IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JESUS RAMIREZ and	§	
ALBERTO SIFUENTES,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	**Civil Action No. 5:09-CV-190**
SALVADOR ABREO, *et al.,*	§	**(Consolidated with Civil**
	§	**Action No. 5:09-CV-189-C)**
Defendants.	§	**ECF**

DEFENDANT ABREO'S BRIEF IN SUPPORT OF
SECOND MOTION FOR SUMMARY JUDGMENT

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE, SAM R. CUMMINGS:

"The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted–indeed, for every suspect released." *Sorenson v. Ferrie*, 134 F.3d 325, 328, n. 3 (5th Cir. 1998). "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Defendant Ranger Salvador Abreo files this Brief in Support of Second Motion for Summary Judgment based upon his entitlement to immunity and the protections of the statute of limitations.

I. STATEMENT OF THE CASE

On August 6, 1996, a convenience store clerk was murdered in Littlefield, Texas. At the time of the murder, Defendant Salvador Abreo was employed by the Texas Department of Public Safety (DPS) as a Texas Ranger. Ranger Abreo was the lead investigator on the case until late October of 1996 when he transferred to the Austin office of the Texas Rangers. Plaintiffs Jesus Ramirez and Alberto Sifuentes were indicted by the Grand Jury in 1996 and both were convicted of murder in

Lamb County in 1998. Their convictions were subsequently overturned based on ineffective defense counsel.

Some claims and some defendants have been dismissed. The remaining claims against Abreo are federal claims under 42 U.S.C. § 1983 for false arrest, coercion, conspiracy, fabricating evidence, failing to disclose exculpatory evidence, and a state claim for malicious prosecution. Abreo is entitled to summary judgment on all claims based on the statute of limitations and his establishment of qualified immunity on all federal claims and official immunity on the claim brought under state law.

II. SUMMARY JUDGMENT EVIDENCE

Abreo's Second Motion for Summary Judgment is based on and supported by the following summary judgment evidence, which is contained in an appendix filed contemporaneously with this Brief in support:

Exhibit A - Affidavit of Ranger Hank Whitman (Appendix pp. 001 - 019)

Exhibit B - Affidavit of Ranger Sal Abreo (Appendix pp. 020 - 036)

Exhibit C - Affidavit of Ranger Warren Yeager (Appendix pp. 037 - 044)

Exhibit D - Affidavit of Ranger Dusty McCord (Appendix pp. 045 - 053)

Exhibit E - Affidavit of Mary Davila Wood dated 04/10/2005 (Appendix pp. 054 - 057)

Exhibit F - Affidavit of Agent Sally Arredondo (Appendix pp. 058 - 061)

Exhibit G - Affidavit of Greg Parrott (Appendix pp. 062 - 074)

Exhibit H- Affidavit of Frank Hoke (Appendix pp. 075 - 219)

Exhibit I - Affidavit of Richard Reyna (Appendix pp. 220 - 221)

Exhibit J - Interview of Mary Davila Wood dated 08/12/1996 (Appendix pp. 222 - 232)

Exhibit K - Affidavit of Mary Davila Wood dated 08/13/1996 (Appendix pp. 233 - 235)

Exhibit L - Grand Jury Testimony of Mary Davila Wood (Appendix pp. 236 - 275)

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Exhibit S - Statement of Janie Ramirez (Appendix pp. 355 - 356)

Exhibit T - Deposition Excerpts from Deposition of Janie Ramirez (Appendix pp. 357 - 387)

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Exhibit KK - Photograph of Cruz Family (Appendix p. 586)

Exhibit LL - Mary Wood Drawing of Jolly Roger Pointed Roof (Appendix p. 587)

Exhibit MM - Photographs (2) of Jolly Roger (Appendix pp. 588 - 589)

Exhibit NN - Photograph of Stop Sign (Appendix p. 590)

Exhibit OO - Photographs (5) of Alberto Sifuentes (Appendix pp. 591 - 595)

Exhibit PP - Photographs (3) of Jesus Ramirez (Appendix pp. 596 - 598)

Exhibit QQ - Photographs (2) of Ramirez' Gold Vehicle (Appendix pp. 599 - 600)

Exhibit RR - Recorded 911 call from Evangelina Cruz (on cd) (Appendix p. 601)

III. UNDISPUTED FACTS

1. Shortly after 2:00 a.m. on August 6, 1996, Evangelina Cruz was on duty at the Jolly Roger convenience store in Littlefield when she was shot nine times. About 2:08 a.m., Cruz called 911 and asked for help. As she did so, Tracy Russell entered the store and noticed that Cruz was bleeding. Russell also noticed that the cash register drawer was open. Russell asked Cruz if the person who had done this to her was still there and she responded that they had left. Russell asked

Cruz who had done this to her and she replied "man, boy."(App. p. 352).[1] Jackie Johnson reported to police that Cruz told him, "a Spanish guy" robbed her (App. p. 353).

2. After hearing Cruz' 911 call for help, Littlefield Police Sergeant Craig Thompson drove to the Jolly Roger (App. pp. 438-439). He found Cruz in bad condition and in lots of pain, but able to talk. Cruz told him that she had been shot by two Hispanic males, one with long hair and one with short hair, 18-20 years old, one had shades and they were in a gold car. (App. pp. 438-439).

3. Sifuentes, Ramirez, and Mary Wood were stopped 10 miles from the Jolly Roger, 47 minutes after the murder and were in a gold car (App. p. 435). At that time, Sifuentes had long hair and Ramirez had short hair Id.

4. Texas Ranger Sal Abreo was contacted by the Littlefield Police Department dispatcher shortly after the murder, around 2:30 a.m. to assist with the investigation (App. p. 21). At that time, Ranger Abreo had 18 years of law enforcement experience with the Texas Department of Public Safety, which included experience in working traffic investigations, narcotics investigations, criminal investigations, and two years as a Texas Ranger. He had prior experience in investigating robberies and some homicides (App. pp. 20-21, 29, 32).

5. The scene was subsequently turned over to Ranger Abreo. (App. p. 21). Before Officer Thompson left the scene, he advised Ranger Abreo of Cruz' description of the suspects. Ranger Abreo interviewed the three witnesses who had arrived on the scene immediately after the shooting. (App. p. 22). Each witness informed Ranger Abreo of what they observed and what Cruz said. (App. pp. 352-353)

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[1] "App." denotes Appendix, followed by the page and line number.

6. Ranger Abreo summoned Ranger Yeager, the DPS lab team, a photographer and other police officers to the scene to assist with collecting evidence and taking photographs (App. 22-23, L.2-19). A shoe print was found on top of the store counter, which appeared to be from a tennis shoe. (App. p. 21). Some of the evidence collected included shell casings, a portion of the counter containing the shoe print, and fingerprints. (App. 22-23)

7. Ranger Abreo removed the internal and external tapes from the cash register, which showed the last purchase was around 2:00 a.m.(App. pp. 5, 23). Ranger Abreo continued to investigate and collect evidence at the scene until about 4:00 p.m. that day (App. p. 23, L.8-23). At some point he went to the hospital to observe the victim's injuries (App. p. 22, L. 7-24). He returned to the scene to continue his investigation. He also went to the home of the victim to question the husband (App. p. 23, L.4-22).

8. On August 6th, Janie Ramirez contacted the Littlefield Police Department (App. pp. 355-356) and reported Sifuentes as a possible suspect in the murder of Cruz (*Id.*). Janie also referred the police to her friend Mary Gallegos, Sifuentes former girlfriend, for more information on Sifuentes. Gallegos show police where Sifuentes lived in Muleshoe. (App. pp. 355-356)

9. Ranger Yeager had been with DPS 24 years, 11 years in Highway Patrol, 13 years as a Texas Ranger and extensive experience as a homicide investigator. Yeager worked with Ranger Abreo on this investigation, interviewing and collecting statements from witnesses and following up on potential leads (App. pp. 37, 38, 22, 32).

10. On the day of the murder, Brenda Ayala told Littlefield Police Officer Leonel Ponce that she had been at the Jolly Roger at around 2:00 a.m. that morning, where she observed two Hispanic males acting suspiciously. Ayala prepared a brief handwritten statement to Officer Ponce

about what she witnessed at the Jolly Roger. Ayala gave a more detailed statement to Ranger Abreo on August 11, 1996. During her interview with Littlefield Officer Leonel Ponce, Ayala saw or was shown a photograph of Alberto Sifuentes and instantly recognized him as one of the men she had seen at the Jolly Roger around 2 a.m. on August 6th. (App. pp. 316 - 318). She then added a sentence to her handwritten statement, confirming that the man with the ponytail that she had seen in the Jolly Roger that morning was the man in the photograph that was shown to her by Officer Ponce. The man in the photograph was Alberto Sifuentes (App. p. 316).

11. At the request of Abreo, Ranger Yeager interviewed and took a statement from Mary Jane Espinoza, a clerk at the Town & Country who had seen a suspicious person the night before the murder. He also interviewed Joe Mark Roden, who reported seeing a gold car with Alaska plates. Yeager also assisted Officer Hilburn in taking the statements of witnesses Mary Helen Gallegos, Jose Acevedo, and Adam Balderas. These witnesses reported seeing Alberto Sifuentes the night of August 6, 1996, in Littlefield, in a gold colored car. Yeager later returned to the scene and assisted Ranger Abreo in processing the scene and gathering evidence, including the overhead sign and a portion of the store counter (App. pp. 38-39).

12. On August 7, 1996, Ranger Abreo took the evidence that had been collected to the Austin DPS crime lab. While Abreo was out of town, Yeager handled any leads that came in. On August 7, 1996, Yeager was notified that Border Patrol Agent Manning in Lubbock had picked up 11 illegal aliens from the Olton area driving an older model gold car. These men were eliminated as suspects because it was determined they had been en route from Mexico the same day as the murder, before their car broke down in or near Olton, where they were arrested. On August 7, 1996, Yeager was contacted by Chief Holder of Levelland Police Department, who advised of two possible suspects from Levelland who drove a 1985 gold colored car. They were 18 year old Armando

Gonzales, and his 17 year old brother Jerry Gonzales. Yeager contacted Lubbock Police Department ID officer Shields and advised him of this information. Shields advised Yeager that he would obtain prints from Chief Holder and compare them to the latent prints taken from the scene. (App. p. 39)

13. On August 7, 1996, Yeager drove to Littlefield and discussed the investigation with Littlefield investigating officers. He was advised that a witness had been located, Brenda Ayala, who had given a written statement that she had been at the Jolly Roger just before the murder occurred and that she had observed suspicious men at the store. He was also told that Officer Ponce showed a photograph to Ayala, which had accidentally fallen off his clipboard. Yeager was told that when she saw the photograph, she instantly recognized the person as one of the men she saw in the Jolly Roger around 2 am, just before the murder occurred. Yeager relayed this information to Abreo.(App. pp. 39-40).

14. Yeager was also told that Officer Boleyn, an Amherst Police Department officer, had stopped a gold 1983 Lincoln within 10-11 miles of the Jolly Roger less than an hour after the murder occurred. The people in the car were identified as Alberto Sifuentes, Oscar Lucke (later determined to be Jesus Ramirez), and Mary Davila (Wood). The vehicle registration returned to Jesus Ramirez. It was later discovered that the driver's license number had been run incorrectly and the person who was in the vehicle with Sifuentes and Wood was actually Jesus Ramirez. (App. p. 40)

15. While Abreo was still out of town, Yeager was called to return to Littlefield to assist in interviewing 2 possible suspects who were detained in a store in Olton after someone overheard them talking about killing someone. The suspects were taken to the Littlefield PD for interviewing. Yeager assisted Officer Campbell with the interviews. The men explained what they were discussing, gave the names of employers, and contact information. It was determined that both men were from Arkansas and had not arrived in Texas until August 7, 1996. Yeager contacted their

employer and confirmed the information. It was determined that these men were not involved in the murder and they were released (App. p. 40).

16. On August 11, 1996, Brenda Ayala was interviewed by Ranger Abreo and provided a more detailed statement. She reported that she went to the Jolly Roger at 2:00 a.m. on August 6, 1996, to get a popsicle. After entering the store, she noticed two Hispanic males acting strangely and standing close to each other in the aisle. When the clerk asked the two Hispanic men if that was all, the darker skinned man (identified by Ayala as Sifuentes) told Ayala to go ahead of them. She stated that the darker skinned man wore dark pants, a white colored t-shirt with a logo, had a moustache that appeared to be separated in the middle and was not full or thick; his eyebrows were full but not bushy; he had bangs or hair hanging on his face; his hair was short on the sides and long in the back in a ponytail. The lighter skinned man (identified later by Ayala as Ramirez) had some acne scars, wore light colored blue jeans and a tank top - maybe white, and had shorter hair- like a buzz cut. When the men tried to get her to check out first, Ayala told him she was not ready yet. The men were standing shoulder to shoulder at an angle, which appeared to be odd to Ayala. The darker skinned man replied that they would get something else. Ayala got her popsicle and returned to the counter. The two men were still standing close to each other and acting strangely. Ayala handed the clerk twenty-seven cents for her item and left. She also noticed that the clerk had a white bag of items for the men that appeared to be a drink and food. Her description of the suspects is similar to the book-in photographs of Sifuentes and Ramirez as they appeared on August 12, 1996, the date of their arrest. She also stated that the darker skinned suspect (Sifuentes) had something, possibly sunglasses, hanging on his shirt. The victim, Mrs. Cruz, also reported that one of the suspects had sunglasses. (App. pp. 24-25).

17. Ranger Abreo believed that Ayala was being truthful and had no reason to doubt her information. (App. pp. 25-34)

18. On the day of the murder, Littlefield resident Janie Ramirez, who was in the hospital at the time, heard a news report about the murder and a description of the suspects as two Hispanic males, one with long hair, one with short hair and driving a gold car.Janie knew Alberto Sifuentes through her friend, Mary Helen Gallegos. She knew that Mary Helen Gallegos had broken off her relationship with Alberto Sifuentes the previous day. She also knew that Alberto knew where Janie lived in Littlefield, and that he had been to her home looking for Gallagos the night before the murder. When he went to Janie's home looking for Mary Helen, Janie's minor son told Sifuentes that Mary Helen was at the hospital with Janie. After hearing the news report of the murder, Janie called home and asked her son about the color of the car Sifuentes was in (). When she called her son and asked what color of car Sifuentes was in when he stopped by the house that evening, he said "yellowish." (App. pp. 366-367). When he said the color, she panicked because he kids were eat home alone. She called the Littlefield Police Department and spoke to Lot McDowell. She told him that thought she might know who the suspects were (App. pp. 367-368). She did not call crimestoppers (App. p. 369). She gave the Lt. The names of the person she thought might be a suspect. (App. p. 370). She later was interviewed by and gave a statement to Ranger Abreo (App. pp. 355- 356).

19. Mary Helen Gallegos was living with Sifuentes approximately 1-2 weeks before the murder occurred, but she was no longer living with him at the time of the murder (App. p. 392). Sometime before Janie went in the hospital on that Sunday, Gallegos had told Sifuentes she thought she was pregnant (App. p. 394, L.14-p. 395,L.7). On the morning of the murder, Gallegos asked

Janie's daughter, Valerie, who was with Sifuentes the night before. Valerie stated it was an older guy and were in a gold car. (App. p. 407). She later realized the older man was Jesus Ramirez (App. p. 408). Gallegos told Valerie to lock the doors because she was concerned that Sifuentes might go back to Janie's, and the children were home alone (App. pp. 409-410). It was Janie's idea to call police. Janie thought Sifuentes matched the description of one of the suspects (App. p. 411). Gallegos never called the police or Crime Stoppers. The police contacted Gallegos (App. p. 412). She was never paid any money from Crime Stoppers (App. pp. 412-414). She prepared a written statement that is true and correct. (App. pp. 388-390). She signed an affidavit for police on August 19, 1996, that is accurate. (App. pp. 388-390). She showed the police where Sifuentes lived. The police did not show her any photographs of Sifuentes that day. (App. p. 415). Gallegos had seen Sifuentes in the past holding his sister, Diana's gun. Diana lived very close to Sifuentes and he went to her home almost daily (App. p. 416-419). She was never mistreated by Abreo or any other police officer during the investigation (App. pp. 420-421). Photograph of Sifuentes, Ex 9 to her depo is photograph of her and Sifuentes around July of 1996. In the photograph Sifuentes is wearing sunglasses, which was common for him. He sometimes pulled his hair back in a ponytail (App. pp. 422-423, 593). Another photograph -Ex.11 - is of Sifuentes, his sister and Gallegos. In the photograph, he has his hair pulled back and his bangs worn on his forehead. Sifuentes wore his hair in a ponytail and with bangs at times. (App. pp. 424, 594). When Gallegos was shown the composite created by Ayala marked as Ex 14 of her deposition, she stated that the picture looked like Ramirez (App. p. 428).

20. Ranger Abreo had received information about the traffic stop of a gold car 10 miles from the Jolly Roger by Amhurst officer Buddy Boleyn at 2:55 a.m. on the morning of the murder.

Abreo understood that the car had two Hispanic males, one identified as Alberto Sifuentes and the other male was determined to be Jesus Ramirez . There was also a female in the car named Mary Davila Wood (Wood). Abreo arranged to meet Wood on August 12, 1996, in Sudan at the City Hall. (App. p. 25)

21. Ranger Abreo invited DPS Special Crimes Investigator Sally Arredondo to accompany him to the meeting with Wood. Arredondo had little experience with conducting police investigations and had asked Abreo in the past to allow her to tag along on some interviews to gain experience with investigations. Abreo and Arredondo left Lubbock and traveled to Sudan on the afternoon of August 12th. Ranger Yeager also attended the meeting with Wood (App. pp. 157:140, L.15-158:142, L. 11). Wood admitted that on the night of the murder, she was partying with two men named Gilbert and Manuel, in a gold car (App. p. 82). Wood identified them as Gilbert and Manuel because Sifuentes and Ramirez had introduced themselves initially to Wood using those names (App. pp. 287-290). Wood stated that they stopped in Littlefield that night and then went to a club in Lubbock (App. pp. 233-234). She was able to identify Alberto Sifuentes from a photograph as the man she knew as "Gilbert". Once she identified Sifuentes as one of the men she was with, Ranger Yeager left and went to Muleshoe to locate Sifuentes and the gold colored vehicle. (App. pp. 25-26, 41).

22. Wood stated that the threesome left "before closing," around 12 or 1:00 a.m (App. pp. 26). Wood did not initially recall stopping anywhere after leaving the club, prior to being stopped by Officer Boleyn in Amhurst. Wood recalled drinking heavily and falling asleep in the car. To help her recollect the events of August 5 and 6, Abreo and Arredondo drove Wood to Littlefield. The Jolly Roger on Hall street is within a ½ mile of Highway 84 (App. p. 28). Abreo drove Wood down

Hall Street, past the Jolly Roger, but did not point out the store or make any suggestion to Wood about the Jolly Roger. On her own, Wood noticed and recognized the Jolly Roger as being familiar. She asked Abreo to pull into the parking lot and park on the side. It was getting dark at that time, and Wood noticed the yellow lights under the eaves. She then indicated that she now was remembering that on the night of the murder, after leaving the club, the threesome had stopped somewhere. She stated that after leaving the club, she fell asleep in the front seat between Sifuentes and Ramirez; she woke up and found herself alone in the car; she looked up and could tell that the car was parked on the side of a building that had bright yellow lights under th/ eaves of the store; and that there were gas pumps to the left of where the car had been parked. She said that she fell asleep again, but was startled awake when Sifuentes and Ramirez got back in the car and slammed their doors at the same time. She further recalled that they took off out of the parking lot and immediately came to a stop sign, but did not make a complete stop. She recalled that the men were eating something "wrapped in paper like a chimichanga or burrito, the kind you get at a convenience store." They were drinking something like a "tallsup" (a large fountain soda in a cup often found at convenience stores). After seeing the side of the Jolly Roger, Wood was sure that they had stopped a store, and parked on the side of the store with a solid door, and she was very sure that the store had yellow lighting under the eaves. She told Ranger Abreo that she was quite sure that although she did not see the Jolly Roger sign, the side of the store of the Jolly Roger appeared to be the same store she saw the night of the murder (App. pp. 277-280, 222-232). Abreo recorded the conversation with Wood on August 12, 1996, when she admitted that they stopped at the Jolly Roger. The recording was transcribed and Wood confirmed that the transcript accurately reflected what was said during their conversation (App. pp. 277-280).

Ranger Abreo knew of no other stores in the area between Amhurst and Lubbock that had a description similar to the building described by Wood with yellow lights and gas pumps to the left of where Wood said they were parked. (App. p. 28). In her deposition, Wood further confirmed that the Jolly Roger was the store where they stopped the morning of the murder. She not only recalled the yellow lights and gas pumps, she also recognized the unusual pointed architecture on the side of the building. In her deposition, Wood circled the pointed structure on the roof of the Jolly Roger that stood out to her (App. p. 587). There are no convenience stores between Lubbock and Amhurst with yellow lights and gas pumps in that area (App. pp. 28-65).

23. Wood also stated that they left the club before closing, around 12:00 a.m. or 1:00 a.m. (App. p. 227). The Jolly Roger is approximately 32 miles from the Paradise Club. The speed limit on Hwy 84 is 65. Plaintiffs had adequate time to drive to the Jolly Roger, even if they left the Paradise Club at 1:30 a.m.(App. p. 28).

24. Abreo tape recorded a portion of the interview of Wood, which was transcribed. Wood reviewed the transcription at her deposition and agreed that the transcript was accurate. (App. pp. 222-232, 277).

25. Ranger Yeager went to the Muleshoe Police Department and asked if they would locate Alberto Sifuentes, the gold-colored vehicle he was driving the night of the murder, and the other occupant of the vehicle (Ramirez). Muleshoe officers were able to locate Sifuentes and he agreed to go to the police department for questioning. While at the Sifuentes residence, officers noticed a gold colored vehicle, which was determined to be the vehicle that Sifuentes was driving the night of the murder. Officers determined that Jesus Ramirez was the owner of the vehicle. Ramirez, who happened to be arriving at Sifuentes' residence at the time the officers were there, also agreed to go

to the police department with the officers. Yeager contacted Abreo and requested that he go to the Muleshoe police department because the suspects had been picked up. (App. p. 41).

26. Yeager and Muleshoe Officer Sanchez interviewed Ramirez while Abreo and Arredondo interviewed Sifuentes. (App. pp. 41, 28).

27. During the interview, Ramirez stated to Ranger Yeager that they did not have any reason to steal three or four hundred dollars from anybody because he made $500.00 a week. At that time, on August 12th, the amount taken in the robbery had not been disclosed and was not yet known, even by police. Ramirez repeated the same statement to Abreo. Both Rangers believed this was a suspicious statement since the amount taken was unknown and Ramirez had specified a range of money missing. The next day Abreo consulted the store manager or owner and learned that the amount missing was around $292.00. Abreo believed this was close to the amount quoted by Ramirez and believed this was additional incriminating evidence. Based on his experience in investigating robberies, Abreo has found that it is not unusual for criminals involved in robberies to make statements about the amount of money missing when the amount has not been disclosed (App. pp. 29, 41). Ramirez admits that it is possible that he made the statement about the amount taken (App. pp. 528-529).

28. During the interview, Ramirez admitted that he owned a .22 caliber pistol, which was at his home. That same night, Ramirez gave consent for law enforcement to search his home and vehicle. Ranger Yeager and a Muleshoe police officer then searched Ramirez' residence, where they found a .22 caliber pistol, .22 caliber ammunition, and tennis shoes. Sifuentes also consented to the search of his home (App. p. 42). Abreo and Arredondo searched his home, but did not find any incriminating evidence at his home. That same night, Ranger Abreo searched Ramirez' vehicle and

found a roll of nickels. Abreo believed this was suspicious and possibly incriminating as people do not normally carry a roll of nickels. Ranger Abreo believed that the nickels could have been taken in the robbery (App. pp. 29-30). Ramirez stated that if a roll of nickels was found in his car, it was his because it was common for him to carry rolls of nickels (App. p. 528).

29. After interviewing Sifuentes and Ramirez, Abreo consulted with Ranger Yeager and Sergeant Arredondo. All three officers agreed they had sufficient probable cause to arrest Sifuentes and Ramirez. Ranger Abreo then contacted Lamb County District Attorney Mark Yarbrough and advised him of the evidence. DA Yarbrough advised Abreo to have Sifuentes and Ramirez held (App. pp. 30, 43, 60).

30. At the time when Abreo arrested Plaintiffs on August 13, 1996, Abreo had the following information and evidence supporting the existence of probable cause:

> 911 tape of Cruz calling in and reporting she had been shot; on-the-scene witness Tracy Russell reported that Cruz told her she was shot by a "Man-Boy," on-the-scene witness Jackie Johnson reported that Cruz said "a young Spanish guy had robbed her"; Cruz said "the guy ran out the north door";Cruz described her assailants as two Hispanic males, one with long hair, and the other with short hair, about 18-20 years old, one wore shades, they were in a gold car; at 2:55 a.m Amherst City Marshal Harley Boleyn stopped a gold colored vehicle at US 84 and County Road 37, 2 miles east of that intersection; the vehicle was a gold 1983 Lincoln 4-door, Texas license plates SSW-78P; Driver was Alberto Sifuentes, had long hair below his shoulders, middle passenger was Mary Wood Davila, Hispanic male passenger with very short hair later identified as Jesus Ramirez; 8-6-96 Janie Ramirez called Littlefield Police Department and talked to Lt. McDowell. Janie told McDowell about Alberto from Muleshoe, who she believed matched the description of one of the suspects. Janie referred McDowell to her friend Mary Helen Gallegos for Alberto's last name. Janie feared for the safety of her children. Brenda Ayala's statement that she was at the Jolly Roger at 2 a.m., saw 2 Hispanic males with physical descriptions similar to Plaintiffs' appearance and Cruz' description of the suspects; Ayala observed the suspects acting suspiciously in the store, there was something hanging from Sifuentes' shirt - perhaps sunglasses, the lighter skinned man

> (Ramirez) had acne scars; Ayala identified Sifuentes from a photograph as being one of the men she saw in the Jolly Roger before the murder; Mary Wood who was with Plaintiffs the evening and morning of August 5-6, 1996, said they had been drinking at a club in Lubbock that night and left before closing around 12 or 1:00 a.m., and that they stopped at a convenience store on their way back to Sudan. She saw yellowish lights on the side of the building, and gas pumps off to the side. Wood stated that the suspects returned to the car with food from a convenience store. She identified the car as a 4 door, gold and brown in color. When Abreo told Sifuentes that Wood had admitted they were at the Jolly Roger, Sifuentes asked if they had him on a video tape recording. When Ramirez was being interviewed by Yeager, Ramirez said "why would we rob a store for $300-$400 when I make $500 dollars a week?"; discovery of a roll of nickels in Ramirez' gold colored vehicle; Wood described the lighter skinned man, Ramirez, as having little scars on his face from acne; Discovery of a .22 caliber pistol and .22 caliber ammunition at Ramirez' trailer, Cruz was shot with a .22 caliber pistol. (App. pp. 30-31)

31. On August 13, 1996, Sifuentes and Ramirez were taken before a magistrate judge, who issued arrest warrants for their arrest for murdering Cruz (App. p. 31).

32. Following the arrest, Abreo collected additional evidence that further supported plaintiffs' arrest: On August 13, 1996, Abreo confirmed through Jolly Roger management that the amount taken in the robbery was $292.00 (App. p. 32).

33. When Abreo was interviewing Sifuentes the morning of his arrest, Sifuentes claimed that the bartender could vouch for the time they left the bar (App. p. 29). In an effort to check out this alleged alibi witness, on August 22, 1996, Abreo went to the Paradise Club and interviewed the bartender Miguel Tijerina. Tijerina reported that he was the bartender at the Paradise Club on August 5, 1996, and that he remembered a threesome at the Club that night, 2 Hispanic men, one older and one younger, with a Hispanic female who drank a lot of alcohol. He stated that the threesome left between 10:00 p.m. and midnight. He signed an affidavit stating these facts (App.

pp. 433-434).

34. In an effort to determine whether Ayala could identify the other man with Sifuentes in the Jolly Roger on the night of the murder, Abreo asked DPS Investigator Sgt. Doug Triplett to meet with Ayala. Sgt Triplett is certified in preparing composite drawings of suspects, by piecing together various facial parts to form a complete face. Prior to that time, neither Ayala nor Triplett had seen Ramirez in any photographs or television broadcasts. On August 15, 1996, Ayala met with Triplett and a composite was done (App. pp. 192-193). Abreo concluded that the composite is similar to photographs of Ramirez (App. p. 191). Believing that Ayala had positively identified Ramirez, Abreo felt that the prior identification of Sifuentes by Ayala was now even more reliable, even with Officer Ponce showing a single photo to Ayala. Abreo believed that Ayala positively identified Sifuentes and Ramirez as the men she saw in the Jolly Roger shortly after 2 a.m.

35. District Attorney Mark Yarbrough presented the case and called witnesses to testify before the grand jury on October 31, 1996. The Grand Jury indicted Sifuentes and Ramirez on October 31, 1996 (App. p. 118, FOF 2).

36. Ranger Abreo ended his involvement in the investigation when he transferred to Austin at the end of October, 1996 (App. p. 32)

37. In January of 1997, Ranger Dusty McCord transferred to the Lubbock DPS office and took over the Cruz murder investigation. By 1997, McCord had 21 years of law enforcement experience, and had been heavily involved with performing investigations for the fifteen of those years. (App. p. 45). McCord played only a small role in the Cruz investigation, primarily acting at the direction of the District Attorney's Office to follow up on leads (App. p. 46). In 1997, while following up on a lead regarding a weapon, he conducted a search of the home of Diane Sifuentes,

Alberto Sifuentes' sister-in-law. 22 caliber ammunition was seized, but no weapon was found (App. p. 46).

38. Pursuant to a request in 2002 from the DA's office, McCord located and interviewed Pauline Robles, who claimed to be an alibi witness for Plaintiffs (McCord aff, App. pp 46-47). Robles claimed that she saw Plaintiffs at the Paradise Club 2-3 days before she heard about the murder, and that she left the club at 2:00a.m., the same time as Plaintiffs. McCord found Robles' story in conflict with the facts since she was certain she had seen Plaintiffs at the club on a weekend and that there was a band playing. McCord knew that the murder occurred on a Tuesday morning and that there was no band playing at the club Monday night (App. p. 47). Additionally, Robles never came forward with this information until she signed an affidavit that was prepared and notarized six years after the murder by Richard Reyna, an investigator hired by Plaintiffs' attorneys, in August of 2002 (App. pp. 46-47).

39. Ramirez admitted that he did not tell anyone about Robles except Sifuentes and his criminal trial attorney (App. p. 505, L.9-68, L.2).

40. Sifuentes testified that he does not recall telling anyone about Pauline Robles. (App. pp. 563-565).

41. At the request of Mark Yarbrough, in 2003, McCord interviewed Lora Casas, Oscar Balderas, Mary Ann Casas Enriquez, and Christina Martinez regarding allegations that Armando and Jerry Gonzalas fit the description of the suspects and had been in Littlefield at the time of the murder. After conducting interviews, McCord concluded that the statements of Lora Casas, Enriquez, Martinez and Balderas obtained by Reyna are full of inaccuracies and inconsistencies and should not be considered credible. Other than the highly questionable accusations and identifications

made by Lora Casas, Enriquez, and Balderas, there was no evidence found that pointed to the Gonzales brothers as suspects in the murder of Evangelina Cruz. (App. pp. 44-48)

42. Balderas claimed that he was already in jail on the night of the murder and that the Gonzales brothers were brought to the same jail sometime after the murder, where they told him they committed the murder. Balderas came forward with this information via an affidavit that was prepared and notarized by investigator Richard Reyna almost six years after the murder. Ranger McCord was able to determine through jail records that Balderas and the Gonzales brothers were never in jail together (App. pp. 47, 50-58). Therefore, Balderas' allegations could not be true. In 2004, Ranger McCord interviewed and conducted testing on Armando and Jerry Gonzales, took bubble swabs from both for DNA profiling and full case prints from both. There was no match. Ranger McCord found the Gonzales brothers to be very cooperative and credible and did not believe they had committed the murder. (App. pp. 50-51)

43. Sifuentes admitted that Janie Ramirez (Mary Helen Gallegos's friend) fell in love with him when he went to jail and visited him many times (App. pp. 556-558). Sifuentes also testified that Oscar Balderas, who was Janie Ramirez' brother-in-law, went to the habeas hearing and testified that he heard a confession by two brothers (App. p. 558). Sifuentes also admits that Janie's brother-in-law, Balderas, helped him get out of prison by saying that he heard a confession from two other people.(App. p. 559)

44. Greg Parrott, an investigator with the Office of the Texas Attorney General, was assigned to assist the Lamb County District Attorney's Office with the Cruz murder investigation. He interviewed Mary Wood and found her to be a credible witness. He checked all of the convenience stores between Lubbock and the Littlefield Jolly Roger checking for yellow lights. He went to many

stores in the area, including the Friend's Convenience store in Anton. The Friend's store had white fluorescent lighting around exterior eaves. The only store in the area with yellow lights was the Jolly Roger. Parrott concluded that the threesome stopped at the Jolly Roger on the morning of the murder (App. pp. 64-65).

45. Parrott concluded that although Wood consumed a large quantity of alcohol, she was still able to accurately recall many events that occurred before, during and after they went to the club, including the stop by Amhurst officer Boleyn (App. pp. 64-65).

46. Parrott also interviewed Brenda Ayala. Parrott found Ms. Ayala to be a very credible witness. Although Ayala reported seeing a small blue car playing music in the parking lot of the Jolly Roger when she arrived, she indicated that she did not notice the blue car or the music when she left the store. Since the car was not still at the store when Ayala left the store, Parrott agreed that there was no need for police to locate the blue vehicle. Parrott's investigation focused on gold cars since Cruz reported that the suspects left in a gold car (App. pp. 66-67).

47. Parrott found that Ayala was very certain about the time that she went to the Jolly Roger on the morning of the murder, stating that it was around 2 am. In her written statements, she stated that her VCR showed 1:50 when she left home and 2:08 when she returned. Ayala lived very close to the Town and Country and Jolly Roger convenience stores. She was very certain about the time because she looked at her VCR before leaving and when she returned. Since Ayala was very certain about the time she was at the Jolly Roger, Parrott found no reason to doubt her memory and no need to further corroborate her statement regarding the time she was at the Jolly Roger. (App. pp. 66-67)

48. The Town and County videotape was not properly collected, as the officer who

collected the tape did not compare the actual time of collection against the camera's internal clock. Therefore, there was no way to prove whether the date and time shown on the tape was accurate. Surveillance cameras in convenience stores, are often not correctly set to time and date. Therefore, when tapes are collected, the officer is to check the time and date when collected, then check the camera's clock to see if there is a difference between actual time/date and the time shown on the camera. The collection time/date and any difference in time/date should be noted on the tapes to confirm that the time and date shown on the tape is accurate. Here, that was not done. Although it may be possible to determine from the lighting on the tape that the time is close to accurate, there is no way of knowing whether the date was accurate. (App. pp. 51-52, 66-67).

49. Additionally, Sifuentes and his criminal defense attorneys agreed to allow him to submit to a polygraph exam. Parrott arranged for the polygraph exam to be conducted by Sgt. Gus Trevino, a DPS officer known to Parrott to be competent and reliable in conducting polygraph exams. After the polygraph was completed, Sgt. Trevino advised Parrott that Sifuentes had failed the test because he reacted to the following questions: 1) Did you shoot the clerk? 2)Were you present when the clerk was shot? 3) Did you have anything to do with shooting the clerk? and 4) Do you know where the gun is? (App. pp. 67-68)

50. In order to further confirm that Ayala was able to identify the suspects, Parrott set up a live line-up. Ayala picked Ramirez out without hesitation. She also commented that he had a small bald spot on the back of his head, which she had noticed in the store the morning of the murder. Parrott was able to see the small bald spot on the back of his head. (App. pp. 68-69).

51. Ramirez confirmed that at the time of the murder, he was going bald on top. He testified that while at the club on August 5, 1996, he saw his old girlfriend Pauline Robles. When

he spoke to Robles, she asked him, "do you still have the same hair you had?" she took off his hat and then she said I (Ramirez) "don't even have any more hair." When asked in deposition if his hair was thinning on top, he answered: "oh yes. Long time. Yes."(App. p. 520, L.14-19). A bookin photograph of Ramirez reflects the appearance of his hair when it is combed down on top (App. p. 596). Ramirez agreed that his car could be described as a gold car (App. pp. 133-134, 599, 600, 530a-530b).

52. Parrott coordinated a line-up of Sifuentes a year after the murder. While in jail, Sifuentes cut his hair short and shaved off his moustache, which made it much more difficult for Ayala to recognize him. Ayala focused on the first two men, #1 was Sifuentes and #2 was another man. Ayala commented to Parrott that the suspect had hair like # 1, but it was longer than #1. She also stated that #1 had a weird eye. She said #2 looked like him, but the suspect was taller and #2's hair was not like the suspect's hair. She said if she had to choose, she would choose #2. Ayala was then escorted outside, where she walked past the criminal defense attorneys on her way to her car. Parrott was notified a short time later that Ayala had called the District Attorney's office and advised that she made a mistake, and that she wanted to change her selection to #1. The defense attorney then claimed that Ayala must have heard him say something about Sifuentes being #1 as she passed by. Although Parrott was standing near the attorneys, he had no recollection of any attorney indicating that Sifuentes was #1. Ayala denied hearing anything the attorneys may have said as she was walking to her car. (App. pp. 68-69; 377, L.20- p.340,L.13).

53. Ayala testified in deposition that she lived very close to the Town & Country convenience store and went to that store almost daily. Therefore, she would be a regular on the Town & Country surveillance videos tapes. She also said it was not uncommon for her to go to that

store without buying something because the store would be too expensive on some items. (App. p. 320,L21-p.322,L2). In August 1996, her son was almost 1 year old. Because he was a premature baby, he had many health issues that required numerous doctor visits and treatments (App. p.322, L.7-P.17,L.15). Her husband had been at a baseball tournament in Lubbock all day and returned around 7:00 pm. She was suffering from tonsilitis and was not feeling well (App. pp. 323-324). Around 9:00 pm, her husband's baseball friends showed up. She stayed in her room until she decided to go to the store for a popsicle to soothe her sore throat. (App. p. 325). When she left, she looked at the VCR and saw that it was 1:50 a.m. She did not have a watch and relied on the VCR for the correct time. Keeping track of the correct time was important as their child was taking medication that had to be given at regular intervals. It was her husband's habit to reset the VCR to the proper time whenever he disconnected it to play video games. Ayala testified that her VCR was working properly at the time, and that she could not recall her VCR not being set to the correct time at any point around the date of the Cruz murders. (App. pp. 326-328). She first went to the Town & Country but they did not have the popsicle she wanted, so she went to the Jolly Roger. When she returned home, she looked at the VCR and the time was 2:08 am. (App. p. 330). At the criminal trial, she erroneously agreed with some things the defense attorney asked, such as whether someone could have hit the time button to stop the blinking on the VCR rather than setting it properly (App. p. 341). She explained that she said yes to the attorney's questions because she felt like the defense attorney was bullying her and was not going to stop asking those questions until she agreed. She even broke down and cried a couple of times while being questioned by the defense attorney (App. p. 342, 348-349). She does not believe the time and date are accurate on the surveillance tape, because the tape shows her being at the store again at 10:30 pm, buying paper plates. She would not

have purchased paper plates unless she was entertaining guests. She would not have been entertaining her husband's friends that night because she was not feeling well (App. pp. 344, 348-349). Richard Reyna traveled to Ayala's home in Indiana without notice. When she told him she did not want to talk to him, he said he would subpoena her and the "whole law firm would come down here." (App. p.350). She felt threatened by his comment (App. p.351). Ayala identified exhibit 16 as the statement she gave to Officer Ponce on August 6, and confirmed that it was true and correct. She also identified exhibit 17 as the statement she gave to Abreo, and that it was true and correct. (App. pp. 331, 332-333).

54. Ayala identified the composite she composed as of one of the suspects in the Jolly Roger. She believes the composite looks like Ramirez (App. pp. 334-336, 443). Ayala identified the person shown in a photograph as the dark skinned man (Sifuentes) (App. pp. 329A - 329B). Ayala identified the light skinned man in a photograph Ramirez, one of the men in the Jolly Roger (App. pp. 329A, 329B, 329C).

55. Ramirez was tried and convicted of murder in May, 1998. Sifuentes was tried and convicted of murder in September, 1998.

56. Prior to the habeas proceeding, Parrott was asked by attorney Barry McNeil to meet with him. During that meeting, they discussed the Cruz investigation. At some point during the meeting, Parrott made a comment about the investigation being a "train wreck." Parrott later explained that he did not mean this comment as a reflection on Ranger Abreo. Parrot clarified that he was referring to the investigation itself and the difficult nature of the case, in that there was no actual eye witness to the shooting, the witness with the suspects had been drinking, there was no confession, the Town & Country tape of Ayala showed the time of 12:34 a.m., the murder weapon

was not found, and there were no fingerprint matches, to name a few of the problems. Parrott stated that this was not the fault of Ranger Abreo. Parrott gave Abreo good marks on conducting the investigation because he believed that Abreo had done the best he could with the evidence he had. Parrott did not become involved in the investigation until 8-9 months after Ranger Abreo had transferred to another office (App. p. 71).

57. Parrott's investigation included following up on the leads that were received by the police. He found no evidence of other suspects (App. p. 71).

58. Ramirez admitted that he knew Wood prior to 8-5-96 (App. pp. 509, L.23 - 511, L22).

III. UNDISPUTED FACTS REGARDING PLAINTIFFS' KNOWLEDGE OF CLAIMS AND ACCESS TO COURTS WHILE IN PRISON, SUPPORTING STATUTE OF LIMITATIONS BAR

1. When an inmate enters TDCJ, he is assigned to a prison unit, which has an orientation program attended by all inmates. At the orientation, each inmate is provided with an inmate handbook, which is available to inmates in English and Spanish. Inmates can choose between the English or Spanish version, or both versions if they wish. A true and correct copy of the English version of the handbook that was provided to inmates in 1998 is attached to the affidavit of Frank Hoke as Exhibit 2. This handbook is available in every prison law library, in both English and Spanish. As with all newly arriving inmates, Plaintiffs would have been provided a copy of this same booklet (in Spanish if such was their primary language). In orientation, all inmates are advised about their rights regarding access to court and law libraries. Since at least 1998, all inmates are made aware of their abilities to access courts and file lawsuits when they believe their rights have been violated. In addition to being advised of such during the orientation process and by way of the inmate handbook, flyers are posted in numerous areas around each prison unit which detail the law

library facilities. These postings have been posted in English and Spanish since at least 1998 (App. p. 76).

2. Plaintiffs were housed in general population during their incarceration. Inmates who are housed in general population are permitted to attend the law library during library operational hours at any time they are not working. Each inmate is allowed at least 10 hours of access to the law library each week. If an inmate needs a translator, there are many inmate volunteers available in the law library who can translate or that will locate a translator for him. If an inmate is unable to locate a translator, the law librarian will assist the inmate in locating a translator. Additionally, inmates are able to purchase writing supplies, stamps, and even typewriters. Inmates who are indigent are provided with the following without cost: paper, writing supplies, stamps, and envelopes (App. p. 77).

3. Each law library is staffed with a librarian who is familiar with the library and is available to answer questions for inmates. Additionally, each unit's law library is stocked with all federal case law, Texas case law, federal and state court rules, Texas Legal Directory, federal and Texas statutes, legal court forms (including 42 Section 1983 and habeas forms), several guidebooks to help inmates with the litigation process, notary services, indigent writing supplies, and legal handbooks. Attached as Exhibit 2 to Hoke's affidavit is a "Law Library Holdings List" for 1994 and 1998, which list the various legal books and guides that are maintained in each prison unit. The list also includes inmate orientation handbooks, in English and Spanish, as well as Court Forms and all of the significant Court Orders regarding operation of the prisons. The court forms also include the standard Civil Rights Complaint routinely utilized by the inmates for filing lawsuits in federal court. These Complaint forms were readily available to all inmates in the library. Inmates are permitted

to file handwritten documents in all Texas state and federal courts. All inmate mail marked "legal" is considered to be private and cannot be read by prison officials absent exigent circumstances. If an inmate is indigent, he is provided with unlimited writing supplies and unlimited stamps for legal mail. Inmates are provided with all materials and information necessary to file a lawsuit. Inmates are allowed to consult with other inmates regarding litigation and lawsuits. The above processes and procedures have been in existence and followed since at least 1998 (App. p. 77).

4. Ramirez heard Woods testify in the criminal trial that they stopped and got food on the way back from Lubbock. (App. p. 522,L.10-17).

5. Ramirez can read Spanish and can read some English (App. p. 489, L.15-18).

6. Ramirez testified that Abreo never did or said anything improper to him and was not mean to him (App. p. 491, L.15-P. 492,L.7.)

7. Ramirez believed from the time of his arrest that he should not have been arrested. When he was convicted, he believed he should not have been convicted and believed that police officers, including Abreo, had done something wrong to cause his wrongful conviction (App. pp. 492-493). Ramirez believed during his trial that Abreo coerced witnesses, believed there was a conspiracy to convict him, and believed defendants had an agreement to get him convicted of murder (App. pp. 494-495). Before the habeas hearing, it was his belief that Cruz's description did not match Plaintiffs (App. pp. 496-497). Before the habeas hearing, Ramirez did not believe Ayala's description of the suspects matched Plaintiffs (App. pp. 497-498).

8. Ramirez admits that while he was in prison, he was aware that many inmates file lawsuits (App. p. 498-499). When he entered prison, TDC officials may have told him about court forms and filing lawsuits, and provided him an inmate handbook. (App. p. 499-500). Ramirez

admits that the prison had law libraries available for inmates to use. (App. p. 500). Ramirez admits that the inmate handbook is like a guide and tells of opportunities available to inmates (App. p. 500,L.11-14). Ramirez was in general population and could have gone to the law library if he wanted to go. (App. p. 500-501). He was not interested in the law library. According to Ramirez, language was not a problem because he spoke some English and guards would interpret for him and some guards spoke Spanish (App. p. 502, L.10-18).

9. Sifuentes could read Spanish and could read some English (App. p. 562A). He attended schools in Mexico for 12 years (App. p. 542, L.22-23). He learned some English in TDCJ (App. p. 543). He was aware that there was a law library in prison, but he did not use it. He did use the regular library. He was in general population and had access to the law library. (App. p. 544-545). Sifuentes believed that police were wrongfully focused on him since the first interview on August 12th of 1996 (546, L.18-- P.548,L.3). He believed his incarceration was wrongful from the time Abreo refused to release him from custody on August 12, 1996 (App. p. 547, L.19-p.548,L.3). Sifuentes was present at his habeas hearing in 2005 and heard all of the wrongdoing that his lawyers alleged against Abreo, other officers and the District Attorneys, including losing evidence or hiding evidence (549-550). He also heard in 2005 about the bad photo lineup by Officer Ponce (App. p. 550). He believed from the very start when Abreo did not believe him and that Abreo conducted a bad investigation. (App. p. 550). During the habeas hearing in 2005 and in his criminal trial in 1998, he heard about Ayala being shown on the Town & Country surveillance tape at 12:30 a.m. (App. p. 550, L.18-P.551,L6). Plaintiffs filed their lawsuit in 2009, well after the statute of limitations expired.

IV. UNDISPUTED FACTS REGARDING THE ALLEGED COERCION OF WITNESS MARY WOOD

Plaintiffs claim that Abreo coerced witness Mary Wood to testify falsely about going to the Jolly Roger after leaving the club. The first time this allegation arose was in an affidavit prepared and notarized by Plaintiffs' investigator Richard Reyna, dated April 10, 2005, more than 9 years after the murder. In the Wood affidavit prepared by Reyna, it states that when she met with the Rangers, "they were in my face yelling at me and calling me a liar." In her deposition Wood testified repeatedly that there was absolutely no coercion by Abreo and that Abreo treated her properly. She agreed that he was a good police officer, and was just doing his job (App. p. 281A,L.17-25). When Wood was asked in deposition about the affidavit she signed for Reyna where it states, "From the first time that I met with Ranger Sal Abreo and another Texas Ranger, they were in my face, yelling at me and calling me a liar," Wood unequivocally stated that Abreo did not get in her face or yell at her, he did not call her a liar, and he did not force her to say anything false. (App. p. 594AL10-P594B,L.2). Wood also stated that she told Reyna that it was the white Ranger who yelled at her, not Abreo (App. p. 294B, L. 19-L.23; P. 313-315). Wood stated that Abreo did not threaten her, Abreo did nothing wrong, he was a good officer, and he was quiet.(App. p. 303,.L.4-5, P.305, L.6-14). Wood also stated that although the affidavit says "they were in my face," she meant the other one, not Abreo (App. p. 304,L.16-23).

Wood was not forced to say that they stopped at the Jolly Roger. Wood testified in deposition that Abreo did not try to make her say that they stopped at the Jolly Roger, "I'm the one that told him, 'this place looks familiar'." (App. p. 281A,L.3-22; p. 281B,L.14-P.284,L.25, P.281D,L.5; P.581E,L.1-P.281F,L.24). Abreo drove her down Hall Street to see if anything looked familiar. (App. p. 307). Abreo did not point anything out as they drove down Hall Street (App. p.

310, L.25-P.311,L.10). Wood noticed the side of the Jolly Roger building was familiar to her and told Abreo to pull over, and to park on the side of the building that looked familiar to her (App. p. 308,L.1-P.309,L.3). It was Wood's decision to turn off Hall Street into the parking lot of the Jolly Roger. (P. 309, L.4-21). Wood testified she remembered waking up, seeing the pointed structure, gas pumps and yellow lighting; She recognized the pointed structure and it is the only pointed structure she has ever noticed in the area. (App. p. 281G, L.9-14). Wood has been consistent since she signed her affidavit in 1996, and in her testimony to the grand jury and at the trials of Sifuentes and Ramirez, that she recognized the yellow lighting, the gas pumps and side of the Jolly Roger as the place the threesome stopped after leaving the club in Lubbock. Wood also remembered the stop sign next to the Jolly Roger where Sifuentes did not make a complete stop when they left (App. p. 281D, L.6- P.284D,L.24). Wood voluntarily told Abreo that the threesome stopped at the Jolly Roger the morning of the murder.

V. UNDISPUTED FACTS REGARDING THE ALLEGED LIE BY RANGER ABREO

District Attorney Mark Yarbrough noted in his records that Ranger Abreo lied to him, suggesting wrongdoing or dishonesty by Abreo. Ranger Abreo told Mr. Yarbrough on the morning of the arrests that Mary Wood said she was at the Jolly Roger with the suspects on the morning of the murder. When Mr. Yarbrough later saw Wood's affidavit given to Ranger Caver, where she did not specify that she was at the Jolly Roger, but indicated the building had yellow lights, Yarbrough thought Abreo lied. Yarbrough did not realize at the time apparently that Abreo had recorded his conversation with Wood of August 12, 1996, and that the tape had been transcribed. Yarbrough later reviewed the transcription and knows that Wood did tell Abreo that they were at the Jolly Roger (Yarbrough grand jury testimony and Yarbrough affidavit attached to Yarbrough's motion for

summary judgment). Wood has consistently testified that they stopped at the Jolly Roger after leaving the Paradise Club in Lubbock. Abreo did not lie to Mr. Yarbrough.

VI. UNDISPUTED FACTS REGARDING ALLEGED EXCULPATORY EVIDENCE

The only alleged exculpatory evidence was the pair of tennis shoes that were found in the Ramirez trailer by Ranger Yeager (See Plaintiffs' Complaint). Ramirez testified in deposition that he has "never used tennis shoes" (App. p. 525, L. 6-11); and that the only shoes he owned were work boots (App. p. 526,L.17-21). Ramirez further testified that if there were tennis shoes found at his trailer, they have nothing to do with him or his kids (App. p. 527,L.5-8). Ramirez understood that tennis shoes includes all athletic and running shoes. Ramirez maintained that he only had work shoes (App. p. 533,l.4-10).

Additionally, Ranger Yeager admitted that he is the officer who located the tennis shoes in Ramirez' trailer. When he wrote his report, he failed to include the information related to finding the tennis shoes (App. p. 42). He turned the shoes over to Abreo, who immediately took the shoes to the lab, where it was determined there was no match. Since the shoes were no match, Abreo did not focus on them any further and he moved on to other leads. Because Abreo did not find the shoes, he did not list them in his report. Due to the fast pace of the case and other leads that were coming in, Abreo forgot about the shoes. He transferred to the Austin DPS Rangers' Office at the end of October and was not involved in the investigation after that point, other than when he was called to testify almost 2 years later. Since the shoes had not been documented in his report or Yeager's report, it was difficult for Abreo to recall whether shoes had been found. Only after talking to Yeager near the time of Sifuentes'trial was Abreo able to recall Yeager finding the shoes. The lapse

in memory about the shoes was not intentional and had no affect on either criminal trial since the shoes did not belong to Ramirez (App. p. 33-34).

VII. UNDISPUTED FACTS RELATED TO ALLEGED FABRICATION OF EVIDENCE

On the morning of the murder, Ranger Abreo obtained statements from several sources related to descriptions of the suspects. Sgt. Thompson told Abreo at the scene that the victim described her assailants as two Hispanic males, one with long hair, one with short hair, about 18-20 years old, one with sunglasses and in a gold car. Abreo also spoke with the three witnesses who arrived on the scene shortly after the shooting (App. pp. 352-354). Tracy Russell told Abreo that when she asked Cruz who did this, Cruz said "Man-Boy."(App. p. 352). Abreo understood this to mean there could be an age difference between the two suspects (App. p. 020-036). Jackie Johnson reported that when he asked Cruz what happened, she told him that "a young Spanish guy had robbed her." (App. p. 353). Abreo interviewed witness Brenda Ayala on August 11th, who stated emphatically that she had been at the Jolly Roger around 2:00 a.m. Ayala told Abreo that there were two Hispanic men in the Jolly Roger when she was there shortly before the murder. Ayala described the men she saw as two Hispanic males, one with long hair, something hanging from his shirt, possible sunglasses, with a moustache, and the other man had shorter hair, like a buzz, not bald, and acne marks on face. When Abreo prepared the portion of his report regarding the description given by Thompson, he erroneously combined the descriptions given by the various witnesses, and stated that the descriptions given by Cruz and Ayala were identical rather than similar. In Ramirez' trial, Abreo admitted he should have characterized the descriptions as similar rather than identical. App. p. 32-33). The District Attorney was provided with all witness statements and was aware of the

differences in the description of the suspects given by Cruz to Officer Thompson and the description given by Brenda Ayala (Yarbrough affidavit submitted with Yarbrough's Motion for Summary Judgment filed January 14, 2011) . He also understood that the descriptions were similar as opposed to identical. Yarbrough believes the descriptions were similar and that, combined with the other evidence collected and witness statements, there was sufficient probable cause to arrest the Plaintiffs for murder. *Id.* Plaintiffs would have been arrested even if Abreo had characterized the descriptions as similar.

VIII. GONZALES BROTHERS ELIMINATED A POSSIBLE SUSPECTS

In 2002 and 2003, the affidavits of Oscar Balderas, Lora Casas, Mary Ann Casas Enriquez and Tina Martinez (cousin of the Cases sisters)surfaced, which were prepared and by notarized by investigator Richard Reyna. The Cases sisters and Tina alleged that Armando and Jerry Gonzales of Levelland had approached them at Lora's apartment in Littlefield on the night of the murder and demanded gas money. When they turned them down, the Gonzales brothers allegedly became very angry. Mary Ann also claimed that she dated one of the Gonzales brothers in the past and claimed to be known as Marianna. These witnesses never came forward until 6 years after the murder, and provided this story for the first time in affidavits drafted by Reyna. Ranger McCord was asked to investigate the allegations. McCord met with all three ladies and Balderas. (App. p. 47-51).

In 2002 Oscar Balderas was contacted by Richard Reyna about the murder. At Reyna's request, Oscar signed an affidavit that was prepared and notarized by Reyna that states that the Gonzales brothers confessed to him while in jail that they committed the murder (App. p. 465-465,L.22-p.466). McCord reviewed jail records and confirmed that the Gonzales brothers were never in jail together with Balderas (App. p. 50). Therefore, the confession could not have occurred.

Balderas has recently admitted that he did not read the affidavit prepared by Reyna before signing it because he did not have his glasses. In the affidavit it states that Reyna showed him photographs of the Gonzales brother, which Balderas testified is false. Balderas stated that Reyna never showed him photographs (App. p. 468).

McCord also met with Lora and Mary Ann Casas and Tina. He found their stories to be full of holes, conflicted with each other, were inconsistent and they were unable to tell the same story that had been told to Reyna just a few months earlier (App. p. 47-52).

In February of 2004 Ranger McCord located Jerry Gonzales in Littlefield and Armando Gonzales at the TDCJ Baten Unit in Pampa. He met with both Gonzales brothers and found both brothers to be were very cooperative. Both provided DNA samples and full case prints. Jerry Gonzales challenged McCord to find anything at the crime scene that matched either him or his brother. Jerry advised that they would cooperate in any way possible because they had not committed the offense and had not been in Littlefield on the night of the murder. The DNA samples and prints did not match any items recovered from the crime scene. The Gonzales brothers were shown photographs of Cases and Enriquez and did not recognize either, and both denied ever dating either lady. Based on his extensive experience and training, in conducting investigations and witness interviews, Ranger McCord concluded that the Gonzales brothers were being truthful. Other than the highly questionable accusations and identifications made by Lora Casas, Enriquez, and Balderas, there was no evidence linking the Gonzales brothers to the murder of Evangelina Cruz. The statements of Lora Casas, Enriquez, and Balderas were full of inaccuracies, inconsistencies, and obvious lies. Ranger McCord concluded that the stories of Cases, Enriquez and Balderas were not credible and he informed Mark Yarbrough of same (App. p. 50-51).

IX. UNDISPUTED FACTS ESTABLISHING THERE WAS NO CRIME STOPPERS MONEY SOUGHT OR PAID

Plaintiffs alleged in the habeas proceeding and in this case that officers should have investigated the payment of a reward to witnesses from Crime Stoppers. The evidence submitted to the habeas court regarding Crime Stopper reward money was affidavits from investigator Reyna, Mary Lou Longoria Rodriguez, and Martin Morales. Mary Lou Longoria Rodriguez signed an affidavit for Richard Reyna in 2003, notarized by Reyna, asserting various facts related to her daughter, Janie Ramirez and Janie's friend, Mary Helen Gallegos receiving crime stoppers money. Martin Morales, Mary Lou Longoria Rodriguez' former boyfriend, also signed an affidavit for Richard Reyna in 2003, notarized by Reyna, alleging that Janie and Janie's friend, Mary Helen Gallegos had received crime stoppers money. In 2010 Mary Lou and Martin testified via affidavit that they had no knowledge about any crime stoppers reward money being paid to anyone and that there numerous facts alleged in their 2003 affidavits that are false. (App. p. 476-485).

In 2002, Janie Ramirez was contacted by Richard Reyna and met with him 2 times (App. p. 372-386). Reyna did not ask her for an affidavit. Instead, Reyna prepared his own affidavit, discussing the interview of Janie (App. p. 372-386). When Janie was shown Reyna's affidavit, Exhibit 2, she said it contained false statements about her. (App. p. 372-386). Janie stated that Reyna's entire affidavit is false because she never called Crimestoppers, she was not contacted by the police department; and she contacted the police directly. Janie stated she was not offered any money from Crimestoppers and did not decline an offer from crime stoppers (App. p. 376-385). When Janie was shown the affidavit of her mother, Mary Lou Longoria Rodriguez, she stated that all of the Crime stopper information was false and that neither she nor Mary Helen Gallegos sought

or accepted any reward (App. p. 381). Janie also reviewed the affidavit of Martin Morales, her mother's ex-boyfriend. (App. p. 383-385). Janie stated that the affidavit, which is notarized by Reyna, states that Mary Helen and Janie received crime stoppers money. According to Janie, this statement and all other statements in the Morales' affidavit related to her having a large sum of money to buy lots of new expensive items are false, and the claim that Mary Helen and Janie each offered $1,000 towards Sifuentes' bond is also false (App. p. 385).

Mary Helen Gallegos testified that she knows Mary Lou Longoria is Janie's mother. Gallegos reviewed Mary Lou's affidavit and stated it is false where it states that she was encouraged to call Crime Stoppers (App. p. 421A). She reviewed Martin Morales's affidavit and states it is false where he states that Gallegos came in to a substantial amount of money three days after the murder. (App. p. 421B, 421C). Gallegos never sought or obtained any crime stoppers reward (App. p. 413-414). There was no crime stoppers money sought by or paid to any witness connected with this case and likely should not have been considered by the habeas court or this court.

X. STANDARD FOR SUMMARY JUDGMENT

The party moving for summary judgment under Rule 56 has the initial burden of demonstrating that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). In order to avoid summary judgment, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *See Matsushita Elec. Indus. Co. v. Zenthi Radio Corp.,* 475 U.S. 574, 585-86 (1986).

XI. ARGUMENT AND AUTHORITIES

A. Statute of Limitations Bars Claims

1. Federal Claims

All of Plaintiffs' federal claims are barred by the statute of limitations. While 42 U.S.C. § 1983 provides a federal cause of action, it does not specify a statute of limitations. Therefore, the federal law, "looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts." *Wallace v. Kato*, 549 U.S. 384, 387 (2007). In Texas, absent assertion of an applicable tolling provision, a federal civil rights claim is subject to a two year limitation period. TEX. CIV. PRAC. & REM. CODE ANN. §16.003(a) (Vernon 1986); *Ali v. Higgs*, 892 F.2d 438, 439 (5th Cir. 1990).

Plaintiffs assert a claim under 42 U.S.C. § 1986, which provides that an action brought under § 1986 must be commenced within one year after the cause of action accrues. *Id.*

The accrual date of a cause of action is a question of federal law that is not resolved by reference to state law. *Wallace*, 549 U.S. at 388; *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir. 1992). Under federal law, a civil rights action accrues when the plaintiff knew, or had reason to know of the injury which forms the basis of the complaint. *Helton v. Clements*, 832 F.2d 332, 334 (5th Cir. 1988). "Under those principles, it is 'the standard rule that [accrual occurs] when the plaintiff has 'a complete and present cause of action.'" *Wallace*, 549 U.S. at 388 (internal citations omitted). "Under the traditional rule of accrual the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable." *Wallace,* 549 U.S. at 391.

For a wrongful imprisonment claim, "there can be no dispute that petitioner could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary detention, so the statute of limitations would normally commence to run from that date." *Wallace*, 549 U.S. at 388. Any "contention that [a] false imprisonment ended upon [a petitioner's] release from custody, after the State dropped the charges against him, must be rejected. It ended much earlier, when legal process was initiated against him, and the statute would have begun to run from that date." *Wallace*, 549 U.S. at 390. The Supreme Court further held that, when an individual brings an action for false imprisonment, limitations is not tolled by a criminal conviction. *Wallace,* 549 U.S. at 384. In this instance, Plaintiffs were entitled to bring suit at the moment of their arrest. *See Wallace*, 549 U.S. at 390, fn.3. Contrary to Plaintiffs' argument, false imprisonment actually ends once the victim becomes held *pursuant to such process-when*, for example, he is bound over by a magistrate or arraigned on charges. *Wallace,* 549 U.S. at 389.

Plaintiffs' claim for false imprisonment, regardless of which Constitutional Amendment or federal statute is relied upon, arose on August 12, 1996 when they were arrested. The last actionable conduct by Ranger Abreo, according to Plaintiffs, occurred during the *habeas* evidentiary hearing, which took place in 2005. Plaintiffs' complaint was not filed until 2009, well outside the two year statute of limitations. Plaintiffs "knew of their injury from false arrest at the time of the arrest." *Patrick v. Howard*, 904 S.W.2d 941, 944 (Tex. App.--Austin 1995, no writ). Plaintiffs admitted in their depositions that they knew from the beginning that the defendants had wrongfully arrested them and believed they conspired against them. Plaintiffs sat through the habeas proceedings in 2005 and heard the evidence presented to the Court. Therefore, they knew in 2005 fully what claims were being asserted by their attorneys. Additionally, Plaintiffs admitted in deposition that they were

provided with the inmate handbook in prison and were aware of the prison law libraries. Mr. Hoke of the Texas Department of Corrections Prison Access to Courts program confirmed that inmate handbooks are provided to all inmates and are available in Spanish and English. The handbook discusses inmate access to courts. Hoke also explains that Plaintiffs had access to the law libraries which are fully stocked with all law books and forms necessary for an inmate to file a lawsuit. The law library even has the form civil rights lawsuit readily available for inmates to utilize to file their lawsuits. There are also guide books in the library to help the inmate pursue claims while in prison.

Plaintiffs did not need to wait for their attorneys to file their lawsuit. Plaintiffs could have easily filed their lawsuit without the assistance of counsel. Plaintiffs and their lawyers simply chose not to file until 14 years after their alleged wrongful arrests, well after the statute ran. The purpose of the statute of limitations is to force litigants to pursue their claims before memories fail, witnesses die, records are destroyed and evidence is lost. Here, at least two witnesses have passed away, memories have faded, records have been destroyed and evidence has been lost. The delay in filing suit operates to deprive defendants of being in a position to adequately defend against claims due to the loss of witnesses, evidence, records and memories. Plaintiffs should not be allowed to benefit from their delay in bringing their lawsuit. All of Plaintiffs' claims are brought outside the statute of limitations and they must be dismissed.

Defendant anticipates Plaintiffs' again assert that *Heck v. Humphrey,* 512U.S. 477(1994) does not apply. Plaintiffs will likely assert again that the Supreme Court decision in *Kato v. Wallace*, 549 U.S. 384 (2007) determined that Heck does not apply to cases of this nature. The Supreme Court in *Kato v. Wallace* distinguishes *Heck* by holding "In *Heck*, a state prisoner filed suit under § 1983 raising claims which, if true, would have established the invalidity of his outstanding

conviction. We analogized his suit to one for malicious prosecution, an element of which is the favorable termination of criminal proceedings." *Wallace*, 549 U.S. at 392. In this case Plaintiffs' allege false imprisonment under the *Heck* case, which is inapplicable. The facts here are similar to the facts in *Wallace*, where the petitioner brought a false arrest claim after his conviction had been set aside and years after his arrest. The Court held "that the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process." *Wallace,* 549 U.S. at 397. The Supreme Court in *Wallace* explicitly stated that statute of limitations commences at time of arrest. Plaintiffs previously argued that the statute of limitations for false imprisonment does not begin to accrue until the conviction is first set aside. Plaintiffs' argument is a misapplication of the law because Plaintiffs ignore the law set forth by the Court in *Wallace. Heck* does not apply to Plaintiffs' false imprisonment claim because *Heck* was decided under a malicious prosecution tort claim. *Wallace*, 549 U.S. at 394. As stated above, Plaintiffs' claims for false imprisonment are barred by the statute of limitations because the claims accrued well over two years before they were filed.

2. State Law Claims

Plaintiffs bring a pendent state law claim against Ranger Abreo for malicious prosecution. A malicious prosecution claim accrues upon the termination of the criminal prosecution. *Patrick*, 904 S.W.2d 941, 944 (Tex. App.--Austin 1995, no writ). In determining the nature of the termination necessary for the accrual, *Sullivan v. O'Brien*, 85 S.W.2d 1106 , 1115 (Tex.Civ.App.--San Antonio 1935, writ ref'd) held:

> It seems well settled that the termination contemplated does not mean the end of the purpose or intention to prosecute, or a final

> adjudication of the accused person's guilt or innocence, but means rather, the termination of the particular prosecution, or proceeding, complained of, so that, if the prosecutor intends to proceed further in his purpose, he must institute proceedings de novo, or, as sometimes said, is "put to a new proceeding."

The termination or disposition of an indictment is a termination of the prosecution in favor of the accused within the meaning of the rule relating to malicious prosecution. *Leal v. American Nat. Ins. Co*., 928 S.W.2d 592, 597 (Tex.App.--Corpus Christi,1996 writ den.) *citing* AM.JUR.2D, MALICIOUS PROSECUTION § 32 at 207 (1970); *Millan v. Dean Witter Reynolds, Inc*., 90 S.W.3d 760, 764 (Tex.App.-San Antonio 2002, pet. denied) (cause of action for an intentional tort accrues when facts come into existence authorizing a claimant to seek a judicial remedy).

Plaintiffs' convictions were vacated on January 16, 2008. *Ex Parte Ramirez* and *Ex Parte Sifuentes* 2008 WL 151128 (Tex.Crim.App. 2008). Consequently, on January 16, 2008, Plaintiffs' malicious prosecution claims accrued as facts came into existence authorizing him to seek a judicial remedy. The prosecution for which they spent 12 years in prison terminated in their favor by the express finding of the Texas Court of Criminal Appeals. To pursue a new prosecution, a new indictment was required as the previous indictment had been terminated or disposed of within the meaning of *Leal*. Plaintiffs admit that their convictions were overturned, the grand jury did not re-indict them and the charges were dismissed. There were no new indictments issued. The first prosecution of Plaintiffs, for which they served 12 years, was resolved in their favor on January 16, 2008 by the Texas Court of Criminal Appeals. The one year limitations period for that prosecution began to run on January 16, 2008 and expired on January 16, 2009. *See* TEX. CIV. PRAC. & REM. CODE §16.002(a). Plaintiffs' Complaint for malicious prosecution filed on April 27, 2009, was untimely and therefore must be dismissed.

B. Federal claims

As the Court stated in ruling upon Ranger Abreo's first motion for summary judgment, "Plaintiffs assert a number of federal claims under § 1983, including claims for false arrest, *Brady* violations, bad faith destruction of exculpatory evidence, bad faith failure to investigate, coercion of witnesses, and conspiracy to violate Plaintiffs' constitutional rights." [D.E. 120, p. 12][2]. The Court stated at that time that the facts, when viewed at that time in light most favorable to the Plaintiffs, a jury could conclude that Ranger Abreo had in fact done what the Plaintiffs' allege [D.E. 120, pp. 14-15]. However, after further development of the facts and evidence following extensive discovery, Ranger Abreo established that he did not falsely arrest the Plaintiffs, fabricate evidence, violate *Brady*, destroy exculpatory evidence, fail to investigate, coerce any witnesses or conspire to violate the Plaintiffs' constitutional rights.[3]

Plaintiffs' morass of allegations boil down to basically a false arrest claim under 42 USC § 1983, which is analyzed under the Fourth Amendment. *Blackwell v. Barton*, 34 F.3d 298, 302 (5th Cir. 1994). However,"[e]vidence that the arrestee was innocent of the crime is not necessarily dispositive of whether the officer had probable cause to conduct the arrest because 'probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *Deville v. Marcantel*, 567 F.3d 156, 165 (5th Cir. 2009) (*citing Illinois v. Gates*, 462 U.S.

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[2] Plaintiffs also appear to assert a claim for false arrest in violation of their Fifth, Eighth and Fourteenth Amendment rights. However, it has been clearly established law for many years that false arrest claims are analyzed under the Fourth Amendment. *Blackwell v. Barton*, 34 F.3d 298, 302 (5th Cir. 1994). Therefore, Plaintiffs' claims for false arrest in the violation of their Fifth, Eighth and Fourteenth Amendment rights must be dismissed.

[3] Plaintiffs also appear to claim Ranger Abreo testified falsely. However, it is well-settled that witnesses are entitled to absolute immunity against § 1983 suits based upon their testimony in a criminal trial. *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 277 (5th Cir. 2001) (*citing Briscoe v. LaHue*, 460 U.S. 325, 329-31 (1983)). Therefore, even if Ranger Abreo's testimony was misleading or factually incorrect, he his absolutely immune from civil liability based upon such testimony. All claims related to alleged false testimony should be dismissed.

213, 244 n. 13 (1983)). The false arrest standard provides ample room for mistaken judgment, protecting all but those who knowingly violate the law or who are plainly incompetent. *Mangieri v. Clifton*, 29 F.3d 1012, 1017 (5th Cir. 1994). Courts must allow law enforcement "officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (*quoting United States v. Cortez*, 449 U.S. 411, 418 (1981)).

"The Fourth Amendment is not violated by an arrest based on probable cause, even if the wrong person is arrested, if the arresting officer had a reasonable, good faith belief that he was arresting the correct person." *Blackwell v. Barton*, 34 F.3d 298, 303 (5th Cir. 1994) (*citing Hill v. California*, 401 U.S. 797 (1971). "Whether the crime actually occurred or whether a suspect is eventually convicted is irrelevant to the probable cause analysis. The inquiry focuses only on what the *officer* could have reasonably believed at the time based on the relevant law, as well as the facts supplied to him by the eyewitness." *Morris v. Dillard Dept. Stores, Inc.,* 277 F.3d at 743, 754, n.10 (5th Cir. 2001). The Court must determine whether a reasonable officer could have thought he had probable cause to arrest someone he believed had, or will commit an offense, in light of the circumstances he faced and the law which was clearly established. *Brown v. Bryan County, Ok*, 67 F.3d 1174, 1180 (5th Cir. 1995); *Gibson v. Rich*, 44 F.3d 274 (5th Cir. 1995); *Blackwell* at 303; *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994).

"To determine the presence or absence of probable cause, one must consider the totality of the circumstances surrounding the arrest." *Brown v. Bryan County, Ok*, 67 F.3d at 1180 (*citing United States v. Maslanka*, 501 F.2d 208, 212 (5th Cir. 1974), *cert. denied*, 421 U.S. 912 (1975). "Probable cause is present 'when the totality of the facts and circumstances within a police officer's

knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense.'" *Vance v. Nunnery*, 137 F.3d 270, 276 (5th Cir. 1998) (*quoting United States v. Levine*, 80 F.3d 129, 132 (5th Cir. 1996)). "To the extent underlying facts are undisputed... [the court] may resolve questions such as probable cause... as questions of law." *Blackwell*, 34 F.3d at 305 (*citing Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

Here, based on the totality of the circumstances, there was more than enough evidence for a reasonable police officer to believe there was probable cause to arrest Plaintiffs and to believe Plaintiffs committed the murder. *Vance v. Nunnery*, 137 F.3d 270, 276 (5th Cir. 1998). The facts and circumstances within Ranger Abreo's knowledge At the time when Abreo arrested Plaintiffs on August 13, 1996, Abreo had the following information and evidence supporting the existence of probable cause:

> 911 tape of Cruz calling in and reporting she had been shot; on-the-scene witness Tracy Russell reported that Cruz told her she was shot by a "Man-Boy," on-the-scene witness Jackie Johnson reported that Cruz said "a young Spanish guy had robbed her"; Cruz said "the guy ran out the north door";Cruz described her assailants as two Hispanic males, one with long hair, and the other with short hair, about 18-20 years old, one wore shades, they were in a gold car; at 2:55 a.m Amherst City Marshal Harley Boleyn stopped a gold colored vehicle at US 84 and County Road 37, 2 miles east of that intersection; the vehicle was a gold 1983 Lincoln 4-door, Texas license plates SSW-78P; Driver was Alberto Sifuentes, had long hair below his shoulders, middle passenger was Mary Wood Davila, Hispanic male passenger with very short hair later identified as Jesus Ramirez; 8-6-96 Janie Ramirez called Littlefield Police Department and talked to Lt. McDowell. Janie told McDowell about Alberto from Muleshoe, who she believed matched the description of one of the suspects. Janie referred McDowell to her friend Mary Helen Gallegos for Alberto's last name. Janie feared for the safety of her children. Brenda Ayala's statement that she was at the Jolly Roger at 2 a.m., saw 2 Hispanic males with physical descriptions similar to Plaintiffs' appearance and Cruz' description of the suspects; Ayala observed the suspects acting suspiciously in the store, there was something hanging from

> Sifuentes' shirt - perhaps sunglasses, the lighter skinned man (Ramirez) had acne scars; Ayala identified Sifuentes from a photograph as being one of the men she saw in the Jolly Roger before the murder; Mary Wood who was with Plaintiffs the evening and morning of August 5-6, 1996, said they had been drinking at a club in Lubbock that night and left before closing around 12 or 1:00 a.m., and that they stopped at a convenience store on their way back to Sudan. She saw yellowish lights on the side of the building, and gas pumps off to the side. Wood stated that the suspects returned to the car with food from a convenience store. She identified the car as a 4 door, gold and brown in color. When Abreo told Sifuentes that Wood had admitted they were at the Jolly Roger, Sifuentes asked if they had him on a video tape recording. When Ramirez was being interviewed by Yeager, Ramirez said "why would we rob a store for $300-$400 when I make $500 dollars a week?"; discovery of a roll of nickels in Ramirez' gold colored vehicle; Wood described the lighter skinned man, Ramirez, as having little scars on his face from acne (wood interview, p.33); Discovery of a .22 caliber pistol and .22 caliber ammunition at Ramirez' trailer (Abreo aff and depo), Cruz was shot with a .22 caliber pistol.

The above facts are undisputed and establish probable cause to arrest Plaintiffs. At the very least, the above facts established that a reasonable officer under the same or similar circumstances could have believed there was probable cause to arrest and reason to believe Plaintiffs committed the murder.

Coercion of witnesses in order to deny a defendant a fair trial implicate constitutional rights; *United States v. Merkt*, 764 F.2d 266, 273-74 (5th Cir. 1985). However, that did not happen here. Plaintiffs alleged that Abreo coerced, threatened and yelled at Wood to force her to say that the threesome stopped at the Jolly Roger. The evidence relied on by Plaintiffs is an affidavit prepared by their investigator Reyna. However, Mary Wood has testified in deposition that the affidavit prepared by Reyna has false information. She clearly testified in her deposition that Abreo was completely professional toward her at all times, he "never yelled" at her, he was "quiet", "never called her a liar," he did not force her to say anything false, and that Abreo did nothing wrong. Wood

had nothing but good things to say about Abreo and commented that he was "just doing his job." Wood also testified that she even told Reyna that it was a "white ranger" who was in her face and yelled at her - NOT RANGER ABREO (App. pp. 313-315). Wood testified that she did not testify falsely. She confirmed that the threesome stopped at the Jolly Roger. She further stated that she was the person who recognized the Jolly Roger and that Abreo did not point out the location to her.

Ranger Whitman, a law enforcement expert, and long time police officer with an extensive background and training in homicide investigations, testified that driving a witness by a location was an accepted practice and utilized to help witnesses remember events. Here Abreo utilized an accepted law enforcement practice of driving Wood by the scene to see if it sparked a memory and it did. Abreo did not point out the location, he simply drove by the location. It was Wood who directed Abreo to slow down and then to pull over and park on the North side of the building. Once Wood saw the building, the lights, and the gas pumps, her memory was refreshed and she has never changed her testimony that after leaving the club, they stopped at a store she believes is the Jolly Roger.

Persuading a witness to falsely identify a defendant as the perpetrator of a crime violates his constitutional rights. *Young v. Biggers*, 938 F.2d 565, 569-70 (5th Cir. 1991). However, that did not happen here. Abreo did not force any witness to falsely identify Plaintiffs as the perpetrator. Plaintiffs allege that Abreo's mischaracterization of the descriptions given by Cruz and Ayala as "identical" was a constitutional violation. While it is true that Abreo did error in his choice of the word identical, rather than using "similar." Abreo admitted in the criminal trials that he should have used "similar" rather than "identical." This was a mistake that did not result in a violation of rights. The district attorney was provided with the affidavits of Ayala and report of Officer Thompson.

Furthermore, all witnesses with information about a description of the suspects, including Ayala, Officer Thompson, Jackie Johnson, and Tracy Russell all testified at the criminal trials.

A defendant has the right to exculpatory evidence and that the purposeful concealment by a police officer of exculpatory evidence violates a person's constitutional rights. *Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008); *See also Hernandez v. Terrones*, 2010 WL 4116737 (5th Cir. 2010). "A valid *Brady* complaint contains three elements: (1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense." *Hernandez*, 2010 WL 4116737, p. 14."Evidence is not 'suppressed' if the defendant 'knows or should know of the essential facts that would enable him to take advantage of it." *Id*. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. "The materiality of *Brady* materials depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." *Id*. Plaintiffs contend that the lost tennis shoes constitute Brady material. This allegation is astonishing since Ramirez testified in deposition that any tennis shoes found in his trailer were not his or his kids and therefore have no bearing on this case. If the shoes did not belong to Ramirez, then the shoes could not have proved or disproved anything related Ramirez. Plaintiffs cannot show harm by the nondisclosure of the shoes. The summary judgment evidence established that it was Ranger Yeager who seized the shoes and he should have documented the seizure in his report. It has been established there were numerous items of evidence for Abreo to keep up with and the case progressed very quickly. Since the shoes were not documented by Yeager, Abreo overlooked adding it to his report too. During Ramirez' criminal trial in May of 1999, when asked about the shoes,

Abreo had completely forgotten about the shoes since that had occurred almost 2 years earlier and there was nothing in Abreo or Yeager's reports to refresh his recollection. By the time of the Sifuentes trial, Abreo had talked to Yeager and Yeager helped him recall that shoes had been seized by Yeager. This was not intentional on Abreo's part. It was a mistake. Ranger Whitman and Investigator Parrott both agree that there is not such thing as a perfect investigation. This was simply a mistake and mistakes do not establish a constitutional violation. Since the shoes did not belong to Ramirez, the mistake could not have affected Plaintiffs.

Plaintiffs complain that Ranger Abreo did not investigate all leads. The duty to investigate such possible leads is owed by Plaintiffs' criminal attorneys and not the police. Police officers are not required to follow every possible lead. Once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in hopes of uncovering potentially exculpatory evidence. *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989) *citing Baker v. McCollan*, 443 U.S. 137, 145-46 (1979). As established in the undisputed facts, Ranger Abreo conducted an investigation. Plaintiffs' mere disagreement with an officer's conclusions, does not state a claim. Regardless, additional leads were investigated by Ranger Abreo and other officers, as set out in the undisputed facts.

Plaintiffs complain that Abreo conspired with Yarbrough and Ponce [D.E. 120, p. 30-31]. Notwithstanding Plaintiffs' assertions, "[a] conspiracy by itself, however, it not actionable under section 1983... [t]hus, a conspiracy claim is not actionable without an actual violation of section 1983." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990). Furthermore, if the state actor is entitled to qualified immunity, a plaintiff's claim for the conspiracy to violate their constitutional rights also fails. *Pfannstiel*, 918 F.2d at 1187; *Rodriguez v. Neeley*, 169 F.3d 220, 222

(5th Cir. 1999). *Mowbray v. Cameron Co., Tx*. 274 F.3d 269 (5th Cir. 2001); *See also Docket Entry* 120, pp. 30-31. Ranger Abreo has established that all of Plaintiffs' federal claims are barred by qualified immunity. Therefore, Plaintiffs' conspiracy claims must be dismissed.

Additionally, the is no evidence to support Plaintiffs general allegations of conspiracy. To prevail on a conspiracy claim under § 1983, a plaintiff must establish the existence of a conspiracy and a deprivation of civil rights in furtherance of that conspiracy. *Thompson v. Johnson*, 348 Fed.Appx. 919, 922-923, 2009 WL 3199647, 3 (5th Cir. 2009) (internal citation omitted). The plaintiff must state a factual basis for the conspiracy; mere allegations are insufficient. *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982). To establish a cause of action based on conspiracy a plaintiff must show that the defendants agreed to commit an illegal act. *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979). More than a blanket of accusation is necessary to support a § 1983 claim. *Arsenaux*, 726 F.2d at 1024, citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir.1980). Plaintiffs' mere assertion that it is reasonable to believe that the defendants were part of a conspiracy is insufficient to state a viable conspiracy claim. *Bowen v. Quarterman*, 339 Fed.Appx. 479, 482, 2009 WL 2391578, 2 (5th Cir. 2009), citing *Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986).

Plaintiffs must develop facts from which a trier of fact could reasonably conclude that defendant agreed with others to commit an illegal act and that a deprivation of constitutional rights occurred. *Rodriguez v. Neeley*, 169 F.3d 220, 222 (5th Cir. 1999) A conclusory allegation of conspiracy is insufficient. See *McAfee v. 5th Circuit Judges*, 884 F.2d 221 (5th Cir. 1989), cert. denied, 493 U.S. 1083, 110 S.Ct. 1141 (1990). Specifically, a plaintiff must identify an illegal objective of the agreement among the defendants.

As *Priester* illustrates, the Fifth Circuit has set a high threshold for establishing a prima facie case of conspiracy in the § 1983 setting. "Private individuals generally are not considered to act under color of law, i.e., are not considered state actors" for purposes of a § 1983 claim. *Gilbert v. French*, 665 F.Supp.2d 743, 766 (S.D. Tex. 2009), citing *Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005) (citing *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 941, 102 S.Ct. 2744 (1982)). Conclusory statements without reference to specific facts will not support a conspiracy allegation. *Id*.; see also *Ballard*, 413 F.3d at 518-519 (absent specific facts that the private defendants knowingly participated in a conspiracy with state officials, the plaintiff fails to state a claim for conspiracy).

Here, Plaintiffs fail to meet the threshold of establishing a conspiracy and there is no evidence of a conspiracy to deprive the Plaintiffs' of their Constitutional rights. In Ranger Whitman's opinion neither Abreo, Ponce, or Yarbrough conspired to violate Plaintiffs' civil rights regarding the identification of Sifuentes by Ayala. In reviewing prior testimony and police reports, there was no evidence that Abreo or Yarbrough were at the Littlefield police station at the time Ponce showed Ayala the photograph of Sifuentes. Abreo testified that showing the single photograph to Ayala had no bearing on his decision to continue the investigation, due to the additional evidence he had obtained during this investigation, which supported Ayala's identification (composite of Ramirez bearing likeness to Ramirez and Wood placing the suspects at the scene). Abreo was reasonable to rely on Ayala as a witness because there was other evidence to show she was there and saw the suspects. Some of the additional evidence in support included Wood's confirmation that the threesome stopped at the Jolly Roger after leaving the club; the similarity of Cruz' description of the suspects, Plaintiffs were found within 10-11 miles of the murder scene 47 minutes after the murder, Plaintiffs were in a gold car, Cruz reported that suspects were in a gold car, and Janie Ramirez

reported that Sifuentes was in Littlefield the night of the murder and that he matched the description of one of the suspects. Additionally, Ayala was able to construct a composite of Ramirez, which was very similar to Ramirez, in Ranger Whitman's opinion.

C. Ranger Abreo is entitled to Qualified Immunity

At the time of the incidents complained of by Plaintiffs, Ranger Abreo was a Texas Ranger with the Texas Department of Public Safety. Texas Rangers are law enforcement officers. As law enforcement officers, they are entitled to the defense of qualified immunity, which is an affirmative defense to all federal law claims. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Under the doctrine of qualified immunity, government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow,* 457 U.S. at 818. Qualified immunity is a threshold legal question to be decided by the court. *Mitchell v. Forsyth,* 472 U.S. 511, 527-529 (1985). The government official's liability turns on the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

Even though a state official may have erred, he is still entitled to qualified immunity if it can be shown that his actions were reasonable, albeit mistaken. *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993). Qualified immunity "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343 (1986). "That is the balance the courts have struck between compensating wronged individuals for deprivation of constitutional rights and frustrating officials in discharging their duties for fear of personal liability." *Brown v. Lyford*, 243 F.3d 185, 190 (5th Cir. 2001).

Conduct which is merely negligent cannot meet the standard for liability under § 1983. *Daniels v. Williams*, 474 U.S. 326, 331-34 (1986); *Davidson v. Cannon,* 474 U.S. 344, 347 (1986).

In determining the applicability of qualified immunity, a two-step analysis is employed. The court must first consider whether the asserted constitutional injury involves a right clearly established at the time of the event. *Hare v. City of Corinth, MS.,* 22 F.3d 612, 614 (5th Cir. 1994). The second step for the court to consider is whether the official's actions were objectively reasonable. *Anderson*, 483 U.S. at 639. Objective reasonableness is assessed in light of legal rules clearly established at the time of the incident. *Id*. "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). "The party seeking damages from an official asserting qualified immunity bears the burden of overcoming that defense." *Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 408 (5th Cir. 1989).

In the context of a Fourth Amendment false arrest claim, "[a]n officer's conduct is objectively reasonable 'if a reasonable person in their position could have believed he had probable cause to arrest.'" *Deville v. Marcantel*, 567 F.3d 156, 166 (5th Cir. 2009) (*citing Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000)).

Moreover, the Fifth Circuit's threshold for a finding of probable cause is quite low, as established in *United States v. Wadley*, 59 F.3d 510, 512-13 (5th Cir.1995). In *Wadley*, the Fifth Circuit held that probable cause existed to arrest a suspect who merely had fled from police in a high crime area and while doing so he "reached into his pocket."

An officer's training and prior law enforcement experience is relevant in determining whether he had probable cause to arrest. *United States v. Wadley,* 59 F.3d 510, 513 (5th Cir.1995). Here,

Ranger Abreo had 18 years of law enforcement experience and had been involved in conducting investigations for many years. Abreo set out in the undisputed facts the facts on which he based his conclusion of the existence of probable cause. Expert Ranger Whitman agreed that Abreo had probable cause under the facts to arrest the suspects; and at the very least a reasonable and prudent officer under the same or similar circumstances could have believed he had probable cause to arrest the Plaintiffs on August 13, 1996. Plaintiffs were indicted at the end of October 1996, which is when Abreo stopped working on the case because he transferred to Austin. Ranger McCord, who took over the investigation after Abreo transferred, agreed that Abreo had probable cause to arrest Plaintiffs. Although Plaintiffs attempt to point to the Gonzales brothers as possible suspects, Ranger McCord was able to eliminate them as possible suspects. Ranger McCord, a very experienced homicide investigator, is the only police officer in this case to interview the Cases sisters, their cousin Tina, Balderas and the Gonzales brothers. McCord established through his investigation and concluded that the allegations against the Gonzales brothers was not credible and was likely a story concocted to turn the focus away from Plaintiffs. Investigator Parrott, an experienced police officer, also agreed that Abreo had probable cause to arrest the Plaintiffs for murder. Parrott reviewed the case and re-interviewed witnesses after Abreo left the case, and ultimately determined there were no other suspects and agreed that Plaintiffs were the only reasonable suspects. Ranger Yeager, another very experienced homicide investigator worked directly with Abreo on this investigation. Abreo requested Yeager's assistance because of his experience level. Yeager agreed with Abreo's conclusions and actions on the case. Yeager reached the same conclusion as Abreo, that is, that there was probable cause to arrest Plaintiffs for the murder of Cruz.

Although probable cause requires more than a bare suspicion of wrongdoing, it requires "substantially less evidence than that sufficient to support a conviction." *United States v. Muniz-Melchor*, 894 F.2d 1430, 1438 (5th Cir.1990). Here, where two different witnesses placed Plaintiffs at the scene of the crime (Ayala and Wood); Ayala was able to construct a composite that has a strong resemblance to Ramirez; two other citizens voluntarily called police the day of the murder naming Sifuentes and his friend as matching the description heard on television (Janie Ramirez and Mary Helen); Plaintiffs generally fit the description given by the victim; Plaintiffs are in a gold car as described by the dying victim; Plaintiffs were found within 10 miles of the murder scene within 47 minutes of the murder; Plaintiffs had adequate time to get to the Jolly Roger from the Paradise Club according to their companion Wood; Plaintiffs had adequate time to dispose of any incriminating evidence before being stopped by police; Yeager and Abreo agreed that Plaintiffs were being evasive during questioning, exhibited signs of deception and appeared to be very nervous - just to name some of the probable cause- there certainly existed sufficient facts to establish the reasonableness of Abreo believing probable cause existed. Moreover, Abreo contacted the District Attorney, who agreed that the suspects should be held. A grand jury agrees and indicts the suspects. Then two separate juries convict Plaintiffs in separate trials.

In a similar murder investigation, arresting officers were accorded qualified immunity even when it turned out they erroneously arrested a fellow police officer for murder. *Mendenhall v. Riser*, 213 F.3d 226 (5th Cir.2000). In that case, Officer Mendenhall and others were chasing a suspected kidnapper. Mendenhall had his gun displayed during the chase and fired his weapon in the air. Shortly thereafter, the suspect fell to the ground and died from a gunshot wound. Two witnesses at the scene reported that Mendenhall was the shooter. When Mendenhall refused to cooperate in the

investigation, a warrant was obtained and he was arrested for murder on the same day of the shooting, which interestingly was Friday the thirteenth. It was subsequently determined that another person shot the deceased. Mendenhall argued that the trial court released him for lack of probable cause. The Fifth Circuit held that this was not determinative of the reasonableness of the officer's actions for purposes of the civil rights action. In their analysis, the Court was "mindful of the notion that 'probable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.'" Citing *Illinois v. Gates,* 462 U.S. 213, 232 (1983). The Court specifically noted that in determining qualified immunity, the issue is not whether probable cause on the facts actually existed at the time of the arrest. Rather the issue is whether, given all of the circumstances a reasonable officer could have believed, there was a fair probability that the suspect committed the crime charged. Qualified immunity was found in *Mendenhall* based on the following undisputed facts: the investigating deputies spoke with two witnesses, who refused to give their names, but affirmatively identified Officer Mendenhall as the shooter; another witness, Pamela Neal in her handwritten statement, placed Officer Mendenhall at the scene with a weapon; medical personnel reported Mendenhall's uncanny knowledge of the wound and he picked up the deceased's gun and then replaced it in the same place on the ground; Mendenhall left the scene without giving a statement to officers; investigating deputies obtained two spent nine-millimeter shell casings from the scene; Mendenhall possessed such a caliber weapon; and Mendenhall refused to cooperate or answer questions concerning the shooting. Even though the witnesses later clarified that they did not actually see the shooting, and circumstances led them to believe he was the shooter, the Fifth Circuit concluded that it was not unreasonable for an officer to believe he had probable cause to arrest the suspect for murder. *Id* at 237.

Similarly, here there were numerous facts and evidence previously cited that establish the reasonableness of the officers' belief that Plaintiffs committed the murder of Cruz. After reviewing the facts gathered by investigating officers on this criminal case, which would include lead investigator Ranger Abreo, it is the opinion of Ranger Whitman that any reasonable law enforcement officer presented with the same or similar facts would have sufficient probable cause to arrest the Plaintiffs for the murder of Cruz. Again, Ranger McCord, Ranger Yeager and Officer Parrott all agree that there was probable cause to arrest Plaintiffs for murder. Given the totality of the circumstances in this case, expert Ranger Whitman opines that Abreo's actions were objectively reasonable.

Regarding Plaintiffs' claim that Abreo coerced Mary Wood, Ranger Whitman found no evidence to suggest that Abreo coerced this witness. Wood testified in her deposition that Abreo was professional to her at all times; specifically denied that Abreo coerced her to do anything; and denied that Abreo did anything wrong toward her. She also stated that he did not force her to say anything. Wood also testified in her deposition that she told the truth each time that she testified (Grand Jury and both criminal trials). In Ranger Whitman's opinion, Abreo did not coerce Wood or any other witness. There simply is not evidence of coercion by this witness.

Plaintiffs also allege that Abreo somehow forced Wood to say they stopped at the Jolly Roger by driving Wood by the Jolly Roger. In Ranger Whitman's opinion Abreo did not violate any standard police procedure by driving Mary Wood by the murder scene to help recollect her memory. In her testimony, Wood stated that she recognized the crime scene without being prompted or directed by Abreo. In Ranger Whitman's experience it is not uncommon for investigators to transport witnesses and/or suspects to a crime scene in order to obtain additional viable information

for their case investigation. It was reasonable for Abreo to drive Wood by the Jolly Roger. Wood was clear in her testimony that she recognized the store on her own when they drove past it and Abreo did not point out the store or prompt her to select the store.

In Ranger Whitman's opinion, the remark by District Attorney Mark Yarbrough in his notes that Abreo lied to him does not affect the existence of probable cause to arrest Plaintiffs. After reviewing both Yarbrough's testimony and Abreo's testimony and reports, it is apparent that Yarbrough misunderstood the facts and evidence. Abreo testified that he advised Yarbrough that Wood said she was at the Jolly Roger with the two defendants/plaintiffs in question. Abreo did not tell Yarbrough that Wood said she and plaintiffs stopped at the Jolly Roger. When Yarbrough reviewed Wood's affidavit given to Ranger Caver, she did not specify the Jolly Roger, but did admit to stopping at a store with yellow lights. Yarbrough did not know that Wood's conversation with Abreo was recorded wherein she admitted to stopping at the Jolly Roger. Wood has admitted that the transcription of their conversation was accurate. Yarbrough subsequently saw the transcription and realized there was no lie.

In Ranger Whitman's opinion neither Abreo, Ponce, or Yarbrough conspired to violate Plaintiffs' civil rights regarding the identification of Sifuentes by Ayala. In reviewing prior testimony and police reports, there was no evidence that Abreo or Yarbrough were at the Littlefield police station at the time Ponce showed Ayala the photograph of Sifuentes. Abreo testified that showing the single photograph to Ayala had no bearing on his decision to continue the investigation, due to the additional evidence he had obtained during this investigation, which supported Ayala's identification (composite of Ramirez bearing likeness to Ramirez and Wood placing the suspects at the scene). Abreo was reasonable to rely on Ayala as a witness because there was other evidence to

show she was there and saw the suspects. Some of the additional evidence in support included Wood's confirmation that the threesome stopped at the Jolly Roger after leaving the club; the similarity of Cruz' description of the suspects, Plaintiffs were found within 10-11 miles of the murder scene 47 minutes after the murder, Plaintiffs were in a gold car, Cruz reported that suspects were in a gold car, and Janie Ramirez reported that Sifuentes was in Littlefield the night of the murder and that he matched the description of one of the suspects. Additionally, Ayala was able to construct a composite of Ramirez, which was very similar to Ramirez, in Ranger Whitman's opinion.

In Ranger Whitman's opinion, Abreo's arrest of Plaintiffs was objectively reasonable because he had adequate probable cause to believe Plaintiffs murdered Cruz. The evidence supporting Abreo's belief that there was probable cause to arrest includes:

1. The dying declarations made by victim Cruz to witnesses at the scene as well as to a police officer. The responding police officer the victim say the perpetrators were two Hispanic males, one with long hair, and the other with short hair, about 18 to 20 years old, one wore shades. One witness at the scene stated she overheard the victim say "Man - Boy," which would lead an investigator to surmise that one suspect was younger than the other suspect. The victim also told the responding officer that the suspects were in a "gold" colored car.

2. Witness Ayala stated that she was at the crime scene at approximately 2:00 a.m. on the day of the murder and witnessed two Hispanic males acting suspicious in the store prior to the murder. She provided a description of the two Hispanic male subjects similar to the description provided by victim Cruz. On the day of the murder, Janie Ramirez contacted the police and reported that Alberto Sifuentes matched the description of one of the suspects. Both Ayala and Janie Ramirez voluntarily notified law enforcement about what they knew and saw regarding the case.

3. After further investigation, Mary Wood provided Abreo with information which revealed she was at the Jolly Roger with both Sifuentes and Ramirez after having returned from Lubbock on the day and approximate time of the murder. Woods, Sifuentes, and Ramirez were stopped by law enforcement officers within 47 minutes after the murder, approximately 10-11 miles from the scene of the crime driving a gold vehicle.

4. During an interview conducted by Ranger Yeager, Ramirez stated, "Why would we steal three or four hundred dollars from anybody because I make $500.00 a week". The amount taken from the Jolly Roger was not known at that time to Abreo. Subsequently, Abreo discovered the amount taken was $292.00.

5. A search was conducted of Ramirez' residence and officers seized a gun and ammunition of the same caliber of spent casings found at the crime scene. Additionally they located a white sack in a nearby dumpster which was similar to that used at the Jolly Roger.

6. During a subsequent search of Ramirez' vehicle at Sifuentes' residence, a roll of nickels was located. Abreo suspected that the nickels could have been taken in the robbery.

In Ranger Whitman's opinion, based on his past experience, knowledge, and training, a reasonable and prudent officer, under the same or similar circumstances would have concluded that there was probable cause to arrest Plaintiffs and would have been reasonable in arresting plaintiffs based on the information Abreo had at the time of the arrest. Given the totality of the circumstances in this investigation, Abreo acted as a reasonable and prudent officer would have under the same or similar circumstances. Additionally, given the totality of the circumstances, it is Ranger Whitman's opinion, based on his extensive experience, knowledge and training as a criminal investigator, that

Abreo had sufficient probable cause to present this case to the District Attorney to initiate prosecution.

In Ranger Whitman's opinion Abreo acted as a reasonable and prudent police officer would have under the same or similar circumstances when he continued to rely on Ayala as a witness even after he learned of the procedure used by Officer Ponce with Ayala in identifying Sifuentes as a suspect. The identification of Sifuentes was not solely relied upon by Abreo. There was additional evidence obtained during the investigation corroborating the identification and establishing Ayala was at the Jolly Roger at the time she claims and that she saw the suspects.

After reviewing the witness statements and Abreo's case reports, Ranger Whitman opined that it appeared that Abreo erred in his report about the descriptions given by the witnesses of the suspects. He mistakenly combined some description information from several witnesses and stated that the descriptions were identical. However, although not identical, the information provided by those witnesses was similar and should not be discounted. There is no evidence that this was anything other than an unintentional error, which did not affect the probable cause to arrest. It is clear from reviewing the statements of the witnesses that the descriptions were not identical. Given that Abreo produced the statements of the witnesses, it would have been evident to other officers and the District Attorney that the descriptions were not identical. Abreo's statement in his report that the descriptions were identical was not important to establishing probable cause to arrest or prosecute. There was sufficient probable cause established by the other evidence in the case. In Ranger Whitman's opinion, this appears to be a mistake on Ranger Abreo's part. Ranger Whitman believes all officers will agree that no investigation is perfect .

After his review of witness statements, court testimony, and case reports, in Ranger Whitman's opinion, there is no evidence that Abreo concealed exculpatory evidence. Ranger Whitman does not believe that the tennis shoes located at Ramirez' house by Ranger Yeager were exculpatory evidence. The Lubbock DPS laboratory conducted a comparison check of the shoe print located at the scene against the shoes located at Ramirez' house and found no-match. It was never determined that the shoe print on the counter was made by the assailants. Moreover, Plaintiff Ramirez testified that the tennis shoes were not his or his son's shoes. If the shoes did not belong to Ramirez, then they would not have been evidence either for or against him.

In Ranger Whitman's opinion, Abreo was reasonable in continuing to rely on Wood even though she had consumed alcohol. It is common knowledge in the police community and it has been Ranger Whitman's experience that many violent crimes involve witnesses and suspects under the influence of either alcohol or drugs. In this case, there was no dispute that Mary Wood had consumed alcohol on the day she was with Plaintiffs. However, in reviewing Wood's testimony and police reports, the officers who detained her and Plaintiffs on the morning of the murder did not believe Wood was highly intoxicated. The reports indicate that Wood was able to get out of the car and carry on a conversation with officer Boleyn. Wood also gave witness statements and testimony that showed she had memory of many events that occurred throughout the night and morning of the murder. Her testimony was corroborated by other witness statements in this case, which shows the accuracy of her memory and indicates that she was not intoxicated to the extent that she could not recall at least some of the events that occurred the night and morning of the murder.

Before Abreo arrested Plaintiffs, he concluded that they matched the description given by Cruz and Wood. Although Abreo erred by combining the description information from several

witnesses and stating that the descriptions were identical, the information provided by the witnesses was similar and generally matched the description of Plaintiffs. Ranger Whitman opines that a reasonable and prudent police officer, under the same or similar circumstances could have and would have believed that the descriptions of the suspects given by Cruz and Ayala were similar.

In Ranger Whitman's opinion, Ranger Abreo did not act with malice. His actions were within the course and scope of his employment as a Texas peace officer. Multiple witnesses testified that Abreo was professional with them during the course of his investigation. No witness testified that Abreo coerced them to testify falsely or that he treated them in a unprofessional manner. There were numerous facts and evidence from various sources supporting Abreo's belief that Plaintiffs committed the murder.

Although Plaintiffs have been released from prison based on ineffective assistance of counsel, that does not suggest that they are innocent of the charge. Given the totality of the circumstances in this case and based on Ranger Whitman's past experience, knowledge, and training as a criminal investigator, he is not able to eliminate the Plaintiffs as subjects of interest in the murder of Ms. Cruz.

Based on his experience and training as a law enforcement officer and his review of the evidence, in Ranger Whitman's opinion Abreo acted as a reasonable and prudent police officer would have under the same or similar circumstances in believing he had probable cause to arrest Plaintiffs for murder. It is also Ranger Whitman's opinion that Ranger Abreo did not violate the Constitutional rights of Plaintiffs.

"An officer's entitlement to qualified immunity based on probable cause is difficult for a plaintiff to disturb." *Morris v. Dillard Department Stores, Inc.*, 277 F.3d 743, 753-754 (5thCir.

2001). "A plaintiff must clear a significant hurdle to defeat qualified immunity. '[T]here must not even arguably be probable cause for the search and arrest for immunity to be lost.' That is, if a reasonable officer could have concluded that there was probable cause upon the facts then available to him, qualified immunity will apply." *Brown v. Lyford*, 243 F.3d 185, 190 (5th Cir. 2001) (internal citations omitted).

An officer is immune from suit even if it is later determined that probable cause did not exist. *Gibson*,44 F.3d at 277; *Babb*,33 F.3d at 477. "[I]f officers of reasonable competence *could* disagree on whether or not there was probable cause to arrest a defendant, immunity should be recognized." *Gibson v. Rich*, 44 F.3d 274, 277 (5thCir. 1995). The Court must review "the police officer's decision to seek an arrest warrant, by evaluating the facts available to the officer at the time he submitted the application." *Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 404 (5thCir. 1989). "[B]ecause the test for immunity is solely one of objective reasonableness, any 'subjective intent, motive, or even outright animus [is] irrelevant in a determination of qualified immunity based on arguable probable cause to arrest, just as an officer's good intent is irrelevant when he contravenes settled law.'" *Morris*, 277 F.3d at 755 (*quoting Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000) (citations omitted)).

Additionally, Abreo is entitled to rely on evidence and information provided to him by other law enforcement officers, even if the evidence turns out to be false or incorrect. "[W]here a police officer makes an arrest on the basis of oral statements by fellow officers, an officer will be entitled to qualified immunity from liability in a civil rights suit for unlawful arrest provided it was objectively reasonable for him to believe, on the basis of the statements, that probable cause for the arrest existed." *Deville*, 567 F.3d at 166 (*quoting Rogers v. Powell*, 120 F.3d 446, 455 (3rd Cir.

1997)). "It is established law within this circuit and others that an officer not present at the time of an alleged crime may form probable cause sufficient to entitle that officer to qualified immunity where the officer interviews an eyewitness to the alleged crime." *Morris*, 277 F.3d at 754.

Plaintiffs complain in part that the information relied on by Ranger Abreo was incorrect. However, his is entitled to rely on information and evidence provided to them by citizens and will still be entitled to the defense of qualified immunity, even if the information turns out to be incorrect. "[W]hen an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case." *United States v. Fooladi*, 703 F.2d 180, 183 (5th Cir. 1983). Eyewitnesses "are seldom involved with the miscreants or the crime. Eyewitnesses by definition are not passing along idle rumor, for they either have been the victims of the crime or have otherwise seen some portion of it." *Unites States v. Bell*, 457 F.2d 1231, 1238-39 (5th Cir. 1972). Abreo established that he was reasonable in relying on the information received from the various witnesses. Further supporting this fact are Ranger McCord, Ranger Yeager, and Officer Parrott who either worked on the case with Abreo or reviewed the case after Abreo transferred. All officers agreed with Abreo's conclusion that there was probable cause to arrest Plaintiffs.

D. Plaintiffs' State Law Claim of Malicious Prosecution is Barred by Official Immunity and Probable Cause

Plaintiffs assert a claim under state law for malicious prosecution. Abreo is immune under official immunity, which is a common-law defense to suit and personal liability provided to governmental employees on claims brought under state law. *Campbell v. Jones,* 153 Tex. 101, 264 S.W.2d 425, 427 (1954). "Police officers are entitled to official immunity from suits arising out of

(1) performance of discretionary duties (2) in good faith as long as they are (3) acting within their authority. *Mowbray v. Cameron County, Texas*, 274 F.3d 269, 280 (5th Cir. 2001); *See also Wren v. Towe*, 130 F.3d 1154, 1160 (5th Cir. 1997). The defense of official immunity applies to police officers accused of false imprisonment. *Davis v. Klevenhagen,* 971 S.W.2d 111, 118 (Tex.App.--Houston[14th Dist.], 1988 *no writ)*; *Lang v. City of Nacogdoches*, 942 S.W.2d 752, 763 (Tex.App.--Tyler 1997, writ denied). "Like qualified immunity, official immunity 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Mowbray*, 274 F.3d at 280 (*quoting City of Lancaster v. Chambers,* 883 S.W.2d 650 (Tex. 1994).

Abreo's actions were discretionary and within his authority. "Under Texas law, an officer's investigation of a crime and arrest of a suspect are considered discretionary duties within police authority." *Mowbray*, 274 F.3d at 280. There is no doubt that the actions of Abreo in conducting an investigation constitute discretionary acts within police authority.

Abreo was acting in good faith when investigating the Cruz murder. "Texas law judges an officer's good faith under the same test federal courts apply for qualified immunity determinations under § 1983." *Mowbray*, 274 F.3d at 280. "[O]fficial immunity is substantially the same as federal qualified immunity law." *Wren* at 1160. As Abreo is entitled to qualified immunity, he his entitled to official immunity for Plaintiffs' state law claims. Abreo is entitled to dismissal of all state claims based on his establishment of all the elements of official immunity. Moreover, where a plaintiff has been detained as a result of a warrant issued for his arrest following his indictment by a grand jury and there is no evidence that he has been detained without authority of law, he is not entitled to recover for false imprisonment. *Tandy Corporation v. McGregor*, 527 S.W.2d 246 (Tex.App.–Texarkana 1975).

Plaintiffs' malicious prosecution claim is further barred by establishment of probable cause. A plaintiff in a malicious criminal prosecution claim must establish:

1. the commencement of a criminal prosecution against the plaintiff;
2. causation (initiation or procurement) of the action by the defendant;
3. termination of the prosecution in the plaintiff's favor;
4. the plaintiff's innocence;
5. the absence of probable cause for the proceedings;
6. malice in filing the charge; and
7. damage to the plaintiff.

Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex.,1997). Abreo has established probable cause for the arrest as discussed above. Therefore, Plaintiffs' claim for malicious prosecution is barred.

E. Injunctive Relief

Lastly, Plaintiffs seek injunctive relief against Abreo [D.E. 1, pp. 71-72]. The purpose of an injunction is to deter future behavior. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990). However, Plaintiffs do not have standing to assert claims for injunctive relief. *See Geiger v. Jowers*, 404 F.3d 371, 375 (5thCir. 2005). To "satisfy the threshold requirement imposed by Art. III of the Constitution," a plaintiff seeking injunctive relief must "show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged ... conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). "[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564

(1992). Plaintiffs do not have any continuing present adverse effects that would give them standing to allow the Court to order the requested injunctive relief.

Abreo is no longer employed by the Texas Department of Public Safety, as Plaintiffs acknowledged in their Complaint. He is retired. A suit for injunctive relief can only be brought against the agency official who has the authority to implement a court directive. *Ruiz v. Johnson*, 178 F.3d 385 (5th Cir. 1999). As Abreo is not employed by the Department of Public Safety, he does not have the ability to implement any directive to which injunctive relief might impose. Plaintiffs' request for injunctive relief must be dismissed.

XII. CONCLUSION

If a plaintiff fails to state a constitutional claim, then the government official is entitled to qualified immunity. *Hampton v. Oktibbeha County Sheriff Dept*.,480 F.3d 358, 363 (5th Cir. 2007). Here, Ranger Abreo has demonstrated that he is entitled to the defense of qualified and official immunity because Plaintiffs failed to state a valid claim overcoming Abreo's immunity, and the claims are barred by the statute of limitations. Abreo also established the existence of probable cause for the arrest of Plaintiffs, or at the very least established that a reasonable police officer in Abreo's position could have believed that probable cause existed for the arrest of Plaintiffs.

Ranger Abreo respectfully asks this Honorable Court to dismiss all claims asserted against him based upon his entitlement to qualified immunity and official immunity, failure to state a claim, or as barred by the statute of limitations and any other relief to which he is entitled to receive.

Respectfully submitted,

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NOTICE OF ELECTRONIC FILING

I, Karen D. Matlock, Assistant General of Texas, do hereby certify that I have electronically submitted for filing, a true and correct copy of the above an foregoing in accordance with the Electronic Case Files System of the Northern District of Texas, on this the 14th day of January, 2011.

/s/ Karen D. Matlock
KAREN D. MATLOCK
Assistant Attorney General

CERTIFICATE OF SERVICE

I, KAREN D. MATLOCK, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Defendant Abreo's Brief in Support of His Second Motion for Summary Judgment** has been served to Plaintiffs only via certified mail, return receipt requested, as well as to all counsel of record via electronic filing notice on this the 14th day of January, 2011, addressed to:

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