

NO. 16-10856

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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ERIN LINCOLN,  
Plaintiff-Appellant

v.

PATRICK TURNER  
Defendant-Appellant

---

On Appeal from the United States District Court  
For the Northern District of Texas, Fort Worth Division

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**BRIEF FOR APPELLANT**

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS  
NO. 16-10856

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

ERIN LINCOLN,  
Plaintiff-Appellee

v.

PATRICK TURNER  
Defendant-Appellant

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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## REQUEST FOR ORAL ARGUMENT

The Plaintiff-Appellant, Erin Lincoln, respectfully requests oral argument. This case presents some important policy issues. Oral argument would assist the Court by allowing the parties to respond to specific inquiries. Oral argument would assist the Court by allowing the parties to bring life and dimension to the circumstances and the applicable law.

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## STATEMENT OF JURISDICTION

Plaintiff asserted an excessive force claim under 42 U.S.C. § 1983. The district court had jurisdiction over that claim under 28 U.S.C. § 1331, as well as 28 U.S.C. § 1343(3)-(4).

Defendant Turner moved to dismiss the Fourth Amendment excessive force claim against him on qualified immunity grounds. The district court granted the motion and entered a Final Judgment on May 23, 2016. Erin Lincoln timely appealed on June 22, 2016.

This Court has jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291.

## ISSUE PRESENTED

Erin Lincoln asserts that Defendant/Appellee Turner detained her against her will without probable cause and used excessive force, thus overcoming any qualified immunity defense asserted by Turner.

## STATEMENT OF THE CASE

This is a case brought pursuant to 42 U.S.C. § 1983 as a result of the force used upon and arrest of Erin Lincoln after her father was shot and killed by police. The encounter between John Lincoln, his daughter Erin and various law enforcement officers included officers from the cities of Colleyville, North

Richland Hills, Keller and Southlake, Texas who jointly participated in a multi-district SWAT team, as well as Ranger Barnes, who detained and interrogated Erin Lincoln against her will and withheld her from her family.

Erin Lincoln was at her grandmother's house (where she resided) when her father arrived in an emotionally unstable state, looking for Erin's grandmother. John was armed and having a mental crisis. Erin tried to calm her father, but when police arrived and surrounded the house (having been told John was armed and posed a threat to his mother), John became more agitated. Erin informed officers by phone that she was not in any danger and was trying to calm her father down. After John opened the front door with a gun in his hand and shouted at police, the SWAT team opened fire, hitting John. Erin, standing inches away from her father when he was shot, cried out in anguish. (ROA 229). She was then forcefully handcuffed by Officer Turner, thrown over his shoulder and taken into custody against her will. (*Id.*). Erin did not resist, struggle or fight in any way. (*Id.*). Despite the fact that she committed no offense and was not suspected of having committed an offense, she was, in effect, arrested. (ROA.229.). After being roughed up and thrown around, Erin was placed in handcuffs, against her will, in the back of a police car. (ROA.229.).

Erin questioned why she was being taken into custody and made it known that she wanted to be with her father, which request was ignored. (ROA.229.).

She was forced to sit in the back of the police car for hours and then transported to the police station against her will. (ROA.229.). She was interrogated against her will for five hours by other officers (also Defendants in the underlying suit). (ROA.229.). Her aunt, a Keller police officer, informed the police that Erin had a severe anxiety disorder and repeatedly asked that her niece be released into her care but she was denied all access to her niece. (ROA.229).

### SUMMARY OF THE ARGUMENT

The right to be free from unconstitutional seizures has been clearly established since long before the events at issue. To claim that Erin Lincoln was a suspect in any criminal activity is a disingenuous attempt to twist the facts to avoid liability. The seizure of Erin Lincoln and excessive use of force does not meet the reasonableness requirement with respect to the severity of the interference with her liberty interests.

### STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss de novo. *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 461 (5th Cir.2010). To survive a motion to dismiss, a complaint must contain enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Facial plausibility requires facts that allow the court “to draw the reasonable inference that the defendant is liable for the

misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citations omitted). This is a context-specific inquiry, “requir[ing] the reviewing court to draw on its experience and common sense.” *Id.* at 679, 129 S.Ct. 1937. Furthermore, the court need not accept legal conclusions as true. *Id.* at 678, 129 S.Ct. 1937. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

In this case, the district court erred in finding that the two hour detention in the police car was not unreasonable, that removing Erin from the scene was not clearly unreasonable and that Plaintiff did not allege that she suffered more than de minimus injury from the handcuffing.

## ARGUMENT

### I. Seizure

The Court's first task is to determine whether Erin Lincoln has alleged the violation of a constitutional right. The right to be free from unconstitutional seizures has been clearly established since at least 1969. In *Davis v. Mississippi*, 394 U.S. 721, 726–27, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), the United States Supreme Court reversed a conviction of a person that was taken into custody and fingerprinted without probable cause and stated that “to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would

subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed ‘arrests’ or ‘investigatory detentions.’” *Id.* at 726, 89 S.Ct. 1394.

In *Dunaway v. New York*, 442 U.S. 200, 212, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), the United States Supreme Court made it clear once again that an investigative detention at a police station based on something less than probable cause was unconstitutional, irrespective of whether the detention amounted to an “arrest” under state law. The Court explained “that detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.” *Id.* at 216, 99 S.Ct. 2248. The Court thus concluded that the police violated the petitioner's Fourth and Fourteenth Amendment rights “when, without probable cause, they seized petitioner and transported him to the police station for interrogation.” *Id.* Considering only the pleadings and accepting Erin Lincoln’s factual allegations as true, the Court should find that Erin Lincoln has stated a claim that the force used upon her was excessive and unreasonable under the circumstances. Erin Lincoln has stated a facially plausible claim for the violation of a constitutional right.

Next, the Court must consider whether the violation of Erin Lincoln's Fourth Amendment rights was objectively unreasonable given the clearly established law at the time of these events. This is a separate inquiry from the Fourth Amendment reasonableness determination. The focus is on the specific circumstances of the incident—could an officer have reasonably interpreted the law to conclude that the seizure was constitutional. *Banks v. Gammon*, 2010 WL 996743, at \*6 (N.D. Tex. Jan.26, 2010)(quoting *Ontiveros*, 564 F.3d 379, 383 n.1 (5<sup>th</sup> Cir. 1979)). For the purposes of the qualified immunity analysis, "'clearly established' means that the 'contours of the right' are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). When qualified immunity is raised in a motion to dismiss, it is the defendant's conduct as outlined in the pleadings that is examined for objective reasonableness. *Id.* at \*7 (quoting *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996)).

It has been clear since at least 1969 that the Fourth Amendment applies to “investigatory” seizures. Erin Lincoln was not even suspected of a crime, yet she was involuntarily taken into custody by force, held in custody without access to her family or any assistance, taken by police to the police station and interrogated for five hours after seeing her father killed and while suffering from her own emotional crisis. The officers were informed at the scene by family members that

Erin was emotionally fragile. (ROA.229.). Erin questioned Turner as to why she was being taken into custody and made it known that she wanted to see and be with her father, which request was ignored. (ROA.229.). Turner forced her to sit in the back of the police car in handcuffs and then Defendant Sandra Scott transported Erin to the police station, still in police custody. (ROA.229.). Erin was interrogated for five hours by Officers Meeks and Barnes and forced to write out a statement. (ROA.230.). The officers took pictures of her bruises and scratches which resulted from the force used upon her by the officers. (ROA.229.).

Kelly Lincoln had immediately gone to the scene after calling the police. (ROA.229.). She was in uniform at the time. (ROA.229.). She informed a Colleyville officer that her niece, Erin, had severe social anxiety disorder and asked that her niece be released into her care. (ROA.229.). She was told by a Colleyville officer that they would not release Erin. (ROA.230.). Kelly reiterated that her niece had a severe anxiety disorder and pointed out that Erin had just seen her father shot by the police and would be extremely distraught. (ROA.230.). When the officer ignored her request to have her niece released to her, Kelly demanded to see a supervisor. (ROA.229.). After approximately thirty minutes, a Colleyville Sgt. came over to talk to Kelly, who still waited by the police barricade near the house. (ROA.229.). The Sgt. told Kelly that they were holding Erin and would not release her. (ROA.229.). Kelly responded that they were outside of

their authority and were holding Erin, a witness not a suspect, against her will. (ROA.229-230.). She reiterated to the Sgt. that Erin had severe anxiety disorder and was emotionally distraught and fragile. (ROA.230.). The Sgt. refused to release Erin from custody. (ROA.230.).

After an additional hour and a half went by, the Sgt. told Kelly that they were taking Erin to the police station. (ROA.230.). Kelly went to the Colleyville police station to get Erin. However, she was not allowed to see Erin, who remained involuntarily in police custody. (ROA.230.). Kelly was forced to wait an additional five hours while Erin was interrogated by police. (ROA.230.). Erin was never a suspect in any crime and was never accused or charged with any crime. (ROA.230.).

In his brief in support of his motion to dismiss, Turner cited to several United States Supreme Court cases in an attempt to persuade the district court that the detention of Erin was “lawful.” Turner asserted that *United States v. Sokolow*, 490 U.S. 1, 9—10 (1989) recognized “that even the seminal case regarding lawful investigatory detentions involves a series of acts, each of them perhaps innocent if viewed separately, but when taken together warranted further investigation.” (ROA.607). Such a representation mischaracterizes and misapplies the *Sokolow* decision. In *Sokolow*, a man was suspected of being a cocaine dealer and was, in fact, arrested with 1,063 grams of cocaine in his luggage. 490 U.S. at 1. The

conduct giving rise to reasonable suspicion of a crime included a laundry list of activity (such as traveling under an assumed name) that, all together, gave rise to suspicion of criminal activity (“there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot” (citations omitted)). *Id.* at 9. Turner cannot point to any activity on the part of Erin in which she herself was suspected of criminal activity. All of the cases cited by Turner in his motion to dismiss relating to detention based upon reasonable suspicion of criminal activity do not apply at all to Erin’s claims. Her claims as asserted are clearly based upon her assertion that she was engaged in no criminal activity and was not engaging in any activity that would even give rise to reasonable suspicion of criminal activity.

Turner also cited to *U.S. v. Sharpe*, 470 U.S. 675, 685 (1985) to support his requested dismissal. (ROA.608). That case actually supports Erin Lincoln’s claim. The opinion reiterates that in evaluating the reasonableness of a detention, the Court must examine “whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 683. Thus, before even considering the “length” of the detention, Turner must first justify *any* detention based upon reasonable suspicion of criminal activity, which he cannot do. Even assuming Turner could justify an initial detention based upon reasonable suspicion of

criminal activity (which he cannot), the length of the detention does not meet the *Sharp* criteria. In *Sharp*, the Court reiterated that the “the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion, [but] we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.” *Id.* at 685. (citations omitted). The Court went on to hold that “in assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.” *Id.* at 686. Turner has not articulated any legitimate reason to detain Erin Lincoln against her will and has articulated nothing that would suggest that placing her handcuffed in the back of a patrol car for an indeterminate amount of time was “diligent.” Again, the detention must be reasonably related to investigation of the individual’s own criminal activity and in this case, there was none.

Similarly in *U.S. v. Maltais*, 403 F.3d 550 (8<sup>th</sup> Cir. 2005) cited by Turner at (ROA.608), the detained individual was suspected of drug activity and whose license plate numbers when called in by police revealed involvement in contraband

smuggling. *Id.* at 552. A drug dog revealed the presence of drugs and over 200 pounds of marijuana was found in the vehicle. *Id.* The Court concluded that the officers had “an articulable, reasonable suspicion that [the individual] was likely engaged in criminal activity.” *Id.* at 555. Each of these cases cited by Turner actually support Ms. Lincoln’s position that in her case, there was no articulable, reasonable suspicion that she was engaged in criminal activity. Turner makes a very disingenuous assertion that Erin Lincoln “admittedly” interfered with law enforcement officials’ effort to communicate with John Lincoln. (ROA.609). First of all, Turner makes no effort to try and convince this Court that he in any way knew or even suspected that Ms. Lincoln was “interfering” or that such was any basis for her detention/de facto arrest, she was never charged with any crime and she has never stated that she was interfering with officers. Instead, her pleading states “The police were aware that John posed no threat to his daughter, Erin, as they spoke to her on the phone and she informed them that her dad would never hurt her and that she was talking to him to calm the situation. She informed them that their presence was upsetting him. However, Erin did nothing to impede the officers or try to assist her father in any type of flight or escape. She did not verbally engage the officers at all, other than telling whoever was on the phone that the manner that the officers were engaging John was upsetting him.” (ROA.228).

Turner's representation to the district court that Plaintiff made "admissions" regarding suspected criminal activity was misleading.

A. The *Brown* Test

In *Brown v. Texas*, 443 U.S. 47, 51 (1979), the Court evaluated (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with the individual liberty.

1. Erin as a Witness

Turner cannot point to a case that allows involuntary seizure and interrogation of a witness that is not suspected of a crime. In *Illinois v. Lidster*, 540 U.S. 419 (2004), a case involving 10-15 second stops of passing motorists to obtain information in a highway death, the Court specifically acknowledged that "the law ordinarily permits police to seek the voluntary cooperation of member of the public in the investigation of a crime." *Id.* at 425. Obviously, that is vastly different than the facts currently under review where a young woman in severe distress was handcuffed and involuntarily interrogated for five hours.

2. Erin as a Suspect

According to Plaintiff's well pleaded facts, Erin, although grief

stricken at watching her father shot in front of her, did nothing toward any officer. She did not struggle, hit, kick, threaten anyone or refuse any commands. (ROA.229.). There is certainly no law against suffering anguish at witnessing the violent death of one's father.

Turner alleges that Erin arguably "interfered with law enforcement efforts to communicate with John Lincoln..." (ROA.609). Texas Penal Code Ann. § 38.15, Interference with Public Duties, provides that a person commits an offense if she "interrupts, disrupts, impedes, or otherwise interferes with: (1) a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law." The statute contains an express defense to prosecution, however, if "the interruption, disruption, impediment, or interference alleged consisted of speech only." *Id.* Turner has alleged no conduct at all on the part of Erin that could even arguably constitute interference other than speech. While Turner does make a reference to Erin "admittedly instructed John Lincoln not to answer the ringing phone and not to engage the Police Official in conversation" (ROA.602), not even the most torturous assessment could construe that as a violation of the law. Even if Erin was yelling and screaming, that does not take her conduct "out of the realm of

speech.” *Freeman v. Gore*, 483 F.3d 404 (5<sup>th</sup> Cir. 2007) (woman who was yelling and screaming at officers who were trying to serve an arrest warrant could not be detained/arrested on that basis).

3. Imposition on Erin’s Rights Not Proportional to Interest Served

In *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), there were numerous facts giving rise to reasonable suspicion that a woman was smuggling drugs into the US in balloons her alimentary canal. The reason for the lengthy detention was the length of time necessary for her to pass the balloons. There was no basis to suspect Erin of any crime at all. Turner was aware that Erin had done nothing criminal and was aware that she had been standing next to her father when he was shot. He was aware that she had not resisted, struggled, threatened or refused any instructions. Under those circumstances, her detention was unconstitutional.

B. Clearly Established

No reasonable officer could have believed that there was probable cause to detain, handcuff, or arrest Erin Lincoln. As noted above, Texas Penal Code Ann. § 38.15, Interference with Public Duties, clearly and plainly excepts from the reach of the statute conduct that “consist[s] of speech only.” Viewing the facts found by the district court in the light most favorable to Erin, her actions clearly fall within

the speech exception to the statute, and, as a result, no reasonable officer would believe that there was probable cause to detain or arrest Erin for Interference with Public Duties. See *Freeman v. Gore*, 483 F.3d at 415-416, holding that the exception was “clearly established” in 2007.

The district court found that Plaintiff had not cited any authority “to establish that every reasonable officer would have known that he could not detain a witness for a period of approximately two hours while an investigation was underway.” (ROA.648). Such a finding ignores all of the cases cited above which clearly establish that a person cannot be taken into custody for such a period of time simply for being a witness to an event, particularly where the individual was taken into custody forcefully, thrown over a fence while handcuffed and detained in the back of a patrol car without ever being questioned.

## II. Excessive Force

Inexplicably, the district court’s opinion finds that “[t]here is no allegation that Erin or her family had any contact with [Turner], physical or verbal.” (ROA.647-648). Clearly, Erin alleges that Turner cuffed her, physically threw her over his shoulder, threw her over a fence and then physically placed her, against her will and still handcuffed, into the back of a patrol car. (ROA.229). Those allegations are not addressed in the district court’s opinion.

All claims that law enforcement officers have used "excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). To state a Fourth Amendment excessive force claim, Erin Lincoln has alleged: 1. a severe emotional injury 2. which resulted from a use of force that was clearly excessive, and 3. the excessiveness of which was clearly unreasonable." *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007). Whether Ms. Lincoln has alleged an excessive force claim against Officer Turner depends on whether or not she has pled a facially plausible claim that the force was objectively unreasonable under the circumstances. *See Banks v. Gammon*, 2010 WL 996743, at \*5 (N.D. Tex. Jan. 26, 2010). "Objective reasonableness is 'a pure question of law' that is considered after determining the relevant facts." *Id.* (*quoting Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007)). To make this determination, courts "must balance the amount of force used against the need for force." *Id.* (*quoting Ramirez v. Knoulton*, 542 F.3d 124, 129 (5th Cir. 2008)).

Here, Erin Lincoln has alleged a use of force which was clearly unreasonable. Officer Turner was aware that she was not a suspect in a crime and had committed no crime. She did not fight, struggle or resist in any way. She questioned why she was being taken into custody but was ignored. Despite that

fact that he had no legal reason to detain Ms. Lincoln and no basis upon which to use any force at all, Turner handcuffed her and then violently threw her over his shoulder, took her through the back yard and threw her over the fence, after which he involuntarily placed her in the back of a patrol car. Officer Turner clearly used unreasonable force excessive to the need and in violation of the Fourth Amendment.

Next, the Court must consider whether the violation of Erin Lincoln's Fourth Amendment rights was objectively unreasonable given the clearly established law at the time of these events. This is a separate inquiry from the Fourth Amendment reasonableness determination. The focus is on the specific circumstances of the incident-could an officer have reasonably interpreted the law to conclude that the perceived threat posed by the suspect was sufficient to justify the amount of force. *Banks*, 2010 WL 996743, at \*6 (quoting *Ontiveros*, 564 F.3d at 383 n.1). For the purposes of the qualified immunity analysis, "'clearly established' means that the 'contours of the right' are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). When qualified immunity is raised in a motion to dismiss, it is the defendant's conduct as outlined in the pleadings that is examined for objective reasonableness. *Id.* at \*7 (quoting *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996)).

To gauge the objective reasonableness of the force used by a law enforcement officer, the Court must balance the amount of force used against the need for force. This balancing test requires careful attention to the facts and circumstances of each particular case. *Flores v. City of Palacios*, 381 F.3d 391 at 399 (5<sup>th</sup> Cir. 2004.) Where, as here, there was no basis for the use of any force at all, it is clearly a violation and there is no basis for qualified immunity.

The district court appears to have concluded that it was not unreasonable to remove Erin from the scene because “[s]he suffered from a severe anxiety disorder and was severely traumatized by watching officers shoot her father.” (ROA.648-649). Surely such an allegation would dictate the opposite finding with respect to using such physical force upon a young woman in that state. If Turner had walked her from the scene into the waiting arms of her police officer aunt who was trying to get to her, that would be a different story. Instead, he handcuffed her and physically threw her around, placing her into custody where her family could not get to her or comfort her.

The district court also held that Plaintiff did “not allege that Erin suffered more than de minimis injury from the handcuffing.” (ROA.649). However, in her First Amended Complaint, Erin makes clear that “[s]he suffered and continues to suffer severe emotional trauma a result of the force used against her and being taken into custody by the [officers] under the circumstances. She has received

counseling but continues to suffer sleeplessness, anxiety, depression, loss of appetite, and severe social anxiety, cutting herself off from others and seeking isolation.” (ROA.240). “This event was almost two years ago and Erin continues to be anxious, depressed, moody, upset, and distraught. She has crying spells, difficulty eating, difficulty sleeping, nightmares and has tried to cut herself off from friends and family, with whom she barely communicates. Her emotional injuries as a result of the restraint and force used are severe.” (ROA.240). These are not “de minimis” injuries. This Court has repeatedly held that “psychological injuries may sustain a Fourth Amendment claim.” *Flores v. City of Palacios*, 381 F.3d 391, 396 (5<sup>th</sup> Cir. 2004).

#### IV. CONCLUSION AND PRAYER

THEREFORE, Erin Lincoln asks that the district court be reversed and all other additional relief as the Court deems just and proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on this 14th day of September 2016, a true and correct copy of the above and foregoing document was served on the following attorneys of record via the court's electronic service and/or first class, regular mail:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that the foregoing BRIEF OF APPELLANT, complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,705 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that the foregoing BRIEF OF APPELLANT, 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 a proportionally spaced typeface using Microsoft Word for MAC in 14 point Times New Roman.

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