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OPINION,
U.S. COURT OF APPEALS, FIFTH CIRCUIT
(MAY 10, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TAYLOR CARLISLE, Individually
and as Representative Member of a Class;
EMILE HERON, Individually and as
Representative Member of a Class,

Plaintiffs-Appellants,

v.

JOE MCNAIR, also known as
Joseph Thomas McNair; NEWELL NORMAND;
MCNAIR & MCNAIR, L.L.C.; PHILADELPHIA
INDEMNITY INSURANCE COMPANY,

Defendants-Appellees.

SHERIFF JOSEPH P. LOPINTO, III,

Appellee.

No. 22-30031

Appeal from the United States District Court
for the Eastern District of Louisiana.
USDC No. 2: 16-CV-3767

Before: HIGGINBOTHAM, SOUTHWICK,
and WILLETT, Circuit Judges.

PER CURIAM:*

Taylor Carlisle and Emile Heron, two former participants in Jefferson Parish's Drug Court, brought this civil rights action under 42 U.S.C. § 1983. They alleged members of the Drug Court, acting in their official and individual capacities, violated their constitutional rights to due process by jailing them for technical program violations and for giving them "flat time" sentences that did not allow credit for good behavior. Appellants also brought state law negligence claims against a court-contracted counselor. The district court dismissed claims against most Drug Court staff members, and this court affirmed those dismissals on two occasions.[1] This court also affirmed a district court's denial of Carlisle's petition for a writ of habeas corpus.[2] Carlisle and Heron now appeal following the district court's final orders dismissing claims against the local sheriff and a court-contracted counselor. We find five issues briefed on appeal.[3]

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* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.1

1 *See generally Carlisle v. Mussal*, 774 F. App'x 905 (5th Cir. 2019) (unpublished) (per curiam); *Carlisle v. Klees*, 786 F. App'x 493 (5th Cir. 2019) (unpublished) (per curiam).

2 *Carlisle v. Lopinto*, No. 20-30720, 2022 U.S. App. LEXIS 15048, 2022 WL 1778548, at *1-2 (5th Cir. June 1, 2022) (unpublished) (per curiam). In 2018, this court reversed the district court's conclusion that Carlisle's habeas petition was moot. *Carlisle v. Normand*, 745 F. App'x 223, 224 (5th Cir. 2018) (unpublished) (per curiam).

3 Appellants' briefing does not clearly convey their arguments. Appellants listed eighteen issues but failed to adequately brief most of those positions with legal arguments and citations to the record. Failure to adequately brief an issue on appeal constitutes

This court reviews the grant of a motion to dismiss and a motion for summary judgment *de novo*.[4] We review a district court's denial of a motion to amend for abuse of discretion.[5]

First, Appellants argue that the district court erred in rejecting their overdetention claim against Sheriff Joseph Lopinto. But the district court found, and Appellants do not contest, that authorities detained them at all times pursuant to court orders. Appellants' claim therefore attacks the drug court's sentence and is barred by *Heck v. Humphry,* which requires a § 1983 plaintiff whose claims would necessarily "render a conviction or sentence invalid" to prove that the conviction or sentence has been reversed on appeal or collateral attack.[6] Appellants can make no such showing here, so their overdetention claim may not proceed under § 1983.

Second, Carlisle contests the district court's dismissal of his state tort claim against Joseph McNair, a court-contracted counselor who evaluated Drug Court participants. McNair assessed Carlisle only once, in January 2013. The district court determined that McNair did not have a therapist-patient relationship

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waiver. *See Roy v. City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020). And an appellant's contentions must provide "citations to the authorities and parts of the record on which the appellant relies," as well as "a short conclusion stating the precise relief sought." Fed. R. App. P. 28(a)(8), (9).

4 *Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 477 (5th Cir. 2002) (citation omitted).

5 *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Assn*, 751 F.3d 368, 378 (5th Cir. 2014).

6 512 U.S. 477, 486, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

with Carlisle and that McNair's activity did not cause Carlisle's alleged harm given that the ultimate decision-making power "rested with the judges administering the program." Appellants do not argue on appeal that McNair owed any duty to them, obliquely challenging only the district court's power to dismiss insufficient claims under Federal Rule of Civil Procedure 12(b)(6).[7] Carlisle therefore fails to show that the district court erred in dismissing his state law tort claim on the merits.

Third, Carlisle contests the district court's determination that any state law claims against McNair arising prior to April 27, 2015, were prescribed.[8] The district court determined that the drug court imposed all sanctions before that date, and Carlisle was therefore aware of facts that would put a reasonable person on notice that McNair committed any of the alleged wrongs against him. On appeal, Carlisle cites mainly federal case law discussing tolling in employment claims under the continuing violation doctrine. This argument is inapposite, and Carlisle points to no facts alleging that McNair continued to cause him harm after April 27, 2015. Carlisle's argument does not show that the district court erred in finding claims arising before that date prescribed.

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[7] *See Ashcroft v v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (citation omitted).

[8] Appellants filed their complaint on April 27, 2016, *see* Complaint, *Carlisle v. Normand*, 2:16-CV-3767 (E.D. La. Apr. 27, 2016) (Dkt. No. 1), and the statute of limitations is one year.

Fourth, Appellants argue that McNair acted with deliberate indifference to the conditions of Appellants' confinement. The district court concluded that McNair was entitled to qualified immunity, dismissing "all § 1983 claims for damages against McNair" with prejudice. Appellants do not challenge the district court's determination that McNair retained qualified immunity, which bars relief on the deliberate indifference claim. Appellants also point to no facts indicating that McNair knew of and disregarded an excessive risk to Appellants' health or safety.[9] Appellants demonstrate no error in the district court's grant of qualified immunity to McNair.

Fifth, Appellants challenge the district court's denial of their motion to file a Fourth Amended Complaint. A "district court properly exercises its discretion under Rule 15(a)(2) when it denies leave to amend for a substantial reason, such as undue delay, repeated failures to cure deficiencies, undue prejudice, or futility."[10] The district court reasoned that Appellants were "simply shifting their claims in response to the Court's rulings, and that the Sheriff would be unduly prejudiced at this stage of litigation if Plaintiffs were allowed to significantly amend the claims against him, particularly given the status of his pending Motion for Summary Judgment." Appellants argue that they had good cause to amend and that the district court lacked a substantial reason to deny the motion but provide no reasons specific to their case. We are satisfied that the district court did not abuse

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[9] *See Farmer v. Brennan*, 511 US 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

[10] *U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354, 367 (5th Cir. 2014).

its discretion in denying leave to file a sixty-page amended complaint in these circumstances.

Appellants fail to show district court error in any orders rejecting claims brought against individuals conducting work related to the Drug Court. We AFFIRM.

OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(DECEMBER 21, 2021)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: H(1)

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court is Sheriff Joseph Lopinto's Motion to Reconsider the Court's Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (Doc. 690). For the following reasons, this Motion is GRANTED.

BACKGROUND

In this suit, Plaintiffs challenge the manner in which the Jefferson Parish Drug Court ("Drug Court") is conducted. Plaintiffs Taylor Carlisle and Emile Heron were convicted of the possession of various controlled

substances and, as part of their sentences, enrolled in Drug Court. The gist of Plaintiffs' claims is that the Drug Court administrators deprived them of due process in various ways, leading to unlawful incarcerations and other negative consequences.

Relevant to the instant Motion are Plaintiffs' claims against Defendant Joseph Lopinto in his official capacity as the Sheriff of Jefferson Parish (the "Sheriff").[1] At the outset of this litigation, Plaintiffs brought "putative class action claims against the Sheriff for declaratory and injunctive relief and damages under § 1983, challenging the imposition of jail time for alleged probation violations by Drug Court participants."[2] On September 25, 2018, this Court held that the Supreme Court case of *Heck v. Humphrey* precluded Plaintiffs' claims against the Sheriff to the extent Plaintiffs sought relief for detention based on judicial incarceration orders that had not been invalidated.[3] Following this Court's September 25, 2018 ruling, Plaintiffs' only remaining claims against the Sheriff were those alleging that the Sheriff's Office imprisoned Plaintiffs and denied them good time credit either without or in contravention to a judicial order.[4]

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[1] By rule, Sheriff Lopinto was substituted as the Defendant Sheriff regarding Plaintiffs' claims in 2017 when Lopinto was appointed to replace Normand. *See* Fed. R. Civ. P. 25(d). *See* Doc. 618 at 2 n.1.

[2] Doc. 521 at 1-5.

[3] *See* Doc. 359; *see also Heck v. Humphrey*, 512 U.S. 477, 482, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[4] *See* Doc. 436 at 4-5 (discussing Plaintiffs' remaining claims following the Court's ruling on the Sheriff's Motion to Dismiss).

On December 13, 2018, the Sheriff filed his first motion for summary judgment ("First MSJ"), in which he argued that Plaintiffs were, at all relevant times, incarcerated pursuant to valid court orders.[5] On August 7, 2019, the Court granted the Sheriff's First MSJ in part, finding (1) that valid Drug Court orders undermine most of Plaintiffs' claims for wrongful imprisonment and (2) that Plaintiffs failed to demonstrate that they were wrongfully denied good time credit.[6] The Court did, however, allow Plaintiffs' claims for wrongful imprisonment to proceed as to two specific periods of incarceration for which the Court could not find evidence of the Sheriff's lawful authority to jail them. For Plaintiff Carlisle, this was his period of incarceration from August 25, 2015 to September 1, 2015. For Plaintiff Heron, this was his period of incarceration from mid-to-late June 2016 to July 20, 2016.

Subsequently, on December 20, 2019, the Sheriff filed his second motion for summary judgment ("Second MSJ"), arguing that these two periods of incarceration were also executed pursuant to valid court orders and presenting new evidence allegedly proving as much.[7] The Court disagreed and denied the motion.[8] In response, the Sheriff filed his third motion for summary judgment ("Third MSJ") with yet more evidence, and this time the Court determined that Carlisle's imprisonment from August 25, 2015 to September 1, 2015 was validly ordered, but the same could not be said for

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[5] Doc. 443.

[6] *See* Doc. 545.

[7] *See* Doc. 566.

[8] *See* Doc. 618.

Heron's respective period of incarceration.[9] The Court entered an Order with reasons to follow granting in part (as to Carlisle) and denying in part (as to Heron) the Sheriff's Third MSJ.

Now before the Court is the Sheriff's Motion to Reconsider the Order as to the Third MSJ.[10] The Sheriff presents new evidence relevant to Heron's roughly month-long incarceration. Plaintiffs oppose this Motion.[11] This Court hereby sets out the reasons for its partial grant of the Sheriff's Third MSJ, as well as its rationale for altering that ruling to a full grant of summary judgment in favor of the Sheriff.

LEGAL STANDARD

I. Motions to Reconsider

Motions to reconsider interlocutory orders are governed by Federal Rule of Civil Procedure 54(b).[12] "Under Rule 54(b), 'the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive

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9 *See* Doc. 628 (the Sheriff's third motion); Doc. 680 (Court's Order).

10 *See* Doc. 690.

11 *See* Doc. 702.

12 Fed. R. Civ. P. 54(b) (noting that a district court may revise at any time prior to final judgment "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties"); *see McClendon v. United States*, 892 F.3d 775, 781 (5th Cir. 2018).

law.'"[13] "'[T]he power to reconsider or modify interlocutory rulings is committed to the discretion of the district court, and that discretion is not cabined by the heightened standards for reconsideration governing final orders.'"[14]

II. Motions for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[15] A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[16]

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in her favor.[17] "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate

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[13] *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990)).

[14] *Id.* at 337 (quoting *Saint Annes Dev. Co. v. Trabich*, 443 Fed. Appx. 829, 831-32 (4th Cir. 2011) (internal quotations omitted)).

[15] *Sherman v. Hallbauer*, 455 F.2d 1236, 1241 (5th Cir. 1972).

[16] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

[17] *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 532 (5th Cir. 1997).

specific facts showing the existence of a genuine issue for trial."[18] Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[19] "In response to a properly supported motion for summary judgment, the non-movant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to sustain a finding in favor of the non-movant on all issues as to which the non-movant would bear the burden of proof at trial."[20] "We do not . . . in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[21] Additionally, "[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion."[22]

LAW AND ANALYSIS

Prior to the Court's most recent Order in this case, there were two pending wrongful imprisonment claims against the Sheriff: one for Plaintiff Carlisle's incarceration from August 25 to September 1, 2015,

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[18] *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

[19] *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

[20] *John v. Deep E. Tex. Reg. Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

[21] *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 394 (5th Cir. 2000) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

[22] *Boudreaux v. BanTec, Inc.*, 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

and another for Plaintiff Heron's incarceration from mid-to-late June 2016 to July 20, 2016. The Court will address the Sheriff's evidence presented as to each Plaintiff separately.

I. Plaintiff Carlisle

The Sheriff has presented the following evidence of the lawfulness of Carlisle's roughly week-long detention. His First MSJ included an August 25, 2015 minute entry of the 24th Judicial District Court that states:

> The Defendant, Taylor E. Carlisle, appeared before the bar of the Court this day for Drug Court.
>
> The Defendant was represented by Joseph A. Marino, Jr. The Court ordered the Defendant to be given a sanction of 6 months JPCC, flat time/contempt.
>
> The Court ordered the Defendant to be held for Revocation after his sanction is completed.
>
> The Defendant is to appear in Court September 1, 2015.[23]

The Court deemed this entry insufficient evidence of lawful detention between August 25 and September 1 insofar as it was silent as to whether Carlisle was to be remanded to Jefferson Parish Correctional Center ("JPCC") prior to his September 1, 2015 court date.

Next, in his Second MSJ, the Sheriff presented an "Order of Attachment" dated August 25, 2015, wherein the Sheriff of Jefferson Parish is directed to "attach the body of Taylor E. Carlisle" and have him appear

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[23] Doc. 525-4 at 5.

in court "to answer for a contempt in neglecting or refusing to attend before said Court as a Defendant."[24] The problem with the Order of Attachment, the Court found, was that it contradicted the August 25 minute entry on the point of whether Carlisle appeared in court. The Sheriff also adduced one page from Carlisle's "Criminal History Report," which states that, on August 25, 2015, Carlisle was arrested pursuant to a Drug Court attachment and "needs to be held brought to Drug Court Tuesday September 1, 2015."[25] The problem with the Criminal History Report, however, was that it does not detail who gave the officer the order to hold Carlisle until September 1.

Finally, in his Third MSJ, the Sheriff presents another signed minute entry from August 25, 2015 that states, "The Defendant, Taylor E. Carlisle, did not appear before the bar of the Court this day for Drug Court. At the request of the Assistant District Attorney the Court ordered that an attachment be issued for Taylor E. Carlisle."[26] The Court finds this evidence sufficient to demonstrate that Carlisle was imprisoned from August 25 to September 1 pursuant to a lawful court order. This minute entry does not suffer from the defects identified in the Sheriff's other evidence. While it does continue to contradict the minute entry from the First MSJ on whether Carlisle appeared in court, the Court finds that this inconsistency does not render unlawful any arrest made pursuant to this order. Indeed, the Sheriff's officer

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[24] Doc. 566-4.

[25] *Id.* (emphasis omitted).

[26] Doc. 628-4.

executing the order may not have been aware of the contradiction, and even if he were, he can hardly be expected to defy a court order on account of a possible clerical error. Accordingly, the Court granted summary judgment in favor of the Sheriff with respect to Carlisle's claim.[27]

II. Plaintiff Heron

Next, based on the Sheriff's Third MSJ, the Court denied relief in his favor with respect to Heron's claim. This is because the Sheriff argued that on January 19, 2016, the 24th Judicial District Court ordered that Heron serve a six-month sentence for contempt and that he be held for his revocation hearing, yet the Sheriff never produced evidence of this January 19 order. In his Second MSJ, the Sheriff presented an affidavit from Ligaya Preatto, the Commander of the Records Division for the JPCC, testifying as to the January 19 order, but there was no direct proof thereof. The only order included was from July 20, 2016, which confirmed the occurrence of the revocation hearing on that same date but did not speak to the January 19 order.

The Sheriff's instant Motion cures this defect. It contains the signed January 19 minute entry from the Jefferson Parish court reflecting that "[t]he Defendant was ordered to be held for Revocation."[28] It also contains an affidavit from Deputy James Hilton, Clerk Supervisor with the Records Department at JPCC, stating that he personally entered the January 19

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[27] *See* Doc. 680.

[28] Doc. 690-3 at 4.

minute entry into the database of the Sheriff's Office.[29] This evidence proves that pursuant to a valid court order, Heron was incarcerated from mid-to-late June until July 20, 2016, the date of his revocation hearing.

The evidence also indicates that Heron received credit for time served. Heron was in detention from December 15, 2015 until January 19, 2016—at which point he was ordered to serve six months for contempt and be held for revocation until July 20, 2016. On January 26, 2016, the court entered another order amending its January 19 order to give Heron credit for time served between December 15 and January 26. This means Heron's contempt sentence ended around early June, which is when he would have been released had he not been held for revocation until July 20, per the January 19 court order.

CONCLUSION

While the Court has serious concerns about a Drug Court that causes defendants to spend significantly more time incarcerated than had they served their original sentences outside Drug Court, what is before this Court is whether the Sheriff had discretion to deviate from a court order. The answer is he did not. Thus, and for the foregoing reasons, Defendant's Motion to Reconsider (Doc. 690) is GRANTED. The Court amends its previous Order partially granting relief (Doc. 680) so as to fully grant summary judgment to the Sheriff. Because the Sheriff is the last remaining Defendant herein, this case is DISMISSED WITH PREJUDICE.

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[29] *Id.* at 2.

New Orleans, Louisiana this 21st day of December, 2021

/s/ Jane Triche Milazzo
United States District Judge

**OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(NOVEMBER 3, 2021)**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court is Plaintiffs' Motion to Amend and Alter the Court's Order and Reasons (Doc. 619). For the following reasons, this Motion is DENIED.

BACKGROUND

In this suit, Plaintiffs challenge the manner in which the Jefferson Parish Drug Court ("Drug Court") is conducted. Plaintiffs Taylor Carlisle and Emile Heron were convicted of the possession of various controlled substances and, as part of their sentences, enrolled in Drug Court. The gist of Plaintiffs' claims is

that the Drug Court administrators deprived them of due process in various ways, leading to unlawful incarcerations at Jefferson Parish Correctional Center ("JPCC") and other negative consequences.

Relevant to the motion before the Court are Plaintiffs' remaining claims against Defendant Joseph Lopinto in his official capacity as the Sheriff of Jefferson Parish (the "Sheriff').[1] Plaintiffs brought "putative class action claims against the Sheriff for declaratory and injunctive relief and damages under § 1983, challenging the imposition of jail time for alleged probation violations by Drug Court participants."[2] Some of these claims have since been dismissed.[3] As the Court clarified in its March 23, 2021 Order and Reasons (the "Order"), "the only claims that remain against the Sheriff are Plaintiff Carlisle's claim that he was wrongfully held in JPCC from August 25, 2015 to September 1, 2015 and Plaintiff Heron's claim that he was wrongfully held from mid-to-late June 2016 to July 20, 2016."[4]

In that same Order, the Court reiterated two prior rulings with which Plaintiffs take issue. First,

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[1] By rule, Sheriff Lopinto was substituted as the Defendant Sheriff regarding Plaintiffs' claims in 2017 when Lopinto was appointed to replace Normand. *See* Fed. R. Civ. P. 25(d). Because Plaintiffs never alleged any individual capacity claims against Normand, he is no longer a defendant in this suit; no claims remain against him. The Court will refer to the official capacity claims against Lopinto as claims against the "Sheriff' to avoid confusion.

[2] Doc. 521 at 1-5.

[3] *See id.* for a detailed procedural history of this case. *See* Doc. 618 for the Court's most recent ruling in this case.

[4] Doc. 618 at 10-11.

the Court referenced its prior holding that *Heck v. Humphrey* barred Plaintiffs' jail-credit claims against the Sheriff to the extent they sought relief for detention based on judicial incarceration orders that had not been invalidated.[5] Second, the Court reemphasized that Plaintiffs' inaccurate-reporting claim was not properly before it.[6] Plaintiffs now move to amend the Court's Order on both of these points. The Sheriff opposes.

LEGAL STANDARD

Motions to reconsider interlocutory orders are governed by Federal Rule of Civil Procedure 54(b).[7] "Under Rule 54(b), 'the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.'"[8] "'[T]he power to reconsider or modify interlocutory rulings is committed to the discretion of the district court, and that discretion is not cabined by the

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[5] *See id.* at 2 n.3 (citing Doc. 359); *see also Heck v. Humphrev*, 512 U.S. 477, 482, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[6] *See* Doc. 618 at 9-10. The inaccurate-reporting claim was that, after Plaintiffs were revoked from the Drug Court program, the Sheriff failed to accurately report their time spent in JPCC to the Louisiana Department of Safety and Corrections.

[7] Fed. R. Civ. P. 54(b) (noting that a district court may revise at any time prior to final judgment "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties"); *see McClendon v. United States*, 892 F.3d 775, 781 (5th Cir. 2018)

[8] *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990)).

heightened standards for reconsideration governing final orders.'"[9]

LAW AND ANALYSIS

Plaintiffs argue in favor of two separate amendments to the March 23, 2021 Order. The Court will consider each proposed amendment in turn.

I. Certifying the *Heck v Humphrey* Ruling for Interlocutory Appeal

First, Plaintiffs ask this Court to amend its Order so as to certify its *Heck v. Humphrey* ruling for appeal. Under 28 U.S.C. § 1292(b), a court can allow for interlocutory appeal of orders without directing entry of a final judgment on the order. For an interlocutory order to be appealable under § 1292(b), three conditions must be satisfied. The trial judge must certify in writing that: (1) the order involves a controlling question of law, (2) there is substantial ground for difference of opinion on that question of law, and (3) an immediate appeal from the order may "materially advance the ultimate termination of [the] litigation."[10] The moving party carries the burden of showing the necessity of interlocutory appeal.[11] Interlocutory appeals are

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[9] *Id*. at 337 (quoting *Saint Annes Dev. Co. v. Trabich*, 443 Fed. Appx. 829, 831-32 (4th Cir. 2011) (internal quotations omitted)).

[10] 28 U.S.C. § 1292.

[11] *Chauvin v. State Farm Mut. Auto. Ins. Co.*, Nos. 06-7145, 06-8769, 2007 WL 4365387, at *2 (E.D. La. Dec. 11, 2007).

"exceptional" and should not be granted "simply to determine the correctness of a judgment."[12]

Plaintiffs argue that the Court's *Heck v. Humphrey* ruling implicates a question with a substantial ground for difference of opinion because another judge in this district allegedly reached the opposite conclusion in the case of *Traweek v. Gusman*.[13] However, the *Traweek* case is easily distinguishable from this one. There, the plaintiff claimed that "bureaucratic incompetence delayed the processing of his 'time-served' judgment, causing him to be unlawfully imprisoned in Orleans Parish Prison almost three weeks beyond his court-ordered release date."[14] The plaintiff did not challenge his conviction or sentence, only the administration of his release after serving his sentence.[15]

Thus, *Heck* did not bar the plaintiffs claim because if he succeeded on the merits, neither his conviction nor his sentence would have been invalidated.[16] Here, by contrast, Plaintiffs allege that Drug Court violated their constitutional rights by failing to ensure that they received credit for time served. A judgment in favor of Plaintiffs on this claim would necessarily imply that their confinements were invalid. In fact, Plaintiffs conceded as much in their Motion: "Plaintiffs contend that the claim that the Sheriff deliberately

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[12] *Id.* (quoting *Clark Dietz & Assocs.-Eng'rs, Inc. v. Basic Constr. Co.*, 702 F.2d 67, 68-69 (5th Cir. 1983)).

[13] *See* Doc. 619-1 at 1-2; *Traweek v. Gusman*, 414 F. Supp. 3d 847 (E.D. La. 2019).

[14] *Traweek*, 414 F. Supp. 3d at 853.

[15] *Id.* at 859.

[16] *Id.*

does not calculate or report credits, would invalidate either Plaintiffs' conviction or sentence."[17] This is precisely the type of claim that *Heck* bars. Judge Feldman did not reach a contrary conclusion in *Traweek*, and thus Plaintiffs have not presented a question with a substantial ground for difference of opinion.[18] Accordingly, the Court denies Plaintiffs' Motion as to this first requested amendment.

II. Clarifying That Plaintiffs Raised the Jail Credit Issue in Earlier Pleadings

Second, Plaintiffs seek an amendment asserting that they raised the "'jail credit issue'" or "jail credit claims" in earlier pleadings such that the Sheriff had notice of those claims prior to Plaintiffs' unsuccessful Motion for Leave to File the Fourth Amended and Supplementing Complaint.[19] On February 12, 2019, Plaintiffs filed said Motion.[20] This Court previously deemed the proposed Fourth Amended and Supplementing Complaint the first instance in which Plaintiffs raised the claim that, after Plaintiffs were revoked from the Drug Court program, the Sheriff failed to accurately report Plaintiffs' time spent in JPCC to the Louisiana Department of Safety and Corrections ("DOC").[21] The Court called this the "inaccurate-

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[17] Doc. 619-1 at 2; *see also* Doc. 619 at 2.

[18] The other case that Plaintiffs cite, *Thomas v. Gryder*, No. 17-1595, 2019 U.S. Dist. LEXIS 192737, 2019 WL 5790351 (MD. La. Nov. 6, 2019), is distinguishable for the same reason as *Traweek*.

[19] Doc. 619 at 3; Doc. 619-1 at 3.

[20] *See* Doc. 490.

[21] *See* Doc. 618 at 9.

reporting claim."[22] On March 20, 2019, the Magistrate Judge denied Plaintiffs' leave to file said complaint, finding that Plaintiffs' amendment was untimely and an attempt to shift their claims in response to the Court's prior rulings.[23] On August 7, 2019, this Court affirmed the Magistrate Judge's decision on appeal.[24] On September 27, 2019, this Court denied Plaintiffs' Motion for Reconsideration of its August 7, 2019 decision.[25] Now, it appears that Plaintiffs ask this Court to find that despite raising the inaccurate-reporting claim for the first time in the proposed Fourth Amended and Supplementing Complaint, the Sheriff had notice of this claim from Plaintiffs' Original, First, and Second Amending Complaints.[26]

Plaintiffs argue that they raised the "'jail credit issue'" or "jail credit claims" in these earlier pleadings. It is unclear what exactly Plaintiffs mean by the terms "jail credit issue" and "jail credit claims."[27] It stands to reason that the Plaintiffs use those terms to refer both to the inaccurate-reporting claim and to the jail-credit claim.[28] Plaintiffs argue that in the Order and

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[22] *Id.*

[23] *See* Doc. 521.

[24] *See* Doc. 545.

[25] *See* Doc. 553.

[26] *See* Doc. 619 at 3.

[27] *Id.*; Doc. 619-1 at 3.

[28] *See* Doc. 619-1 at 5 ("Thus, their claim for 'wrongful reporting'—if that truly is a 'separate claim' from the claim made which is failure to provide jail credit—did not accrue until 2018 when they were released without credit for time served [sic] However the

Reasons dated October 31, 2017, this Court acknowledged both claims when it said, "Plaintiffs argue that they should receive credit toward their current post-revocation sentences for all time served while in Drug Court because the underlying infractions were the same events that led to their revocations."[29] This acknowledgment, according to Plaintiffs, shows that "the parties were on notice of the substance of the jail credit claim."[30] If by "jail credit claim" the Plaintiffs mean the inaccurate-reporting claim, the Court disagrees. As stated before, this claim was first raised in the proposed Fourth Amended and Supplementing Complaint.[31] That is when the Sheriff would have first had fair notice of the nature of the inaccurate-reporting claim, as Federal Rule of Civil Procedure 8 requires.[32] Accordingly, the Court denies Plaintiffs Motion as to this second requested amendment.

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claim, was sufficiently pled in 2017 for the Court to make the decision it did in Rec. doc. 178.").

[29] Doc. 178 at 17.

[30] Doc. 619 at 5.

[31] Doc. 618 at 9 n.31.

[32] *Rozers v. McDorman*, 521 F.3d 381, 385 (5th Cir. 2008).

CONCLUSION

For the foregoing reasons, Plaintiffs Motion to Alter and Amend (Doc. 619) is DENIED.

New Orleans, Louisiana this 3rd day of November, 2021.

/s/ Jane Triche Milazzo
United States District Judge

OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(MARCH 23, 2021)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court are three Motions: the Motion for Summary Judgment by former Jefferson Parish Sheriff Newell Normand and current Jefferson Parish Sheriff Joseph Lopinto (Doc. 566); Plaintiffs' Motion for Partial Summary Judgment Against Sheriff (Doc. 580); and Plaintiffs' Motion to Certify Class Respecting Sheriff Claims and to Issue Notice to Class Members (Doc. 608). For the following reasons, all three Motions are DENIED.

BACKGROUND

In this suit, Plaintiffs challenge the manner in which the Jefferson Parish Drug Court ("Drug Court") is conducted. Plaintiffs Taylor Carlisle and Emile Heron were convicted of the possession of various controlled substances and, as part of their sentences, enrolled in Drug Court. The gist of Plaintiffs' claims is that the Drug Court administrators deprived them of due process in various ways, leading to unlawful incarcerations and other negative consequences.

Relevant to the pending Motions are Plaintiffs' claims against Defendant Joseph Lopinto in his official capacity as the Sheriff of Jefferson Parish (the "Sheriff").[1] Plaintiffs brought "putative class action claims against the Sheriff for declaratory and injunctive relief and damages under § 1983, challenging the imposition of jail time for alleged probation violations by Drug Court participants."[2] On September 25, 2018, this Court held that the Supreme Court case of *Heck v. Humphrey* precluded Plaintiffs' claims against the Sheriff to the extent Plaintiffs sought relief for detention

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[1] The Motion for Summary Judgment currently before the Court was technically filed by former Sheriff Normand in his individual capacity and Sheriff Joseph Lopinto in his official capacity. *See* Doc. 443. By rule, Sheriff Lopinto was substituted as the Defendant Sheriff regarding Plaintiffs' claims in 2017 when Lopinto was appointed to replace Normand. *See* Fed. R. Civ. P. 25(d). Because Plaintiffs never alleged any individual capacity claims against Normand, he is no longer a defendant in this suit; no claims remain against him. Accordingly, this Court will construe the instant Motion for Summary Judgment as one by Sheriff Lopinto. The Court will refer to the official capacity claims against Lopinto as claims against the "Sheriff' to avoid confusion.

[2] *See* Doc. 521 at 1-5.

based on judicial incarceration orders that had not been invalidated.[3] Following this Court's September 25, 2018 ruling, Plaintiffs' only remaining claims against the Sheriff were those alleging that the Sheriff's Office imprisoned Plaintiffs and denied them good time credit either without, or in contravention to, a judicial order.[4]

On December 13, 2018, the Sheriff filed a Motion for Summary Judgment in which he argued that Plaintiffs were, at all relevant times, incarcerated pursuant to a valid court order. On August 7, 2019, the Court granted the Sheriff's Motion for Summary Judgment in part, finding (1) that valid Drug Court orders undermine most of Plaintiffs' claims for wrongful imprisonment and (2) that Plaintiffs failed to demonstrate that they were wrongfully denied good time credit.[5] The Court did, however, allow Plaintiffs' claims for wrongful imprisonment to proceed as to two specific periods of incarceration for which the Court could not find evidence of the Sheriff's lawful authority to jail them. For Plaintiff Carlisle, this is his period of incarceration from August 25, 2015 to September 1, 2015. For Plaintiff Heron, this is his period of incarceration from mid-to-late June 2016 to July 20, 2016.[6] Today, Plaintiffs' only remaining claims against the Sheriff are that the Sheriff's Office held them in

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[3] *See* Doc. 359. *See also Heck v. Humphrey*, 512 U.S. 477, 482, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[4] *See* Doc. 436 at 4-5 (the Court's discussion of Plaintiffs' remaining claims following the Court's ruling on the Sheriff's Motion to Dismiss.

[5] *See* Doc. 545.

[6] Doc. 5

prison during these two discrete periods without a Drug Court order directing the Office to do so.

Now before the Court are three Motions concerning Plaintiffs' claims against the Sheriff. The first Motion is Defendant Sheriff Lopinto's second Motion for Summary Judgment in which he provides new evidence that purportedly demonstrates the Sheriff's legal authority to incarcerate the Plaintiffs for the time periods at issue. The second Motion before the Court is Plaintiffs' Motion for Partial Summary Judgment, wherein Plaintiffs ask this Court to find that the Sheriff's Office incorrectly reported Plaintiffs' jail time to the Louisiana Department of Safety and Corrections ("DOC"). The third and final Motion before the Court is Plaintiffs' Motion to Certify Class Respecting Sheriff Claims and to Issue Notice to Class Members. All Motions are opposed.

LEGAL STANDARD

I. Motion for Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[7] "As to materiality . . . [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[8] Nevertheless, a dispute about a material fact is "genuine" such that summary judgment is inappropriate "if the evidence

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[7] Fed. R. Civ. P. 56.

[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

is such that a reasonable jury could return a verdict for the nonmoving party."[9]

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor.[10] "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial."[11] Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[12]

"In response to a properly supported motion for summary judgment, the nonmovant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to sustain a finding in favor of the nonmovant on all issues as to which the nonmovant would bear the burden of proof at trial."[13] The Court does "not . . . in the absence of any proof, assume that the nonmoving party could or

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[9] *Id.* at 248.

[10] *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

[11] *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

[12] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

[13] *Johnson v. Deep E. Tex. ReQ. Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

would prove the necessary facts."[14] Additionally, "[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion."[15]

II. Motion to Certify Class

To be certified under Rule 23, the class must first satisfy four threshold requirements. A court may certify a class only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.[16]

After the prerequisites of Rule 23(a) have been met, the proposed class must satisfy one of the three provisions for certification under Rule 23(b). This class action purports to be an action under Rule 23(b)(2), which allows for class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final

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[14] *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 393-94 (5th Cir. 2000) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

[15] *Boudreaux v. BanTec, Inc.*, 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

[16] Fed. R. Civ. P. 23(a).

injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[17]

A Court must determine whether to certify an action as a class action "at an early practicable time after a person sues or is sued as a class representative."[18] In the Eastern District of Louisiana, the Local Rules require that a plaintiff move for class certification "[w]ithin 91 days after filing of a complaint in a class action or filing of a notice of removal of the class action from state court, whichever is later, . . . unless this period is extended upon motion for good cause and order by the court."[19]

LAW AND ANALYSIS

There are currently three Motions before the Court: (1) the Sheriff's Motion for Summary Judgment; (2) Plaintiffs' Motion for Partial Summary Judgment; and (3) Plaintiffs' Motion to Certify Class. Each Motion will be discussed in turn.

I. The Sheriff's Motion for Summary Judgment (Doc. 566)

In the Sheriff's Motion for Summary Judgment, the Sheriff provides new evidence that arguably demonstrates that Plaintiffs were at all relevant rimes incarcerated pursuant to a valid court order. The Court will address the evidence presented as to each Plaintiff separately.

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17 Fed. R. Civ. P. 23(b)(2).

18 Fed. R. Civ. P. 23(c)(1)(A).

19 L.R. 23.1(B).

A. Plaintiff Carlisle

In this Court's Order and Reasons addressing the Sheriff s first Motion for Summary Judgment, this Court found that a genuine issue of material fact existed as to whether the Sheriff's incarceration of Carlisle from August 25, 2015 to September 1, 2015 was pursuant to a valid court order. In so holding, the Court looked to an August 25, 2015 minute entry which stated:

> The Defendant, Taylor E. Carlisle, appeared before the bar of the Court this day for Drug Court.
>
> The Defendant was represented by Joseph A. Marino, Jr. The Court ordered the Defendant to be given a sanction of 6 months JPCC, flat time/contempt.
>
> The Court ordered the Defendant to be held for Revocation after his sanction is completed.
>
> The Defendant is to appear in Court September 1, 2015.[20]

Finding the minute entry relatively silent as to whether Carlisle was to be remanded to Jefferson Parish Correctional Center ("JPCC") prior to his September 1, 2015 court date, this Court found a genuine issue of fact as to whether Carlisle's detention during that time was pursuant to a court order.

In his current Motion for Summary Judgment, Sheriff Lopinto presents two new pieces of evidence to demonstrate that the Drug Court ordered Carlisle's imprisonment from August 25, 2015 until September

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[20] Doc. 525-4 at 5.

1, 2015. First, the Sheriff presents an "Order of Attachment" dated August 25, 2015, wherein the Sheriff of Jefferson Parish is directed to "attach the body of Taylor E. Carlisle" and have him appear in court "to answer for a contempt in neglecting or refusing to attend before said Court as a Defendant."[21] Second, the Sheriff presents one page from Carlisle's "Criminal History Report" which states that, on August 25, 2015, Carlisle was arrested pursuant to a Drug Court attachment and "needs to be held brought to Drug Court Tuesday September 1, 2015."[22] The Court finds these two documents alone insufficient to warrant summary judgment in the Sheriff's favor.

First the Court cannot ignore the inconsistency between the August 25, 2015 minute entry, which states that Carlisle appeared in court,[23] and the August 25, 2015 Order of Attachment, which states that Carlisle is to be arrested for his failure to appear.[24] Second, although the Criminal History Report indicates that Carlisle was to be held and brought to Drug Court on September 1, 2015, the report does not indicate who gave the officer this order. Moreover, the Sheriff does not provide this Court with affidavits or testimony that would clarify or otherwise authenticate the documents.

Carlisle asserts in his affidavit that he was arrested outside of the courthouse without cause after making his appearance in Drug Court on August 25,

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21 Doc. 566-4.

22 *Id.* (emphasis omitted).

23 *See* Doc. 525-4 at 5.

24 *See* Doc. 566-4.

2015 and that the Order of Attachment was fraudulently created to support his unlawful arrest.[25] The Sheriff has not provided this Court with proper summary judgment evidence to refute Carlisle's assertion. Accordingly, the Sheriff's Motion for Summary Judgment on Carlisle's remaining claim against him is denied.

B. Plaintiff Heron

In this Court's Order and Reasons addressing the Sheriff s first Motion for Summary Judgment, this Court found a genuine issue of material fact as to whether the Sheriff unlawfully held Plaintiff from mid-to-late June 2016 to July 20, 2016.[26] In so holding, this Court found evidence that, on January 19, 2016, Plaintiff was given a six-month sanction. On January 26, 2016, that sanction was amended to include credit for time served between December 15, 2015 to January 26, 2016. Heron's six-month sentence therefore should have ended in mid-to-late June 2016. As the Sheriff did not provide evidence as to why Heron remained in prison until July 20, 2016, this Court found that Heron's wrongful imprisonment claim persisted during the period from mid-to-late June 2016 to July 20, 2016.

In the Sheriff's current Motion for Summary Judgment, the Sheriff now presents a previously unsubmitted document titled "Court Disposition," dated June 17, 2016, on Jefferson Parish Sheriff's

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[25] Doc. 525-2 at 31-32.

[26] *See* Doc. 545 at 10-11.

Office letterhead.[27] The Court Disposition bears the typed signature of a clerk, Jaime Plaisance, and indicates that Heron "is to be held for revocations."[28] The Sheriff argues that this document suffices to demonstrate that Plaintiffs incarceration from June 2016 until his revocation hearing on July 20, 2016 was pursuant to a valid court order. This Court disagrees. Unlike the other minute entries upheld by this Court, the Court Disposition does not bear the seal of the 24th Judicial District Court or otherwise indicate that it is a court-sanctioned document. In the deposition of Deputy Steven Abadie, the 30(b)(6) representative of the Sheriff and Administrator of JPCC, Abadie stated that court dispositions are ordinarily written by sheriff's deputies but that a typed document like the one at issue was likely supplied by "court staff."[29] In any event, Abadie testified that he did not understand the document to be a court order.[30] The Sheriff's Motion for Summary Judgment on Plaintiff Heron's claim is therefore denied.

II. Plaintiffs' Motion for Partial Summary Judgment (Doc. 580)

In Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs ask this Court to find in their favor on their purported claim that, after Plaintiff's were revoked from the Drug Court program, the Sheriff failed to accurately report Plaintiffs' time spent in

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[27] *See* Doc. 566-7.

[28] *Id.*

[29] Doc. 611-2 at 7, 17-18.

[30] *Id.* at 18.

JPCC to the DOC (hereinafter the "inaccurate reporting claim"). Plaintiffs thus contend that the Sheriff unlawfully deprived them of credit for time served in contravention to orders from the 24th Judicial District Court. However, as this Court has explained many times before, this claim is not properly before this Court.

Plaintiffs' inaccurate reporting claim was brought before this Court for the first time in Plaintiffs' proposed Fourth Amended and Supplementing Complaint.[31] On March 20, 2019, the Magistrate Judge denied Plaintiffs' leave to file said complaint, finding that Plaintiffs' amendment was both untimely and an attempt to shift the claims in response to the Court's rulings.[32] On August 7, 2019, this Court affirmed the Magistrate Judge's decision on appeal. On September

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[31] In Plaintiffs' Reply, Plaintiffs assert that their inaccurate reporting claim was properly alleged in their Original Complaint. In the Original Complaint, Plaintiff Carlisle alleges that the Sheriff wrongfully kept him "in jail . . . for mere probation infractions. The Defendant Sheriff Normand knew that under LSA-R.S. LSA-R.S. 15:571.3 only the sheriff can issue 'flat time' . . . Sheriff Normand did not release Carlisle for good time even though he knew he was entitled to it. Sheriff Normand knew that although the Drug Court ordered 'flat time' . . . the Drug Court statute requires that all time be credited if revocation occurs and the Drug Court lacked that authority under LSA-R.S. 15:571.3 which states that EVERY prisoner is entitled to good time unless he has committed a sexual crime or a violent crime on two or more occasions. Furthermore the Sheriff knew that only the Sheriff is authorized to order flat time." *See* Doc. 1. at 27-28. The Court does not find these allegations in the Original Complaint sufficient to state a claim against the Sheriff for inaccurate reporting. Rather, Plaintiffs clearly assert the inaccurate reporting claim for the first time in their proposed Fourth Amended and Supplementing Complaint. *See* Doc. 490-1 at 36.

[32] *See* Doc. 521.

27, 2019, this Court denied Plaintiffs' Motion for Reconsideration of its August 7, 2019 decision.[33] Now, a year and a half later and for the third rime, Plaintiff asks this Court to reverse the Magistrate Judge's decision and address the claims in their proposed Fourth Amended and Supplemental Complaint. The Court declines to do so.[34]

Moreover, any claims that Plaintiffs had timely alleged regarding the Sheriff's failure to credit good time have been dismissed. Specifically, Plaintiffs alleged that the Sheriff refused to award Plaintiffs good time credit as a result of "flat time" sanctions.[35] The Court found, however, that Plaintiffs' flat time sanctions were ordered by the Drug Court and that Plaintiffs' related claims against the Sheriff were barred under *Heck v. Humphrey*.[36] Accordingly, the only claims that remain against the Sheriff are Plaintiff Carlisle's claim that he was wrongfully held in JPCC from August 25, 2015 to September 1, 2015 and Plaintiff Heron's claim that he was wrongfully held from mid-to-late June 2016 to July 20, 2016. To the extent that

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[33] *See* Doc. 553.

[34] For the reasons stated herein, the Court cannot address the merits of Plaintiffs' inaccurate reporting claim. The Court does, however, acknowledge that Plaintiffs have presented evidence that the Sheriff's Office was indeed reporting less than the actual time a prisoner served to the DOC in derogation of Civil Code of Procedure Article 880. The Court laments that Plaintiffs' inaccurate reporting claim was not timely brought before the Court as Plaintiffs' evidence demonstrates cause for concern.

[35] "Flat time" refers to a prison term served without benefit of good time credit. *See* Doc. 117 at 56 n.14.

[36] *See* Doc. 545 at 12-13.

Plaintiffs contend that they have additional claims against the Sheriff, the Court emphasizes that these are not before the Court. Plaintiffs' Motion for Partial Summary Judgment is denied.

III. Plaintiffs' Motion to Certify Class Respecting Sheriff Claims and to Issue Notice to Class Members (Doc. 608)

In Plaintiffs' Motion to Certify, Plaintiffs ask this Court to certify their claims against the Sheriff as a class action. Specifically, Plaintiffs ask this Court to certify a class of Drug Court participants sentenced to jail time at JPCC for whom,

> despite judicial order and/ or in violation of the Drug Court statute, and La. Code Crim. Proc. Art. 880, and Art. 900 and related regulations, the Sheriff of Jefferson Parish did not calculate and provide "credit for time in custody" upon the probationers' revocation and re- sentencing to "hard labor" to be served in the Department of Public Safety and Corrections.[37]

Plaintiffs' defined class is a restatement of Plaintiffs' proposed inaccurate reporting claim. As explained above in response to Plaintiffs' Motion for Partial Summary Judgment, this claim is not before the Court. Accordingly, Plaintiffs' Motion to Certify such a class is denied.

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[37] Doc. 608 at 2. For the purpose of preserving the record on appeal, Plaintiffs also define a second class but acknowledge that the claims within the proposed second class are no longer before this Court. *See id*. at 2-3.

To the extent that Plaintiffs ask this Court to certify a class relating to Plaintiffs' wrongful imprisonment claims, Plaintiffs' request is also denied.[38] Plaintiffs each only have one, highly fact-specific claim remaining against the Sheriff. Plaintiffs therefore have not demonstrated that they can "fairly and adequately protect the interests of the class" or that the certified questions "predominate."[39]

For the above reasons, Plaintiffs' Motion to Certify is denied. Plaintiffs' putative class action claims against the Sheriff are dismissed with prejudice.

CONCLUSION

Accordingly, the Sheriff's Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment, and Plaintiffs' Motion to Certify Class are DENIED.

IT IS ORDERED that Plaintiffs' putative class claims against the Sheriff are hereby DISMISSED WITH PREJUDICE.

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[38] The Court does not perceive Plaintiffs' Motion to Certify as asking this Court to certify Plaintiffs' remaining wrongful imprisonment claim but addresses the claim out of an abundance of caution as the proposed class was addressed in the Original and First Supplementing Complaints. *See* Doc. 1 at 8; Doc. 14 at 10.

[39] *See Jenkins v. Ravmark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) ("Defendants have not shown that the representatives are 'inadequate' due to an insufficient stake in the outcome or interests antagonistic to the unnamed members." (citations omitted)) ("In order to 'predominate,' common issues must constitute a significant part of the individual cases." (citations omitted)).

New Orleans, Louisiana this 23rd day of March, 2021.

/s/ Jane Triche Milazzo
United States District Judge

**OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(JANUARY 23, 2020)**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court is Defendants Joe McNair, McNair & McNair, LLC, and Philadelphia Indemnity Insurance Company's Motion for Summary Judgment (Doc. 554). For the following reasons, the Motion is GRANTED.

BACKGROUND

In this suit, Plaintiffs challenge the manner in which the Jefferson Parish Drug Court ("Drug Court") is conducted. Plaintiffs Taylor Carlisle and Emile Heron were convicted of the possession of various

controlled substances and, as part of their sentences, enrolled in Drug Court. The gist of Plaintiffs' claim is that the Drug Court administrators deprived them of due process in various ways, leading to unlawful incarcerations and other negative consequences.

This case has been pending for a few years, and many of Plaintiffs' claims have been dismissed. For the purposes of this Motion, it is relevant that the only remaining claim against Defendants Joe McNair, McNair & McNair, LLC, and Philadelphia Indemnity Insurance Company (collectively, the "McNair Defendants") is Plaintiff Taylor Carlisle's state law negligence claim for actions taken after April 27, 2015.[1]

The following relevant facts are undisputed. Joe McNair is a Licensed Professional Counselor ("LPC") in Louisiana.[2] Carlisle's first encounter with Joe McNair took place on January 24, 2013. On that date, McNair interviewed Carlisle at the Jefferson Parish Correctional Center, where he was being detained, in connection with his application to participate in Drug Court. Carlisle attended four group therapy sessions conducted by Joe McNair's employees between April 28, 2015 and August 25, 2015. Finally, Carlisle spoke with McNair on July 27, 2015—the first direct interaction between the two since McNair's initial interview of Carlisle in January 2013. These events constitute all of the interactions between the McNair Defendants and Carlisle that have not prescribed.[3]

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[1] Doc. 545 at 2.

[2] *See* La. Stat. Ann. § 37:1101 *et. seq.*

[3] While Plaintiffs assert that Carlisle maintained contact with the McNair Defendants "on an almost daily basis" by appearing "almost daily at McNair and McNair [sic] offices for his counseling

Additionally, Carlisle was sentenced to a 90-day flat time sanction on April 28, 2015. While serving that 90-day sanction, Carlisle was ordered to attend Oxford House upon completion of the sanction. Carlisle was then sentenced to a 6-month flat time sanction in a September 1, 2015 order. Finally, his probation status was revoked on September 22, 2015.

LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[4] "As to materiality . . . [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[5] Nevertheless, a dispute about a material fact is "genuine" such that summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[6]

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all

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sessions" and "weekly in court [for] the status appearances," Plaintiffs provide no evidence in support. More importantly, however, Plaintiffs' state law negligence claims against the McNair Defendants never alleged that Carlisle suffered damages flowing from his regular counseling sessions or weekly court appearances.

[4] Fed. R. Civ. P. 56.

[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

[6] *Id.* at 248.

reasonable inferences in his favor.[7] "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial."[8] Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[9]

"In response to a properly supported motion for summary judgment, the non-movant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to sustain a finding in favor of the non-movant on all issues as to which the non-movant would bear the burden of proof at trial."[10] The Court does "not . . . in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[11] Additionally, "[t]he mere

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[7] *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

[8] *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

[9] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

[10] *Johnson v. Deep E. Tex. Reg. Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

[11] *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 393-94 (5th Cir. 2000) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

argued existence of a factual dispute will not defeat an otherwise properly supported motion."[12]

LAW AND ANALYSIS

The McNair Defendants argue that Carlisle's state law malpractice claim is legally deficient for three reasons. First, they argue that there is no relationship between Carlisle's damages and the allegations of negligence made against the McNair Defendants. Second, they assert that there existed no patient-therapist relationship between McNair and Carlisle during the prescriptive period. And third, they aver that the only interaction McNair had with Carlisle was in McNair's official capacity with the Drug Court. Because the Court agrees with the McNair Defendants as to the first point, the Court need not assess the other two.

Let the Court be unmistakably clear: the only remaining claim against the McNair Defendants is a state law professional negligence claim.[13] Louisiana employs the duty-risk analysis to determine whether

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[12] *Boudreaux v. Banctec, Inc.*, 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

[13] Doc. 178 at 26 ("All of Plaintiffs' § 1983 claims against [the McNair Defendants] . . . in their personal and official capacities, whether for injunctive or declaratory relief or damages, are DISMISSED WITH PREJUDICE.") (emphasis added); Doc. 231 at 4 ("At this point, the claims remaining in this action are as follows: 1) Plaintiff Carlisle's negligence claims against [the McNair Defendants] . . . ."); Doc. 545 at 2 ([T]he following claims remain: . . . 3. Plaintiff Carlisle's state law negligence claims against [the McNair Defendants] for actions taken after April 27, 2015.").

to impose liability under Louisiana Civil Code Article 2315.[14]

> Under this analysis plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to plaintiff, the requisite duty was breached by the defendant and the risk of harm was within the scope of protection afforded by the duty breached.[15]

"A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability."[16] The first determination in the duty-risk analysis is cause-in-fact.[17] A defendant's conduct is a cause-in-fact of the harm if it was a substantial factor in bringing about the harm. "For example, the act is a cause-in-fact in bringing about the injury when the harm would not have occurred without it."[18] "While a party's conduct does not have to be the sole cause of the harm, it is a necessary antecedent essential to an assessment of liability."[19]

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14 *Mathieu v. Imperial Toy Corp.*, 646 So. 2d 318, 321 (La. 1994).

15 *Berry v. State Through Dep't of Health & Human Res.*, 637 So. 2d 412, 414 (La. 1994) (citing *Mundy v. Dep't of Health & Human Res.*, 620 So.2d 811, 813 (La.1993)).

16 *Paul v. La. State Emps. Grp. Benefit Program*, 762 So. 2d 136, 142 (La. App. 1 Cir. 2000) (citing *Mathieu*, 646 So. 2d at 326).

17 *Id.* (citing *Boykin v. La. Transit Co., Inc.*, 707 So. 2d 1225, 1230 (La. 1998)).

18 *Id.*

19 *Id.* (citing *Netecke v. State ex rel. DOTD*, 747 So. 2d 489, 498 (La. 1999)).

Plaintiffs' Opposition Memorandum ("brief") is replete with arguments sounding in § 1983 claims. In fact, there are striking similarities between the arguments made in Plaintiffs' brief and Plaintiffs' allegations of § 1983 violations in the Second Amended Complaint. In that sense, Plaintiffs' brief is vexing. Additionally, much of Plaintiffs' brief ?????????? allegations against the McNair Defendants without tying those allegations to any purported harm suffered by Carlisle. The Court has managed, however, to decipher the following allegations of harm from Plaintiffs' brief: (1) McNair's failures as Carlisle's counselor caused Carlisle to be demoted to Phase II in the Drug Court program; (2) the McNair Defendants cost Carlisle money by requiring him to "pay accrue and fees [sic];" (3) McNair caused Carlisle to be incarcerated in jail without medication; and (4) McNair ?? caused Carlisle to be sent to Oxford House.[20] The Court will address each of Plaintiffs' asserted harms in turn.

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[20] Doc. 556 at 16-18. To afford Plaintiffs the fairest consideration of their arguments, the Court also looked to Plaintiffs' Complaints for reference to damages suffered by Carlisle due to the McNair Defendants' actions. The Second Amended Complaint states that Carlisle's damages

> include limitations and deprivations of Carlisle's . . . liberty, freedom of association, and freedom of mover [sic] by virtue of the contempts; financial expense; reputational harm among members of the community; inability to transact business or obtain employment in the local area, inability to secure credit, mental anguish and loss of family.

Doc. 117 at 61-62.

A. Demotion to Phase II

Carlisle first asserts that "[d]ue to McNair's failures Carlisle was 'returned to Phase II three times.'"[21] Carlisle notes that "McNair never advised Carlisle in advance they were considering phasing him down and he was given no notice of a potential sanction. There was no rehabilitation related reason, or treatment related reason, he was phased back down to II."[22] These conclusory statements encompass the entirety of Plaintiffs' argument that McNair caused Carlisle to be demoted to Phase II. Plaintiffs provide this Court with no evidence whatsoever to support its claim. Accordingly, the Court finds that Plaintiffs fail to demonstrate a disputed issue of material fact as to the McNair Defendants' role in demoting Carlisle to Phase II.

B. Accruing Fees

Carlisle next asserts that he, "like all the participants, continued to pay accrue and fees [sic] because he was detained in the program, even when he was incarcerated."[23] Again, Plaintiffs fail to provide any evidence to suggest that the McNair Defendants played a role in requiring Drug Court participants to pay for and accrue fees. Accordingly, the Court finds that Plaintiffs fail to demonstrate a disputed issue of material fact as to the McNair Defendants' role in causing Carlisle's harm of being forced to pay Drug Court fees.

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[21] Doc. 556 at 16.

[22] *Id.*

[23] *Id.* at 17.

C. Incarceration without Medication

Carlisle next asserts that "McNair knew Carlisle was taking an anti-anxiety or antidepressant and never contacted him at the jail. He did not ask if Carlisle were [sic] receiving it while in jail. Despite numerous attempts to receive his medication while in jail during the six months [sic] sanction he never received it."[24] Assuming McNair had a duty to ensure that Carlisle was maintaining his medication regimen while in jail, Carlisle fails to provide any evidence that would make McNair culpable for this alleged harm. For example, Carlisle fails to demonstrate that McNair had the power to prescribe Carlisle his medications while he was incarcerated or that McNair could require jail officials to provide them to him. Accordingly, there is no dispute of material fact regarding McNair's role in causing Carlisle to remain incarcerated without medications.

D. Oxford House

Finally, Carlisle argues that he was forced to live at Oxford House "at McNair's direction."[25] Carlisle's own deposition testimony notes that Judge Faulkner ordered him to go to Oxford House.[26] McNair's deposition testimony notes that he had nothing to do with Judge Faulkner's decision to send Carlisle to Oxford House, and further, that he never made any recommendation for or against sending Carlisle to Oxford

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[24] *Id.*

[25] *Id.*

[26] Doc. 554-4 at 13.

House.[27] Carlisle fails to point the Court to any evidence disputing these testimonies. Accordingly, there is no dispute of material fact regarding McNair's involvement with Carlisle being ordered to go to Oxford House.

Having found that Plaintiffs failed to demonstrate a genuine dispute of material fact as to an essential element—cause-in-fact—of Carlisle's sole claim against the McNair Defendants, the Court need not engage in an analysis of the other elements.

CONCLUSION

Accordingly, the McNair Defendants' Motion for Summary Judgment is GRANTED. Defendants Joe McNair, McNair & McNair, LLC, and Philadelphia Indemnity Insurance Company are hereby DISMISSED WITH PREJUDICE.

New Orleans, Louisiana this 23rd day of January, 2020.

/s/ Jane Triche Milazzo
United States District Judge

[27] Doc. 554-3 at 9.

OPINION, U.S. DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA (AUGUST 7, 2019)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"(1)

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court are four motions: (1) a Motion for Summary Judgment by former Jefferson Parish Sheriff Newell Normand ("Sheriff") (Doc. 443);[1] (2)

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[1] The Motion was technically filed by former Sheriff Normand. Doc. 443. By rule, Sheriff Lopinto was substituted as the Defendant Sheriff regarding Plaintiffs' claims in 2017 when Lopinto was appointed to replace Normand. *See* Fed. R. Civ. P. 25(d). Because Plaintiffs never alleged any individual capacity claims against Normand, he is no longer a defendant in this suit; no claims remain against him. Accordingly, this Court will construe the instant Motion for Summary Judgment as one by Sheriff Lopinto. The Court will refer to the official capacity

Plaintiffs' Appeal from the Magistrate Judge's March 20, 2019 Order and Reasons denying Plaintiff's Motion for Leave to file a Fourth Amended and Supplementing Complaint (Doc. 530); (3) Plaintiffs' Motion to Strike exhibits attached to Sheriff Normand's supplemental memorandum in support of his Motion for Summary Judgment (Doc. 532); and (4) Plaintiffs' Motion for Reconsideration of this Court's May 7, 2019 Order and Reasons denying Plaintiff's Appeal from the Magistrate Judge's February 4, 2019 Order and Reasons (Doc. 542). For the following reasons, the Sheriff's Motion for Summary Judgment is GRANTED IN PART, and Plaintiffs' Motions are DENIED.

BACKGROUND

This lawsuit arises out of the participation by Plaintiffs Taylor Carlisle and Emile Heron in Jefferson Parish's Drug Court. This case has been pending for more than three years, and no trial date has been set. Since its inception, Plaintiffs have alleged a number of federal and state claims against a number of defendants. Many of those claims have since been dismissed. As summarized by the Magistrate Judge in her March 20, 2019 Order and Reasons, the following claims remain:

1. Plaintiffs' putative class action claims against the Sheriff for declaratory and injunctive relief and damages under § 1983, challenging the imposition of jail time for alleged probation violations by Drug Court Program participants to the extent that imprisonment

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claims against Lopinto as claims against the "Sheriff" to avoid confusion.

or refusal to consider good time by the Sheriff was not pursuant to an order from the Drug Court;

2. Plaintiffs' state law claims for legal malpractice pending against Joseph Marino; and

3. Plaintiff Carlisle's state law negligence claims against [Joe] McNair and McNair's business, for actions taken after April 27, 2015.[2]

On December 12, 2018, the Sheriff moved for summary judgment on the claims remaining against him.[3] The submission date on this Motion was continued several times, but the Motion eventually came under submission on April 10, 2019. On the same day Plaintiffs filed a lengthy opposition to the Motion, the Sheriff supplemented his Motion with a significant number of records.[4] Plaintiffs did not seek leave to respond to the supplemental memorandum but instead filed a Motion to Strike many of the records.[5] The Sheriff opposes the Motion to Strike.[6]

Two months after the Sheriff filed his Motion for Summary Judgment, Plaintiffs filed a Motion for Leave to File a Fourth Amended and Supplementing Complaint.[7] Plaintiffs sought to amend their claims against the Sheriff. This Motion was referred to the

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[2] Doc. 521 at 1-5.

[3] Doc. 443.

[4] *See* Doc. 528.

[5] *See* Doc. 532.

[6] Doc. 540.

[7] *See* Doc. 490.

Magistrate Judge. On March 20, 2019, the Magistrate Judge denied the Motion.[8] Plaintiffs now appeal the Magistrate Judge's decision denying leave to amend their claims against the Sheriff.[9] The Sheriff opposes the Motion.

Plaintiffs also seek reconsideration of a May 7, 2019 order by this Court affirming the Magistrate Judge's February 4, 2019 Order and Reasons that granted Defendants' Motion to Compel certain documents and ordered Plaintiffs to pay $500 in opposing counsel's expenses and fees.[10] Defendants oppose this Motion.

The Court will first address Plaintiffs' Motion to Strike records that the Sheriff relies on to support his Motion for Summary Judgment. Next, the Court will address the Sheriff's Motion for Summary Judgment. After that, the Court will address Plaintiffs' pending appeal of the Magistrate Judge's March 20, 2019 Order and Reasons. Finally, the Court will turn to Plaintiffs' Motion for Reconsideration.

LEGAL STANDARD

I. Motion to Strike

Under Federal Rule 56(c)(2), "[a] party may object that the material cited to support or dispute a fact

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[8] Doc. 521.

[9] Doc. 530.

[10] *See* Docs. 481 (February 4, 2019 Order and Reasons), 500 (Plaintiffs' Appeal of the February 4, 2019 Order and Reasons), and 541 (May 7, 2019 Order and Reasons denying Plaintiffs' appeal).

cannot be presented in a form that would be admissible in evidence." Nevertheless, "[a]t the summary judgment stage, materials cited to support or dispute a fact need only be capable of being 'presented in a form that would be admissible in evidence.'"[11] "This flexibility allows the court to consider the evidence that would likely be admitted at trial—as summary judgment is trying to determine if the evidence admitted at trial would allow a jury to find in favor of the nonmovant—without imposing on parties the time and expense it takes to authenticate everything in the record."[12]

II. Motion for Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[13] "As to materiality . . . [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[14] Nevertheless, a dispute about a material fact is

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11 *LSR Consulting, LLC v. Wells Fargo Bank, N.A.*, 835 F.3d 530, 534 (5th Cir. 2016) (emphasis in original) (quoting Fed. R. Civ. P. 56(c)(2)).

12 *Maurer v. Indep. Town*, 870 F.3d 380, 384 (5th Cir. 2017) (citing Fed. R. Civ. P. 56(c)(1)(A)).

13 Fed. R. Civ. P. 56.

14 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

"genuine" such that summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[15]

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor.[16] "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial."[17] Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[18]

"In response to a properly supported motion for summary judgment, the nonmovant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to sustain a finding in favor of the nonmovant on all issues as to which the nonmovant would bear the burden of proof at trial."[19] The Court does "not . . . in the absence of any

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15 *Id*. at 248.

16 *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

17 *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

18 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

19 *Johnson v. Deep E. Tex. Reg. Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

proof, assume that the nonmoving party could or would prove the necessary facts."[20] Additionally, "[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion."[21]

III. Appeal from Magistrate Judge's Order and Reasons

A district judge may refer any non-dispositive pretrial matter to a United States Magistrate Judge.[22] District judges must consider timely objections to rulings by magistrates on such matters, and they must "modify or set aside any part of the order that is clearly erroneous or contrary to law."[23] "A finding is clearly erroneous only if it is implausible in the light of the record considered as a whole."[24] More specifically, "[a]n order is clearly erroneous if the court 'is left with the definite and firm conviction that a mistake has been committed.'"[25] "The district court

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[20] *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 393-94 (5th Cir. 2000) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

[21] *Boudreaux v. BanTec, Inc.*, 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

[22] 28 U.S.C. § 636(b)(1)(A). *See Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995).

[23] *See* Fed. R. Civ. P. 72(a).

[24] *Moore v. Ford Motor Co.*, 755 F.3d 802, 808 n.11 (5th Cir. 2014) (quoting *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006)).

[25] *Alphonse v. Arch Bay Holdings, L.L.C.*, 618 F. App'x 765, 768 (5th Cir. 2015) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)).

[is not permitted to] undertake a de novo review of the magistrate's disposition."[26]

IV. Motion for Reconsideration

A Motion for Reconsideration of an interlocutory order is governed by Federal Rule of Civil Procedure 54(b).[27] "Under Rule 54(b), 'the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.'"[28]

LAW AND ANALYSIS

I. Motion to Strike

Plaintiffs ask this Court to strike from the record two sets of minute entries that the Sheriff produced in support of his Motion for Summary Judgment. The first is a set of minute entries reflecting Drug Court

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[26] *Cordova v. Crowley Marine Servs., Inc.*, No. 02-2880, 2003 U.S. Dist. LEXIS 14073, 2003 WL 21804986, at *1 (E.D. La. Aug. 4, 2003) (Duval, J.) (citing *Merritt v. Int'l Bhd. of Boilermakers*, 649 F.2d 1013, 1017 (5th Cir. 1981) ("Pretrial orders of a magistrate under s (sic) 636(b)(1)(A) are reviewable under the 'clearly erroneous and contrary to law' standard; they are not subject to a de novo determination as are a magistrate's proposed findings and recommendations under s (sic) 636(b)(1)(B).").

[27] Fed. R. Civ. P. 54(b) (noting that a district court may revise at any time prior to final judgment "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties"). *See McClendon v. United States*, 892 F.3d 775, 781 (5th Cir. 2018).

[28] *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990)).

appearances for Plaintiff Carlisle,[29] and the second is a similar set of minute entries regarding court appearances by Plaintiff Heron.[30] Plaintiffs ask to strike these from the record on the ground that they are inaccurate. That is, the minute entries say Plaintiffs were in court when they were not; that Plaintiffs were represented by counsel when they were not; and at least one minute entry says Plaintiff Carlisle appeared before a judge who Carlisle says he has never appeared before.

As previously noted by this Court, "[a]t the summary judgment stage, materials cited to support or dispute a fact need only be capable of being 'presented in a form that would be admissible in evidence.'"[31] Plaintiffs have failed to show that these minute entries are not capable of being presented in a form that would be admissible in evidence. More importantly, Plaintiffs have failed to show that the Sheriff is not entitled to reasonably rely on such minute entries when determining who to incarcerate and for how long. Even if the minute entries contain inaccuracies, the Sheriff was entitled to rely on them when determining how long to incarcerate Plaintiffs Carlisle and Heron. Accordingly, the Motion is denied, and the Court will consider the minute entries in ruling on the Sheriff's Motion for Summary Judgment.

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[29] Plaintiffs refer to these as Rec. Doc. 524-3. They also appear at Rec. Doc. 528-1.

[30] Plaintiffs refer to these are Rec. Doc. 524-5. They also appear at Rec. Doc. 528-3.

[31] *LSR Consulting*, 835 F.3d at 534 (5th Cir. 2016) (emphasis in original) (quoting Fed. R. Civ. P. 56(c)(2)).

II. Motion for Summary Judgment

Two types of claims remain against the Sheriff. The first allege that he held Plaintiffs in jail on numerous occasions absent a court order to do so. The second allege that he denied Plaintiffs good time credit in jail absent the authority to do so.

a. Claims that the Sheriff Jailed Plaintiffs Absent a Court Order

i. Plaintiff Carlisle

This Court has combed over the numerous minute entries submitted by the parties in response to the Sheriff's Motion. Having done so, this Court can find only one instance where Plaintiff Carlisle says he was in jail for which there is nothing in the record showing that the Sheriff had the authority to jail him. That period of time is between August 25, 2015 and September 1, 2015. For all other time periods that Plaintiff Carlisle says he spent in Jefferson Parish Correctional Center ("JPCC"), there are minute entries showing that Drug Court judges ordered him to be held during those periods.

Carlisle says he was in jail from August 25, 2015 to September 1, 2015.[32] The Sheriff did not introduce evidence to refute this statement. Carlisle says he attended a Drug Court hearing on August 25, 2015 but "was dismissed by Judge Faulkner without sanction to go see [his] probation officer."[33] Shortly thereafter, Carlisle says, he was arrested by a Gretna police

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[32] *See* Doc. 525-2 at 30.

[33] *Id.* at 31.

officer and taken to jail.[34] He says he remained there over the next week.[35]

An August 25, 2015 minute entry reads, in its entirety, as follows:

> The Defendant, Taylor E. Carlisle, appeared before the bar of the Court this day for Drug Court.
>
> The Defendant was represented by Joseph A. Marino, Jr. The Court ordered the Defendant to be given a sanction of 6 months JPCC, flat time/contempt.
>
> The Court ordered the Defendant to be held for Revocation after his sanction is completed.
>
> The Defendant is to appear in Court September 1, 2015.[36]

At first glance, it appears this minute entry shows that Carlisle was ordered to begin serving a six-month jail sanction on August 25, 2015. If that were true, the Sheriff would have proof that he was holding Carlisle pursuant to an order from Drug Court between August 25, 2015 and September 1, 2015. Viewing the record in the light most favorable to Carlisle, however, the minute entry cannot be read to mean that.

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[34] Id.

[35] *Id.* at 30. In fact, he says he was incarcerated from August 25, 2015 until he finished serving out his prison term in August 2018. *Id.*

[36] Doc. 525-4 at 5.

First, it is important to note what the minute entry does not say. Most of the minute entries reflecting Carlisle's Drug Court appearances where he was sanctioned to immediate jail time indicate that he was remanded to JPCC at the end of the hearing.[37] The August 25, 2018 minute entry says no such thing.

Second, several sentences of the August 25, 2018 minute entry written in the passive voice suggest that Carlisle was not ordered to go straight to jail after the hearing. The minute entry says he was "to be given a sanction," that he was to "be held for Revocation after his sanction is completed," and that he "is to appear in Court September 1, 2015."[38] Considered together, these sentences could mean that the judge ordered that Carlisle be sanctioned at a later date—September 1, 2015—and that he could remain free until then. This reading is rendered more plausible given the existence of a September 1, 2015 minute entry where Carlisle "was given a sanction of 6 months" at a hearing on that day and "was remanded to Jefferson Parish Prison" afterward.[39]

Accordingly, a genuine dispute of material fact exists as to whether the Sheriff held Carlisle without the authority to do so from August 25, 2015 to September 1, 2015. Nevertheless, the record is clear—that is, there is no genuine dispute of material fact—that the Sheriff had authority from Drug Court judges

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[37] *See* Doc 528-1 at 1-6. The minute entries often refer to JPCC as Jefferson Parish Prison, which is what the correctional facility used to be called.

[38] Doc. 525-4 at 5.

[39] Doc. 528-1 at 5.

to incarcerate Plaintiff for all the other periods of time for which he says the Sheriff held him unlawfully.

Thus, the Sheriff's Motion is granted in part. The only remaining claim Plaintiff Carlisle has against the Sheriff is one for wrongful imprisonment from August 25, 2015 to September 1, 2015. The Sheriff is entitled to summary judgment on all other claims by Plaintiff Carlisle.

ii. Plaintiff Heron

As with Plaintiff Carlisle, there is only one instance in the record where Plaintiff Heron says he was jailed for which the Sheriff has not shown that he had the authority to jail him. That time was between mid-to-late June 2016 and July 20, 2016.

Plaintiff Heron says he was incarcerated during this period of time.[40] Between December 15, 2015 and January 26, 2016, Plaintiff Heron made several appearances at Drug Court.[41] One such appearance occurred on January 19, 2016, and at that hearing Plaintiff Heron "stipulated" to a sanction.[42] This Court cannot find a minute entry in the record dated January 19, 2016. There is, however, a minute entry dated January 26, 2019.[43] That minute entry says that "[o]n January 19, 2016, the Defendant was sanctioned to 6 months flat time for contempt of court

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40 *See* Doc. 525-2 at 22-23.

41 *See* Doc. 525-3 at 14-18.

42 Doc. 525-2 at 22.

43 Doc. 525-3 at 14.

to be served in the Jefferson Parish Prison."[44] The minute entry also says that "[t]he Court now amends the aforementioned sanction and orders that the Defendant is to be given credit for all time served beginning on December 15, 2015 to present day."[45]

The January 26, 2016 minute entry thus appears to show that Plaintiff Heron's six-month sanction from the previous week should have run its course in June 2016.[46] Unlike other minute entries, this one does not say that Heron should be held in jail pending a final revocation hearing. The Sheriff has not introduced evidence to contradict the showing by Heron that he was entitled to credit for time served during this roughly month-long period between late June 2016 and July 20, 2016.

Accordingly, the Sheriff's Motion is granted in part on this claim. A genuine dispute of material fact exists as to whether the Sheriff unlawfully held Plaintiff for an unspecified time period beginning in late June 2016 and ending July 20, 2016. Thus, Plaintiff Heron's claim against the Sheriff remains for that time period only. The record is clear—that is, there is no genuine dispute of material fact—that the Sheriff jailed Plaintiff Heron at all other times pursuant to orders from Drug Court judges. The Sheriff is thus

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[44] *Id.*

[45] *Id.*

[46] Without calculating the date exactly, because Plaintiff Heron was ordered to serve a six-month sanction, and his sanction was to begin retroactively on December 15, 2015, he should have been eligible for release around June 15, 2016.

entitled to summary judgment against Plaintiff Heron's claims except as outlined above.

b. Claims that the Sheriff Denied Plaintiffs Good Time Absent a Court Order

In a September 25, 2018 Order and Reasons, this Court held as follows:

> *Heck* [*v. Humphrey*] does not bar claims against the Sheriff for denying Plaintiff good time if the order imposing his incarceration did not specify that punishment. Therefore Plaintiff's claims for wrongful imprisonment against the sheriff remain but only to the extent that the imprisonment or refusal to consider good time was not pursuant to an order from Drug Court.[47]

This ruling pertained to claims by Plaintiffs that the Sheriff refused to award them "good time" credit for time they served in JPCC as a result of "flat time" sanctions from Drug Court judges. That is, Plaintiffs claimed that the Sheriff wrongfully imprisoned them by holding them for the entirety of their incarceration sanctions when in fact they should have been able to earn good time credit and secure a release from JPCC without having to serve their full sanctions.

The minute entries show that Plaintiffs' sanctions were ordered to be served as flat time—that is, as Plaintiffs noted in their Second Supplemental and Amending Complaint,[48] without the benefit of the

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[47] Doc. 359 at 4-5.

[48] Doc. 117 at 56 n.14 ("When used in the context of prisoners, the term 'flat time' refers to the prison term that is to be served

ability to earn good time.[49] Although the minute entry reflecting Plaintiff Heron's sanction on December 2, 2014 does not specify a flat time sanction, the Court notes that a 48-hour sentence—like many, if not all, of the sanctions Plaintiffs were punished with by the Drug Court—is too short to potentially qualify an inmate for good time credit under Louisiana law.[50]

At this point, this Court believes it is necessary to point out the difference between the claims that Plaintiffs have alleged regarding good time and the claims Plaintiffs have attempted to allege regarding good time in their proposed Fourth Amended and Supplementing Complaint. As described above, Plaintiffs have alleged that the Sheriff wrongfully imprisoned them by failing to apply good time credit to their Drug Court flat time sanctions.[51] What Plaintiffs have not alleged—but what they are now trying to allege—is that the Sheriff miscalculated the time Plaintiffs spent in JPCC when reporting such time to the Louisiana Department of Public Safety and Corrections, which resulted in Plaintiffs spending more time incarcerated post-revocation than they should have. This claim is not before the Court.

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by a prisoner without the benefit of good time credit and the like.").

[49] *See, e.g.*, Doc. 528-1 at 2-5 (ordering flat time sanctions for Plaintiff Carlisle); Doc. 528-3 at 1-3, 5, 7 (ordering flat time sanctions for Plaintiff Heron).

[50] *See* Doc. 528-3 at 6 (sanctioning Plaintiff Heron to "48 hours in JPCC"); La. Rev. Stat. § 15:571.3 (providing when inmates may qualify for good time credit).

[51] *See* Docs. 1, 117.

Accordingly, the Court expresses no opinion as to the potential merits of such a claim.

There is no genuine dispute of material fact about whether the Sheriff failed to properly credit Plaintiffs with good time for their flat time Drug Court sanctions. Accordingly, he is entitled to summary judgment on these claims. The only claims that remain against him are for wrongful imprisonment based on allegedly incarcerating each Plaintiff for the specific time periods outlined above without the authority to do so.

III. Appeal from the Magistrate Judge's Denial of Leave to Amend

On March 30, 2019, the Magistrate Judge denied Plaintiffs' Motion for Leave to File a Fourth Amended and Supplementing Complaint. The Magistrate Judge reasoned in relevant part that Plaintiffs' exhibited "a clear pattern of delay," that they were "shifting the nature of their claims in response to the court's rulings," and that the Sheriff—whose Motion for Summary Judgment had been pending for about four months when Plaintiffs' moved for leave to amend their Complaint—would be prejudiced by the granting of Plaintiffs' Motion.[52]

Plaintiffs have failed to show that the Magistrate Judge's ruling was clearly erroneous or contrary to law.[53] This Court agrees with the Magistrate Judge

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[52] Doc. 521 at 7-8.

[53] Plaintiffs argue that their Motion should be reviewed under a *de novo* standard on the ground that the denial of leave to amend a complaint is a dispositive rather than a non-dispositive issue under Federal Rule of Civil Procedure 72. Plaintiffs cite two decisions from outside the Fifth Circuit that support this argument.

that Plaintiffs are simply shifting their claims in response to the Court's rulings, and that the Sheriff would be unduly prejudiced at this stage of litigation if Plaintiffs were allowed to significantly amend the claims against him, particularly given the status of his pending Motion for Summary Judgment. Accordingly, Plaintiffs' Motion is denied.

IV. Motion for Reconsideration

Plaintiffs in this Motion continue to re-hash the same arguments they have now presented before both the Magistrate Judge and this Court regarding the imposition of a $500 award of attorneys' fees related to Plaintiffs' failure to produce certain discovery. Plaintiffs now seek a "stay" of this award, even though they offer no reason to explain why they failed to ask for such relief sooner. Plaintiffs refusal to fully comply with the Magistrate Judge's fair sanction underscores the need for the sanction. Accordingly, this Court sees no need to disturb its previous decision affirming the Magistrate's award of the discovery sanction.[54] Plaintiffs' Motion is denied.

See Lariviere, Grubman & Payne, LLP v. Phillips, No. 07-CV-01723-WYD-CBS, 2010 U.S. Dist. LEXIS 119501, 2010 WL 4818101, at *5 (D. Colo. Nov. 9, 2010); *Cuenca v. Univ. of Kansas*, 205 F. Supp. 2d 1226, 1229 (D. Kan. 2002). The Fifth Circuit, however, has indicated that such issues are non-dispositive. *See PYCA Indus., Inc. v. Harrison Cty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 n.11 (5th Cir. 1996). Accordingly, this Court will review Plaintiff's appeal under the standard for non-dispositive motions, as is customary in this Circuit.

[54] *See* Doc. 541.

CONCLUSION

For the foregoing reasons, the Sheriff's Motion for Summary Judgment (Doc. 443) is GRANTED IN PART. Plaintiff Carlisle's claim that the Sheriff held him in jail without the authority to do so from August 25, 2015 to September 1, 2015 remains. Plaintiff Heron's claim that the Sheriff held him in jail from an unspecified day in June 2016 until July 20, 2016 without the authority to do so also remains. The Sheriff is entitled to summary judgment on the remainder of Plaintiffs' claims against him.

It is further ordered that Plaintiffs' Motions (Docs. 530, 532, and 542) are DENIED.

New Orleans, Louisiana this 7th day of August, 2019.

/s/ Jane Triche Milazzo
United States District Judge

OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(MAY 7, 2019)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court is Plaintiffs' Appeal of the Magistrate Judge's February 4, 2019 Order and Reasons granting a Motion to Compel filed by Defendants Joe McNair and McNair & McNair, LLC (Doc. 500). For the following reasons, the Magistrate Judge's Order and Reasons is AFFIRMED.

BACKGROUND

This lawsuit arises out of the participation by Plaintiffs Taylor Carlisle and Emile Heron in Jefferson Parish's Drug Court. The background of this litigation

has been detailed in Orders and Reasons previously issued by this Court.[1] The Court will nevertheless discuss the context in which the instant Motion arose.

Among the Defendants in this lawsuit are Joe McNair and McNair & McNair, LLC (the "McNair Defendants"). Joe McNair is a licensed professional counselor, and McNair & McNair, LLC is his counseling firm. McNair evaluated Plaintiff Taylor Carlisle in 2013 as part of Carlisle's acceptance into the Drug Court program. After Carlisle received a number of sanctions from the Drug Court, he filed the instant lawsuit. In it, he accuses the McNair Defendants of therapist malpractice under Louisiana law.

In discovery, the McNair Defendants sought from Plaintiff Carlisle "any and all documents obtained or received by [Carlisle] from the Jefferson Parish Drug Court."[2] Carlisle produced nearly 300 pages in response to the request.[3] What he did not produce was what the parties now refer to as "the O'Brien record," a set of nearly 400 pages of Carlisle's Drug Court records that Carlisle's mother received from Mike O'Brien, a Drug Court administrator.[4] Carlisle did, however, refer to the O'Brien record in opposing a previous motion filed by the McNair Defendants.

In December 2018, the McNair Defendants' counsel requested a copy of the O'Brien record from Carlisle's counsel pursuant to the McNair Defendants' earlier

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1 *See* Docs. 110, 178, 231, 296, 355 and 359.

2 Doc. 481 at 2.

3 *Id.*

4 *Id.*

production request. It soon became clear through subsequent communications that Carlisle thought he did not have to produce the O'Brien record. The McNair Defendants then filed a Motion to Compel the production of the O'Brien record.[5] Plaintiffs opposed the Motion, which was referred to the Magistrate Judge.

On February 4, 2019, the Magistrate Judge granted the McNair Defendants' Motion to Compel.[6] The Magistrate Judge noted that "[t]he basis for Carlisle's objection to producing the O'Brien Record . . . is unclear."[7] Nevertheless, the Magistrate Judge then considered the various arguments raised by Carlisle in his opposition to the Motion to Compel.[8] Ultimately, the Magistrate Judge ruled that the O'Brien record was relevant to Carlisle's pending claims against the McNair Defendants, proportional to the needs of the case, and within the McNair Defendants' production request.[9] Because Carlisle failed to identify any legal authority justifying his withholding of the O'Brien record, the Magistrate Judge ordered Carlisle to pay the McNair Defendants reasonable attorneys' fees in filing and pursuing the Motion to Compel. The Court found that $500 was a reasonable amount "for approximately 2 hours of

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5 *See* Doc. 455.

6 Doc. 481.

7 *Id.* at 3.

8 *See* Doc. 465 (the opposition).

9 *See* Doc. 481 at 5.

time" that the McNair Defendants' counsel spent filing the Motion to Compel.[10]

On February 15, 2019, Plaintiffs timely appealed the Magistrate Judge's ruling ordering Carlisle to produce the O'Brien record within seven days and pay $500 worth of attorneys' fees to the McNair Defendants' counsel. In their Motion, Plaintiffs argue that the Magistrate Judge's ruling was clearly erroneous on 11 different grounds. The McNair Defendants oppose the appeal.

LEGAL STANDARD

A district judge may refer any non-dispositive pretrial matter to a United States Magistrate Judge.[11] District judges must consider timely objections to rulings by magistrates on such matters, and they must "modify or set aside any part of the order that is clearly erroneous or contrary to law."[12] "A finding is clearly erroneous only if it is implausible in the light of the record considered as a whole."[13]

LAW AND ANALYSIS

Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's

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[10] *Id.*

[11] 28 U.S.C. § 636(b)(1)(A). *See Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995).

[12] *See* Fed. R. Civ. P. 72(a).

[13] *Moore v. Ford Motor Co.*, 755 F.3d 802, 808 n.11 (5th Cir. 2014) (quoting *St. Aubin v. quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006)).

claim or defense and proportional to the needs of the case."[14] Nowhere in this appeal or in his original opposition to the McNair Defendants' Motion to Compel does Carlisle argue that the O'Brien record is not relevant to his claim against the McNair Defendants.

Carlisle does, however, appear to argue in his appeal that the O'Brien record is privileged for two different reasons. The first contention is that this Court should not compel the production of the O'Brien record because it was sealed from public disclosure in Carlisle's habeas proceeding that is separate from this case.[15] As the Magistrate Judge noted in her ruling, whether the O'Brien record was sealed from public view in another case has no bearing on whether it must be produced in discovery to the McNair Defendants in this case.[16] This aspect of the Magistrate Judge's ruling thus was neither clearly erroneous nor contrary to law.

Carlisle also argues in his tenth objection to the Magistrate Judge's ruling that the O'Brien record is "highly protected under 42 C.F.R. § 2.64 and [Louisiana] R.S. 13:5304(L)(1)."[17] As an initial matter, the federal regulations governing the disclosure of "substance use disorder patient records" only cover specific types of records, and Carlisle has presented no evidence to explain why the O'Brien record falls within these regulations.[18] More to the point, Carlisle

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[14] Fed. R. Civ. P. 26(b)(1).

[15] *See Carlisle v. Normand, et al.*, No. 16-838, Docs. 23, 24.

[16] *See* Doc. 481 at 4-5.

[17] Doc. 500 at 5.

[18] *See* 42 C.F.R. §§ 2.1-2.67.

fails to explain how either the relevant federal regulations or Louisiana law applies to and protects the disclosure of the O'Brien record. Furthermore, Carlisle failed to raise this specific issue before the Magistrate Judge.[19] Accordingly, she never ruled on it, and thus the issue is not before this Court on appeal. Carlisle's other arguments fail to show how the Magistrate Judge's granting of the McNair Defendants' Motion to Compel was either clearly erroneous or contrary to law.

Carlisle also appeals the Magistrate Judge's award of $500 in fees to the McNair Defendants' attorneys pursuant to Federal Rule of Civil Procedure 37. Under that Rule, when a motion to compel is granted, "the court must after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees."[20]

Carlisle first argues that the Magistrate Judge erred in awarding fees because Carlisle never received a hearing with oral argument on the Motion to Compel despite the Rule's provision that an award shall only be issued after an opportunity to be heard. Carlisle received "an opportunity to be heard" when he filed an opposition to the Motion to Compel. The Rule does not require that a physical hearing take place.[21]

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[19] *See* Docs. 465 and 481.

[20] Fed R. Civ. P. 37(a)(5)(A) (emphasis added).

[21] *See* Fed R. Civ. P. 37, advisory committee's notes on 1993 amendments ("Revised paragraph (4) is divided into three

Carlisle next argues that ordering a plaintiff proceeding *in forma pauperis* to pay attorneys' fees pursuant to Rule 37 violates the Rule itself. Rule 37 provides that "the Court must not order . . . payment [of attorneys' fees] if: . . . other circumstances make an award of expenses unjust."[22] Carlisle argues that forcing a plaintiff proceeding *in forma pauperis* to pay attorneys' fees is just such an "unjust" situation covered by the Rule. Carlisle, however, cites no case law to support this argument. It also is not clear whether this argument was even raised before the Magistrate Judge. In any event, Carlisle has failed to show that the Magistrate Judge's ruling was clearly erroneous or contrary to law.

CONCLUSION

For the foregoing reasons, the Magistrate Judge's ruling is AFFIRMED.

New Orleans, Louisiana this 7th day of May, 2019.

/s/ Jane Triche Milazzo
United States District Judge

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subparagraphs for ease of reference, and in each the phrase 'after opportunity for hearing' is changed to 'after affording an opportunity to be heard' to make clear that the court can consider such questions on written submissions as well as on oral hearings.").

[22] Fed. R. Civ. P. 37(a)(5)(A)(iii).

OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(DECEMBER 13, 2018)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court are Cross-Motions (Docs. 418,423) appealing a ruling by Magistrate Judge van Meerveld that ordered Defendant Joe Marino to make himself available for a discovery deposition before December 31, 2018. Also before the Court is a Motion by Defendant Marino to strike an exhibit that Plaintiffs attached to their Motion appealing Judge van Meerveld's order (Doc. 428), and accompanying Motions to Expedite (Doc. 429) the Motion to Strike and a Request for Oral Argument on the Motion to Strike (Doc. 430).

For the following reasons, the Motions appealing Judge van Meerveld's ruling are DENIED, and Defendant's Motion to Strike is GRANTED. Because this Court grants Defendant's Motion to Strike, the Motion to Expedite and Request for Oral Argument are DENIED as moot.

BACKGROUND

This lawsuit arises out of the participation by Plaintiffs Taylor Carlisle and Emile Heron in Jefferson Parish's Drug Court. Much of the background of this litigation has been reproduced in Orders and Reasons previously issued by this Court. The Court will nevertheless briefly discuss the context in which the instant Motions arose.

On October 29, 2018, Plaintiffs filed a Motion seeking a perpetuation deposition of Defendant Joe Marino under Federal Rule of Civil Procedure 27.[1] Plaintiffs argue such a deposition is necessary because Marino has been diagnosed with Amyotrophic Lateral Sclerosis, commonly known as ALS and Lou Gehrig's Disease, a debilitating disease that may make Marino incompetent to serve as a witness during trial.

On November 28, 2018, Magistrate Judge van Meerveld granted Plaintiffs' Motion in part.[2] Judge van Meerveld ruled that Marino must appear for a deposition before December 31, 2018.[3] She also ruled that the deposition should be a discovery deposition pursuant to Rule 30, not a perpetuation deposition

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1 *See* Doc. 392.

2 *See* Doc. 417.

3 *Id.*

pursuant to Rule 27.[4] In her ruling, Judge van Meerveld informed Plaintiffs that if they believed a perpetuation deposition was necessary following the discovery deposition, and if Marino would not consent to such a deposition, they could seek relief from the court for a perpetuation deposition.[5]

On December 4, 2018, Marino appealed the ruling, arguing that the court should not allow discovery to proceed because Defendants plan to move to dismiss this action for lack of jurisdiction.[6] Plaintiffs oppose and make an appeal themselves, arguing that Judge van Meerveld should have granted them a Rule 27 perpetuation deposition. In their Motion appealing Judge van Meerveld's ruling, Plaintiffs attached as an exhibit screenshots of web pages containing information about ALS.[7] Marino moved to strike the exhibit from the Record as inadmissible hearsay.[8]

This Court heard oral argument on the appeals on December 12, 2018.

LEGAL STANDARD

A district judge may refer any non-dispositive pretrial matter to a United States Magistrate Judge.[9] District judges must consider timely objections to

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[4] *Id.*

[5] *Id.*

[6] *See* Doc. 418.

[7] *See* Doc. 423-3.

[8] *See* Doc. 428-1.

[9] 28 U.S.C. § 636(b)(1)(A). *See Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995).

rulings by magistrates on such matters, and they must "modify or set aside any part of the order that is clearly erroneous or contrary to law."[10] "A finding is clearly erroneous only if it is implausible in the light of the record considered as a whole."[11]

LAW AND ANALYSIS

Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[12] Rule 30 provides that parties may conduct discovery by deposition.[13] Rule 27 provides that under limited circumstances parties also may conduct depositions to perpetuate the testimony of certain witnesses who may be unavailable for trial.[14]

Plaintiffs in this case seek to depose Defendant Joe Marino, who represented Plaintiffs in Drug Court in Jefferson Parish. Plaintiffs allege that Marino committed professional malpractice in his capacity as their attorney in Drug Court. The parties do not dispute that Marino has knowledge of discoverable information relevant to Plaintiffs' claims. The parties also do not dispute that Marino suffers from ALS.

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[10] *See* Fed. R. Civ. P. 72(a).

[11] *Moore v. Ford Motor Co.*, 755 F.3d 802, 808 n.11 (5th Cir. 2014) (quoting *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006)).

[12] Fed. R. Civ. P. 26(b)(1).

[13] Fed. R. Civ. P. 30.

[14] Fed. R. Civ. P. 27.

This lawsuit was filed more than two and a half years ago. Although many of Plaintiffs' initial claims have been dismissed, state law claims against Marino remain. Federal claims against Defendant Sheriff Joe Lopinto also remain. Marino argues that Judge van Meerveld was clearly erroneous when she ordered his deposition to be taken. This Court disagrees.

Because claims remain pending against Marino, and at this time this Court possesses jurisdiction over this lawsuit, this Court finds that Judge van Meerveld was not clearly erroneous when she ordered a discovery deposition of Marino to be taken before December 31, 2018. The timeliness of the deposition is particularly important considering Marino's ALS diagnosis.

This Court also finds that Judge van Meerveld was not clearly erroneous when she denied Plaintiffs' request for a Rule 27 perpetuation deposition. Plaintiffs asked Judge van Meerveld to order Marino to submit to a deposition. She granted Plaintiffs' request. They are entitled to a Rule 30 deposition of Marino because they have shown he likely possesses knowledge of information relevant to their claims against him.

When asked how they were harmed by Judge van Meerveld's ruling, Plaintiffs' expressed concern that the scope of their questioning would be more limited in a Rule 30 deposition than in a Rule 27 perpetuation deposition. They argued that a Rule 27 deposition would allow them to question Marino about information relevant to claims against previously named defendants that this Court dismissed but that are pending on appeal, whereas a Rule 30 deposition would not.

Judge van Meerveld's ruling left open the possibility that Plaintiffs' could seek a perpetuation

deposition—or some type of additional deposition—of Marino if necessary after Plaintiffs' conduct their initial discovery deposition. In other words, the ruling expressly noted that if Plaintiffs determine during their discovery deposition of Marino that they need to perpetuate his testimony for any reason, they can seek such relief from the Court. If the parties cannot agree on the scope of questioning Marino may face in his discovery deposition, they can seek relief from Judge van Meerveld.

Finally, this Court finds that the web pages containing information about ALS that are attached to Plaintiffs' Motion appealing Judge van Meerveld's ruling are unreliable and unhelpful. They are unreliable because the documents are unauthenticated screen shots of Internet web pages. They are unhelpful because it is undisputed that ALS is a progressive degenerative disease. Therefore, Defendants' Motion to Strike Record Document 423-3 is granted.

CONCLUSION

In conclusion, the parties' Cross-Motions appealing Magistrate Judge van Meerveld's ruling that ordered Defendant Marino to submit to a deposition are DENIED, and Defendant Marino's Motion to Strike is GRANTED. Defendant's Motion to Expedite the Motion to Strike and Request for Oral Argument on the Motion to Strike are DENIED as moot.

New Orleans, Louisiana this 13th day of December, 2018.

/s/ Jane Triche Milazzo
United States District Judge

**OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(DECEMBER 12, 2018)**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court are two Motions for Reconsideration filed by Plaintiffs (Docs. 356, 381), a Motion for Reconsideration filed by Defendants Normand and Lopinto (Doc. 366), and a Motion to Strike and a Motion for Leave to File a Declaration by Defendants Joe McNair, McNair & McNair, L.L.C., and Philadelphia Indemnity Insurance Company (Docs. 360, 362).

For the following reasons, the Motions for Reconsideration are DENIED, the Motion to Strike is DENIED, and the Motion for Leave to File a Declaration is GRANTED.

BACKGROUND

This lawsuit arises out of the participation by Plaintiffs Taylor Carlisle and Emile Heron in Jefferson Parish's Drug Court. Much of the background of this litigation has been reproduced in Orders and Reasons previously issued by this Court. The Court will nevertheless briefly discuss the procedural history that lead up to the Motions it is considering in this Order and Reasons.

On March 20, 2018, Defendants Joe McNair, McNair & McNair, L.L.C., and Philadelphia Indemnity Insurance Company (collectively "the McNair Defendants") filed a Motion for Partial Summary Judgment.[1] On August 30, 2018, this Court granted the McNair Defendants' Motion.[2] Plaintiffs then asked this Court to reconsider its ruling.[3] Attached to Plaintiffs' Motion for Reconsideration was an Affidavit signed by Plaintiff Taylor *Carlisle*.[4] The McNair Defendants moved to Strike *Carlisle*'s Affidavit from the Record.[5] The McNair Defendants also moved for Leave to File a Declaration by Neil Johnston in response to Plaintiffs' Motion for Reconsideration.[6]

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[1] Doc. 280.

[2] Doc. 355.

[3] Doc. 356.

[4] *See* Doc. 356-4.

[5] *See* Doc. 360.

[6] *See* Doc. 362.

On May 25, 2018, Defendant Joseph Lopinto filed a Motion to Dismiss Plaintiffs' claims against him.[7] On September 25, 2018, this Court granted in part Lopinto's Motion.[8] Both Plaintiffs' and Lopinto filed Motions for this Court to Reconsider its August 30, 2018 Order and Reasons.[9]

LEGAL STANDARD

A Motion for Reconsideration of an interlocutory order is governed by Federal Rule of Civil Procedure 54(b).[10] "Under Rule 54(b), 'the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.'"[11]

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7 *See* Doc. 307.

8 Doc. 359.

9 *See* Docs. 364, 381.

10 *See* Fed. R. Civ. P. 54(b) (noting that a district court may revise at any time prior to final judgment "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties"); *McClendon v. United States*, 892 F.3d 775, 781 (5th Cir. 2018) (applying the Rule 54(b) standard to a motion to reconsider an interlocutory order); *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (same). *See also Int'l Corrugated & Packing Supplies, Inc. v. Lear Corp.*, 694 F. App'x 364, 366 (5th Cir. 2017) (holding that a district court abused its discretion in applying the Rule 59(e) standard when reviewing an interlocutory order pursuant to Rule 54(b)).

11 *Austin*, 864 F.3d at 336 (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990)).

LAW AND ANALYSIS

The Court will first address Plaintiffs' Motion for Reconsideration of this Court's August 30, 2018 Order and Reasons and Defendants' related Motion to Strike and Motion for Leave to File a Declaration. Next, the Court will address the parties' Motions for Reconsideration of this Court's September 25, 2018 Order and Reasons.

I. Motions related to This Court's August 30, 2018 Order and Reasons

In its August 30, 2018 Order and Reasons, this Court ruled that Plaintiffs' claims against the McNair Defendants arising from conduct that occurred before April 27, 2015 had prescribed.[12] In so ruling, the Court found specifically that Plaintiff *Carlisle* had constructive knowledge of the facts necessary to trigger the prescriptive clock for his negligence claims against the McNair Defendants.[13] In their Motion for Reconsideration, Plaintiffs' challenge this finding by the Court, mostly re-hashing and expanding on the same arguments they already presented when this Court considered Plaintiffs' opposition to the McNair Defendants' Motion for Partial Summary Judgment.

To the extent Plaintiffs' cite to new evidence including Taylor *Carlisle*'s Affidavit and his probation records—to support their Motion, the Court finds that such evidence does not change the result of its previous decision. The fact remains that *Carlisle* knew, before April 2015, every time he received a

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[12] Doc. 355.

[13] *Id.*

sanction from the Drug Court. He also knew of Joe McNair's involvement with the Drug Court because McNair appeared at *Carlisle*'s hearings there. *Carlisle* had even met with McNair on at least one occasion years before he filed suit against him. Plaintiffs, therefore, have failed to produce a sufficient reason for this Court to reconsider its Order and Reasons granting partial summary judgment in favor of the McNair Defendants. Plaintiffs' Motion for Reconsideration of this Court's August 30,2018 Order and Reasons is denied.

Because this Court is denying Plaintiffs' Motion for Reconsideration, this Court finds that Defendants will suffer no harm if *Carlisle*'s Affidavit remains in the Record at this time. Therefore, Defendants' Motion to Strike the *Carlisle* Affidavit from the Record is denied without prejudice.

In a similar vein, this Court finds that Plaintiffs will suffer no harm if this Court allows the Declaration of Neil Johnston into the Record. As such, Defendants' Motion for Leave to file the Declaration into the Record is granted.

II. Motions related to this Court's September 25, 2018 Order and Reasons

In its September 25, 2018 Order and Reasons, this Court held that the U.S. Supreme Court's decision in *Heck v. Humphrey* barred Plaintiffs' claims against Defendant Lopinto to the extent Plaintiffs sought

relief for detention based on judicial incarceration orders that had not been invalidated.[14]

This ruling resulted in the dismissal of most of Plaintiffs' claims against Lopinto. The Court also held, however, that *Heck* did not bar Plaintiffs' claims that the Sheriff's Office detained them while they waited for a bed to open at a drug treatment facility, to the extent such detainment was not pursuant to a court order.[15] The Court held that the same result applied to Plaintiffs' claims that the Sheriff's Office denied good time credit, again to the extent that any such denial contradicted a judicial order.[16]

Lopinto now argues in his Motion for Reconsideration that the Court's ruling resulted in manifest error because Plaintiffs never pleaded the wrongful detention claims that this Court held survived Lopinto's Motion to Dismiss. This Court finds that Plaintiffs did plead such claims, at least as to Plaintiff Heron, in their First Amended Complaint.[17] Because Plaintiffs alleged they were detained beyond the scope of court orders, as this Court previously ruled, such claims are not barred by *Heck*. Therefore, Defendants' Motion for Reconsideration is denied.

Defendants in a footnote in their Motion for Reconsideration argue that this Court should "reconsider its Order and dismiss the claims against" Defendant

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[14] *See* Doc. 359. *See also Heck v. Humphrey*, 512 U. S. 477, 482, 114 S. Ct. 2364,129L. Ed. 2d 383 (1994).

[15] *See* Doc. 359.

[16] *See id*.

[17] Doc. 14 at 4,6.

Newell Normand.[18] This Court notes, however, that unlike Lopinto, Defendant Normand did not move to dismiss the claims against him.[19] Lopinto did note—again in a footnote—in his Motion to Dismiss that pursuant to Federal Rule of Civil Procedure 25, he was automatically substituted as the Defendant for Plaintiffs' official capacity claims against Defendant Normand when Lopinto succeeded Normand as Jefferson Parish's sheriff.[20] This Court cannot reconsider a request that was never made. To the extent Defendant Normand wants to be terminated from this suit, he should request the appropriate relief. The Court will consider such a request when it is made.

Finally, Plaintiffs' moved for this Court to reconsider its September 25, 2018 ruling regarding the claims against Defendant Lopinto.[21] Plaintiffs mostly recycle the same arguments they made in opposition to Lopinto's original Motion to Dismiss, except in this motion they home in on one particular issue. Plaintiffs essentially argue that judicial orders contained in minute entries are not judicial orders. This argument has no merit. A judicial order is a judicial order whether it is stated in written reasons or whether it is given orally and recorded for the Record in a minute entry. Neither this argument nor any other presented by Plaintiffs provide this Court with sufficient reason to reconsider its previous ruling. Thus, for the same reasons explained in this Court's September 25, 2018

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[18] Doc. 366 at 1, n.1.

[19] *See* Doc. 307.

[20] *See* Doc. 307-1 at 1, n.1.

[21] *See* Doc. 381.

Order and Reasons, Plaintiffs' Motion for Reconsideration is denied.

CONCLUSION

In Conclusion, Plaintiffs' Motions for Reconsideration (Docs. 356, 381) and Defendants' Motion for Reconsideration (Doc. 366) are DENIED. Defendants' Motion to Strike Taylor *Carlisle*'s Affidavit (Doc. 360) is DENIED without prejudice, and Defendants' Motion for Leave to File the Declaration of Neil Johnston (Doc. 362) is GRANTED.

New Orleans, Louisiana this 12th day of December, 2018.

/s/ Jane Triche Milazzo
United States District Judge

OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(SEPTEMBER 25, 2018)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: H(1)

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court are a Motion to Dismiss filed by Defendant Sheriff Joseph Lopinto (Doc. 307) and two Motions to Dismiss by Defendant Patricia Klees: a Motion to Dismiss for Failure to State a Claim and Lack of Jurisdiction (Doc. 308) and a Motion to Dismiss Based on Prescription (Doc. 309). For the following reasons, Defendant Lopinto's Motion is GRANTED IN PART, Defendant Klees's Motion to Dismiss for Failure to State a Claim and Lack of Jurisdiction is GRANTED, and Defendant Klees's

Motion to Dismiss Based on Prescription is DENIED AS MOOT.

BACKGROUND

The facts and procedure of this case are set forth in this Court's Order and Reasons' of October 31, 2017, and December 19, 2017. They need not be repeated here.[1] Defendant Lopinto now files a Motion to Dismiss arguing that Plaintiff Carlisle's claims against him are barred by *Heck v. Humphrey*.[2] Lopinto additionally argues that Plaintiff fails to state a claim because Defendant Lopinto lacks the power to grant a remedy.[3] Plaintiff opposes the motion.[4] Defendant Klees now files two motions to dismiss. Klees argues first that she is immune from claims against her in her official capacity under the Eleventh Amendment.[5] Second, for the claims against Klees in her individual capacity, she argues that she is entitled to absolute immunity and, in the alternative, qualified immunity.[6]

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1 *See* Docs. 178, 231.

2 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (holding that damages claims do not exist under § 1983 based on an allegedly invalid incarceration except in very limited circumstances). *See also* Doc. 307-1.

3 *See* Doc. 307-1.

4 *See* Doc. 330.

5 *See* Doc. 308-1.

6 *See* Doc. 308-1.

Klees further argues that all claims against her are prescribed.[7] Plaintiff opposes.[8]

LAW AND ANALYSIS

I. *Heck v. Humphrey* Bars Plaintiff's Claims Against Lopinto

Sheriff Lopinto moves to dismiss Plaintiff Carlisle's claims against him. While Lopinto acknowledges that there are multiple Plaintiffs in this suit, he moves only to dismiss the claims asserted by Plaintiff Carlisle.[9]

Defendant Lopinto first moves to dismiss Plaintiff Carlisle's claims against him on the ground that they are barred by *Heck v. Humphrey*.[10] This Court previously held that Heck applies to Plaintiff's claims for damages based on Plaintiff's incarceration imposed as a sanction in Drug Court.[11] Because Plaintiff's incarceration has not been invalidated in some other proceeding, Plaintiff may not maintain a § 1983 claim based on the invalidity of that incarceration.[12] The

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[7] *See* Doc. 309-1.

[8] *See* Docs. 328, 329.

[9] Doc. 307-1 at 1 ("Defendant has moved to dismiss Plaintiff Carlisle's claims against him on grounds that same are *Heck* barred and otherwise fail to state a cause of action.").

[10] *See* 512 U.S. at 477.

[11] Doc. 178 at 19-21.

[12] Obtaining a certificate of appealability in a federal § 2254 proceeding does not mean that the imprisonment has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus" because a COA is not a writ of habeas corpus.

Heck rule also applies to claims for prospective injunctive or declaratory relief "if a favorable judgment would 'necessarily imply' the invalidity of the prisoner's 'conviction' . . . or the length of the prisoner's confinement."[13] Therefore, for the same reasons set forth in this Court's previous ruling that *Heck* applies to Plaintiff's claims for damages, *Heck* also bars Plaintiff's claims for prospective relief declaring unconstitutional the Drug Court procedures under which Plaintiff was sanctioned to terms of imprisonment.

Plaintiff, however, raises several arguments in support of the proposition that *Heck* does not apply here. For example, Plaintiff argues that his claims may proceed under *Wolff v. McDonnell*.[14] *Wolff*, however, does not control this case. In Wolff, the Supreme Court granted the plaintiff relief under § 1983 not for an invalid incarceration but instead for the violation of procedural Due Process rights that exist in the context of prison disciplinary hearings.[15] In fact, the Court in Wolff specifically clarified that habeas corpus, not § 1983, is the proper procedural vehicle for seeking relief from an invalid incarceration.[16] Here, Plaintiff seeks damages "associated with the sheriff's failure to

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Heck, 512 U.S. at 487. Thus, the COA in this case does not rise to the level of invalidation necessary to overcome the *Heck* bar.

[13] *Clarke v. Stalder*, 154 F.3d 186, 189 (5th Cir. 1998) (holding that a claim for declaratory relief that the prison disciplinary rule under which plaintiff was convicted was unconstitutional was barred by Heck because it would necessarily imply that plaintiff's sanction was invalid).

[14] 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

[15] *See id*. at 554-55.

[16] *See id*.

provide credit for good time served," not for the deprivation of procedural rights in the decision to do so.[17] As such, Plaintiff seeks relief that necessarily would invalidate his underlying contempt sentence—the exact type of relief the Court in *Wolff* held is unavailable via § 1983. Thus, Plaintiff's claim is not a *Wolff* claim.

Plaintiff also raises additional yet equally unpersuasive arguments regarding *Heck*'s applicability to this case. For instance, Plaintiff argues that *Heck* does not apply to Sheriff Lopinto because he is an "independently elected official," not a "state actor."[18] Whether an official is elected has no bearing on whether the official is a state actor for purposes of § 1983. As a local law enforcement officer, a sheriff undoubtedly is a state actor for purposes of § 1983.[19] Plaintiff also argues that *Heck* does not apply because Plaintiff is no longer imprisoned, but this Court has already rejected that argument.[20]

Finally, Plaintiff argues that some of his claims against the Sheriff are for detention while awaiting a bed at a drug treatment program or otherwise for detention not pursuant to a sentence or conviction.[21]

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[17] Doc. 330 at 7.

[18] *See* Doc. 330 at 11.

[19] *See Grant v. Sistrunk*, 41 F.3d 663 (5th Cir. 1994) (noting it was "beyond dispute" that officials of a sheriff's department were state actors for § 1983 purposes).

[20] Doc. 178 at 21.

[21] Plaintiff also refers to a claim that the Sheriff failed to present Plaintiff to a magistrate within 72 hours of being arrested for a

Heck does not bar a claim for incarceration that was not imposed pursuant to a judicial order. Similarly, *Heck* does not bar claims against the Sheriff for denying Plaintiff good time if the order imposing his incarceration did not specify that punishment. Therefore Plaintiff's claims for wrongful imprisonment against the sheriff remain but only to the extent that the imprisonment or refusal to consider good time was not pursuant to an order from Drug Court.

Defendant Lopinto also moves to dismiss Plaintiff's claims on the grounds that Defendant Lopinto lacks the authority to amend a sentence imposed by a judge. The claims to which this defense would apply—those for incarceration pursuant to an order of the Drug Court—are coterminous with the claims that this Court determined above are barred by *Heck*. Therefore the Court does not reach this argument.

II. Plaintiffs Fail to State a Claim Against Klees

Defendant Klees moves to dismiss Plaintiffs' claims against her in her official capacity on the ground that they are barred by sovereign immunity under the Eleventh Amendment. This Court has previously dismissed claims against other administrators of Drug Court in their official capacities as claims against the State itself barred by sovereign immunity.[22] Plaintiffs argue that their official-capacity claims against Klees for directing the arrest and incarceration of Plaintiffs are for acts that she took in her capacity as a police

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new charge. None of Plaintiff's amended complaints contain such a claim.

[22] *See* Docs. 136, 178.

officer for the City of Gretna rather than in her capacity as a Drug Court administrator.

Plaintiffs' Second Amended Complaint first mentions Klees in the section that "supplement[s] the official capacity claims."[23] There, Klees is identified as a "program official" who was "deemed under federal law to be acting as [an] official[ ] of the program."[24] Plaintiffs allege that "the program officials sued herein, in their official capacity, namely . . . Klees . . . compose the 'team' . . . who are operating the program."[25] Plaintiffs' Second Amending Complaint does not allege that Klees acted in her capacity as a Gretna police officer. The Second Amended Complaint contains only two references to the Gretna Police Department. In one, Plaintiffs allege that the Gretna Police Department detained Plaintiff Carlisle on August 25, 2015, and took him to the Jefferson Parish Correction Center.[26] Plaintiffs do not allege that Klees was the officer who carried that out. In the other, Plaintiffs allege that "[t]he Probation officer Theriot accepted the hearsay of Officer Klees and Mussall and Becnel and arranged an attachment to issue through Gretna Police Department and directed Officer Fortmeyer to arrest Carlisle. Carlisle was booked at Gretna PD."[27] Again, Plaintiffs do not allege that Klees was the officer of the Gretna Police Department who issued the attachment for, arrested, or booked Plaintiff

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[23] Doc. 117 at 4.

[24] Doc. 117 at 4.

[25] Doc. 117 at 9.

[26] Doc. 117 at 45.

[27] Doc. 117 at 45-46.

Carlisle. This Court therefore finds that Plaintiffs have not stated a claim against Defendant Klees in her official capacity as an officer of the Gretna Police Department.

Because Plaintiffs' only official-capacity claims against Klees arise from her role as an administrator of Drug Court, they are actually claims against the Drug Court itself. As such, they merge with Plaintiffs' claims against other Drug Court administrators in their official capacities.[28] This Court has already dismissed Plaintiff's claims against the Drug Court.[29] For the same reasons set forth previously by this Court, Plaintiffs' claims against Defendant Klees for declaratory or injunctive relief are dismissed for lack of standing.[30]

The parties dispute whether Plaintiffs have also sued Defendant Klees in her personal capacity. Plaintiffs' Second Amended Complaint does not explicitly state that it asserts a claim against Klees in her personal capacity, and in fact it does not mention Klees in any section purporting to assert any claims against anyone in their personal capacities. As described above, Klees is named as a defendant in a section of the Second Amending Complaint that purports to supplement Plaintiffs' official capacity claims. Therefore, while the Second Amended Complaint presents facts that could form the basis of Klees's personal liability, Plaintiffs fail to make a short and plain statement

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[28] *See Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 485 (5th Cir. 2000).

[29] Doc. 178 at 12-18.

[30] *See* Doc. 178 at 15-18.

that they seek relief from Klees individually. "[A] § 1983 suit naming defendants only in their 'official capacity' does not involve personal liability to the individual defendant."[31] Accordingly, Plaintiffs have not asserted a claim against Klees in her personal capacity, and no claims against her remain. Even if such claims existed, however, Klees would benefit from both absolute and qualified immunity.[32]

Defendant Klees further moves to dismiss the class allegations against her pursuant to Federal Rule of Civil Procedure 23. Plaintiffs do not contest this argument. For the same reasons that this Court previously dismissed the class allegations against other Drug Court administrators, the class allegations against Defendant Klees are dismissed as well.[33]

In light of the foregoing holding, there are no remaining claims against Klees, and her Motion to Dismiss based on prescription is moot.

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[31] *Turner*, 229 F.3d at 483.

[32] This Court previously held that other administrators of Drug Court enjoy absolute judicial immunity. Doc. 110 at 15-16. Klees, also a Drug Court administrator, enjoys the same immunity for her role in any sanctions Plaintiffs received. Further, because Plaintiff Carlisle has not shown the existence of a "clearly established" right that was violated when he signed an agreement waiving his Due Process rights in Drug Court, Klees also enjoys qualified immunity under the test for qualified immunity created by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), and further explained in *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2008).

[33] *See* Doc. 110 at 16.

CONCLUSION

For the foregoing reasons, Defendant Lopinto's Motion to Dismiss (Doc. 307) is GRANTED IN PART. Defendant Klees's Motion to Dismiss for Failure to State a Claim and Lack of Jurisdiction is GRANTED, and Defendant Klees's Motion to Dismiss Based on Prescription is DENIED AS MOOT.

New Orleans, Louisiana this 25th day of September, 2018.

/s/ Jane Triche Milazzo
United States District Judge

**OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(DECEMBER 19, 2017)**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"(1)

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court are the McNair Defendants' Motion to Dismiss State-Law Claims on Jurisdictional Grounds (Doc. 181), the McNair Defendants' Motion for Reconsideration of Denial of Motion to Dismiss Therapist Malpractice Claim (Doc. 182), Plaintiffs' Motion for Reconsideration of Order Dismissing Claims for Injunctive and Declaratory Relief (Doc. 189), Defendant Drug Court Administrators' Motion for Entry of Judgment (Doc. 197), Plaintiffs' Motion for a Certificate of Appealability (Doc. 191), and Defendant Marino's Motions to Reconsider, for Judgment on the

Pleadings, and to Strike (Doc. 199). The Court will address each in turn.

BACKGROUND

Plaintiffs Taylor *Carlisle* and Emile Heron were convicted of the possession of various controlled substances and, as a part of their sentences, enrolled in the Drug Court program of the 24th Judicial District Court.[1] Plaintiffs allege that the program administrators deprived them of due process in various ways, leading to unlawful incarcerations and other negative consequences.

Plaintiffs' Complaint[2] and First Supplementing Complaint[3] name as defendants Jefferson Parish Sherriff Newell Normand; Kristen Becnel, Tracy Mussal, and Kevin Theriot (collectively, the "Drug Court Administrators"); Joseph McNair, a professional counselor and the Drug Court clinical director; Joe Marino, the attorney working with Drug Court, and Richard Thompson, his supervisor.[4] Plaintiffs assert claims for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 regarding the allegedly illegal procedures employed by Drug Court, damages pursuant to § 1983, and state-law claims of professional negligence against Defendants McNair, Marino, and

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[1] Docs. 1, 14. For a more complete description of the procedural history of the case, with which the Court and parties are no doubt familiar, see the Court's Order and Reasons of October 31, 2017, Doc. 178.

[2] Doc. 1.

[3] Doc. 14.

[4] Doc. 1.

Thompson. Plaintiffs also seek certification of two classes of similarly situated Drug Court participants.

Three groups of Defendants moved separately to dismiss Plaintiffs' claims as stated in their Complaint and First Supplementing Complaint. In a consolidated Order and Reasons issued May 23, 2017, the Court dismissed with prejudice the personal-capacity claims against Defendant McNair under § 1983 because McNair had qualified immunity, and the personal-capacity claims for damages against the Drug Court Administrators under § 1983 because the they enjoyed absolute judicial immunity.[5] The Court also struck the class allegations against Defendants McNair and the Drug Court Administrators for the failure to plead common questions of law and fact, and dismissed other claims without prejudice.[6] Further, in an August 1, 2017 Order and Reasons, the Court dismissed with prejudice all official-capacity claims for damages against Defendants McNair and the Drug Court Administrators as barred by the Eleventh Amendment.[7]

Plaintiffs submitted a Second Amending and Supplementing Complaint ("Second Amending Complaint").[8] It reasserts the entirety of the original Complaint and First Supplementing Complaint. It also adds the following parties: Officer Patricia Klees of the Gretna Police Department, alleged to be a team member of Drug Court; McNair & McNair, LLC ("McNair's Business"); Defendant Joseph McNair in

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[5] Doc. 110.

[6] Doc. 110.

[7] Doc. 136.

[8] *See* Doc. 117.

his official capacity as a member of the Drug Court team; Jefferson Parish; and two unidentified insurance companies.

Defendants McNair, McNair's Business, Marino, Thompson, and the Drug Court Administrators (collectively, "the Second Group of Moving Defendants") made a second round of motions to dismiss. In an October 31, 2017 Order and Reasons, the Court dismissed the following claims with prejudice: a) all official-capacity claims for damages under § 1983 against the Second Group of Moving Defendants because Drug Court is an arm of the state and protected by Eleventh Amendment immunity, b) all official-capacity claims for injunctive or declaratory relief against the Second Group of Moving Defendants because Plaintiffs are no longer enrolled in Drug Court and thus lack standing, c) the personal-capacity claims for damages against Defendants Marino and Thompson under § 1983 because such claims are barred by *Heck v. Humphrey*,[9] d) Plaintiff Heron's state-law negligence claims against Defendants McNair and McNair's Business because Heron failed to make any factual allegations against them, and e) Plaintiffs' state-law negligence claims against Defendant Thompson because Plaintiffs alleged no facts specific to Thompson.[10] Additionally, the Court struck the class allegations related to the negligence claims against Defendants McNair and McNair's Business for failing to plead common questions of law and fact.

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[9] *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[10] Doc. 178.

The Court declined to dismiss the state-law negligence claims asserted against Defendant Marino by Plaintiffs *Carlisle* and Heron, and against Defendants McNair and McNair's Business by Plaintiff *Carlisle*, finding that Plaintiffs stated a plausible claim for relief and that the Court would continue to exercise supplemental jurisdiction over the state-law claims while federal claims related to the same events remained pending against other defendants.

On November 7, 2017, the Court dismissed without prejudice Plaintiffs' claims against Defendant Jefferson Parish, finding that Plaintiffs failed to allege any facts connecting Jefferson Parish to Drug Court.[11]

At this point, the claims remaining in this action are as follows:

1) Plaintiff *Carlisle*'s negligence claims against Defendants McNair and McNair's Business;

2) Plaintiffs *Carlisle* and Heron's malpractice claims against Defendant Marino;

3) Plaintiffs' claims for declaratory and injunctive relief and damages under § 1983 against Defendant Sherriff Normand;

4) Plaintiffs' claims for declaratory and injunctive relief and damages under § 1983 against Defendant Klees;

Now before the Court are a group of motions relating to the reconsideration or finality of the Court's rulings described above. The Court will address each in turn.

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[11] Doc. 179.

LEGAL STANDARD

A Rule 12(b)(1) motion challenges the subject matter jurisdiction of a federal district court. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case."[12] In ruling on a Rule 12(b)(1) motion to dismiss, the court may rely on (1) the complaint alone, presuming the allegations to be true, (2) the complaint supplemented by undisputed facts, or (3) the complaint supplemented by undisputed facts and by the court's resolution of disputed facts.[13] The proponents of federal court jurisdiction in this case, Plaintiffs—bear the burden of establishing subject matter jurisdiction.[14]

A Motion for Reconsideration of an interlocutory order is governed by Federal Rule of Civil Procedure 54(b), which states that: "[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." "Under Rule 54(b), 'the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an

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12 *Home Builders Assn of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

13 *Den Norske Stats Oljeselskap As v. HeereMac Vof.*, 241 F.3d 420, 424 (5th Cir. 2001).

14 *See Physician Hosps. Of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012).

intervening change in or clarification of the substantive law.'"[15] "[T]he power to reconsider or modify interlocutory rulings is committed to the discretion of the district court, and that discretion is not cabined by the heightened standards for reconsideration governing final orders."[16]

LAW AND ANALYSIS

I. The McNair Defendants' Motion to Dismiss State-Law Claims on Jurisdictional Grounds (Doc. 181)

Defendants McNair and McNair's business move to dismiss Plaintiff *Carlisle*'s state-law negligence claims against them on the grounds that the Court lacks jurisdiction.[17] They argue that there is no longer a common nucleus of operative facts between Plaintiffs negligence claim against them and Plaintiffs' remaining federal claims against Defendants Klees and Sheriff Normand.

This Court already concluded that Plaintiffs' state-law negligence claims against Defendant Marino fall within the Court's supplemental jurisdiction because they share a common nucleus of operative facts with the federal claims remaining after the Court's October

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[15] *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 2017 WL 1379453, at *9 (5th Cir. 2017) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990)).

[16] *Id.* (quoting *Saint Annes Dev. Co. v. Trabich*, 443 Fed. App'x. 829, 832 (4th Cir. 2011) (internal quotations removed).

[17] Doc. 181.

31, 2017 Order and Reasons.[18] Plaintiff *Carlisle*'s state-law negligence claims against the McNair Defendants are analogous, and the same reasoning applies. Plaintiffs allegations against the McNair Defendants, that McNair worked with the administrators of Drug Court to operate the program in contravention of best practices and assigned penalties without clinical justification, share operative facts with the § 1983 claims against Defendants Sheriff Normand and Klees, that they operated the Drug Court program in violation of due process and imposed illegal penalties. Accordingly, the McNair Defendants' Motion to Dismiss on Jurisdictional Grounds is DENIED.

II. The McNair Defendants' Motion for Reconsideration of Denial of Motion to Dismiss Therapist Malpractice Claim (Doc. 182)

Defendants McNair and McNair's business move the Court to reconsider its earlier denial of Defendants' motion to dismiss Plaintiff *Carlisle*'s therapist malpractice claim for failure to allege a patient-therapist relationship.[19] Defendants argue that under *Thomas v. Kenton*, a doctor owes no duty to a plaintiff that he examines or treats when the doctor is hired by a third party for its own benefit because the existence of a duty depends on an express or implied contract between the doctor and patient.[20] Because Defendants here were hired by Drug Court, rather than Plaintiff *Carlisle*, they argue that there is no patient-

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[18] *See* Doc. 178 at 25.

[19] Doc. 182.

[20] *See Thomas v. Kenton*, 425 So. 2d 396, 400 (La. Ct. App. 1982).

therapist relationship and therefore that they owed no duty to Plaintiff.

The Court has considered Defendants' arguments in their Motion for Reconsideration and finds that they do not change the outcome or reasoning expressed the Court's original denial of Defendants' motion to dismiss Plaintiffs negligence claims.[21] As Defendants quote, *Thomas* is predicated on the reasoning that "any benefit that the employees receive from having a doctor there to conduct these examinations was only secondary in nature."[22] While Defendants here were hired by Drug Court, it can hardly be imagined that the benefit to Plaintiff of Defendant McNair's treatment recommendations was merely secondary to that contract. Accordingly, the McNair Defendants' Motion for Reconsideration of Denial of Motion to Dismiss Therapist Malpractice Claim is DENIED.

III. Plaintiffs' Motion for Reconsideration of Order Dismissing Claims for Injunctive and Declaratory Relief (Doc. 189)

The Court earlier dismissed Plaintiffs' claims for injunctive and declaratory relief under 42 U.S.C. § 1983 because Plaintiffs were no longer a part of Drug Court and thus lacked standing.[23] Plaintiffs now move for reconsideration of that order based on the fact that Plaintiff *Carlisle* has allegedly been ordered back into Drug Court by the Louisiana Committee on Parole as a condition of his parole from the prison

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21 *See* Doc. 178 at 21-23.

22 *Thomas*, 425 So. 2d at 400.

23 Doc. 178 at 15-18.

sentence imposed pursuant to the conviction that led him to Drug Court initially.[24] Plaintiffs argue that this triggers standing for Plaintiff Heron and the alleged class members because any past participant in Drug Court could be ordered back into Drug Court by the Parole Committee. To support their contention, Plaintiffs submit an affidavit from Plaintiff *Carlisle*'s father who was present for the meeting of the Parole Committee and relates the content of the Committee's discussion and decision.[25]

Defendants argue that, whatever the Parole Committee may have said, Drug Court does not enroll participants who are on active parole and the Parole Committee has no power to order a prisoner into the Drug Court program.[26] Further, they argue that Plaintiffs' affidavit is inadmissible hearsay and that there is evidence the Parole Committee has already revoked for other reasons any decision ordering Plaintiff Carlisle into Drug Court.

Even considering the assertions in a light most favorable to Plaintiffs, until Plaintiff *Carlisle* actually re-enrolls, any interaction with Drug Court remains speculative. Defendants' arguments that Drug Court rules prohibit parolees from participating in the program only lessens the likelihood that Plaintiff *Carlisle* will actually be subject to the allegedly unconstitutional practices of Drug Court in the future. Accordingly, Plaintiffs' Motion for Reconsideration of Order Dismissing Claims for Injunctive and Declaratory Relief

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[24] Doc. 189.

[25] Doc. 189-3.

[26] Docs. 210, 212.

is DENIED. Plaintiffs may re-urge the motion if a plaintiff actually enrolls in Drug Court again.

IV. Defendant Drug Court Administrators' Motion for Entry of Judgment (Doc. 197)

The Court's Order and Reasons dated May 23, August 1, and October 31 of 2017 dismiss all claims against Defendants Becnel, Mussal, and Theriot with prejudice.[27] The Court finds that there is no just reason to delay the issuance of a partial final judgment pursuant to Rule 54. Accordingly, Defendants' Motion for Judgment is GRANTED.

V. Plaintiffs' Motion for a Certificate of Appealability (Doc. 191)

Plaintiffs move for the Court, pursuant to 28 U.S.C. § 1292(b), to certify an interlocutory appeal of this Court's dismissal of Plaintiffs' § 1983 claims on the grounds of qualified and judicial immunity. A district judge shall allow an interlocutory appeal of an order when the judge believes it "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[28] Plaintiffs argue that there is substantial ground for a difference of opinion as to the controlling law because the appellate court could find that Drug Court is not an arm of the state and that judicial immunity does not apply because Drug Court acted outside of its jurisdiction. These are not, however, questions of controlling law, but rather

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[27] Docs. 110, 136, 178.

[28] 28 U.S.C. § 1292(b).

assertions that the Court applied the law to the facts incorrectly.[29] Further, this Court does not believe that an interlocutory appeal will advance the termination of litigation. Accordingly, Plaintiffs' Motion for a Certificate of Appealability is DENIED.

The denial of Plaintiffs' Motion does not, however, impact the appealability of the partial final judgment entered in favor of the Drug Court Administrators, though that judgment relies in part on the same issues Plaintiffs' sought to appeal.

VI. Defendant Marino's Motions (Doc. 199)

Defendant Marino moves the Court to a) reconsider its decision to continue to exercise supplemental jurisdiction over Plaintiffs' state-law claims, b) dismiss Plaintiffs' state-law negligence claims pursuant to Rule 12(c) for the failure to allege that Defendant's conduct caused Plaintiffs a loss, and c) to strike the class allegations against Defendant Marino pursuant to Rule 23(d)(1)(D) for failing to allege numerosity or common questions of law.

For the same reasons explained above in denying the McNair Defendants' Motion to Reconsider, Defendant Marino's Motion to Reconsider is DENIED. A common nucleus of operative facts continues to exist between the remaining federal claims and the state claims asserted against Defendant Marino. Furthermore, at this time the Court does not believe that the case has been developed enough to find that the

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[29] *See AMA Disc., Inc. v. Seneca Specialty Ins. Co.*, 697 F. App'x 354, 355 (5th Car. 2017) (per curiam) ("The parties merely dispute whether the district court accurately applied this standard . . . .").

claims against Marino present novel or complex issues of state law.

Defendant Marino's Motion for Judgment on the Pleadings is also DENIED. Plaintiffs have alleged, inter alia, that had Defendant Marino acted with due care they would not have been subject to unlawful flat-time incarcerations. Taking Plaintiffs allegations as true, they have stated a claim for legal malpractice. That Plaintiffs admit to violating Drug Court policy does not absolve Defendant Marino of any role he may have had in the consequences of those violations that Plaintiffs suffered.

Defendant Marino's Motion to Strike the class allegations against him is GRANTED. The elements of legal malpractice or professional negligence involve questions of law and facts that are unique to each plaintiff, just as those against the McNair Defendants.[30] Accordingly, the class allegations against Defendant Marino are STRICKEN.

CONCLUSION

For the foregoing reasons, the motions contained in Documents 181, 182, 189, and 191 are DENIED. Defendant Drug Court Administrators' Motion for Entry of Judgment (Doc. 197) is GRANTED. Defendant Marino's Motions to Reconsider and for Judgment on the Pleadings are DENIED, and Defendant Marino's Motion to Strike the Class Allegations is GRANTED (Doc. 199).

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30 *See* Doc. 178 at 24.

Further, all motions having been considered, oral argument scheduled for December 20, 2017 is CANCELLED.

New Orleans, Louisiana this 19th day of December, 2017.

/s/ Jane Triche Milazzo
United States District Judge

OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(OCTOBER 31, 2017)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"(1)

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court are three Motions: a Motion to Dismiss filed by Defendants Joe McNair and McNair & McNair, LLC (Doc. 130); a Motion to Dismiss filed by Defendants Richard Thompson and Joseph Marino (Doc. 138); and a Motion to Dismiss filed by Defendants Kristen Becnel, Tracey Mussal, and Kevin Theriot (Doc. 128). For the following reasons, Defendants Joe McNair and McNair & McNair, LLC's Motion is GRANTED IN PART, Defendants Richard Thompson and Joseph Marino's Motion is GRANTED IN PART,

and Defendants Kristen Becnel, Tracey Mussal, and Kevin Theriot's Motion is GRANTED.

BACKGROUND

In this suit, Plaintiffs challenge the manner in which the Jefferson Parish Drug Court ("Drug Court") is conducted. In addition to their individual claims, they seek to represent a class of individuals who were similarly sentenced by the Drug Court.

I. Allegations of Plaintiffs' Complaint and First Supplementing Complaint

Plaintiffs' Complaint and First Supplementing Complaint made the following allegations.[1]

Plaintiff Taylor *Carlisle* was arrested on November 9, 2012 and charged in the 24th Judicial District Court for the Parish of Jefferson with possession of oxycodone in case number 12-6158 and with possession of marijuana and drug paraphernalia in case number 12-6159. On January 30, 2015 he entered a guilty plea as to all charges. In case number 12-6159, he was sentenced to time served, while his plea in case number 12-6158 was entered pursuant to Louisiana Revised Statutes § 13:5304, also known as the "Louisiana Drug Court Statute." He was sentenced to between zero and five years, with the sentence deferred contingent upon his completion of the Jefferson Parish Intensive Drug Court Program while on probation. As part of this program, *Carlisle* was required to maintain regular contact with the program probation officer and Drug Court, attend regular AA meetings, consent to regular drug testing, and present required

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[1] *See* Does. 1, 14.

documentation to the probation officer and Drug Court. He also agreed to waive due process rights in Drug Court proceedings.

His primary claim involves allegations that he received excessive sentences from Drug Court for failure to comply with the terms of the program. On April 28, 2015, he was sanctioned to 90 days flat time.[2] On August 25, 2015, he was sanctioned with six months of flat time for contempt of court when he failed to appear for a hearing. *Carlisle* brings six claims relative to his experience in Drug Court, essentially averring that the closed courtroom, lack of court reporter, and lack of adversarial proceedings violate his due process rights. He also alleges that these sentences were in excess of those permitted under the state law authorizing Drug Court and that they are impermissible flat time sentences. He argues that this is a violation of the Eighth Amendment's protections against cruel and unusual punishment and the Equal Protection Clause of the Fourteenth Amendment. First, he seeks declaratory and injunctive relief prohibiting Drug Court from acting in this unconstitutional manner. Second, he brings a § 1983 claim against Sheriff Normand for deliberate indifference in keeping *Carlisle* in jail for the flat time sentences of 90 and 180 days, in violation of Louisiana law and his Equal Protection and Due Process rights. Third, he brings a § 1983 claim against Drug Court Administrator Kristen Becnel, Program Supervisor Tracy Mussal, Probation Coordinator Kevin Theriot (collectively, the "Drug Court Administrators"), and

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[2] "Flat time" refers to "[a] prison term that is to be served without the benefit of time-reduction allowances for good behavior and the like." Time, Black's Law Dictionary (10th ed. 2014).

Director of Counseling Joe McNair for failure to properly train and supervise the implements of Drug Court policy.

In addition to these constitutional claims, he brings "pendant state law claims" against several individuals. First, he brings a legal malpractice claim against the Drug Court's Indigent Public Defender Board and its staff attorney, Joe Marino. Mr. Marino was appointed to represent *Carlisle* in Drug Court, and *Carlisle* contends that he breached his duty by failing to appropriately defend *Carlisle*. Second, he brings a claim against Drug Court Clinical Director Joe McNair for breach of his duty as a therapist. He avers that McNair owed him a duty to act within the standard of care governing the treatment of patients with substance abuse problems and that he breached that duty by failing to make proper recommendations as to his treatment.

Plaintiff Emile Heron has been a participant in the Drug Court program since April 17, 2012. He pleaded guilty to one count of possession of oxycodone. He alleges that he suffered periods of detention for technical violations of his probation without procedural due process. On July 30, 2013, he was sentenced to 24 hours flat time for failing to complete required community service. He next alleges that, on November 12, 2013, he was sentenced to 30 days flat time for "associating with a felon" despite having never committed that offense. On January 14, 2014, he was sanctioned with 60 days flat time for failing to appear at Drug Court on January 3, 2014. He further avers that he was held for an additional four and a half months at the end of this sentence while waiting for a long term care bed to become available. Eventually,

he was sent to Assisi Bridge House in Shreveport for seven and half months of inpatient treatment. Upon release, he was again sanctioned for noncompliance and sentenced to 16 hours of community service due November 18, 2014. It seems that he failed to complete this community service and was therefore sentenced to 48 hours in the Jefferson Parish Correctional Center on December 2, 2014. On February 5, 2015 he was held in contempt for failure to pay $1,624.50 in fines from the original plea agreement. He was later jailed on December 15, 2015 for failure to complete community service. He alleges that he was held until January 26, 2016, at which time he was sanctioned with six months' time. He alleges that all of these sanctions were imposed without hearing, a court reporter, or formal notice in violation of due process. He also alleges that, while he was incarcerated, his probation was extended by motion without his knowledge.

Plaintiffs also seek certification of the following two classes:

> Those individual natural persons who, while participating as probationers in the 24th Judicial District Court Drug Court program pursuant to Plea Agreement (hereinafter the "probationers") have been sanctioned, for alleged probation infractions and sentenced with jail time in the Jefferson Parish Correctional Center or other location, in excess of ten days as proscribed by LA Code Crim. Proc. 891(C). and/or in violation of the Drug Court Act, R.S. 13:5304 et seq. These probationers include but are not limited to those sentenced to "flat time" in connection

> with said sanctions, as well as those who are alleged to have committed Contempt and sentenced to jail time without a hearing or opportunity to defend, or without a record from which to launch an appeal based on Due Process waivers executed at the time of the Plea Agreement.
>
> [and]
>
> [A]ll persons who are or were participants in Jefferson Parish Drug Court Program "held over" pending (1) revocation of their probation based on technical probation agreement violations imposed by the Drug Court staff or the Court, without evidentiary hearing and due process or statutory authority for issuance of jail sanction or (2) holding a probationer in jail and whose probations were subsequently revoked based on violations for which they were already sanctioned with jail terms or (3) for other reasons not prescribed in the governing statute including pending transfer to a rehabilitation facility.[3]

Plaintiffs aver that all of these individuals were subject to a pattern and practice of conduct whereby they were deprived of liberty under color of state law. They aver that the subject class may consist of more than one thousand individuals and that their claims involve common questions of law and fact.

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[3] Doc. 14 ¶¶ 94-95.

II. Initial Round of Motions to Dismiss

Three groups of Defendants moved separately to dismiss Plaintiffs' claims as stated in the Complaint and First Supplementing Complaint. The Court addressed the motions with a consolidated Order and Reasons on May 23, 2017.[4]

The Court dismissed all personal-capacity claims against Defendant McNair. The Court dismissed the negligence claims without prejudice, finding that Plaintiffs failed to sufficiently allege a doctor-patient relationship.[5] The Court dismissed the failure to train and deliberate indifference claims without prejudice because the Complaints failed to allege a causal connection between McNair and the sanctions imposed by a judge. Further, the Court found that Defendant McNair had qualified immunity against a suit for damages under § 1983 in his personal capacity because Plaintiffs failed to establish that the due process waivers they signed were clearly illegal. The Court accordingly dismissed the personal-capacity 1983 claims for damages with prejudice. The Court found that Plaintiff Heron failed to plead any facts supporting his claims against Defendant McNair and dismissed Plaintiff Heron's claims without prejudice. Finally, the Court struck the class allegations against Defendant McNair for the failure to plead common questions of law and fact relative to him.

The Court dismissed without prejudice Plaintiffs' legal malpractice claims against Defendants Thompson and Marino. The Court found that although such

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[4] Doc. 110.

[5] Doc. 110.

claims fell within the Court's supplemental jurisdiction, Plaintiffs failed to allege that the actions of Defendant Marino caused the harm of which Plaintiffs complain. Plaintiffs further made no factual allegations supporting a malpractice claim against Defendant Thompson.

The Court dismissed with prejudice Plaintiffs' § 1983 claims for damages against the Drug Court Administrators in their personal capacities. The Court found that the Drug Court program is an intensive probation program over which judges preside. Any role the Defendants played in bringing about the allegedly unconstitutional sanctions was judicial in nature, entitling the Drug Court Administrators to absolute judicial immunity. The Court also struck the class allegations against the Drug Court Administrators for failing to allege that those Defendants were involved in the deprivation of rights of all class members.

The Court asked the parties to submit additional briefing on the Court's jurisdiction to hear claims against Defendants in their official capacities. The Court concluded that Drug Court exists under the auspices of the 24th Judicial District Court for the Parish of Jefferson and is therefore an arm of the state. The Court dismissed with prejudice Plaintiffs' official-capacity claims against Defendants McNair and the Drug Court Administrators as barred by the Eleventh Amendment.[6]

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[6] Doc. 136.

III. Plaintiffs' Second Amending and Supplementing Complaint

Having dismissed several of Plaintiffs' claims without prejudice, the Court granted Plaintiffs leave to amend, which they did with the submission of their Second Amending and Supplementing Complaint ("Second Amending Complaint").[7] The Second Amending Complaint re-asserts the entirety of the original Complaint and First Supplementing Complaint. It also adds the following parties: Officer Patricia Klees of the Gretna Police Department, alleged to be a team member of Drug Court; McNair & McNair, LLC ("McNair's Business"); Defendant Joseph McNair in his official capacity as a member of the Drug Court team; Jefferson Parish; and two unidentified insurance companies.

Plaintiffs' Second Amending Complaint alleges additional factual details as to how the Drug Court team, including Defendants McNair, Marino, and the Drug Court Administrators, allegedly conspired to have the Drug Court judge sanction Plaintiffs in violation of due process. Plaintiffs specifically allege that Defendant Klees lied to Defendant Theriot about how Klees discovered Plaintiff *Carlisle*'s missing AA paperwork. Plaintiffs allege that Defendants knowingly ignored national treatment standards and drug court guidelines in implementing the program. Plaintiffs allege that the rights of all class members were violated by Defendants' policies and practices of ignoring treatment standards, recommending illegal sanctions, and participating in proceedings lacking due process.

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7 *See* Doc. 117.

With respect to the state-law claims against Defendant McNair, Plaintiffs allege that McNair evaluated them for treatment and admission into the Drug Court program. Plaintiffs also allege that after the initial February 2013 evaluations, Defendant McNair never again evaluated Plaintiffs or recommended that they be evaluated by another specialist. Plaintiff *Carlisle* alleges that McNair ordered him to go to Oxford House without authority and in violation of the Drug Court authorizing statutes.

IV. Second Round of Motions to Dismiss

Three groups of Defendants again move separately to dismiss the remaining and amended claims against them.

The Drug Court Administrators move the Court to dismiss all claims against them pursuant to Rules 12(b)(1) and 12(b)(6).[8] They argue that Plaintiffs, having been discharged from Drug Court, no longer have standing to bring their claims. The Drug Court Administrators also argue that they have absolute judicial immunity. Plaintiffs oppose the Motion, arguing that Plaintiffs do have standing because they continue to suffer harm, that judicial immunity should not apply, and that the official capacity claims should not have been dismissed in the first place.

Defendants McNair and McNair's Business also move to dismiss for lack of jurisdiction and failure to state a claim, as well as to strike the class allegations.[9] They argue that Plaintiffs lack standing because they

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[8] Doc. 128.

[9] Doc. 130.

have been discharged from Drug Court, that any official-capacity claims against them have been dismissed already pursuant to Eleventh Amendment immunity, and that the Second Amending Complaint fails to allege either numerosity or common questions of law and fact as required by Rule 23. Plaintiffs oppose the motion, arguing that their continued harm gives them standing and that immunity does not apply.

Defendants Marino and Thompson move to dismiss the state-law malpractice claims against them on the grounds that a) the claims do not fall under the Court's supplemental jurisdiction, b) that even if supplemental jurisdiction exists, the fact that the sentences of which Plaintiffs complain have not been overturned presents a compelling reason to decline to exercise supplemental jurisdiction, and c) that Plaintiffs fail to state a claim for legal malpractice because the underlying sentences have not been overturned, Plaintiffs fail to allege causation, and Plaintiffs' allegations against Defendant Thompson are merely conclusory.[10] Defendants Marino and Thompson move to dismiss the § 1983 claims against them on the grounds that a) as defense attorneys, they are private actors and not subject to suit under § 1983, and b) that Plaintiffs lack standing to bring claims for injunctive and declaratory relief. Finally, Defendants Marino and Thompson move to dismiss all claims against them because they are barred by the application of *Heck v. Humphrey* and because Louisiana state courts already

[10] Doc. 138.

adjudicated Plaintiffs' claims.[11] Plaintiffs oppose the Motion, arguing inter alia that *Heck* and res judicata do not apply, and that Defendants Marino and Thompson were not acting as private individuals because they were not traditional defense attorneys.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead enough facts "to state a claim to relief that is plausible on its face."[12] A claim is "plausible on its face" when the pleaded facts allow the court to "[d]raw the reasonable inference that the defendant is liable for the misconduct alleged."[13] A court must accept the complaint's factual allegations as true and must "draw all reasonable inferences in the plaintiffs favor."[14] The Court need not, however, accept as true legal conclusions couched as factual allegations.[15]

To be legally sufficient, a complaint must establish more than a "sheer possibility" that the plaintiffs claims are true.[16] "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements

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[11] *See Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[12] *Ashcroft v. Iqbal*, 556 U.S. 662 667, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

[13] *Id.*

[14] *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009).

[15] *Iqbal*, 556 U.S. at 667.

[16] *Id.*

of a cause of action will not do.'"[17] Rather, the complaint must contain enough factual allegations to raise a reasonable expectation that discovery will reveal evidence of each element of the plaintiffs' claim.[18]

A Rule 12(b)(1) motion challenges the subject matter jurisdiction of a federal district court. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case."[19] In ruling on a Rule 12(b)(1) motion to dismiss, the court may rely on (1) the complaint alone, presuming the allegations to be true, (2) the complaint supplemented by undisputed facts, or (3) the complaint supplemented by undisputed facts and by the court's resolution of disputed facts.[20] The proponents of federal court jurisdiction—in this case, Plaintiffs bear the burden of establishing subject matter jurisdiction.[21]

LAW AND ANALYSIS

Plaintiffs' Second Amending Complaint is replete with factual detail, but at the expense of clarity as to the specific claims that Plaintiffs assert. In the broadest reading of all complaints together, Plaintiffs appear to assert claims under § 1983 for both damages

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[17] *Id*. at 678 (quoting *Twombly*, 550 U.S. at 555).

[18] *Lormand*, 565 F.3d at 255-57.

[19] *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

[20] *Den Norske Stats Oljesels kap As v. Heere MacVof*, 241 F.3d 420 424 (5th Cir. 2001).

[21] *See Physicians Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012).

and injunctive relief against Defendants McNair and McNair's Business, Marino and Thompson, and the Drug Court Administrators (collectively, "Moving Defendants") in both their personal and official capacities.[22]

As explained below, none of Plaintiffs' § 1983 claims against the Moving Defendants survive. Plaintiffs' official-capacity claims for damages are barred by the Eleventh Amendment. Plaintiffs lack standing to bring claims for injunctive or declaratory relief because the Moving Defendants do not have the power, in either their official or personal capacities, to redress the harms of which Plaintiffs complain. And Plaintiffs' personal-capacity claims for damages are barred by the doctrines of either qualified immunity or absolute judicial immunity.

Furthermore, Plaintiffs fail to plead a viable state-law claim against Defendant Thompson, but Plaintiffs' legal malpractice claim against Defendant Marino and negligence claims against Defendants McNair and McNair's Business survive.

I. Section 1983 Claims for Damages Against Moving Defendants in Their Official Capacities

Previously, this Court dismissed Plaintiffs' claims against the Drug Court Administrators and McNair in their official capacities on the grounds that Drug Court is an arm of the state and therefore immune to

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[22] *See, e.g.*, Doc. 117 at 4 (official-capacity claims against Drug Court Administrators, Marino and Thompson, and McNair); Doc. 1 at 7 (naming Defendants without reference to official capacity).

suit under the Eleventh Amendment.[23] Plaintiffs' Second Amending Complaint newly asserts claims against Defendants Marino and Thompson in their official capacities, alleging that they worked in concert with the other Defendants as part of the Drug Court team to deprive Plaintiffs of their rights. For the same reasons as applied to Defendants McNair and the Drug Court Administrators, Plaintiffs' official-capacity claims against Defendants Marino and Thompson are also barred by the Eleventh Amendment. Furthermore, state officials named in their official capacity are not "persons" under § 1983 and therefore are not amenable to suit.[24] Accordingly, the official-capacity claims for damages against Defendants Marino and Thompson are dismissed with prejudice.

In their Oppositions, Plaintiffs repeatedly urge the Court to reconsider the earlier Order and Reasons finding Drug Court to be an arm of the state. Although Plaintiffs have not made a formal motion to reconsider under Rule 59(e), the standard applicable to that rule is informative. "A motion to alter or amend judgment must 'clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued.'"[25] There has been no change in

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[23] Doc. 136. Any official-capacity claims against McNair's Business are likewise dismissed because Plaintiffs have asserted no basis for McNair's Business's liability separate from McNair's liability.

[24] *See Will v. Michigan Dep't of State Police*, 491 U.S. 58. 71, 109 S. Ct. 2304, 105 L. Ed 2d 45 (1989).

[25] *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)).

existing law and Plaintiffs offer no new evidence that was not available when the Court first requested briefing on the issue of Eleventh Amendment immunity.

Regardless, the Court's conclusion that Drug Court is an arm of the state and therefore immune from suit because of the Eleventh Amendment is correct. To determine whether a body is a state agency, courts in the Fifth Circuit must consider,

> (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.[26]

Here, the factors weigh in favor of fmding Drug Court to be an arm of the state. First, the statutes creating the program clearly view it as a function of the state courts, which are themselves state entities.[27] The statutes state that the legislatures intent was to "facilitate the creation of alcohol and drug treatment divisions in the various district courts of this state,"[28]

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[26] *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 319 (5th Cir. 2001) (citing *Clark v. Tarrant Cty*., 798 F.2d 736, 744 (5th Cir. 1986)).

[27] *See Bourgeois v. Par. of Jefferson*, 20 F.3d 465 (5th Cir. 1994) (holding that Louisiana state courts are arms of the state and immune under the Eleventh Amendment); Doc. 136 at n.3.

[28] La. Rev. Stat. § 13:5301.

and authorize "each district court [to] establish a probation program to be administered by the presiding judge or judges thereof or by an employee designated by the court."[29] Opinions from the Louisiana Attorney General also view drug courts as programs of the state courts.[30]

Second, from the information included in Plaintiffs' Second Amending Complaint, Drug Court appears to be funded by federal grants given to the state and administered by the Louisiana Supreme Court.[31] Presumably, any judgment against the Drug Court would be paid out of those funds, which are part of the state treasury.

Third, drug courts are controlled by judicial districts, rather than local parishes, and those judicial districts are not necessarily coterminous with a given parish.[32] Control by a state entity that is separate from local government weighs towards finding that drug courts are arms of the state.

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[29] § 13:5304.

[30] *See, e.g.*, La. Att'y Gen. Op. No. 07-0100 (May 1, 2007) (advising that the district court was the last employer of a drug court staffer, even though the parish paid the staffer's salary, because the parish was reimbursed with court funds).

[31] *See* Doc. 117 ¶¶ 111, 142, 151.

[32] *See* La. Const. art. V. §§ 14-15 (giving the legislature the power to create judicial districts comprising multiple parishes); *cf. Clark v. Tarrant Cty., Tex.*, 798 F.2d 736, 745 (5th Cir. 1986) (concluding that the legal distinction between judicial districts and county lines, though sometimes coterminous, means that probation departments tied to judicial districts are not concerned with county problems).

The fourth factor, whether the entity is concerned with mainly local problems, is mixed. Drug courts are administered by state entities, which suggests that they tackle issues of statewide import. On the other hand, the statute leaves each district court the discretion to establish a drug court, suggesting that the creation of any one drug court program is a response to local conditions.

The fifth and sixth factors, whether the drug courts can sue, be sued, and own property in their own names, are less important.[33] The Court does not have specific information before it relating to those factors. Even if those factors were to lean in the opposite direction, they would not overcome the clear weight of the prior factors toward finding Drug Court to be an arm of the state.

Accordingly, all claims for damages against the Moving Defendants in their official capacities are dismissed with prejudice.

While the Eleventh Amendment bars claims against the state, there are two exceptions relevant to the § 1983 claims here. First, the *Ex parte Young* doctrine allows a plaintiff to sue a state officer in his official capacity for prospective injunctive or declaratory relief.[34] Second, a plaintiff may sue a state officer in his personal capacity for damages resulting from a

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[33] *See Hudson v. City of New Orleans*, 174 F.3d 677, 682 (5th Cir. 1999) ("[W]e typically deal with the last two factors in a fairly brief fashion.").

[34] *See Fontenot v. McCraw*, 777 F. 3d 741, 752 (5th Cir. 2015).

deprivation of the plaintiffs constitutional rights under color of law.[35]

II. Section 1983 Claims for Injunctive or Declaratory Relief

Plaintiffs assert claims for injunctive and declaratory relief against the Moving Defendants in their official capacities. The Moving Defendants argue that Plaintiffs have no standing to sue for declaratory or injunctive relief because they have been discharged from the Drug Court program. Article DI standing requires a plaintiff to show that he suffered a concrete harm that is actual or imminent, caused by the defendant, and redressible by the court.[36] When a plaintiff seeks injunctive or declaratory relief, the plaintiff must also show that he is "likely to suffer future injury by the defendant and that the sought-after relief will prevent that future injury."[37]

To support their contention that Plaintiffs are no longer participating in Drug Court, Defendants submit discharge forms signed by Mussall as the Drug Court Administrator. The forms show that Plaintiff *Carlisle* was discharged from Drug Court on August 10, 2016,[38] and that Plaintiff Heron was discharged on July 20, 2016.[39] Plaintiffs object to the submission of evidence outside the pleadings, arguing that

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[35] *See Hafer v. Melo*, 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).

[36] *See Cole v. Gen. Motors Corp.*, 484 F.3d 717. 721 (5th Cir. 2007).

[37] *James v. City of Dallas Tex.*, 254 F.3d 551. 563 (5th Cir. 2001).

[38] Doc. 128-2.

[39] Doc. 128-3.

reliance on such evidence would convert the motions to dismiss into motions for summary judgment without adequate discovery. This is incorrect, as Defendants have moved under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction. In deciding a jurisdictional issue, the Court may rely on the complaint supplemented by undisputed facts, or the complaint supplemented by undisputed facts and by the Court's resolution of disputed facts.[40]

Plaintiffs do not appear to dispute the fact that they have been discharged from Drug Court. Plaintiffs submit a minute entry from the 24th Judicial District Court recording Plaintiff Heron's revocation and sentencing on his original charge and claim the document "refutes the standing argument and more correctly demonstrates the plaintiffs' current circumstances."[41] But Plaintiffs do not assert in any of their oppositions to the motions to dismiss considered here that Plaintiffs have not been discharged. Therefore, the Court finds that the fact that Plaintiffs have been discharged from Drug Court is an undisputed fact. At the very least, the Court finds the Moving Defendants' evidence sufficient to show that Plaintiffs have been discharged.

While Plaintiffs remain in prison, their current sentences stem from the revocation of their probation, not the imposition during Drug Court of sanction or contempt time. A declaration that the practices of Drug Court were unlawful or an injunction prohibiting such conduct in the future would have no impact on

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[40] *Den Norske Stats Oljesels kap As*, 241 F.3d at 424.

[41] Docs. 146 at 1; 146-1.

the sentences that Plaintiffs are currently serving. Furthermore, any future contact that Plaintiffs may have with Drug Court is merely speculative and cannot be the grounds for standing.[42] Plaintiffs cannot show that they are "likely to suffer future injury by the defendant and that the sought-after relief will prevent that future injury."[43]

Plaintiffs argue that they continue to suffer harm, and thus have standing, by pointing to a litany of negative impacts caused by the actions of Defendants while Plaintiffs were enrolled in Drug Court. Plaintiffs do not, however, demonstrate how declaratory or injunctive relief against the Moving Defendants is likely to redress the vast majority of that harm. For example, injunctive or declaratory relief cannot redress Plaintiffs' lost employment.

Plaintiffs come closest to identifying harms redressible by injunction in two instances. First, Plaintiffs argue that they continue to suffer harm from the imposition of flat time sentences because they should be able to apply against their current post-revocation sentences good time credit that they earned while imprisoned for the allegedly unlawful sanctions. Second, Plaintiffs argue that they should receive credit toward their current post-revocation sentences for all time served while in Drug Court because the underlying infractions were the same events that led to their

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42 *See James*, 254 F.3d at 563.

43 *See id.*

revocations. However, none of the Moving Defendants has the power to grant that relief.[44]

Even if the Moving Defendants were the correct parties against which to seek such an injunction, the claim would be barred by *Preiser v. Rodriguez*.[45] An injunction forcing the state to apply good time or time served credits to Plaintiffs' current sentences would result in earlier release, and the only avenue for such a remedy is a writ of habeas corpus.[46] In *Wolff v. McDonnell*, the Supreme Court did allow prisoners to seek a declaration under, § 1983 that the procedures by which they were denied good time credit were unconstitutional, even though such a judgment could have reduced their sentences through the application of collateral estoppel and res judicata.[47] Plaintiffs here may not pursue such claims because they, unlike the prisoners in Wolff, are not currently subject to the procedures they allege to be deficient. The only interest Plaintiffs now have in changing the Drug Court procedures is to be released from prison sooner based on a retroactive declaratory judgment, a claim foreclosed by *Preiser*.

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[44] *See K.P. v. LeBlanc*, 627 F.3d 115 124 (5th Cir. 2010) (explaining that the Ex Parte Young exception applies only to state officials with at least "some connection" to the compulsion or restraint involved in enforcement).

[45] *See Preiser v. Rodriguez*, 411 U.S. 475 500 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973).

[46] *See id*.

[47] *See Wolff v. McDonnell*, 418 U.S. 539, 542, 94 S. Ct. 2963 41 L. Ed. 2d 935, (1974); *Serio v. Members of Louisiana State Bd. of Pardons*, 821 F.2d 1112, 1116 (5th Cir. 1987) (elucidating guiding principles from *Preiser* and *Wolff*).

Plaintiffs have failed to establish that they are suffering, or are about to suffer, a harm redressible by injunction or declaration directed against the Moving Defendants. Accordingly, Plaintiffs' claims for injunctive and declaratory relief against the Moving Defendants are dismissed with prejudice for lack of standing.

That Plaintiffs have pled a class action is of no import to the standing inquiry.[48] "Before we reach the questions regarding the class certification, we must resolve the standing question as a threshold matter of jurisdiction."[49] "If the litigant fails to establish standing, he or she may not seek relief on behalf of himself or herself or any other member of the class."[50] Plaintiffs here have not been certified as class representatives and so their class action claims cannot preserve their action in the face of Plaintiffs' lack of personal standing.

III. Section 1983 Claims for Damages Against Defendants in Their Personal Capacities

The Court previously dismissed with prejudice Plaintiffs' personal-capacity § 1983 claims for damages against Defendants McNair and the Drug Court Administrators. The Court found that the claims against the Drug Court Administrators could not proceed because any role they played in the imposition of the complained-of sanctions was judicial in nature and thus protected by absolute judicial immunity.[51]

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[48] *See Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S 26 40 n.20 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976).

[49] *Cole*, 484 F. 3d at 721.

[50] *James*, 254 F.3d at 563.

[51] Doc. 110 at 15-16.

Plaintiffs' claims for damages against McNair were barred by qualified immunity because Plaintiffs could not show that the due process waivers they executed were clearly prohibited by law.[52]

Defendants Marino and Thompson argue that Plaintiffs' § 1983 claims for damages against them should be dismissed because a) Marino and Thompson are not state actors, b) *Heck v. Humphrey* bars § 1983 claims for damages that impugn a state sentence unless the sentence has already been invalidated, and c) Plaintiffs' claims are precluded by prior adjudication. The Court finds that Plaintiffs' claims for damages are barred by *Heck* and therefore does not reach Defendants Marino and Thompson's other arguments.

In *Heck v. Humphrey* the Supreme Court held that before a plaintiff may maintain a § 1983 action for damages resulting from an unconstitutional conviction or confinement, the conviction or confinement must be invalidated in some other proceeding.[53] "Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus."[54] The rule applies not only to claims that seek damages for the confinement itself, but also those "for other harm caused by actions whose

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[52] Doc. 110 at 8-9. For the same reasons, any personal-capacity claims for damages under § 1983 against Defendant McNair's Business are also dismissed Plaintiffs have advanced no facts alleging that McNair's Business is liable separately from McNair himself.

[53] *Heck*, 512 U.S. at 489-90.

[54] *Id*. at 489.

unlawfulness would render a conviction or sentence invalid."[55]

Here, Plaintiffs allege that Drug Court violated their constitutional rights by imprisoning them without due process, in the form of probation sanctions, contempt convictions, and time spent waiting. An award of damages to compensate for either the confinement itself or the alleged violations of due process that led to the confinements would necessarily imply that the confinements were invalid. *Heck* requires Plaintiffs to assert the invalidity of the confinements elsewhere before suing for damages.

Plaintiffs cite to *Brown v. Sudduth* and argue that *Heck* does not apply because Plaintiffs do not challenge the original convictions on which they were sent to Drug Court.[56] In Brown, the Fifth Circuit explained that a § 1983 action for false arrest does not necessarily impugn the validity of all subsequent convictions because a valid conviction can often follow an unlawful arrest.[57] Here, however, the issue is not whether Plaintiffs' claims would call into question their original convictions, but rather the imprisonments imposed upon them during Drug Court. On that point, Plaintiffs are very clear: "Plaintiffs' challenge is to various extended flat time 'incarcerations' without a hearing, without evidence, orchestrated by program staff, without convictions, after inter alia, ex parte communications between administrators and the judge

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55 *Id.* at 486.

56 *See Brown v. Sudduth*, 255 F. App'x 803, 805-07 (5th Cir. 2007); Doc. 144 at 13-15.

57 *Brown*, 255 F. App x at 806.

alleging they committed 'technical infractions' of the treatment program they entered as a part of their probation agreement."[58] Plaintiffs plainly seek damages on the grounds that their incarcerations during Drug Court were invalid. That is exactly the type of claim barred by *Heck*. At the very least they seek damages for violations of due process that would necessarily invalidate the imprisonments imposed as a result of those violations. That the incarcerations were allegedly not the result of a conviction, even if true, does not change the analysis, as *Heck* repeatedly uses "incarceration" interchangeably with "sentence."[59] Plaintiffs cite to no authority suggesting otherwise.

Plaintiffs also argue that a majority of the Supreme Court now only believe *Heck* applies to prisoners still serving the sentence of which they complain. The Fifth Circuit, however, explicitly rejected that interpretation and recognizes *Heck* as an unequivocal bar.[60]

Accordingly, Plaintiffs' § 1983 claims for damages against Defendants Marino and Thompson are dismissed with prejudice.

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[58] Doc. 144 at 14.

[59] *See Heck*, 512 U.S. at 484-90; *see also DeLeon v. City of Corpus Christi*, 488 F.3d 649 656 (5th Cir. 2007) (holding that Heck applies to deferred adjudication because such orders are treated as final and, similar to the sanctions imposed here, involve a "judicial finding that the evidence substantiates the defendant's guilt, followed by conditions of probation that may include a fine and incarceration").

[60] *See Black v. Hathaway*, 616 F. App'x 650, 653 (5th Cir. 2015).

IV. Remaining Claims

Having dismissed all § 1983 claims against the Moving Defendants, the only claims that remain are Plaintiffs' negligence claims against Defendants McNair and McNair's Business, and malpractice claims against Defendants Marino and Thompson.

A. Defendants McNair and McNair's Business

Defendant McNair moves to dismiss the remaining claims against him on the grounds that Plaintiffs failed to re-allege a negligence claim against McNair or re-assert the existence of a therapist-patient relationship. McNair further argues that any claims against McNair's business should be dismissed for the same reasons as the claims against McNair himself

The Court summarized Plaintiff *Carlisle*'s negligence claim as presented in his First Complaint as follows:

> *Carlisle* alleges that McNair served as the Clinical Director of Drug Court and recommended Carlisle for the program. He alleges that McNair evaluated him for program eligibility and that he owed a duty to properly evaluate *Carlisle* throughout the program. He alleges that McNair failed to make appropriate recommendations relative to his treatment throughout the program.[61]

Finding those allegations insufficient to establish a patient-therapist relationship, the Court dismissed Plaintiff Carlisle's negligence claims.

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[61] Doc. 110 at 7.

In his Second Amending Complaint, Plaintiff *Carlisle* additionally alleges that Defendant McNair is responsible for the overall treatment protocol of the program, that McNair is the "supervising counselor," that McNair provided recommendations regarding Plaintiffs' treatment during the program, that Plaintiff *Carlisle* and other class members are sent to inpatient treatment on McNair's recommendation, and that McNair ordered "anti-depressant assessment" for Plaintiff *Carlisle.*[62] Plaintiff Carlisle further alleges that McNair imposed or recommended sanctions against *Carlisle* without clinical justification or counter to clinical guidelines, including sending *Carlisle* to an addiction treatment program despite the fact that *Carlisle* was not using drugs or alcohol,[63] demoting *Carlisle* to Phase 2 of the program as a punishment,[64] and requiring that *Carlisle* attend 90 meetings in 90 days.[65]

These additions, when viewed in the light most favorable to Plaintiff *Carlisle,* state facts that make it plausible there was a therapist-patient relationship and that Defendant McNair caused harm to Plaintiff *Carlisle* by providing substandard care.[66] Defendant

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[62] Doc. 117.

[63] *See* Doc. 117 ¶¶ 160, 164, 166-75.

[64] Doc. 117 ¶ 161.

[65] Doc. 117 ¶¶ 181-82; see also Doc. 117 ¶ 191 (alleging that McNair actively participated in the imposition of a jail sentence for contempt that didn't occur).

[66] *Cf. Green v. Walker*, 910 F.2d 291, 295 (5th Cir. 1990) (holding that Louisiana law would extend to a physician hired by an

McNair's motion to dismiss is denied with respect to Plaintiff *Carlisle*'s negligence claim. Defendant McNair's Business advances no independent basis for dismissal of Plaintiff *Carlisle*'s negligence claim, and therefore Defendant McNair's Business's motion to dismiss is also denied with respect to Plaintiff *Carlisle*'s negligence claim.

The Court dismissed Plaintiff Heron's negligence claim against Defendant McNair in the First Supplementing Complaint for the failure to allege any facts supporting a cause of action against McNair.[67] Plaintiff Heron again makes no specific factual allegations against Defendant McNair that would support a claim for negligence in the Second Amending Complaint. Therefore Plaintiff Heron's negligence claims against Defendants McNair and McNair's Business are dismissed with prejudice.

Defendants McNair and McNair's Business also move to strike the class allegations against them. In order for an action to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, each of the four prerequisites of Rule 23(a) must be satisfied.[68] Additionally, one of the three conditions of Rule 23(b) must be met by all proposed classes.[69] Ultimately, a [d]istrict court maintains great discretion

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employer to examine an employee the duty to perform necessary tests and inform the employee of the results).

67 Doc. 110 at 11.

68 Fed. R. Civ. P. 23.

69 *Id.*; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

in certifying and managing a class action."[70] Courts have routinely applied Rule 23(d)(1)(D), formerly Rule 23(d)(4), to actions where a party seeks to strike class allegations because plaintiffs have not met the requirements of Rule 23.[71] A court may strike class allegations under Rule 23 where a complaint fails to plead the minimum facts necessary to establish the existence of a class.[72]

Rule 23(b) allows a class action only when 1) separate actions risk inconsistent judgments or would impair the rights of class members, 2) injunctive or declaratory relief is appropriate for the class as a whole, or 3) the questions of law and fact that are common to the class predominate over those that are individual.[73] Plaintiffs make no argument regarding the first element, and all claims for injunctive or declaratory relief against Defendants McNair and McNair's business have been dismissed, negating the second element. The only remaining claim against Defendants McNair and McNair's Business is Plaintiff *Carlisle's* claim for negligence, and Plaintiffs have failed to demonstrate how common issues of fact or law regarding that claim predominate. The negligence claim is highly individual, depending on specific facts

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[70] *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 478 (5th Cir. 2001) (quoting *Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 624 (5th Cir. 1999)).

[71] *Markey v. La. Citizens Fair Plan*, No. 06-5473, 2008 U.S. Dist. LEXIS 106051 2008 WL 5427708 at *1 (E.D. La. Dec. 30, 2008) (citations omitted).

[72] *Aguilar v. Allstate Fire & Cas. Ins. Co.*, No. 06-4660, 2007 U.S. Dist. LEXIS 16073. 2007 WL 734809, at 2 (E.D. La. Mar. 6, 2007).

[73] Fed. R. Civ. P. 23(b).

to establish a therapist-patient relationship and the ways in which Defendants allegedly breached the resulting duty. Accordingly, the class allegations as to Defendants McNair and McNair's Business are stricken.

B. Defendants Marino and Thompson

Defendants Marino and Thompson move to dismiss Plaintiffs' legal malpractice claims against them on the grounds that a) the Court lacks subject matter jurisdiction over the claims or should decline to exercise it, b) that Plaintiffs fail to state a claim for malpractice because Plaintiffs were the proximate cause of their own imprisonment, and c) that Plaintiffs fail to allege any facts that would prove Defendants Marino and Thompson breached their duty to Plaintiffs.

Defendant Thompson also moves to dismiss on the ground that Plaintiffs' only allegations against him, for failure to train or supervise, are entirely conclusory. The Court previously found that Plaintiffs' Complaint and First Amending Complaint were completely devoid of any factual allegations against Defendant Thompson. Plaintiffs have added nothing to the Second Amending Complaint regarding Thompson other than conclusory allegations that he failed to train Marino. Having been granted leave to amend once before, Plaintiffs' state-law claims against Defendant Thompson are dismissed with prejudice.

The Court previously held that Plaintiffs' legal malpractice claims against Defendant Marino shared a common nucleus of operative fact with the § 1983 claims and therefore fell within the Court's supplemental jurisdiction.[74] The Court also found that no

[74] Doc. 110 at 11-13.

exceptional circumstances existed to cause the Court to decline to exercise that jurisdiction. The dismissal of the all federal claims against Defendant Marino does not change those findings. Nor does it allow for the dismissal of Plaintiffs' state law claims under 28 U.S.C. 1367(c)(3), because § 1983 claims arising from the same nucleus of operative facts remain against other defendants.[75]

Although Defendant Marino argues that Plaintiffs have failed to allege that Marino either breached his duty to Plaintiffs or was the proximate cause of Plaintiffs' injuries, the Court finds that Plaintiffs have done both. The Court already held that Louisiana law does not require a criminal defendant to supply proof of innocence before maintaining a legal malpractice action.[76] Plaintiffs have alleged that Defendant Marino failed to bring any objections to the Drug Court judge over allegedly unconstitutional procedures employed by the Drug Court team and Drug Court itself Plaintiffs' Second Amending Complaint provides specific factual allegations regarding Defendant Marino's supposedly deficient representation, including the failure to object to the classification of a former Drug Court participant as a felon[77] and the failure to

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[75] *See Enochs v. Lampasas Cty.*, 691 F.3d 155, 161 (5th Cir. 2011) (gathering authority for the general rule that state-law claims should be dismissed when all federal claims have been dismissed); Charles Allen Wright, et al., 13D Federal Practice & Procedure § 3567.3(3d ed. 201 7) ("If any claim invoking an independent basis of subject matter jurisdiction remains viable . . . § 1367(c)(3) will not apply.").

[76] Doc. 110 at 14.

[77] Doc. 117 196-98, 218.

object to the imposition of contempt sentences.[78] These allegations, if true, make it plausible that Defendant Marino's performance fell below the standard of care required of him and caused Plaintiffs harm.[79] As those are the only elements of a legal malpractice claim that Defendant Marino challenges, his motion to dismiss Plaintiffs' malpractice claims is denied.

CONCLUSION

For the foregoing reasons, Defendants' Motions are GRANTED IN PART.

All of Plaintiffs' § 1983 claims against Defendants Joe McNair, McNair & McNair, LLC, Richard Thompson, Joseph Marino, Kristen Becnel, Tracey Mussal, and Kevin Theriot in their personal and official capacities, whether for injunctive or declaratory relief or damages, are DISMISSED WITH PREJUDICE.

Plaintiff *Carlisle*'s negligence claims against Defendants McNair and McNair & McNair, LLC REMAIN.

Plaintiff Heron's negligence claims against Defendants McNair and McNair & McNair, LLC are DISMISSED WITH PREJUDICE.

The class allegations against Defendants McNair and McNair & McNair, LLC are STRICKEN with respect to the negligence claims.

All of Plaintiffs' claims against Defendant Thompson are DISMISSED WITH PREJUDICE.

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78 Doc. 117 ¶ 220.

79 *See Iqbal*, 556 US. at 667

Plaintiffs' legal malpractice claims against Defendant Marino REMAIN.

New Orleans, Louisiana this 31st day of October, 2017.

/s/ Jane Triche Milazzo
United States District Judge

OPINION, U.S. DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA (AUGUST 1, 2017)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"(1)

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

The Court sua sponte raised the issue of its jurisdiction to entertain Plaintiff's official capacity claims against Defendants Kristen Becnel, Tracey Mussal, Kevin Theriot, and Joe McNair. Having received and considered briefing on the subject, the Court finds that these claims must be DISMISSED.

BACKGROUND

Plaintiffs challenge the manner in which the Jefferson Parish Drug Court is conducted. The allegations of Plaintiffs' Complaints have been detailed at

length in the Court's earlier order and Reasons and need not be repeated here.[1] In that Order, however, the Court directed the parties to file briefs addressing whether this Court has jurisdiction to entertain official capacity claims against Drug Court Administrator Kristen Becnel, Program Supervisor Tracy Mussal, Probation Coordinator Kevin Theriot, and Director of counseling Joe McNair. For the following reasons, the official capacity claims are dismissed for lack of jurisdiction.

LAW AND ANALYSIS

In its earlier order, the Court noted that Plaintiffs appeared to seek relief against Becnel, Mussal, Theriot, and McNair in their official capacities. The Court sua sponte raised the issue of its jurisdiction to entertain such claims. These suits are directed at these individuals based on their role within the Drug Court system. Official capacity claims merely represent an alternative means of pleading a cause of action against the entity of which the individual is a member—here, the Jefferson Parish Drug Court.[2] Despite Plaintiffs' arguments to the contrary, it is apparent from the statute authorizing the Drug Court that it exists under the auspices of the 24th Judicial District Court for the Parish of Jefferson. These official capacity claims, therefore, are actually suits against the 24th Judicial District Court itself. Any such suit is precluded by the immunity provisions of

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[1] Doc. 110.

[2] *Burge v. Par. of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("Official capacity suits generally represent another way of pleading an action against an entity of which an officer is an agent.").

the Eleventh Amendment. Indeed, "Courts in this and other circuits routinely hold that state courts are immune from suit under the Eleventh Amendment."[3]

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[3] *Cain v. City of New Orleans*, No. CV 15-4479, 2016 U.S. Dist. LEXIS 62391, 2016 WL 2742374, at *1 (E.D. La. May 11, 2016) ("*See, e.g.*, *Jefferson v. La. State Supreme Court*, 46 Fed. Appx. 732, *1 (5th Cir. 2002) ("The Eleventh Amendment clearly bars [plaintiff's § 1983 claims against the Louisiana Supreme Court, which is a branch of Louisiana's state government."); *Bourgeois v. Par. of Jefferson*, 20 F.3d 465, *1 (5th Cir. 1994) (holding that the Orleans Parish Civil District Court is "an agency of the state" entitled to Eleventh Amendment immunity); *Summers v. Louisiana*, No. 13-4573, 2013 U.S. Dist. LEXIS 102023, 2013 WL 3818560, at *4 (E.D. La. July 22, 2013) (holding that an official capacity claim against a state court judge "would in reality be a claim against the state itself, and . . . would be barred by the Eleventh Amendment"); *Wilkerson v. 17th Judicial Dist. Court*, No. 08-1196, 2009 U.S. Dist. LEXIS 6802, 2009 WL 249737, at *4 (E.D. La. Jan. 30, 2009) ("It is clear that the Eleventh Amendment bars § 1983 claims against a state court."); *Rackley v. Louisiana*, No. 07-504, 2007 U.S. Dist. LEXIS 45227, 2007 WL 1792524, at *3 (E.D. La. June 21, 2007) ("[T]he Eleventh Amendment likewise bars 1983 claims against a state court."); *see generally Mumford v. Basinski*, 105 F.3d 264, 267 (6th Cir. 1997) (noting that state courts are not "persons" under section 1983 and are otherwise immune from suit as an arm of the state government); *Harris v. Champion*, 51 F.3d 901, 905-06 (10th Cir. 1995) (holding that Oklahoma Court of Criminal Appeals is immune from suit under Eleventh Amendment as "a governmental entity that is an arm of the state"); *Landers Seed Co., Inc. v. Champaign Nat'l Bank*, 15 F.3d 729, 731-32 (7th Cir. 1994) ("The Eleventh Amendment, however, bars federal suits against state courts and other branches of state government[.]"); *Clark v. Clark*, 984 F.2d 272, 273 (8th Cir. 1993) ("Courts are not persons within the meaning of 42 U.S.C. § 1983, and, if they were, the action would be barred by the Eleventh Amendment anyway.")").

CONCLUSION

For the foregoing reasons, Plaintiffs' official capacity suits against Drug Court Administrator Kristen Becnel, Program Supervisor Tracy Mussal, Probation Coordinator Kevin Theriot, and Director of counseling Joe McNair are DISMISSED for lack of jurisdiction.

New Orleans, Louisiana this 1th day of August, 2017.

/s/ Jane Triche Milazzo
United States District Judge

**OPINION,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(MAY 23, 2017)**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"(1)

Before: Jane Triche MILAZZO,
United States District Judge.

Opinion by: JANE TRICHE MILAZZO

ORDER AND REASONS

Before the Court are three Motions: A Motion to Dismiss filed by Defendant Joe McNair (Doc. 58); a Motion to Dismiss filed by Defendants Richard Thompson and Joseph Marino (Doc. 59); and a Motion to Dismiss filed by Defendants Kristen Becnel, Tracey Mussal, and Kevin Theriot (Doc. 71). These Motions are GRANTED IN PART as outlined herein.

BACKGROUND

In this suit, Plaintiffs challenge the manner in which the Jefferson Parish Drug Court is conducted.

In addition to their individual claims, they seek to represent a class of individuals who were similarly sentenced by the Drug Court. The Court will begin by outlining their individual claims.

I. Taylor Carlisle

Plaintiff Taylor Carlisle was arrested on November 9, 2012 and charged in the 24th Judicial District Court for the Parish of Jefferson with possession of oxycodone in case no. 12-6158 and with possession of marijuana and drug paraphernalia in case no. 12-6159. On January 30, 2015 he entered a guilty plea as to all charges. In case number 12-6159 he was sentenced to time served, while his plea in case number 12-6158 was entered pursuant to Louisiana Revised Statutes 13:5304, also known as the "Louisiana Drug Court Statute." He was sentenced to 0-5 years, with the sentence deferred contingent upon his completion of the Jefferson Parish Intensive Drug Court Program while on probation. As part of this program, Carlisle was required to maintain regular contact with the program probation officer and the drug court, attend regular AA meetings, consent to regular drug testing, and present required documentation to the probation officer and the drug court. He also agreed to waive due process rights in Drug Court proceedings.

His primary claim involves allegations that he received excessive sentences from the Drug Court for failure to comply with the terms of the program. On April 28, 2015, he was sanctioned to 90 days flat time. Later, on August 25, 2015, he was sanctioned with six months of flat time for contempt of court when he failed to appear for a hearing. Carlisle brings six claims

relative to his experience at Drug Court, essentially averring that the closed courtroom, lack of court reporter, and lack of adversarial proceedings violate his due process rights. He also alleges that these sentences were in excess of those permitted under the state law authorizing the Drug Court and that they are impermissible "flat time" sentences. He argues that this is violation of the Eighth Amendment's protections against cruel and unusual punishment and the Equal Protection Clause of the Fourteenth Amendment. First, he seeks declaratory and injunctive relief prohibiting the Drug Court from acting in this unconstitutional manner. Second, he brings a § 1983 claim against Sheriff Normand for deliberate indifference in keeping Carlisle in jail for the 90 and 180 day flat time sentences, in violation of Louisiana law and his Equal Protection and Due Process rights. Third, he brings a 1983 claim against Drug Court Administrator Kristen Becnel, Program Supervisor Tracy Mussal, Probation Coordinator Kevin Theriot, and Director of Counseling Joe McNair for failure to properly train and supervise the implements of the Drug Court policy.

In addition to these constitutional claims, he brings "pendant state law claims" against several individuals. First, he brings a legal malpractice claim against the Drug Court's Indigent Public Defender Board and its staff attorney, Joe Marino. Mr. Marino was appointed to represent Carlisle in Drug Court, and Carlisle contends that he breached his duty by failing to appropriately defend Carlisle. Second, he brings a claim against Drug Court Clinical Director Joe McNair for breach of his duty as a therapist. He avers that McNair owed him a duty to act within the

standard of care governing the treatment of patients with substance abuse problems and that he breached that duty by failing to make proper recommendations as to his treatment.

II. Emile Heron

Plaintiff Emile Heron has been a participant in the Drug Court Program since April 17, 2012. He pleaded guilty to one count of possession of oxycodone. He alleges that he has suffered periods of detention for technical violations of his probation without procedural due process.[1] On July 30, 2013, he was sentenced to 24 hours flat time for failing to complete required community service. He next alleges that, on November 12, 2013, he was sentenced to 30 days flat time for "associating with a felon" despite having never committed that offense. On January 14, 2014, he was sanctioned with 60 days flat time for failing to appear at Drug Court on January 3, 2014. He further avers that he was held for an additional four and a half months at the end of this sentence while waiting for a Long Term Care bed to become available. Eventually, he was sent to Assisi Bridge House in Shreveport for seven and half months of inpatient treatment. Upon release, he was again sanctioned for noncompliance and sentenced to 16 hours of community service due November 18, 2014. It seems that he failed to complete this community services and was therefore sentenced to 48 hours in the Jefferson Parish Correctional Center on December 2, 2014. On February 5, 2015 he was held in contempt for failure to pay $1,624.50 in fines from the original plea agreement.

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[1] This is despite the fact that he signed a waiver of due process rights.

He was later jailed on December 15, 2015 for failure to complete community service. He alleges that he was held until January 26, 2016, at which time he was sanctioned with 6 months' time. He alleges that all of these sanctions were imposed without hearing, a court reporter, or formal notice in violation of due process. He also alleges that, while he was incarcerated, his probation was extended by motion without his knowledge.

III. Class Allegations

Plaintiffs also seek certification of the following class:

> Those individual natural persons who, while participating as probationers in the 24th Judicial District Court Drug Court program pursuant to Plea Agreement (hereinafter the "probationers") have been sanctioned, for alleged probation infractions and sentenced with jail time in the Jefferson Parish Correctional Center or other location, in excess often days as proscribed by LA Code Crim. Proc. 891(C). and/or in violation of the Drug Court Act, R.S. 13:5304 et seq. These probationers include but are not limited to those sentenced to "flat time" in connection with said sanctions, as well as those who are alleged to have committed Contempt and sentenced to jail time without a hearing or opportunity to defend, or without a record from which to launch an appeal based on Due Process waivers executed at the time of the Plea Agreement.

Plaintiffs aver that all of these individuals were subject to a pattern and practice of conduct whereby they were deprived of liberty under color of state law. They aver that the subject class may consist of more than one thousand individuals and that their claims involve common questions of law and fact.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead enough facts "to state a claim to relief that is plausible on its face."[2] A claim is "plausible on its face" when the pleaded facts allow the court to "[d]raw the reasonable inference that the defendant is liable for the misconduct alleged."[3] A court must accept the complaint's factual allegations as true and must "draw all reasonable inferences in the plaintiff's favor."[4] The Court need not, however, accept as true legal conclusions couched as factual allegations.[5]

To be legally sufficient, a complaint must establish more than a "sheer possibility" that the plaintiff's claims are true.[6] "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements

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[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 667, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

[3] *Id.*

[4] *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009).

[5] *Iqbal*, 556 U.S. at 667.

[6] *Id.*

of a cause of action'" will not suffice.[7] Rather, the complaint must contain enough factual allegations to raise a reasonable expectation that discovery will reveal evidence of each element of the plaintiffs' claim.[8]

LAW AND ANALYSIS

The Court will address each of the three pending Motions to Dismiss in turn.

I. Motion to Dismiss filed by Defendant McNair (Doc. 58)

The first Motion to Dismiss was filed by Defendant Joe McNair, who served as the Drug Court clinical director while Carlisle was in Drug Court. The Complaint alleges that McNair, as an administrator of the Drug Court, is liable for "deliberate indifference" in failing to properly train and supervise the implementation of Drug Court policy, leading to violations of Plaintiff's constitutional rights. It further alleges a pendant state law negligence claim against McNair for breach of his duty to Carlisle as a therapist. McNair avers that he should be dismissed from this action for the following reasons: (1) there is no therapist/patient relationship between Carlisle and McNair; (2) there is no causal connection between McNair's alleged negligence and the alleged deprivation of Carlisle's rights; (3) the deliberate indifference claim against McNair is barred by qualified immunity; (4) the allegations do not meet class action requisites set forth in Federal Rule of Civil Procedure 23; and (5)

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[7] *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555).

[8] *Lormand*, 565 F.3d at 255-57.

Heron asserted no cause of action against McNair. The Court will address these arguments in turn.

A. Existence of a Therapist/Patient Relationship

McNair first argues that the pendant negligence claims asserted against him should be dismissed because there are no facts alleged in the Complaint and Amended Complaint from which the Court could find that a patient/therapist relationship existed. The factual allegations against McNair are contained in paragraphs 62 through 65 of the Complaint. Therein, Carlisle alleges that McNair served as the Clinical Director of Drug Court and recommended Carlisle for the program. He alleges that McNair evaluated him for program eligibility and that he owed a duty to properly evaluate Carlisle throughout the program. He alleges that McNair failed to make appropriate recommendations relative to his treatment throughout the program. The Court finds that these allegations are insufficient, even if taken as true, to establish a patient/therapist relationship. Accordingly, the negligence claims against McNair are dismissed without prejudice.

B. Causal Connection Between McNair's Negligence and Deprivation of Rights

McNair next argues that Plaintiffs' "deliberate indifference" claims must fail because there are insufficient factual allegations to show that he was causally connected with the due process violations allegedly stemming from excessive sentences imposed by the Drug Court. "When, as here, a plaintiff alleges a failure to train or supervise, the plaintiff must show

that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference."[9] The Complaint broadly alleges that he and the other Drug Court administrators failed to properly supervise the implementation of Drug Court policy, leading to unlawful sentences imposed in violation of due process protections. The ultimate decision-making power relative to these sentences, however, rested with the judges administering the program.[10] Indeed, the Complaint does not identify subordinate officials whom McNair failed to train or supervise. In fact, quite the opposite, it appears that the complained-of sentences were imposed by the drug court judges, who clearly served as McNair's supervisors in the program.[11] Because the Complaint fails to allege a causal connection between any alleged failure to train or supervise and the deprivation of a constitutional right, Plaintiffs' deliberate indifference claims against McNair are dismissed without prejudice.

C. Qualified Immunity

McNair next avers that he is entitled to qualified immunity from suit for damages in his personal capacity on any § 1983 claim. Plaintiff responds, arguing that (1) as a private contractor he is not entitled to qualified immunity and (2) that the alleged

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[9] *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005)

[10] The judges have not been made party to this suit.

[11] La. Rev. Stat. § 13:5304.

violations amount to violations of clearly established law. The Supreme Court has previously held that medical professionals contracted to work part time with the state act under color of state law when treating individuals as part of the terms of their employment.[12] Accordingly, McNair is permitted to assert qualified immunity as a defense. In *Saucier v. Katz*, the Supreme Court promulgated a two-step analysis to determine if an official has stepped outside the bounds of qualified immunity.[13] Under that test, the initial inquiry is whether the Plaintiff has alleged a constitutional violation.[14] If established, the next inquiry is whether the defendant's conduct was objectively reasonable in light of clearly established law at the time the conduct occurred.[15] In *Pearson v. Callahan*, the Court retreated somewhat from this rigid two-step inquiry, giving courts leave to decide which prong to consider first.[16] Plaintiff argues that the procedural due process rights violated by Defendants are clearly established, however, it is undisputed that Plaintiff signed a waiver of his due process rights prior to participating in the Drug Court program. To evade qualified immunity, Plaintiffs would have to demonstrate that the invalidity of the due process waiver was clearly established. They have not done so. Accordingly, in light of the due process waiver, Plaintiff

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[12] *West v. Atkins*, 487 U.S. 42, 56, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (U.S. 1988).

[13] 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

[14] *Id.*

[15] *Id.*

[16] 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2008).

cannot establish that McNair's actions violated any clearly established constitutional right. He is therefore entitled to qualified immunity from suit in his personal capacity as to all claims for damages arising under § 1983. Accordingly, all § 1983 claims for damages against McNair in his personal capacity are dismissed with prejudice.

D. Class Allegations as to McNair

McNair next argues that the class allegations against him are insufficient because the class action allegations of the Complaint are devoid of any allegations specific to McNair. Plaintiff avers that this attack on the class allegations is premature, as he has not yet moved for class certification. This argument is unavailing. Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[17] In order for an action to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, each of the four prerequisites of Rule 23(a) must be satisfied.[18] Additionally, one of the three conditions of Rule 23(b) must be met by all proposed classes.[19] Ultimately, a

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17 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)).

18 Fed. R. Civ. P. 23.

19 *Id.*; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

"[d]istrict court maintains great discretion in certifying and managing a class action."[20]

Courts have routinely applied Rule 23(d)(1)(D), formerly Rule 23(d)(4), to actions where a party seeks to strike class allegations because plaintiffs have not met the requirements of Rule 23.[21] A court may strike class allegations under Rule 23 where a complaint fails to plead the minimum facts necessary to establish the existence of a class.[22]

The Court has reviewed the factual allegations of the Complaint and the Amended Complaint and finds that no facts have been asserted to support a class action against Defendant McNair. Plaintiff has not alleged that any individual other than Plaintiff Carlisle was treated by McNair as part of the Drug Court program. Accordingly, Plaintiff has failed to plead common questions of law and fact relative to this Defendant. Accordingly, Plaintiffs' class allegations as to Defendant Joe McNair are stricken.

E. Allegations as to Heron

McNair finally argues that Heron has asserted no claim against him. Plaintiffs respond, arguing that Heron has adopted the allegations of the Complaint

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20 *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 478 (5th Cir. 2001) (quoting *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (quotations omitted).

21 *Markey v. La. Citizens Fair Plan*, No. 06-5473, 2008 U.S. Dist. LEXIS 106051, 2008 WL 5427708, at *1 (E.D.La. Dec. 30, 2008) (citations omitted).

22 *Aguilar v. Allstate Fire and Cas. Ins. Co.*, No. 06-4660, 2007 U.S. Dist. LEXIS 16073, 2007 WL 734809, at *2 (E.D.La. Mar. 6, 2007).

relative the McNair's conduct. The Court has reviewed both the Complaint and the Amended Complaint and finds that Plaintiffs have plead no facts to support a cause of action against McNair as asserted by Plaintiff Heron. Accordingly, such claims are dismissed without prejudice.

II. Motion to Dismiss filed by Marino and Tompson (Doc. 59)

Plaintiffs bring a state legal malpractice claim against District Defender for the 24th Judicial District Richard Tompson and Joseph Marino, who served as Plaintiff Carlisle's counsel in Drug Court. Marino and Tompson argue that this claim should be dismissed because (1) it does not fall within the Court's supplemental jurisdiction and (2) even if it does fall within the Court's supplemental jurisdiction, the allegations of the Complaint and Amended Complaint are insufficient to support a legal malpractice action. The Court will address these arguments in turn.

A. Whether the Claim Falls Within the Court's Supplemental Jurisdiction

Marino and Tompson argue that there is no supplemental jurisdiction over the malpractice claims asserted against them. In pertinent part, 28 U.S.C. § 1367 provides as follows:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such

> original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

"The question under section 1367(a) is whether the supplemental claims are so related to the original claims that they form part of the same case or controversy, or in other words, that they 'derive from a common nucleus of operative fact.'"[23]

Defendants Marino and Tompson argue that the federal question claims in the Complaint involve the formation and application of Drug Court policies and practices that violate due process under the Eight and Fourteenth Amendments. They argue that the malpractice claims are divorced from these federal question claims in that they involve only whether the defendants breached their duty of care. This argument misapplies the applicable standard in determining whether supplemental jurisdiction exists. The claims need not share the same legal theory; rather, "[a] loose factual connection between the claims is generally sufficient."[24] Additionally, "[a] court's determination of whether to exercise supplemental jurisdiction is guided by considerations of judicial economy, convenience and fairness

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[23] *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)).

[24] *CheckPoint Fluidic Sys. Int'l, Ltd. v. Guccione*, No. 10-4505, 2012 U.S. Dist. LEXIS 7015, 2012 WL 195533, at *3 (E.D. La. Jan. 23, 2012).

to litigants."[25] The Court finds that the alleged malpractice claim falls within the same common nucleus of operative fact as the federal constitutional claims. Indeed, they arise out of the same Drug Court meetings as the constitutional claim and include allegations that these Defendants allowed the complained-of constitutional violations to continue unabated despite their duty as counsel to Plaintiffs. Accordingly, these claims form part of the same "common nucleus of operative fact" and fall within the Court's supplemental jurisdiction.

In their reply brief, Defendants for the first time argue that the Court should decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c). This argument is not properly before the Court, as arguments cannot be raised for the first time in a reply brief.[26] Nevertheless, the Court finds that no exceptions circumstances exist that would cause it to decline to exercise supplemental jurisdiction over this matter.

B. Sufficiency of Legal Malpractice Claims

To establish a prima facie case for legal malpractice, a plaintiff must prove there was an attorney-client relationship, the attorney was guilty of negligence in his handling of the client's case or professional impropriety in his relationship with the client, and the attorney's misconduct caused the client some loss or

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[25] *Id.*

[26] *Spencer v. Hercules Offshore, Inc.*, No. 13-4706, 2014 U.S. Dist. LEXIS 55722, 2014 WL 1612440, at *4 (E.D. La. Apr. 22, 2014).

damage.[27] When the attorney's performance falls below the standard of competence and expertise usually exercised by other attorneys in handling such matters, the attorney is liable for any damage to the client caused by his substandard performance. "The proper method of determining whether an attorney's malpractice is a cause in fact of damage to his client is whether the proper performance of that act would have prevented the damage."[28]

Defendants argue that Plaintiff must present proof of innocence or exoneration in order to pursue a legal malpractice claim. They do not, however, point the Court to any Louisiana case adopting this rule. Indeed, it appears that such a rule has not been expressly adopted in Louisiana.[29] Accordingly, the Court declines to adopt such a rule here.

Even if the Court does not apply the proof of innocence standard, Defendants argue that Plaintiff has alleged insufficient facts to show that their conduct has caused the complained-of damage. With regard to Defendant Marino, Plaintiff alleges that he served as lawyer in the Drug Court and failed to object to the various constitutional and state law violations that took place therein, causing him damage. The Court finds that these allegations are conclusory and fail to establish causation. Accordingly, the malpractice claims against Defendant Marino are dismissed without prejudice.

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[27] *See Prestage v. Clark*, 723 So.2d 1086, 1091 (La. App. 1 Cir. 1998), writ denied, 739 So. 2d 800 (La. 1999).

[28] *Schwehm v. Jones*, 872 So. 2d 1140, 1143 (La. App. 1 Cir. 2004).

[29] *Id.*

With regard to Defendant Tompson, the Complaint is entirely devoid of any factual allegations sufficient to support a legal malpractice claim.[30] Accordingly, the legal malpractice claim against him is dismissed without prejudice.

III. Motion to Dismiss Filed by Becnel, Mussal, and Theriot (Doc. 71)

The final Motion to Dismiss was filed by Drug Court Administrator Kristen Becnel, Program Supervisor Tracey Mussal, and Probation Coordinator Kevin Theriot (collectively, the "Drug Court Administrators"). They argue that the claims asserted against them should be dismissed on the basis of absolute judicial immunity, or alternatively qualified immunity. These Defendants also adopt McNair's Motion with regard to the sufficiency of the class allegations. The Court will address these arguments separately.

A. Applicability of Absolute Immunity

Defendants argue that absolute judicial immunity may be extended to them in this matter. Judges are absolutely immune from suit for damages under § 1983 for action performed in their role as judges, even where their actions are malicious.[31] Absolute immunity does not, however, shield individuals from suits for declaratory relief.[32] Absolute immunity "help[s] guarantee an independent, disinterested

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[30] Indeed, the Complaint is completely devoid of any factual allegations against Tompson.

[31] *Holloway v. Walker*, 765 F.2d 517, 522 (5th Cir. 1985).

[32] *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

decision-making process" by "prevent[ing] harassment and intimidation that could otherwise result if disgruntled litigants—particularly criminal defendants and inmates . . . could vent their anger by suing . . . the person or persons who rendered an adverse decision."[33] As another section of this Court recently summarized:

> To further this underlying policy, "other necessary participants in the judicial process are entitled to absolute quasi-judicial immunity." This absolute quasi-judicial immunity "protects officials that perform functions comparable to those of judges. . . . " In determining whether an official is entitled to absolute quasi-judicial immunity, courts must take a "functional approach"—looking to "the nature of the function performed, not the identity or title of the actor who performed it." Consistent with this "functional approach," courts often hold that other judicial employees, such as clerks of court, law clerks, and others, enjoy absolute quasi-judicial immunity when "performing a discretionary act or . . . a ministerial function at the direction of the judge." In other words, judicial employees are absolutely immune when they act, whether "in bath faith or with malice" pursuant to a court order or a judge's instructions because the employee is "act[ing] as the arm of the judge and comes within his absolute immunity."[34]

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[33] *Johnson v. Kegans*, 870 F.2d 992, 996-97. (5th Cir. 1989)

[34] *Cain v. City of New Orleans*, 184 F. Supp. 3d 379, 388-89 (E.D. La. 2016).

Defendants argue that their roles as part of the Drug Court were under the direct supervision of the presiding judge, entitling them to absolute judicial immunity. Plaintiffs respond, arguing that the "Drug Court" is not a court, but rather a non-profit treatment program. The Court does not find this argument persuasive. A review of the statute authorizing the creation of the drug courts indicates that it is an intensive probation program over which the judges preside.[35] The sanctions complained of by Plaintiffs were imposed by judges acting in their judicial roles, shielding them from liability. Any role Defendants played in bringing about these allegedly unconstitutional sanctions was judicial in nature, entitling them to absolute immunity. Accordingly, the § 1983 claims for damages asserted against the Drug Court Administrators in their personal capacities are dismissed with prejudice.

B. Class Allegations

The Drug Court Administrators adopt arguments asserted by McNair relative to the Complaint's class allegations. They asserted that Plaintiffs have failed to show that there are common issues of law or fact among the class members sufficient to support a class action against them. This Court agrees. The class allegations of the Complaint contain broad factual assertions relative to the Drug Court; however, they do not allege that the Defendant Drug Court Administrators were involved in the alleged rights deprivations of all class members. Accordingly, the class allegations against the Drug Court Administrators are stricken.

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[35] La. Rev. Stat. § 13:5304.

IV. Jurisdiction Over Remaining Claims

The Court notes that Plaintiffs have asserted § 1983 claims for damages, declaratory, and injunctive relief against the Drug Court Administrators and McNair arising out of their roles as officials with the Drug Court. The Court has ruled that any § 1983 claims for damages asserted against these individuals in their personal capacities are precluded by either absolute or qualified immunity. It appears to this Court, however, that Plaintiffs also seek relief against these individuals in their official capacities. Official capacity claims merely represent an alternative means of pleading a cause of action against the entity of which the individual is a member—here, the Jefferson Parish Drug Court.[36] The Court now sua sponte raises the issue of its jurisdiction to entertain such claims.

Despite Plaintiffs' arguments to the contrary, it is apparent from the statute authorizing the Drug Court that it exists under the auspices of the 24th Judicial District Court for the Parish of Jefferson. Accordingly, any suit against the Drug Court appears precluded by the immunity provisions of the Eleventh Amendment. Indeed, "Courts in this and other circuits routinely hold that state courts are immune from suit under the Eleventh Amendment."[37] Because this issue

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[36] *Burge v. Par. of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("Official capacity suits generally represent another way of pleading an action against an entity of which an officer is an agent.").

[37] *Cain v. City of New Orleans*, No. CV 15-4479, 2016 U.S. Dist. LEXIS 62391, 2016 WL 2742374, at *1 (E.D. La. May 11, 2016) ("*See, e.g., Jefferson v. La. State Supreme Court*, 46 Fed. Appx. 732, *1 [published in full-text format at 2002 U.S. App. LEXIS 28361] (5th Cir. 2002) ("The Eleventh Amendment clearly bars [plaintiff's] § 1983 claims against the Louisiana Supreme Court, which is a

is jurisdictional, the Court may raise it sua sponte.[38] Before dismissing any such claims, however, the Court will allow briefing on the subject. The parties are therefore directed to submit briefs, not to exceed five pages, addressing the limited issue of whether any official capacity claims brought against Defendants Becnel, Mussal, Theriot, and McNair are precluded by

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branch of Louisiana's state government."); *Bourgeois v. Par. of Jefferson*, 20 F.3d 465, *1 [published in full-text format at 1994 U.S. App. LEXIS 42564] (5th Cir. 1994) (holding that the Orleans Parish Civil District Court is "an agency of the state" entitled to Eleventh Amendment immunity); *Summers v. Louisiana*, No. 13-4573, 2013 U.S. Dist. LEXIS 102023, 2013 WL 3818560, at *4 (E.D. La. July 22, 2013) (holding that an official capacity claim against a state court judge "would in reality be a claim against the state itself, and . . . would be barred by the Eleventh Amendment"); *Wilkerson v. 17th Judicial Dist. Court*, No. 08-1196, 2008 U.S. Dist. LEXIS 112051, 2009 WL 249737, at *4 (E.D. La. Jan. 30, 2009) ("It is clear that the Eleventh Amendment bars § 1983 claims against a state court."); *Rackley v. Louisiana*, No. 07-504, 2007 U.S. Dist. LEXIS 103961, 2007 WL 1792524, at *3 (E.D. La. June 21, 2007) ("[T]he Eleventh Amendment likewise bars § 1983 claims against a state court."); *see generally Mumford v. Basinski*, 105 F.3d 264, 267 (6th Cir. 1997) (noting that state courts are not "persons" under section 1983 and are otherwise immune from suit as an arm of the state government); *Harris v. Champion*, 51 F.3d 901, 905-06 (10th Cir. 1995) (holding that Oklahoma Court of Criminal Appeals is immune from suit under Eleventh Amendment as "a governmental entity that is an arm of the state"); *Landers Seed Co., Inc. v. Champaign Nat'l Bank*, 15 F.3d 729, 731-32 (7th Cir. 1994) ("The Eleventh Amendment, however, bars federal suits against state courts and other branches of state government[.]"); *Clark v. Clark*, 984 F.2d 272, 273 (8th Cir. 1993) ("Courts are not persons within the meaning of 42 U.S.C. § 1983, and, if they were, the action would be barred by the Eleventh Amendment anyway.")").

[38] *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 333 (5th Cir. 2002).

the provisions of the Eleventh Amendment. The briefs shall be submitted within 15 days of the entry of this order.

CONCLUSION

For the foregoing reasons, Defendants Motions are GRANTED IN PART as outlined herein. Plaintiffs may amend their Complaint within 21 days of the entry of this Order to the extent they can remedy any deficiencies outlined herein.

IT IS FURTHER ORDERED that the parties shall submit any briefing relative to this Court's jurisdiction to entertain official-capacity claims against Defendants Becnel, Mussal, Theriot, and McNair within 15 days of the entry of this Order. Any such briefs shall not exceed five pages in length.

New Orleans, Louisiana this 23rd day of May, 2017.

/s/ Jane Triche Milazzo
United States District Judge

ORDER,
U.S. COURT OF APPEALS, FIFTH CIRCUIT
(MAY 3, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TAYLOR CARLISLE, Individually
and as Representative Member of a Class;
EMILE HERON, Individually and as
Representative Member of a Class,

Plaintiffs-Petitioners,

v.

JOSEPH P. LOPINTO, III,
Sheriff and Administrator of the
Jefferson Parish Correctional Center,

Defendants-Respondent.

No. 21-90012

Motion for Leave to Appeal under Fed. R. Civ. P. 23(f)
USDC No. 2:16-CV-3767

Before: WILLETT, HO, and DUNCAN, Circuit Judges.

PER CURIAM:

Under Fed. R. Civ. P. 23(f), we have discretion to allow an interlocutory appeal from an order granting or denying class certification. "A party must file a petition for permission to appeal with the circuit clerk

within 14 days after the order is entered." Fed. R. Civ. P. 23(f). However, when a motion for reconsideration is filed within the 14 days, the period to file a Rule 23(f) petition doesn't begin to run until that motion is resolved. *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 717 (2019); *see also McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005); *Shin v. Cobb Cnty. Bd. of Educ.*, 248 F.3d 1061, 1064-65 (11th Cir. 2001); *Gary v. Sheahan*, 188 F.3d 891, 892 (7th Cir. 1999). Here, the motion for reconsideration delayed the Rule 23(f) deadline, which renders the petition timely. But because that motion is still pending and could alter the course of the case, appellate review of the denial of class certification is premature.

IT IS ORDERED that the motion for leave to appeal under Fed. R. Civ. P. 23(f) is DENIED WITHOUT PREJUDICE. Either party may file a Rule 23(f) petition within 14 days of the entry of an order disposing of the motion for reconsideration in the district court.

OPINION,
U.S. COURT OF APPEALS, FIFTH CIRCUIT
(AUGUST 14, 2019)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TAYLOR CARLISLE, Individually
and as Representative Member of a Class;
EMILE HERON, Individually and as
Representative Member of a Class,

Plaintiffs-Appellants,

v.

TRACY MUSSAL, as Program Supervisor
of the 24th Judicial District Court Drug Court
Intensive Probation Program; KEVIN THERIOT,
Probation Coordinator of the 24th Judicial District
Court Drug Court Intensive Probation Program;
KRISTEN BECNEL, as Administrator of the
24th Judicial District Court Drug Court
Intensive Probation Program,

Defendants-Appellees.

No. 18-30002

Appeal from the United States District Court
for the Eastern District of Louisiana.
USDC No. 2:16-CV-3767

Before: HAYNES, GRAVES, and
DUNCAN, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellants, two former participants in Jefferson Parish's Drug Court, brought this civil rights action under 42 U.S.C. § 1983. They alleged members of the Drug Court, acting in their official and individual capacities, violated their constitutional rights to due process by jailing them for technical program violations without a hearing and for giving them "flat time" sentences that did not allow the ability to earn credit for good behavior. The district court dismissed the claims against three Defendants, a Drug Court administrator, a Drug Court supervisor, and Drug Court probation officer, and entered a final judgment in their favor.

We have carefully reviewed the briefs, the applicable law, and the relevant portions of the record. We AFFIRM the judgment of the district court for the reasons explained in the district court's orders dated May 23, 2017, August 1, 2017, October 31, 2017, and December 19, 2017.

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

ORDER,
U.S. COURT OF APPEALS, FIFTH CIRCUIT
(APRIL 17, 2018)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TAYLOR CARLISLE, Individually and as Representative Member of a Class; EMILE HERON,

Plaintiffs-Appellants,

v.

TRACY MUSSAL, as Program Supervisor of the 24th Judicial District Court Drug Court Intensive Probation Program; KEVIN THERIOT, Probation Coordinator of the 24th Judicial District Court Drug Court Intensive Probation Program; JOE McNAIR, Director of Counseling of the 24th Judicial District Court Intensive Probation Program, also known as Joseph Thomas McNair; KRISTEN BECNEL, as Administrator of the 24th Judicial District Court Drug Court Intensive Probation Program, McNAIR & McNAIR, L.L.C.; RICHARD M. TOMPSON, District Defender #24 of Louisiana Public Defender Board; originally named in Complaint and Amended Complaint as Richard M. Thompson; JOSEPH A. MARINO, JR., Staff Counsel of Louisiana Public Defender Board; originally sued in Complaint and Amended Complaint as Joe Marino

Defendants-Appellees.

No. 18-30002

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

Before: DENNIS, SOUTHWICK, and
HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the opposed motion of appellees Joe McNair and McNair & McNair, L.L.C. to dismiss this appeal is GRANTED. Plaintiffs have not demonstrated that they are entitled to an interlocutory appeal as of right. *See* 28 U.S.C. § 1291, § 1292(a).

OPINION,
U.S. COURT OF APPEALS, FIFTH CIRCUIT
(DECEMBER 4, 2019)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TAYLOR CARLISLE, Individually
and as Representative Member of a Class;
EMILE HERON, Individually and as
Representative Member of a Class,

Plaintiffs-Appellants,

v.

PATRICIA KLEES, Officer,

Defendant-Appellee.

No. 19-30027

Appeal from the United States District Court
for the Eastern District of Louisiana.
USDC No. 2:16-CV-3767

Before: KING, JONES, and
DENNIS, Circuit Judges.

PER CURIAM:*

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

Plaintiffs-Appellants, two former participants in Jefferson Parish's Drug Court, brought this civil rights action under 42 U.S.C. § 1983. They alleged that members of the Drug Court, acting in their official and individual capacities, violated their constitutional rights to due process by jailing them for technical program violations without a hearing and for giving them "flat time" sentences that did not allow the ability to earn credit for good behavior.

The district court dismissed the claims against three defendants—a Drug Court administrator, a supervisor, and a probation officer (collectively, the Drug Court Administrators)—finding, inter alia, that the Drug Court Administrators were entitled to Eleventh Amendment immunity from suit seeking damages for actions taken in their official capacities and that Plaintiffs lacked standing to bring injunctive and declaratory relief claims against the Drug Court Administrators. A panel of this court affirmed that dismissal for the reasons stated by the district court. *Carlisle v. Mussal*, 774 F. App'x 905, 905 (5th Cir. 2019). Now, Plaintiffs appeal the district court's dismissal of their claims against another Drug Court administrator, compliance officer Patricia Klees. The district court concluded that, like the Drug Court Administrators, Klees was entitled to Eleventh Amendment sovereign immunity from Plaintiffs' § 1983 damages claim against her in her official capacity and that Plaintiffs lacked standing to bring claims seeking declaratory or injunctive relief against Klees.

"Under the law of the case doctrine, an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States v.*

Matthews, 312 F.3d 652, 657 (5th Cir. 2002) (internal quotation marks and citation omitted). Because Klees is identically situated to the Drug Court Administrators,[1] we apply the law of the case doctrine and decline to disturb the earlier panel's ruling that the district court did not err in dismissing Plaintiffs' official-capacity damages claims based on Eleventh Amendment immunity and their declaratory-or-injunctive-relief claims for lack of standing. *See Carlisle*, 774 F. App'x at 905; *In re Fisher*, 640 F.3d 645, 649-50 (5th Cir. 2011).

The district court also found that Plaintiffs failed to sufficiently plead a § 1983 damages claim against Klees in her individual capacity. The court explained that Plaintiffs' complaint "[did] not explicitly state that it asserts a claim against Klees in her personal capacity, and in fact it does not mention Klees in any section purporting to assert any claims against anyone in their personal capacities." Because "a 1983 suit naming defendants only in their 'official capacity' does not involve personal liability to the individual defendant," *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000), and Plaintiffs' complaint did not contain a short and plain statement seeking relief from Klees individually, the district court concluded that no claims against Klees

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[1] Plaintiffs argued in the district court, and seem to argue before this court, that their official-capacity claims against Klees differ from those against the other Drug Court Administrators because "their official-capacity claims against Klees . . . are for acts that she took in her capacity as a police officer for the City of Gretna rather than in her capacity as a Drug Court administrator." We agree with the district court that Plaintiffs' allegations against Klees are for acts committed in her capacity as a compliance officer for the Drug Court, and therefore she is situated identically to the Drug Court Administrators.

remained. We agree. *See Bell Ad. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (stating that Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the claim is and the grounds upon which it rests' (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)) (alteration omitted)).

For these reasons, the judgment of the district court is AFFIRMED.

DENIAL OF WRIT,
SUPREME COURT OF LOUISIANA
(JANUARY 15, 2016)

THE SUPREME COURT OF THE
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

TAYLOR CARLISLE

No. 2015-KK-2078

IN RE: Taylor Carlisle; - Defendant;
Applying For Supervisory and/or Remedial Writs,
Parish of Jefferson, 24th Judicial District Court
Div. P, No. 12-6158; to the Court of Appeal,
Fifth Circuit, No. 15-KH-597;

Before: WEIMER, J.

Denied.

GGG
BJJ
JTK
MRC
JOH
SJC

WEIMER, J., would grant.

/s/
Deputy Clerk of Court
For the Court

Supreme Court of Louisiana
January 15, 2016

DENIAL OF PETITION FOR WRIT, FIFTH CIRCUIT COURT OF APPEAL, STATE OF LOUISIANA (JANUARY 15, 2016)

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

TAYLOR CARLISLE

No. 15-KH-597

Before: Susan M. CHEHARDY, Chief Judge, Jude G. GAVOIS, Robert A. CHAISSON, Judges.

WRIT DENIED

Relator, Taylor Carlisle, filed this writ application seeking review of the district court's ruling of August 25, 2015 in which the court held relator in contempt of court and sentenced him to six months in parish prison. For the reasons that follow, we deny the instant writ application.

On December 17, 2012, the Jefferson Parish District Attorney charged relator with possession of oxycodone, a violation of La. R.S. 40:967(C). On January 30, 2013, he pled guilty pursuant to La. C.C.P. art. 893 and was placed in the drug court program in accordance with La. R.S. 13:5304. On August 25, 2015, during relator's participation in the

program, the court held relator in contempt of court and sentenced him to six months in parish prison. These proceedings were held in closed court without a court reporter. Relator filed the instant writ application on September 25, 2015. Without a record, we cannot review the proceedings below. Consequently, on September 29, 2015, we ordered a *per curiam* from the district court explaining the lack of a record, the factual basis for the contempt finding, and the statutory authority for the penalty imposed. The district court issued its *per curiam* on October 9, 2015.

Regarding the lack of a record, the court explained that "[i]t is not protocol to record the weekly court meetings of [drug court]." The Louisiana Constitution mandates the recordation of proceedings as a prerequisite for imposition of imprisonment.[1] Art. I, § 19 of the Louisiana Constitution provides:

> No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently

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[1] In addition to this constitutional mandate, La. C.Cr.P. art. 843 provides:

> In felony cases, in cases involving violation of an ordinance enacted pursuant to R.S. 14: 143(B), and on motion of the court, the state, or the defendant in other misdemeanor cases tried in a district, parish, or city court, the clerk or court stenographer shall record all of the proceeding, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

> waived. The cost of transcribing the record shall be paid as provided by law.

Drug court is a probation program, entry into which is contingent upon a plea of guilty to the charged offense. *See* La. R.S. 13:5304(C)(1). In addition to pleading guilty, entry into the program is contingent upon the defendant's signing a probation agreement stating the terms and conditions of the program. *See id*. The court is authorized to "impose any conditions reasonably related to the complete rehabilitation ofthe defendant." *See* La. R.S. 13:5304(B)(3)(d). The probation agreement of the Twenty-Fourth Judicial District Intensive Probation Drug Court, which relator agreed to and signed, states that a participant waives "all due process rights which [he] may have under the U.S. Constitution and the Constitution of Louisiana involved in the administration of Drug Court and in particular the imposition of sanctions by the Drug Court Judge." By agreeing to the probation agreement, we find defendant waived all of his due process rights under the Louisiana Constitution, including that afforded by Art. I, § 19.

Regarding the factual basis for the finding of contempt, the district court provided the following:

> Mr. Carlisle has a lengthy sanction history that dates back to the year 2013. His last sanctions involved him lying to the court and staff about the location of his AA sheets. He said he lost the AA sheets. He later admitted that he lied to the staff and the sheets were in his car. He lied about attending AA meetings and violated curfew at least four times. The participant also lied about associating with a convicted felon, despite being shown a picture

> of himself with the convicted felon. Based upon his sanction history, he was held in contempt and sentenced accordingly.

Contempt of court is defined as "an act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority." La. C.Cr.P. art. 20. Contempt is either direct or constructive. *Id*. Based on the foregoing factual basis, it seems the court adjudged relator guilty of direct contempt, which is defined in part as an act or omission "committed in the immediate view and presence of the court and of which it has personal knowledge." La. C.Cr.P. art. 21. This includes "[c]ontumacious, insolent, or disorderly behavior toward the judge or an attorney or other officer of the court, tending to interrupt or interfere with the business of the court or to impair its dignity or respect for its authority." La. C.Cr.P. art. 21(5). This carries a penalty of a fine of not more than five hundred dollars, or imprisonment for not more than six months, or both. La. C.Cr.P. art. 25(B). "A person who has committed a direct contempt of court may be found guilty and punished therefor by the court without any trial, after affording him an opportunity to be heard orally by way of defense or mitigation." La. C.Cr.P. art. 22. "The court shall render an order reciting the facts constituting the contempt, adjudging the person guilty thereof, and specifying the punishment imposed." *Id*.

The district court is vested with great discretion in finding contempt of court. *See McCaffery v. McCaffery*, 13-692 (La. App. 5 Cir. 4/9/14), 140 So.3d 105, 117, *writ denied*, 14-981 (La. 6/13/14), 141 So.3d 273. In consideration of relator's repeated lies to the court, we find the court did not abuse its discretion by holding

relator in contempt and sentencing him to six months in parish prison. Although the court did not initially comply with the mandate of La. C.Cr.P. art. 22 to "render an order reciting the facts constituting the contempt, adjudging the person guilty thereof, and specifying the punishment imposed," we find the court subsequently came into compliance with the issuance of its *per curiam*.

Furthermore, we note that by signing the probation agreement, relator agreed to "abide by all sanctions imposed by the Drug Court Judge including jail service, community service, frequent court visits and appearances, increased drug testing, AA and NA meetings, individual and group counseling sessions and any conditions of supervision which, in the judgment of the court, would be beneficial to me." (Emphasis added).

Upon review, we see no reason to disturb the ruling of the district court. This writ application is accordingly denied.

Gretna, Louisiana, this 16th day of October, 2015.

/s/ Susan M. Chehardy
Chief Judge

/s/ Jude G. Gavois
Judge

/s/ Robert A. Chaisson
Judge

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS, FIFTH CIRCUIT (JUNE 22, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TAYLOR CARLISLE, Individually and as Representative Member of a Class; EMILE HERON, Individually and as Representative Member of a Class,

Plaintiffs-Appellants,

v.

JOE MCNAIR, also known as Joseph Thomas McNair; NEWELL NORMAND; MCNAIR & MCNAIR, L.L.C.; PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendants-Appellees.

SHERIFF JOSEPH P. LOPINTO, III,

Appellee.

No. 22-30031

Appeal from the United States District Court
for the Eastern District of Louisiana.
USDC No. 2: 16-CV-3767

Before: HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

JUDGMENT,
U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
(JANUARY 19, 2022)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TAYLOR CARLISLE, ET AL.

v.

NEWELL NORMAND, ET AL.

Civil Action No. 16-3767 Section: "H"(1)

Before: Jane Triche MILAZZO,
United States District Judge.

For reasons previously issued by this Court as set forth in Rec. Docs. 355, 545, 577, 601, 618, 680 and 704;

IT IS ORDERED, ADJUDGED AND DECREED that the above-captioned matter is hereby DISMISSED WITH PREJUDICE in its entirety.

Signed in New Orleans, Louisiana, this 19th day of January 2022.

/s/ Jane Triche Milazzo
United States District Judge

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTORY TEXT

U.S. CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment V

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

U.S. Const. Amendment VI

"[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

U.S. Const. Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

42 U.S.C. § 1983
Civil Rights Act of 1871, as amended,
Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

LOUISIANA CONSTITUTIONAL PROVISIONS

La. Const. art. I, § 19
Right to Judicial Review

No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

La. Const. art. I, § 22
Access to Courts

All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, or unreasonable

delay, for injury to him in his person, property, reputation, or other rights**.**

LOUISIANA STATUTES

Code Crim. Proc. Ann. art. 20
Contempt of court; kinds of contempt

A contempt of court is an act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court, or respect for its authority.

La. Crim. Proc. Ann. art. 21
Direct contempt (contempt which takes place in the presence of the court)(2009)

A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge; or a contumacious failure to comply with a subpoena, summons or order to appear in court, proof of service of which appears of record; or, a contumacious failure to comply with an order sequestering a witness.

A direct contempt includes, but is not limited to, any of the following acts:

(1) Contumacious failure, after notice, to appear for arraignment or trial on the day fixed therefor;

(2) Contumacious failure to comply with a subpoena or summons to appear in court, proof of service of which appears of record;

(3) Contumacious violation of an order excluding, separating, or sequestering a witness;

(4) Refusal to take the oath or affirmation as a witness, or refusal of a witness to answer a no

incriminating question when ordered to do so by the court;

(5) Contumacious, insolent, or disorderly behavior toward the judge or an attorney or other officer of the court, tending to interrupt or interfere with the business of the court or to impair its dignity or respect for its authority;

(6) Breach of the peace, boisterous conduct, or violent disturbance tending to interrupt or interfere with the business of the court or to impair its dignity or respect for its authority;

(7) Use of insulting, abusive, or discourteous language by an attorney or other person in open court, or in a motion, plea, brief, or other document, filed with the court, in irrelevant criticism of another attorney or of a judge or officer of the court;

(8) Violation of a rule of the court adopted to maintain order and decorum in the court room; or

(9) Contumacious failure to attend court as a member of a jury venire or to serve as a juror after being accepted as such when proof of service of the subpoena appears of record.

La. Code Crim. Proc. Ann. § 22.
Procedure for punishing direct contempt (2009)

A person who has committed a direct contempt of court may be found guilty and punished therefor by the court without any trial, after affording him an opportunity to be heard orally by way of defense or mitigation. The court shall render an order reciting the facts constituting the contempt, adjudging the person guilty thereof, and specifying the punishment imposed.

La. Code Crim. Proc. Ann. § 880A
Credit for prior custody, limitations
(effective 2013)

A. A defendant shall receive credit toward service of his sentence for time spent in actual custody prior to imposition of sentence.

. . .

Louisiana Rev. Stat. Ann. § 13:5304
The Drug Division Probation Program
(effective 2009)

A. Each district court by rule may designate as a drug division one or more divisions to which alcohol- or drug-related offenses are assigned and may establish a probation program to be administered by the presiding judge or judges thereof or by an employee designated by the court.

. . .

B. Participation in probation programs shall be subject to the following provisions:

(1) . . . .[a]ll of the following criteria are satisfied:

. . .

(c) It is in the best interest of the community and in the interest of justice to provide the defendant with treatment as opposed to incarceration or other sanctions.

. . .

(3) In offering a defendant the opportunity to request treatment, the court shall advise the defendant of the following:

(a) If the defendant is accepted into the drug division probation program, then the defendant must waive the right to a trial. The defendant must enter a plea of guilty to the charge, with the stipulation that sentencing be deferred or that sentence be imposed, but suspended, and the defendant placed on supervised probation under the usual conditions of probation and under certain special conditions of probation related to the completion of such substance abuse treatment programs as are ordered by the court.

(b) If the defendant requests to undergo treatment and is accepted, the defendant will be placed under the supervision of the drug division probation program for a period of not less than twelve months.

(c) During treatment the defendant may be confined in a treatment facility or, at the discretion of the court, the defendant may be released on a probationary basis for treatment or supervised aftercare in the community.

(d) The court may impose any conditions reasonably related to the complete rehabilitation of the defendant.

(e) The defendant shall be required to participate in an alcohol and drug testing program at his own expense, unless the court determines that he is indigent.

(f) If the defendant completes the drug division probation program, and successfully completes all other requirements of his court-ordered probation, the conviction may be set aside and the prosecution dismissed in accordance with the provisions of Code of Criminal Procedure Articles 893 and 894. If the defendant was sentenced at the time of the entry of the plea of guilty, the successful completion of the drug division probation program and the other requirements of probation will result in his discharge from supervision. If the defendant does not successfully complete the drug division probation program, the judge may revoke the probation and impose sentence, or the judge may revoke the probation and order the defendant to serve the sentence previously imposed and suspended, or the judge may revoke the probation and order the defendant to be committed to the custody of the Department of Public Safety and Corrections and be required to serve a sentence of not more than six months without diminution of sentence in the intensive incarceration program pursuant to R.S. 15:574.4.1, or the court may impose any sanction provided by

Code of Criminal Procedure Article 900, and extend probation and order that the defendant continue treatment for an additional period, or both.

(4) The defendant has the right to be represented by counsel at all stages of a criminal prosecution and in any court-hearing relating to the drug division probation program. The defendant shall be represented by counsel during the negotiations to determine eligibility to participate in the drug division probation program and shall be represented by counsel at the time of the execution of the probation agreement, and at any hearing to revoke the defendant's probation and discharge him from the program, unless the court finds and the record shows that the defendant has knowingly and intelligently waived his right to counsel.

(5) The defendant must agree to the drug division probation program. If the defendant elects to undergo treatment and participate in the drug division probation program, the court shall order an examination of the defendant by one of the court's designated licensed treatment programs. Treatment programs shall possess sufficient experience in working with criminal justice clients with alcohol or drug addictions, or both, and shall be certified and approved by the state of Louisiana. The designated treatment program shall utilize standardized testing and evaluation procedures to determine whether or not the defendant is an appropriate candidate for a treatment program and shall report such findings to the court and the district attorney.

(6) Only those defendants who suffer from alcoholism or a drug addiction, or both, or who are in danger of becoming dependent on alcohol or drugs and who are likely to be rehabilitated through treatment shall be considered for treatment.

. . . .

(10) In order to be eligible for the drug division probation program, the defendant must satisfy each of the following criteria:

(a) The defendant cannot have any prior felony convictions for any offenses defined as crimes of violence in R.S. 14:2(B).

(b) The crime before the court cannot be a crime of violence as defined in R.S. 14:2(B), including domestic violence.

(c) Other criminal proceedings alleging commission of a crime of violence as defined in R.S. 14:2(B) cannot be pending against the defendant.

(d) The defendant cannot have been convicted of aggravated burglary or simple burglary of an inhabited dwelling if the defendant has a record of one or more prior felony convictions.

(e) The crime before the court cannot be a charge of driving under the influence of alcohol or any other drug or drugs that resulted in the death of a person.

(f) The crime charged cannot be one of multiple counts of distribution, possession with intent to distribute, production, manufacture, or

cultivation of controlled dangerous substances.

. . . .

(11)

(a) The judge shall make the final determination of eligibility. If, based on the examiner's report and the recommendations of the district attorney and the defense counsel, the judge determines that the defendant should be enrolled in the drug division probation program, the court shall accept the defendant's guilty plea and suspend or defer the imposition of sentence and place the defendant on probation under the terms and conditions of the drug division probation program. The court also may impose sentence and suspend the execution thereof, placing the defendant on probation under the terms and conditions of the drug division probation program. . . .

(c) . . . Additionally, a treatment program may petition the court for immediate discharge of any individual who fails to comply with treatment program rules and treatment expectations or who refuses to constructively engage in the treatment process.

C.

(1) The terms of each probation agreement shall be decided by the judge. The defendant must agree to enter the program and sign a probation agreement stating the terms and conditions of his program. The defendant must plead guilty to the

charge in order to be eligible for the drug division probation program.

(2) Any probation agreement entered into pursuant to this Section shall include the following:

(a) The terms of the agreement, which shall provide that if the defendant fulfills the obligations of the agreement, as determined by the court, then the criminal charges may be dismissed and the prosecution set aside in accordance with the provisions of Code of Criminal Procedure Articles 893 and 894, or, if the defendant has been sentenced following the plea of guilty, then the successful completion of the drug division probation program may result in the discharge of the defendant from continued supervision.

(b) A waiver by the defendant *of the right to trial by jury* under the laws and constitution of Louisiana and the United States.

. . . .

(3) A defendant who is placed under the supervision of the drug division probation program shall pay the cost of the treatment program to which he is assigned and the cost of any additional supervision that may be required, to the extent of his financial resources, as determined by the drug division.

D.

(1) When appropriate, the imposition or execution of sentence shall be postponed while the defendant is enrolled in the treatment program. As

long as the probationer follows the conditions of his agreement, he or she shall remain on probation. At the conclusion of the period of probation, the district attorney, on advice of the person providing the probationer's treatment and the probation officer, may recommend that the drug division take one of the following courses of action:

(a) That the probationer's probation be revoked and the probationer be sentenced because the probationer has not successfully completed the treatment and has violated one or more conditions of probation . . .

(b) That the period of probation be extended so that the probationer may continue the program.

(c) That the probationer's conviction be set aside and the prosecution dismissed because the probationer has successfully completed all the conditions of his or her probation and treatment agreement.

(2) The district attorney shall make the final determination on whether to request revocation, extension, or dismissal.

(3)

(a) If an individual who has enrolled in a program violates any of the conditions of his probation or his treatment agreement or appears to be performing unsatisfactorily in the assigned program, or if it appears that the probationer is not benefiting from edu-

cation, treatment, or rehabilitation, the treatment supervisor, probation officer, or the district attorney may move the court for a hearing to determine if the probationer should remain in the program or whether the probation should be revoked and the probationer removed from the program and sentenced or ordered to serve any sentence previously imposed. If at the hearing the moving party can show sufficient proof that the probationer has violated his probation or his treatment agreement and has not shown a willingness to submit to rehabilitation, the probationer may be removed from the program or his treatment agreement may be changed to meet the probationer's specific needs.

(b) If the court finds that the probationer has violated a condition of his or her probation or a provision of his or her probation agreement and that the probationer should be removed from the probation program, then the court may revoke the probation and sentence the individual in accordance with his or her guilty plea or, if the individual has been sentenced and the sentence suspended, order the individual to begin serving the sentence.

(c) If a defendant who has been admitted to the probation program fails to complete the program and is thereafter sentenced to jail time for the offense, he shall be entitled to credit for the time served in any correctional facility in connection with the charge before the court.

(d) At any time and for any appropriate reason, the probationer, his probation officer, the district attorney, or his treatment provider may petition the court to reconsider, suspend, or modify its order for rehabilitation or treatment concerning that probationer.

(e) The burden of proof at all such hearings shall be the burden of proof required to revoke probation as provided by law.

E. The appropriate alcohol and drug treatment program shall report the following changes or conditions to the district attorney at any periodic reporting period specified by the court:

(1) The probationer is changed from an inpatient to an outpatient.

(2) The probationer is transferred to another treatment center or program.

(3) The probationer fails to comply with program rules and treatment expectations.

(4) The probationer refuses to engage constructively in the treatment process.

(5) The probationer terminates his or her participation in the treatment program.

(6) The probationer is rehabilitated or obtains the maximum benefits of rehabilitation or treatment.

F. Upon successful completion of the drug division probation program and its terms and conditions, the judge, after receiving the recommendation from the district attorney, may vacate the judgment of conviction and dismiss the criminal proceedings against the

probationer or may discharge the defendant from probation in accordance with the provisions of Code of Criminal Procedure Article 893 or 894.

G. Discharge and dismissal under this Chapter, as provided in Code of Criminal Procedure Articles 893 and 894, shall have the same effect as acquittal, except that the conviction may be considered in order to provide the basis for subsequent prosecution of the party as a multiple offender and shall be considered as an offense for the purposes of any other law or laws relating to cumulation of offenses. Dismissal under this Chapter shall occur only once with respect to any person. Nothing herein shall be construed as a basis for the destruction of records of the arrest and prosecution of the person.

I. Each defendant shall contribute to the cost of substance abuse treatment received in the drug treatment program based upon guidelines developed by the drug division.

J. Each judicial district that establishes a drug division shall adopt written policies and guidelines for the implementation of a probation program in accordance with this Chapter . . .

K. Each drug division shall develop a method of evaluation so that its effectiveness can be measured. These evaluations shall be compiled annually and transmitted to the judicial administrator of the Supreme Court of Louisiana.

Louisiana Rev. Stat. Ann. 15 § 571.3
Diminution of sentence for good behavior

A.

(1) Every prisoner in a parish prison convicted of an offense and sentenced to imprisonment without hard labor . . . ., may earn a diminution of sentence, to be known as "good time", by good behavior and performance of work or self-improvement activities, or both . . . . [a]t the rate of thirty days for every thirty days in actual custody, ... including, in either case, time spent in custody with good behavior prior to sentencing for the particular sentence imposed as authorized by Code of Criminal Procedure Article 880.

(2) The sheriff of the parish in which the conviction was had shall have the sole authority to determine when good time has been earned in accordance with the sheriff's regulations and the provisions of this section.

Louisiana Admin. Code, tit. 22, Part IX, Ch.3 § 305. Credit for Time Served A.(pub'd June, 2023) effective January 1992:

A. If a sentence of incarceration is imposed and executed, an offender should be given credit for time served under the following conditions prior to the imposition or execution of sentence:

1. time spent in actual custody in connection with the offense of conviction;

2. time spent in actual custody in a public or private mental hospital or other similar facility if

ordered by the court in connection with the offense of conviction;

3. time spent in actual custody as a condition of probation if that probation is subsequently revoked.

B. Actual custody, as used in this Section, is limited to time spent in confinement in prisons, jails, parish prisons, prison farms, workhouses, work-release centers, regional correctional facilities, public or private mental hospitals, or other similar facilities.