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

LAURA MIRELES,	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. B: 13-197**
	§	
UNITED STATES CUSTOMS &	§	
BORDER PROTECTION, THE UNITED	§	
STATES & DANIEL RIANO,	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

On October 21, 2013, Plaintiff Laura Mireles ("Mireles") filed a complaint against United States Customs & Border Protection,[1] the United States, and Border Patrol agent Daniel Riano (collectively "Defendants"). Dkt. No. 1. Mireles's claims relate to her alleged mistreatment by Riano during a search of her vehicle at or near one of the international bridges in Brownsville, Texas. Pending before the Court is Defendants' motion to dismiss all of the claims. Dkt. No. 22. On August 22, 2014, the Magistrate Judge filed a Report and Recommendation in this case. Dkt. No. 33. The parties filed their objections. Dkt. Nos. 35, 36. On September 10, 2014, the District Judge declined to adopt the Report and Recommendation and remanded the case for further consideration. Dkt. No. 37.

Upon further review of the motion, and for the reasons set forth in this Report and Recommendation, the Magistrate Judge **RECOMMENDS** that the motion to dismiss be

[1] While listed as a defendant on the docket sheet, no claims have been made against "United States Customs & Border Protection," an agency of the United States. As discussed later, the Federal Tort Claims Act claims are properly brought only against the United States and not its agencies or employees. Atorie Air, Inc. v. Federal Aviation Admin., 942 F.2d 954, 957 (5th Cir.1991). The Bivens claims are properly alleged only against the agent in his personal capacity. Affiliated Prof'l Home Health Care Agency v. Shalala, 164 F.3d 282, 286 (5th Cir. 1999). Accordingly, the Court considers only two defendants in this case: the United States and Riano.

granted in part and denied in part. The motion to dismiss for lack of jurisdiction should be granted as to the claims against the United States for battery, assault, false arrest, false imprisonment, and intentional infliction of emotional distress.

On the other hand, Defendants' motion to dismiss should be denied as to the claims of false arrest and excessive force against Riano, who – for present purposes – is not entitled to the protections of qualified immunity. Discovery in this case is stayed, pending resolution of Riano's assertion of qualified immunity. Dkt. No. 32.

I. Background

A. Factual Background[2]

Mireles is a United States citizen who works at a duty-free store in Brownsville, Texas. Dkt. No. 1, p. 3. The store is located on the United States' side of the Veterans International Bridge ("the Bridge"). Id. Mireles is approximately 61 inches tall and weighs approximately 100 pounds. Id. She "has a visually apparent congenital malformation of her hands and legs" and uses a disabled parking placard for her vehicle. Id.

The location of Mireles's job forces her to use the Bridge every time she leaves the store – regardless of whether she is traveling to a location in the United States or Mexico. Dkt. No. 1, p. 3. If she leaves the store to travel within the United States, "she must head briefly in the direction of Mexico, make a U turn and pass through" a Customs and Border Protection ("CBP") checkpoint at the Bridge. Id.

On November 5, 2012, Mireles left work and traveled to the Mexican side of the Bridge to "retrieve the store keys from a coworker in Mexico." Dkt. No. 1, pp. 3-4. She left the store at around 8:00 p.m. Id. After retrieving the keys, Mireles immediately returned to the United States. Id.

Upon returning to the United States, Mireles used the lane set aside for participants

---

[2] All of the facts are taken directly from the complaint. In resolving a motion to dismiss, 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).

in the Secure Electronic Network for Travels Rapid Inspection ("SENTRI") program. Dkt. No. 1, p. 4. The SENTRI program requires applicants to "undergo a thorough biographical background check against criminal, law enforcement, customs, immigration and terrorist indices; a 10-fingerprint law enforcement check; and a personal interview with a CBP officer." Id.[3] Mireles's vehicle displayed a valid SENTRI sticker decal on the day in question. Id.

Mireles "presented herself for inspection before the CBP agent staffing the SENTRI lane" and he admitted her into the United States. Dkt. No. 1, p. 4. Upon being admitted, Mireles asked the agent if she could "use a special lane, known as the return lane," to return to work. Id. Using the return lane would shorten her route and allow her to bypass the X-ray machines. Id. Mireles asked for permission to use this short cut so that she could get back to work more quickly, because her co-worker was at the store alone. Id.

The agent gave her permission to use the return lane and Mireles returned to work. Dkt. No. 1, p. 5. The entire trip took 10 to 15 minutes. Id.

Approximately 10 to 15 minutes after returning to the United States, Mireles and her co-worker closed the store and "entered their cars to leave for the day." Dkt. No. 1, p. 5. A CBP vehicle – with flashing lights – approached their vehicles, so Mireles and her co-worker did not leave. Id.

Riano – who is described in the complaint as a tall man, weighing approximately 200 pounds – exited the CBP vehicle and approached Mireles in her vehicle. Dkt. No. 1, pp. 5, 7. Upon approaching Mireles, Riano asked her why she had not passed through the X-ray machines. Id, p. 5. Mireles explained that the agent in the SENTRI lane had given her permission to use the return lane. Id. Riano contacted the SENTRI lane agent via radio; the SENTRI lane agent confirmed Mireles's account. Id.

---

[3] This language in the complaint is a direct quote from the Customs & Border Protection website describing SENTRI. See http://www.cbp.gov/travel/trusted-traveler-programs/sentri (last accessed September 11, 2014).

At that point, Riano informed Mireles that he and another agent were going to search her car. Dkt. No. 1, p. 5. Mireles consented to the search. Id. Mireles exited her vehicle and stood approximately nine feet away from her car on the driver's side. Id. "Mireles was not carrying anything when she exited her car." Id.

Riano searched both the interior and trunk of Mireles's vehicle and found no contraband. Dkt. No. 1, p. 6. After finding no contraband anywhere within Mireles's vehicle, Riano proceeded to search Mireles's purse, which had remained in her car. Id. Riano was standing on the passenger side of Mireles's vehicle when he began searching the purse. Id.

When Riano began to search Mireles's purse, she took "a few steps forward to have a better view of her purse," but remained on the driver's side of her vehicle. Dkt. No. 1, p. 6. Mireles has pled that she was approximately 15 feet away from Riano at this point and never crossed over to the passenger side of the vehicle, where Riano was located. Id.[4]

In response to Mireles taking a few steps forward, Riano "told her to move away." Dkt. No. 1, p. 6. Mireles asked if Riano was searching Mireles's purse. Id. In response to this query, Riano "shouted" at Mireles to move away. Id. Mireles "politely explained that she only wanted to watch," indicating that she posed no danger to Riano, but merely wanted a better view of the search. Id. "At no time," – after Riano told Mireles "to move away," – did Mireles move toward any CBP agent or threaten them. Id.

In the complaint, Mireles alleges that Riano walked over to Mireles and – without warning – grabbed both of her hands, threw her to ground, and placed her face down on the ground. Dkt. No. 1, p. 6. The force of this action ripped Mireles's jeans at the knee, causing her to suffer "a large knee wound." Id. She also "suffered several cuts and abrasions by her

[4] Riano has asserted that the complaint is factually inconsistent as to where Mireles was standing in relation to Riano. Riano states that the complaint asserts that Mireles says she was nine feet away when the search began, took several steps forward to watch the search of her purse, but was 15 feet away when the search of the purse began. Dkt. No. 36, pp. 3-4. Even if the Court assumes that Mireles was only nine feet away from her vehicle when Riano told her to stop moving and arrested her, it does not change the Court's analysis; nor does it render Riano's actions any more reasonable under the facts as pled.

elbows when [Riano] threw her to the ground." Id, p. 7. At that point, Riano handcuffed Mireles, who was not resisting. Id. After handcuffing her, he placed his body weight upon her. Id.

According to the complaint, Mireles was shaken by this series of events; she "was confused, scared, [and] crying." Dkt. No. 1, p. 7. Mireles asserts that she asked Riano to let her go. Instead, Riano told her to "shut up" or he would hit her with an object. Id. She did not recognize the name of the object, but "upon information and belief" has pled that it was a Taser gun. Id.

Mireles again asked to be released. Dkt. No. 1, p. 7. Riano again ordered Mireles to "shut up" or else he would use his Taser gun on her. Id. Another agent helped Mireles – who remained handcuffed – up from the ground and placed her in the back of the CBP vehicle. Id.

Mireles was then taken to the customs office at the Bridge. Dkt. No. 1, p. 8. As a result of her injuries, Mireles claims that she was in too much pain to walk and remained in the CBP vehicle until approximately 10 p.m. Id. Riano remained in the vicinity of the vehicle for the entire time. Id.

Mireles informed the agents that she needed medical attention and an ambulance was called to treat her. Dkt. No. 1, p. 8. When the EMTs and Border Patrol agents attempted to remove her handcuffs, they were unable to do so because she was handcuffed so tightly. Id. The local fire department was called to remove the handcuffs. Id. The handcuffs were so tight that "the metal rubbed Mireles's wrists raw, resulting in wounds to each wrist." Id. Mireles was taken to the hospital for further treatment. Id. Mireles asserts that as a result of this incident, she "was injured in her arms, elbows, knees, feet, neck and back." Id, p. 9.

Mireles was never charged with a crime; no contraband was found in her purse; and no agents were harmed as a result of her actions. Dkt. No. 1, pp. 6-8.

B. Procedural History

On October 21, 2013, Mireles filed a complaint against the United States and Riano. Dkt. No. 1. Mireles asserted claims of battery, assault, false arrest, false imprisonment, and

intentional infliction of emotional distress against the United States, pursuant to the Federal Tort Claims Act ("FTCA"). Id, pp. 11-13. Mireles also asserted claims of false arrest and excessive force against Riano, pursuant to Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). Id, p. 10.

On January 27, 2014, the United States and Riano timely filed an answer. Dkt. No. 12. In his answer, Riano asserted that he was entitled to qualified immunity. Id., p. 14.

On July 7, 2014, the United States and Riano filed a motion to dismiss. Dkt. No. 22. The United States sought dismissal pursuant to FED. R. CIV. P. 12(b)(1), stating that the Court lacked jurisdiction because Mireles did not state valid FTCA claims. Id. The United States asserts that it has not waived sovereign immunity, under the FTCA, for claims arising out of "the detention of goods, merchandise or other property by any officer of customs or excise or any other law enforcement officer." Id, citing 28 U.S.C. § 2680(c).

In that same motion, Riano sought dismissal pursuant to FED. R. CIV. P. 12(b)(6), asserting that Mireles had not pled facts that would overcome his invocation of qualified immunity. Dkt. No. 22.[5]

On August 1, 2014, Mireles filed a response to the motion to dismiss. Dkt. No. 26. As to the claims against the United States, Mireles asserts that, while the United States has not waived sovereign immunity for property damage claims, it has waived sovereign immunity for claims regarding bodily injury. Id. Mireles also asserts that the United States has waived sovereign immunity for searches in the interior of the United States and for post-

[5] The motion to dismiss for failure to state a claim – regarding Riano – was filed after an answer, thus it was untimely. Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999) (per curiam). However, an untimely filed Rule 12(b)(6) motion can be treated as a Rule 12(c) motion for judgment on the pleadings. Id. A motion to dismiss under Rule 12(b)(6) is subject to the same standard as a motion for judgment on the pleadings under Rule 12(c). Great Plains Trust Co. v. Morgan Stanley Dean Witter, 313 F.3d 305, 313 n. 8 (5th Cir. 2002). The Court will consider Riano's motion to be one for judgment on the pleadings, but will interchangeably refer to it as a motion to dismiss for failure to state a claim.

Defendants' motion, regarding the FTCA claims against the United States, is properly a motion to dismiss for lack of jurisdiction, which may be filed at any time, even after an answer has been filed. Arena v. Graybar Elec. Co., Inc., 669 F.3d 214, 223 (5th Cir. 2012).

search seizures. Id.

Regarding the claims against Riano, Mireles asserts that she has pled facts showing that Riano violated her right to be free of excessive force and unreasonable seizure[6] and that her rights were clearly established at the time of the incident. Dkt. No. 26. Thus, Mireles asserts that qualified immunity is inappropriate in this case. Id.

On August 13, 2014, Defendants filed a reply brief. Dkt. No. 31. As to the FTCA claims, the United States asserts that Mireles's contentions as to the scope of sovereign immunity are foreclosed by existing caselaw. Dkt. No. 31.

Regarding Mireles's claims against Riano, Defendants assert that Mireles cannot state a claim for unlawful seizure, because Mireles consented to the search. Dkt. No. 31. Finally, as for the claim of excessive force – against Riano – Defendants argue that Mireles has not pled facts to overcome the invocation of qualified immunity. Id.

On August 22, 2014, the Magistrate Judge filed a Report and Recommendation in this case. Dkt. No. 33. The parties filed their objections. Dkt. Nos. 35, 36. On September 10, 2014, the District Judge declined to adopt the Report and Recommendation and remanded the case for further consideration. Dkt. No. 37.

II. Applicable Law

A. Jurisdiction

The threshold question, before considering the substance of any claim, is whether the court possesses jurisdiction over the claim. This is the case, because federal courts are courts of limited jurisdiction, whose authority exists only within the boundaries established by Congress and the United States Constitution. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583-84 (1999). The plaintiff bears the burden of proving jurisdiction. Choice Inc. of Tex. v. Greenstein, 691 F.3d 710, 714 (5th Cir. 2012). If the Court lacks subject-matter

[6] Under the facts of this case, the Court considers the latter of these to be an allegation of unlawful arrest. Freeman v. Gore, 483 F.3d 404, 413 (5th Cir. 2007). In her complaint, Mireless characterizes this allegation as a claim of "Unreasonable Seizure, False Arrest, and False Imprisonment." Dkt. No. 1, p. 10.

jurisdiction over a claim, the Court must dismiss the action. FED. R. CIV. P. 12(b)(1); 12 (h)(3).

B. Failure to State a Claim

Dismissal, pursuant to FED. R. CIV. P. 12(b)(6), is appropriate where a defendant shows that a "complaint . . . fails to state a legally cognizable claim." Ramming v. U.S., 281 F.3d 158, 161 (5th Cir. 2001).

To survive a motion to dismiss, a complaint must state "the plaintiff's 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. Sullivan, 503 F.3d 397, 401 (5th Cir. 2007) (internal quotation marks omitted). Thus, a complaint must contain sufficient facts to state a claim for relief that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). It is not enough that the facts permit the "mere possibility of misconduct." Id. While the plausibility standard is not akin to a probability requirement, it requires more than "a sheer possibility that a defendant has acted unlawfully." Id.

In reviewing such motions, the Court is charged with construing the complaint in the light most favorable to the plaintiff. Turner v. Pleasant, 663 F.3d 770, 775 (5th Cir. 2011). Thus, all well-pleaded facts are taken as true for the purposes of deciding the 12(b)(6) motion. Wolcott v. Sebelius, 635 F.3d 757, 763 (5th Cir. 2011). The Court, however, will not "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." Great Lakes Dredge & Dock, Co. LLC v. La. State, 624 F.3d 201, 210 (5th Cir. 2010).

C. Federal Tort Claims Act

The FTCA is a limited waiver of sovereign immunity, which allows the United States to be sued for "injury or death caused by the negligent or wrongful act or omission of any

employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b). Statutes waiving sovereign immunity of the United States are to be "construed strictly in favor of the sovereign." Jeanmarie v. U.S., 242 F.3d 600, 604-05 (5th Cir. 2001) (citing McMahon v. U.S., 342 U.S. 25 (1951)).

As relevant here, the United States expressly has not waived sovereign immunity for "[a]ny claim arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). The Fifth Circuit has concluded that this section is to be read "broadly." Davila v. U.S., 713 F.3d 248 (5th Cir. 2013) (citing Capozzoli v. Tracey, 663 F.2d 654, 658 (5th Cir. 1981)).

D. Qualified Immunity

Qualified immunity protects "government officials performing discretionary functions" from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity is "an immunity from suit rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). "'One of the most salient benefits of qualified immunity is protection from pre-trial discovery.'" Zapata v. Melson, 750 F.3d 481, 484-85 (5th Cir. 2014)(quoting Backe v. LeBlanc, 691 F.3d 645, 648 (5th Cir. 2012)).

Qualified immunity is "a defense against an individual capacity lawsuit." Sanders-Burns v. City Of Plano, 594 F.3d 366, 378 (5th Cir. 2010). " 'Qualified immunity gives government officials breathing room to make reasonable, but mistaken judgments.' " Thompson v. Mercer, --- F.3d ---, ---, 2014 WL 3882460, *2 (5th Cir. 2014) (internal citation omitted) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

If a defendant claims qualified immunity, the burden shifts to the plaintiff to establish the inapplicability of that defense. Kitchen v. Dallas County, Tex., — F.3d —, — 2014 WL

3537022, *4 (5th Cir. July 17, 2014) (citing Brumfield v. Hollins, 551 F.3d 322, 326 (5th Cir. 2008)). To survive a claim of qualified immunity – in a motion to dismiss under FED. R. CIV. P. 12(b)(6) – the plaintiff must have pled "specific facts that, if proved, would overcome the individual defendant's immunity defense; complaints containing conclusory allegations, absent reference to material facts, will not survive motions to dismiss." Geter v. Fortenberry, 849 F.2d 1550, 1553 (5th Cir. 1988); Cobb v. City of Harahan, 516 Fed. App'x. 337, 340 (5th Cir. 2013) (unpubl.) (citing Geter).

The two-part test for qualified immunity requires the Court to determine: (1) whether defendants' actions violated the plaintiff's constitutional rights; and (2) whether those rights were clearly established at the time of the defendant's actions. Pearson v. Callahan, 555 U.S. 223 (2009).

III. Analysis

In resolving the motion to dismiss, the Court will address the claims against each defendant separately. In sum, while the FTCA generally waives sovereign immunity for a number of claims against the United States, an exception to that waiver applies in this case. As discussed further below, the exception to the FTCA results in the United States retaining sovereign immunity for the claims Mireles has asserted against it. For that reason the claims against the United States should be dismissed.

As to the claims against Riano, the Court concludes that Mireles has pled specific facts, which if proved, would overcome Riano's invocation of qualified immunity. For that reason, the claims against Riano, individually, should not be dismissed. The Court will address each of these points in turn.

A. United States

Mireles asserted claims of battery, assault, false arrest, false imprisonment, and intentional infliction of emotional distress against the United States, pursuant to the FTCA. Dkt. No. 1, pp. 11-13. The United States, however, has not waived sovereign immunity for these claims under the specific facts of this case.

As previously noted, the United States has not waived sovereign immunity for "[a]ny claim arising in respect of ... the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). The courts have read the phrase "arising in respect" very broadly to cover any claims – property damage or otherwise – arising out of such an act. Jeanmarie v. U.S., 242 F.3d 600, 602 (5th Cir. 2001). Additionally, the exception applies not only to customs officers, but to any law enforcement officer, regardless of his or her employing agency. Ali v. Federal Bureau of Prisons, 552 U.S. 214, 220 (2008) ("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind.").

Jeanmarie is instructive and dictates the result as to the claims against the United States. In Jeanmarie, the plaintiff was entering the United States and customs agents stopped his vehicle at the border. Jeanmarie, 242 F.3d at 601. The plaintiff was waiting in a "designated area" while the customs agents searched his trunk. Id. The plaintiff, who had recently undergone surgery that affected his kidneys and bladder, twice requested permission to use the restroom. Id. His requests were denied. Id. The plaintiff left the designated area – without permission – to use the restroom and was tackled by customs agents. Id. The plaintiff was "forcibly restrained" and was shoved "against a counter, causing numerous injuries." Id. There was no allegation of any property damage.

The Fifth Circuit held that the intentional torts alleged by the plaintiff were "committed incident to the performance of an agent's duties under § 2680(c)." Jeanmarie, 242 F.3d at 605. Because the agents' actions "were related to the Customs agents' official duties in inspecting and detaining goods," the Fifth Circuit held that "§ 2680(c) is broad enough to cover those actions." Id. Thus, the Fifth Circuit found that the United States had not waived sovereign immunity for the agents's actions.

The factual similarities between Jeanmarie and the instant case are notable. In each case, federal agents detained a vehicle near the border while the plaintiff watched. While

that detention of property was ongoing, the plaintiff made an innocuous – but unauthorized – movement and the agents responded with force that injured the plaintiff. The holding of Jeanmarie compels a finding that the United States has not waived sovereign immunity for the actions that caused Mireles's physical injuries.

In contrast to Jeanmarie, the Fifth Circuit has explained that the provisions of § 2680(c) do not apply when the detention of property has been completed. Davila v. U.S., 713 F.3d 248, 257 (5th Cir. 2013). In Davila, the plaintiff and his son were waiting at a checkpoint while agents searched their vehicle. Id, at 253. Frustrated with the length of the wait, the son got into the vehicle and drove away, thus terminating the detention of the property – namely, the vehicle. Id. The agents held the plaintiff; attempted to coerce him into making a statement against his son; and, ultimately, arrested him. Id.

The Fifth Circuit determined that the torts "occurred well after the search," and were "unrelated to the vehicle or the detention thereof." Davila, 713 F.3d at 257. Accordingly, the Fifth Circuit found that § 2680(c) was inapplicable to the plaintiff's claims. Id.

Thus, if the detention of the vehicle is ongoing, then the actions stemming from that detention are covered under § 2680(c) – as in Jeanmarie. If the detention of the property has ended and the actions do not relate to that detention, then those actions are not covered by § 2680(c) – as in Davila. In the instant case, the detention of the vehicle had not ended and all of the complained-of actions arose directly from that detention. For those reasons sovereign immunity protects the United States from liability for this detention under § 2680(c). That fact, as it did in Jeanmarie, forecloses Mireles's claims against the United States pursuant to the FTCA.

The facts of Jeanmarie also undermine Mireles's argument that § 2680(c) only relates to property damage. See Dkt. No. 26, p. 17 (asserting that § 2680(c) does not apply in this case because Mireles's claims "concern personal injury, not property damage."). Jeanmarie contained no allegations of property damage – plaintiff's only claims related to his physical injuries resulting from being tackled by agents. Thus, again, the Fifth Circuit has foreclosed

Mireles's argument.

Mireles has also asserted that such a broad reading of § 2680(c) would run afoul of statutory construction principles. Mireles asserts that under § 2680(h), the United States has expressly waived sovereign immunity for claims that law enforcement officers committed "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h). Mireles argues that a broad reading of § 2680(c) would render this provision "meaningless." Dkt. No. 26, p. 24.

Notwithstanding her arguments to the contrary, the Fifth Circuit has foreclosed Mireles's attempt. Rather than finding § 2680(c) and § 2680(h) conflicting, the Fifth Circuit read the two statutory provisions in harmony. See Doe v. KPMG, LLP, 398 F.3d 686, 688 (5th Cir. 2005) ("When interpreting a statute, we start with the plain text, and read all parts of the statute together to produce a harmonious whole."). The Fifth Circuit, agreeing with the Ninth Circuit,[7] concluded that the United States has waived sovereign immunity for assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution, unless those torts "arose from the inspection, seizure or detention of goods" by a law enforcement agent. Jeanmarie, 242 F.3d at 604.

Mireles has also asserted that § 2680(c) does not apply to searches conducted in the interior of the United States. Dkt. No. 26, pp. 24-25. Neither the plain text of the statute, nor existing case law, support this limitation. See Ali, 552 U.S. at 220 (applying § 2680(c) to a claim that federal prison employees in Atlanta, Georgia, lost an inmate's personal property).

Initially, the Court observes that there are several interior checkpoints – such as the permanent ones in Sarita and Falfurrias – which are more than 50 miles inside the United States from the place where Mireles was searched. The authority to conduct such inspections and checks has been upheld by the Fifth Circuit. U.S. v. Moreno-Vargas, 315 F.3d 489, 490 (5th Cir. 2002) (sustaining the Sarita checkpoint as a constitutionally permissible checkpoint whose primary purpose is immigration compliance, but permits inspections for other

[7] Gasho v. U.S., 39 F.3d 1420, 1433-34 (9th Cir. 1994).

legitimate purposes.).

Further, Mireles's argument leads to the question of how far into the interior would one have to go before certain constitutional rights would apply. While this Court cannot provide the answer in a vacuum, the Fifth Circuit has concluded that proximity to the border is a major factor to be considered when evaluating stops and searches. See Davila, 713 F.3d at 259 ("while proximity to the border does not alone constitute reasonable suspicion to stop and search a vehicle, 'it is afforded great weight in this Court's Fourth Amendment analysis.'") (quoting U.S. v. Rangel-Portillo, 586 F.3d 376, 380 (5th Cir. 2009)). In the instant case, all of the acts occurred within yards of the border. Thus, any sort of sliding scale or consideration of distance from the border would be of no avail to Mireles's cause.

Given the broad statutory language and controlling precedent, the Government has not waived sovereign immunity for Mireles's FTCA claims against the United States under the facts of this case. If the Government has not waived sovereign immunity, then the Court lacks jurisdiction to consider these claims. Rankin v. U.S., 556 Fed. App'x. 305, 309-10 (5th Cir. 2014). Accordingly, all of Mireles's claims against the United States should be dismissed without prejudice for lack of jurisdiction. Id.

B. Riano

The analysis of sovereign immunity does not apply to the claims against Riano. In fact, there are instances where a government agent or employee commits an act and the Government is immune from suit by virtue of sovereign immunity, but the agent can be held individually liable under Bivens. See Hernandez v. U.S., 757 F.3d 249 (5th Cir. 2014) (holding the Government immune from suit under the FTCA, but allowing a Bivens claim to proceed against the Border Patrol agent).

With this distinction in mind, and leaving the question of sovereign immunity behind, the Court turns to Mireles's claims against Riano in his individual capacity. Mireles has asserted two claims against Riano: (1) that he violated her right to be free from unlawful seizure, when Riano unlawfully arrested Mireles; and (2) that Riano violated Mireles's right

to be free from the use of excessive force. Dkt. No. 1. Riano has claimed qualified immunity for his actions. Dkt. No. 22. If Riano is entitled to qualified immunity, then the claims against him must be dismissed. Each claim and the defense are examined in turn.

1. Unlawful Seizure/Arrest Claim

Mireles has asserted that Riano's decision to handcuff her; place her in the patrol car; and, make her wait for approximately 90 minutes, violated her right to be free of unreasonable seizure and arrest under the Fourth Amendment.[8] Riano seeks to dismiss the claim, because he argues that he is entitled to qualified immunity. While Riano has pled qualified immunity, Mireles has pled facts that, if true, would overcome that immunity.

There is a constitutional right to be free from the unreasonable seizure or arrest of one's person.[9] Brower v. County of Inyo, 489 U.S. 593 (1989). The standard for deciding whether an arrest of one's person is unreasonable under the Fourth Amendment is identical in both civil and criminal cases. Wooley v. City of Baton Rouge, 211 F.3d 913, 925 (5th Cir. 2000) (citing Soldal v. Cook, 506 U.S. 56 (1992)). Thus, the Court will cite criminal and civil cases interchangeably.

In deciding whether the arrest – i.e. the seizure of one's person – was unlawful, the first question is whether Mireles was seized or arrested within the context of the Fourth Amendment. The second question is, then, whether the seizure or arrest was unreasonable. If the answers to both questions are affirmative, the focus changes.

If Mireles was subjected to an unreasonable seizure or arrest, the Court must then determine if the agent is nevertheless protected by qualified immunity. That determination

---

[8] The claim that Mireles was arrested without probable cause is substantively different than the claim that Riano used excessive force in effectuating that arrest. An excessive force claim is "separate and distinct" from a claim of unlawful arrest. Freeman, 483 F.3d at 417. As such, the Court must analyze each claim separately. Id.

[9] The standard for determining the reasonableness of seizure or arrest of a person is different than the standard for determining the reasonableness of an agent's decision to detain a vehicle at the border for a search. See U.S. v. Guzman-Padilla, 573 F.3d 865, 877-887 (9th Cir. 2009) (discussing searches and seizures in the border context).

depends upon whether the seizure or arrest violated clearly established federal law when it was effected. Each of these considerations is examined in turn.

a. Seizure/Arrest

A person is considered "seized," within the meaning of the Fourth Amendment, if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." U.S. v. Mendenhall, 446 U.S. 544, 554 (1980). The seizure must be the result of the use of force that was "intentionally" applied by the defendant. Brower, 489 U.S. at 599. Police detention is considered an "arrest" if a reasonable person "in the suspect's position would understand the situation to be a restraint on freedom of the kind that the law typically associates with a formal arrest." Freeman v. Gore, 483 F.3d at 413. An "arrest" requires probable cause that a crime has occurred. Id.

However, a person may be physically restrained by law enforcement without that custody being considered an arrest for constitutional purposes. "The police are allowed to stop and briefly detain persons for investigative purposes if the police have a reasonable suspicion supported by articulate facts that criminal activity 'may be afoot.' " U.S. v. Lewis, 208 Fed. App'x. 298, 300 (5th Cir. 2006) (unpubl.) (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)). This investigatory detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983). If the investigatory detention lasts beyond that duration, it may turn into a de facto arrest. U.S. v. Zavala, 541 F.3d 562, 579 (5th Cir. 2008). "[E]very seizure having the essential attributes of a formal arrest[ ] is unreasonable unless it is supported by probable cause." Michigan v. Summers, 452 U.S. 692, 700 (1981).

The line between an investigatory detention and an arrest – and determining which applies to the facts of any particular case – is not necessarily a straightforward task. Id. At the international border, authorities are permitted to hold a person long enough to complete their search without the detention becoming an arrest under the Fourth Amendment. Tabbaa v. Chertoff, 509 F.3d 89, 99-101 (2d. Cir. 2007) (detention of six hours at the border was not

an arrest). In fact, "routine" searches and investigatory detentions may be lengthy in order to complete necessary actions, such as "vehicle searches, questioning, [and] identity verification . . ." Id.

In this case, Mireles was not merely detained and made to wait. Instead, she was tackled to the ground; was handcuffed and placed in the back of a Border Patrol vehicle; and, was then transported to the CBP office. Under such circumstances, any reasonable person would consider their freedom to be restrained in a way "that the law typically associates with a formal arrest." Freeman, 483 F.3d at 413.

In Freeman, the plaintiff was handcuffed, placed in the back of a police car and made to wait 30 to 45 minutes. The Fifth Circuit found that a reasonable person "would surely believe that she had been restrained to an extent that normally accompanies a formal arrest." Id. The same conclusion is inescapable in this case. Riano clearly arrested Mireles within the meaning of the Fourth Amendment. What happened to Mireles went beyond a brief investigatory detention and carried all of the formal hallmarks of arrest.

The Government has focused its analysis on Riano's authority to search Mireles's vehicle, without reasonable suspicion or probable cause. Dkt. No. 22, pp. 20-22. That focus is misplaced; no party questions Riano's legal authority to search Mireles's vehicle. Dkt. No. 26, p. 15 ("Although Riano's search of her vehicle was baseless, as explained above, Ms. Mireles does not challenge the search as unconstitutional."). When a person presents themselves at an international border, any search of their person or property need not be supported by probable cause. U.S. v. Ramsey, 431 U.S. 606, 620 (1977). What amounts to an impermissibly lengthy search within the country's interior is different than that for a search conducted at the border. Compare Tabbaa, 509 F.3d at 99-101 (holding that delays of six hours to complete a search at the border did not violate the Fourth Amendment) with Zavala, 541 F.3d at 579-580 (holding that a 90 minute detention in Houston, Texas, was an arrest for Fourth Amendment purposes).

Riano's decision to arrest Mireles is not per se permissible simply because he had

legal justification to detain her and her vehicle while he conducted a search of the vehicle. Riano has asserted that the "seizure of Plaintiff's person . . . constituted a border search for which no suspicion was required." As it relates to the decision to handcuff her and place her in the back of the patrol car for two hours, this argument is overstated. See Guzman-Padilla, 573 F.3d at 883 (within the context of a border search, officers have increased latitude, but a lawful detention can still transform into an arrest).

While an agent at a fixed border crossing may conduct routine suspicionless-searches, a person may not be subjected to "extended detention," beyond what is necessary to complete the search. Id. If a "a reasonable person would believe that he is being subjected to more than the temporary detention occasioned by border crossing formalities," then a de facto arrest has occurred. Id at 1009 (internal quotations omitted). In this case, a reasonable person would not believe that being handcuffed and placed in the backseat of a law enforcement vehicle for an extended period of time are routine border crossing formalities; nor should they.

If Mireles's complaint was merely that her vehicle was searched and that the search took several hours, the analysis of the "seizure" would be far different. The Supreme Court has expressly provided that the Fourth Amendment does not "shield[] entrants from inconvenience or delay at the international border." U.S. v. Flores-Montano, 541 U.S. 149, 155 (2004). The detention, however, must be "reasonably related in scope to the circumstances which justified it initially." Tabbaa, 509 F.3d at 100. Thus, while the border presents unique circumstances for Fourth Amendment jurisprudence, the length of the detention must still be reasonably related to the circumstances warranting the search. During a border search "some period of detention for those persons is inevitable. Nevertheless, so long as the searches are conducted with reasonable dispatch and the detention involved is reasonably related in duration to the search, the detention is permissible under the [Fourth]

Amendment." U.S. v. Espericueta Reyes, 631 F.2d 616, 622 (9th Cir. 1980).[10] The required relationship between the duration of the detention and the duration of the search is not present under the facts as currently before the Court.

The facts of this case indicate that the search of the vehicle was completed by the time Mireles was taken into custody. In fact, it appears from the complaint that Mireles was not even taken into custody until after the search of her vehicle was completed. Further, while it may have taken additional time to search the purse, there are no facts alleged in the complaint that would indicate that it took approximately 90 minutes to complete that search.

The Government has asserted that it was "appropriate" for Riano to "further extend the seizure" of Mireles "in an effort to control the situation." Dkt. No. 22, pp. 23-24. This argument is unavailing. Calling the effort one "to control the situation" does not change its character as an arrest. Arguably all arrests control the situation; that does not change the nature of the restraint.

Riano has quoted language from the Fifth Circuit, stating that "[c]learly, using some force on a suspect, pointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect—whether singly or in combination—do not automatically convert an investigatory detention into an arrest requiring probable cause." Dkt. No. 36, p. 5 (quoting U.S. v. Sanders, 994 F.2d 200, 206 (5th Cir. 1993). What Riano has failed to consider is the next line from that decision, which provides: "[w]e caution, however, that this holding is not to be interpreted as meaning that the police are automatically authorized to employ these procedures in every investigatory detention." Sanders, 994 F.2d at 206.

Sanders explained that there may be circumstances where the temporary handcuffing of a suspect – typically for officer safety purposes – would be reasonable during an investigatory detention. For example, an officer would be justified during a Terry stop to

[10] While Espericueta Reyes is a Ninth Circuit decision, there is no reason to believe that the Fifth Circuit would conclude differently. See U.S. v. Ventura, 447 F.3d 375, 381-82 (5th Cir. 2006) (discussing how the duration of the search is an important factor in determining whether a border search has transformed into an illegally extended seizure).

briefly handcuff a suspect to complete the search if the officer has a reasonable basis to believe the suspect is armed. Id. In this case, Mireles was not handcuffed for a short period of time, sufficient only to ensure that she did not pose a danger to Riano. Mireles was handcuffed and left in the back of a CBP vehicle and – under the facts for present purposes – no effort was made to determine whether she presented a danger to Riano or anyone else.

Riano, citing U.S. v. Nava, 363 F.3d 942, 946 (9th Cir. 2004), argues that use of handcuffs by officers on the border is reasonable and that the use does not convert Mireles's detention into an arrest. Dkt. No. 36, p. 6. An examination of the facts in Nava, however, does not support his argument in the instant case.

In Nava, the Ninth Circuit discussed a line of cases that permitted Border Patrol agents to briefly handcuff a suspect, while escorting them to a secondary waiting area, and, while conducting a brief patdown search, before removing the handcuffs. Id. at 944-946. The suspect was informed in advance that they were being handcuffed; the handcuffs were on for a brief period of time; and, the officers removed the handcuffs, after briefly ensuring that the person posed no danger to the officers. Id. The Ninth Circuit concluded that these actions did not turn a border detention into an arrest for Fourth Amendment purposes. This conclusion seems reasonable. What this holding does not do is to permit the tackling of an unthreatening suspect; handcuffing the suspect so hard as to require emergency personnel to remove the handcuffs; and leaving the suspect to sit in the back of a CBP vehicle with no apparent effort to verify if the suspect actually posed a danger to the officers. As pled, those are the facts of this case. Nava avails Riano nothing in this case.

Any reasonable person would view the series of events alleged in the complaint "to be a restraint on freedom of the kind that the law typically associates with a formal arrest." Freeman, 483 F.3d at 413. Again, while the initial detention to conduct the search was lawful, the other acts that followed the search amounted to an arrest for constitutional purposes. That conclusion, however, is only half of the inquiry.

b. Reasonableness

Having concluded that Riano arrested Mireles within the meaning of the Fourth Amendment, the Court must examine whether that arrest was reasonable. Atwater v. City of Lago Vista, 195 F.3d 242, 244 (5th Cir. 1999) (en banc). The reasonableness of Riano's decision to arrest Mireles depends upon whether probable cause existed for the arrest. Wooley, 211 F.3d at 925. "The appropriate balance between an individual's interest in remaining free from seizure of his person and the government's interest in enforcing its laws has been reached by requiring a warrant or the existence of probable cause that the individual has committed some criminal act." Id.

Probable cause is required for arrests made by border patrol officers. U.S. v. Alvarado-Garcia, 781 F.2d 422, 426 (5th Cir. 1986) (noting that if probable cause did not exist for an arrest, border patrol officers were compelled to release the suspect), overruled on other grounds, U.S. v. Bengivenga, 845 F.2d 593 (5th Cir. 1988). "Though law enforcement officers protecting our border have more leeway than law enforcement officers in other settings with regard to searches and detentions, probable cause to suspect criminal activity is still generally required for arrest." U.S. v. Garcia-Rivas, 520 Fed. App'x. 507, 508 (9th Cir. 2013) (unpubl.). The Fifth Circuit has consistently reviewed arrests by border patrol officers – conducting their duties at an international border or a checkpoint – for probable cause. U.S. v. Rodriguez, 702 F.3d 206, 209 (5th Cir. 2012) (applying probable cause analysis to arrest made at border checkpoint); U.S. v. Marioni-Melendez, 460 Fed. App'x. 336, 339-340 (5th Cir. 2012) (unpubl.) (applying probable cause analysis to arrest made in proximity to border); U.S. v. Calderon-Beltran, 124 Fed. App'x. 223 (5th Cir. 2004) (unpubl.) (same); Bengivenga, 811 F.2d at 855 (applying probable cause analysis to arrest made at border checkpoint).

Probable cause is defined as "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to

commit an offense." Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (citations omitted).

The objective facts known to Riano at the time of the arrest do not reasonably support a finding of probable cause to arrest Mireles. Riano knew that Mireles had taken a shortcut back to the duty free store, but he also knew that route had been authorized by a law enforcement officer. Riano knew that no contraband had been found inside Mireles's vehicle or the trunk; he had just completed the search of those areas. Mireles did not have her purse with her – Riano was searching it in the vehicle – for which reason there was nothing in the purse that Mireles could use against Riano. Riano knew that Mireles was smaller than him, had visually apparent deformities in her hands and legs and had a disabled vehicle parking placard. Riano also knew that Mireles was nine feet or so away from him, with Mireles's vehicle separating them. There are no facts indicating that Mireles moved purposefully toward Riano; rather, the facts indicate that when Riano ordered Mireles to move, she failed to do so.

Under these objective facts, there was no probable cause to arrest Mireles for any crime. While traffic stops may be "especially fraught with danger to police officers,"[11] there is no objective evidence that this particular stop was dangerous. Riano has not identified any crime that Mireles may have committed or that she in any way presented a threat to him or others.

The only possible offense raised – and then only by stretching the facts – is resisting a law enforcement officer. It is a violation of Federal law to resist federal law enforcement officers. 18 U.S.C. § 111(a). Commission of that offense, however, requires the use of force by the person being arrested. U.S. v. Hazelwood, 2007 WL 1888883, *3 (W.D. Tex. 2007) (unpubl.) (citing U.S. v. Arrington, 309 F.3d 40, 44 (D.C. Cir. 2002)). No facts have been alleged that Mireles used force against Riano, or that she was about to use such force, or that she was even capable of using such force against any federal law enforcement officer.

Riano appears to assert that the need to handcuff Mireles was necessitated by officer

[11] Michigan v. Long, 463 U.S. 1032, 1047 (1983).

safety concerns. Dkt. No. 22, p. 23 (stating it was "an effort to control the situation"). However, even viewed through that lens, the decision to arrest Mireles was unreasonable. While "an officer may resort to physical restraint in special circumstances, doing so is 'not ordinarily proper' without probable cause." Brown v. Lynch, 524 Fed. App'x. 69 (5th Cir. 2013) (unpubl.) (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.2(d) (5th ed. 2012)). In cases where a person is suspected of a non-violent crime and poses "a remote threat of either fight or flight," the Fifth Circuit has "never allowed the use of handcuffs on reasonable suspicion alone." Id. As previously detailed, there are no objective facts to support any claim that Mireles posed a serious threat of either fight or flight. Officer safety cannot reasonably justify Mireles's arrest.

The Court is cognizant of the fact that it is viewing the facts from a different perspective than the agent's at the time the incident occurred. At this stage, the record will not reflect everything that was said, seen, or done. That may be a blessing or a curse for either party. Nevertheless, the objective facts, as they currently exist, provide no reasonable basis for finding probable cause that Mireles had committed, was committing, or was about to commit a crime. In fact, the information received from the other agent – that Mireles had permission to use the shortcut – would indicate the opposite. By arresting Mireles without probable cause, Riano violated her constitutional rights.

At this point – given the violation of Mireles's constitutional rights – the question becomes whether Riano is entitled to qualified immunity. That question, in turn, rests upon whether the rights that were violated were clearly established at the time of the violation. If the rights were clearly established, qualified immunity does not shield the agent. On the other hand, if the rights were not clearly established, then qualified immunity applies and Mireles's claims must be dismissed.

c. Qualified Immunity

As noted earlier, a two part analysis is employed to resolve claims of qualified immunity: (1) whether the defendant violated the plaintiff's constitutional rights; and (2)

whether those rights were clearly established at the time of the violation. The Court has already concluded that Riano violated Mireles's constitutional rights. Therefore, the Court turns to the second question, i.e. whether those rights were clearly established.

The right to be free from arrests that lack probable cause was clearly established at the time of the incident. The incident occurred on November 5, 2012. Dkt. No. 1, p. 3. It was long been the law in this country, that federal agents may not arrest a person without probable cause. As far back as 1971 – in Bivens – the Supreme Court held that federal agents could be held civilly liable for arresting a man without probable cause. Bivens, 403 U.S. at 392-93. This is not a new development.

A reasonable officer would have known that handcuffing Mireles and making her sit in the back of a CBP vehicle – for what currently appears to be more than an hour – would constitute an arrest. Freeman, 483 F.3d at 413 (30-45 minute detention was a de facto arrest for Fourth Amendment purposes); Zavala, 541 F.3d at 580 (90 minute detention); U.S. v. Place, 462 U.S. 696, 709-10 (1983) (same). In fact, it seems to be more the conditions of the detention than the mere fact that she was detained, that makes Mireles's detention an arrest. Those conditions, coupled with the length, would have alerted a reasonable officer that Mireles's detention was an arrest.

That same reasonable officer also would have known that he needed probable cause to justify that arrest and that probable cause was lacking in this case. Wooley, 211 F.3d at 925. None of these conclusions are new, novel, or otherwise unfamiliar to law enforcement officers in this country. These concepts encompass basic constitutional rights. Thus, Mireles's constitutional rights were clearly established at the time of the incident.

Having found that Riano violated Mireles's clearly established constitutional rights, when he arrested Mireles without probable cause, it seems equally clear that Riano is not entitled to the protections of qualified immunity in effecting that arrest. Accordingly, the motion to dismiss this claim should be denied.

2. Unreasonable Force Claim

Mireles also claims that Riano violated her, i.e. Mireles's, constitutional rights when he used unreasonable force in effectuating her arrest. Again, Riano has asserted qualified immunity as a defense to the claim. As with the other claim against Riano, Mireles has pled facts that, if true, would overcome qualified immunity.

"To establish the use of excessive force in violation of the Constitution, a plaintiff must prove: (1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." Elizondo v. Green, 671 F.3d 506, 510 (5th Cir. 2012) (quoting Collier v. Montgomery, 569 F.3d 214, 218 (5th Cir. 2009)).

In determining whether Mireles has pled facts to meet the elements of excessive force, the Court first considers whether the facts, as pled, allege unreasonably excessive force and sufficient injuries. The question then turns to the issue of qualified immunity, which – again – requires a determination of whether the law was clearly established at the time the excessive force was used.

a. Excessive & Unreasonable Force[12]

In determining whether Riano's use of force was excessive and unreasonable, the Court is to be guided by "the facts and circumstances of each particular case." Graham v. Connor, 490 U.S. 386, 396 (1989). Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." Id. The "reasonableness" of a particular use of force must be judged from the perspective of "a reasonable officer on the scene," rather than with the 20/20 vision of hindsight. Id.

At the risk of being repetitive, Riano knew that Mireles had taken a shortcut back to

[12] The Fifth Circuit has noted that these inquiries "are often intertwined." Poole v. City of Shreveport, 691 F.3d 624, 628 (5th Cir. 2012). Thus, the Court will address these issues simultaneously rather that repeating its analysis. See Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir. 2009) (simultaneously analyzing excessive force and unreasonableness).

the duty free store, but he also knew that route had been authorized by another federal agent. By the time force was exercised, Riano also knew that there was no contraband inside Mireles's vehicle or the trunk; he had completed the search of those locations. Mireles did not have access to the contents of her purse; Riano had control of it and was searching it in Mireles's vehicle. Riano knew that Mireles was smaller than him; had visually apparent deformities in her hands and legs; and, had a disabled vehicle parking placard. Riano also knew that Mireles was about nine feet away from him, with Mireles' vehicle separating them. There are no facts indicating that Mireles moved purposefully toward Riano. Instead, when Riano ordered Mireles to move, she failed to do so, citing a desire to watch him search her purse.

It is undisputed that Riano ordered Mireles to return to the place where she had once stood and Mireles failed to do so. "Officers may consider a suspect's refusal to comply with instructions . . . in assessing whether physical force is needed to effectuate the suspect's compliance." Deville, 567 F.3d at 167. Officers, however, must assess "the relationship between the need and the amount of force used." Id. Moreover, in deciding the issue, the Court should consider whether the officers used "measured and ascending responses," in response to a suspect's noncompliance. Poole, 691 F.3d at 629.

There are two cases which are instructive on this point. In Deville, the plaintiff was pulled over for speeding and had her granddaughter in the car with her. When the officer told her that he clocked her going 10 miles over the speed limit, the plaintiff responded with an obscenity. The officer informed the plaintiff that she needed to exit the vehicle and that child services was coming to retrieve her granddaughter. The plaintiff refused to leave the vehicle until her husband arrived to take her granddaughter home. Deville, 567 F.3d at 161.

The chief of police arrived as backup and told the plaintiff that she "needed to get the window down or he was going to break it." Deville, 567 F.3d at 162. Before she could roll down the window, the chief of police broke the window with his flashlight; opened the door; pulled her out of the vehicle; and, shoved her against the vehicle. Id.

The Fifth Circuit found that, based upon the plaintiff's version of events, the defendants were not entitled to qualified immunity. Deville, 567 F.3d at 169. The appeals court considered: (1) that the plaintiff was not attempting to flee; (2) that she was passively resisting by insisting on waiting until her husband arrived; and, (3) that she did not place anyone in danger with her actions. From these facts, the Fifth Circuit reasoned that the force – under the plaintiff's version of events – was excessive to the need. Because the chief of police "engaged in very little, if any negotiation" with the plaintiff before escalating the situation, the force used was excessive. Id.

In Newman v. Guedry, the Fifth Circuit also determined that the officers used excessive force. Newman, 703 F.3d 757 (5th Cir. 2012). In that case, the plaintiff was a passenger in a vehicle that was pulled over for speeding. Another occupant of the vehicle had outstanding warrants and began to resist arrest. The plaintiff got out of the vehicle to urge his friend to calm down. An officer did a pat down search of the plaintiff, who made an inappropriate comment when the officer patted down his groin area. The officer shoved him down onto the car and another officer hit him "thirteen times in nine seconds" with a nightstick and then tased him three times. Id, at 759-61.

The Fifth Circuit noted that if the plaintiff's version of events was true, "the officers immediately resorted to taser and nightstick without attempting to use physical skill, negotiation, or even commands." Newman, 703 F.3d at 763. The Fifth Circuit stated that "the particular facts of this encounter did not justify treating [the plaintiff] as a serious threat." Id, at 762-63. Accordingly, the Fifth Circuit affirmed the denial of qualified immunity.

The cases in which it was determined that the force employed was not excessive are equally instructive. In each case, the plaintiff attempted to flee, was physically combative, or made direct threats to the officers. See Williams v. City of Cleveland, Miss., 736 F.3d 684, 688 (5th Cir. 2013) (suspect was non-compliant and physically struggled with officers); Elizondo v. Green, 671 F.3d 506, 510 (5th Cir. 2012) (suspect was holding a knife and

continued to advance on officers, despite being instructed to stop); Ramirez v. Knoulton, 542 F.3d 124, 131 (5th Cir. 2008) (suspect was holding a handgun, was emotionally unstable, and potentially suicidal); Young v. City of Killeen, Tex., 775 F.2d 1349, 1353 (5th Cir. 1985) (suspect was reaching under seat of car and officer believed that suspect was reaching for a weapon).

The use of force – even deadly force – is reasonable "when an officer would have reason to believe the suspect poses a serious threat of harm to the officer or others." Mercer, 2014 WL 3882460, *2 (5th Cir. 2014) (internal citation omitted) (quoting Mace v. City of Palestine, 333 F.3d 621, 624 (5th Cir. 2003)). In Mercer, the Fifth Circuit held that firing an assault rifle directly into the truck was not unreasonable when the driver was leading the police on a high-speed chase that at times exceeded 100 miles per hour on a busy interstate. Id. In judging whether an officer's actions were reasonable, the Court must "consider the risk of bodily harm that [the officer's] actions posed to [the plaintiff] in light of the threat that [the officer] was trying to eliminate . . .". Id. at *3 (emphasis supplied by the Fifth Circuit) (quoting Scott v. Harris, 550 U.S. 372, 383-84 (2007)). At this juncture, neither the justification for the amount of force, nor the purported threat that the force was needed to address, are evident.

In cases where the suspect was non-compliant and force was used, the Court looks to whether the officers used "measured and ascending force . . . that corresponded to [the suspect's] escalating verbal and physical resistance." Poole, 691 F.3d at 629. In Poole, the suspect did not "give up his right arm" to allow himself to be handcuffed and later kicked and screamed at the officers. Id. In response, the officers issued verbal commands and tried grabbing his arm, before finally applying and withdrawing a taser "very quickly." Id. The Fifth Circuit focused on the fact that the ascending use of force corresponded with the suspect's increasing resistance and found that the force used was not excessive. Id.

In this case, Riano's actions were not measured in response to Mireles's essentially static resistance. The facts do not indicate that Mireles was a flight danger or posed any

physical danger to Riano or anyone else. Instead, Mireles re-positioned herself to better watch Riano search her purse, but remained approximately nine feet away from Riano. Dkt. No. 1, p. 6. Her movements were not furtive, nor did she advance toward Riano. Id. Thus, despite arguments to the contrary, the facts indicate that Mireles did not pose a threat to anyone.

Moreover, to whatever extent Mireles may have posed a threat to Riano, the force used was clearly excessive in relation to that threat. There are no facts indicating that Mireles had a weapon or was reaching for one. There are no facts indicating that Mireles intended to flee the scene, either on foot or by re-entering her vehicle. In response to a suspect moving a few steps to get a better view of the search, Riano threw the suspect – who was half his size and had a visually apparent physical handicap – to the ground, placed all of his weight upon her, and handcuffed her so tightly that the fire department had to be called to remove the handcuffs. Dkt. No. 1, pp. 6-8. Unlike the officers in Poole, Riano did not use "measured and ascending" force in order to ensure compliance. Poole, 691 F.3d at 629.

In the motion to dismiss, Riano has asserted that Mireles "became combative and resisted the request to search her purse." Dkt. No. 22, pp. 22-23. This assertion is not accompanied by any citation to the complaint and – unsurprisingly – does not appear in the facts as pled in the complaint. The facts asserted in the complaint indicate that Mireles did not "resist" a request to search her purse, but indicated a desire to view the search of the purse at a distance. Dkt. No. 1, p. 6. While Riano claims that Mireles was "combative," she has asserted that she was acting "politely." Dkt. No. 22, p. 22; Dkt. No. 1, p. 6.

As previously noted, the Court is obligated to take all well-pled facts as true for purposes of resolving this motion. Club Retro, L.L.C., 568 F.3d at 194. "The court will not weigh the evidence or resolve competing factual assertions at the motion to dismiss stage." Perry v. Federal Nat. Mortg. Ass'n, 2014 WL 3972295, *2 (N.D. Tex. 2014) (unpubl.) (citing Nietzke v. Williams, 490 U.S. 319, 327 (1989)). Thus, the Court does not accept Riano's implicit invitation to base its decision upon factual assertions that are not present in the

complaint.[13]

There must be a reasonable relationship between the amount of force used and the harm posed by the suspect, as shown by the specific, objective facts that are known to the officer at the time that the force is used. There is no such relationship under the facts of this case. While a border entry may authorize detention to conduct a search and permit acts that otherwise might be impermissible within the interior of the United States, that authority does not extend to the use and type of force in the circumstances pled in this case.

Simply stated, no facts have been alleged that would justify a reasonable officer escalating the use of force so quickly in response to Mireles's actions. Accordingly, for present purposes – assuming the alleged facts are true – the force used by Riano appears unreasonable and excessive, violating Mireles's constitutional rights.

b. Injury

The questions of injury and whether excessive force was used are often inseparable. A plaintiff must plead more than de minimis injuries. However, if the force used was not excessive, then any injuries suffered – no matter how medically severe – will be considered de minimis. Brown v. Lynch, 524 Fed. App'x. 69, 79 (5th Cir. 2013) (unpubl.). On the other hand, if the force used is constitutionally excessive, then even "relatively insignificant injuries" suffice to meet the injury requirement. Id (collecting cases).

The Fifth Circuit has held that "pain, soreness and bruising" is sufficient to support a claim of excessive force if that force is unreasonably applied. Schmidt v. Gray, 399 Fed.

---

[13] The Court notes that its qualified immunity analysis is different in a motion to dismiss than it is in the context of a motion for summary judgment. In analyzing qualified immunity under FED. R. CIV. P. 12(b)(6), the Court analyzes the defendant's conduct based solely upon the well-pled facts of the complaint. McClendon v. City of Columbia, 305 F.3d 314, 323 (5th Cir. 2002). In analyzing qualified immunity under FED. R. CIV. P. 56, the plaintiff may not rest upon the pleadings and the Court analyzes the defendant's conduct based upon the evidence before it, viewing it in the light most favorable to the plaintiff. Id. This Report and Recommendation is based upon the former analysis and takes no position as to whether the analysis would change under a Rule 56 standard. Furthermore, Riano is permitted to raise the defense of qualified immunity at successive stages within these proceedings. Behrens v. Pelletier, 516 U.S. 299, 306-308 (1996).

App'x. 925, 928 (5th Cir. 2010) (unpubl.) (holding that a plaintiff who alleged that a police officer slammed the trunk lid on his finger for no apparent reason stated a sufficient injury for Fourth Amendment purposes). The injuries in this case are at least as serious – if not more serious – than the injuries pled in Schmidt.

As a result of Riano's actions, Mireles suffered a "large knee wound," cuts and abrasions on her elbows, and her wrists were rubbed raw – by the handcuffs – which required the assistance of emergency personnel to remove them. Dkt. No. 1, pp. 6-8. The injuries in this case – "combined and in context" – state a sufficient injury for Fourth Amendment purposes. Schmidt, 399 Fed. App'x. at 928.

c. Qualified Immunity

Having concluded that, as pled, Mireles has alleged a constitutional violation by Riano, the Court must determine whether these rights were clearly established at the time of the incident. As noted earlier, "[a] right is clearly established if it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Davila, 713 F.3d at 257 (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)).

In Graham v. Connor, the Supreme Court ruled that citizens have a right to be free from excessive force and that the use of force is to be analyzed under a standard of objective reasonableness. Graham, 490 U.S. 386 (1989). Thus, the prevailing case law and applicable standard had been in effect for over 20 years at the time of the incident. It was also established that there had to be a relationship between the need to use force and the amount of force to be used. Deville, 567 F.3d at 167. A reasonable officer would have known that the amount of force he could reasonably use was inextricably linked to the danger presented. City of Palestine, 333 F.3d at 624; Scott, 550 U.S. at 383-84.

When judging claims involving noncompliant subjects, the Fifth Circuit has made it clear that officers should use "measured and ascending" responses in order to ensure compliance under the specific facts of the case at hand. Poole, 691 F.3d at 629. Faced with a non-compliant suspect who – under the objective facts known to the officer – does not pose a risk of fight or flight, an officer should not immediately resort to the highest levels of force.

Deville, 567 F.3d at 168. However, if a non-compliant suspect continues to struggle, does not submit to the officers' commands, and the officers use measured responses to the non-compliance, then an officer may justifiably use increased force to ensure compliance. Poole, 691 F.3d at 629. While the ultimate conclusions of Poole and Deville differ – in the former, the force was not excessive, while in the latter, the force was found to be excessive – the standard used to judge the officers' conduct was consistent. The Fifth Circuit's holdings in Poole and Deville are neither contradictory nor muddled. See Poole, 691 F.3d at 629-630, n 4 (noting that the facts underlying Poole and Deville were "distinguishable.").

There can be no reasonable confusion that the force employed in this case, under the facts as pled, was excessive and that using that excessive force injured Mireles. Moreover, the excessive nature of that force – vis-a-vis the threat presented – would have been recognized by any reasonable law enforcement officer. In short, Mireles's allegations of fact overcome any claim of qualified immunity at this stage. For that reason, Riano is not entitled to the protections of qualified immunity – at this point – and his motion to dismiss should be denied.

IV. Recommendation

WHEREFORE it is **RECOMMENDED** that the motion to dismiss filed by Defendants, Dkt. No. 22, be **granted in part and denied in part.**

The motion to dismiss, for lack of jurisdiction, should be **GRANTED** as to the Federal Tort Claims Act claims of battery, assault, false arrest, false imprisonment, and intentional infliction of emotional distress against the United States. These claims should be dismissed without prejudice.

The motion should be **DENIED** as to the claims of false arrest and excessive force against Riano, who – for present purposes – is not entitled to the protections of qualified immunity.

A. Notice to Parties

The parties have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the

Honorable Andrew S. Hanen, United States District Judge. 28 U.S.C. § 636(b)(1). Failure to timely file objections shall bar the parties from a de novo determination by the District Judge of an issue covered in the report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district court except upon grounds of plain error or manifest injustice. See § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428–29 (5th Cir. 1996).

DONE at Brownsville, Texas, on September 11, 2014.

Ronald G. Morgan
United States Magistrate Judge