IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

REGINA KELLY, *et al.*,	*	
Plaintiffs,	*	
	*	
VS.	*	**CIVIL NO. W-03-CA-179**
	*	
JOHN PASCHALL, *et al.*,	*	
Defendants.	*	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

This Report and Recommendation is respectfully submitted to the Court pursuant to 28 U.S.C. § 636 (b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, local Rules for the Assignment of Duties to United States Magistrates.

I. Background and Statement of the Case

Came for consideration Defendant John Paschall's Motion for Summary Judgment ("Defendant's Motion"). In prior Orders and Reports and Recommendations, the Court has recounted the procedural history and the factual background of the instant case in detail. This being the case, further detailed recitation is unwarranted. In sum, Plaintiffs filed suit pursuant to 42 U.S.C. §1983 and §1981 alleging

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 John Paschall brings the instant Motion for Summary Judgment, contending that (1) Plaintiffs' equal protection claim is without legal basis, (2) Paschall is entitled to prosecutorial immunity, (3) Plaintiffs have presented no competent summary judgment evidence in support of their claims against Paschall, (4) Paschall is entitled to qualified immunity, (5) the grand jury indictments break the chain of causation for false arrest, (6) Plaintiffs have no competent summary judgment evidence of a conspiracy, (7) Plaintiffs allege negligence, and (8) Paschall is entitled to official immunity.

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. Equal protection

Plaintiffs, in order to bring an equal protection claim, must establish that: (1) the policy/action in question had a discriminatory effect, and that (2) that it was motivated by a discriminatory purpose. *See United States v. Armstrong*, 517 U.S. 456, 465 (1996). Defendant argues that, in order to demonstrate a discriminatory effect, Plaintiffs must show that while they were investigated, a similarly situated class was not. Defendant's Motion at 2; *Chavez v. Illinois State Police*, 251 F.3d 612, 638; *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Defendant, citing criminal cases dealing with selective prosecution, argues that Plaintiffs must "identify specific drug dealers of another race that were known to Paschall, dealing the same type of drugs in Robertson County during the same time frame, yet not prosecuted." Defendant's Motion at 3.

"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227 (1995). In the instant case, Plaintiffs have repeatedly offered competent summary judgment evidence that African Americans were targeted on the basis of race. Thus, the alleged policy of Defendant is presumptively unconstitutional, and subject to strict scrutiny.

> [I]t is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. These classifications are subject to strict scrutiny, and strict scrutiny analysis in effect addresses the question of whether people of different races are similarly situated with regard to the law or policy at issue.

Brown v. City of Oneonta, 221 F.3d 329, 337 (2nd Cir. 2000) *cert. denied*, 534 U.S. 816 (2001); *see also Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 308 F.3d 523, 534 n.4 (6th Cir. 2002); *Pyke v. Cuomo*, 258 F.3d 107, 108-10 (2nd Cir. 2001); *Awabdy v. City of Adelanto*, 368 F.3d 1062 (9th Cir. 2004).

Moreover, Defendant's argument is based on criminal cases in which defendants allege selective prosecution to have criminal charges dismissed. This is not the standard for civil rights cases such as this. *See Chavez v. Illinois State Police*, 251 F.3d 612, 640 (7th Cir. 2001); *Pyke v. Cuomo*, 258 F.3d 107 (2nd Cir. 2001).

C. Prosecutorial immunity

In its Memorandum Opinion and Order, the Court found that Paschall is entitled to absolute immunity "for all actions taken in presenting these cases to the grand jury and in pursuing the prosecution against" Plaintiffs. Paschall is not, however, entitled to absolute immunity for investigatory functions. Paschall argues that he is entitled to absolute prosecutorial immunity because he was completely uninvolved in the investigation of the Plaintiffs prior to the filing of the relevant offense reports in his office. The Court has previously addressed this issue, and found the existence of genuine issues of material fact as to Paschall's involvement in the investigations.

> In this case, Plaintiffs have alleged that Paschall is a policy maker not only because of his role as district attorney, but because he was a supervisor and manager of the Task Force. The actions carried out by Paschall in regard to the investigation and selection of individuals to target for criminal charges, as well as the preparation and execution of warrants, are not within the traditional role of a district attorney. Assuming as true the allegations of Plaintiffs' complaint, dismissal as to Paschall in his official capacity . . . would not be appropriate for the claims raised in relation to

the targeting of the Plaintiffs for arrest and eventual prosecution.

Memorandum Opinion and Order, October 30, 2003 at 37.

D. No competent summary judgment evidence

Paschall alleges that Plaintiffs have offered no competent summary judgment evidence against him. The Court has already found the existence of genuine issues of material fact as to Paschall's alleged wrongdoing and racial animus. *See* January 10, 2005 Report and Recommendation at 7. Defendant also alleges that the Megress affidavit is not competent summary judgment evidence. *Id* at 8-9. Defendant's Motion at 6. The Court has also addressed this issue previously. *See* January 10, 2005 Report and Recommendation at 7.

E. Qualified 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 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.

Paschall asserts that Plaintiffs have failed to offer a scintilla of competent summary judgment evidence that overcomes his qualified immunity. Defendant's Motion at 8. 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 reveals the existence of genuine issues of material fact as to the applicability of qualified immunity to Defendant Paschall. As such, Paschall's qualified immunity defense must be decided by a jury.

F. Grand jury intermediary

Defendant Paschall 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 its previous Report and Recommendation with regard to Limestone County, and the analysis as to Defendant Paschall 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).

G. Conclusory allegations

Defendant Paschall argues that Plaintiffs have offered no evidence linking him to any alleged conspiracy, and that Plaintiffs' claims are therefore without legal basis. Defendant's Motion at 9;

Arsenaux v. Roberts, 726 F.2d 1022, 1024 (5th Cir. 1982). To support a federal civil rights conspiracy claim, a plaintiff must allege facts that suggest: 1) the existence of a conspiracy involving state action, 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)) *Cinel*, 15 F.3d at 1343. The existence of a conspiracy can be proven by circumstantial evidence. *Mack v. Newton*, 737 F.2d 1343, 1350 (5th Cir. 1984). As discussed *supra*, Plaintiffs have presented competent summary judgment evidence to support their claims of Paschall's involvement in a conspiracy to selectively target African American residents of Hearne. Plaintiffs' claims are not conclusory, and summary judgment is improper.

Defendant Paschall 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 Agnew 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).

H. Negligence

Plaintiff argues that "The majority of Plaintiffs' allegation 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 10 (parenthetical in original). While Defendant does not specify which allegations to which he refers, Plaintiff's specific allegations and summary judgment evidence concerning Defendant Paschall's involvement with the coercion of Megress 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. *See* Megress Aff. ¶ 6, 16; Megress Dep. at 66, 75.

I. Official immunity

Defendant 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 Paschall'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 Paschall's immunity defenses.

IV. Recommendation

After thoroughly reviewing the record, the undersigned recommends that Defendant John Paschall'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 unobjected to 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 11th day of April, 2005.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE