Case No. 16-10856

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ERIN LINCOLN,

Plaintiff - Appellant

v.

PATRICK TURNER

Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS—FORT WORTH DIVISION
Cause No. 4:15-CV-819-A

BRIEF FOR APPELLEE

ORAL ARGUMENT NOT REQUESTED

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FOR THE FIFTH CIRCUIT

ERIN LINCOLN,	§	
	§	
Plaintiff-Appellant,	§	
v.	§	**CASE NO. 16-10856**
	§	
PATRICK TURNER	§	
	§	
Defendant-Appellee.	§	

CERTIFICATE OF INTERESTED PARTIES AND ENTITIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

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Texas Municipal League Intergovernmental Risk Pool (Indemnitor for Appellee)	

/s/ William W. Krueger, III
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STATEMENT REGARDING ORAL ARGUMENT

Appellee Patrick Turner ("Officer Turner") believes the issues presented in this appeal do not require oral argument. Rather the issue presented on appeal is adequately briefed at both the district court and appellate levels. However, to the extent any oral argument would assist this Honorable Circuit with the facts or issues in this case, Appellee requests oral argument.

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I. JURISDICTIONAL STATEMENT

Plaintiff-Appellant brought claims against the Defendant-Appellee under 42 U.S.C. § 1983, giving the district court subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. This is an appeal from the district court's May 23, 2016 order granting Appellee's Motion and Brief to Dismiss for Failure to State a Claim ("Motion to Dismiss"). Plaintiff-Appellant appealed this order on June 22, 2016. This Court has jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUE

Whether Plaintiff-Appellant sufficiently pleaded her constitutional claims against Defendant-Appellee; and whether Plaintiff-Appellant overcame Defendant-Appellee's qualified immunity defense to avoid dismissal.

III. STATEMENT OF THE CASE

Appellant-Plaintiff Erin Lincoln ("Erin") brought this lawsuit after she was detained following a fatal encounter between police and her father John Lincoln ("John"). (ROA.227).

According to Erin's *First Amended Complaint* ("Amended Complaint"), John had a history of mental illness pre-dating December 2013, he used medication for his mental illness, and he failed to use his medication at the time of the incident. (ROA.227). Erin does not allege that Keller Police Officer Patrick

Turner ("Officer Turner") was aware of these facts/circumstances before the incident or that Officer Turner had any contact/communication with John on the date in question.

Erin alleged that on the evening of December 26, 2013, John took one of his father's guns and his father's car and drove from his father's house to his mother's house. (ROA.227). Erin also alleged that John's father believed that John was threatening John's mother. (ROA.227). John's father called family members, including John's sister Arlington Police Officer Kelly Lincoln ("Kelly"), and informed them of the perceived threat. (ROA.227). Kelly told the Colleyville Police Department that John may pose a threat to his mother. (ROA.227).

John arrived at his mother's house, which at the time was occupied only by his 18-year old daughter, Erin. (ROA.227). John's mother, Kathleen Lincoln, who he had threatened to kill, was not at home at any point in time during the incident. (ROA.227).

Police officers from Colleyville and North Richland Hills arrived at the house. (ROA.228). John's other sister, Kim, told officers that John was off his bipolar medications, but allegedly would not hurt Erin. (ROA.227). A SWAT team arrived. (ROA.228).

Police officers contacted the occupants of the house by phone to check on their welfare. (ROA.228). Erin told the police that she was okay and that she was

trying to calm her dad down. (ROA.228). Without any training or expertise in dealing with persons with John's psychological conditions, Erin told her father that he should not answer the ringing telephone because it would be a police officer. (ROA.228). Untrained eighteen-year-old Erin also tried to talk John into watching TV to calm him down. (ROA.228). Unsurprisingly John did not follow his daughter's suggestions. (ROA.228).

The police officers on the scene knew that John had been reported as a potential deadly threat to his family members and that he was armed with a gun. (ROA.227–28). However, police officers did not know the exact degree to which John was a threat to his daughter Erin. Despite Erin's instruction to John that he refrain from answering the phone, Erin alleged in her *Amended Complaint* that police officers on the scene used insufficient efforts to communicate with John. (ROA.231–32). Moreover, Erin's *Amended Complaint* does not indicate that Officer Turner was on-scene at the time and/or involved in the insufficient communication efforts. (ROA.227–30).

John repeatedly went to the front door of the house and shouted at the officers. (ROA.228–29). Each time John went to the door and opened it to shout at the officers, he was holding a gun. (ROA.228–29). Erin admits that John was holding his gun while defiantly shouting at the officers when he was shot by the officers at the scene. (ROA.228–29). Yet, Erin asserts in her *Amended Complaint*

that John was not a threat because he did not shoot his gun. (ROA.228). Regardless, Erin admits that the only officers who fired shots striking John were officers with the North Richland Hills Police Department, not Officer Turner. (ROA.228–29). Again, the *Amended Complaint* does not indicate that Officer Turner was on the scene when John was shot. (ROA.227–30).

Erin states that after John was shot, she fell to the ground crying in terror. (ROA.229). Officer Turner was never in communication/contact with John, and only contacted Erin after John was shot. (ROA.229). Pursuant to SWAT protocol, Officer Turner handcuffed Erin, removed her from the home. (ROA.588–89). At Colleyville Police Department's direction, Officer Turner placed Erin into a Colleyville Police vehicle.[1] (ROA.590). Approximately two hours later, a Colleyville Police Sergeant drove Erin to the Colleyville Police station. (ROA.229–30). Officer Turner was not involved with transporting or interviewing Erin at the police station. Erin's *Amended Complaint* does not indicate that Officer Turner inappropriately transported, questioned, arrested, or detained Erin in violation of her constitutional rights. (ROA.227–30).

Officer Turner filed a Motion to Dismiss, claiming that Erin's *Amended Complaint* failed to provide sufficient factual details to adequately explain Officer

[1] Erin cites a number of facts in her brief regarding actions taken by the Colleyville Police Department after Keller Officer Turner placed Erin in the Colleyville Police vehicle. (Appellant's Brief, pp. 7–8). None of these actions were taken by Officer Turner and they are of no consequence in determining the constitutionality of his actions.

Turner's alleged unlawful involvement in the incident. (ROA.593). Without adequate factual detail, Erin's conclusory assertions are insufficient to state a claim for relief that is plausible on its face under the governing standards. Officer Turner also moved to dismiss Erin's claims based on his Qualified Immunity.

On May 23, 2016, the district court granted Officer Turner's Motion to Dismiss, finding that Erin's factual allegations allowed the court to do no more than "infer the possibility of misconduct" and did not show that Officer Turner's actions were objectively unreasonable under the circumstances. (ROA.648–49).

IV. SUMMARY OF THE ARGUMENT

Erin sued Officer Turner for unreasonable seizure and excessive force after being taken into custody although she alleges that she committed no crime and was not suspected of committing a crime. Consequently, Erin had the burden to plead sufficient facts to state her claims. She has failed at this task.

Specifically, Erin has not pleaded sufficient facts to show that Officer Turner unreasonably seized her as a material witness and suspect after John was shot. Erin was the only person in the house with John before the shooting, she interfered with police officers' attempt to communicate with John, and she was standing at his side as he threatened officers with a gun. (ROA.228–29). Thus, Keller Officer Turner reasonably handcuffed her to remove her from the scene, and placed her in a Colleyville Police vehicle to detain her after the shooting.

Likewise, Erin did not adequately plead facts showing that Officer Turner used excessive force to detain her. Erin claims only de minimis injuries consistent with a constitutional handcuffing. (ROA.240). Erin also did not allege these injuries "resulted directly and only" from Officer Turner's actions, and did not plead facts sufficient to show that the force used was excessive in light of the hostage/criminal situation.

Finally, Erin did not offer sufficient evidence to overcome Officer Turner's qualified immunity defense. Specifically, case precedent offered by Erin in response to Officer Turner's motion to dismiss did not show that no reasonable officer would have thought that Officer Turner's actions were constitutional under the circumstances. (ROA.631–33).

V. ARGUMENT & AUTHORITIES

A. Standard of Review

This Court reviews a district court's grant of a motion to dismiss de novo. *Whitley v. Hanna*, 726 F.3d 631, 637 (5th Cir. 2013) (citing *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 219 (5th Cir. 2012)). Likewise, dismissal on qualified immunity grounds is also reviewed de novo. *Id*.

Under this standard, all well-pleaded facts alleged are viewed in a light most favorable to the non-movant, and must "state a claim that is plausible on its face." *Id*. at 637–38 (quoting *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252,

254 (5th Cir. 2011)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A complaint is insufficient if it offers only 'labels and conclusions,' or 'a formulaic recitation of the elements of a cause of action.'" *Whitley*, 726 F.3d at 638 (quoting *Iqbal*, 556 U.S. at 678).

Rule 12(b)(6) allows a party to move for dismissal of an action for failure to state a claim upon which relief can be granted. Fed R. Civ. P. 12(b)(6). To survive a 12(b)(6) motion, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009).

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, the Court identifies and disregards conclusory allegations because they are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680. Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Id.* The factual allegations must be sufficient "to raise a reasonable expectation that discovery will reveal evidence of the necessary

claims or elements." *In re So. Scrap Material Co.*, 541 F.3d 584, 587 (5th Cir. 2008).

B. Officer Turner's Detention of Erin Lincoln Was Not Unconstitutional.

Erin sued Officer Turner for unreasonable seizure and wrongful arrest after being taken into custody although, as she alleges, she committed no crime and was not suspected of committing a crime. However, an officer may temporarily detain a person for an investigation without probable cause to arrest if the officer has reasonable suspicion supported by articulable facts that criminal activity may be afoot. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Erin had the burden to plead facts to show Officer Turner's involvement in the incident, that Officer Turner improperly arrested or detained her, and that there was no probable cause supporting her arrest or detention. *Haggerty v. Texas Southern University*, 391 F.3d 653, 655 (5th Cir. 2004); *Brown v. Lyford*, 243 F.3d 185, 189 (5th Cir. 2001). Erin's *Amended Complaint* merely proclaims, however, that there was no probable cause for her arrest or detention. (ROA.236). *See Iqbal*, 556 U.S. at 678. Erin's failure to provide complete facts, and her reliance on conclusory allegations are insufficient to establish her unreasonable seizure and wrongful arrest claims. *See id.*

Conduct which is entirely legal may give rise to a reasonable suspicion allowing police officers to initiate an investigatory detention.[2] *See Sokolow*, 490 U.S. at 9–10. In *Sokolow*, the Supreme Court rejected the Ninth Circuit's attempt to require some evidence of ongoing wrongful or criminal behavior to initiate and continue an investigatory detention. Rather, the Court recognized even its seminal case, *Terry v. Ohio*, that a series of apparently innocent acts that warranted further investigation only when viewed as a whole. *Id.* (citing *Terry*, 392 U.S. at 22).

Furthermore, there is no rigid time limit on the duration of an investigatory detention.[3] *United States v. Sharpe*, 470 U.S. 675, 685 (1985). When considering whether a detention is excessively long, courts consider the law enforcement purposes to be served by the stop and the time reasonably needed to effectuate those purposes. *United States v. Maltais*, 403 F.3d 550, 556 (8th Cir. 2005). In *Maltais*, the Court held that detaining a suspect for two hours and 55 minutes in the

[2] Erin correctly states that officers must have probable cause to conduct an "investigative detention at a police station." (Appellant's Brief, p. 5). However, Officer Turner did not conduct an "investigative detention at a police station," but merely handcuffed and secured Erin in a police vehicle at the scene. Thus, case law regarding the degree of proof necessary to conduct an "investigative detention at a police station" is of no value in deciding this appeal. Erin later recognizes this in her brief and correctly argues that Officer Turner must have had only "reasonable suspicion of criminal activity" to seize Erin, which he did. (Appellant's Brief, p. 9).

[3] Despite appealing the district court's order regarding her seizure by Keller Police Officer Turner, Erin appears to argue that the length of her detention at the Colleyville Police Department was unconstitutional. Officer Turner does not work for the Colleyville Police Department, did not transport Erin there, and did not detain Erin there. Thus, any argument on this point is irrelevant to the district court's order as to Officer Turner and this appeal, and the Court should disregard it.

back of a patrol car while waiting for a drug dog to arrive was not so long as to be unreasonable and constitute an arrest without probable cause. *Id.* at 558.

To assess the reasonableness of Erin's detention, the Court must "'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.'" *Terry*, 392 U.S. at 20–21 (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 536–37 (1967)); *see also Sharpe*, 470 U.S. at 685 (reiterating that courts must "consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes").

When Officer Turner picked up Erin and carried her away from the scene of the shooting, a lawful investigation was about to begin. John had armed himself with a gun, threatened to kill family members, and gone to his mother's house after threatening his mother. (ROA.227–28). Once there, neither Erin or John cooperated with police officers' efforts to communicate with them. (ROA.228). Moreover, John defied orders to surrender his gun or show his hands. (ROA.228, 588). While holding the gun and pointing it at officers, he was shot. (ROA.228–29). When Officer Turner seized Erin, John had not yet died.

Several crimes and potential crimes had taken place, and police were about to investigate. Erin was present for all of the events that took place at the house, and if nothing else, she was a material witness. Thus, even accepting Erin's

version of the facts as true, officers could have reasonably suspected that Erin may have been involved in criminal activity.

Erin attempts to argue "[t]here was no basis to suspect [her] of any crime at all," and cites *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), to illustrate "reasonable suspicion." (Appellant's Brief, p. 14). *Montoya* involved a customs detention at LAX of a drug mule who did not speak English, had repeatedly flown between the United States and Bogota, Colombia, carried $5,000 in cash on an alleged business trip with no appointments, no hotel reservation, no credit cards, and no shoes but the high-heeled pair she was wearing. *Id*. at 533. Although the facts here are not as stark as those in *Montoya*, they are sufficient to justify Officer Turner's seizure of Erin on reasonable suspicion that she might be part of a larger criminal enterprise.

Specifically, Erin admittedly interfered with law enforcement officials' efforts to communicate with John before the confrontation.[4] (ROA.228). Thus, Erin's actions prevented police from investigating and evaluating John's conduct, and trying to avoid a confrontation or prevent him from harming anyone (including himself). Considering Erin's admissions and conclusory allegations Erin failed to

[4] In her brief, Erin attempts to improperly shift the burden to plead facts supporting her claims to Officer Turner. Specifically, Erin argues that Officer Turner "makes no effort to try and convince this Court" that he suspected Erin was interfering with police officers' attempts to communicate with John. (Appellant's Brief 11). It was not Officer Turner's burden to prove this fact. Rather, it was Erin's obligation to plead facts sufficient to show that Officer Turner unconstitutionally seized her. *See Iqbal*, 556 U.S. at 678. She did not do so.

state a claim that it was improper or unlawful to arrest or detain her, or hold her for questioning. *See Sokolow*, 490 U.S. at 9–10; *Iqbal*, 556 U.S. at 679.

Citing *Illinois v. Lidster*, 540 U.S. 419 (2004), Erin attempts to characterize herself as merely a "member of the public," arguing that Officer Turner could not seize her as a witness to the shooting. (Appellant's Brief, p. 12). *Lidster* involved police officers blocked a roadway to solicit information about a recent hit-and-run from passing motorists. *Lidster*, 540 U.S. at 422. Here, as Erin acknowledges, the facts are "vastly different." (Appellant's Brief, p. 12). As previously discussed, Erin interfered with police communications, was in the house with John before the shooting, communicated with him during the incident, and was standing at John's side when he was shot after yelling and pointing a gun at police. Indeed, Erin was not merely a "member of the public," but potentially a suspect in a larger criminal enterprise.

Erin also argues for the first time on appeal that her interference with police communications was protected "speech only" under Texas Penal Code § 38.15. (Appellant's Brief, p. 13). This Court disregards arguments brought for the first time on appeal unless the issue "is a pure question of law and a miscarriage of justice would result from our failure to consider it." *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996); *see also Harden v. Field Mem. Cmty. Hosp.*, 265 F. App'x 405, 406 n.1 (5th Cir. 2008) (per curiam). The

question of whether Erin's interference with police communications consisted of "speech only" does not fall within the exception required for review on appeal. *See Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, 478 (5th Cir. 2002) (rejecting argument on issue not presented in complaint but raised for the first time on appeal); *Harden*, 265 F. App'x at 406 n.1 (rejecting appellant's argument regarding a state-law tort claims notice requirement brought for the first time on appeal).

Nonetheless, section 38.15 is inapplicable to this case. Although it is true that section 38.15 does provide a defense to an interference charge for interference that is "speech only," there is no indication that Erin was charged with or that Officer Turner detained her for interference with public duties. *See* Tex. Penal Code Ann. § 38.15 (West 2016). Regardless, this argument was not presented to the district court and there is ample evidence Officer Turner reasonably seized Erin under the circumstances. *See Copeland*, 278 F.3d at 478.

Officer Turner's only contact with Erin was removing her from the scene pursuant to SWAT protocol and Colleyville Police Department direction. (ROA.588–89). Officer Turner did not transport or interview Erin. Indeed, Erin's *Amended Complaint* does not indicate that Officer Turner inappropriately transported, questioned, arrested, or detained Erin. Consequently, this Court

should affirm the district court's order dismissing Erin's claim for wrongful arrest and unreasonable seizure. *See id.*

C. Officer Turner Did Not Use Excessive Force in Detaining Erin Lincoln.

Officer Turner's only contact with Erin was to simply remove her from the scene and take her to a Colleyville Police vehicle. (ROA.588–89). In the process, Officer Turner handcuffed Erin to secure her. These actions are well within the constitutional boundaries for an investigative detention.

This Court has recognized that placing handcuffs on a person tightly or even too tightly does not constitute excessive force. *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). Thus, handcuffing, even handcuffing that results in swelling or scrapes, is simply not an excessive use of force. *See id.* Indeed, Erin has not provided evidence of any injury or harm suffered from Officer Turner's alleged excessive force other than alleged bruises and scratches. This is insufficient to maintain a claim of excessive force. *See id*.

Moreover, Erin's conclusory allegations are insufficient to state an excessive force claim. *See Iqbal*, 556 U.S. at 680. Specifically, Erin ignores the context in which she was detained, including her own actions. Erin pleaded insufficient facts to allege that the force used by Officer Turner was excessive under the totality of the circumstances. *See id.* at 679; *Graham v. Connor*, 490 U.S. 386, 395–96 (1989).

Regardless, Erin's excessive force claim is evaluated under the Fourth Amendment objective reasonableness standard. *See Graham*, 490 U.S. at 395. Thus, Erin must allege "'(1) an 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.'" *Poole v. City of Shreveport*, 691 F.3d 624, 630 (5th Cir. 2012) (quoting *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009)). This injury must be more than de minimis. *Glenn*, 242 F.3d at 314.

In evaluating whether Plaintiffs have stated an excessive force claim regarding Erin Lincoln, the Court should consider: (1) the extent of the injury suffered; (2) the need for the applications of force; (3) the relationship between the need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response. *See Hudson v. McMillan*, 503 U.S. 1, 7 (1992); *Kitchen v. Dallas Cnty.*, 759 F.3d 468, 477 (5th Cir. 2014); *see also Petta v. Rivera*, 143 F.3d 895, 912 (5th Cir. 1998) (noting the blurred lines between Fourteenth Amendment and either Fourth or Eighth Amendment excessive force claims).

Erin has not provided sufficient details about Officer Turner's conduct and practically no details about her own conduct to state a claim for excessive force. The Supreme Court has explained:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment

> requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and, whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396 (internal quotes and citations omitted). Erin's *Amended Complaint* has not alleged "facts and circumstances," particularly regarding her own behavior, sufficient for the Court to determine that the force used by Officer Turner was excessive.

The only facts pleaded with sufficient specificity indicate that Keller Officer Turner handcuffed and carried Erin to a Colleyville Police vehicle. (ROA.229). Erin provides no facts as to her actions that precipitated Officer Turner's, and only vaguely alleges that she suffered "bruises and scratches" and "further traumatiz[ation]" when Officer Turner removed her from the scene. (ROA.240). However, she also alleges she was "severely traumatized" by the shooting, of which Officer Turner had no part. (ROA.239–40).

Regardless, handcuffing a person, even too tightly, does not violate the Fourth Amendment reasonableness standard and Erin's conclusory allegation regarding being "further traumatized" by Officer Turner's seizure is insufficient to state an excessive force claim. *See Glenn*, 242 F.3d at 314 (holding that swelling due to tight handcuffs did not amount to excessive force); *see also Stephenson v. McCleland*, 632 F. App'x 177, 184 (5th Cir. 2015) (per curiam) (bruising from handcuffs insufficient to show excessive force); *Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir. 2007) (same); *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005) (contusions from handcuffs and undemonstrated psychological injuries insufficient to show excessive force). Furthermore, Erin did not allege these injuries "resulted directly and only" from Officer Turner's actions, but that she was injured by "the force used on her" and "*further* traumatized" by Officer Turner's actions. (emphasis added). *See Poole*, 691 F.3d at 630.

Erin had been involved in a criminal event that ended with police shooting John as he yelled and pointed a gun at them. Thus, although Erin does not plead facts regarding her own behavior after the shooting, the facts she does plead are sufficient to justify Officer Turner treating her as a suspect. Specifically, Erin was in the house with John before the shooting, she had instructed him not to talk to police, and she was at his side when he was shot. Indeed, consider Erin's own description of:

- "screaming in terror";
- "lying on the ground crying";
- wanting to "be with her father";
- being "removed from the scene against her will";
- being a "young girl in distress because she had witnessed her father being killed and was almost killed herself"; and
- being "in extreme distress as a result of the shooting of her father." (ROA.229, 237–38, 240).

These facts alone justify Officer Turner's actions to secure Erin—a "severely traumatized," non-compliant, unidentified, victim/suspect—and remove her from the scene as officers and medics attended to John.

Finally, even assuming Erin was directly and only injured by Officer Turner's use of force, which Officer Turner contests, Erin's *Amended Complaint* gives no indication that Officer Turner's force was clearly excessive or unreasonable in light of the unfolding hostage/criminal situation that resulted in John's shooting. Erin made clear to Officer Turner that she wanted to stay with the armed and dying suspect. To remove her from the crime scene, Officer Turner had to handcuff her, pick her up, and carry her out. He did just that, and his actions were reasonable and necessary.

Erin's *Amended Complaint* has alleged only impropriety, but does not show "that the pleader is entitled to relief" against Officer Turner. *See Iqbal*, 556 U.S. at 678. Consequently, the district court properly dismissed Erin's excessive force claim against Officer Turner, and this Court should affirm that dismissal.

D. Officer Turner Is Entitled to Qualified Immunity, and Erin Lincoln Did Not Overcome Officer Turner's Qualified Immunity Defense.

Assuming that Erin successfully pleaded her claims against Officer Turner, which she has not, she has not overcome Officer Turner's qualified immunity defense.

The Court employs a two-part test to analyze a qualified immunity defense. First, the Court must determine whether the plaintiff alleges a violation of a "clearly established" constitutional right as to each individual defendant. *Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, the Court must determine whether that individual defendant's conduct was "objectively unreasonable." *Collins*, 382 F.3d 529 at 537. Even if a governmental official violated the Constitution, the official is nonetheless entitled to immunity if his or her conduct was "objectively reasonable" in light of "law which was clearly established at the time of the disputed action." *Id*.; *see also Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000). An official's conduct is objectively reasonable "unless all reasonable officials in the defendant's circumstances would have then known that the conduct violated the Constitution." *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 419 (5th Cir. 2008) (emphasis added). The Court may consider the two prongs of the qualified immunity analysis in either order. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

Once a defendant raises a qualified immunity defense, the plaintiff has the burden in response to the officers' motion to dismiss to show it was clearly established that the officers' actions were unconstitutional. *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009). Erin has failed at this task.

Erin again argues that her actions fall within the "clearly established" "speech only" exception to the Texas statute permitting criminal charges for interference with public duties. (Appellant's Brief, pp. 14–15). Again, this argument was not made to the district court and should be disregarded here. *See N. Alamo Water Supply*, 90 F.3d at 916.

Substantively, Erin argues that her two cited cases show that Officer Turner's seizure "simply for being a witness" was objectively unreasonable in light of clearly established law. (Appellant's Brief, p. 15). However, the facts in Erin's cited cases are too distinct from the facts presented here to clearly establish that no reasonable officer would have seized Erin as Officer Turner did. *See Gates*, 537 F.3d at 419.

As previously discussed, *Lidster* and *Montoya* involve facts vastly different from those at issue here. Specifically, *Lidster* involved a police roadblock at which officers were soliciting information about a hit-and-run from passing motorists. *See Lidster*, 540 U.S. at 422. This was truly an attempt to solicit information from members of the public at large. *Montoya*, however, involved the detention of a

suspect at LAX airport based on numerous suspicious facts that raised a reasonable suspicion the suspect was transporting drugs into the United States. *See Montoya*, 473 U.S. at 533. Indeed, *Montoya* does not even involve the detention of a witness, but a suspect. Moreover, neither case involves facts similar to those at issue here. *See Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam) (holding that courts must conduct a fact-specific analysis of case precedent when determining whether a law is "clearly established"). Specifically, neither case involves a witness to a police shooting in which she was the only person with the suspect before the shooting, interfered with police attempts to communicate with the suspect, and was standing next to the suspect when he threatened police and was shot. Thus, Erin's cited cases offer no insight into whether it was "clearly established" that Officer Turner's seizure was unconstitutional under the circumstances. *See City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (highlighting the need for case precedent to clearly establish that the action take under the specific circumstances in question was unconstitutional).

In contrast, the court in *Walker v. City of Orem*, 451 F.3d 1139, 1144 (10th Cir. 2006), held that officers who detained family members after witnessing another family member being shot by the officers were protected by qualified immunity. In *Walker*, police pursued a suspect to his parents' home. *Id*. Once there, police confronted the suspect in the driveway as he allegedly held a knife to

his wrist. *Id*. Police fatally shot the suspect. *Id*. Immediately after the shooting, the suspect's mother and sister were on the front porch, and police ordered them to the ground at gunpoint. *Id*. at 1145. Police then ordered them into the home and detained them for approximately an hour and a half. *Id*.

On appeal from denial of the officers' motion to dismiss, the Tenth Circuit noted that the seizure advanced the public interest "to a much greater degree than the roadblock involved in *Lidster*." *Id*. at 1148. Thus, the court held that a detention longer than that in *Lidster* "may have been reasonable," but the detention was too long for investigative purposes. *Id*. at 1148–49.

As to the officers' qualified immunity defense, however, the court noted that the plaintiffs had the burden in response to the officers' motion to dismiss to show it was clearly established that the officers' actions were unconstitutional. *Id*. at 1151. Noting the lack of case precedent on point, the court held that "[t]he contours of the right [were not] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right," and reversed the trial court's denial of the officers' motion to dismiss. *Id*.

As was the case in *Walker*, the police here encountered and shot a dangerous suspect. (ROA.228–29). *Id*. at 1145. In *Walker*, the suspect's mother and sister witnessed the shooting. *Id*. Here, Erin witnessed the shooting of John. (ROA.228–29). Both the officers in *Walker* and Officer Turner here secured and

detained the family member witnesses. (ROA.229–30). *Id*. Thus, just as the plaintiffs in *Walker* could not show the officers violated a clearly established right by detaining them, so Erin cannot establish that Officer Turner violated a clearly established right by detaining her.

As to her excessive force claim, Erin cites no case law to show that no reasonable officer would have thought the means by which Officer Turner seized her was constitutional. *See Collier*, 569 F.3d at 217; *Gates*, 537 F.3d at 419.

In sum, Erin has not shown it was clearly established that Officer Turner's seizure of her was unconstitutional. She was the only other person in the house with John before the shooting and was standing at his side while he threatened police with a gun. Thus, Erin was properly removed from the scene of the shooting and detained for questioning as a material witness and potential suspect. Consequently, this Court should affirm the district court's dismissal of Erin's claims as to Officer Turner's qualified immunity defense.

VI. CONCLUSION

Erin did not adequately plead facts showing that Officer Turner could not reasonably detain her as a suspect or material witness after John was shot. Erin was the only person in the house with John before the shooting, she interfered with police officers' attempt to communicate with John, and she was standing at his side as he threatened officers with a gun. Thus, Keller Officer Turner reasonably

handcuffed her to remove her from the scene, and placed her in a Colleyville Police vehicle to detain her after the shooting.

Likewise, Erin did not adequately plead facts showing that Officer Turner used excessive force to detain her. Specifically, Erin only claims de minimis injuries consistent with a constitutional handcuffing. Furthermore, Erin did not allege these injuries "resulted directly and only" from Officer Turner's actions. Regardless, Erin did not plead facts sufficient to show that the force used was excessive in light of the hostage/criminal situation.

Finally, Erin did not offer sufficient evidence to overcome Officer Turner's qualified immunity defense. Specifically, Erin did not offer sufficient case precedent to demonstrate that Officer Turner violated a "clearly established" right. In other words, Erin failed to show that no reasonable officer would have thought that Officer Turner's actions were constitutional under the circumstances.

Consequently, the district court properly dismissed Erin's claims against Officer Turner for failure to state a claim and failure to overcome Officer Turner's qualified immunity defense.

VII. PRAYER

WHEREFORE, Appellee Officer Turner prays that this Honorable Court will affirm the district court's order dismissing Appellant's claims. Appellee

further prays for any other relief, at law or in equity, general or special, to which he may otherwise show himself to be justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Appellee's Brief* has been served on all counsel of record on this 31st day of October, 2016, by email through the Court's electronic filing system.

/s/ William W. Krueger, III
WILLIAM W. KRUEGER, III

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief (pages 1–25) contains 5,800 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, Font Size 14, with footnotes at Font Size 12.

/s/ William W. Krueger, III
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