

violations of the Fourth and Fourteenth Amendments, as well as violations of Texas law, all arising out of actions of the South Central Texas Regional Narcotics Task Force (“the Task Force”). Plaintiffs allege that Defendants conspired to target African Americans in Hearne, Texas, for searches, seizures, arrest and prosecution. Plaintiffs claim that after the American Civil Liberties Union Foundation brought attention to the Task Force’s actions, Defendant Paschall dismissed the charges against the substantial majority of the arrestees.

Defendant brings the instant Motion for Summary Judgment, contending that (1) Plaintiffs’ allegations against him are speculative and conclusory, (2) Plaintiffs have no evidence to support a failure to train claim, (3) Defendant is entitled to qualified and official immunity, (4) the grand jury indictments break the chain of causation for false arrest, (5) Plaintiffs offer no competent evidence of a conspiracy, and (6) Plaintiffs allege mere negligence.

II. Summary Judgment

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to as a matter of law.” FED. R. CIV. P. 56c). A material fact is one that is likely to reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is not genuine if the trier of fact could not, after an examination of the record, rationally find for the non-moving party. *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As such, the burden of demonstrating that no genuine issue of material fact exists lies with the party moving for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once presented, the Court must view the movant's evidence and all factual inferences from such evidence in a light most favorable to the party opposing summary judgment. *Impossible Electronics Techniques v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir.1982). Accordingly, the simple fact that the Court believes that the non-moving party will be unsuccessful at trial is insufficient reason to grant summary judgment in favor of the moving party. *Jones v. Geophysical Co.*, 669 F.2d 280, 283 (5th Cir.1982).

Once the Court determines that the movant has presented sufficient evidence that no genuine issue of material fact exists the burden of production shifts to the party opposing summary judgment. *Matsushita*, 475 U.S. at 586. The non-moving party cannot overcome its burden by way of a simple general denial, but must respond "by affidavit or as otherwise provided in th[e] rule, [and] must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). This does not mean that "the non-moving party must produce evidence that would be admissible at trial," *Celotex*, 477 U.S. at 324, but it does force the non-moving party "to [go] beyond the pleadings and by her own interrogatories . . . designate 'specific facts showing there is a genuine issue for trial.'" FED. R. CIV. P. 56(e); *Id.* Under such a standard the burden on the non-moving party to defeat summary judgment is not an especially difficult one to fulfill.

III. Discussion

A. Title 42 United States Code, Section 1983

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. Section 1983 provides, in

pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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

Section 1983 was promulgated to prevent “. . .[a government official's] [m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law.” *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986); *Whitley v. Albers*, 475 U.S. 312 (1986) (8th Amendment); *Davidson v. Cannon*, 474 U.S. 344 (1986) (14th Amendment); *Daniels v. Williams*, 474 U.S. 327 (1986) (14th Amendment). Section 1983, however, does not grant a cause of action for every action taken by a state official. *Whitley*, 475 U.S. at 319.

Only two allegations are required in order to state a cause of action under 42 U.S.C. § 1983. “First, the Plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.” *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Manax v. McNamara*, 842 F.2d 808, 812 (5th Cir. 1988).

B. Speculative and conclusory claims

Defendant argues that Plaintiffs’ claims against him are conclusory and without evidentiary support. Defendant Garney, the Task Force commander, supervised the Task Force’s investigators and made policy for day-to-day operations as well as the handling of confidential informants and undercover operations. Paschall Dep. (Vol. I) at 168:14-169:4 (Aug. 26, 2004); Paschall Dep. (Vol. II) at 28:19-24, 33:9-14 (Aug. 3, 2004); Robertson County Dep. (Ron Garney testifying) at 13:9-14:4 (Nov. 14, 2003). Defendant

had daily contact with the officers. Hendrix Dep. at 129:22-25 (Plaintiff's Opposition at Exhibit 5). Task Force officers were required to receive Garney's approval prior to the initiation of an undercover operation, or the recruitment of a confidential informant. Task force Operation Procedures at TF 000050, 000060 (Plaintiff's Opposition at Exhibit 1); *see also* Crowell Dep. at 79-80. Defendant Garney monitored Task Force officers' contact with informant Derrick Megress. Garney Dep. at 103:1-18; 105:5-21 (Plaintiff's Opposition at Exhibit 4); Robertson County Dep. (Garney testifying pursuant to Rule 30(b)(6) at 83:15-84:17 (Plaintiff's Opposition at Exhibit 3); Crowell Dep. at 134:14-135:6; 136:20-22 (Plaintiff's Opposition at Exhibit 2); Curry Dep. at 214:2-20 (Plaintiff's Opposition at Exhibit 9); and Hendrix Dep. at 220-21 (Plaintiff's Opposition at Exhibit 5). Thus, Plaintiffs have offered competent evidence from which a reasonable jury could conclude that Garney was aware of the manner of recruitment and utilization of the informant Derrick Megress.

Defendant Garney argues that Plaintiffs have failed to offer a scintilla of evidence that he discriminated against them because of their race. Defendant's Motion at 5. However, Plaintiffs offer testimony that Defendants Garney and Paschall opined that "the only way to save Hearne was to bomb the Village and get rid of all the blacks". Paschall-White Aff. ¶ 2 (Plaintiff's Opposition at Exhibit 32). Paschall and Garney are alleged to have joked about how "niggers ran" from narcotics round-ups. Sandra Paschall Aff. ¶ 4 (Plaintiff's Opposition at Exhibit 44). Based on these comments alone, a reasonable jury could find the existence of racial animus on the part of the Defendant. *See Williams v. Kaufman County*, 352 F.3d 994, 1013 (5th Cir. 2003).

Plaintiffs also offer competent summary judgment evidence of disproportionate arrests of African Americans by the Task Force that Garney commanded. *See* Dwight Steward, Expert Report (Sept. 10,

2004)(Plaintiff's Opposition at Exhibit 33); Dwight Steward, Expert Report (Jan. 10, 2005)(Plaintiff's Opposition at Exhibit 35); Katherine Beckett, *Race and Drug Law Enforcement in Robertson/Limestone Counties* (Jan. 10, 2005)(Plaintiff's Opposition at Exhibit 34). These statistical analyses are also probative of Defendant Garney's alleged discriminatory intent. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997).

C. Failure to train or supervise

[I]nadequacy of police training may serve as the basis for § 1983 liability where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with [the Supreme Court's] admonition in *Monell*, and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.

City of Canton v. Harris, 489 U.S. 378, 388 (1989)(*citations omitted*).

It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen 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. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id at 390.

Defendant Garney asserts that the Plaintiffs have offered no evidence of inadequate training, and that the Defendants have shown that the Task Force officers were well-trained. Defendant's Motion at

5-6. Plaintiffs counter that they have offered specific evidence as to the specialized training that Task Force officers should have received. *See* Michael E. Tate, *Expert Report* at 4 (Aug. 19, 2004); Michael Tate Dep. at 141:18-144:4 (Oct. 12, 2004)(on the need for training less-experienced narcotics officers by pairing them with experienced officers and the inadequacy of Task Force practice in this regard). Plaintiffs also direct the Court to Defendant Paschall's testimony that Defendant Bancroft was untrained as a narcotics officer at the time he was assisted with drug transactions involving Derrick Megress. Paschall Dep. (Vol. II) 62:8-64:10 (Aug. 26, 2004). Task Force commander Ron Garney did not require any special training of Task Force investigators beyond those required for a peace officer to maintain his commission. Robertson County Dep. (Ron Garney testifying) at 86:1-87:7. Garney also testified that Defendants Hendrix, Agnew, Miller and Crowell had no experience working with confidential informants in narcotics cases when they started with the Task Force. Garney Dep. at 99:17-100:6, 102:5-9 (Nov. 14, 2003). Defendant Huey Curry testified that Defendants Hendrix, Agnew and Crowell were not trained to work on narcotics cases with informants, yet did so. Curry Dep. at 104:25-105:13 (June 2, 2004). The Plaintiffs also offer evidence that Defendant Garney had unequivocal power to hire Task Force officers, but failed to supervise the investigators by inadequately screening applicants to the Task Force. Robertson County Dep. (Garney testifying) at 34-35; Hendrix Dep. at 124; Garney Dep. at 111. Plaintiffs also cite testimony that Garney failed to conduct required drug testing of Task Force members during the first year of the Task Force's operation. Garney Dep. at 169-171. As such, the Court is faced with genuine issues of material fact on this issue, and summary judgment would be improper.

D. Grand jury intermediary

Defendant Garney argues that the intermediate decision of the grand jury breaks the causal chain for false arrest, and insulates the Defendant from suit. The Court has addressed this issue in prior Reports and Recommendations, and the analysis as to Defendant Garney reaches the same result. The parties contest the nature of evidence presented to the grand jury, and important questions of fact remain for the jury as to the veracity of information presented. If a grand jury is deliberately presented with false information to obtain an indictment, an independent intermediary defense will fail. *See Miller v. Riser*, 84 Fed. Appx. 417, 418 (5th Cir. 2003); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988).

E. Negligence

Plaintiff argues that “The majority of Plaintiffs’ allegations are essentially allegations of purported negligence (i.e., something could have been done a different way, [D]efendants should have used different equipment, etc.)” Defendant’s Motion at 9 (parenthetical in original). While Defendant does not specify which allegations to which he refers, Plaintiff’s specific allegations and summary judgment evidence concerning Defendant Garney’s conduct with the Task Force raise material factual disputes as to conduct that, if proven, would far surpass the bounds of negligence. Such decisions are the province of the jury.

F. Intracorporate conspiracy

Defendant Garney also argues that Plaintiff’s conspiracy allegations are meritless because a governmental agency cannot conspire with its own officers. *See Hilliard v. Ferguson*, 30 F.3d 649 653 (5th Cir. 1994). Therefore, Defendant asserts, he could not have conspired with other Robertson County officials as a matter of law. However, the alleged conspiracy was not the product of a single entity. The Court has previously held that the South Central Texas Narcotics Task Force (“the Task Force”) is a

creation of Limestone and Robertson Counties. Order of October 30, 2003 at 32-33. The Task Force officers acted as representatives of both counties; thus, any conspiracy amongst the officers cannot be said to be the product of a single governmental agency. *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994); *Crawford v. Commonwealth of Pennsylvania*, 2003 WL 22169372, *11 (M.D. Pa. 2003).

G. Qualified immunity and official immunity

Qualified immunity is not merely a defense to liability, but a shield from suit. *Mitchell v. Forsyth*, 475 U.S. 511, 526 (1985). The determination of whether qualified immunity is applicable to any defendant is initially determined by the Court as a matter of law. The issue goes to the jury only if disputed fact issues must be resolved. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

A public official is entitled to qualified immunity “unless it is shown by specific allegations that he violated clearly established constitutional law.” *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992). In making this determination, the Court undertakes a two-step analysis. *Duckett v. City of Cedar Park*, 950 F.2d 272, 278 (5th Cir. 1992). First, the Court determines whether the plaintiff has “stated a violation of rights secured by the Constitution.” *Salas*, 980 F.2d at 305; *see also Siegert v. Gilley*, 501 U.S. 65 (1991). Only if the plaintiff has crossed this threshold, does the Court move to the second stage of the analysis: whether the defendant’s conduct was objectively reasonable. *Salas v. Carpenter*, 980 F.2d 299, 305-06 (5th Cir. 1992). In making this determination, “the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.” *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). “If reasonable public officials could differ on the lawfulness of the defendant’s actions, the defendant is entitled to immunity.” *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992). The qualified

immunity standard is broad enough to encompass mistakes in judgment by protecting “all but the plainly incompetent or those who knowingly violate the law.” *Hunter*, 502 U.S. at 229, quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To support a federal civil rights conspiracy claim, a plaintiff must allege facts that suggest: 1) an agreement between a private party and state actors to commit an illegal act, and 2) an actual deprivation of constitutional rights. *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994.), cert. denied, 513 U.S. 868 (1994) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

As discussed in the Court’s Order of October 30, 2003, the Defendants are alleged to have conspired and been involved in the development and execution of the policy of purposely and selectively targeting innocent African American residents in Hearne for arrest and prosecution, and of using an unreliable informant to support the prosecutions. The Defendants are also accused of threatening and coercing the informant, Derrick Megress, into concocting cases against the Plaintiffs despite their knowledge of Megress’s drug use and mental problems. Plaintiffs allege that the Defendants concealed Megress’s drug use from the grand jury.

Garney asserts that Plaintiffs have failed to offer a scintilla of competent summary judgment evidence that overcomes his qualified immunity. Defendant’s Motion at 7. In support of their allegations, Plaintiffs offer the affidavit of Derrick Megress, which the Court discussed in its January 10, 2005 Report and Recommendation on Defendant Agnew’s Motion for Summary Judgment. *See id* at 7. Additional review of the Megress affidavit alone reveals the existence of genuine issues of material fact as to the applicability of qualified immunity to Defendant Garney. As such, Defendant’s qualified immunity defense must be decided by a jury.

Defendant also argues that he is entitled to the Texas equivalent of qualified immunity—official immunity. Official immunity is available to state actors who perform their duties in good faith. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Good faith is an objective test of reasonableness. *Id* at 656. Because, as discussed *infra*, vital issues of material fact exist as to Defendant Garney's actions with regard to the alleged misconduct, the Court is unable to determine if his actions were reasonable. The jury must decide the validity of Defendant's immunity defenses.

IV. Recommendation

After thoroughly reviewing the record, the undersigned recommends that Defendant Garney's Motion for Summary Judgment be **DENIED**.

The Defendant may wish to file objections to this Report and Recommendation. Failure to file written objections to these findings and recommendations within ten (10) days from the date of its receipt shall bar an aggrieved party from receiving a *de novo* review by the District Court of the findings and recommendations contained herein, *see* 28 U.S.C. Section 636(b)(1)(C), and shall bar an aggrieved party except upon grounds of plain error from attacking on appeal the unchallenged proposed factual findings and legal conclusions accepted by the District Court. *See Douglas v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

SIGNED this 13th day of April, 2005.


JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE