*In the*
*Supreme Court of the United States*

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**No. _____**

AMANDA WOOD,
*PETITIONER,*

**v.**

CITY OF SAN ANTONIO, OFFICER MARTHA MARTINEZ, OFFICER J. ORTIZ
*RESPONDENTS.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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# SUPPLEMENTAL CERTIORARI APPENDIX

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Andres Roberto Cano
Supreme Court Bar # 325608
Texas Bar 24100071
Petitioner's Counsel
5231 Redding
San Antonio, Texas 78219
(210) 231-0433 (office)
(210) 263-7667 (fax)
dx4829@gmail.com

**SUPPLEMENTAL APPENDIX**

**U.S. Magistrate's Report & Recommendations**

5:21-cv-187-OLG

*Amanda Wood v. City of San Antonio, et al.*

October 25, 2022

**ROA.23-50037.878-898.**

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Respectfully Submitted,

***/s/ Andres Cano***

Petitioner's Counsel
Supreme Court Bar 325608
Texas Bar 24100071
5231 Redding
San Antonio, Texas 78219
(210) 231-0433
(210) 263-7667 (fax)
dx4829@gmail.com

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

**AMANDA WOOD,**
**Plaintiff,**

**v.** **5:21cv895-OLG**

**CITY OF SAN ANTONIO, et al.**
**Defendants.**

## REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

**To the Honorable Orlando L. Garcia,**
**United States Chief District Judge:**

This Report and Recommendation concerns the Motions to Dismiss Pursuant to FED. R. CIV. P. 12(c) and/or Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56 filed by Defendants Jimmy Ortiz and Martha Martinez (Docket Entry 51), and the Motion to Dismiss Pursuant to FED. R. CIV. P. 12(c) and/or Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56 filed by the City of San Antonio ("the City") (Docket Entry 52). Pretrial motions in this case have been referred to the undersigned for consideration. (*See* Docket Entry 62.) For the reasons set out below, I recommend that Defendants' motions (Docket Entries 51 and 52) be **GRANTED**.

## I. Jurisdiction

Plaintiff brought suit alleging violations of 42 U.S.C. § 1983 and § 1985. (Docket Entry 1.) The Court has jurisdiction to consider this case based on federal question jurisdiction under 28 U.S.C. § 1331, and I have authority to issue this Report and Recommendation pursuant to 28 U.S.C. § 636(b).

## II. Background

***Factual background***. This case arises out of Plaintiff's arrest in San Antonio, Texas, in the early morning hours of February 27, 2019. (Docket Entry 1, at 5.) The incident was captured on video by two officers (*see* Docket Entry 51-2); that video evidence is cited in recounting the events below.

While on patrol, Defendants San Antonio Police Officers Jimmy Ortiz and Martha Martinez received a call at approximately 1:15 A.M., informing them that an individual appeared to be using a machine to break through a metal fence. (Docket Entry 51-1, at 2.) When the officers arrived at the scene, they saw a male individual using welding equipment on a metal fence. (Docket Entry 51-2, at 0:40.) As they approached the man, Plaintiff exited her vehicle parked right next to the gate and moved toward the officers. (*Id.* at 0:50.) Officer Ortiz asked the man, who identified himself as Harry Lozano, what he was doing so late at night and why he was locking his gate when the officers approached him. (*Id.* at 0:50–0:57.) At that point, Plaintiff interjected and asked, with a slurred voice, "Wait. I'm sorry, is there

something going on?" (*Id.* at 0:56–0:58.) Officer Ortiz was still interacting with Lozano, who was in the process of locking the gate against the officers. (*Id.* at 0:58–1:05.) Plaintiff asked again what was wrong, and if Officer Ortiz needed to see her identification despite not being spoken to by the officers. (*Id.*) Officer Ortiz said yes, and Plaintiff approached the rear of her vehicle where Officer Ortiz was standing and began to rummage through her trunk. (*Id.* at 1:05–1:14.) Meanwhile, the officers were still attempting to question Lozano about why he was locking the gate and why he was welding at that time of night. (*Id.*)

Plaintiff again interjected and told Officer Ortiz that she would be seeking a copy of the police report and that she and Lozano hadn't done anything wrong. (Docket Entry 51-2, at 1:14–1:21.) Officer Ortiz told her not to reach into her bag, which was in the trunk of her car, and to come towards him away from the vehicle. (*Id.* at 1:21–1:26.) He then told her "You want to do this the hard way, we can do this the hard way." (*Id.* at 1:26–1:32.) He began to lead her towards his vehicle. (*Id.*) Officer Ortiz then told Plaintiff, "First of all, you smell like weed." (*Id.* at 1:33–1:38.) Plaintiff disagreed, and Officer Ortiz reiterated that he could smell burnt marijuana. (*Id.*) He instructed Plaintiff to put her hands behind her back and, when she did not immediately comply, began to tug her hands behind her back and place her in handcuffs. (*Id.* at 1:38–2:00) Plaintiff started asking to speak to her attorney, but Officer Ortiz informed her that she wouldn't be speaking to anybody. (*Id.* at 2:00–2:10.)

He led Plaintiff to sit in the back of his vehicle while he resumed trying to question Lozano, who had retreated into the gated property. (*Id.* at 2:20–6:47.)

Four and a half minutes after handcuffing Plaintiff, Officer Ortiz initiated a search of her vehicle. (Docket Entry 51-2, at 2:20–7:00.) Officer Ortiz told other officers who had arrived at the scene that "she smells like weed so we can [search her car]." (*Id.* at 6:57–6:59.) Plaintiff did not consent to this search. (*Id.* at 7:22–7:26.) Officer Martinez performed a search of Plaintiff's vehicle and noted a smell of burnt marijuana upon opening the door. (Docket Entry 51-4, at 0:35–0:39.) During her search, Officer Martinez found a "small roach," a small amount of burnt marijuana, in the driver's side door handle compartment. (*Id.* at 2:00–2:10.) Officer Martinez gave it to Officer Ortiz, who placed it on the passenger seat of his police vehicle. (Docket Entry 51-2, at 13:20–13:55.) Officer Ortiz then informed Plaintiff that she was under arrest for possession of marijuana. (*Id.* at 13:55–14:00.) Officers continued to search the rest of Plaintiff's vehicle after discovering the marijuana. (*Id.* at 14:00–16:00.)

Plaintiff complained that her handcuffs were too tight, specifically that one was fastened tighter than the other. (Docket Entry 51-2, at 23:10–23:40.) Officer Ortiz went to help her while she was buckled into the back seat, instructing her to move forward so he could reach her handcuffs behind her back. (*Id.*) He adjusted the size of her handcuffs and asked her

if it was better, to which she responded affirmatively. (*Id.* at 23:40–24:28.)

***Procedural history.*** Plaintiff filed this case against Officers Ortiz and Martinez, unnamed staff at Bexar County Jail, Bexar County, and the City. (Docket Entry 1.) Bexar County moved to have the claims against it and the unnamed employees dismissed; the motion was granted by District Judge Xavier Rodriguez. (Docket Entry 17.) The case was subsequently transferred to this Court. (Docket Entry 59.) Officers Ortiz and Martinez and the City then moved either for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) or summary judgment pursuant to Federal Rule of Civil Procedure 56. (Docket Entries 51 and 52.) Plaintiff responded (Docket Entry 54), Defendants replied (Docket Entries 60 and 61), and the District Court subsequently referred the case to the undersigned for consideration. (Docket Entry 62).

## III. Applicable Legal Standards

### A. Rule 12(c)

The standard for Rule 12(c) motions for judgment on the pleadings is identical to the standard for considering motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Waller v. Hanlon*, 922 F.3d 590, 599 (5th Cir. 2019) (citing *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008)). When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the "court accepts 'all well-pleaded

facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). For a claim to survive a motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In determining whether a plaintiff's claims survive a Rule 12(b)(6) motion to dismiss, the factual information the court considers is limited to (1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201. *Gomez v. Galman*, 18 F.4th 769, 775 (5th Cir. 2021). Judicial notice may be taken of matters of public record. *Firefighters' Ret. Sys., v. EisnerAmper*, 898 F.3d 553, 558 n.2 (5th Cir. 2018). When a defendant includes evidence in his motion that is referred to in the complaint and is central to the plaintiff's claims, the court may also properly

consider that evidence. *See Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004); *In re Katrina Canal Breaches Litig.*, 495 F.3d at 205. "In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000).

**B. Summary Judgment**

A party is entitled to summary judgment under Federal Rule of Civil Procedure 56 if the record shows no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A party against whom summary judgment is sought may not rest on the allegations or denials in her pleadings, but instead must come forward with sufficient evidence to demonstrate a "genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute concerning a material fact is "genuine," and therefore sufficient to overcome a summary judgment motion, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact."

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FED. R. CIV. P. 56).

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citations omitted). "Although the evidence is viewed in the light most favorable to the nonmoving party, a nonmovant may not rely on 'conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence' to create a genuine issue of material fact sufficient to survive summary judgment." *Barrera v. MTC, Inc.*, No. SA-10-CV 665-XR, 2012 WL 1202296, at *2 (W.D. Tex. Apr. 10, 2012) (quoting *Freeman v. Tex. Dep't of Crim. Just.*, 369 F.3d 854, 860 (5th Cir. 2004)).

When the parties submit video evidence, the Court "assign[s] greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Carnaby v. City of Houston.*, 636 F.3d 183, 187 (5th Cir. 2011) (citing *Scott v. Harris*, 550 U.S. 372 (2007)).

**C. 42 U.S.C. 1983**

To state a claim under Section 1983 a plaintiff must: (1) allege the violation of a right secured by the Constitution and laws of the United States and (2) show that the alleged deprivation was committed

by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). To act under the color of state law in such an action requires a defendant to have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

In considering the § 1983 claims in this case, two additional legal doctrines must be considered: (1) qualified immunity and (2) municipal liability.

**1. Qualified Immunity**

The doctrine of qualified immunity protects public officials from suit and liability for damages under § 1983 unless their conduct violates a clearly established constitutional right. *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). In determining whether the doctrine applies, courts engage in a two-step analysis, determining (1) whether a statutory or constitutional right was violated on the facts alleged, and (2) whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 623–24. The two steps of the qualified immunity inquiry may be performed in any order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Under the second step of the inquiry, "[a] Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear

that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The Court does not need "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Clearly established law is not determined "at a high level of generality." *Id.* at 742. Instead, the dispositive question is "whether the violative nature of particular conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 11–12 (2015) (citation omitted)). The inquiry must look at the specific context of the case. *Id.*

"A qualified immunity defense alters the usual summary judgment burden of proof." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). Although nominally an affirmative defense, the plaintiff has the burden to negate the defense once it is properly raised. *Garza v. Briones,* 943 F.3d 740, 744 (5th Cir. 2019). The plaintiff has the burden to point out clearly established law. *Clarkston v. White*, 943 F.3d 988, 993 (5th Cir. 2019). The plaintiff also bears the burden of "raising a fact issue as to its violation." *Delaughter v. Woodall,* 909 F.3d 130, 139 (5th Cir. 2018). Thus, once the defense is invoked, "[t]he plaintiff must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law and that genuine issues of material fact exist regarding the reasonableness of the official's conduct" according to that law. *Gates v. Texas Dep't of Protective & Regul. Servs.*, 537 F.3d 404, 419 (5th Cir. 2008).

Even in in the qualified immunity context, however, all inferences are still drawn in the plaintiff's favor at the dismissal and summary judgment stages. *Brown,* 623 F.3d at 253. This is true "even when . . . a court decides only the clearly-established prong of the [qualified immunity] standard." *Tolan v. Cotton,* 572 U.S. 650, 657 (2014). Indeed, "under either [qualified immunity] prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Id.* at 656. "Accordingly, courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Id.* at 657; *cf., Tarver v. City of Edna*, 410 F.3d 745, 754 (5th Cir. 2005) (dismissal at summary judgment phase inappropriate because determining whether officer's conduct was objectively unreasonable in light of clearly established law required factfinding and credibility assessments).[1]

[1] Further qualified immunity precedent is discussed in the context of particular claims, as set out below.

**2. Municipal Liability**

Municipalities can be held liable for violating a person's constitutional rights under § 1983, but only in limited circumstances. *See Monell v. Dep't of Soc. Servs. Of City of New York.*, 436 U.S. 658 (1978). "[M]unicipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy. . . ." *Piotrowski v. City of*

*Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell*, 436 U.S. at 694.) An official policy need not be a written policy; it may also constitute "a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 413 (5th Cir. 2015).

## IV. ANALYSIS

Plaintiff brings claims against Officers Martinez and Ortiz in their individual capacity and municipal liability claims against the City. (Docket Entry 1, at 10–17.) Defendants seek to dismiss all of Plaintiff's claims. (Docket Entries 51 and 52.) This Report and Recommendation will first address the claims against the officers, then the claims against the City. Given that the parties have all attached evidence to their briefing, including video evidence of the incidents at issue, the undersigned will treat consideration of this motion as a motion for summary judgment and consider whether Plaintiff has raised a genuine issue of material fact as to her claims.

### A. Plaintiff's Claims against Officers Ortiz and Martinez

Plaintiff brings § 1983 claims against both officers for violation of the Fourteenth Amendment Due Process Clause, and unreasonable search of her vehicle and her person in violation of the Fourth Amendment; she also alleges a conspiracy to violate Plaintiff's civil rights in violation of 42 U.S.C. § 1985.

(Docket Entry 1, 10–15.) Against Officer Ortiz, Plaintiff additionally brings § 1983 claims for unreasonable seizure by use of both deadly force and excessive force. (*Id.* 10–12.) Each of these claims is discussed below.

**1. Plaintiff's 14th Amendment Claims**

Plaintiff claims that Officers Ortiz and Martinez "knowingly and intentionally filed false criminal charges" for possession of marijuana against her in violation of her right to Due Process of law. (Docket Entry 1, at 10–12.) In the Fifth Circuit, there is "a due process right not to have police deliberately fabricate evidence and use it to frame and bring false charges against a person." *Morgan v. Chapman*, 969 F.3d 238, 250 (5th Cir. 2020) (citing *Cole v. Carson*, 802 F.3d 752, 771 (5th Cir. 2015) *cert. granted, judgment vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016) *and opinion reinstated in part*, 935 F.3d 444 (5th Cir. 2018) (en banc)).

A victim of intentional fabrication of evidence by law enforcement officers is denied due process whether she is convicted or acquitted, and even where the false charges are dismissed before trial. *Cole v. Hunter*, 497 F. Supp. 3d 172, 190 (N.D. Tex. 2020). To succeed on an evidence-fabrication claim under the Fourteenth Amendment, a plaintiff must show (1) the officers fabricated evidence (2) for the purpose of falsely obtaining a charge and (3) that the evidence influenced the decision to charge. *Id.*

Plaintiff claims that the officers arrested her for "giving [them] a hard time," and that the marijuana charge was later manufactured to cover up their constitutional violations. (Docket Entry 54, at 22–23.) The video evidence, however, reveals that upon approaching Plaintiff, Officer Ortiz immediately noticed a smell of burnt marijuana coming from Plaintiff. (Docket Entry 51-2, at 1:33–1:38.) Moreover, during a search of Plaintiff's vehicle, Officer Martinez detected a strong smell of burnt marijuana coming from Plaintiff's vehicle and discovered a small amount of burnt marijuana inside. (*Id.* at 13:20–13:55.) Plaintiff does not dispute this evidence, which is included in the videos which she herself submitted to the Court. (Docket Entry 54-1, at 1, 11.) Therefore, Plaintiff has failed to create a fact issue as to the first element of the claim, that the officers fabricated evidence. Judgment should be granted as to her due process claims.

**2. Plaintiff's 4th Amendment Unreasonable search claims**

Plaintiff next claims that both officers violated her right to be free from warrantless search, both of her and of her person. (Docket Entry 1, at 10–14.)

*Search of Plaintiff's Vehicle.* Plaintiff claims that the officers' warrantless search of her vehicle violated her civil rights, both based on the extension of time of the initial investigatory stop, and the search itself. (Docket Entry 1, at 10-14.) These claims fail.

Under *Terry v. Ohio*, officers are permitted to make a brief, investigatory stop if they have reasonable suspicion that criminal activity is afoot. 392 U.S. 1 (1968). This stop may be further extended if law enforcement "develops reasonable suspicion of additional criminal activity in the meantime." *United States v. Pack*, 612 F.3d 341, 350 (5th Cir. 2010). Additionally, in the Fifth Circuit, "[i]t is well settled that warrantless searches of automobiles are permitted by the Fourth Amendment if the officers have probable cause to believe that the vehicle contains contraband or other evidence of a crime." *United States v. McSween*, 53 F.3d 684, 686 (5th Cir. 1995). The Fifth Circuit has regularly upheld a finding of probable cause based on the smell of burnt marijuana in a vehicle. *See, e.g.*, *United States v. Reed*, 882 F.2d 147, 149 (5th Cir. 1989) (the officer's detection of marijuana "in itself . . . justified the subsequent search of [the defendant's] vehicle"); *United States v. Henke*, 775 F.2d 641, 645 (5th Cir. 1985) ("Once the officer smelled the marijuana, he had probable cause to search the vehicle."); *United States v. Gordon*, 722 F.2d 112, 114 (5th Cir. 1983) (same).

In this case, the officers received a call that someone was welding a fence in the early hours of the morning, an unusual activity. (Docket Entry 52-2, at 0:00–0:40.) When the officers located the individual in question, Plaintiff immediately exited a vehicle that was parked within feet of the gate being welded. (*Id.* at 0:40–0:50.) Plaintiff initiated contact with the officers, questioning their actions while speaking in a slurred manner. When Officer Ortiz approached

Plaintiff, he smelled burnt marijuana coming from Plaintiff's person. (*Id.* at 1:33–1:38.) The officers then opened the door to the vehicle that Plaintiff had exited, again smelling marijuana. They searched the vehicle and found contraband. The search was initiated and concluded within fifteen minutes of the initial stop. (*Id.* at 0:00–15:00.)

Based on the timeline evidenced by the parties' videos, the officers did not impermissibly extend their investigatory stop to further search Plaintiff and her vehicle. *See United States v. Hernandez*, 518 F. App'x 270, 271–72 (5th Cir. 2013) (3-hour extension of stop not impermissible). Moreover, the smell of burnt marijuana, combined with Plaintiff's slurred speech, the time of night and the location of her vehicle, together provided the officers with probable cause to search. *See McSween*, 53 F.3d at 686–87. Therefore, the officers' motion should be granted as to Plaintiff's claimed unreasonable search of her vehicle.

*Search of Plaintiff's person.* Plaintiff also argues that the officers illegally searched her person. (Docket Entry 1, at 10–14.) Plaintiff alleges that the officers had no lawful basis to conduct their search. (*Id.*) However, as discussed above, the officers smelled marijuana on her person, and lawfully discovered burnt marijuana in the vehicle Plaintiff had just exited; they thus had probable cause to arrest Plaintiff for possession of marijuana, a crime under Texas law at the time of the incident. TEX. HEALTH & SAFETY CODE ANN. § 481.121 (West 2009) ("a person commits an offense if the person

knowingly or intentionally possesses a usable quantity of marihuana"). Based on this arrest, the officers lawfully conducted a search of Plaintiff's person. *See United States v. Robinson*, 414 U.S. 218, 235 (1973) (when a person is arrested, she is subject to search incident to her arrest and all belongings on her person are likewise subject to search). Therefore, Defendants' motion should be granted as to Plaintiff's search-of her-person claims.

**3. Plaintiff's 42 U.S.C. 1985 Conspiracy Claims**

Plaintiff included claims under 42 U.S.C. § 1985 in her complaint, alleging that Officers Ortiz and Martinez conspired to violate her civil rights. (Docket Entry 1, at 10–14.) Based on the complaint, Plaintiff seems to be alleging a violation of § 1985(3), which requires a plaintiff to show (1) a conspiracy; (2) for the purpose of depriving a person of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or a deprivation of any right or privilege of a citizen of the United States. *See Lockett v. New Orleans City*, 607 F.3d 992, 1002 (5th Cir. 2010) (per curiam). Plaintiff does not identify in the record any evidence which would create a fact issue as to any of the required elements; in fact, she does not address these claims in briefing at all. (*See* Docket Entry 54.) An independent review of the evidence in the record conducted by the undersigned also does not reveal a fact issue as to the required elements. Therefore, the officers' motion should be granted as to Plaintiff's § 1985 claims.

### 4. Plaintiff's Excessive Force Claim against Officer Oritz

Plaintiff claims that Officer Ortiz improperly used excessive force when arresting her, both by using deadly force and by handcuffing her. Summary judgment is appropriate as to these claims.

To bring a claim for violation of the Fourth Amendment's prohibition on the use of excessive force, Plaintiff must show (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need, and (3) the use of force was objectively unreasonable." *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir. 2008). The standard for determining whether the use of force is objectively unreasonable is well established: it is a fact sensitive inquiry that turns on the totality of the circumstances, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Additional considerations that may bear on the reasonableness or unreasonableness of the force used include: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015). "The 'reasonableness' of a particular use

of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The "calculus of reasonableness" must allow for the fact that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id*. at 396–97.

Plaintiff claims that Officer Ortiz improperly used deadly force against her by pointing a "a metallic object at Amanda Wood. It was believed to be a firearm, as it was metallic and not lit." (Docket Entry 54, at 21.) Besides her claimed belief, however, Plaintiff has produced no evidence to create a fact issue as to whether Ortiz did in fact point a weapon at her. (*Id.*) She relies entirely on her pleadings, which, standing alone, cannot create a "genuine issue for trial." *Anderson*, 477 U.S. at 248. In her deposition, Plaintiff admits that she does not know if the object Ortiz was holding was a gun or a flashlight, and she admits that no officer pointed the object at her at any time. (Docket Entry 51-5, at 4–5.) A review of the video evidence also does not reveal that Ortiz pointed a weapon at Plaintiff. (Docket Entry 51-2, at 0:40–0:50.) Without evidence that Ortiz might have pointed a weapon at her, Plaintiff has failed to create a fact issue as to the necessary elements of this claim.

Plaintiff also brings a claim for excessive force under the Fourth Amendment based on Officer Ortiz's application of handcuffs. (Docket Entry 1, at

11.) A significant injury is not required in order to establish a claim for excessive force. *See Harper v. Harris City., Tex.*, 21 F.3d 597, 600 (5th Cir. 1994) (citing *Hudson v. McMillan*, 503 U.S. 1, 10 (1992)). Nevertheless, a plaintiff's injury, whether physical or psychological, "must be more than a *de minimis* injury and must be evaluated in the context in which the force was deployed." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). In this Circuit, "[m]inor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force." *See Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir. 2007).

Plaintiff alleges that Officer Ortiz "twisted and contorted [her] arms behind her back, tightened handcuffs which cut into her wrist nerves, and shoved her up and down at the Magistrate's Office." (Docket Entry 54, at 20.) Plaintiff has not cited to any evidence in the record that would show that any action by Ortiz was excessive or objectively unreasonable. (*Id.*) An independent review of the videos and other evidence submitted by Plaintiff also does not reveal an evidentiary basis for her claim. At the time of her arrest, Plaintiff complained that one of her cuffs had been closed too tightly; after her complaints, Officer Ortiz loosened one of Plaintiff's handcuffs. (Docket Entry 51-2, at 23:10–24:28.) He asked her if the adjustment was better, and Plaintiff said it was. (*Id.*) This evidence does not create a fact issue that the force used by Ortiz was unreasonable, or that the injury she suffered was more than *de*

*minimis.* Judgment should be granted on Plaintiff's excessive force claim.

**B. Plaintiff's claims against the City**

A municipality cannot be held liable on a theory of *respondeat superior* under §1983. *Leatherman v. Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 166 (1993). Instead, a valid claim against a municipality under § 1983 requires a plaintiff to provide proof of (1) a policymaker, (2) an official policy, and (3) a violation of constitutional rights whose "moving force" is that policy or custom. *Monell*, 436 U.S. at 694. The policymaker must have "actual or constructive knowledge of such custom" or policy. *Peña v. City of Rio Grande City*, 879 F.3d 613, 623 (5th Cir. 2018). Constructive knowledge "may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of these." *Id.* at 336, n.15 (quoting *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987)).

Under *Monell*, the Fifth Circuit has construed "official policy" to mean: (1) "a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policymaking authority" or (2) "a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated

policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.*"* *Mason v. Lafayette City Parish Consol. Gov't*, 806 F.3d 268, 280 (5th Cir. 2015). "Isolated unconstitutional actions by municipal employees will almost never trigger liability." *Piotrowski*, 237 F.3d at 578.

Plaintiff claims that the City as a municipality has committed a number of constitutional violations, including (1) a failure to train officers, (2) a failure to supervise officers, (3) and a failure to discipline officers. (Docket Entry 1, at 17–19.) Each claim has similar elements: a plaintiff must show: (1) that the municipality has inadequate procedures related to training, supervision, or discipline, (2) that such inadequate procedures were the direct cause of the plaintiff's injuries, and (3) that the municipality was deliberately indifferent in adopting the procedures and policies at issue. *Quinn v. Guerrero*, 863 F.3d 353, 365 (5th Cir. 2017); *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381(5th Cir. 2010). "Defects in a particular training program must be specifically alleged." *Quinn*, 863 F.3d at 365.

A plaintiff may make out a *Monell* claim based on "deliberate indifference"; this standard of fault, however, is a "stringent" one, requiring a showing "that a municipal actor disregarded a known or obvious consequence of his action." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). A plaintiff must provide some evidence that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the

inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'" *Valle v. City of Houston*, 613 F.3d 536, 547 (5th Cir. 2010) (internal quotes omitted).

**1. Plaintiff's Failure to Train Claim**

Plaintiff alleges that the City has a "policy, custom, or practice of a Failure to Train." (Docket Entry 1, at 17.) She bases this allegation on the idea that officers "are not properly trained in rudimentary Constitutional law, 4th Amendment procedures, or legal uses of force." (*Id.*) Plaintiff claims that "[these] policies, customs, and practices are approved and implemented by final policymakers with a deliberate indifference to the resulting harms." (*Id.*) Plaintiff does not cite to any officially adopted policy statement to support these allegations. (Docket Entry 54, at 15.) Therefore, the Court must determine whether Plaintiff has established that constitutionally violative conduct is so common and well settled as to constitute a custom that fairly represents municipal policy. *Mason*, 806 F.3d at 280.

In support of her claim, Plaintiff cites to "San Antonio's Official Policies and conduct on February 27, 2019" to show that "their policies are defective through flawed interpretations of 'reasonable suspicion' and 'probable cause.'" (Docket Entry 54, at 15.) However, as discussed above, neither of the officers involved in this suit committed constitutional violations in their search of Plaintiff's

vehicle or her person. Even if any of the officers' actions might have constituted violations, Plaintiff has failed to create a fact issue that these violations would be so prevalent as to create an unofficial policy or custom. "Isolated instances of police misbehavior do not prove acquiescence by a city policymaker in that conduct." *Piotrowski*, 237 F.3d at 578, n.18 (citing *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161 (5th Cir. 1985)). Therefore, the City's motion should be granted as to Plaintiff's failure to train claim.

**2. Plaintiff's Failure to Supervise claim**

As for Plaintiff's failure to supervise claim, she alleges that "San Antonio's hollow Supervisory policies . . . permit SAPD Officers to run amok." (Docket Entry 54, at 17.) She claims that, in the supervisory policy attached to her pleading, "several key policies have the effect and intent to obstruct disciplinary action. This occurs through the failure to facilitate complaints, or the diminishing of punishments." (Docket Entry 54, at 17.) Plaintiff does not, however, specify which provisions of the attached policies she believes to be insufficient, nor does she identify the ways in which they are deficient. An independent review of the attached supervisory policy also does not reveal to the undersigned any facial deficiencies which would create a fact issue. (*See* Docket Entry 54-1, at 32–38.) Plaintiff's bare citation to a policy, without any accompanying analysis or precedent regard its terms, is insufficient to sustain her failure to sustain her failure to supervise claim.

Plaintiff also asserts an unofficial policy by claiming that, "[j]udging from . . . Officer Jimmy Ortiz' body camera video, it is easy to see a wholesale lack of Supervision. Officers commit illegal detentions, illegal seizures, commit excessive force, and conduct illegal entries and searches in 3 minutes. This indicates from the conduct of the 6 SAPD Officers—that is standard procedure." (Docket Entry 54, at 18–19.) As discussed above, the footage from the officers' body cameras did not reveal any constitutional violations, much less a pattern of violations so prevalent as to constitute an unofficial policy or custom. Therefore, the City's motion should be granted as to Plaintiff's failure to supervise claim.

**3. Plaintiff's Failure to Discipline Claim**

Finally, in support of her failure to discipline claim, Plaintiff asserts in a conclusory fashion that "she pled facts in her situation, and recurring ones. SAPD Officers are allowed to violate citizen and suspect rights through unlawful contacts, unlawful detentions, unlawful seizures, unlawful searches, and excessive force. SAPD Officers are permitted to use excessive force and deadly force gratuitously. SAPD Officers are allowed to arrest citizens for no reason, or invalid reasons." (Docket Entry 54, at 19.) She cites to cases in which circuit courts have found a failure to discipline, without explaining whether similar evidence exists in this case. Such bare assertions lack the specificity or evidentiary support necessary to create a fact issue as to whether the City had a policy of failing to discipline officers for committing constitutional violations. Therefore, the

City's motion should be granted as to Plaintiff's failure to discipline claim.

## V. Conclusion and Recommendations

Based on the foregoing, I conclude that summary judgment should be entered for Defendants, and I therefore recommend that Defendants Jimmy Ortiz's and Martha Martinez's Motion to Dismiss Pursuant to FED. R. CIV. P. 12(c) and/or Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56 (Docket Entry 51) and Defendant City of San Antonio's Motion to Dismiss Pursuant to FED. R. CIV. P. 12(c) and/or Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56 (Docket Entry 52) be **GRANTED**.

## VI. Instructions for Service and Notice of Right to Object

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested.

Written objections to this Report and Recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties.

The objections should be limited to no longer than 20 pages; if the need for longer objections arises, the parties may seek leave of the District Court to exceed this page limit. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.,* 200 F.3d 335, 340 (5th Cir. 2000).

Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

**Signed** on October 25, 2022.

***Henry Bemporad***
**United States Magistrate Judge**