

United States Courts  
Southern District of Texas  
FILED

JUL 29 2019

David J. Bradley, Clerk of Court

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

KEDRIC JOHMARCO JEROME KIZZIE,

)( Civil Action

19 CV 2780

)(

Plaintiff, )(

)(

V. )( JURY TRIAL

)(

CITY OF WILLIS, TEXAS; )(

John Mc'caffery, individually; )(

Kenneth Elmore, individually; )(

)(

Defendants. )(

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF THE COURT:

NOW COMES Plaintiff KEDRIC JOHMARCO JEROME KIZZIE and complains of the CITY OF WILLIS,  
TEXAS; JOHN MC'CAFFERY, individually; KENNETH ELMORE, individually; and will show the Court the  
following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over Plaintiff's federal claims, under 28 U.S.C. § 1331, 42 U.S.C. §§ 1983 and 1988, and supplemental jurisdiction, under 28 U.S.C. § 1367(a), to hear Plaintiff's state law claims, if any. Venue is proper in this Court, under 28 U.S.C. § 1391(b) because the incident at issue took place in Montgomery County, Texas within the United States Southern District of Texas.

#### **PARTIES**

2. Plaintiff Kedric Johmarco Kizzie is a resident of Montgomery County, Texas
3. The City of Willis, Texas, is a municipality existing under the laws of the State of Texas and situated mainly in Montgomery County, Texas in the U.S. Southern District of Texas and can be served with process by serving the City of Willis Secretary at 200 N. Bell Street, Willis, TX 77378.
4. Defendant John Mc'caffery is sued in his individual capacity and can be served with process wherever he is found.
5. Defendant Kenneth Elmore is sued in his individual capacity and can be served with process wherever he is found.

#### **INTRODUCTION**

6. Two Willis police officers tasered Kedric Kizzie, a small man, for an unjustified reason and then violently abused him while he lied helpless on the ground including kneeling his back causing him a great deal of pain. To cover up the wrongdoing the WPD officers charged Kedric with evading arrest, but when the body camera videos came out the evading charge was dismissed. This incident was investigated by the Texas Rangers and the Montgomery County District Attorney Office Public Integrity Division. Officer Mc'caffery and officer Elmore was indicted and arrested. They were released on bond. As of July 25, 2019 they are awaiting criminal trial.

**ADDITIONAL FACTS**

7. Kedric Kizzie ("Kedric") is 22 years old. He is the father of 2 small children. He has a superb relationship with his god-mother.

8. July 29, 2017 officer Elmore was dispatched to 105 Will Street, Willis, Texas for an alleged assault. Upon arriving on the scene Elmore was informed by Kenjette Hector that her attacker had fled the scene. Kenjette stated that Kedric Kizzie participated in the attack and he remained inside of the house located on said address. Kedric Kizzie exited the house and engaged in a conversation with officer Elmore. Elmore handcuffed Kedric Kizzie. Officer Elmore place Kedric Kizzie in the back seat of the patrol car. Officer Elmore phoned the Montgomery County District Attorney's office whereby he was instructed to release Kedric Kizzie from detainment due to lack of probable cause. Kedric Kizzie was released from the patrol car and ordered to leave the premise by Elmore. Thereafter Elmore gave Kedric Kizzie a courtesy ride to Tinley park located within a half of mile from the scene in question.

Later on said date, officer Elmore and officer reeves was dispatched to the same location at 105 Will Street, Willis, Texas due-to being notified that Kedric Kizzie returned to said location. Upon the aforementioned officers arrival, Kedric Kizzie explained that he returned to gather the remainder of his personal property which included clothing and shoes. Kedric Kizzie exited the premises without incident.

Thereafter police officers re-engaged with Kedric Kizzie away from said premise. During the interaction Kedric made a statement that eluded to the police would-be unable to catch him if he decided to run. Thereafter Kedric Kizzie began to remove himself from the officers presence by attempting to leave the

scene. Officer Mc'caffery pursued Kedric Kizzie by chasing him via patrol car. Officer Mc'caffery utilized his Taser by striking Kedric Kizzie in the shoulder. Kedric Kizzie fell in a ditch due-to being struck by the Taser. Officer Mc'caffery and Officer Elmore proceeded by restraining Kedric Kizzie on the ground in a rough unnecessary manner. The officers searched Kedric Kizzie's person. The officers called Ems to the scene. The EMS staff provided medical treatment to Kedric Kizzie by treating the injuries Kedric Kizzie suffered from the Taser. Kedric Kizzie was transported to Montgomery county jail by officer Elmore.

9. The officers then charged Kedric with evading arrest when Kedric did not evade arrest but was calm and cooperative throughout. Kedric calmness was only broken by his severe injuries. Defendants falsely reported that Kedric had resisted arrest and wrote false statements in the police incident report supporting the false arrest.

#### **VIOLATION OF THE 4TH AND 14TH FOURTEENTH AMENDMENTS**

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

11. The Fourth Amendments guarantees everyone the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The 14th Amendment allows for due process of law. Such violations are actionable pursuant to 42 U.S.C. Section 1983 and 1988.

12. The force used by the individually named defendants, was in great excess to the need to use such force and constituted an Unreasonable Seizure of Kedric and violated his due process rights under the 14th Amendment. The defendants unlawfully detained, searched, and arrested Kedric which are violations of the 4th and 14th Amendments. The defendants maliciously prosecuted Kedric and the

criminal charge of evading arrest ended in Kedric's favor. The defendants made false statements in the police incident report.

13. The City of Willis has a custom, policy, practice, and procedure of using excessive force on individuals and not disciplining or training officers adequately and is therefore liable under 42 U.S.C. Section 1983 and 1988. There is a pattern and practice of excessive force and condoning excessive force. There is a pattern and practice of charging suspects with evading arrest, resisting arrest, failure to identify, assault on a peace officer, and other crimes to cover up excessive force.

#### **ASSAULT AND BATTERY**

14. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

15. The individually named defendants committed assault upon Kedric and caused the damages described herein.

#### **LIABILITY FOR FAILURE TO INTERVENE**

16. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

17. A law enforcement officer "who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force may be liable under section 1983." *Hale v. Tinley*, 45 F.3d 914, 919 (5th Cir. 1995). Although *Hale* most often applies in the context of excessive force claims, this Court recognized that other constitutional violations also may support a theory of bystander liability. *Whitley v. Hanna*, 726 F.3d 631, 646 n. 11 (5th Cir. 2013) (citing *Richie v. Wharton County Sheriff's Dep't Star Team*,

No. 12–20014, 2013 WL 616962, at \*2 (5th Cir. Feb. 19, 2013) (per curiam) (unpublished)(noting that plaintiff failed to allege facts suggesting that officers “were liable under a theory of bystander liability for failing to prevent ... other member[s] from committing constitutional violations”)). Further, the Second Circuit has stated that “law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence.” *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994). See also, *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972)(“we believe it is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge.”). Thus, an officer such as Elmore may be liable under § 1983 under a theory of bystander liability when the officer “(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act.” *Whitley*, 726 F.3d at 646.

#### **MENTAL ANGUISH**

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

19. Kedric suffered at least anxiety, fear, anger and depression because of the acts of the individually named defendants and the City of Willis and, therefore, Kedric seeks damages for mental anguish past and future as well as the pain and suffering, past and future, and other damages set forth above.

#### **PUNITIVE DAMAGES**

20. Kedric incorporates all preceding paragraphs as if set fully herein.

21. The individually named defendants actions and inactions cause them to be liable for punitive damages as they were consciously indifferent to the plaintiff's constitutional rights and they did the acts knowingly, such acts being extreme and outrageous and shocking to the conscious.

#### **ATTORNEYS' FEES**

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

#### **JURY TRIAL**

23. Kedric requests a trial by jury on all issues triable to a jury.

#### **PRAYER FOR RELIEF**

**WHEREFORE, Plaintiff Kedric Kizzie requests that the Court:**

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

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

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

D. Award Pre- and post-judgment interest;

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

and

F. Grant such other and further relief as appears reasonable and just, to which

plaintiff shows himself entitled.

Respectfully Submitted,

Earl Oaks Esq.

## CIVIL COVER SHEET

JS 44 (Rev. 02/19)

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

## I. (a) PLAINTIFFS

Kedric Johmarco Jerome Kizzie

## DEFENDANTS

City of Willis; John McCaffery; Kenneth Elmore

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

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

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

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Earl Campbell Oaks  
PO BOX 398813 Miami Beach, FL, 33239  
786-373-8402

Attorneys (If Known)

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

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

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input 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 |

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

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 Veterans' 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	<b>PERSONAL INJURY</b> <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 type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <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"/> 425 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <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 <b>IMMIGRATION</b> <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 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HLA (43958) <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)) <b>FEDERAL TAX SUITS</b> <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 <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <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
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

## 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 necessary):  
Civil Right under section 1983

Brief description of cause:

Excessive force, 4th Amendment violation, Civil Right Violation under section 1983

## VII. REQUESTED IN COMPLAINT:

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

DEMAND'S

CHECK YES only if demanded in complaint.

JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
07/29/2019SIGNATURE OF ATTORNEY OF RECORD  
Earl Campbell Oaks

EARL CAMPBELL OAKS

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

AO 399 (01/09) Waiver of the Service of Summons

UNITED STATES DISTRICT COURT

for the  
Southern District of Texas



Kedric Johmarco Kizzie

Plaintiff

v.

City of Willis

Defendant

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)  
)  
)  
)

Civil Action No.

19 CV 2780

WAIVER OF THE SERVICE OF SUMMONS

To: Earl Oaks

(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from , the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date:

Earl Oaks

Signature of the attorney or unrepresented party

Printed name of party waiving service of summons

Earl Oaks

Printed name

P.O.Box 398813  
Miami Beach, FL 33239

Address

olawfirm@gmail.com

E-mail address

(786) 373-8402

Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

AO 399 (01/09) Waiver of the Service of Summons

UNITED STATES DISTRICT COURT

for the  
Southern District of Texas



Kedric Johmarco Kizzie  
*Plaintiff*

v.

Kenneth\_Elmore  
*Defendant*

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Date:

Earl Oaks

*Signature of the attorney or unrepresented party*

EARL OAKS

*Printed name of party waiving service of summons*

Earl Oaks

*Printed name*

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AO 399 (01/09) Waiver of the Service of Summons

UNITED STATES DISTRICT COURT

for the  
Southern District of Texas



Kedric Johmarco Kizzie  
*Plaintiff*

v.

Kenneth Elmore  
*Defendant*

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*Signature of the attorney or unrepresented party*

EARL OAKS

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