IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF TEXAS
HOUSTON DIVISION

ANTONIO ARMSTRONG JR.,	)(	**Civil Action No. 4:23-cv-**
	)(	**(Jury Trial)**
Plaintiff,	)(	
	)(	
V.	)(	
	)(	
CITY OF HOUSTON, TEXAS,	)(	
	)(	
Defendant.	)(	

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF THE COURT:

NOW COMES Plaintiff ANTONIO ARMSTRONG JR. and complains of the CITY OF HOUSTON, TEXAS, and will show the Court the following:

JURISDICTION AND VENUE

1. This is an action brought under the common law of the State of Texas and for violations of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction over Plaintiff's federal claims, under 28 U.S.C. § 1331, 42 U.S.C. §§ 1983 and 1988, and supplemental jurisdiction, under 28 U.S.C. § 1367(a), to hear Plaintiff's state law claims. Venue is proper in this Court, under 28 U.S.C. § 1391(b) because the incident at issue took place in Harris County, Texas within the United States Southern District of Texas.

PARTIES

2. Plaintiff Antonio Armstrong, Jr. is a resident of Harris County, Texas.

3. The City of Houston, Texas, is a municipality existing under the laws of the State of Texas and situated mainly in Harris County, Texas, in the U.S. Southern District of Texas, Houston Division and can be served with process by serving the City of Houston Secretary at 901 Bagby, Houston, TX 77002.

INTRODUCTORY FACTS

4. Antonio Armstrong, Jr. was arrested at his home July 29, 2016, by City of Houston police personnel and accused of the capital murder of his parents at the age of sixteen. When the Houston police arrived Armstrong's parents had both been shot in their bed and both died.

5. The Houston police investigated the crime scene and immediately took control of much of the evidence including the gray T-shirt that Armstrong was wearing. The T-shirt was extensively tested by the Houston Forensic Science Center (HFSC) and no DNA evidence was found. When the T-shirt was not in possession of the Harris County District Attorney's Office the T-shirt was in the possession of the City of Houston including at the HPD Property Room at 1202 Washington Avenue, Houston, TX 77002.

6. Antiono was twice tried for capital murder in the 178th Judicial District

Court of Harris County, Texas and both times there was a hung jury, the second one was eight Not Guilty to four Guilty on October 26, 2022. A main argument of Antonio's defense was that no DNA evidence was found on Antonio or his clothes. The Harris County District Attorney's office was so obsessed with losing the trial they had to file a retraction of a false statement to the Houston Chronicle. **Exhibit 1.**

7. Suddenly, just three days before the start of yet a third trial, in June 2023, as KPRC TV Channel 2 later reported:

> "Within the last few weeks, the T-shirt was retested at a crime lab after what appear to be flakes of blood were discovered under an adhesive HPD visitor's badge that had been stuck to his shirt, sources say.
>
> The badge was believed to be put on Armstrong by someone else because he was handcuffed when he arrived at police headquarters for his interview with officers."
>
> *--https://abc13.com/aj-armstrong-accused-of-killing-parents-hearing-for-new-evidence-likely-blood-on-t-shirt/13405646/*

8. July 31, 2023, it was reported by local TV stations that at opening statements in Armstong's third trial the Harris County District Attorney prosecuting the case stated to the jury that there were two pieces of blood with murder victim Antonio Armstrong Sr.'s DNA that were on the back of a name tag sticker (or underneath the name tag) that the police had put on the extensively-tested T-shirt Antonio wore when he was arrested the night of the murder.

9. At the third trial the experienced Houston police officer who put the

name tag on Armstrong testified under oath that he saw no blood on Armstrong, the T-shirt, or the name tag.

10. The lead HPD Homicide Detective who interrogated Armstrong testified under oath at the third trial he saw no blood on Armstrong.

11. HPD Homicide Detective Dodson who observed Armstrong testified under oath at the third trial he saw no blood on Armstrong.

12. Experienced HPD Officer Webber who transported Armstrong from the crime scene testified under oath at the third trial he saw no blood on Armstrong.

13. Experienced HPD Officer Maldanado who helped transport Armstrong from the crime scene testified under oath at the third trial he saw no blood on Armstrong.

14. No one testified that they saw blood on Armstrong.

15. At Armstrong's third trial an expert witness for the prosecution testified that one of the two particles of blood allegedly found on Armstrong's T-shirt under the visitor badge or on the back of the visitor badge after around seven years was transferred there. This implies that human action, after the T-shirt was taken from Armstrong, caused Armstrong's father's blood particle to be there.

16. Former Harris County prosecutor Lisa Andrews opined the alleged discovery of blood/DNA was "highly unusual."

17. Based on the square area of the front of a T-shirt the size of Armstrong's

and the area of the average visitor's badge the probability that two separate flakes of blood, and no others, would both be found in the area encompassed by the visitor's badge is *no greater than 1 in 100 and probably much less* unless deposited there on purpose.

18. Considering the foregoing, and the following, the blood was planted by, or in conspiracy with, one or more persons at the HPD in order to try and convict Armstrong of capital murder and to taint his reputation in the mind of the public.

19. There is a long history of planting evidence by the City of Houston police. In all probability one or more individuals purposefully caused the deposition of Antonio Armstrong Sr's blood on the back of the name tag or underneath the name tag on Antonio's T-shirt while it was in the HPD Property Room or otherwise in HPD's possession.

ADDITIONAL FACTS

20. In one of the biggest police evidence planting scandals in American history many criminal defendants have been exonerated or their cases overturned by the Texas Court of Criminal Appeals after Houston police officer Gerald Goines and other HPD officers planted evidence to secure felony convictions. Goines was found out after a botched drug raid killing two civilians and the wounding of several police officers by friendly fire revealed that the heroin "evidence" was planted and the reason for the drug raid was fabricated. This systemic planting of evidence by the

Houston Police Department went on for over a decade and many more Houston police officers have been implicated in the evidence planting scandal. Due to the false statements made and planting of evidence by Goines and other HPD officers concerning the raid, Houston police began a systematic review of some combined 14,000 cases which had been handled by the HPD officers. By the end of 2021, more than 160 of those cases had been dismissed.

--https://en.wikipedia.org/wiki/Harding_Street_raid

21. In 2000 a Houston police office shot and killed Lanny Blaine Robinson claiming Robinson brandished a knife in an undercover police car. A federal civil rights lawsuit was filed, **Civil Action No. 4:02cv1435.** A fair reading of the police records referenced in the federal judge's Order on motion for summary judgment indicates not only that a knife was planted in an area to associate it with the deceased, but a car window was rolled down after the killing to bolster where the knife was found. See **Exhibit 2,** pages 17-19.

22. The Houston police shot and killed Randy Webster in 1977 and then planted a gun near him to justify the killing. *https://www.texasmonthly.com/news-politics/the-throwdown/*

COUNT 1-COMMON LAW MALICIOUS PROSECUTION

23. Previous Paragraphs are hereby re-alleged and incorporated by reference in this Count.

24. This count sets forth claims against Defendant for malicious prosecution and is pled in the alternative.

25. Defendant caused the continuation of criminal proceedings against Plaintiff. They acted intentionally and with malice in depositing the blood/DNA upon Antonio's clothing and/or the name tag while others moved forward with acts in continuance of the prosecution knowing the blood/DNA was deposited purposefully by human action sometime after the T-shirt left the possession and control of Armstrong.

26. As a direct and proximate cause of Defendant's actions, Plaintiff has been damaged, which damages include: mental anguish, pain and suffering, loss of capacity for the enjoyment of life, embarrassment, humiliation, and loss of reputation. These damages have occurred at present, in the past and will most likely occur in the future.

COUNT 2-42 USC SECTION 1983
FOURTH AMENDMENT VIOLATION

27. Previous paragraphs are hereby re-alleged and incorporated by reference in this Count.

28. This count sets forth claims against Defendant for violating the Fourth Amendment by acting under color of state law when they acted and failed to act thereby allowing planted blood/DNA evidence to be attributed to Plaintiff in the public including public governmental records when this was knowingly false. Furthermore, the planted evidence was knowingly used to attempt to convict Plaintiff of capital murder by statements and introduction to jurors at jury trial.

29. Defendant caused the continuation of criminal proceedings against Plaintiff. Defendant's employees and agents acted intentionally and with malice in depositing the blood/DNA upon Armstrong's clothing and/or the name tag while others moved forward with acts in continuance of the prosecution knowing the blood/DNA was deposited purposefully by human action sometime after the T-shirt left the possession and control of Armstrong.

30. As a direct and proximate cause of Defendant's actions, Plaintiff has been damaged, which damages include: mental anguish, pain and suffering, loss of capacity for the enjoyment of life, embarrassment, humiliation, and loss of reputation. These damages have occurred at present, in the past and will most likely occur in the future.

COUNT 3-42 USC Section 1983

FOURTEENTH AMENDMENT VIOLATIONS

31. Previous Paragraphs are hereby re-alleged and incorporated by reference in this Count.

32. This count sets forth claims against Defendant for abuse of power and the violation of the Plaintiff's property and liberty interests under the Due Process clause of the Fourteenth Amendment, brought through U.S.C. §1983. This count is set forth in the alternative and both the procedural and substantive Due Process rights of the Plaintiff are implicated and a claim for outrageous and shocking the conscious conduct is made herein.

33. Defendant violated the substantive and procedural Due Process clause of the Fourteenth Amendment by planting DNA/Blood evidence on Plaintiff's clothes thereby, causing the malicious criminal prosecution of Plaintiff, the making illegal false sworn statements in official documents regarding Plaintiff, and violating the civil and constitutional rights of Plaintiff against illegal search and seizure of their person and property, and their illegal and improper detention, prosecution and incarceration, for which there was no justification or legal basis. The actions against Plaintiff were taken knowingly, maliciously, and unlawfully, and under color of state law.

34. Defendant misused and abused their power, possessed by virtue of state law and made possible only because he was clothed with the authority of state law. The violation of Plaintiff's rights, as described above, occurred under color of state law and is actionable under 42 U.S.C. §1983.

35. Furthermore, Defendant failed properly train and discipline police officers, employees, and agents to prevent the harm that was caused to Plaintiff including policies or procedures to properly retain an safe keep evidence; policies and procedures to identify officers who falsify facts to support probable cause affidavits and prosecute criminal defendants; policies and procedures to supervise officers in the City of Houston's employ; policies and procedures to detect officers who may engage in criminal activity by planting evidence upon citizens or on their belongings like Plaintiff; and policies and procedures to properly discipline officers who willfully trample on the constitutional rights of citizens like Plaintiff, and to prevent the type of harm described in part above.

36. The City of Houston has a custom, policy, practice, and procedure of planting evidence without repercussions and not disciplining or training officers adequately and is therefore liable under 42 U.S.C. Section 1983 and 1988.

LIABILTY FOR FAILURE TO INTERVENE

37. Plaintiff incorporates the preceding paragraphs as if fully set forth

herein.

38. A law enforcement officer "who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force may be liable under section 1983." *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995). Although *Hale* most often applies in the context of excessive force claims, this Court recognized that other constitutional violations also may support a theory of bystander liability. *Whitley v. Hanna*, 726 F.3d 631, 646 n. 11 (5th Cir. 2013)(citing *Richie v. Wharton County Sheriff's Dep't Star Team*, No. 12–20014, 2013 WL 616962, at *2 (5th Cir. Feb. 19, 2013)(per curiam) (unpublished)(noting that plaintiff failed to allege facts suggesting that officers "were liable under a theory of bystander liability for failing to prevent ... other member[s] from committing constitutional violations")). Further, the Second Circuit has stated that "law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994). *See* also, *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972)("we believe it is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge."). An officer observing or having knowledge of the planting of evidence may be liable under § 1983 under a theory of

bystander liability when the officer "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." *Whitley*, 726 F.3d at 646.

MENTAL ANGUISH

39. Plaintiff incorporates all preceding paragraphs as if set fully set forth herein.

40. Plaintiff suffered at least anxiety, fear, and depression because of the acts of the defendants and, therefore, Plaintiff seeks damages for mental anguish past and future as well as the pain and suffering, past and future, and other damages set forth above.

41. Plaintiff suffered loss of reputation.

PUNITIVE DAMAGES

42. Plaintiff incorporates all preceding paragraphs as if set fully herein.

43. Defendant's actions and inactions cause them to be liable for punitive damages as they were consciously indifferent to the Plaintiff's constitutional rights and they did the acts knowingly, such acts being extreme and outrageous and shocking to the conscious.

NOTICE TO PRESERVE EVIDENCE

BY THE FILING OF THIS PUBLIC LAWSUIT AND PROVIDING SAME TO THE CITY OF HOUSTON, THE CITY OF HOUSTON AND ITS

EMPLOYEES AND OTHER PERSONS ARE ON NOTICE, IF NOT BEFORE, THAT ALL VIDEOS, CHECK INS, PHOTOS, SIGN IN SHEETS, OR EVIDENCE FROM THE HOUSTON POLICE PROPERTY ROOM(S) AND BUILDING RELATING TO ANY EVIDENCE IN THE ARMSTRONG CRIMINAL CASE AS WELL AS ALL PHOTOS, VIDEOS, REPORTS, STATEMENTS, RECORDINGS, MEMOS, TEXTS, TELEPHONE RECORDS, AND OTHER MATERIALS OR POTENTIAL EVIDENCE IS TO BE PRESERVED AND NOT DESTROYED, SECRETED AWAY, OR ALTERED IN ANY WAY SO AS TO BE USED IN THIS INSTANT CIVIL ACTION. THIS INCLUDES ALL COMMUNICATIONS OF ANY KIND WITH THE HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE, EXPERT ROSSI OR ANY OTHER PERSON RELATED TO THE ARMSTRONG CRIMINAL CASE. IF EVIDENCE IS NOT PRESERVED IT IS UNDERSTOOD A COURT MAY STRIKE THE PLEADINGS OF THE CITY OF HOUSTON OR INSTRUCT THE JURY THAT EVIFDENCE WAS SPOLIATED OR OTHER RELIEF MAY BE GRANTED AGAINST THE CITY OF HOUSTON OR OTHER DEFENDANT.

ATTORNEYS' FEES

44. Plaintiff is entitled to recover attorneys' fees and costs to enforce his Constitutional rights and under 42 U.S.C. Sections 1983 and 1988.

JURY TRIAL

45. Plaintiff requests a trial by jury on all issues triable to a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court:

A. Enter judgment for the Plaintiff and against the individual defendants and the City of Houston holding them jointly and severally liable;

B. Find that Plaintiff is the prevailing party in this case and award attorneys' fees and costs, pursuant to federal law, as noted against Defendant(s);

C. Award damages to Plaintiff for the violations of his Constitutional rights;

D. Award Pre- and post-judgement interest;

E. Award Punitive damages against each and every individually named defendant,

F. Grant injunctive relief to investigate evidence planting in the Houston Police Department and other involved entities; and

G. Grant such other and further relief as appears reasonable and just, to which plaintiff shows himself entitled.

Respectfully Submitted,

/s/ *Randall L. Kallinen*
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ATTORNEYS FOR PLAINTIFF

Defense attorney Rick DeToto represents Antonio Armstrong, Jr., in Armstrong's capital murder trial.
Brett Coomer, Houston Chronicle / Staff photographer

The Harris County District Attorney's Office on Thursday retracted a statement a spokesman made about defense attorneys in Antonio Armstrong, Jr.'s capital murder trial, days after those lawyers threatened legal action.

Schiller told the paper that "defense lawyers are once again lying to the public and potential jurors about the facts" in the murders of Armstrong's parents.

DeToto retained his own attorney, who sent a letter Monday to the district attorney's office.

"While it is understandable that the Harris County District Attorney's Office would be overly sensitive about losing evidence in a high-profile case, however, for the District Attorney's office to issue a written statement to the media calling my clients "liars," is beyond the pale and will not stand," said Dean Blumrosen, DeToto's lawyer.

The district attorney's office sent the Chronicle a retraction of the statement on Thursday.

"The Harris County District Attorney's Office should not have characterized the Armstrong defense lawyers as 'lying' in that email message," the statement reads.

Armstrong's re-trial is scheduled to begin in late March. A jury deadlocked in 2019 over a verdict in the summer 2016 shooting deaths of his parents.

Written By
Samantha Ketterer

Reach Samantha on

Samantha Ketterer is a Houston Chronicle reporter covering higher education. She can be reached at samantha.ketterer@houstonchronicle.com.

Since joining the staff in 2018, Samantha has also covered criminal justice and the Harris County courthouse. She is a former reporting fellow for the Dallas Morning News' state bureau and a former city hall reporter for The Galveston County Daily News.

Samantha, who is from Houston's suburbs, graduated from the University of Texas at Austin and is a proud alumna of The Daily Texan.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COLLEEN MAHAN, Individually and on behalf of LANNY BLAINE ROBINSON, Deceased, and the ESTATE OF LANNY BLAINE ROBINSON,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-02-1435
CITY OF HOUSTON, TEXAS, MARK R. PRENDERGAST,[1] Individually, and JIMMY D. CARGILL, Individually,	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending are Defendant Mark R. Prendergast's Second Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment (Document No. 53), Defendant City of Houston's Motion for Summary Judgment (Document No. 54), and Defendant Jimmy D. Cargill's Second Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment (Document No. 57). After carefully considering the motions, responses, replies, and applicable law, the Court concludes as follows:[2]

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[1] Some documents mistakenly refer to Officer Prendergast as Officer "Pendergast," which accounts for the misspelling of Prendergast in certain quoted material herein.

[2] Also pending are Defendants' Motion for Leave to File Supplemental Evidence and Amend Daubert Motion to Strike Plaintiffs' Expert Opinion Testimony (Document No. 55), Defendant

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I. Background

This is a 42 U.S.C. § 1983 claim for use of excessive force filed against The City of Houston ("City"), Houston Police Department ("HPD") Officer Mark R. Prendergast ("Officer Prendergast"), and HPD Officer Jimmy D. Cargill ("Officer Cargill"). On April 19, 2000, Officers Cargill and Prendergast were engaged in an undercover narcotics operation known as a "buy-walk," in which the officers would pose as purchasers of crack cocaine in order to obtain information about the source of the cocaine.

At a trailer on Howard Avenue, the officers located a man known to them as "Popeye," who was in fact Larry Robinson. Based on an earlier conversation with Robinson, the officers had determined that Robinson could lead them to a source of crack

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City of Houston's Motion to Strike Opinion Testimony of Plaintiff's Expert Witness Roger Clark (Document No. 56), and Defendant City of Houston's Amended Motion to Strike Plaintiffs' Expert Witness, Roger Clark's Testimony (Document No. 65), and Plaintiff's FRCP 56(g) Motion for Fees and Contempt Because Defendant Jimmy D. Cargill Filed a Summary Judgment Affidavit in Bad Faith (Document No. 67). The Court has considered Roger Clark's opinion to the extent that it is admissible, and determined that it does not prejudice Defendants as to the outcome of Defendants' current dispositive motions. The motions for leave to file supplemental evidence and to strike Roger Clark's testimony are therefore DENIED, subject to being re-urged at trial. As to Plaintiff's motion for fees and contempt, the City of Houston's response to this motion (Document No. 72) shows that the apparent discrepancies in Officer Cargill's testimony can be reconciled or adequately explained. The Court is not persuaded that the affidavit was filed in bad faith. The Motion is therefore DENIED.

cocaine if they came to Howard Avenue at 6:30 p.m. on April 19, 2000. Upon arrival at the trailer, the officers noticed that Robinson appeared to be somewhat intoxicated and was acting erratically. Although the officers had not revealed their true identities, Robinson seemed reluctant to ride in the officers' unmarked car. After the officers demonstrated, at Robinson's demand, that the rear doors of the car could be opened from the inside, Robinson agreed to join the officers and climbed into the backseat, carrying with him a can of tomato juice and a bottle of vodka. Officer Prendergast sat in the front passenger seat while Officer Cargill took the wheel. Robinson directed the officers to proceed to Scott Street. According to Officer Prendergast, while all three of them were on Interstate 45 en route to Scott Street, Robinson warned Officer Prendergast that Prendergast had better not be a police officer. Officer Prendergast replied that he was not and was out on parole. When Robinson asked to see Officer Prendergast's parole card, Officer Prendergast stated that he had left it in his truck. According to Officer Prendergast, Robinson then became very upset and pulled a knife either out from under his armpit or from the can while saying "I'll show you." Officer Prendergast claims that he only had a moment to say "knife!" and reach for his concealed firearm, a 9mm semiautomatic pistol. He maintains that Robinson started towards Officer Cargill with the knife and, in fear for Officer Cargill's life, he (Officer

Prendergast) fired at Robinson. Officer Prendergast contends that his shots seemed either not to hit Robinson or not to affect him, and so he (Officer Prendergast) fired several more times at Robinson until he felt Robinson was no longer a threat. Officer Prendergast shot Robinson a total of seven times, inflicting wounds to Robinson's head, right hand, right forearm, and torso. Officer Cargill contends that he then pulled the car over to the right shoulder of I-45, exited the car, drew his own firearm and opened the rear left door of the car, but did not shoot as he considered Robinson to no longer be a threat.

The officers claim they then radioed dispatch to advise of the shooting, although the recording of the dispatch has been misplaced. Firefighters dispatched to the scene pronounced Robinson dead upon their arrival. The only knife recovered from Robinson was a folding knife located in the pocket of his pants. No knife was located in the undercover car. A serrated knife was located on the right shoulder of the highway about 300 feet behind the stopped car. The vehicle's rear door windows, however, were closed at the time of the shooting, as indicated by the blood splattered on the inside of them. No DNA or latent fingerprints were detected on the serrated knife.

Plaintiff Collen Mahan ("Plaintiff"), Robinson's mother, filed suit in her individual capacity, in behalf of her deceased son, Lanny Robinson, and as representative of the Estate of Robinson

pursuant to the Texas Wrongful Death Act, Tex. Civ. Prac. & Rem Code. Ann. § 71.004, and the Texas Survival Statute. Plaintiff alleges that Officers Cargill and Prendergast violated Robinson's constitutional rights when Officer Prendergast shot Robinson because the force used was objectively unreasonable and excessive. Plaintiff also alleges that the City of Houston ("City") is liable because it maintained deficient policies on the use of deadly force that caused Robinson's death, and because the City failed adequately to train, supervise, and discipline Officers Cargill and Prendergast.

In its prior Memorandum and Order entered February 7, 2003, (Document No. 34) the Court dismissed Plaintiff's state law negligence claims against the City. The Court further held that the officers' motions to dismiss would be granted unless Plaintiff filed an amended complaint "pleading with particularity all material facts that she contends will establish her right to recovery under 42 U.S.C. § 1983, including detailed facts supporting the contention that the Defendants' plea of immunity cannot be sustained." Plaintiff filed her Second Amended Complaint (Document No. 35) on February 26, 2003.

II. Pending Motions

Officers Prendergast and Cargill renew their motions to dismiss, and in the alternative move for summary judgment based on

their affirmative defense of qualified immunity. The officers contend that Plaintiff has failed to state the violation of a constitutional right, and that in any event, their actions under the circumstances were objectively reasonable.

The City moves for summary judgment on Plaintiff's § 1983 claims, contending that neither officer committed a constitutional violation, and that Plaintiff has failed to identify a City policy or custom that served as the moving force behind the alleged Fourth Amendment violations. In addition, the City argues that as a matter of law the officers were adequately trained, supervised, and disciplined.

III. Standards of Review

The individual officers have moved for dismissal under Rule 12(b)(6) and, in the alternative, for summary judgment. The City has moved for summary judgment.

A. Motion to Dismiss

Rule 12(b)(6) authorizes the dismissal of a claim for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court may not look beyond the face of the pleadings. Classroom Teachers of Dallas v. Dallas Indep. Sch. Dist., 164 F. Supp.2d 839, 845 (N.D. Tex. 2001). Moreover, a district court must liberally

construe the allegations in the complaint in favor of the plaintiff and must accept as true all well-pleaded facts in the complaint. Lowrey v. Tex. A & M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997).

Dismissal of a claim is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir. 2000). "A plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal." Classroom Teachers of Dallas, 164 F. Supp.2d at 845. "A motion to dismiss under rule 12(b)(6) 'is viewed with disfavor and is rarely granted.'" Collins, 224 F.3d at 498 (quoting Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, 677 F.2d 1045, 1050 (5th Cir. 1982)).

B. Summary Judgment Standard

Rule 56(c) provides that summary judgment "shall be rendered forthwith 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 and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party must "demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See* id. at 2553-54. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. *See* Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998) (citing Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2514-15 (1986)). "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." Id.

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *See* Anderson, 106 S. Ct. at 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. Kelley v. Price Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993) (citing Matsushita, 106 S. Ct. at 1351). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." Id. (citing Anderson, 106 S. Ct. at 2511). Even if the standards of Rule 56 are met, a court has discretion to deny a motion for

summary judgment if it believes that "the better course would be to proceed to a full trial." Anderson, 106 S. Ct. at 2513.

Plaintiff has filed numerous objections to the summary judgment evidence, including objections to: exhibits A and B to Officer Cargill's Motion for Summary Judgment; exhibits A, B, and C to Officer Prendergast's Motion for Summary Judgment, and exhibits A-F, inclusive, to the City of Houston's Motion for Summary Judgment. Plaintiff has not cited any authority in support of her objections. In addition the objections are cursory. With the exception of Plaintiff's objection to the expert report of C.A. McClelland (Document No. 53 ex. C., Document No. 54 ex. D), which is hearsay, *see* Wittmer v. Peters, 87 F.3d 916, 917 (7th Cir. 1996), Plaintiff's objections are OVERRULED. Plaintiff's objection to the unverified expert report of C. A. McClelland is SUSTAINED.

IV. Discussion--Individual Liability

Officers Prendergast and Cargill argue that they are entitled to summary judgment based on qualified immunity. "Qualified immunity protects government officials performing discretionary functions from civil damages liability *if* their actions were *objectively reasonable* in light of then clearly established law." Bazan ex rel. Bazan v. Hidalgo County, 246 F.3d 481, 488 (5th Cir. 2001). For qualified immunity to apply

> "the defendant official must initially plead his good faith and establish that he was acting within the scope of his discretionary authority. Once the defendant has done so, the burden shifts to plaintiff to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law."

Id. at 489 (quoting Salas v. Carpenter, 980 F.2d 299, 306 (5th Cir. 1992) (citations omitted)).

Assessing a qualified immunity defense requires a two-step analysis.

> First, we must determine "whether the facts alleged, taken in the light most favorable to [Plaintiff], show that the officer's conduct violated a constitutional right." Price v. Roark, 256 F.3d 364, 369 (5th Cir. 2001)) (citing Saucier v. Katz, 533 U.S. 194, 200, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)). If there is no constitutional violation, our inquiry ends. However, if "the allegations could make out a constitutional violation, we must ask whether the right was clearly established--that is whether 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Id.

Mace v. City of Palestine, 333 F.3d 621, 623-24 (5th Cir. 2003). In evaluating whether Plaintiff has stated a constitutional violation, the Court must look to current applicable constitutional standards. Rankin v. Klevenhagen, 5 F.3d 103, 108 (5th Cir. 1993). "However, '[t]he objective reasonableness of an official's conduct must be measured with reference to the law as it existed at the time of the conduct in question.'" Id. (quoting Mouille v. City of Live Oak, 918 F.2d 548, 551 (5th Cir. 1990)).

It is well settled that claims involving claims of excessive force are based upon an alleged violation of the Fourth Amendment. *See* Graham v. Connor, 109 S. Ct. 1865, 1867-68 (1989). To prevail on her claim of excessive force under the Fourth Amendment, Plaintiff must do more than allege that the individual officers used excessive force. Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 620 (5th Cir. 1992). She must plead specific facts that if proved would overcome the individual officer's qualified immunity defense. Id. To state a claim of excessive force "a plaintiff must allege (1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." Bazan, 246 F.3d at 487-88.

In this case, Plaintiff's § 1983 claim is predicated on allegations of not only excessive force, but deadly force. In particular, Plaintiff contends that the deadly force used against Robinson was objectively unreasonable and therefore a violation of the Fourth Amendment. "Deadly force is a subset of excessive force. Deadly force violates the Fourth Amendment *unless* 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" Bazan, 246 F.3d at 487-88 (quoting Tennessee v. Garner, 105 S. Ct. 1694, 1701 (1985)). "Use of deadly force is not unreasonable when an officer would have reason to believe that the

suspect poses a threat of serious harm to the officer or others." Mace, 333 F.3d at 624. "Accordingly, deciding what occurred when deadly force was employed obviously will control whether the [officer's] conduct was *objectively reasonable*; therefore, those facts are material." Bazan, 246 F.3d at 492. The reasonableness of an officer's belief as to the appropriate level of force should be judged from an "on-scene" perspective, rather than the "'20/20 vision of hindsight.'" Saucier, 121 S. Ct. at 2151 (quoting Graham v. Connor, 109 S. Ct. 1856, 1872 (1989)).

Plaintiff in her Second Amended Complaint alleges that "Lanny Blaine Robinson, 49 years old, was shot ten times with a 9mm handgun at point blank range by Houston Police Officer Mark R. Pendergast, working undercover, while in the back seat of a car driven by Houston Police Officer Jimmy D. Cargill, working undercover, near 6600 Gulf Freeway (Interstate 45) in Houston, Harris County, Texas, on the northbound side [sic] April 19, 2000. Officers Pendergast and Cargill allege that Robinson pulled a knife in the undercover car leading to his fatal shooting." Document No. 35 ¶ 10. The Complaint then makes the following allegations:

1. "Lanny had multiple contusions of the trunk and extremities consistent with a severe beating before death." Document No. 35 ¶ 22.

2. "Officers Pendergast and Cargill did not suffer a scratch, abrasion, contusion, cut or any injury whatsoever." Id. ¶ 23

3. "Lanny had a blood alcohol level of 0.25%, over three times the limit for adult DUI in Texas." Id. ¶ 24.

4. "Larry Blaine Robinson was right-handed and Gunshot wounds G and H go through this open right hand in a manner consistent with a non-aggressive, defensive posture. Lanny had his hand open in a vain attempt to shield himself from the gunfire coming from Officer Pendergast in the front seat." Id. ¶ 28.

5. "Right-handed Lanny--with bullets passing through his open right hand--could not be holding a knife or any weapon with his open right hand." Id. ¶ 29.

6. "The alleged knife was not found on Lanny nor in the undercover car. Several individuals who were with Lanny that day up until Lanny got into the car with the officers state that Lanny had no knife nor any place to conceal a knife." Id. ¶ 30.

7. "Gunshot wounds E and F are perforating wounds of Lanny's right arm consistent with the same non-aggressive defensive posture referenced above." Id. ¶ 31.

8. "By the pattern of bullets it is consistent with Lanny cowering in the corner of the backseat." Id. ¶ 32.

Document No. 35 ¶¶ 22-24, 28-32.

A. Officer Cargill

The facts alleged in Plaintiff's Second Amended Complaint are insufficient to raise a § 1983 claim against Officer Cargill. Plaintiff does not allege that Cargill did anything other than drive the car at the time Robinson was shot. Moreover, there are no allegations in the Complaint of a conspiracy involving Officer Cargill. While Plaintiff raises conspiracy allegations in response

to Cargill's Second Motion to Dismiss, such allegations are not in the Complaint. "Plaintiffs who assert conspiracy claims under civil rights statutes must *plead* the operative facts upon which their claim is based." Lynch v. Canatella, 810 F.2d 1363, 1369-70 (5th Cir. 1987) (emphasis added). Plaintiff's allegation of a conspiracy and cover-up neither appears in Plaintiff's Second Amended Complaint nor follows from the facts pleaded therein. Plaintiff cannot now raise it as an alternative theory of recovery.

Plaintiff has failed to "enunciate a set of facts that illustrate [Cargill's] participation in the wrong alleged." Jacquez v. Procunier, 801 F.2d 789, 793 (5th Cir. 1986).[3] Therefore, Plaintiff's § 1983 claim against Officer Cargill will be dismissed. Defendant Cargill's Second Motion to Dismiss is GRANTED.

B. Officer Prendergast

Plaintiff's allegations support Plaintiff's claim against Prendergast "'with sufficient precision and factual specificity to raise a genuine issue as to the illegality of [Prendergast's]

[3] Although "an officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force may be liable under section 1983, Plaintiff's Second Amended Complaint does not allege that Officer Cargill, who was driving an automobile on an interstate highway in Houston, "had a reasonable opportunity to realize the excessive nature of the force and to intervene to stop it." Hale v. Townley, 45 F.3d 914, 919 (5th Cir. 1995).

conduct at the time of the alleged acts.'" Baker v. Putnal, 75 F.3d 190, 195 (5th Cir. 1996) (quoting Schultea v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc)). If proved, Plaintiff's allegations indicate that Officer Prendergast used excessive force against Robinson (1) that was objectively unreasonable, and (2) that a reasonable officer in such circumstances would have known was unlawful. Accordingly, Officer Prendergast's Motion to Dismiss will be denied.

With respect to Officer Prendergast's Alternative Motion for Summary Judgment, Prendergast argues that his use of deadly force was neither excessive nor objectively unreasonable because he was responding to a threat of serious physical harm that Robinson posed to both officers. Plaintiff's § 1983 claim against Prendergast, as well as Prendergast's qualified immunity defense, hinge on this matter--whether Officer Prendergast reasonably believed that Robinson posed a threat of serious physical harm to either officer. If Officer Prendergast reasonably believed Robinson posed a threat of serious physical harm, Prendergast's use of deadly force was neither a Fourth Amendment violation nor objectively unreasonable under Garner. On the other hand, if Prendergast did not have reason to believe Robinson posed a threat of serious physical harm, the deadly force was both excessive and objectively unreasonable.

There is a genuine issue of material fact as to whether Officer Prendergast reasonably believed that Robinson posed a

threat of serious physical harm. There is sworn testimony from Officer Prendergast that he "shot Mr. Robinson only after Mr. Robinson threatened the officers with a knife." Document No. 53 ¶ 4.4. This is the only summary judgment evidence that Robinson threatened the officers with a knife, and it comes from Officer Prendergast, a highly interested witness in this case. Under such circumstances, the Court has good reason to be cautious:

> The award of summary judgment to the defense in deadly force cases may be made only with *particular care where the officer defendant is the only witness left alive to testify.* In any self-defense case, a defendant knows that *the only person likely to contradict him or her is beyond reach.* So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial.

Bazan, 246 F.3d at 492 (quoting with implied approval dicta from Plakas v. Drinski, 19 F.3d 1143, 1147 (7th Cir.) (emphasis added), cert. denied, 115 S. Ct. 81 (1994)). Although Officer Cargill was also present when Officer Prendergast shot Robinson, the summary judgment evidence indicates that Cargill was driving the car at the time, never saw the alleged knife, and does not believe he could identify it. *See* Document No. 57 ex. B; Document No. 68 ex. 2, at 127.[4] Consequently, Officer Prendergast is the sole source of

[4] In his affidavit Officer Cargill states: "While en route to purchase the crack cocaine, Mr. Robinson became agitated and I heard Officer Prendergast say he (Mr. Robinson) had a knife. Officer Prendergast shot Mr. Robinson." Document No. 57 ex. B. In

direct evidence that Robinson threatened the officers with a knife. "'Cases that turn crucially on the credibility of witnesses' testimony in particular should *not* be resolved on summary judgment.'" Bazan, 246 F.3d at 492 (quoting Abraham v. Raso, 183 F.3d 279, 287 (3d Cir. 1999)).

Furthermore, Plaintiff points to circumstantial evidence that calls into question Officer Prendergast's version of events. In a sworn witness statement, Officer Prendergast stated that Robinson, riding as a passenger in the backseat of the officers' undercover car, warned Prendergast that he had better not be a police officer. Prendergast responded that he was out on parole. Robinson asked to see the parole card, and Prendergast replied that he had left it in his truck. Then, according to Prendergast,

> [Robinson] seemed to lose it. He started stating very aggressively that he was a schizophrenic and that 'I'll show You" as he was saying, he also reached either under his armpit or into the can and pulled out a knife. I only had a moment to say knife as I reached for my weapon. He was less than a foot to a foot and a half from officer Cargill's neck. As he stated I'd show you, he pulled the knife and started toward officer Cargill with the knife in his hand. Fearing for officer Cargill's life I began to fire at the suspect. It seemed that either I was not hitting him or that my rounds were having no effect. His body was reacting but it did not appear to stop him instantly. I fired approximately 5-6 times at the suspect before I felt there was no longer a threat to either officer Cargill or myself.

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a prior deposition Cargill stated that he had never seen the alleged knife and could not now identify it. *See* Document No. 68 ex. 2, at 127.

See Document No. 53 ex. A. In a subsequent deposition, Prendergast could not offer any real details about the alleged knife other than that he saw a blade.[5] *See* Document No. 69 ex. 2, at 38. Nor did he recall seeing anything happen to the knife once he started shooting Robinson. Id. at 41. The summary judgment evidence shows that the only knife recovered from Robinson was a folding knife located *inside the pants pocket* of Robinson's corpse, and that no other knife was recovered from the car. *See* id. ex. 1, at 000136. Although a knife with a 3.5 inch serrated blade ("serrated knife") was recovered from the right shoulder of the highway some 300 feet behind the officers' vehicle, the investigator's report notes that the rear door windows of the car had been *closed* at the time of the shooting, as indicated by the blood splattered on the inside of them. *See* id. ex. 1, at 000149. The driver's door window was down only 6-7 inches, the passenger side front window was down only 2 inches, and the serrated knife was found on the *right* shoulder of the road. Document No. 69 ex. 1, at 000149. A police lab report states that "blood was indicated on the knife," but does not specify if this was the folding knife taken from the deceased's right front pocket or the serrated knife found on the highway shoulder. Id. at 000155. A subsequent police

[5] When asked in the deposition what kind of blade it was, Officer Prendergast responded: "It was just a blade. It looked sharp. And my eyes made contact with it and it was a knife." Document No. 69 ex. 2, at 38.

lab report states that no DNA type was detected on "the knife." Id. at 000169. A separate police lab report states that no latent prints were identified on the "steak knife," presumably the serrated knife found 300 feet away from the car. Id. at 000161.

Given that the reasonableness of Officer Prendergast's actions is predicated on his solo version of events, and given that there is scant circumstantial evidence to corroborate his version, *see* Bazan, 246 F.3d at 492, genuine issues of material fact preclude summary judgment.[6] Consequently, Officer Prendergast's Motion for Summary Judgment will be denied.

V. Discussion--Municipal Liability

The City argues that it is entitled to summary judgment (1) because Officer Prendergast's conduct did not amount to a constitutional violation, and (2) there is no City policy that can be established to be the moving force behind the alleged violation. As is clear from the analysis of Officer Prendergast's Motion for Summary Judgment, fact issues preclude the City from prevailing on

[6] In opposing the motions for summary judgment, Plaintiff complains about the alleged spoliation of evidence, including a missing dispatch tape, missing serrated knives, and contamination of the scene of the shooting. This alleged spoliated evidence is relevant, if at all, to Plaintiff's claims against Officer Prendergast and Prendergast's version of events. It has no applicability to the basis for municipal liability alleged in this case. Given that there are genuine issues of material fact that preclude summary judgment for Officer Prendergast, the spoliation issue may be raised at trial.

its first argument. The Court therefore turns to the issue of municipal policy.

A municipality can be held liable under § 1983 only when the municipality itself causes a constitutional deprivation. *See* City of Canton v. Harris, 109 S. Ct. 1197, 1203 (1989); Monell v. Dept. of Soc. Servs., 98 S. Ct. 2018, 2037-38 (1978). This requires the execution of an official city policy or custom which results in the injury made the basis of the § 1983 claim. Bd. of County Comm'rs v. Brown, 117 S. Ct. 1382, 1388 (1997); Monell, 98 S. Ct. at 2035-36. There are two fundamental requirements for holding a city liable under § 1983: culpability and causation. *See* Brown, 117 S. Ct. at 1388; Snyder v. Trepagnier, 142 F.3d 791, 795 (5th Cir. 1998). "First, the municipal policy must have been adopted with 'deliberate indifference' to its known or obvious consequences. Second, the municipality must be the 'moving force' behind the constitutional violation." Snyder, 142 F.3d at 795; Brown, 117 S. Ct. at 1394; Canton, 109 S. Ct. at 1204-05. *See* Piotrowski v. City of Houston, 237 F.3d 567 (5th Cir. 2001) ("[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 or custom."). A high standard of proof is required before a municipality can be held liable under § 1983. *See* Snyder, 142 F.3d at 796; *see also* Brown, 117 S. Ct. at 1394 (stating that "[w]here a court fails to adhere to rigorous

requirements of culpability and causation, municipal liability [inappropriately] collapses into respondeat superior liability"); Canton, 109 S. Ct. at 1208 (stating that § 1983 liability should not be imposed absent a showing of "a high degree of fault on the part of city officials" (O'Connor, J., concurring)).

"[E]ach and any policy which allegedly caused constitutional violations must be specifically identified by a plaintiff, and it must be determined whether each one is facially constitutional or unconstitutional." Piotrowski, 237 F.3d at 579-80. An official policy is defined as

> 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 policy-making 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. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Johnson v. Moore, 958 F.2d 92, 94 (5th Cir. 1992). "[P]roof of a custom or practice requires more than a showing of isolated acts . . . ." Burge v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. 2003). The narrow "single incident" exception to this rule applies "only where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional

violation was the highly predictable consequence of a particular policy or failure to train." Id. at 373.

To establish municipal liability for inadequate training, supervision, or discipline, Plaintiff must show (1) inadequate training, supervision, or disciplinary procedures; (2) that such inadequate procedures caused the alleged constitutional violation (in this case, the alleged unlawful use of deadly force); and (3) the deliberate indifference of municipal policymakers in establishing the allegedly inadequate procedures. *See* Burge, 336 F.3d at 370. *See also* Pineda v. City of Houston, 291 F.3d 325, 332 (5th Cir. 2002) (inadequate training). The adequacy of such procedures must be evaluated "in relation to the tasks *the particular officers must perform*." Pineda, 291 F.3d at 332 (emphasis in original). Only where the allegedly inadequate training, supervision, and disciplinary procedures of a municipality evidence a "'deliberate indifference' to the rights of its inhabitants can such [] shortcoming[s] be properly thought of as a city 'policy or custom' that is actionable under § 1983." Canton, 109 S. Ct. at 1205. Only where a municipality's procedures "reflect[] a 'deliberate' or 'conscious' choice by a municipality --a "policy" as defined by our prior cases--can a city be liable for such a failure under § 1983." Id. The need for "more or different" training, supervision, or discipline must be "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." Id.

Plaintiff contends that Officer Prendergast's alleged use of objectively unreasonable deadly force was "in compliance with [the City's] deficient actual policies. Procedures, practices, and customs relating to the use of force, including deadly force." [sic] Document No. 35 ¶ 55. Specifically Plaintiff alleges that the City provides its officers with "too much discretion in determining whether to use excessive force without considering less drastic alternatives," that these "deficient actual policies" amount to deliberate indifference to a citizen's right not to be subjected to objectively unreasonable deadly force, and that these policies proximately caused Robinson's death. *See* id. Plaintiff further alleges that the City failed adequately to train Officer Prendergast in the use of deadly force, failed adequately to supervise him, and failed adequately to discipline him.

The City's formal written policy on the use of deadly force, HPD General Order 600-17, states the following:

> The use of deadly force will be limited to those circumstances in which an employee reasonably believes it is necessary to protect himself or another from the imminent threat of serious bodily injury or death.
>
> Employees will not justify the use of deadly force by intentionally placing themselves in imminent danger (e.g. placing themselves in front of moving vehicles).

> Use of firearms in the following ways is prohibited:
>
> a. Firing warning shots.
>
> b. Firing at fleeing suspects who do not represent an imminent threat to the life of the officer or another.
>
> c. Firing at a suspect whose actions are only a threat to the suspect himself (e.g., attempted suicide).

Document No. 54 ex. F. This written policy is facially constitutional in that it permits the use of deadly force only well within the limits expressed by the Supreme Court in Garner, and as interpreted in this circuit. *See* Mace, 333 F.3d at 624 ("Use of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others."). Indeed, the policy is more restrictive of an officer's discretion than the City of Arlington's deadly force policy upheld by the Fifth Circuit in Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992).

In Fraire the Fifth Circuit held that Arlington's deadly force policy fell within the bounds of Garner even though the policy did not preclude an officer from placing himself in front of an oncoming vehicle where the utilization of force was a likely outcome. *See* id. at 1280-81. HPD General Order 600-17, by contrast, forbids this practice. *See* Document No. 54 ex. F. As expressed in HPD General Order 600-17, the City's policy does not provide officers with too much discretion in the use of deadly force, because Garner does not proscribe the use of deadly force

where "an employee reasonably believes it is necessary to protect himself or another from the imminent threat of serious bodily injury or death." Document No. 54 ex. F.

Furthermore, "[w]here . . . as in the present case, an alleged policy or custom is facially innocuous, establishing the requisite official knowledge requires that a plaintiff establish that an official policy was 'promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result.'" Burge, 336 F.3d at 370 (quoting Piotrowski, 237 F.3d at 579). Plaintiff points to no summary judgment evidence establishing that constitutional violations would obviously result from the application of this policy. Plaintiff's single expert states that HPD's narcotics abatement procedures are "seriously flawed" and that the narcotics unit in which Officers Cargill and Prendergast worked used unnecessary and dangerous tactics. *See* Document No. 70 ¶¶ 49-51. This does not explain how HPD's policy would obviously result in the unreasonable use of deadly force, particularly given that a threat of serious physical harm is to be evaluated "regardless of what transpired up until the shooting itself . . . ." Fraire, 957 F.2d at 1276. In addition, "plaintiffs generally cannot show deliberate indifference through the opinion of only a single expert." Conner v. Travis County, 209 F.3d 794, 798 (5th Cir. 2000).

Regarding alleged policies based on custom or practice, Plaintiff fails to provide summary judgment evidence revealing a "persistent, widespread practice" of police officers improperly resorting to deadly force, much less one "so common and well settled as to constitute a custom that fairly represents municipal policy." Johnson, 858 F.2d at 94. Plaintiff makes reference to several other shootings involving HPD officers, including Officers Prendergast and Cargill, but does not explain how these shootings involved an improper use of excessive or deadly force. As set forth above, "proof of custom or practice requires more than a showing of isolated acts . . . ." Burge, 336 F.3d at 370.

As for Plaintiff's allegations of inadequate training, the summary judgment evidence shows that Officer Prendergast has completed training, both at the police academy and in the HPD, which meets and exceeds the requirements of the state-mandated Texas Commission Law Enforcement Officers Standard Education ("TCLOSE"). *See* Document No. 54 ex. B. At least one court has held that compliance with state-mandated training procedures is sufficient to prevail over an inadequate training claim. *See* Huong v. City of Port Arthur, 961 F. Supp. 1003, 1006 (E.D. Tex. 1997). Furthermore, the summary judgment evidence shows that Officer Prendergast has completed extensive specialized narcotics training, including instruction on concealed weapons and reactive shooting. *See* Document No. 54 ex. B. It will not suffice to

> prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. *And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.*

Pineda, 291 F.3d at 333 (quoting Canton, 109 S. Ct. at 1206).

Even if the City's training procedures were inadequate and Officer Prendergast improperly used deadly force, however, the summary judgment evidence does not reveal deliberate indifference by municipal policymakers. "Deliberate indifference generally requires that a plaintiff demonstrate 'at least a pattern of similar violations' arising from training that is so clearly inadequate as to be 'obviously likely to result in a constitutional violation.'" Burge, 336 F.3d at 370. Plaintiff refers to other shootings involving Officer Prendergast, but aside from conclusory statements by Plaintiff's expert, Plaintiff does not explain how these shootings involved an improper use of deadly force or how such force was an obvious result of clearly inadequate training provided by the City to its officers.

With respect to the alleged inadequate supervision and discipline, while Plaintiff refers to several complaints sustained against Officer Prendergast, and other shooting incidents,

Plaintiff does not elaborate on these or explain why the City, as Plaintiff alleges, should have fired or better supervised Officer Prendergast. Plaintiff does not identify any details of the complaints against Officer Prendergast, does not provide any details about any of the other shootings in which Prendergast was involved, and has provided no summary judgment evidence that Prendergast, prior to the incident involving Robinson, ever unlawfully used deadly force. Consequently, Plaintiff has not demonstrated "'at least a pattern of similar violations' arising from [the City's] training, [supervision, or disciplinary procedures] that is so clearly inadequate as to be obviously likely to result in a constitutional violation." Burge, 336 F.3d at 370. In the absence of some summary judgment evidence of deliberate indifference on the part of the City, the City is entitled to summary judgment on the § 1983 claim.

In an attempt to raise a genuine issue of material fact on the existence of a municipal policy, Plaintiff has offered the Declaration of its expert, Roger A. Clark. Mr. Clark, a twenty-seven year veteran of the Los Angeles County Sheriffs Department, and purportedly an expert on police officer standards and training, states in his Declaration the following:

> The record clearly demonstrates that the custom and practice of the Houston Police Department in regard to street level narcotic abatement procedures was seriously flawed at the time of this incident. On pages 3 & 4 of this declaration I noted 10 serious operational mistakes

> that occurred during this incident. They apparently continue to this day since recent material provided to me documents that these flaws continue to routinely occur on a daily basis within the Houston Police Department.
>
> The recent depositions of both Officers CARGILL and Prendergast also confirm that unnecessary and dangerous tactics are part of the everyday operation of their unit; and that they so operate with the full knowledge and approval of their superiors in the department.
>
> This type of operational practice is grossly incompetent and dangerous. It is inefficient in terms of controlling narcotics within neighborhoods, and it presents unnecessary and serious risks to both the officers and public. Unless these procedures and practices are changed, they will surely result in further unnecessary death and injury.
>
> A listing of the 10 gross errors committed by Officers CARGILL and Prendergast has already been discussed in this report. In this regard, the entire incident smacks of a mentality by officers who operated with impunity. As a police supervisor and unit commander for 21 years of my law enforcement career, I know from personal experience that such activities can only occur among the line personnel when supervisors in charge deliberately look the other way. The record is clear that the responsibility for this fact falls squarely upon the Chief of Police of the Houston Police Department and his command staff.

Document No. 70 ex. 1 ¶¶ 49-52. In sum, it appears that Clark's position is that the Houston Police Department should not condone small undercover "buy/bust" or "buy/walk" narcotics operations, because the risks attendant to such operations greatly outweigh the potential benefits. Clark does not, however, state that the Houston Police Department's policy of allowing small undercover "buy/bust" or "buy/walk" narcotics operations results in, or is the "moving force" behind, the use of unlawful deadly force. Clark

does note that there is a risk of unnecessary death and injury associated with such operations, but such a risk does not by itself constitute a constitutional violation. It is only the *unlawful* use of deadly force that rises to such a level. Clark's Declaration, taken in the light most favorable to the Plaintiff, does not connect any custom or practice of the Houston Police Department to the alleged use of unlawful deadly force. *See* Bd. of County Comm'rs v. Brown, 117 S. Ct. 1382, 1388 (1997) ("[A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.").

As Plaintiff has not come forward with any summary judgment evidence of a City policy or custom that served as the moving force behind the alleged constitutional violation, the City's Motion for Summary Judgment will be granted.

VI. Order

For the foregoing reasons, it is hereby

ORDERED that Defendant Mark R. Prendergast's Second Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment (Document No. 53) is DENIED, and Plaintiff's § 1983 claims against Prendergast remain for trial; it is further

ORDERED that Defendant City of Houston's Motion for Summary Judgment (Document No. 54) is GRANTED, and Plaintiff's § 1983

claims against the City of Houston are dismissed with prejudice. It is further

ORDERED that Defendant Jimmy D. CARGILL's Second Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment (Document No. 57) is GRANTED, and Plaintiff's claims against CARGILL are dismissed with prejudice. It is further

ORDERED that Defendants' Motion for Leave to File Supplemental Evidence and Amend Daubert Motion to Strike Plaintiffs' Expert Opinion Testimony (Document No. 55), Defendant City of Houston's Motion to Strike Opinion Testimony of Plaintiff's Expert Witness Roger Clark (Document No. 56), and Defendant City of Houston's Amended Motion to Strike Plaintiffs' Expert Witness, Roger Clark's Testimony (Document No. 65) are all DENIED, subject to being re-urged if appropriate at trial; and it further

ORDERED that Plaintiff's Motion for Fees and Contempt Because Defendant Jimmy D. CARGILL Filed a Summary Judgment Affidavit in Bad Faith (Document No. 67) is DENIED.

The Clerk will enter this Order and send copies to all counsel of record.

SIGNED at Houston, Texas on this 27TH day of January, 2004.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Antonio Armstrong Jr.

(b) County of Residence of First Listed Plaintiff Fort Bend
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Randall L. Kallinen, Kallinen Law PLLC, 511 Broadway Street, Houston, TX 77012; 713/320-3785

DEFENDANTS

City of Houston, Texas

County of Residence of First Listed Defendant Harris
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

INTELLECTUAL PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
42 USC Section 1983

Brief description of cause:
Houston police planted blood evidence to try and convict Plaintiff of capital murder

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions):*

JUDGE _____ DOCKET NUMBER _____

DATE
08/15/2023

SIGNATURE OF ATTORNEY OF RECORD
/s/ Randall L. Kallinen

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.