Appendix A

United States Court of Appeals
for the Fifth Circuit

No. 20-20217

KEVIN BYRD,

Plaintiff–Appellee,

versus

RAY LAMB, *Agent*,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-3014

(Filed Mar. 9, 2021)

Before KING, ELROD, and WILLETT, *Circuit Judges.*

PER CURIAM:

Kevin Byrd alleges that Ray Lamb, an Agent for the Department of Homeland Security, verbally and physically threatened him with a gun to facilitate an unlawful seizure. Byrd filed a *Bivens* action against Agent Lamb alleging use of excessive force to effectuate an unlawful seizure. Agent Lamb filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court denied Agent Lamb's motion to dismiss. Agent Lamb now appeals. We conclude

that Byrd's lawsuit is precluded by our binding case law in *Oliva v. Nivar*, 973 F.3d 438 (5th Cir. 2020), *petition for cert. filed*, 89 U.S.L.W. 28 (U.S. Jan. 29, 2021) (No. 20-1060). We therefore REVERSE and REMAND with instructions to dismiss the claims against Agent Ray Lamb.

I.

In the early morning hours of February 2, 2019, Kevin Byrd went to visit his ex-girlfriend, Darcy Wade, at the hospital after she called to tell him that she had been in a car accident. Byrd learned that Wade had been in the car with Eric Lamb (Darcy's then-boyfriend) when they collided with a Greyhound bus. Byrd also became aware that Wade and Eric Lamb had been kicked out of a bar before the car accident occurred. Byrd went to that bar to learn more details about this occurrence. After attempting to investigate, Byrd tried to leave the parking lot of the bar, but he was prevented by Eric's father, Agent Ray Lamb.

Byrd alleges that Agent Lamb physically threatened him with a gun, and verbally threatened to "put a bullet through his f–king skull" and that "he would blow his head off." Byrd further alleges that Agent Lamb attempted to smash the window of his car and left marks and scratches on his window.

Shortly after the incident began, Byrd called for police assistance. Two local officers arrived at the scene. Byrd contends that upon the officers' arrival,

Agent Lamb identified himself as a federal agent for the Department of Homeland Security, and one of the officers immediately handcuffed and detained Byrd for nearly four hours.

After reviewing surveillance footage, the officers released Byrd. Shortly thereafter, Agent Lamb was arrested and taken into custody for aggravated assault with a deadly weapon and misdemeanor criminal mischief.

Byrd filed a *Bivens* action against Agent Lamb alleging use of excessive force to effectuate an unlawful seizure and filed a 42 U.S.C. § 1983 action against the two local officers for unlawfully detaining him. Agent Lamb and the local officers filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) raising the defense of qualified immunity. Agent Lamb also argued that he had reasonable suspicion of Byrd's criminal activity, including harassment and stalking of Lamb's son. The district court granted the officers' motions to dismiss but denied Agent Lamb's motion to dismiss.

Agent Lamb timely appealed.

II.

"We review the district court's denial of the qualified immunity defense *de novo*, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff." *Brown v. Miller*, 519

F.3d 231, 236 (5th Cir. 2008). "Our jurisdiction over qualified immunity appeals extends to 'elements of the asserted cause of action' that are 'directly implicated by the defense of qualified immunity[,]' including whether to recognize new *Bivens* claims." *De La Paz v. Coy*, 786 F.3d 367, 371 (5th Cir. 2015) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007)).

The Supreme Court has stated that "the *Bivens* question" is "antecedent" to the question of qualified immunity. *Hernandez v. Mesa* (*Hernandez I*), 137 S. Ct. 2003, 2006 (2017). In *Bivens*, the Supreme Court recognized an implied right of action for damages against federal officers alleged to have violated a citizen's constitutional rights. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

The Supreme Court has cautioned against extending *Bivens* to new contexts. *See Hernandez v. Mesa* (*Hernandez II*), 140 S. Ct. 735, 744 (2020) (holding that the plaintiff's *Bivens* claim arose in a new context, and factors, including the potential effect on foreign relations, counseled hesitation with respect to extending *Bivens*); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (holding that plaintiff's detention-policy claims arose in a new *Bivens* context, and factors, such as interfering with sensitive Executive-Branch functions and inquiring into national-security issues, counseled against extending *Bivens*). In fact, the Supreme Court has gone so far as to say that extending *Bivens* to new contexts is a " 'disfavored' judicial activity." *Abbasi*, 137

S. Ct. at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

The Supreme Court has provided a two-part test to determine when extension would be appropriate. First, courts should consider whether the case before it presents a "new context." *Hernandez II*, 140 S. Ct. at 743. Only where a claim arises in a new context should courts then proceed to the second step of the inquiry, and contemplate whether there are "any special factors that counsel hesitation about granting the extension." *Id.* (cleaned up). Some recognized special factors to consider include: whether there is a "risk of interfering with the authority of the other branches," whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," and "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* "When a party seeks to assert an implied cause of action under the Constitution," as in this case, "separation-of-powers principles . . . should be central to the analysis." *Abbasi*, 137 S. Ct. at 1857.

We recently addressed the extension of *Bivens* in *Oliva v. Nivar*, 973 F.3d 438. In that case, an altercation arose between police officers in a Veterans Affairs (VA) hospital and Oliva over hospital ID policy. *Id.* at 440. The VA officer wrestled Oliva to the ground in a chokehold and arrested him. *Id.* We concluded that Oliva' s Fourth Amendment claim for use of excessive force arose in a new context. *Id.* at 443.

In ruling in this case, the conscientious district court judge did not have the benefit of our decision in *Oliva* and Agent Lamb's attorney did not even raise the *Bivens* issue in the district court. Nevertheless, we must address it here. In *Oliva*, we held that *Bivens* claims are limited to three situations. First, "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment." *Id.* at 442 (citing *Bivens*, 403 U.S. at 389–90). Second, "discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment." *Id.* (citing *Davis v. Passman*, 442 U.S. 228 (1979)). Third, "failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment." *Id.* (citing *Carlson v. Green*, 446 U.S. 14 (1980)). "Virtually everything else is a 'new context.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1865).

To determine whether Byrd's case presents a new context, we must determine whether his case falls squarely into one of the established *Bivens* categories, or if it is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Id.* at 442 (quoting *Abbasi*, 137 S. Ct. at 1859).

Here, although Byrd alleges violations of the Fourth Amendment, as did the plaintiff in *Bivens*, Byrd's lawsuit differs from *Bivens* in several meaningful ways. This case arose in a parking lot, not a private home as was the case in *Bivens.* 403 U.S. at 389. Agent Lamb prevented Byrd from leaving the parking lot; he

was not making a warrantless search for narcotics in Byrd's home, as was the case in *Bivens*. *Id.* The incident between the two parties involved Agent Lamb's suspicion of Byrd harassing and stalking his son, not a narcotics investigation as was the case in *Bivens*. *Id.* Agent Lamb did not manacle Byrd in front of his family, nor strip-search him, as was the case in *Bivens*. *Id.* Nor did Lamb discriminate based on sex like in *Davis*, 442 U.S. at 230. Nor did he fail to provide medical attention like in *Carlson*, 446 U.S. at 23–24. As explained in *Oliva*, Byrd's case presents a new context.

We must also determine whether any special factors counsel against extending *Bivens*. Here, as in *Oliva*, separation of powers counsels against extending *Bivens*. *Oliva*, 973 F.3d at 444. Congress did not make individual officers statutorily liable for excessive-force or unlawful-detention claims, and the "silence of Congress is relevant." *Abbasi*, 137 S. Ct. at 1862. This special factor gives us "reason to pause" before extending *Bivens*. *Hernandez II*, 140 S. Ct. at 743.

For these reasons, we reject Byrd's request to extend *Bivens*. Because we do not extend *Bivens* to Byrd's lawsuit, we need not address whether Agent Lamb is entitled to qualified immunity.

III.

We REVERSE and REMAND with instructions to dismiss the claims against federal Agent Ray Lamb.

Appendix A

DON R. WILLETT, *Circuit Judge*, specially concurring:

The majority opinion correctly denies *Bivens* relief.

Middle-management circuit judges must salute smartly and follow precedent. And today's result is precedentially inescapable: Private citizens who are brutalized—even killed—by rogue federal officers can find little solace in *Bivens*.

Between 1971 and 1980, the Supreme Court recognized a *Bivens* claim in three different cases, involving three different constitutional violations under the Fourth, Fifth, and Eighth Amendments.[1] Those nine years represent the entire lifespan of *Bivens*. For four decades now, the Supreme Court, while stopping short of overruling *Bivens*, has "cabined the doctrine's scope, undermined its foundation, and limited its precedential value."[2] Since 1980, the Supreme Court has "consistently rebuffed" pleas to extend *Bivens*, even going so far as to suggest that the Court's *Bivens* trilogy was

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[1] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–90 (1971) (strip search in violation of the Fourth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (discrimination on the basis of sex in violation of the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (failure to provide medical attention to a prisoner in violation of the Eighth Amendment).

[2] *Hernandez v. Mesa*, 140 S. Ct. 735, 751 (2020) (Thomas, J., concurring).

wrongly decided.[3] The *Bivens* doctrine, if not overruled, has certainly been overtaken.

Our recent decision in *Oliva v. Nivar* erases any doubt.[4] José Oliva was a 70-year-old Vietnam veteran who was choked and assaulted by federal police in an unprovoked attack at a VA hospital. The *Oliva* panel isolated the precise facts of the three Supreme Court cases that recognized *Bivens* liability,[5] quoted the Court's recent admonition that extending *Bivens* was "disfavored judicial activity,"[6] and concluded that Oliva had no constitutional remedy. "Virtually everything" beyond the specific facts of the *Bivens* trilogy "is a 'new context,'" the panel held.[7] And new context = no *Bivens* claim.

My big-picture concern as a federal judge—indeed, as an everyday citizen—is this: If *Bivens* is off the table, whether formally or functionally, and if the Westfall Act preempts all previously available state-law constitutional tort claims against federal officers acting within the scope of their employment,[8] do victims

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[3] *Id.* at 743.

[4] 973 F.3d 438 (5th Cir. 2020).

[5] *Id.* at 442.

[6] *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

[7] 973 F.3d at 442.

[8] 28 U.S.C. § 2679(b). The Federal Tort Claims Act does waive the United States' sovereign immunity for certain intentional torts—but not for excessive-force claims against individual federal officers. For victims like José Oliva, Congress offers no protection at all; indeed, it has removed protection. *Hernandez*,

of unconstitutional conduct have any judicial forum whatsoever? Are all courthouse doors—both state and federal—slammed shut? If so, and leaving aside the serious constitutional concerns that would raise, does such wholesale immunity induce impunity, giving the federal government a pass to commit one-off constitutional violations?

Chief Justice John Marshall warned in 1803 that when the law no longer furnishes a "remedy for the violation of a vested legal right," the United States "cease[s] to deserve th[e] high appellation" of being called "a government of laws, and not of men."[9] Fast forward two centuries, and redress for a federal officer's unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone. *Bivens* today is essentially a relic, technically on the books but practically a dead letter, meaning this: If you wear a federal badge, you can inflict excessive force on someone with little fear of liability.

At bottom, *Bivens* poses the age-old structural question of American government: who decides—the

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140 S. Ct. at 752 (Thomas, J., concurring). Beyond providing no federal-officer corollary to § 1983, Congress "has pre-empted the state tort suits that traditionally served as the mechanism by which damages were recovered from federal officers." *Id.* (citing the Westfall Act, 28 U.S.C. § 2679(b)). For Oliva, as for many victims of unconstitutional conduct at the hands of federal officers, it's *Bivens* or nothing.

[9] *Marbury v. Madison, 5* U.S. 137, 163 (1803).

judiciary, by creating implied damages actions for constitutional torts, or Congress, by reclaiming its lawmaking prerogative to codify a *Bivens*-type remedy (or by nixing the preemption of state-law tort suits against federal officers)? Justices Thomas and Gorsuch have called for *Bivens* to be overruled, contending it lacks any historical basis.[10] Some constitutional scholars counter that judge-made tort remedies against lawless federal officers date back to the Founding.[11] Putting that debate aside, Congress certainly knows how to provide a damages action for unconstitutional conduct. Wrongs inflicted by state officers are covered by § 1983. But wrongs inflicted by federal officers are not similarly righted, leaving constitutional interests violated but not vindicated. And it certainly smacks of

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[10] *Hernandez*, 140 S. Ct. at 750–53 (Thomas, J., concurring, joined by Gorsuch, J.).

[11] *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 GEORGETOWN L. J. 117, 134 (2009); *see also* Carlos M. Vazquez & Steven I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 532 (2013); Sina Kian, *The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 144 (2012); Peter Margulies, *Curbing Remedies for Official Wrongs: The Need for* Bivens *Suits in National Security Cases*, 68 CASE W. RES. L. REV. 1153, 1156–64 (2018); Steven I. Vladeck, *Supreme Court Review*, CATO INSTITUTE, https://www.cato.org/sites/cato.org/files/2020-09/2020-supreme-court-review-10_vladeck.pdf; James E. Pfander, Alexander A. Reinert, Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 569 (2020); Brief Amicus Curiae of Douglas Laycock, James E. Pfander, Alexander A. Reinert and Joanna C. Schwartz, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).

self-dealing when Congress subjects state and local officials to money damages for violating the Constitution but gives a pass to rogue federal officials who do the same. Such imbalance—denying federal remedies while preempting nonfederal remedies—seems innately unjust.

I am certainly not the first to express unease that individuals whose constitutional rights are violated at the hands of federal officers are essentially remedy-less.[12] A written constitution is mere meringue when rights can be violated with nonchalance. I add my voice to those lamenting today's rights-without-remedies regime, hoping (against hope) that as the chorus grows louder, change comes sooner.

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[12] *See Marbury*, 5 U.S. at 163 (noting the "general and indisputable rule, that where there is a legal right, there is also a legal remedy") (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES, 23); *see also* Joan Steinman, *Backing Off* Bivens *and the Ramifications of This Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984); Betsy J. Grey, *Preemption of* Bivens *Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L.Q. 1087, 1127 (1992); Joanna C. Schwartz, Alexander A. Reinert, and James E. Pfander, *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based* Bivens *Claims*, NOTRE DAME L. REV., Forthcoming 2021, https://ssrn.com/abstract=3778230; William Baude, Bivens *Liability and its Alternatives*, https://www.summarycommajudgment.com/blog/a-few-thoughts-about-bivens-liability.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEVIN BYRD, PLAINTIFF, VS. RAY LAMB, KOSKA, AND W. LINDEMANN, DEFENDANTS.	. . . . .	4:19-CV-3014 HOUSTON, TEXAS FEBRUARY 20, 2020 2:36 P.M.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPEARANCES

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Appendix B

APPEARANCES – CONTINUED

FOR DEFENDANTS KOSKA AND LINDEMANN:

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

PROCEEDINGS

THE COURT: I know you've been through it for Ms. Malone, but for my benefit, we are going to do appearances of counsel in Byrd versus Lamb. We will start with plaintiffs.

MR. ALTMAN: Keith Altman on behalf of the plaintiffs. I apologize. I have not entered an appearance and not pro hac vice in this case, but Mr. Radner, my colleague, got stuck in trial and could not break away to be on the call today. And so I apologize and I

hope that the Court will allow me this brief, temporary appearance.

THE COURT: You will be filing your entry of appearance?

MR. ALTMAN: Yes, I will be.

THE COURT: Okay. All right. For the defendants?

MR. SELBE: Your Honor, Steven Selbe and Allison Wells for Officers Koska and Lindemann.

THE COURT: Welcome.

MR. WILLEY: Drew Willey for Ray Lamb.

THE COURT: We have two motions from Moss or Lamb. One is the motion to dismiss and one is the motion for leave to file a third party complaint. I have read the papers. You needn't repeat anything in the papers.

Does Officer Lamb wish to add to anything that's in the papers?

Please identify yourself for those on the phone because Mr. Altman -- he won't be able to tell who is speaking.

MR. WILLEY: Yes, Your Honor. This is Drew Willey speaking.

Just a few things to highlight for the Court. First, specifically on the de minimus injuries, in the response

to -- plaintiff's response to our motion to dismiss, they indicated that they did allege psychological injuries. I would contest that those allegations were merely conclusory. They just make the blanket statement that there were psychological injuries and mental distress and, you know, three or four other things. They don't actually say what those injuries are, and Texas state law often recognizes that psychological, emotional distress --

THE COURT: Well, let's see. If we take plaintiff's allegations as true, which we must at this stage, he says that Defendant Lamb pointed his gun at Mr. Byrd, threatened to kill him, attempted to shoot him without any indication that the plaintiff had done or was about to do anything unlawful, causing plaintiff emotional harm. That is sufficiently specific, isn't it? Wouldn't all of us be harmed emotionally if a gun was pointed at us and the trigger was pulled?

MR. WILLEY: I would ordinarily say yes, but that's not alleged. And so, yes, if we are going by the four corners of the complaint, then, yeah, common sense, maybe that's in there, but they did not allege it. And so the complaint as written does not meet the de minimus injury requirements for that.

There is also paragraph 66, Your Honor, where they state, As a proximate result, the plaintiff was harmed and suffered damages for his physical, mental, emotional injury and pain, fright and shock, mental anguish, humiliation and embarrassment. My contention

is just that those are all conclusory, and there is not any mention of what the result of that was, not to mention that there was no physical manifestation of any of those alleged nonphysical injuries.

THE COURT: Okay. Let's see. It is alleged that Defendant Ray Lamb jumped out of his truck, threatened Mr. Byrd with a gun, yelled he would, quote, put a bullet through Mr. Byrd's fucking skull.

Defendant Lamb continued to yell that he was a federal agent and instructed Mr. Byrd to roll down his window or he would blow his head off. With his gun drawn at Mr. Byrd, Defendant Lamb stepped in front of Mr. Byrd's car to prevent him from driving away. He attempted to smash the window of Mr. Byrd's car on two occasions. He strikes the window of the car and he attempted to pull the trigger of the gun. The bullet fell out or became dislodged. When the police arrived, they handcuffed Mr. Byrd for several hours and refused to loosen the handcuffs or allow Mr. Byrd to use the restroom, despite his pleas.

MR. WILLEY: That speaks to the other defendants.

THE COURT REPORTER: I'm sorry. What did you say?

THE COURT: He said that referred to the other defendants.

After the incident, Mr. Byrd received threatening phone calls believed to be from Defendant Lamb's son, claiming, quote, he doesn't know who he has fucked with.

Surely that's enough to present emotional harm. No?

MR. WILLEY: Your Honor, I'm saying that that presumption is one thing. He controls the complaint and he controls what you are looking at on there. And if he wanted to allege specific injuries resulting from those facts, then he very well could have, but plaintiff failed to do so.

THE COURT: Would plaintiff like to respond?

MR. ALTMAN: Sure, Your Honor. I just think the whole concept of conclusory allegations is where he is just filling in the four corners of like the pattern -- you know, the elements of a claim. Clearly, as Your Honor read, there was an explicit and frankly obscene detail of exactly what took place here. And as Your Honor clearly said, that certainly allows a reasonable inference that these are called damages. I don't think there is any requirement at this time that the damages have to be specified with particularity in that way. He suffered, you know, emotional harm as a result of these very explicit actions. Clearly that is sufficient at this stage of the litigation at the motion to dismiss stage to -- for denial of the motion to dismiss.

MR. WILLEY: May I respond?

THE COURT: Yes. Certainly.

MR. WILLEY: Just to make things abundantly clear, I was speaking specifically not about damages. I was speaking specifically to the issue of de minimus injuries and the requirement to claim injuries that are more than de minimus.

In that respect, I understand that given the facts that he laid out -- I believe plaintiff's counsel called them obscene, detailed facts. While those are true, he still has to allege more than de minimus injuries.

THE COURT: The Fifth Circuit in Checki versus Webb. That is spelled C-H-E-C-K-I versus Webb, W-E-B-B, said, quote: A police officer who terrorizes a civilian by brandishing a cocked gun in front of a civilian's face may not cause physical injury but he has certainly laid the building blocks for a Section 1983 claim against him, end quote.

Quote: There is no valid reason for insisting on physical injury for a Section 1983 claim can be stated in this context.

I think it's sufficient. All these are just allegations right now, and we have to defer until summary judgment for further factual development, but I think the complaint passes muster at this stage. So I'm going to deny the motion to dismiss.

Now, on the motion for leave to file a third party complaint -- maybe I'm mistaken about the purpose of a third party complaint, but I authority authorities were clear, including Dwight and Miller, that Rule 14 is for a defendant who is trying to transfer to a third party the liability that's asserted against the defendant by the original plaintiff. The fact that it's from the same transaction, the same constellation of facts doesn't seem to me enough, but tell me where I'm wrong.

MR. WILLEY: Yes, Your Honor. To the extent there is a procedural way to get this separate complaint in and the way -- the case law and my interpretation of Rule 14 was that in order to get new defendants in to this claim, that this was the correct procedure to do so.

THE COURT: Well, let's see. The relevant -- in Southeast Mortgage Company versus Mullins -- Mullins is M-U-L-L-I-N-S -- the Fifth Circuit said, The entirely separate independent claim cannot be maintained against a third party under Rule 14 even though it does arise out of the same general set of facts as the main claim, and I think that's what is happening here. And I'm going to have to deny that motion too. I'm very sorry.

The whole quiver of allegations and claims for relief are terribly unnecessary. I think this all could have been settled with a round of handshakes and a few apologies, but that's out of my control.

MR. WILLEY: Your Honor, you'll be denying the motion for leave --

THE COURT: I'm afraid I need to deny both motions. Yes.

MR. WILLEY: As to all new parties, both the city --

THE COURT: The complaint is denied. You might be able to draft a different complaint that would pass Rule 14 muster, but the complaint as proposed is not going to be allowed. If you can say this was not officer -- none of this has to do with Officer Lamb, in fact, the real culprit was police Lieutenant Smith, that's the kind of thing that I could allow.

MR. WILLEY: Officer Phillips?

THE COURT: I made up the name Smith because I'm not --

MR. WILLEY: I know, but I'm saying, he was -- what you're saying is Officer --

THE COURT: You need to file a complaint that says that then, not sue the City of Conroe and who all else you have sued.

Do y'all wish to be heard?

MR. SELBE: No, Your Honor.

MR. ALTMAN: Your Honor --

THE COURT: Go ahead. We can hear you.

MR. ALTMAN: Your Honor, I didn't have anything to say, so that's all I was going to say.

THE COURT: This is very atypical of lawyers not to have anything to say.

(Laughter)

THE COURT: Thank you all very much. You are excused. Thank you.

MR. ALTMAN: Thank you, Your Honor.

(Court adjourned at 2:48 p.m.)

* * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause.

Date: May 6, 2020

/s/ Mayra Malone

Mayra Malone, CSR, RMR, CRR
Official Court Reporter

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEVIN BYRD

Plaintiff,

Case No. 4:19-cv-03014

v.

AGENT RAY LAMB;
OFFICER KOSKA; and
OFFICER W. LINDEMANN,

Defendants,

/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT RAY LAMB'S MOTION TO DISMISS

NOW COMES Plaintiff, Kevin Byrd, by and through counsel, and files this response to Defendant Ray Lamb's Motion to Dismiss. For the reasons stated herein, Plaintiff respectfully requests this Honorable Court deny Defendant's motion.

STATEMENT OF ISSUE PRESENTED

Whether Plaintiff has alleged sufficient facts to state a claim against Defendant Lamb for excessive force and unlawful detention/seizure where Plaintiff has alleged, among other things, that Defendant Lamb held him at gunpoint, physically prevented him from leaving the parking lot, threatened to kill and attempted to shoot Plaintiff.

Appendix C

STATEMENT OF FACTS

On February 2, 2019, Kevin Byrd, ("Mr. Byrd" or "Plaintiff") was at the hospital visiting his ex-girlfriend, Ms. Darci Wade, who had sustained injuries in a car accident. (ECF # 1, ¶ 12). Mr. Byrd had been summoned to the hospital by Ms. Wade specifically requesting his presence. (*Id.* at ¶ 13). While at the hospital, Mr. Byrd learned about the accident and later left the hospital to check on Ms. Wade's pets. (*Id.* at ¶ 16). On his way, Mr. Byrd was informed that before the accident, Ms. Wade and Mr. Eric Lamb, who was with her and driving the car when it collided with a parked bus on the side of the road, were kicked out of a local establishment. (*Id.* at ¶ 17, 14). Mr. Byrd then drove to the establishment to inquire about the incident. (*Id.* at ¶ 18). After not being able to speak to a manager, Mr. Byrd attempted to leave the parking lot. (*Id.* at ¶ 19, 21). As Mr. Byrd went to drive away, he noticed someone inside of the red truck parked in the parking lot. (*Id.* at ¶ 22). Mr. Byrd thought this truck might belong to Eric Lamb. (*Id.* at ¶¶ 14, 17, 20, 22). Eric Lamb's father, Defendant Ray Lamb, immediately jumped out of the truck and threatened Mr. Byrd with a gun and yelled that he would "put a bullet through [Mr. Byrd]'s fucking skull." (*Id.* at ¶ 23). Defendant Lamb continued to yell that he was a federal agent and instructed Mr. Byrd to roll down his window or he would blow his head off. (*Id.* at ¶ 24). With his gun drawn at Mr. Byrd, Defendant Lamb stepped in front of Mr. Byrd's car to prevent him from driving away, attempted to smash

the window of Mr. Byrd's car on two occasions, struck the window of the car, and attempted to pull the trigger of this gun at Mr. Byrd but the bullet fell out or became dislodged instead of discharging at Mr. Byrd. (*Id.* at ¶ 25-28). At this point, Mr. Byrd called the police himself for assistance in dealing with Defendant Lamb. (*Id.* at ¶ 29).

When the police arrived, they handcuffed Mr. Byrd for several hours, and refused to loosen the handcuffs or allow Mr. Byrd to use the restroom, despite his pleas. (*Id.* at ¶ 31-36). After the police arrived, Defendant Lamb's wife exited the vehicle and picked up the dislodged bullets that fell from her husband's gun and placed them in her car. (*Id.* at ¶ 37). Sometime later, another officer showed up and began to conduct an investigation. (*Id.* at ¶ 38). Mr. Byrd told the officer what happened and told him to check the surveillance videos of the parking lot to confirm his story. (*Id.* at ¶ 39). After watching the surveillance video, Mr. Byrd was released, and the officer told Mr. Byrd that he was free to stay while he finished his investigation of Defendant Lamb. (*Id.* at ¶ 40). Mr. Byrd told the officer that he wished to press charges against Defendant Lamb. (*Id.* at ¶ 41). The other police officers then told Mr. Byrd that he was not free to stay at the scene and needed to leave. (*Id.* at ¶ 42). Out of concerns for his safety, having heard different instructions from different officers, Mr. Byrd left the parking lot. (*Id.* at ¶ 43). While Mr. Byrd was not charged with any crimes as a result of this incident with Defendant Lamb, Lamb was

arrested and taken into custody for Aggravated Assault with a Deadly Weapon and Misdemeanor Criminal Mischief. (*Id.* at ¶ 44).

After Defendant Lamb was arrested, either Defendant Lamb, his wife, or his son, attempted to file harassment charges against Mr. Byrd. These harassment charges were rejected. (*Id.* at ¶ 46). After the incident, Mr. Byrd received threatening phone calls, believed to be from Defendant Lamb's son, stating that "he doesn't know who he has nicked with." (*Id.* at ¶ 45).

There was no lawful basis for Defendant Lamb to point his weapon at Mr. Byrd and detain him at gunpoint, to threaten Mr. Byrd that he would "put a bullet through his fucking skull," or "blow his head off," or for Defendant Lamb to attempt to shoot or to threaten to kill Mr. Byrd. (*Id.* at ¶ 23-24, 28, 48, 63).

STANDARD OF REVIEW

"To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiffs grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). That is, "a complaint must 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,

129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, at 570). 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." *Id.* (citing *Twombly*, at 556). The court's task is "to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Doe ex rel. Magee v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 854 (5th Cir. 2012). "Determining whether a complaint states a plausible claim for relief . . . requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

In deciding a 12(b)(6) motion, the court "must accept all well-pleaded facts as true, draw all inferences in favor of the nonmoving party, and view all facts and inferences in the light most favorable to the nonmoving party." *Club Retro, L.L.C., v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotations and citations omitted). "*Iqbal* does not allow us to question the credibility of the facts pleaded . . . . *Iqbal*, instead, tells us to assume the veracity of well-pleaded factual allegations." *Ramirez v. Escajeda*, 921 F.3d 497, 501 (5th Cir. 2019) (internal quotations omitted). "Finally, motions to dismiss under Rule 12(b)(6) "are viewed with disfavor and are rarely

granted." *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 231 (5th Cir. 2009) (internal citation omitted).

LAW & ARGUMENT

I. DEFENDANT LAMB IS NOT ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S CLAIMS OF EXCESSIVE FORCE AND UNLAWFUL DETENTION

"A public official is entitled to qualified immunity unless a plaintiff can show (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Gerhart v. McLendon*, 714 Fed. Appx. 327, 333 (5th Cir. 2017) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (unpublished, Exhibit 1). As "an affirmative defense, the defendant must both plead and establish his entitlement to immunity." *Holland v. City of Houston*, 41 F. Supp. 2d 678, 695 (S.D. Tex. 1999).

a. Constitutional Violation – Excessive Force

As pronounced by the Fifth Circuit long ago, "[a] police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause *physical* injury, but he has certainly laid the building blocks for a section 1983 claim against him." *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986). Since then, the 5th Circuit has established that "psychological," and not just physical "injuries may sustain

a Fourth amendment claim." *Flores v. City of Palacios*, 381 F.3d 391, 397-398 (5th Cir. 2004). "Any force found to be objectively unreasonable exceeds the de minimis threshold, and, conversely, objectively reasonable force will result in de minimis injuries only." *Alexander v. City of Round Rock*, 854 F.3d 298, 309 (5th Cir. 2017). Accordingly, the "sufficiency of a plaintiff's injury turns not on the severity of the injury, but on the reasonableness of the officer's use of force." *Scott v. White*, 2018 U.S. Dist. LEXIS 73907, at *15 (W.D. Tex. Apr. 30, 2018). As summarized by a district court in the case *Bernard v. Maine*, 2019 U.S. Dist. LEXIS 467705, at *23 (D. Me. March 22, 2019), it is established throughout the circuits that an officer's act of pointing weapons at civilians can amount to unconstitutional excessive force under the Fourth Amendment:

> Under certain circumstances, police use of force "may be unreasonable under the Fourth Amendment even if officers do no more than threaten the occupants with firearms." *Terebesi v. Torreso*, 764 F.3d 217, 240 (2d Cir. 2014). "[P]ointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force." *Espinosa v. City & Cty. of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010). "While police are not entitled to point their guns at citizens when there is no hint of danger, they are allowed to do so when there *is* reason to fear danger." *Baird v. Renbarger*, 576 F.3d 340, 346 (7th Cir. 2009). "The display of weapons, and the pointing of firearms directly at persons inescapably involves the

> immediate threat of deadly force. Such a show of force should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at that time." *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1192-93 (10th Cir. 2001); see also *Mlodzinski v. Lewis*, 648 F.3d 24, 37-40 (1st Cir. 2011) (applying the *Graham* factors to an officer's conduct in pointing a weapon); *Stamps*, 813 F.3d at 40-41 (same).

Further, "[o]ther circuits also have recognized excessive-force claims without physical contact and therefore rejected qualified immunity defenses under circumstances similar to those here." *Merrill v. Schell*, 279 F. Supp. 3d 438, 447-49 (W.D.N.Y. 2017). "For example, the Seventh and Ninth Circuits have found that pointing a gun at a suspect when he or she does not present any significant danger to officers may constitute an unreasonable use of force under the Fourth Amendment." *Id.* (collecting cases). Similarly, "[o]ther circuits have also held that pointing guns at persons who are compliant and present no danger is a constitutional violation." *Baird v. Renbarger*, 578 F.3d 340, 346 (7th Cir. 2009) (citing *Robinson v. Solano County*, 278 F.3d 1007, 1015-16 (9th Cir. 2002) (en banc) (pointing a gun at an unarmed suspect who poses no danger constitutes excessive force); *Baker v. Monroe Township*, 50 F.3d 1186, 1193-94 (3d Cir. 1995) (detention at gunpoint violated the Fourth Amendment as there was "simply no evidence of anything that should have

caused the officers to use the kind of force they are alleged to have used").

District courts in this circuit have specifically entertained claims of excessive force where police officers unreasonably hold citizens at gunpoint and point weapons in their face without a lawful basis and without a physical injury sustained. See *Manis v. Cohen*, 2001 U.S. Dist. LEXIS 19453, at *24-27 (N.D. Tex. Nov. 28, 2001); *Hodge v. Layrisson*, 1998 U.S. Dist. LEXIS 13930, at *17-19 (E.D. La. Aug. 31, 1998). Both *Manis* and *Hodge* courts explained that physical injury is no longer required to maintain an excessive force claim, an emotional or psychological injury may suffice to support this constitutional claim.

In *Davenport v. Rodriguez*, 147 F. Supp. 2d 630, 637 (S.D. Tex. 2001), the district court dismissed the plaintiff's excessive force claim finding her allegations that the officers act of handcuffing her and "shoving" her into a police car to not allege an excessive force claim. In finding the plaintiff did not state a claim the court wrote: "Had Plaintiff alleged that she was handcuffed too tightly, for instance, or that the officer had pointed a gun and threatened to shoot while she was being arrested, she may have stated a claim." *Id.* (citing *Thompson v. City of Galveston*, 979 F. Supp. 504, 509-510 (S.D.Tex.1997), aff'd 158 F.3d 583 (5th Cir. 1998) (finding that an action might lie for excessive force for a police officer holding a gun to the head of a nine-year-old and threatening to pull the trigger)).

Appendix C

"In order to state a claim for excessive force in violation of the constitution, a plaintiff must allege (1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *Manis*, at *22. "The amount of injury necessary to satisfy the Fifth Circuit's requirement of 'some injury' and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances." *Id.* (citing *Ikerd v. Blair*, 101 F.3d 430, 434-435 (5th Cir. 1996)). Finally, "a psychological injury may suffice to support a constitutional claim of excessive force in an action under Section 1983." *Id.* at *25 (citing *Dunn v. Denk*, 79 F.3d 401, 403-404 (5th Cir. 1995)).

Here, Plaintiff was attempting to lawfully drive his car away when Defendant Lamb exited his vehicle, pointed his gun at Plaintiff and threatened to "put a bullet through his fucking skull," and "blow his head off" Defendant Lamb threatened to kill and attempted to shoot Plaintiff for no lawful basis. (*Id.* at ¶ 23-24, 28, 48, 58, 63). Plaintiff alleged that Defendant Lamb's act of threatening to kill him, pointing a gun at him, and attempting to shoot the gun, were objectively unreasonably, unnecessary and excessive where Plaintiff had done nothing unlawful, no crime was committed nor was one about to be committed that warranted any use of force whatsoever. (*Id.* at ¶ 58-59). Plaintiff has alleged a sufficient injury where Defendant Lamb's actions caused Plaintiff emotional harm and emotional

injury, fright, shock, mental anguish, humiliation and embarrassment. (*Id.* at ¶ 66). Plaintiff has alleged an injury resulting from force and has alleged and described the unreasonableness of Defendant Lamb's actions. Accordingly, Plaintiff has stated a claim for excessive force against Defendant Lamb for pointing a gun at Plaintiff, threatening to shoot and kill Plaintiff, and attempting to shoot Plaintiff.

b. Constitutional Violation – Unlawful Detention

"Fourth Amendment protections attach "whenever a police officer accosts an individual and restrains his freedom to walk away." *Flores v. Rivas*, 2019 U.S. LEXIS 178034, at *17 (W.D. Tex. Aug. 11, 2019) (quoting *Lincoln v. Turner*, 874 F.3d 833, 844 (5th Cir. 2017). Warrantless searches and seizures, often called "investigatory stops," are permissible "only if based on reasonable suspicion that 'criminal activity is afoot.'" *United States v. Martinez*, 486 F.3d 855, 859 (5th Cir. 2007) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "The presence or absence of reasonable suspicion must be determined in light of the totality of the circumstances confronting a police officer, including all information available to the officer at the time of the decision to stop a person." *United States v. Silva*, 957 F.2d 157, 160 (5th Cir. 1992). The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. *See Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). If the officer

does not learn facts rising to the level of probable cause, the individual must be allowed to "go on his way." *Id.*

"A person is seized when an officer, by means of physical force or show of authority, has in some way restrained that person's liberty." *Flores*, at *17 (citing *Flores v. City of Palacios*, 381 F.3d 391, 398 (5th Cir. 2004)). "While physical force is not required, to effect a seizure without it, "*submission* to the assertion of authority is necessary." " *Id.* at *19 (quoting *McLin v. Ard*, 866 F.3d 682, 691 (5th Cir. 2017). A "person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980). Circumstances that might indicate a seizure, "even where the person did not attempt to leave," can be the "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*

"The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Mich. v. Chesternut*, 486 U.S. 567, 574 (1988). "Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only

with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Id.*

Plaintiff has alleged sufficient facts to demonstrate he was unlawfully seized and detained by Defendant Lamb. Here, Plaintiff alleged that Defendant Lamb, with a gun pointed at his head, stated that he was a federal agent and verbally threatened to kill Plaintiff if Plaintiff did not comply with his orders. (ECF # 1, ¶ 23-24, 63). Plaintiff alleged that Defendant Lamb blocked Plaintiff's vehicle path and physically prevented Plaintiff from driving away, still with his gun pointed at Plaintiff, and attempted to shoot Plaintiff. (*Id.* at ¶ 27-28). Plaintiff alleged that he had to call the police for assistance. (*Id.* at ¶ 29). Plaintiff's allegations imply that he complied with Defendant Lamb's show of force and did not leave the parking lot, as was his intention upon being confronted by Defendant Lamb. Instead, he called the police for help. He had a federal agent pointing a gun at him and preventing him from leaving and driving his car away safely. Plaintiff submits that he had alleged sufficient facts to demonstrate a detainment/seizure by Defendant Lamb. Additionally, Plaintiff has alleged sufficient circumstances to demonstrate that Defendant Lamb's actions were unlawful. Plaintiff was leaving a parking lot when accosted by Defendant Lamb. Defendant Lamb made no attempt to have any sort of investigative conversation with Plaintiff, instead making an immediate threat to kill Plaintiff, with a gun in his hand and pointed at Plaintiff. Plaintiff alleged that Defendant

had no legal basis to hold Plaintiff at gunpoint where Plaintiff had done nothing unlawful, no crime had been committed, nor was one about to be committed that warranted Defendant's detainment of Plaintiff. (*Id.* at ¶ 58-62).

Defendant Lamb claims that his actions were lawful because of Plaintiff's suspicious behavior, because his actions "could constitute harassment, stalking or suspicion of other criminal activity." (ECF # 22, Page 5). Plaintiff alleged that Defendant Lamb attempted to file such a meritless charge against him, and it was rejected by the court. (*Id.* at ¶ 46). Further, Plaintiff has alleged that no crime occurred, and no crime was about to be committed to warrant Defendant Lamb's conduct. As the nonmoving party at the motion to dismiss stage, all inferences are to be viewed in the light most favorable to Plaintiff. *Club Retro, L.L.C.*, 568 F.3d at 194. Defendant Lamb apparently believes the first step in investigating a nonviolent suspect is to accost him with a gun and threaten to "put a bullet through his fucking skull." While Plaintiff was not arrested for his actions, Defendant Lamb was arrested and taken into custody for Aggravated Assault with a Deadly Weapon and Misdemeanor Criminal Mischief. (ECF # 1, ¶ 44). When the investigating officer watched the film, Plaintiff was released. There was no lawful basis to detain Plaintiff. No reasonable police officer would believe it was lawful to threaten to kill and attempt to shoot a nonviolent individual, physically prevent him from leaving, and keep him detained at gunpoint. Plaintiff

has stated a claim of unlawful seizure against Defendant Lamb.

c. Qualified Immunity – Clearly Established Law

Defendant Lamb is not entitled to qualified immunity for his conduct because he violated Plaintiff's clearly established constitutional rights to be free from excessive force and unlawful seizures. To "defeat a qualified immunity defense" at the motion to dismiss stage, "the plaintiff's burden is discharged if the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." *Brown v. City of Houston*, 297 F. Supp. 3d 748, 773 (S.D. Tex. 2017) (citing *Martone v. Livingston*, 2014 U.S. Dist. LEXIS 96375, at *21 (S.D. Tex. July 16, 2014)). *See also., O'Bryant v. Walker Cty.*, 2009 U.S. Dist. LEXIS 6301, at *5-6 (S.D. Tex. Jan. 29, 2009) ("At the motion to dismiss stage, a Section 1983 cause of action survives a qualified immunity challenge if the allegations in the complaint [evidence] 'an objectively unreasonable violation of a clearly established right.' If, on the other hand, the evidence viewed most favorably to the nonmovant gives rise to a difference of opinion as to the lawfulness of the action among reasonably competent officers, the police officer is entitled to qualified immunity.")). As discussed herein, Plaintiff has alleged sufficient facts to support both his claim of excessive force and unlawful detention. Defendant Lamb is therefore not entitled to dismissal. *See Manis*, at *24-27; *Hodge*, at *17-19.

"In order for a right to be 'clearly established,' the relevant legal authorities must give the officer 'fair warning' that his or her conduct was unlawful." *Gerhart v. McLendon*, 714 Fed. Appx. 327, 333 (5th Cir. 2017) (citing *Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002)). "Although the right cannot be defined too abstractly, the Supreme Court has rejected any requirement that the facts of prior cases be 'fundamentally' or 'materially' similar." *Id.* (citing *Hope*, at 741). "Thus, officials can still be on notice that their conduct violates established law even in novel factual circumstances. The key question is not whether there is a case directly on point, but whether a reasonable officer would understand that his or her conduct was unlawful." *Id.* (citing *Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004) (internal citation omitted).

The court "need not immunize an officer from suit for an obvious violation simply because no case has held that the officer's precise conduct was unlawful." *Id.* at 334-335. Where there is an absence of controlling authority, "a consensus of cases of persuasive authority" can be "sufficient to compel the conclusion that no reasonable officer could have believed that his or her actions were unlawful. Case law need not be directly on point, though it should be close, and if the conduct is particularly outrageous, the caselaw putting the officer on notice can be more general in character." *Graves v. Zachary*, 277 Fed. Appx. 344, 348 n.4 (5th Cir. 2008) (citing *McClendon v. City of Columbia*, 305 F.3d 214, 329 (5th Cir. 2002) and *Pierce v. Smith*, 117

F.3d 866, 882 (5th Cir. 1997) ("We recognize that in order to preclude qualified immunity it is not necessary that the very action in question has previously been held unlawful, or that the plaintiff point to a previous case that differs only *trivially* from his case. However, the facts of the previous case do need to be *materially* similar. We also recognize that the egregiousness and outrageousness of certain conduct may suffice to obviously locate it within the area proscribed by a more general constitutional rule . . . .") (unpublished, Exhibit 2).

Here, Plaintiff "had a clearly established right to be free from excessive force, and it was clearly established that the amount of force that the officers could use depended on the severity of the crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee." *Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir. 2009). Under these factors, no use of force was permitted where Plaintiff had not committed a crime, did not pose a threat to Defendant Lamb's immediate safety, and was not resisting arrest nor attempting to flee a legitimate police stop.

In *Hinojosa v. Terrell*, 834 F.2d 1223, 1230 (5th Cir. 1988), the plaintiffs alleged excessive force and Court found that pointing a gun was not so "grossly disproportionate to the need for action under these circumstances." *Id.* at 1230-1231. There, officers had responded to a pool hall where fights had and were continuing to occur and where one officer was "on the ground engaged in a physical altercation." *Id.* The

court placed emphasis on the fact that there was no physical injury resulted, a factor that is no longer dispositive of the analysis. *Id.* at 1230; *Flores*, at 397-398; *Manis*, at *25-26. While finding the act of pointing a gun was not excessive force under those facts, the *Hinojosa* court did not foreclose excessive force claims being brought when a citizen is unlawfully threatened with a gun by police officers where there is no lawful basis to do so. Accordingly, Plaintiff submits that his right to be free from excessive force in having a gun pointed at him was clearly established law and Defendant Lamb is not entitled to qualified immunity.

Finally, an individual's right to be free from detention absent reasonable suspicion was clearly established well before the actions giving rise to this case. *See Ibarra v. Harris Cty. Tex.*, 243 Fed. Appx. 830, 833 (5th Cir. 2007) ("The law is clearly established that a detention is objectively unreasonable if the police officers lacks reasonable suspicion to believe that the person is engaged in criminal activity . . . .") (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979) (unpublished, Exhibit 3). Defendant Lamb is not entitled to qualified immunity for detaining Plaintiff at gunpoint and threating to blow his head off if he did not comply where Plaintiff had not committed any crime and Defendant Lamb had no reasonable suspicion or lawful basis to detain Plaintiff.

Appendix C

CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests this Honorable Court deny Defendant Lamb's motion to dismiss.

Respectfully submitted,

EXCOLO LAW, PLLC

Dated: November 12, 2019 By: */s/ Solomon M. Radner*

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CERTIFICATE OF SERVICE

Undersigned hereby states that on November 12, 2019, he caused the foregoing document to be filed electronically with the United States District Court and that a copy of said document was sent to all counsel of record through the Court's CM/ECF electronic filing system.

/s/ Solomon M. Radner

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEVIN BYRD,	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO.
AGENT RAY LAMB;	§	4:19-cv-3014
OFFICER KOSKA; and	§	
OFFICER W. LINDEMANN,	§	
Defendants.	§	

AGENT RAY LAMB'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Ray Lamb files this Partial Motion to Dismiss in response to Plaintiff's Original Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and for the same would show as follows:

I. NATURE AND STAGE OF PROCEEDINGS

Plaintiff, Kevin Byrd, filed his Original Petition on August 13, 2019 against Defendants alleging causes of action for a violation of his civil rights with regard to an incident that occurred on February 2, 2019. Plaintiff specifically alleges Fourth Amendment unlawful

detention and excessive force claims against Defendant Ray Lamb (Hereafter "Mr. Lamb"), Fourth Amendment unlawful detention, arrest and excessive force claims against Defendant Officer Koska and a Fourth Amendment failure to intervene claim against Defendant Officer Lindemann.

II. STATEMENT OF ISSUES PRESENTED

The issues presented in this motion are as follows:

1) Are Plaintiff's claims sufficient to allege an actual constitutional violation against Mr. Lamb with regard to excessive force?

2) Are Plaintiff's claims sufficient to allege an actual constitutional violation against Mr. Lamb with regard to unlawful detention?

3) Does Plaintiff's pleading overcome this officer's entitlement to qualified immunity with regard to Plaintiff's excessive force and unlawful detention claims?

III. STANDARD OF REVIEW PURSUANT TO RULE 12(b)(6)

A Rule 12(b)(6) motion to dismiss should be granted when a plaintiff fails to provide the "grounds of his entitlement to relief." FED. R. CIV. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"); *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). "[T]o survive a motion to dismiss, a complaint

must 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 (2009) (quoting *Twombly*, 550 U.S. at 570). 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." *Id.* (citing *Twombly*, 550 U.S. at 556); *Young. v. Vanerson*, 612 F.Supp.2d 829, 846 (S.D. Tex. 2009).

To survive a motion to dismiss, Plaintiff's complaint must state a "plausible" claim for relief:

> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief.

Iqbal, 556 U.S. at 679 (internal citations and quotations omitted).

Plaintiff's complaint must include facts that "raise a right to relief above the speculative level," and into the "realm of plausible liability." *Twombly*, 550 U.S. at 555. Plaintiff's obligation to "provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v.*

Allain, 478 U.S. 265, 286 (1986) (internal quotations omitted)).

Under *Twombly*, a plaintiff's complaint must "nudg[e] his claim across the line from conceivable to plausible." *Id.* Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Iqbal*, 556 U.S. at 678. Legal conclusions "must be supported by factual allegations." *Id.* "However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Piolets Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

IV. ARGUMENTS AND AUTHORITIES

No Constitutional Violation has been Alleged Regarding Excessive Use of Force

Under 42 U.S.C. § 1983, to prevail on an excessive use of force claim, a plaintiff must show "(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." *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) (quoting *Ramirez v. Knoulton*, 542 F.3d 124, 128 (5th Cir. 2008)). Although the Fifth Circuit no longer requires a "significant injury" for excessive force claims, the injury must be more than de minimis. *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999); *Tarver v. City of Edna*, 410 F.3d at 752 (5th Cir. 2005). In the present case, Plaintiff's

allegations of merely the "use of a gun" and the "threat of deadly force" simply do not rise to the level of a constitutional violation under well-settled Fifth Circuit law Plaintiff has not alleged any conduct that indicates any act or use of force against Plaintiff at all that resulted in any injury to Plaintiff whatsoever.

Plaintiff alleges that Mr. Lamb's "strikes on the window left marks and scratches" and that Mr. Lamb "with his gun drawn, then stepped in front of Mr. Byrd's car to prevent him from driving away" after he "threatens" Plaintiff with mere words. Dkt. 1 pg. 3-4. Plaintiff fails to make any other allegations concerning any use of force or injury. Even Plaintiff's own allegations indicate the alleged weapon drawing and threats of force did not result in any physical harm to Plaintiff.

Plaintiff has failed to show an injury resulting from force and has further failed to show that the force was clearly unreasonable, as required for his claims against Mr. Lamb. Because Plaintiff fails to allege an injury that constitutes a constitutional violation, his excessive force claim against Defendant Lamb should be dismissed.

No Constitutional Violation has been Alleged Regarding Unlawful Detention

Plaintiff has failed to establish that a detention took place during the encounter with Mr. Lamb. For there to be an unlawful detention, the person in question must have been subject to an unlawful search or

seizure under the Fourth Amendment. A person is not seized unless "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 545 (1980). The majority in *Michigan v. Chesternet*, 486 U.S. 567, 575 n.9 (1988) held that a seizure requires either physical force or, where that is absent, submission to a show of authority. Here, there was no physical force used because the interaction between Plaintiff and Mr. Lamb did not involve any physical contact. The alleged facts do not indicate that Plaintiff was submitting to a show of authority by Mr. Lamb. Therefore, Plaintiff has not established that the circumstances of this incident rose to the level of a seizure or detention.

Even if this court found that Plaintiff was subject to detention, it was not an unlawful detention. "Under *Terry*, if a law enforcement officer can point to specific and articulable facts that lead him to reasonably suspect that a particular person is committing, or is about to commit, a crime, the officer may briefly detain—that is, 'seize'—the person to investigate." *U.S. v. Hill*, 752 F.3d at 1029, 1033 (citing *United States v. Jordan*, 232 F.3d 447, 448 (5th Cir. 2000)); *see also United States v. Sanders*, 994 F.2d 200, 203 (5th Cir. 1993) ("[A]fter the Supreme Court's opinion in Terry v. Ohio, it is now axiomatic that the police are allowed to stop and briefly detain persons for investigative purposes if the police have a reasonable suspicion supported by articulable facts that criminal activity may be afoot.") (internal

quotation marks and footnote omitted). Plaintiff's allegations themselves show that Mr. Lamb was justified in having reasonable suspicion of Plaintiff – according to the allegations, Plaintiff went to the establishment where Mr. Lamb's son was the night before, after finding out that information from a third party and parked right next to Mr. Lamb's son's car. Dkt. 1 pg. 4. These actions, even as alleged, could constitute harassment, stalking, or suspicion of other criminal activity. Therefore, based on Plaintiff's suspicious behavior regarding Mr. Lamb and his family, any possibly construed detention was lawful. Because no detention occurred and if it did, it was lawful, Plaintiff's claims of unlawful detention against Mr. Lamb should be dismissed.

Qualified Immunity

The doctrine of qualified immunity shields officials from civil liability so long as the conduct of the officials "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)). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (cleaned up). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Put simply, qualified immunity protects "all but the plainly

incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The qualified immunity inquiry includes two parts. In the first part, the court asks whether the officer's alleged conduct has violated a federal right; in the second, it asks whether the right in question was "clearly established" at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct. The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate law clearly established at the time. *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014) (per curiam).

Here, both prongs of the qualified immunity test are in favor of Mr. Lamb. First, Plaintiff has not pled sufficient facts for his claims to rise to the level of a constitutional violation. *Galvan v. City of San Antonio*, 435 Fed. Appx. 309-11 (5th Cir. 2010) (per curiam) ("When dealing with an uncooperative suspect, police act within the scope of objective reasonableness when they "react[ ] with measured and ascending responses.") *Glenn v. City of Tyler*, 242 F.3d at 314 (5th Cir. 2001) ("handcuffing too tightly, without more, does not amount to excessive force."); *Tarver*, 410 F.3d at 752 ("[a]s Tarver does not allege any degree of physical harm greater than de minimis from the handcuffing, we find that he has not satisfied the injury requirement of a § 1983 claim."). Plaintiff has failed to allege any actions by Mr. Lamb that could be construed as use of force or unlawful detention, and much less, any acts that would defeat his qualified immunity. Because

Plaintiff has failed to allege a constitutional violation, his claims against Mr. Lamb should be dismissed.

Second, Plaintiff has identified no clearly established right under Fifth Circuit precedent that Mr. Lamb violated. No reasonable officer (or any officer for that matter) would have believed the actions complained of here would amount to a constitutional violation. Admittedly, research on these alleged facts is lacking because they amount to almost no actions to complain of at all. The alleged actions fall below even minimal actions that have been dismissed in other cases, like tightly handcuffing someone. These allegations consist of mere words, scratches on a window, and standing in front of a car. These allegations are grossly insufficient for a constitutional claim and legal precedent provides no clearly established right of Plaintiff to be free from words of an officer, scratches on a window, and standing in front of a car, especially given the suspicious actions of Plaintiff. Therefore, Mr. Lamb is entitled to qualified immunity and Plaintiff's claims should be dismissed.

V. CONCLUSION AND PRAYER

Defendant Ray Lamb respectfully requests that the Court grant his Partial Motion to Dismiss and dismiss the claims of excessive force and unreasonable

detention in Plaintiff's Original Complaint as against this Defendant pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Drew Willey, certify by my signature below that the foregoing document was electronically filed with this Court on Oct. 22, 2019, which constitutes service on Filing Users.

/s/ Drew Willey

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEVIN BYRD

Plaintiff,

v.

AGENT RAY LAMB;
OFFICER KOSKA; and
OFFICER W. LINDEMANN,

Defendants,

/

Case No. 4:19-cv-3014

JURY DEMANDED

COMPLAINT AND DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, KEVIN BYRD, by and through his attorneys, complaining of Defendants, and respectfully alleges as follows:

JURISDICTION AND VENUE

1. This is a civil rights action in which the Plaintiff seeks relief for the violation of this rights secured by 42 U.S.C. § 1983, *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), and the Fourth and Fourteenth Amendment.

2. Jurisdiction of this Court is found upon 28 U.S.C. §§ 1331 and 1367(a).

3. The events that give rise to this lawsuit took place in the City of Conroe, County of Montgomery, State of Texas.

4. Venue is appropriate in the Southern District of Texas pursuant to 28 U.S.C § 1391(b) since the acts providing the legal basis for this complaint occurred in the City of Conroe, County of Montgomery, State of Texas.

PARTIES

5. Plaintiff, Kevin Byrd ("Mr. Byrd" or "Plaintiff'), is a law-abiding citizen of the United States and a resident of the City of Conroe, County of Montgomery, State of Texas.

6. Defendant, Ray Lamb ("Defendant Lamb"), is employed by the United States Federal Government as an agent in the Homeland Security Department and was acting under color of law.

7. Defendant, Officer Koska ("Defendant Koska"), is employed by the City of Conroe as a police officer in the Conroe Police Department and was acting under the color of law.

8. Defendant, Officer W. Lindemann ("Defendant Lindemann"), is employed by the City of Conroe as a police officer in the Conroe Police Department and was acting under the color of law.

9. The individual Defendants Lamb, Koska and Lindemann, when referred to collectivity, will be referred to as the individually named "Defendant Officers."

10. Each and all of the acts of the Defendants alleged herein were committed by said Defendants while acting within the scope of their employment by the Conroe Police Department.

11. All herein complained of actions of the Defendants were done recklessly, intentionally, maliciously, gross negligently, wantonly, knowingly, and with deliberate indifference, and in a manner that shocks the conscience.

STATEMENT OF FACTS

12. On February 2, 2019, Mr. Byrd was at the hospital visiting his ex-girlfriend, Darci Wade, who had just been involved in a serious motor vehicle accident.

13. Mr. Byrd had received a phone call in the early hours of the morning requesting him to go to the hospital because Darci Wade had been severely injured and was requesting Mr. Byrd's presence.

14. The accident occurred when Eric Lamb collided with a Greyhound Bus which allegedly was broken down on the side of the road. Eric Lamb was driving Darci Wade's vehicle.

15. While at the hospital, Mr. Byrd spoke with a friend of Darci's, and learned about the accident.

16. Mr. Byrd then left the hospital. Mr. Byrd initially left to go check on Darci's pets and let them out.

17. On his way, Mr. Byrd learned that Darci and Eric Lamb had been kicked out of an establishment the night before.

18. Mr. Byrd decided to go to the establishment and inquire as to why they had been kicked out.

19. While waiting in the parking lot, Mr. Byrd saw a caretaker or custodian cleaning the parking lot. Mr. Byrd had a conversation with the man and learned that the entire parking lot is under video surveillance and that if he could obtain the video footage from the manager, who would arrive in a few hours.

20. Mr. Byrd was parked near a red dodge truck that he believed to be Eric Lamb's vehicle.

21. While waiting to speak to the manager, Mr. Byrd got hungry and decided to leave the parking lot to get something to eat.

22. As Mr. Byrd starts to drive away he notices someone inside of the red truck and thought it was Eric Lamb. It was not Eric Lamb, but Ray Lamb, (Defendant Lamb), Eric's father.

23. Defendant Lamb immediately jumps out and threatens Mr. Byrd with a gun and states that he would "put a bullet through his fucking skull."

24. Defendant Lamb yelled at Mr. Byrd that he is a federal agent and told him to roll down his window or he would blow his head off.

25. Defendant Lamb then attempts to smash the window of Mr. Byrd's car on two occasions.

26. Defendant Lamb's strikes on the window left marks and scratches.

27. Defendant Lamb, with his gun drawn, then stepped in front of Mr. Byrd's car to prevent him from driving away.

28. Defendant Lamb then tries to pull the trigger at Mr. Byrd but the bullet falls out / becomes dislodged.

29. Mr. Byrd calls the police to his assistance.

30. When Defendant Koska arrives, Defendant Lamb shows him his police-credentials.

31. Defendant Koska then immediately places Mr. Byrd in handcuffs and detains him in the back of the squad car.

32. Defendant Lindemann arrives shortly thereafter.

33. The handcuffs were so tight they caused Mr. Byrd's hands to turn purple.

34. Mr. Byrd asked Defendant Officers to loosen the handcuffs and to allow him to use the restroom.

35. Defendant Officers denied these requests.

36. Defendant Officers kept Mr. Byrd detained in this manner near four hours.

37. Defendant Lamb's wife then exited her vehicle and picked up the dislodged bullets from her husband's gun and put them in her car.

38. After some time, another officer shows up and conducts an investigation.

39. Mr. Byrd speaks to the officer and told him that he was in the parking lot before Defendant Lamb and that the officer should check the surveillance videos in the parking lot to confirm.

40. After seeing the videos, the investigating officer told Mr. Byrd that he was free to stay while he completed his investigation of Defendant Lamb.

41. Mr. Byrd told the officer he wished to press charges against Defendant Lamb.

42. The Officers Koska and Lindemann told Mr. Byrd that he was not free to stay and needed to leave the scene.

43. Out of concerns for his safety, having heard different instructions from the officers, Mr. Byrd left the parking lot.

44. Upon information and belief, once Mr. Byrd left the parking lot, Defendant Lamb was arrested and taken into custody for Aggravated Assault with a Deadly Weapon and Misdemeanor Criminal Mischief for his unlawful conduct against Mr. Byrd.

45. After Defendant Lamb was arrested, Mr. Byrd received a phone call from a blocked number informing him that "he doesn't know who he has fucked with." Upon information and belief, Eric Lamb made this phone call.

46. After Defendant Lamb was arrested, Eric Lamb and/or Defendant Lamb and/or Mrs. Lamb attempted to file harassment charges against Mr. Byrd. These charges were rejected by a court. Upon information and belief, these charges were instigated by Defendant Lamb.

47. Since Ray Lamb was arrested, Mr. Byrd had experienced stalking and his business has received false tips of unlawful activity requiring Mr. Byrd to retain counsel on the matter. Upon information and belief, Defendant Lamb caused the falsehood and instigated theft charges against Mr. Byrd.

48. Defendant asserted his privilege as a federal officer when he held Mr. Byrd at gunpoint. There was no lawful reason for Defendant Lamb to detain Mr. Byrd and no legal basis whatsoever to hold him at gun point.

49. There was no lawful reason whatsoever for Defendant Koska and Defendant Lindemann to detain and arrest Mr. Byrd.

50. As a direct and proximate result of the wrongful acts and omissions of Defendants, Mr. Byrd has sustained damages.

COUNT I
VIOLATION OF CIVIL RIGHTS UNDER *BIVENS*
(Fourth Amendment – Unlawful Detention and Excessive Force)

(*Against Defendant Lamb*)

51. Plaintiff incorporates herein all the prior allegations.

52. The Fourth Amendment guarantees citizens to be secure in their persons from unreasonable search and seizures.

53. A law enforcement officer may conduct an investigative stop if he has a reasonable suspicion, based on specific and articulable facts, that the stopped citizen has or is about to commit a crime.

54. Mr. Byrd is a law-abiding citizen.

55. At all relevant time, Mr. Byrd had a clearly established right to liberty, including his right to personal safety and bodily integrity, as well as protection from interrogations and unlawful stops and excessive

force pursuant to the Fourth Amendment to the United States Constitution.

56. At all times relevant, as a federal agent acting under color of law, Defendant Lamb was required to obey the laws of the United States.

57. At all times relevant, Defendant Lamb was acting under color of law where he stated he was a federal agent and ordered Mr. Byrd to comply.

58. Defendant Lamb had no reasonable suspicion nor probable cause to detain Mr. Byrd at gunpoint.

59. Further, the use of a gun and threat of deadly force by Defendant Lamb was objectively unreasonable, unnecessary, and excessive given the circumstances.

60. Mr. Byrd had done nothing unlawful. No crime was committed nor was one about to be committed whatsoever that warranted detention.

61. Defendant Lamb did not have any lawful basis whatsoever to detain Mr. Byrd.

62. Defendant Lamb's actions constituted unlawful detention.

63. Defendant Lamb threatened to kill Mr. Byrd.

64. Due to Defendant Lamb unlawful actions, he was charged with Aggravated Assault with a Deadly Weapon and Misdemeanor Criminal Mischief

65. The aforementioned acts deprived Mr. Byrd of the rights, privileges and immunities guaranteed to citizens of the United States by the Fourth and Fourteenth Amendments to the Constitution of the United States of America, and in violation of 42 U.S.C. § 1983.

66. As a proximate result of the illegal and unconstitutional acts of Defendant Lamb, Plaintiff was harmed and suffered damages for his physical, mental, emotional injury and pain, fright and shock, mental anguish, humiliation, and embarrassment.

COUNT II
VIOLATION OF CIVIL RIGHTS
UNDER 42 U.S.C. § 1983
(Fourth Amendment – Unlawful Detention/Arrest)

(*Against Defendant Koska*)

67. Plaintiff incorporates herein all the prior allegations.

68. The Fourth Amendment guarantees citizens to be secure in their persons from unreasonable search and seizures.

69. A law enforcement officer may conduct an investigative stop if he has a reasonable suspicion, based on specific and articulable facts, that the stopped citizen has or is about to commit a crime.

70. The Fourth Amendment requires police officers to possess sufficient probable cause to arrest criminal suspects.

71. At all relevant times, Mr. Byrd had a clearly established right to liberty, including his right to personal safety and bodily integrity, as well as protection from unlawful interrogations, stops, and arrests and excessive force pursuant to the Fourth Amendment to the United States Constitution.

72. At all times relevant, as a police officer acting under color of law, Defendant Koska was required to obey the laws of the United States.

73. Defendant Koska detain Mr. Byrd without any lawful basis.

74. Defendant Koska had no reasonable suspicion that Mr. Byrd has or was about to commit a crime.

75. In fact, it was Mr. Byrd who called the police to help him when Defendant Lamb was holding him at gun point for no lawful reason.

76. Defendnat Koska handcuffed and arrested Mr. Byrd, and placed in him the backseat of his squad car for several hours and would not loosen his handcuffs when his hands began to turn purple or allow him to use the restroom when he asked.

77. Tightening Mr. Byrd's handcuffs to the point where his hands changed colors despite his plea to loosen them was unreasonable and excessive. Mr. Byrd

was not a threat to anyone and had called the police to protect him. Further, preventing Mr. Byrd from using the restroom for several hours was unreasonable and unnecessary.

78. Defendant Koska did not have probable cause or any legal basis to arrest Mr. Byrd.

79. Defendant Koska's actions constituted unlawful arrest.

80. The aforementioned acts deprived Mr. Byrd of the rights, privileges and immunities guaranteed to citizens of the United States by the Fourth and Fourteenth Amendments to the Constitution of the United States of America, and in violation of 42 U.S.C. § 1983.

81. As a proximate result of the illegal and unconstitutional acts of Defendant Koska, Plaintiff was harmed and suffered damages for his physical, mental, emotional injury and pain, fright and shock, mental anguish, humiliation, and embarrassment.

COUNT III
VIOLATION OF CIVIL RIGHTS
UNDER 42 U.S.C. § 1983
(Fourth Amendment – Failure to Intervene)

(*Against Defendant Lindemann*)

82. Plaintiff incorporates herein all the prior allegations.

83. An officer who is present at the scene and fails to take responsible steps to protect a victim of another officer's use of excessive force can be held responsible for his own nonfeasance.

84. At all relevant time, Mr. Byrd had a clearly established right to liberty, including his right to personal safety and bodily integrity, as well as protection from unlawful detention and unlawful arrests to the Fourth Amendment to the United States Constitution.

85. Defendant Lindemann was present at the moment Defendant Lamb and Defendant Koska unlawfully detained and arrested Mr. Byrd. A reasonable police officer would have known that Defendant Lamb and Defendant Koska's actions were unlawful. Defendant Lindemann, with deliberate indifference, overlooked these unlawful actions and failed to intervene for Mr. Byrd's clearly established constitutional rights.

86. Defendant Lindemann decided to step back and watched Mr. Byrd's constitutional rights be violated.

87. At all times relevant, as a police officers acting under color of law, Defendant Lindemann was required to obey the laws of the United States.

88. Defendant Lindemann's action and omissions constituted a unconstitutional failure to intervene.

89. The aforementioned acts deprived Mr. Byrd of the rights, privileges and immunities guaranteed to citizens of the United States by the Fourth and Fourteenth Amendments to the Constitution of the United States of America and in violation of 42 U.S.C. § 1983.

90. As a proximate result of the illegal and unconstitutional acts of Defendant Lindemann, Plaintiff was harmed and suffered damages for his physical, mental, emotional injury and pain, fright and shock, mental anguish, humiliation and embarrassment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, KEVIN BYRD, demands judgment and prays for the following relief, jointly and severally, against all Defendants:

a. Full and fair compensatory damages in an amount to be determined by a jury;

b. Punitive damages in an amount to be determined by a jury;

c. Reasonable attorney's fees and costs of this action; and

d. Any such other relief as appears just and proper.

Appendix E

JURY DEMAND

Plaintiff hereby demands a trial by jury of all triable issues, per Fed. R. Civ. P. 38(b).

Respectfully Submitted,

Dated: **August 13, 2019**

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