No. 23-20281

United States Court of Appeals for the Fifth Circuit

SHANITA TERRELL

Plaintiff - Appellant

v.

HARRIS COUNTY, MICHAEL HINES, MARK CANNON, and ED GONZALEZ

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas in Case No. 4:22-CV-302, the Honorable Lee Rosenthal.

BRIEF OF APPELLEES ED GONZALEZ AND HARRIS COUNTY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

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/s/ Seth Hopkins
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Ed Gonzalez and Harris County

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 28.2.3, Appellees Sheriff Ed Gonzalez and Harris County believe oral argument is unnecessary because: (1) the dispositive issues have been authoritatively decided and (2) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Under well-settled law, Terrell's allegations do not state a claim against Sheriff Gonzalez or Harris County, and the District Court prepared two well-reasoned opinions that properly found Sheriff Gonzalez is entitled to qualified immunity and Harris County cannot be liable under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). This court recently, regularly, and authoritatively rules on qualified immunity and *Monell* claims, and the factual and legal issues in this case are not complex or nuanced.

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RESPONSE TO JURISDICTIONAL STATEMENT

Appellees Sheriff Ed Gonzalez and Harris County agree with Appellant that this Court has jurisdiction over this appeal. Terrell timely served Sheriff Ed Gonzalez, Harris County, and Deputy Mark Cannon, and they have all been dismissed with prejudice. ROA.571-584. Terrell voluntarily dismissed her claims against former Deputy Michael Hines without serving him (ROA.601) and the statute of limitations has expired. Thus, Terrell is appealing a final judgment that "ends the litigation and leaves nothing for the [district] court to do. . . ." *Walton v. City of Verona*, 82 F.4th 314, 320 (5th Cir. 2023).

STATEMENT OF THE CASE

I.
FACTS

On February 23, 2020, Plaintiff-Appellant Shanita Terrell became heavily intoxicated at The Address, a nightclub on the South Side of Houston, Texas. ROA.387. Terrell admits she "drove her car" to the bar and "was leaving the bar" while "visibly and audibly" intoxicated and "not in her usual state of mind."[1]

Defendant-Appellee Harris County Sheriff's Deputy Mark Cannon and former Deputy Jarell Hines—who is not part of this lawsuit—had independently contracted with the bar to provide uniformed security while off-duty that night. ROA.386. Texas peace officers are required to enforce the law even when off-duty, and the deputies could not allow Terrell to drive her car incapacitated.[2]

To prevent Terrell from endangering herself or others and avoid having to arrest her, Hines drove Terrell to her house. At some point, they had sex, and the

[1] Appellant's Brief at 4; ROA.387. Terrell speculates about whether she was intoxicated with alcohol or another substance, such as Rohypnol. However, she does not suggest any evidence exists to show she ingested anything other than alcohol, and she acknowledges it would have been difficult for the officers to tell the difference in a crowded bar because Rohypnol "mimics the alcohol intoxication in many ways." Appellant's Brief at 5; ROA.388. The source of her intoxication does not change the analysis of the case.

[2] See *Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 (5th Cir. 2010).

next day, Terrell went to the hospital and reported that the encounter was not consensual. A rape kit confirmed Hines' DNA was present. ROA.388.

The Harris County Sheriff's Office fired Hines. ROA.101 at fn.1. Hines was also investigated and charged with attempted sexual assault.[3] Deputy Cannon's only role in this incident was to assist Terrell as she entered Hines' patrol car, document the circumstances under which Terrell left with Hines by making a video recording, and assist authorities by preserving this important evidence.[4] There is no allegation that Sheriff Ed Gonzalez was present or had any personal involvement in this incident.

[3] Hines' grand jury indictment is at ROA.23. Terrell improperly attached an "Order of Deferred Adjudication" to her appellate brief showing that Hines pleaded guilty and received probation. Terrell did not provide the District Court with this information or request a stay to allow Hines' criminal case to be resolved. "As a general rule, this court is barred from considering evidence not included in the record on appeal, and 'attachments to briefs will not suffice.'" *Pitre v. Wadley Regional Medical Center*, 73 Fed. Appx. 21, 22 (5th Cir. 2003). *See also*, *Parker v. Blackwell*, 23 F.4th 517, 525 (5th Cir. 2022) (striking references to material outside the record); Fed. R. App. P. 10(a); Fifth Circuit Rule 28.2.2 (requiring citations to the record). Terrell's attachment should be stricken. However, even if considered, it would not affect the appellate analysis.

[4] The video was identified in disclosures, produced, and discussed in the briefing below. *See, e.g.*, ROA. 149, 167, 260, 268, 279, 284, and 407. Terrell objected to the District Court considering the video's substance. See ROA. 325, 360 at fn. 2., 491 at fn.2, and 539. The District Court did not indicate that the video had any weight in its decision to dismiss the case, and Harris County and Sheriff Gonzalez do not rely on it on appeal, except to point out that it exists.

II.
PROCEDURAL HISTORY

Terrell filed suit against Harris County and Hines on January 30, 2022, but failed to serve Hines. ROA.9-22. Harris County moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) on February 14, 2022. ROA.101-140.

Terrell filed a First Amended Complaint on February 22, 2022 and added claims against Cannon and Sheriff Gonzalez. ROA.183-198. Harris County moved to dismiss the First Amended Complaint on March 7, 2022. ROA.212-254. Cannon moved to dismiss the First Amended Complaint on March 9, 2022. ROA.259-275. Sheriff Gonzalez moved to dismiss the First Amended Complaint on March 18, 2022. ROA.286-312. Terrell responded to the motions to dismiss on April 11, 2022. ROA.320-332. Appellees collectively replied on April 18, 2022. ROA.333-349.

On May 11, 2022, the District Court dismissed Terrell's claims against all defendants except Hines (who had not been served). ROA.352-369. The court's dismissal was without prejudice, and it granted Terrell leave to amend in an attempt to plead facts sufficient to survive dismissal. ROA.353.

Hines filed a Second Amended Complaint on June 27, 2022. ROA.384-404. Cannon moved to dismiss on July 6, 2022. ROA.405-411. Harris County and Sheriff

Gonzalez moved to dismiss the same day. ROA.412-523. Terrell responded on August 19, 2022. ROA.531-559. Appellees replied August 26, 2022. ROA.561-570.

On September 6, 2022, the District Court dismissed all claims against Cannon, Sheriff Gonzalez, and Harris County with prejudice. ROA.571-584 (incorporating findings from the first ruling at ROA.352-369). The District Court recognized that "Terrell has amended twice previously and further amendment would be futile." ROA.572. On December 30, 2022, the District Court granted Terrell until February 15, 2023 to serve Hines. ROA.594. However, Terrell failed to do so and voluntarily dismissed Hines on May 11, 2023. ROA.598. On July 13, 2023, Terrell filed a notice of appeal.

SUMMARY OF THE ARGUMENT

Rule 12(b) permits dismissal of a case when a plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The District Court correctly dismissed the claims against Sheriff Ed Gonzalez and Harris County because Terrell failed to plead facts sufficient to state a viable claim against them.

I.
SHERIFF GONZALEZ

Terrell makes two allegations against Sheriff Gonzalez. First, she claims that because Sheriff Gonzalez did not take some unspecified action after a grand jury

cleared Hines of an unrelated charge in 2018, he can be liable for Hines' decision to commit an unexpected, off-duty crime in 2020. Appellant's Brief at 19-20. Second, Terrell claimed in the court below that Sheriff Gonzalez had a policy of not investigating complaints against officers when the person complaining had pending criminal charges. Terrell did not preserve that argument on appeal, and it is factually irrelevant because she does not allege she was charged with a crime, and the Sheriff did investigate and fire Hines. ROA.101 at fn.1.

These threadbare allegations could never overcome Sheriff Gonzalez's qualified immunity. Terrell had the burden of pleading facts to show how the Sheriff acted with deliberate indifference to her clearly established constitutional rights and that there was a causal connection between his actions and her injury. *Parker v. Blackwell*, 23 F.4th 517, 522 (5th Cir. 2022). This required Terrell to allege more than negligence—she needed to show that Sheriff Gonzalez knew the relevant facts and drew an inference that his decisions created a substantial risk that Hines would rape her. *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998). After two attempts to amend her complaint, Terrell failed to meet this pleading burden, and the District Court properly dismissed her complaints against Sheriff Gonzalez.

II.
HARRIS COUNTY

Terrell claims Harris County should be subject to municipal liability based on an alleged failure to train and investigate. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). To establish municipal liability under 42 U.S.C. § 1983, a plaintiff must identify (1) a policy or custom, (2) promulgated by a policymaker, (3) that caused the violation of her constitutional rights. *Edwards v. City of Balch Springs, Texas*, 70 F.4th 302, 307 (5th Cir. 2023). Further, the policy must have been created with deliberate indifference, which means Harris County had to be aware of the relevant facts and draw the inference that those facts created a substantial risk of harm that Hines would rape Terrell. *Edwards*, 70 F.4th at 308.

First, Terrell makes vague allegations that Harris County should have provided unspecified training to teach deputies not to drug and rape women while off duty and about loading drunk and drugged people into cars. Appellant's Brief at 24-25. Putting aside that this is so obvious that it does not need to be taught,[5] Terrell failed to explain the alleged deficiencies in Harris County's training and failed to plead facts plausibly demonstrating that the training was inadequate, adopted with deliberate indifference, and directly caused the constitutional violation in question.

[5] *Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996).

Pena v. City of Rio Grande City, 879 F.3d 613, 622 (5th Cir. 2018); *Jackson v. Valdez*, 852 Fed. Appx. 129, 135 (5th Cir. 2021); *Connick v. Thompson*, 563 U.S. 51, 60 (2011).

Second, Terrell alleges Harris County had a policy of not investigating allegations against officers. However, she cites no policy, and her only example is a single incident where Hines was no-billed by a grand jury in 2018. She never explains why she believes Harris County had a legal duty to second-guess the grand jury and conduct its own investigation. She also provides no facts to show Harris County was deliberately indifferent to her constitutional rights or should have known that Hines was likely to rape her. While she contends Harris County had a policy of not investigating accusations against officers, her allegation against Hines was investigated, and Hines was criminally charged and fired. ROA.101 at fn. 1.

Finally, Terrell pleads no facts to suggest the alleged policies she cites caused her constitutional injury. *Edwards*, 70 F.4th at 307 (5th Cir. 2023). Hines independently committed a crime when he assaulted Terrell while off-duty. That has no connection with any official Harris County policy. For these reasons, the District Court properly dismissed Terrell's claims against Harris County. ROA.368.

ARGUMENT

I.
STANDARD OF REVIEW FOR A MOTION TO DISMISS

A court of appeals reviews a District Court's dismissal of a case *de novo*. *Martinez v. Nueces County, Texas*, 71 F.4th 385, 388 (5th Cir. 2023) (citing *Lampton v. Diaz*, 639 F.3d 223, 225 (5th Cir. 2011)). Rule 12(b)(6) permits dismissal if a plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Rule 12 is read with Rule 8, which requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a)(2).

To survive dismissal, any legal conclusions in a complaint "must be supported by factual allegations" *Ashcroft v. Iqbal*, 556 U.S. 662 at 664 (2009). Further, those factual allegations must be detailed enough to "state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 663 (citing *Twombly*, 550 U.S. at 556). "A complaint 'does not need detailed factual allegations,' but the facts alleged 'must be enough to raise a right to relief above the speculative level.'" *Cicalese v. University of*

Texas Medical Branch, 924 F.3d 762, 765 (5th Cir. 2019) (quoting *Twombly*, 550 U.S. at 555). When the allegations in a complaint "could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558).

II.
THE DISTRICT COURT PROPERLY DISMISSED TERRELL'S CLAIMS AGAINST SHERIFF GONZALEZ

(Response to pages 19-20.)

A. Terrell made limited claims against Sheriff Gonzalez.

Terrell sued Sheriff Gonzalez in his individual and official capacities. When a party makes claims against a person in his official capacity, that is "only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (citation and quotation marks omitted). *See* ROA.474-475. Thus, Terrell's official capacity claims against Sheriff Gonzalez are subsumed into her claims against Harris County.

Terrell's live complaint makes these allegations against Sheriff Gonzalez:

> ¶ 32. Sheriff Gonzalez is a policymaker for Harris County is [sic] regards to officer discipline and investigations and the HCSO policies generally and does not investigate and/or discipline officers alleged of crimes if they are no-billed by a Grand Jury including sexual assault of a minor. Grand Jury proceedings are secret including as to Sheriff Gonzalez and HCSO employees. Sheriff Gonzalez does not investigate and/or discipline deputies accused of policy violations if the

> complainant is charged with a crime even if the deputy is the one the complainant is complaining about. There are many reasons a person charged with Sexual Assault of Child by a Harris County Grand Jury may be no-billed such as the child died or became incompetent or a witness died or became incompetent.

ROA.391. The allegations continue:

> ¶ 57. Sheriff Gonzalez is a policymaker for Harris County in regards to officer discipline and investigations and the HCSO policies generally and does not investigate and/or discipline officers alleged of crimes if they are no-billed by a Grand Jury including sexual assault of a minor. Grant Jury proceedings are secret including as to Sheriff Gonzalez and HCSO employees. Sheriff Gonzalez does not investigate and/or discipline deputies accused of policy violations if the complainant is charged with a crime even if the deputy is the one the complainant is complaining about. This also creates Harris County liability and individual liability for Sheriff Gonzalez.
>
> ¶ 58. Sheriff Gonzalez maintains a policy of not conducting IAD investigations if a criminal case is pending against the complainant, even if the complaint is about the arrest itself or the arresting deputy. This policy has led to a custom and practice among HSCO [sic] deputies of arresting citizens with impunity in numerous circumstances as a default response. . . .

ROA.400-401. Terrell does not allege Sheriff Gonzalez personally harmed her or was even present at The Address nightclub on February 23, 2020. The paragraphs above make only vague allegations that (1) Sheriff Gonzalez did not conduct independent investigations of officers cleared of charges by a grand jury and (2) Sheriff Gonzalez did not investigate complaints about officers when the person complaining had pending criminal charges. ROA.363-365, 391, 400-401, 580-582.

B. The District Court properly found that Terrell failed to plead a viable claim against Sheriff Gonzalez.

1. Standard for qualified immunity.

Sheriff Gonzalez is entitled to qualified immunity for claims made against him under 42 U.S.C. § 1983. *See* ROA.477-478. "Qualified immunity protects government officials from civil liability in their individual capacity to the extent that their conduct does not violate clearly established statutory or constitutional rights." *Garcia v. Blevins*, 957 F.3d 596, 600 (5th Cir. 2016), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985).

When a defendant invokes qualified immunity, "the burden shifts to the plaintiff to show that the defense is not available." *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016) (citation omitted). "A plaintiff seeking to overcome a motion to dismiss because of qualified immunity . . . must plead facts that allow the court to draw the reasonable inference that the defendant is liable for the harm alleged." *Edmiston v. Borrego*, 75 F.4th 551, 557 (5th Cir. 2023). This requires a plaintiff to show: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

A plaintiff cannot survive a motion to dismiss without pleading facts to support her burden under both prongs of qualified immunity. *Robinson v. Midland County, Texas*, 80 F.4th 704, 711 (5th Cir. 2023) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). It "is difficult" for a plaintiff to meet the second prong and show that a right was clearly established because the right must be specifically described, and it must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Parker*, 23 F.4th at 522. (quoting *Cunningham v. Castloo*, 983 F.3d 185, 191 (5th Cir. 2020) (internal quotation marks and citation omitted)).

2. Terrell failed to plead facts or law to support a claim against Sheriff Gonzalez.

Terrell's first claim against Sheriff Gonzalez is that he should have supervised Hines in a different manner or taken some unspecified employment action against Hines after he was accused of a crime in 2018. However, Terrell acknowledges that a grand jury found no basis to indict Hines,[6] and she fails to suggest what Sheriff Gonzalez should have done. She also fails to show how Sheriff Gonzalez violated her

[6] The District Court explained that "[a] no-bill occurs in Texas when at least nine jurors do not find cause to enter a bill of indictment." ROA.363 (citing Tex. Code Crim. P. Art. 20A.301). There is no allegation that the District Attorney's Office attempted to refile charges against Hines.

clearly established constitutional rights and fails to make any causal connection between Sheriff Gonzalez and her constitutional injury.

"In order to establish supervisor liability for constitutional violations committed by subordinate employees, plaintiffs must show that the supervisor act[ed], or fail[ed] to act, with *deliberate indifference* to violations of others' constitutional rights committed by their subordinates." *Parker*, 23 F.4th at 522 (emphasis and alternations in original) (citing *Wernecke v. Garcia*, 591 F.3d 386, 401 (5th Cir. 2009)).

"Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity." *Walker v. Upshaw*, 515 Fed. Appx. 334, 339-40 (5th Cir. Mar. 4, 2013). "For an official to act with deliberate indifference, 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998) (quoting *Farmer v. Brennan,* 511 U.S. 825, 837 (1994)).

Terrell was required to plead facts showing Sheriff Gonzalez knew Hines "was highly likely to inflict the particular type of injury" she suffered. *Gomez v. Galman*, 18 F.4th 769, 778 (5th Cir. 2021). In *Gomez*, two off-duty officers were

working at a bar, harassed a man without provocation, tried to strip his clothes off, beat him, chased him, then beat him again until he was unconscious. *Gomez*, 18 F.4th at 774. The man filed suit and pleaded that the city was deliberately indifferent for continuing to employ one of the officers because he previously performed an illegal strip search of an arrestee and headbutted a car in anger. *Gomez*, 18 F.4th at 778.

This Court held these two incidents did not meet the standard for deliberate indifference. "The connection between the background of the particular [defendant] and the *specific* constitutional violation alleged must be strong." *Gomez*, 18 F.4th at 778 (quoting *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 at 412 (1997)). While the two prior incidents of misconduct were similar, they did not make it "plainly obvious" that the officer "had a proclivity toward such brutal violence as alleged here." *Gomez*, 18 F.4th at 778.

In *Brown*, an officer used excessive force and seriously injured a woman at a traffic stop. *Brown*, 520 U.S. at 401-402 (1997). The officer had a criminal record which included assault and battery, resisting arrest, public drunkenness, nine moving violations, driving with a suspended license, and driving while intoxicated. *Brown*, 520 U.S. at 413–14. The Sheriff made only a cursory investigation of this background.

The Supreme Court held this was insufficient to show that the specific constitutional violation "would have been a plainly obvious consequence of the

hiring decision." *Brown*, 520 U.S. at 415. "[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff." *Brown*, 520 U.S. at 412.

In *Gros*, a patrol officer assaulted at least two women while on duty. The police chief hired him despite having evidence of at least 11 negative notations from prior employees in the form of reprimands, psychological tests, and complaints about using excessive force, being "overbearing," "badge heavy," and "aggressive." *Gros v. City of Grand Prairie*, 209 F.3d 431, 434 (5th Cir. 2000).

While the disciplinary history suggested the chief may have been negligent in hiring or retaining the officer, it did "not rise to the level of a constitutional violation" because no criminal court or internal affairs department found the officer guilty of engaging in the same conduct that led to the lawsuit, and there was not a "'strong' causal connection" between his background and the "specific constitutional violation alleged." *Gros*, 209 F.3d at 435. "With the benefit of hindsight, it is apparent that [Officer] Rogers was a bad hire, but there is insufficient evidence to show that [Chief] Crum was deliberately indifferent to plaintiffs constitutional rights when he made his hiring decision." *Gros*, 209 F.3d at 436.

In this case, Hines was never convicted of any crime, there is no allegation of prior workplace complaints, and the only fact pleaded about his past involved an unrelated incident that never made it past a grand jury.[7] The District Court correctly recognized that Terrell pleaded no facts or law to suggest it would have been "plainly obvious" to Sheriff Gonzalez that unless he or one of his employees "address[ed] a no-billed grand jury charge" that Hines would rape a woman while working an off-duty job.[8] The District Court also recognized that Terrell never "pleaded that Sheriff Gonzalez was aware of a pattern of deputies with no-billed grand jury charges inflicting injury onto others." ROA.364.

There are no facts to show that Sheriff Gonzalez violated Terrell's constitutional rights, no showing of deliberate indifference, and no causal relationship between anything Terrell alleges Sheriff Gonzalez did and any injury she suffered. ROA.582. The District Court correctly concluded in its first ruling:[9]

> There is no support in case law that a sheriff who is aware that one of his deputies charged with an assault of a minor, which was later no-billed by a grand jury, should have been aware that the deputy posed a substantial risk of serious harm to future persons like Terrell. Because

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[7] As noted, a no-bill occurs when at least nine jurors do not find cause to meet the low bar of entering a bill of indictment. ROA.363 (citing Tex. Code Crim. P. Art. 20A.301).

[8] ROA.364. Terrell not only failed to meet her pleading burden, but she undermined her argument. Rather than explain how it was "plainly obvious" to Sheriff Gonzalez that Hines was likely to violate her constitutional rights in the manner that he did, she emphasized that his conduct was unexpected and "outrageous in character and extreme in degree." ROA.394.

[9] The District Court adopted much of its first ruling in its second ruling at ROA.571-584.

> Terrell has not pleaded deliberate indifference as to the sheriff, the individual and official capacity claims against him are dismissed.

ROA.365.

Terrell's second claim against Sheriff Gonzalez is that he did not investigate or discipline deputies accused of policy violations if there were pending criminal charges against the person who complained about the deputies. ROA.401. That claim was never relevant because Terrell was not charged with any crime, and Hines was investigated and terminated. ROA.101 at fn.1. Terrell abandoned this claim on appeal, but Sheriff Gonzalez briefly addresses it out of an abundance of caution.

In the court below, Terrell relied on *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981). In that case, an undercover officer was alleged to have jumped out of his car, screamed at a motorist, pointed a gun at his head, and then had him arrested for aggravated assault. *Black*, 662 F.2d at 185. When the motorist complained, the police chief told him there would be no investigation of the officer until all the charges against the motorist were resolved. The officers then charged the motorist with three additional crimes. *Black*, 662 F.2d at 186.

The District Court found the facts in *Black* to be distinguished because the police chief in that case personally created a policy "that caused harm to the plaintiff" by causing "additional unwarranted charges filed against him in an apparent attempt to delay any investigation into the arresting officer." ROA.581-82

(citing *Black*, 662 F.2d at 189-190). The District Court's analysis is correct and unchallenged on appeal.

C. Terrell fails to provide a reason to reverse the District Court.

Terrell's entire argument against Sheriff Gonzalez relies on two cases. Appellant's Brief at 19 (citing *Casnova v. City of Brookshire*, 119 F.Supp.2d 639, 660 (S.D. Tex. 2000) (citing *Baker v. Putnal*, 75 F.3d 190, 199 (5th Cir. 1996))). In *Casanova*, plaintiff was arrested on a drug warrant based on false information. He filed a civil suit against the officers, police chief, and county alleging false arrest and malicious prosecution. The district court dismissed the case and held the officers were not liable for malicious prosecution, the county was not liable for false arrest or malicious prosecution, the police chief was not liable for false arrest, and the police chief was entitled to qualified immunity on the false arrest claim. *Casanova v. City of Brookshire*, 119 F. Supp. 2d 639 (S.D. Tex. 2000). This case does not support Terrell's position.

In *Baker*, an officer investigating a fight and gunfire shot and killed a suspect. His family filed suit against the officer, the City of Galveston, and the police chief. This Court ultimately held there were issues of material fact as to whether the officer used excessive force, but the plaintiff did not state a claim against the city for inadequate training and did not overcome the police chief's qualified immunity for

allegedly failing to train and having outdated policies and inadequate manpower. *Baker v. Putnal*, 75 F.3d 190, 199 (5th Cir. 1996). This case also does not support Terrell's position.

Terrell cites no authority to establish that a sheriff has a duty to review a no-billed assault charge against a deputy and conduct an independent investigation of the grand jury's findings, or that the results of this investigation would make it "plainly obvious" that the deputy would likely rape a woman while working off-duty at a bar. Terrell does not plead facts or law to overcome qualified immunity or meet the standard for supervisory liability. Accordingly, the District Court's dismissal of Sheriff Gonzalez should be affirmed.

III.
THE COURT IS REQUIRED TO RECOGNIZE QUALIFIED IMMUNITY UNLESS IT IS OVERTURNED BY A CHANGE IN LAW

(Response to pages 21-23.)

Terrell asks this Court to abolish the qualified immunity defense. Appellant's Brief at 21-23. Terrell does not dispute that qualified immunity is the law of this Circuit.[10] Instead, Terrell cites the dissent in *Hoggard v. Rhodes*, 141 S.Ct. 2421 (2021), and *Rogers v. Jarrett*, which acknowledges qualified immunity is "controlling precedent" but advocates that it be reconsidered based in part on a typographical

[10] Appellees incorporate by reference the qualified immunity cases cited *supra*.

error that may have occurred 149 years ago. *Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023), cert. denied, No. 23-93, 2023 WL 6378558 (U.S. Oct. 2, 2023).

This is not the correct forum to litigate Terrell's challenge for two reasons. First, Terrell did not preserve these arguments in the court below. "A party forfeits an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal[.]" *Thomas v. Ameritas Life Insurance Corporation*, 34 F.4th 395, 402 (5th Cir. 2022), quoting *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021). A party must not only raise a matter but also "press and not merely intimate the argument during proceedings before the district court." *Id.,* quoting *Templeton v. Jarmillo*, 28 F.4th 618, 622 (5th Cir. 2022).

Second, under the rule of orderliness, "one panel of our court may not overturn another panel's decision, absent an intervening change in law, such as by statutory amendment, or the Supreme Court or our *en banc* court." *Edmiston v. Borrego*, 75 F.4th 551, 559 (5th Cir. 2023); *Canales-Berrios v. Barr*, 838 Fed. Appx. 800, 804 (5th Cir. 2020); *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016); *Jacobs v. Nat'l Drug Intelligence Center*, 548 F.3d 375, 378 (5th Cir. 2008).

Other litigants have recently made similar arguments on appeal, and this Court has recognized that a challenge to qualified immunity can only be addressed by "further review." In *Crandel*, this Court held:

> Plaintiffs maintain, solely for the purpose of preserving the issue for further review, that qualified immunity should be "abolished or modified so that it is inapplicable here". For this appeal, we proceed with the qualified-immunity doctrine intact.

Crandel v. Hall, 75 F.4th 537, 543 (5th Cir. 2023); *Edmiston v. Borrego*, 75 F.4th 551, 558 (5th Cir. 2023). Appellees respectfully request a finding that the defense continues to be applicable in this Circuit and for the opportunity to more thoroughly brief the issue if the Court is inclined to reconsider this precedent.

IV.
THE DISTRICT COURT PROPERLY DISMISSED TERRELL'S CLAIMS AGAINST HARRIS COUNTY

(Response to pages 23-26.)

A. Terrell's claims against Harris County.

Terrell's live complaint made these allegations against Harris County:

> ¶ 45. In addition, and in the alternative, Harris County gave inadequate training to civilian and officer personnel, including but not limited to Hines and Cannon, on physical contact with detainees, and failed to supervise when detentions occurred. Harris County and the HCSO including but not limited to Deputy Hines and Deputy Cannon (alone and in concert and/or individually) endangered female citizens and detainees, including Plaintiff herein, resulting in the sexual assault of Plaintiff and possibly other females.

> ¶ 46. In addition, and in the alternative, Harris County provided inadequate training to Deputies Hines and Cannon on the appropriate protocol with respect to the use of the front seat of a squad car, the use of an off duty deputy's squad car, and the safe treatment of intoxicated persons, specifically persons under the effect of date-rape drugs. This lack of training was deliberately indifferent to the rights of citizens that

> encounter HCSO deputies at HCSO-approved security jobs where alcohol and, by extension, opportunities for the use of date-rape drugs are plentiful, such as Deputy Hines and Cannon's HCSO-approved security job at The Address. Proper training in this area would have prevented Deputy Cannon from assisting Deputy Hines in forcing Ms. Terrell into Hines's squad car, and helped both deputies recognize the effects of a date-rape drug and respond in a manner that would have kept Ms. Terrell safe from sexual assault, such as by getting her to the Sobering Center.
>
> ¶ 47. Additionally, Harris County did not train Mark Cannon nor Terrell [sic] Hines to take Ms. Terrell to the sobering center when the sobering center was desiged [sic] for people like Ms. Terrell with its gender specific dorms to prevent sexual assault.

ROA.395-396.

Succinctly stated, Terrell initially alleged the County failed to train or supervise on (1) physical contact with detainees, (2) appropriate protocol with respect to the use of the front seat of a squad car, (3) use of an off-duty deputy's squad car, (4) safe treatment of intoxicated persons, specifically persons under the effect of date-rape drugs, and (5) use of the sobering center.[11] As discussed below, Terrell abandoned most of these claims on appeal.

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[11] Terrell also made a vague allegation that Harris County "failed to supervise when detentions occurred." ROA.395. This sentence fragment does not place Harris County on notice of what Terrell is claiming, and Terrell provides no additional facts or law. ROA.395-396, 365-368, 582-584.

B. The District Court properly found that Terrell failed to plead a viable claim against Harris County.

1. Standard for a civil rights claim against a municipality.

"[R]ecovery from a municipality is limited to acts that are, properly speaking, acts of the municipality—that is, acts which the municipality has *officially sanctioned or ordered*." *Edwards*, 70 F.4th at 308 (emphasis in original) (quoting in part *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)). Under 42 U.S.C. § 1983, "a municipality cannot be held liable solely because it employs a tortfeasor…" *Monell*, 436 U.S. at 691; *Martinez v. Nueces County, Texas*, 71 F.4th 385, 389 (5th Cir. 2023); *Shumpert v. City of Tupelo*, 905 F.3d 310, 316 (5th Cir. 2018), as revised (Sept. 25, 2018).

To establish municipal liability under § 1983, a plaintiff must identify (1) an official policy (2) promulgated by the municipal policymaker (3) that caused a violation of his constitutional rights. *Edwards*, 70 F.4th at 307 (5th Cir. 2023). An official policy can be "written policy statements, ordinances, or regulations" or a "widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Webb v. Town of Saint Joseph*, 925 F.3d 209, 214-15 (5th Cir. 2019) (citations omitted).[12]

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[12] In "rare circumstances," an official policymaker can form an official policy without a formal writing or widespread practice when the policymaker personally "performs the specific act that forms the basis of the § 1983 claim." *Webb*, 925 F.3d at 214-15; See *Owen v. Independence*, 445 U.S.

A plaintiff has a high burden to plead the existence of a custom that fairly represents municipal policy. "To plausibly plead a practice 'so persistent and widespread as to practically have the force of law,' a plaintiff must do more than describe the incident that gave rise to [her] injury." *Jackson v. Valdez*, 852 Fed. Appx. 129, 135 (5th Cir. May 18, 2021) (citation omitted). She must plead facts to show the actions of public employees "have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice" of the employees. *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984).

This typically requires showing "sufficiently numerous prior incidents," as opposed to "isolated instances." *Peterson v. City of Fort Worth, Texas*, 588 F.3d 838, 850 (5th Cir. 2009), quoting *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989). The size of a police department "may be relevant to determining whether a series of incidents can be called a pattern." *Id.*, quoting *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002). In *Pineda*, 11 incidents of Fourth Amendment violations "cannot support a pattern of illegality in one of the Nation's largest cities and police forces." *Pineda*, 291 F.3d at 329.

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622 (1980) (city council censured and fired an employee without a hearing). Terrell does not allege that Sheriff Gonzalez took any personal action against her.

In *Peterson*, in the absence of record evidence, this Court looked to the City of Fort Worth's website to show it employed 1,500 officers and dealt with 67,000 incidents of crime per year to conclude that "27 incidents of excessive force over a period of four years do not reflect a pattern that can be said to represent official policy of condoning excessive force…" *Peterson*, 588 F.3d at 852. The Harris County Sheriff's Office has "more than 5,000 employees to protect the 4.5 million residents living with the 1,700 square miles of Harris County."[13]

The practices must not only rise to the level of a custom, but must also involve unconstitutional conduct with "similarity and specificity; prior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question." *Peterson v. City of Fort Worth, Texas*, 588 F.3d 838, 850 (5th Cir. 2009) (internal quotation marks omitted).

Once a plaintiff identifies a policy or custom, she must show "the policy itself was unconstitutional" or, if the policy is facially constitutional, it "was adopted with deliberate indifference to the known or obvious fact that a specific constitutional violation would follow." *Id.* As discussed above, deliberate indifference carries a high burden. "A showing of simple or even heightened negligence will not suffice."

[13] "About Sheriff Ed Gonzalez", retrieved on November 1, 2023 from https://harriscountyso.org/AboutUs/AboutMe.

Brown, 520 U.S. at 407. Instead, it "must amount to an intentional choice, not merely an unintentionally negligent oversight." *James v. Harris County*, 577 F.3d 612, 617-18 (5th Cir. 2009) (quoting *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992); *Connick v. Thompson*, 563 U.S. 51, 60 (2011).

2. Terrell failed to plead facts or law to support a claim that a policymaker adopted an official policy that was the moving force behind her constitutional injury.

a. Terrell's failure to train claims.

Terrell first alleges Harris County had inadequate training policies. "To state a cognizable failure-to-train claim, a plaintiff must plead facts plausibly demonstrating that: (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the constitutional violations in question." *Jackson*, 852 Fed. Appx. at 135.

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. at 61. "To proceed beyond the pleading stage, a complaint's 'description of a policy or custom and its relationship to the underlying constitutional violation . . . cannot be conclusory; it must contain specific facts.'" *Pena*, 879 F.3d at 622 (5th Cir. 2018) (quoting *Spiller*

v. City of Texas City, Police Department, 130 F.3d 162, 167 (5th Cir. 1997)); *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009).

On appeal, Terrell identifies only two claims related to training. First, she alleges Harris County failed to train Hines and Cannon to not place her into a squad car and sexually assault her (Appellant's Brief at 24). However, courts have held that public entities are not required to spend public money to tell deputies not to drug and rape women because that is so obvious that it does not require training. "In light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women." *Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996).

Second, Terell alleges Harris County should have provided unspecified training about loading drunk and drugged people into cars. Appellant's Brief at 25-26. However, Terrell's vague opinion about what training Harris County might have offered does not satisfy her pleading burden to show how existing training was inadequate, promulgated with deliberate indifference, and directly caused her harm. *Jackson*, 852 Fed. Appx. at 135. As the district court noted, Terrell's complaint "contains no specific allegation about the substance, content, or deficiencies of Harris County's officer training practices related to treatment of persons in custody." ROA.368, citing *Quinn v. Guerrero*, 863 F.3d 353, 365 (5th Cir. 2017).

Terrell contends she can evade her burden by claiming "the outrageousness of" Hines' off-duty and unsanctioned "action is itself proof of the failure to train…" (Appellant's Brief at 24). However, that is not the standard.

This Court narrowly construes the single-incident exception to extreme cases where a plaintiff can show a "highly predictable consequence . . . implicated in recurrent situations that a particular employee is certain to face" where a government actor "was provided no training whatsoever." *Hutcheson v. Dallas County, Texas*, 994 F.3d 477 (5th Cir. 2021), cert. denied, 142 S. Ct. 564, 211 L. Ed. 2d 352 (2021).

Terrell has not pleaded that Harris County fails to train deputies at all and has not shown that deputies are likely to face recurrent situations where it is highly predictable that they will need training to prevent them from assaulting bar patrons while off duty. Further, Terrell has not identified exactly what training they should have received, how Harris County was deliberately indifferent, or how this supposedly deficient training directly caused Hines to make the off-duty decision to assault Terrell. Her allegations are conclusory, and the District Court properly dismissed the training claims against Harris County.

b. Terrell's alleged failure to investigate claim.

Next, Terrell alleges Harris County had a policy of not investigating allegations of officer criminal activity.[14] She cites no policy and provides only a single example—the 2018 allegation where Hines was no-billed by a grand jury.

As explained, the Sheriff had no duty to challenge the grand jury's 2018 decision to no-bill Hines, and there are no facts pleaded to suggest Harris County was even negligent—much less deliberately indifferent—in its investigation of officers. Indeed, Terrell's own allegation against Hines was investigated, and Hines was criminally charged and fired. ROA.101 at fn. 1.

Terrell also pleads no facts to suggest that any policy she complains about was created with deliberate indifference to her constitutional rights. As explained, deliberate indifference carries a high burden of showing that Harris County was both aware of the relevant facts and actually drew the inference that those facts created a "substantial risk of harm" that Hines would rape Terrell. *Smith*, 158 F.3d at 912. There is nothing in the complaint or on appeal to meet that burden.

[14] Specifically, Terrell alleges Harris County had a policy of: (1) "failing to properly screen and investigate their deputies," (2) "failing to investigate officers accused of crime" or "conduct IAD investigations when the complainant has been charged with a crime," and (3) "having inadequate policies with respect to (among other things) reporting and investigating sexual assaults and officer conduct on extra jobs at all" (Appellate Brief at 25).

Finally, Terrell pleads no facts to suggest the alleged failure-to-investigate policy caused her constitutional injury. *Edwards*, 70 F.4th at 307 (5th Cir. 2023). Hines acted independently and violated Harris County policy when he assaulted Terrell while off-duty on February 22, 2020. Terrell has not met any of the elements required to plead a *Monell* case against Harris County.

V.
SHERIFF GONZALEZ AND HARRIS COUNTY DO NOT DISPUTE THAT THIS COURT HAS JURISDICTION OVER THIS APPEAL

Terrell's fourth issue is whether there was an appealable final decision giving this Court jurisdiction. See Appellant's Brief at 2. For the reasons explained in the Jurisdictional Statement, *supra*, Sheriff Gonzalez and Harris County do not dispute that the Court has jurisdiction over this appeal.

CONCLUSION

The District Court properly dismissed Appellant Shanita Terrell's claims against Sheriff Ed Gonzalez and Harris County because Terrell's Second Amended Complaint does not meet the pleading standards required by Rule 12(b)(6). Accordingly, this Court should affirm the District Court's dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 10, 2023, I filed a true and correct copy of the foregoing document via the Court's CM/ECF system, which will automatically serve a copy on all parties' counsel. I further certify that I emailed an electronic copy of this brief to the counsel of record below:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), and 5th CIR. R. 32.1: this document contains 7,132 words.

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/s/ Seth Hopkins