

Pro Se 15 (Rev. 12/16) Complaint for Violation of Civil Rights (Non-Prisoner)

FILED

UNITED STATES DISTRICT COURT

2023 AUG -4 PM 3:07  
CLERK, US DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY CR

for the

Western District of Texas

Austin Division

1:23 CV 00920 DII

Case No.

(to be filled in by the Clerk's Office)

Derek Samuel Fowler

Plaintiff(s)

(Write the full name of each plaintiff who is filing this complaint. If the names of all the plaintiffs cannot fit in the space above, please write "see attached" in the space and attach an additional page with the full list of names.)

-v-

Jury Trial: (check one)  Yes  No

Edward Jaramillo #8408

Defendant(s)

(Write the full name of each defendant who is being sued. If the names of all the defendants cannot fit in the space above, please write "see attached" in the space and attach an additional page with the full list of names. Do not include addresses here.)

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS  
(Non-Prisoner Complaint)

NOTICE

Federal Rules of Civil Procedure 5.2 addresses the privacy and security concerns resulting from public access to electronic court files. Under this rule, papers filed with the court should not contain: an individual's full social security number or full birth date; the full name of a person known to be a minor; or a complete financial account number. A filing may include only: the last four digits of a social security number; the year of an individual's birth; a minor's initials; and the last four digits of a financial account number.

Except as noted in this form, plaintiff need not send exhibits, affidavits, grievance or witness statements, or any other materials to the Clerk's Office with this complaint.

In order for your complaint to be filed, it must be accompanied by the filing fee or an application to proceed in forma pauperis.

Pro Se 15 (Rev. 12/16) Complaint for Violation of Civil Rights (Non-Prisoner)

**I. The Parties to This Complaint**

**A. The Plaintiff(s)**

Provide the information below for each plaintiff named in the complaint. Attach additional pages if needed.

Name Derek Samuel Fowler  
 Address 6803 N. NAVARRO unit 181  
Victoria TX 77904  
City State Zip Code  
 County Victoria  
 Telephone Number 512-947-3979  
 E-Mail Address Derek fowler 712@gmail.com

**B. The Defendant(s)**

Derek fowler 712@gmail.com

Provide the information below for each defendant named in the complaint, whether the defendant is an individual, a government agency, an organization, or a corporation. For an individual defendant, include the person's job or title (if known) and check whether you are bringing this complaint against them in their individual capacity or official capacity, or both. Attach additional pages if needed.

Defendant No. 1

Name Edward Jaramillo  
 Job or Title (if known) Austin police officer  
 Address 715 E. 8th St  
Austin TX 78701  
City State Zip Code  
 County Travis  
 Telephone Number \_\_\_\_\_  
 E-Mail Address (if known) \_\_\_\_\_

Individual capacity  Official capacity

Defendant No. 2

Name \_\_\_\_\_  
 Job or Title (if known) \_\_\_\_\_  
 Address \_\_\_\_\_  
City State Zip Code  
 County \_\_\_\_\_  
 Telephone Number \_\_\_\_\_  
 E-Mail Address (if known) \_\_\_\_\_

Individual capacity  Official capacity



- D. Section 1983 allows defendants to be found liable only when they have acted “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.” 42 U.S.C. § 1983. If you are suing under section 1983, explain how each defendant acted under color of state or local law. If you are suing under *Bivens*, explain how each defendant acted under color of federal law. Attach additional pages if needed.

### III. Statement of Claim

State as briefly as possible the facts of your case. Describe how each defendant was personally involved in the alleged wrongful action, along with the dates and locations of all relevant events. You may wish to include further details such as the names of other persons involved in the events giving rise to your claims. Do not cite any cases or statutes. If more than one claim is asserted, number each claim and write a short and plain statement of each claim in a separate paragraph. Attach additional pages if needed.

- A. Where did the events giving rise to your claim(s) occur?

302 E. 6<sup>th</sup> St. Austin, Texas

- B. What date and approximate time did the events giving rise to your claim(s) occur?

September 18<sup>th</sup>, 2021 12:53 A.M.

- C. What are the facts underlying your claim(s)? (For example: What happened to you? Who did what? Was anyone else involved? Who else saw what happened?)

on September 18<sup>th</sup>, 2021 officer Edward Jaramillo delivered several closed fist punches to my face causing a broken orbital socket and bloody nose requiring surgery to remedy. EMS and other officers on the scene saw the incident occur.

**IV. Injuries**

If you sustained injuries related to the events alleged above, describe your injuries and state what medical treatment, if any, you required and did or did not receive.

Under went facial re constructive surgery which was necessary to repair my Orbital eye socket fractured, nose fracture, permanent nerve damage to eyelid, bloody nose,

**V. Relief**

State briefly what you want the court to do for you. Make no legal arguments. Do not cite any cases or statutes. If requesting money damages, include the amounts of any actual damages and/or punitive damages claimed for the acts alleged. Explain the basis for these claims.

I request from the court monetary relief compensation in the amount of \$5,000,000 for reimbursement of medical bill cost, past and future pain and suffering, permanent disfigurement and nerve damage, violation of my civil rights, punitive damages to punish and send a strong message to hopefully deter future acts and create policy change to deter this type of conduct in future to other potential victims, and loss of wages, Emotional distress.

**VI. Certification and Closing**

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

**A. For Parties Without an Attorney**

I agree to provide the Clerk’s Office with any changes to my address where case-related papers may be served. I understand that my failure to keep a current address on file with the Clerk’s Office may result in the dismissal of my case.

Date of signing: 07/27/2023

Signature of Plaintiff *Derek Samuel Fowler*  
Printed Name of Plaintiff Derek Samuel Fowler

**B. For Attorneys**

Date of signing: \_\_\_\_\_

Signature of Attorney \_\_\_\_\_  
Printed Name of Attorney \_\_\_\_\_  
Bar Number \_\_\_\_\_  
Name of Law Firm \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_  
*City State Zip Code*  
Telephone Number \_\_\_\_\_  
E-mail Address \_\_\_\_\_

Generated: Aug 4, 2023 3:01PM

Page 1/1



**U.S. District Court**

**Texas Western - Austin**

Receipt Date: Aug 4, 2023 3:01PM

Derek Fowler  
6803 N. Navarro, Unit #181  
Victoria, TX 77904

Rcpt. No: 1118

Trans. Date: Aug 4, 2023 3:01PM

Cashier ID: #CR

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
200	Civil Filing Fee- Non-Prisoner		1	402.00	402.00

CD	Tender			Amt
MO	Money Order	#0008201751	08/4/2023	\$402.00
Total Due Prior to Payment:				\$402.00
Total Tendered:				\$402.00
Total Cash Received:				\$0.00
Cash Change Amount:				\$0.00

**Comments:** 1:23cv920 Fowler v. Jaramillo

Clerk, U.S. District Court - Austin Division - 501 West Fifth Street, Suite 1100, Austin, TX 78701 - (512) 916-5896 - [www.txwd.uscourts.gov](http://www.txwd.uscourts.gov)

JS 44 (Rev. 06/17)

**CIVIL COVER SHEET**

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

<p><b>I. (a) PLAINTIFFS</b>  <span style="font-size: 1.2em; color: blue;">Derek Samuel Fowler</span></p> <p><b>(b) County of Residence of First Listed Plaintiff</b> <span style="color: blue;">Victoria</span>  <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p><b>(c) Attorneys (Firm Name, Address, and Telephone Number)</b></p>	<p><b>DEFENDANTS</b>  <span style="font-size: 1.2em; color: blue;">Edward Jaramillo</span>  <span style="font-size: 1.2em; color: blue;">Travis</span></p> <p>County of Residence of First Listed Defendant <span style="color: blue;">Travis</span>  <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys <i>(If Known)</i></p>
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<p><b>II. BASIS OF JURISDICTION</b> <i>(Place an "X" in One Box Only)</i></p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i></p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i></p>	<p><b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i></p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td style="text-align: center;"><b>PTF</b></td> <td style="text-align: center;"><b>DEF</b></td> <td></td> <td style="text-align: center;"><b>PTF</b></td> <td style="text-align: center;"><b>DEF</b></td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		<b>PTF</b>	<b>DEF</b>		<b>PTF</b>	<b>DEF</b>	Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

**IV. NATURE OF SUIT** *(Place an "X" in One Box Only)* Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p><b>PERSONAL INJURY</b></p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<p><b>PERSONAL INJURY</b></p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p><b>LABOR</b></p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <p><b>LABOR</b></p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <p><b>IMMIGRATION</b></p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p><b>PROPERTY RIGHTS</b></p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <p><b>SOCIAL SECURITY</b></p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p><b>FEDERAL TAX SUITS</b></p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations Act <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

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

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

**VI. CAUSE OF ACTION**

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

Brief description of cause: Defendant punched me several times injuring me requiring surgery.

**VII. REQUESTED IN COMPLAINT:**

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

DEMAND \$ 5,000,000

CHECK YES only if demanded in complaint:  
 JURY DEMAND:  Yes  No

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

JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE 08/04/2023 SIGNATURE OF ATTORNEY OF RECORD \_\_\_\_\_

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**DEREK SAMUEL FOWLER,**  
*Plaintiff,*

v.

**EDWARD JARAMILLO #8408,**  
*Defendant.*

§  
§  
§  
§  
§  
§  
§

**CIVIL ACTION NO. 1:23-cv-920**

**DEFENDANT OFFICER’S ORIGINAL ANSWER AND AFFIRMATIVE DEFENSES**

TO THE HONORABLE JUDGE PRESIDING:

Officer Edward Jaramillo of the Austin Police Department, (“Defendant Officer”) files this Answer denying all claims, and asserting Affirmative Defenses to Plaintiff’s Complaint [DOC 1].

Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendants respectfully show the Court the following:

**ANSWER**

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant Officer responds to each of the specific averments in Plaintiff’s Complaint as set forth below. To the extent that Defendant Officer does not address a specific averment made by Plaintiff, Defendant expressly denies that averment. <sup>1</sup>

**COMPLAINT FOR VIOLATION OF CIVIL RIGHTS  
(Non-Prisoner Complaint)**

With regard to the NOTICE and other pre-printed official language contained within the subparagraphs and subheadings included under this section, no response is required, as this portion of the COMPLAINT does not contain any factual or liability allegations. To the extent any response is required,

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<sup>1</sup> Paragraph numbers in Defendant’s Answer correspond to the paragraphs of the Complaint For Violation of Civil Rights (Non-Prisoner Complaint) Pro Se 15.

the Defendant denies the allegations, and further denies that Plaintiff has any valid or supportable basis for any recovery of any type or nature.

### **I. THE PARTIES TO THIS COMPLAINT**

#### A. The Plaintiff(s):

With regard to this section of the pre-printed official form, no response is required, as this portion of the NON-PRISONER CIVIL RIGHTS COMPLAINT does not contain any factual or liability allegations. To the extent any response is required, Defendant admits that Derek Samuel Fowler is the named plaintiff in this case. Defendant is without sufficient knowledge to form a belief as to Plaintiff's present address. Any remaining allegations are denied. Defendants further expressly deny that Plaintiff has any valid or supportable basis for any recovery of any type or nature.

#### B. Defendant(s):

##### Defendant No. 1:

Defendant Edward Jaramillo admits that at all relevant times, he was an officer with the Austin Police Department. Defendant further expressly denies that Plaintiff has any valid or supportable basis for any recovery of any type or nature.

### **II. BASIS OF JURISDICTION**

With regard to this section of the pre-printed official form, no response is required, as this portion of the COMPLAINT does not contain any factual or liability allegations. To the extent any response is required, the Defendant admits that Plaintiff is seeking relief under 42 U.S.C. Section 1983 and the Fourth Amendment but denies that Plaintiff is entitled to relief under those provisions.

### **III. STATEMENT OF CLAIM**

- A. Defendant officer admits that the Austin Police Department responded to and provided law enforcement support at or near the property address identified.
- B. Defendant officer admits that he and other APD officers were flagged down and responded to a request for assistance at approximately 12:53 a.m. on September 18,

2021.

- C. Defendant officer admits that, in response to Plaintiff assuming a threatening stance, he struck Plaintiff in the face more than once and that EMS and other APD officers were on scene. Defendant officer denies the remainder of the allegations in Paragraph C.

#### **IV. INJURIES**

Defendant officer admits that Plaintiff appeared to have a bloody nose. Defendant officer is without sufficient information as to the remaining allegations in Paragraph IV and therefore denies the same.

#### **V. RELIEF**

With regard to this section of the pre-printed official form, Defendant officer denies liability for the damages sought in Paragraph V. of the pre-printed form and denies Plaintiff is entitled to the relief requested.

#### **AFFIRMATIVE DEFENSES**

1. Defendant officer denies any deprivation under color of statute, ordinance, custom, or abuses of any rights, privileges, or immunities secured to the decedent by the United States Constitution, state law, or 42 U.S.C. § 1983, *et seq.*
2. Defendant officer hereby invokes the doctrine of Qualified Immunity and Official Immunity. Defendant officer discharged his respective obligations and public duties in good faith, and would show that his respective actions were objectively reasonable in light of the law and the information possessed at that time.
3. The incident in question and any claimed action resulting harm to Plaintiff was caused or contributed to by Plaintiff's own conduct.
4. Defendant pleads that he had legal justification for each and every action taken by them

relating to this incident.

5. Defendants assert the affirmative defense that Plaintiffs failed to mitigate damages, if any, and assert this failure to mitigate as both an affirmative defense and as a reduction in the damage amount, if any, due Plaintiff.
6. To the extent Defendants did not address a specific averment made by Plaintiff in his Amended Complaint, Defendants expressly deny all such averments.

**DEFENDANT'S PRAYER**

Defendant officer prays that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award any additional relief to which he is entitled under law or equity.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY  
MEGHAN L. RILEY, CHIEF OF LITIGATION

/s/ Meghan L. Riley

Meghan L. Riley

Assistant City Attorney

State Bar No. 24049373

[meghan.riley@austintexas.gov](mailto:meghan.riley@austintexas.gov)

City of Austin

P. O. Box 1546

Austin, Texas 78767-1546

Telephone (512) 974-2458

Facsimile (512) 974-1311

**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Texas Rules of Federal Procedure, this 11th day of September, 2023.

**Via First Class Regular Mail and Certified Mail:**

Derek Samuel Fowler (pro se)

6803 N. Navarro, Unit 181

Victoria, TX 77904

[Derekfower712@gmail.com](mailto:Derekfower712@gmail.com)

Telephone: (512) 947-3979

**PLAINTIFF PRO SE**

/s/ Meghan L. Riley

MEGHAN L. RILEY

Mail body:

I, Derek Fowler, had sent some of the medical records regarding my claim to the city when I gave them notice through the website. The entirety of the records will be disclosed in the discovery phase. I was not actively resisting arrest or causing a safety threat to Jaramillo at the time he punched me and I can show the court the body camera footage of the incident.

Next, I will address the defendants affirmative defense of qualified immunity. The standard for dismissing a complaint under Rule 12(c) is the same as a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312–13 (5th Cir. 2002). The standard requires the complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

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2023 SEP 28 PM 1:11  
WESTERN DISTRICT COURT  
OK

To overcome the officers qualified immunity defense, a plaintiff must allege facts showing that the officer (1) "violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). Because the officer invoked a qualified immunity defense, the burden shifts to the plaintiff to show the officer violated his clearly established rights. *Cass v. City of Abilene*, 814 F.3d 721, 729, 732–33 (5th Cir. 2016). A right is clearly established when it is defined "with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct." *McClendon v. City of Columbia*, 305 F.3d 314,331 (5th Cir. 2002). The court must determine "whether the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742, 131 S.Ct. 2074 (emphasis added). So, although a plaintiff does not need to identify a case "directly on point" to meet this burden, he must identify caselaw that "place[s] the statutory or constitutional question beyond debate." *Id.* at 741, 131 S.Ct. 2074.

I can identify caselaw that specifically addresses the conduct in question through a case directly on point that is extremely similar in nature. It's included in this response with highlighted sections. The case outlines all elements and shows that this particular conduct is not protected under the qualified immunity doctrine. Therefore, I ask the court to deny the defendants motion for summary judgment and to allow the case to proceed.

Respectfully submitted,  
Derek Samuel Fowler  
09/27/2023

Civil Action No. 4:18-cv-00340-P

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

## Vasquez v. Landon

Decided Feb 25, 2020

Civil Action No. 4:18-cv-00340-P

02-25-2020

JOSE VASQUEZ, Plaintiff, v. JUSTIN LANDON  
et al., Defendants.Mark T. Pittman UNITED STATES DISTRICT  
JUDGE

### MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Justin Landon's Motion for Summary Judgment (ECF No. 52), in which Officer Landon seeks summary judgment on the issue of qualified immunity—a defense asserted in response to Plaintiff Jose Vasquez's excessive-force claim. Also before the Court are Vasquez's Response (ECF No. 65) and Officer Landon's Reply (ECF No. 66). Having considered the motion, briefing, and applicable law, the Court finds that Officer Landon's Motion for Summary Judgment should be and hereby is **DENIED**.

### BODY CAMERA FOOTAGE

At the outset, the Court highlights the significance of the body camera footage submitted by Officer Landon. *See* ECF No. 55. In order to grant summary judgment, the Court must find that no reasonable juror could find that Officer Landon violated Vasquez's constitutional rights. Officer Landon characterizes the strike of Vasquez as a "distractory slap," and Officer Landon claims it was acceptable conduct given the \*2 situation. Upon viewing the video alongside the other summary judgment evidence, it is not clear to the Court that Officer Landon's conduct constituted an appropriate "distractory slap" and was not an

excessive use of force. Rather, the Court believes a jury needs to view this footage and other relevant evidence and live testimony to determine for themselves whether Vasquez's constitutional rights were violated. The presence of the fact issue created by the body camera footage is sufficient to deny summary judgment.

### BACKGROUND

#### A. Officer Landon's Account of Arrest

Officer Landon begins his factual account by introducing himself and the call that led to him being at the scene of the incident in question. Def.'s MSJ Br. at 3, ECF No. 53. The call happened at approximately 12:24 a.m. reporting that Vasquez was threatening his neighbor with a knife and Officer Landon was dispatched to the scene. Def.'s MSJ Appx., (Landon Decl.) at 1-2, ECF No. 54. Officer Landon then takes a break from describing this incident to describe another encounter that he had with Vasquez a month earlier as well as to recount Vasquez's day leading up to the arrest. *See* Def.'s MSJ Br. at 3-6.<sup>1</sup>

<sup>1</sup> The Court acknowledges the impact that an encounter a month prior may have on a police officer approaching a hostile situation. However, the relevance of Vasquez's activities during the day prior to the incident is not apparent to the Court especially because Landon did not learn of those things until depositions were being taken in this case. -----

Officer Landon was the first officer to arrive on scene, shortly followed by two other officers. Def.'s MSJ Appx. at 1-2. Officer Landon approached Vasquez at the bed of a truck after being pointed in that direction by people yelling and pointing. *Id.* Vasquez \*3 matched the description Officer Landon had been given and Officer Landon recognized him from the earlier encounter. *Id.* Officer Landon recalls seeing Vasquez making a throwing motion, wondering whether Vasquez was throwing the reported knife, and being uncertain as to whether Vasquez was still armed. *Id.* Being unsure, Officer Landon pulled his Taser, pointed it at Vasquez, and repeatedly shouted for Vasquez to put his hands up. *Id.* at 7. Other officers arrived at the scene and issued similar commands. *Id.*

Officer Landon testifies it was at this moment that Officer Rogers's body camera began recording. Def.'s MSJ Appx. at 2, 10. He briefly explains the operation of the body camera and some of the lapses in audio. *Id.* Officer Landon also draws attention to the video showing him lead the effort to instruct Vasquez and deescalate the situation, mentioning that the other officers corroborate his claims that multiple instructions were given to Vasquez to put his hands up. *Id.*

Officer Landon recounts that Vasquez, who was "admittedly intoxicated" at the time, responded to the officers' instructions by putting his hands on the top of the bed of the pickup truck and just looking at Officer Landon. *Id.* Vasquez then reached into the bed of the pickup and picked up a beer, opened it, and took a sip, all while ignoring the officers' repeated demands to raise his hands. *Id.* During this exchange, Vasquez's sister is purported to approach while yelling at the officers and is told to get back by Officer Rogers. *Id.*

Officer Landon notes that he was getting close to a suspect who was possibly armed with a knife, who had allegedly threatened his neighbors that night, who was likely intoxicated, and who had a history of noncompliance with the police. *Id.* at 3. Officer

\*4 Landon recognized that he did not know where the knife was, that the sister was approaching the scene and arguing with officers, and that there were other potential threats in the area as well. *Id.* The situation was tense, and Officer Landon felt the urge to detain Vasquez as quickly and effectively as possible. *Id.*

At this time, Officer Landon realized he was too close to Vasquez to deploy his Taser and that he would need to abandon that option. *Id.* at 3, 18. Consequently, he dropped his Taser and chose to administer a "distractory strike," as trained by Fort Worth Police Department, in order to subdue and gain compliance of suspects who are posing a threat and not complying with commands. *Id.* at 3, 16-17, 84. This training teaches officers that such a strike can quickly gain compliance by startling a suspect and allowing other control tactics to be effectively employed. *Id.* Officer Landon describes the types of strikes the training included and that the training instructs officers to use "maximum force" in order to prevent the need for a second strike. *Id.*

Officer Landon describes his strike of Vasquez as "simple but forceful." Def.'s MSJ Br. at 10. According to Officer Landon, the strike was an open-handed slap across Vasquez's face that glanced across Vasquez's nose, causing a nose bleed. Officer Landon claims that the video and three still shots that he included in his brief clearly show that the strike was a slap and nothing more. Def.'s MSJ Appx. at 7. Following this "slap," Vasquez was put in handcuffs and arrested. *Id.* at 5. Officer Landon goes on to describe the post-arrest events, such as the paramedic diagnosis on the scene, the criminal matter that followed, and the reports filed by various. *See generally* Def.'s MSJ Br. at 12-16. \*5

## B. Vasquez's Account of Arrest

On the night of July 16, 2017, six Fort Worth Police Department officers responded to a call involving Vasquez. First Am. Compl. 2, ECF No. 35. Vasquez was surrounded by four of these

officers when Officer Landon approached him with his Taser drawn and pointed at Vasquez. *See* Body Camera Video, ECF No. 55. Two other officers also had their department-issued firearms drawn and pointed at Vasquez. *Id.* Vasquez was directed to put his hands in the air where the officers could see them. Vasquez asserts that he complied with these instructions even though he had a beer in his hand, which he was never instructed to drop. Pl.'s MSJ Appx. (Vasquez Depo.) at 135, ECF No 65-1.

After Vasquez complied with instructions, one of the officers holstered their firearm. *Id.* at 141-43. Officer Landon then dropped his Taser and struck Vasquez in the face "without warning or reason." *Id.* Vasquez fell to the ground where he was handcuffed without issue. Vasquez's nose was busted and bloody and the Medstar paramedics who responded believed that his nose was broken. Pl.'s MSJ Appx. at 47. Vasquez states that his nose was broken as a result of the strike from Officer Landon. Pl.'s MSJ Appx. at 68.

Vasquez claims that Officer Landon went on to falsify his report of the arrest by claiming that Vasquez was noncompliant with officer instructions and that is what prompted the "open hand strike." First Am. Compl. at 3. Vasquez goes on to describe the different reports and statements given following the incident which he then cites later during the summary judgment stage of this case. *See id.* at 3-6. Following the abovementioned events and investigation, Vasquez filed the current suit. \*6

## PROCEDURAL BACKGROUND

Vasquez filed this suit on May 4, 2018. *See* ECF No. 1. On June 19, 2018, Officer Landon answered and asserted the affirmative defense of qualified immunity. *See* ECF No. 6. The Court subsequently issued a scheduling order outlining the deadlines for handling the qualified immunity defense. *See* ECF No. 9. The Parties filed a series of amendments to the Complaint and Answer (ECF Nos. 35 & 40, respectively). The Court set a

dispositive motion deadline of June 30, 2019, and Officer Landon timely filed this Motion for Summary Judgment. Vasquez subsequently responded and Officer replied. The Motion has been fully briefed and is ripe for the Court's review.

## LEGAL STANDARD

Summary judgment is appropriate if the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Norwegian Bulk Transp. A/S v. Int'l Marine Terminals Partnership*, 520 F.3d 409, 411 (5th Cir. 2008). "A court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in her favor." *Norwegian Bulk Transp. A/S*, 520 F.3d at 411-12 (internal quotation marks and citations omitted).

The "usual summary judgment burden of proof" is altered when the movant asserts a qualified immunity defense. *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). When a government official pleads qualified immunity, the burden shifts to the plaintiff to demonstrate the defense's inapplicability by "establishing a genuine fact issue as to \*7 whether the official's allegedly wrongful conduct violated clearly established law." *Brown*, 537 F.3d at 253; *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009). The court must view all facts and reasonable inferences drawn from the record "in the light most favorable to" a plaintiff opposing the motion, but the plaintiff cannot rest on conclusory allegations or assertions. *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 234 (5th Cir. 2016); *Poole v. City of Shreveport*, 691 F.3d 624, 630 (5th Cir. 2012).

## OBJECTIONS

### A. Objection 1

Officer Landon first objects to "virtually all of Plaintiff's summary judgment evidence." Reply at 1, ECF No. 66. The basis of this global objection is that all of Vasquez's appendix (ECF No. 51) should be struck because he did not underline, highlight, or cite to the entire 383-page appendix. *Id.* at 2. Officer Landon's first objection is **OVERRULED**.

### B. Objection 2

Officer Landon next objects to pages 230-31 of Vasquez's Appendix, which contains deposition excerpts from the deposition of Officer Zachary Ferrell. Landon asserts that the questions posed to Officer Ferrell call for speculation and are not supported by personal knowledge, making the statements irrelevant. *See id.* at 3. The question asked, "[t]hat was not a slap, correct[.]" refers not to Officer Ferrell's own recollection of the night of the incident, but rather to Officer Ferrell's impression of the situation after viewing the video during the deposition. Asking the officer his impressions of what he saw in the video does not call for speculation and is not requiring the officer to make a response without personal knowledge, as Officer Ferrell had in fact just watched the video. Therefore, Officer Landon's objection to pages 230-31 of Vasquez's appendix is hereby **OVERRULED**.

### C. Objection 3

Finally, Officer Landon objects to Vasquez's attachment of the "typed notes of a detective" as exhibits to depositions. Reply at 3. Officer Landon argues that the typed notes, attached at pages 158-88, 252-82, and 353-83, are "hearsay, hearsay within hearsay, and not authenticated." *Id.* A nonmoving party is not required to produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see also Maurer v. Independence Town*, 870 F.3d 380, 384 (5th Cir. 2017) (holding that at the "summary judgment stage, evidence need not be authenticated or otherwise presented in an

admissible form"). Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves. *Id.*; FED. R. CIV. P. 56. Accordingly, Officer Landon's objection to the typed notes is hereby **OVERRULED**.

### ANALYSIS

"The doctrine of qualified immunity protects government officials '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.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Supreme Court has "mandated a two-step sequence for resolving government officials' qualified immunity claims." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

We must determine (1) "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right" and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* In the excessive force context, a constitutional violation is clearly established if no reasonable officer could believe the act was lawful. *See Manis v. Lawson*, 585 F.3d 839, 846 (5th Cir. 2009). Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236. However, deciding the two prongs in order "is often beneficial." *Id.*

Officer Landon contends the summary judgment evidence establishes he is entitled to qualified immunity under both prongs of the defense. To overcome the defense, Vasquez has the burden to direct the Court to evidence establishing a genuine dispute of material fact as to whether (1) Officer Landon "violated a federal constitutional or statutory right and that (2) the violated right was

clearly established at the time of the challenged conduct." *Escarcega v. Jordan*, 701 F. App'x 338, 341 (5th Cir. 2017).

### A. Violation of a Constitutional Right: Excessive Force Claim

With respect to the first prong, Vasquez alleges Officer Landon violated his Fourth Amendment right by using excessive force in apprehending and arresting him. To prevail on an excessive-force claim, a plaintiff must show "(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016) (quoting *Elizondo v. Green*, 671 F.3d 506, 510 (5th Cir. 2012)). \*10

#### 1. Injury/Causation

The parties do not dispute whether there was an injury or what caused that injury. Vasquez contends that the strike by Officer Landon broke his nose. *See* Am. Compl. at 3, ECF No. 35. Officer Landon asserts that the only injury incurred by Vasquez was a minor bloody nose. *See* Br. Supp. MSJ at 12, ECF No. 53. But regardless of the extent of the injury, there is no debate that Vasquez has set forth sufficient evidence to satisfy the injury element of his excessive force claim. *See* Appx. at 68, ECF No. 65-1.

Further, there is no dispute as to the cause of the injury. Neither Officer Landon nor Vasquez offer an alternate cause of Vasquez's injured nose, acknowledging that the injury was caused by the slap/strike from Officer Landon. Because it is clear that Vasquez suffered an injury to his nose and that the injury occurred due to the strike from Officer Landon, these elements of an excessive force claim are satisfied.

#### 2. Clearly Excessive and Clearly Unreasonable Use of Force

Vasquez's excessive force claim is "analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 396 (1989). To determine the objective reasonableness of the force used, a court must balance "the amount of force used against the need for that force, taking the perspective of a reasonable officer on the scene without the 20/20 vision of hindsight." *Poole*, 691 F.3d at 628 (internal quotations omitted). Considerations include the severity of the offense, whether the suspect posed an immediate threat to the safety of the officer or others, and whether the suspect resisted or attempted to evade arrest. *Graham*, 490 U.S. at 396. \*11

#### a. Severity of the Crime

On the night of the incident in question, Fort Worth officers were responding to a call alleging that Vasquez was threatening his neighbors with a knife. *See* Br. Supp. MSJ at 3, ECF No. 53. The nature of the call on its own is enough to raise concern for Officer Landon as he approached this situation and weighs in favor of finding the use of a strike to the face reasonable.

#### b. Immediate Safety Threat and Resisting Arrest

There is evidentiary support that Vasquez posed an immediate safety threat to the officers or anyone surrounding him and whether Vasquez was resisting arrest or refusing to obey Officer Landon or any other officers' instructions. As noted above, responding to an aggravated assault call is accompanied by certain inherent dangers, and Officer Landon reasonably suggests that he was uncertain whether Vasquez still had the knife when he arrived on the scene and encountered Vasquez. *See id.* at 6, ECF No. 53. Officer Landon claims that Vasquez was noncompliant with his orders and refused to raise his hands in the air when directed to do so. *See id.* at 8, ECF No. 53. It is the totality of these circumstances—the environment, behavior, and "noncompliance"—that prompted Officer Landon to administer a "distractionary strike." Br. Supp. MSJ at 10, ECF

No. 53 Vasquez counters with evidence that he did in fact have his hands in the air as instructed and that Officer Landon still struck him unexpectedly and for no apparent reason. Pl.'s Resp. at 6, ECF No. 65.

12 Although both parties provide testimonial evidence to bolster their case, the Court finds most compelling the body camera footage from the scene. The video shows Vasquez \*12 surrounded by police officers, appearing to have his hands in the air, but it is unclear whether he is holding anything. See ECF No. 55. Seemingly out of nowhere, Officer Landon delivers a serious blow to Vasquez that the Court would not label as a distractionary slap. The Court fails to see any signs of danger from Vasquez or any attempt to resist arrest. Indeed, a jury could reasonably conclude that Vasquez was not actively resisting arrest and likewise that Officer Landon used excessive force by striking him. The Court believes that this evidence presents a genuine issue of material fact that precludes granting summary judgment in favor of Officer Landon receiving qualified immunity in this case.

### B. Violated Right was Clearly Established

The Court now turns to the second prong—whether the right violated was clearly established at the time of the violation. *Pearson*, 555 U.S. at 232. Case law makes clear that when an arrestee is not actively resisting arrest the degree of force an officer can employ is reduced. *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 731 (5th Cir. 2018). The Fifth Circuit has found that a police officer uses excessive force when the officer strikes, punches, or violently slams a suspect who is not resisting arrest. *Id.* Officer Landon should

have known that he could not have used that amount of force on a suspect such as Vasquez, who was arguably not resisting arrest. This right was clearly established at the time of Officer Landon's conduct.

13 Again, the issue of qualified immunity turns on the level of resistance and danger Vasquez exhibited. Based on the summary judgment record, a reasonable jury could find that Vasquez was not actively resisting arrest and thus that Officer Landon used excessive \*13 force in striking him. For that reason, the Court finds that Officer Landon's Motion for Summary Judgment should be and hereby is **DENIED**.

### CONCLUSION

Because on this summary judgment record there is a genuine fact issue as to whether the Officer Landon's allegedly wrongful conduct violated clearly established law, the Court finds that Officer Landon's Motion for Summary Judgment should be and hereby is **DENIED**.

**SO ORDERED** on this 25th day of February, 2020.

/s/ \_\_\_\_\_

Mark T. Pittman

UNITED STATES DISTRICT JUDGE