

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

HERSCHEL SMITH	§	
<i>Plaintiff</i>	§	
	§	
VS.	§	CIVIL ACTION NO. _____
	§	
TED HEAP, Individually and in his Official Capacity; JOHN DOES 1-4, Individually and in their Official Capacities; HARRIS COUNTY;	§	JURY DEMANDED
	§	
<i>Defendants</i>	§	

PLAINTIFF’S ORIGINAL COMPLAINT

COMES NOW, Plaintiff, HERSCHEL SMITH, complaining of Defendants TED HEAP, Individually and in his Official Capacity, JOHN DOES 1-4, Individually and in their Official Capacity, and HARRIS COUNTY, pursuant to 42 U.S.C. §§1983 and 1988, and the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiff herein complies with the pleading requirements of FRCP Rule 8(a)(2) and the requirements of *Ashcroft v. Iqbal*, 556 U.S. 129 S. Ct. 1937, 1949 (2009) that “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”

I. INTRODUCTION

This is an action for monetary damages brought pursuant to 42 U.S.C. §§1983 and 1988, and the Fourth and Fourteenth Amendments to the United States Constitution against Harris County Precinct 5 Constable Ted Heap, Deputies John Does 1-4 and Harris County. This action stems from outrageous conduct in which Plaintiff, the duly elected Constable of Precinct 3 of Waller County, Texas, was the subject of a felony stop by four Precinct 5 deputies who removed him from his government vehicle at gunpoint, while he was wearing his official

Constable uniform and badge, handcuffed him, tried to put him in the back of a patrol car, and publicly defamed him as a “suspect” in a criminal investigation.

II. PARTIES

1. Plaintiff Herschel Smith, is a citizen of the United States, residing in Waller County, Texas and is the duly elected Constable of Waller County, Precinct 3.

2. Defendant Ted Heap is a citizen of the United States who at all relevant times was the Harris County Constable of Precinct 5 and each of the acts complained of herein arises from the conduct of this Defendant while acting under color of law, under color of the statutes, ordinances, regulations, policies, customs and usages of the State of Texas and/or the County of Harris, Texas. Defendant Ted Heap is sued in both his individual and official capacities. **This Defendant may be personally served at his place of business: The Office of Constable Ted Heap Harris County Precinct 5, 17423 Katy Fwy, Houston, TX 77094 or wherever he may be found.**

3. Defendants John Does 1-4 are citizens of the United States who at all relevant times were deputy constables for Harris County Precinct 5 and each of the acts complained of herein arises from the conduct of these Defendants while acting under color of law, under color of the statutes, ordinances, regulations, policies, customs and usages of the State of Texas and/or the Harris County, Texas. Defendants John Does 1-4 are sued in both their individual and official capacities. **These Defendants may be personally served at their place of business: The Office of Constable Ted Heap Harris County Precinct 5, 17423 Katy Fwy, Houston, TX 77094 or wherever they may be found.**

4. Defendant Harris County is county of the State of Texas. **This Defendant may be personally served by serving Harris County Judge Lina Hidalgo, 1001 Preston, Suite 911, Houston, Texas 77002.**

III. JURISDICTION AND VENUE

5. This Court possesses jurisdiction over this action because Plaintiff asserts a federal claim against Defendants based on a violation of civil rights pursuant to 42 U.S.C. §§ 1983 and 1988 and the Fourth and Fourteenth Amendments to the United States Constitution. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. §1331.

6. This Court has supplemental jurisdiction over Plaintiff's state law claims, under 28 U.S.C. §1367, because the claims are so related to the claims over which this Court has original jurisdiction that they are part of the same case or controversy.

7. Venue is appropriate in the United States District Court for the Southern District of Texas, Houston Division, under 28 U.S.C. §1391(b), as this is the judicial district in which a substantial part of the events or omissions giving rise to the claims occurred.

IV. STATEMENT OF FACTS

8. Plaintiff alleges that a constable is an elected office created by the Texas Constitution, TEX. CONST. ART. V, SEC. 18, and that an elected constable holds the position for four years within each justice precinct.

9. Plaintiff alleges that he first took office on January 1, 2013 as Constable of Precinct 3 in Waller County, Texas which directly adjoins Harris County, Texas to the northwest and includes the Prairie View area.

10. Plaintiff alleges that at all times relevant to this lawsuit, he is the duly elected Constable of Precinct 3 in Waller County, Texas and that he is a "peace officer", as that term is defined under Texas law, TEX. CODE CRIM. P. §2.12 (2), which states:

Art. 2.12. WHO ARE PEACE OFFICERS. The following are peace officers: (2) constables, deputy constables, and those reserve deputy constables who hold a permanent peace officer license issued under Chapter 1701, Occupations Code;

11. Plaintiff alleges that at all times relevant to this lawsuit, he was: (1) on duty, (2) wearing his official uniform bearing his name, “Constable Herschel Smith”, (3) wearing his badge on his gun-belt, (4) in possession of his service weapon that he is required to have on his person while on duty, (5) driving his official government vehicle, a black Chevy Tahoe, with a Texas license plate that indicates it is “Exempt” which is typical for government vehicles, and (6) equipped with standard red-and-blue police lights and sirens, even though the government vehicle itself is unmarked.

12. Plaintiff alleges that on August 18, 2020, he was traveling home from a second job that he works in Harris County, Texas when he witnessed an unknown driver speeding and driving recklessly on Beltway 8 in south Houston.

13. Plaintiff alleges that as a peace officer under Texas law, he is under the legal duty stated in TEX. CODE CRIM. P. §2.13 (a) and (b)(1):

Art. 2.13. DUTIES AND POWERS.

(a) It is the duty of every peace officer to preserve the peace within the officer’s jurisdiction. To effect this purpose, the officer shall use all lawful means.

(b) The officer shall: (1) in every case authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime;

14. Plaintiff alleges that under Texas law, an off-duty peace officer who observes a crime immediately becomes an on-duty peace officer. *See, Hafdahl v. State*, 805 S.W.2d 396, 401 (Tex.Crim.App.1990).

15. Plaintiff alleges that since a Constable has a duty to suppress crime and he was now on-duty because he observed the vehicle committing a crime by violating the Texas traffic laws, he flashed his police lights in an attempt to get the unknown driver to slow down and stop driving recklessly.

16. Plaintiff alleges that because he was not in Waller County, he was outside of his jurisdiction and could arrest the unknown driver for a breach of the peace but could not arrest the unknown driver for traffic violations, pursuant to TEX. CODE CRIM. P. §§14.03 (d) and (g)(1):

Art. 14.03. AUTHORITY OF PEACE OFFICERS.

(d) A peace officer who is outside his jurisdiction may arrest, without warrant, a person who commits an offense within the officer's presence or view, if the offense is a felony, a violation of Chapter 42 or 49, Penal Code, or a breach of the peace. A peace officer making an arrest under this subsection shall, as soon as practicable after making the arrest, notify a law enforcement agency having jurisdiction where the arrest was made. The law enforcement agency shall then take custody of the person committing the offense and take the person before a magistrate in compliance with Article 14.06 of this code.

(e) The justification for conduct provided under Section 9.21, Penal Code, applies to a peace officer when the peace officer is performing a duty required by this article.

(g)(1) A peace officer listed in Subdivision (1), (2), or (5), Article 2.12, who is licensed under Chapter 1701, Occupations Code, and is outside of the officer's jurisdiction may arrest without a warrant a person who commits any offense within the officer's presence or view, other than a violation of Subtitle C, Title 7, Transportation Code.

17. Plaintiff alleges that because he was performing a duty required of peace officers under Texas law, his conduct was justified as a public duty under TEX. CODE CRIM. P. §14.03 (e) and TEX. PENAL CODE §9.21.

18. Plaintiff alleges that flashing his police lights had the desired effect, the unknown driver slowed down and Plaintiff proceeded on his way down Beltway 8 heading north to Highway 290 on his way home.

19. Plaintiff alleges that the incident made the basis of this lawsuit was captured by traffic video cameras and aired on local news media and that the photographs incorporated into this complaint are taken from that video, available at: <https://abc13.com/constable-vs-pulled-over-by-deputies-smith-handcuffed-racial-profiling/6381061/>, retrieved on October 13, 2020.

20. Plaintiff alleges that as he was proceeding north on Beltway 8, he suddenly noticed that there were four police cars behind him with their police lights and sirens on.



21. Plaintiff alleges that since he was in his official government vehicle and in his official constable uniform, he was initially curious as to why the police vehicles were behind him so he pulled over to the right shoulder and stopped his government vehicle on Beltway 8 near the Memorial Drive exit in Harris County.

22. Plaintiff alleges that he became alarmed when he saw Defendants John Does 1-4, four uniformed officers exit their police vehicles with their handguns and a high-powered rifle drawn and pointed at him through his government vehicle.

23. Plaintiff alleges that based on his training and expertise, he realized that the officers were performing a felony stop on him, meaning that the officers believed that he had committed a felony level offense, as evidenced by the number of officers and the fact that they had their guns drawn and pointed at him.

24. Plaintiff alleges that he knew he had not committed a felony level offense and the officers use of force was excessive under the circumstances and patently unreasonable because he was a uniformed peace officer in an official government vehicle.

25. Plaintiff alleges that even before Defendants John Does 1-4 pulled him over, they knew from his license plate that the vehicle was a government vehicle, not only because it had “Exempt” license plates, but because the vehicle itself is registered to Waller County and this information would show up in the police database when the license plates were checked.

26. Plaintiff alleges that he was ordered over the police microphone to put his hands out of the window, which he did because of the weapons that were pointed at him.

27. Plaintiff alleges that he was then ordered to step out of the vehicle with his hands in the air which he did because he was afraid for his life at this point because it was highly unusual and irregular for a uniformed peace officer in a government vehicle to be the subject of a felony stop by fellow peace officers.

28. Plaintiff alleges that on May 8, 2018, a similar incident occurred in Harris County where Constable Mark Herman of Harris County Precinct 4, which is directly adjacent to Defendant’s Precinct 5, was stopped by a Harris County Sheriff’s Deputy while driving an unmarked government vehicle but that his treatment was significantly different from Plaintiff’s treatment by the Defendants.

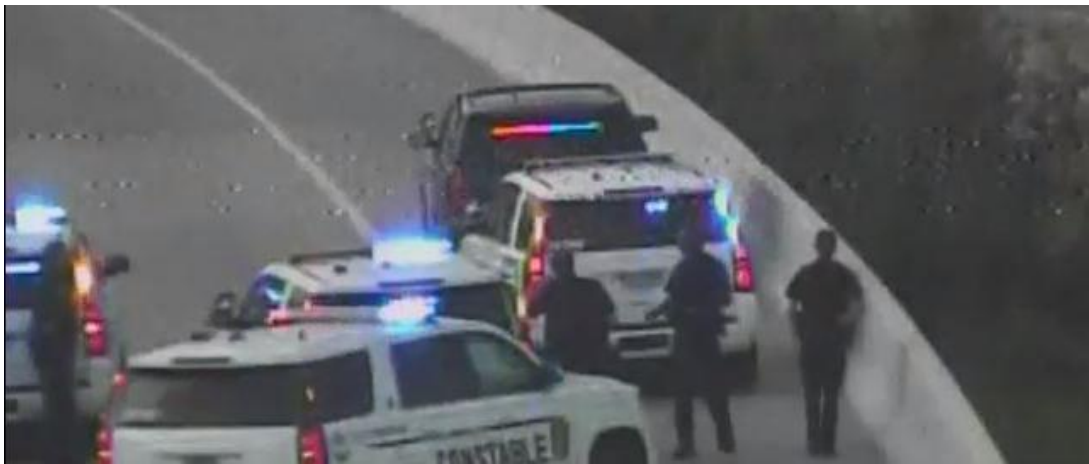
29. Plaintiff alleges that this similar incident was also reported on by local news media and that a video and short transcript of the officers’ interaction is available at <https://abc13.com/dashcam-catches-testy-exchange-after-deputy-pulls-over-constable/3478635/>, retrieved on October 13, 2020.

30. Plaintiff alleges that Constable Herman was accused of running a red light by the Sheriff’s Deputy but was let go with a warning and was never handcuffed or held at gunpoint.¹

¹ The news article states that Constable Herman “found it suspicious that the sheriff’s deputy was tailing his truck, and ‘surreptitiously’ recorded him driving” but refused to comment on the record if the traffic stop perhaps exposed some ongoing rifts between some members of the two law enforcement agencies.

31. Plaintiff alleges that it is of note in this prior incident, that: (1) Constable Herman was in uniform, (2) wearing a gun, (3) in an unmarked government vehicle with police lights which he turned on after being stopped, and (4) is very clearly a white man.

32. Plaintiff alleges that before he exited his government vehicle, he turned his police lights on to signal to the peace officers that he was a peace officer in a government vehicle, although Plaintiff is also very clearly a black man who is commissioned to carry a handgun which at this point in time did not seem to matter to Defendants John Does 1-4.



33. Plaintiff alleges that he was instructed to walk towards the officers with his hands in the air, which he did because he was still at gunpoint.



34. Plaintiff alleges that as he was walking towards the peace officers, he learned from their police vehicles that Defendant John Does 1-4 were deputy constables from the Harris County Pct. 5 Constable's Office where Defendant Ted Heap is Constable.

35. Plaintiff alleges that although he was in uniform, wearing his Constable badge, wearing a shirt that read "Constable Herschel Smith", and driving a government vehicle, one of the Defendant John Does told him to put his hands behind his back and handcuffed him, all while Plaintiff remained at gunpoint.

36. Plaintiff alleges that although he identified himself as a peace officer and the elected Constable of Waller County, Pct. 3, the Defendant John Does ignored him and instead questioned him on where his service weapon was located.

37. Plaintiff alleges that even though he told Defendant John Does 1-4 that his service weapon was in his government vehicle, the Defendants still attempted to place him in the back of the police vehicle in handcuffs.

38. Plaintiff alleges that he refused to be placed in the back of the police vehicle in handcuffs and told Defendant John Does 1-4 that they needed to call Defendant Ted Heap, because the way he was being treated was unreasonable and a clear violation of his civil rights.

39. Plaintiff alleges that when he asked why he was being placed under arrest, as evidenced by the use of force and the fact that he was in handcuffs, one of Defendant John Does informed him that the Constable's office had received a 911 call that a person in a vehicle matching the license plate and description of Plaintiff's government vehicle had flashed police lights and then pointed a gun at the caller.

40. Plaintiff alleges that according to media reports of the 911 call, the caller stated:

"He's got like police lights. I thought I was being pulled over by the police. When I slowed down and I got in the left lane in the shoulder on the left side to get pulled over, he pulled up next to me and pointed a gun at me and was yelling stuff at me and drove off."

41. Plaintiff alleges that the 911 call is false and vehemently denies pointing his gun at the driver, who apparently was the unknown driver that was speeding and driving recklessly whom Plaintiff had flashed with his police lights earlier on Beltway 8.

42. Plaintiff alleges that even if he had pointed his gun at the unknown driver, as was falsely alleged, the corresponding crime of “Deadly Conduct” is a misdemeanor under Texas law and did not warrant the felony stop he was unreasonably subjected to by the Defendants.

Sec. 22.05. DEADLY CONDUCT.

(a) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.

(c) Recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded.

(e) An offense under Subsection (a) is a Class A misdemeanor. An offense under Subsection (b) is a felony of the third degree.

43. Plaintiff alleges that the unreasonable and excessive force used by the Defendants to arrest him, a uniformed peace officer in a government vehicle, violated his Fourth and Fourteenth Amendment rights to be free from unreasonable and excessive force.

44. Plaintiff alleges that according to media reports, he was handcuffed for one minute and 47 seconds before he was released but every second seemed like an eternity to him.

45. Plaintiff alleges that the entire incident involving the unreasonable and excessive use of force against him was supervised by Defendant Ted Heap’s Precinct 5 Constable’s Office and states on information and belief that Defendant Ted Heap supervised the felony stop himself and personally authorized the excessive use of force against Plaintiff, a fellow peace officer.

46. Plaintiff alleges that Defendant Ted Heap falsely claimed that his government vehicle does not show Waller County as the owner, when it clearly does, in an attempt to justify his deputies’ unlawful conduct in using excessive force against a fellow peace officer.

47. Plaintiff alleges on information and belief that Defendant Ted Heap has had him under prior surveillance because Defendant Ted Heap reported to the news media that Plaintiff's government vehicle had been reported as suspicious by another law enforcement agency in June 2020, as such, Plaintiff alleges that Defendant Heap knew Plaintiff Constable Smith was driving the vehicle at the time his deputies unlawfully used excessive force against him, committed first degree felony aggravated assault and engaged in official oppression, as set forth below.

48. Plaintiff alleges that after the incident, he demanded a full accounting of his unlawful detention and a full apology from the officers involved and their supervisor, Defendant Ted Heap.

49. Plaintiff alleges that when interviewed by local news media and asked if he had called to apologize to Plaintiff, Defendant Ted Heap publicly defamed Plaintiff by stating:

“Why would I call him? He’s a suspect in a criminal case. If I was to call a suspect in a criminal case, would you imagine how that is going to play?”

50. Plaintiff alleges that he is not facing any criminal charges and is not a suspect in a criminal investigation, nor was he at the time the false statement was knowingly and intentionally made by Defendant Ted Heap.

51. Plaintiff alleges that Defendants John Does 1-4, by performing a felony stop on him for a possible misdemeanor, pointing several weapons at him, including a high-powered rifle, putting him in handcuffs, and placing him under arrest, for Plaintiff's official act of trying to slow down a speeding motorist who was driving recklessly, committed the crime of aggravated assault, as set forth in TEX. PENAL CODE §§22.01 and 22.02, under Texas law which is a first degree felony since the crime was committed while the Defendants were acting under the color of their office or employment and/or in retaliation of or on account of Plaintiff's exercise of official power or performance of an official duty as a public servant. See, TEX. PENAL CODE §22.02 (b)(2)(A) and (B).

Sec. 22.01. ASSAULT.

(a) A person commits an offense if the person:

(2) intentionally or knowingly threatens another with imminent bodily injury,

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Sec. 22.02. AGGRAVATED ASSAULT.

(a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person:

(2) uses or exhibits a deadly weapon during the commission of the assault.

(b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if:

(2) regardless of whether the offense is committed under Subsection (a)(1) or (a)(2), the offense is committed:

(A) by a public servant acting under color of the servant's office or employment;

(B) against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant;

52. Plaintiff alleges the Defendants have also engaged in official oppression, in violation of TEX. PENAL CODE § 39.03, which states:

Sec. 39.03. OFFICIAL OPPRESSION. (a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

53. Plaintiff alleges that the commission of first degree felony aggravated assault and official oppression by Defendants John Does 1-4 clearly demonstrates the unreasonable nature of the excessive use of force by these Defendants against the Plaintiff in violation of his Fourth Amendment rights guaranteed by the United States Constitution.

V. CAUSES OF ACTION

FIRST CLAIM FOR RELIEF – 42 U.S.C. §1983

54. The allegations contained in the paragraphs above are hereby incorporated and alleged for all purposes and incorporated herein with the same force and effect as if set forth verbatim.

55. The Defendants deliberate and/or reckless acts violated the Plaintiff's clearly established rights under the United States Constitution to: (1) the right to due process by law; (2) freedom from unreasonable seizure of his person; and (3) freedom from the use of unreasonable, unnecessary, and excessive force.

56. **§1983**. The Civil Rights Act of 1871, now codified as 42 U.S.C. §1983 as federal law provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any laws 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." 42 U.S.C. §1983.

57. The state action requirement for standing under 42 U.S.C. §1983 has more commonly been referred to as "color of state law", from the statute itself. Plaintiff is informed and believes and thereupon alleges that in committing said acts and/or omissions, the Defendants John Does 1-4 were agents and employees of Harris County Constable Precinct 5 and were acting under color of state law.

58. Section 1983 requires that the conduct complained of must have deprived the person of some privilege or immunity secured by the Constitution or laws of the United States. Plaintiff alleges that Defendants deprived him of his Fourth Amendment rights and those rights, privileges, and immunities secured by the Fourth Amendment to the Constitution incorporated and applied to the states through the Fourteenth Amendment. Defendants violated these provisions by the following actions and/or omissions:

- a. by using excessive force in the course of Defendants' arrest of Plaintiff without a warrant, in violation of the Fourth Amendment and its "reasonableness" standard. Plaintiff pleads he was unlawfully detained and arrested and such actions resulted directly and only from the use of force clearly excessive to the need, and the excessiveness of which was objectively unreasonable;
- b. by detaining Plaintiff in violation of his Fourth Amendment expectation of privacy and guarantee to security from unreasonable seizure without reasonable suspicion and/or probable cause;

59. The Defendants' actions and/or omissions were objectively unreasonable in light of the facts and circumstance confronting them without regard to their underlying intent or motivation. Clearly, careful attention to the facts and circumstances of this particular case demonstrates the unreasonableness of the Defendants' actions.

60. In light of the fact Plaintiff was a uniformed peace officer in a licensed government vehicle, it is patently absurd the Defendants would deem force was warranted and/or required. First, the crime of "Deadly Conduct", as alleged by the Defendants, is only a misdemeanor under Texas law and did not warrant a felony stop from the Defendants. Further,

Plaintiff never posed an immediate threat to the safety of Defendants, in fact, Plaintiff is a uniformed peace officer driving a government vehicle and an elected official. Finally, Plaintiff never resisted arrest or attempted to evade arrest by flight.

61. For these and other reasons, it was objectively unreasonable for Defendants to conduct a felony stop on him, place him at gunpoint, handcuff him and humiliate a uniformed government official and fellow peace officer in this manner.

62. **§1983 - Excessive Force.** Plaintiff alleges that Defendants used excessive force in the course of the deputies' supposed arrest and/or other "seizure" of a free citizen, such as Plaintiff Constable Smith, in violation of the Fourth Amendment and its reasonableness standard.

63. Plaintiff alleges that he was unlawfully assaulted by Defendants and that such actions resulted directly and only from the use of force clearly excessive to the need, and the excessiveness of which was objectively unreasonable.

64. While the law allows an officer to use reasonable force to effect an arrest, only that force necessary to bring the individual under control may be used. That is to say, once the need for force has ended, the application of force must also end.

65. Here, there was no need for any force, yet the Defendants pointed guns at and put handcuffs on a fellow uniformed peace officer driving a government vehicle. The Defendants subsequent removal of the handcuffs after several minutes and release of Plaintiff only reinforces the unreasonable and excessive nature of the force used against him.

66. **§1983 - Search & Seizure.** The Fourth Amendment guarantees security from unreasonable search and seizure. It includes the expectation of privacy, the right to be free from detention, search and/or arrest without reasonable suspicion and/or probable cause to believe the seized person committed a crime.

67. Plaintiff alleges Defendants John Does 1-4 violated his Fourth Amendment rights when he was unreasonably, and unlawfully detained. When a person, such as Plaintiff, is seized and is not a "suspect" and is committing no crime, but is forced to undergo police escalation and brutality, the importance of the governmental interests alleged to justify the intrusion is necessarily diminished. As such, the actions and/or omissions of said deputies cannot be justified under the circumstances of the instant case.

68. Likewise, Defendants John Does 1-4 are liable if they conduct the search or seizure in an abusive manner even if they have the lawful authority to conduct the search and/or seizure.

69. Plaintiff, in this situation, is protected by the Fourth Amendment of the United States Constitution, and Article I Section 9 of the Texas Constitution. The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search comprises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. In this instance, the seizure of Plaintiff ran afoul of the Fourth Amendment because the seizure was conducted in an unnecessarily cruel and/or dangerous manner in violation of Texas law.

SECOND CLAIM FOR RELIEF — Intentional Infliction of Emotional Distress

70. The allegations set forth in the paragraphs above are herein incorporated by reference, the same as if fully set forth verbatim for any and all purposes of this pleading.

71. As a pendant state cause of action, at all times material and relevant herein, Defendants, by acts and/or omissions and under color of state law, intentionally and/or recklessly inflicted emotional duress upon Plaintiff, thereby he claims the tort of intentional infliction of emotional distress. Plaintiff alleges Defendants acted intentionally or recklessly when detaining and arresting him, and further alleges such conduct was extreme and outrageous. The actions of

Defendants proximately caused Plaintiff to suffer severe emotional distress.

THIRD CLAIM FOR RELIEF — Defamation

72. The allegations set forth in the paragraphs above are herein incorporated by reference, the same as if fully set forth verbatim for any and all purposes of this pleading.

73. Defendant Ted Heap published a statement by oral and written communication asserting as fact that Plaintiff was a “suspect” in a “criminal investigation”.

74. Defendant Ted Heap’s statement referred to Plaintiff by name and indirectly because this Defendant was asked to comment on whether he intended to apologize to Plaintiff for his unlawful detention and arrest by the Defendant’s deputies.

75. Plaintiff alleges that the statement concerned a private matter and was negligently made by Defendant Heap without regard to the truth of the statement.

76. Plaintiff alleges in the alternative, if the Court determines that Defendant Ted Heap’s defamatory statement involves a public matter, that the statement was made with actual malice because it was made with knowledge of the statement’s falsity and/or reckless disregard for the truth of the statement.

77. Defendant Ted Heap’s statement was false because Plaintiff was not a “suspect” in a “criminal investigation” at the time the statement was made nor is he currently. Defendant Heap knew the statement was false or acted with reckless disregard as to the statement’s truth.

78. Defendant Ted Heap’s statement regarding Plaintiff was defamatory and is considered libel per se under Texas law because: (1) it falsely imputes that Plaintiff was charged with a crime and (2) it is injurious to Plaintiff’s occupation as the elected Constable of Precinct 3 for Waller County. An accusation of criminal conduct, no matter how remote in time or place, always relates to an official’s fitness for office and therefore relates to “official conduct.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971).

79. Defendant Ted Heap's false statement caused injury to Plaintiff's character or reputation, injury to his feelings and mental anguish for which Plaintiff seeks general damages within the Court's jurisdictional limit.

80. Plaintiff's injuries resulted from Defendant Ted Heap's malice and knowledge of the statement's falsity and/or reckless disregard for the truth, which entitles Plaintiff to exemplary damages under TEX. CIV. PRAC. & REM. CODE §41.003(a).

VI. DAMAGES AND PUNITIVE DAMAGES

81. As a result of the foregoing unlawful and wrongful acts as described above, Plaintiff has suffered actual and consequential damages exceeding the minimum jurisdictional limits of this Court. As a direct and proximate result of Defendants' acts and omissions as heretofore alleged, Plaintiff suffered, and is seeking recovery of, general damages which include, but are not limited to, the following in both the past and the future: physical and emotional personal injury, pain and suffering, and mental anguish.

82. In addition, the Defendants committed the foregoing acts with the kind of willfulness, wantonness, fraud and/or malice for which the law allows imposition of punitive damages against Defendants. Punitive damages are designed to punish and/or deter persons such as the Defendants who engaged in egregious wrongdoing. Punitive damages may be assessed under 42 U.S.C. §1983 when the conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

Plaintiff seeks punitive damages of at least \$50 million to punish and deter such conduct by the Defendants in the future.

VII. ATTORNEY'S FEES

83. Plaintiff has retained the undersigned attorneys to represent him, and pursuant to 42 U.S.C. §1988(b)-(c) of the Federal Civil Rights Act, he is entitled to recover for his

reasonable and necessary fees incurred for his attorneys, and the reasonable and necessary expenses incurred in the pursuit of this claim at the trial level, the Court of Appeals level, if the case is appealed to that Court, and in the Supreme Court of the United States, if necessary.

VIII. PRE- AND POST-JUDGMENT INTEREST

84. Plaintiff requests pre- and post-judgment interest in the maximum amount allowed by law.

IX. JURY DEMAND

85. Plaintiff respectfully demands a trial by jury.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays the Court, upon final trial of this cause, grant judgment in favor of the Plaintiff and against Defendants for:

- A. Actual and compensatory damages as determined at a trial on the merits;
- B. Mental anguish damages;
- C. Punitive damages in an amount to punish and/or deter, and to make an example of Defendants, in order to prevent similar future conduct;
- D. Costs of court;
- E. Reasonable and necessary Attorney's fees;
- F. Reasonable and necessary expert fees;
- G. Pre-judgment and post-judgment interest at the maximum rate allowed by law;
- H. Such other and further relief, general or special, at law or in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

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