfdfe718e28f97f
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Additional material from this filing is available in the Clerk's Office.