

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
4

5 August Term, 2015
6

7 (Argued: December 11, 2015 Decided: April 11, 2016)
8

9 Docket No. 14-2554-cv
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11
12 DAMANI JABARI MYERS,
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14 *Plaintiff,*
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16 and
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18 JULIA JOHNSON,
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20 *Plaintiff-Appellant,*
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22 – v. –
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24 POLICE OFFICER PATTERSON, Shield No. 658, 1st Pct,
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26 *Defendant-Appellee,*
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28 and
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30 EDDIE JAMES MYERS, JR.; BENJAMIN MALEWICZ; JODI WEITZMAN-FISHER;
31 JOHN CIAPOLI, Nassau County Attorney; KAREN MURPHY, Justice, Nassau County
32 Supreme Court; DONNA GUARTON, Nassau County Baldwin, UFSD, Psychologist;
33 ROBERT BARRIS, MD; G. ST. VICTOR, DR.; ARTHUR A. GIANELLA, President/CEO
34 Nassau University Medical Center; CYRUS R. VANCE JR.,
35

1 *Defendants.**

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5 Before: JACOBS, LEVAL, and CALABRESI, *Circuit Judges*.

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7 Appeal from the judgment of the United States District Court for the Eastern District of
8 New York (Seybert, J.), Johnson v. Myers, No. 10-CV-1964(JS)(WDW), 2014 WL 2744624
9 (E.D.N.Y. June 16, 2014), granting summary judgment, on the basis of qualified
10 immunity, in favor of Defendant-Appellee Police Officer Patterson.

11 Pursuant to an ongoing child neglect investigation, police officers and a Child
12 Protective Services (CPS) caseworker arrived at Johnson's home one evening intending
13 to interview her child. Johnson refused to allow CPS to talk to her son and allegedly
14 stated that they would have to arrest her if they wanted to interview him. The police
15 then arrested Johnson, who was ultimately involuntarily hospitalized.

16 The current record, which does not contain a statement from Officer Patterson,
17 provides neither sufficient indicia of Johnson's dangerousness to herself or to others at
18 the time of the seizure nor evidence that Patterson reasonably relied on the seemingly
19 expert knowledge or instructions of another appropriate party in seizing Johnson. The
20 record consists solely of contemporaneous notes from the CPS caseworker, which do
21 not indicate that Johnson was a danger to herself, to her child, or to anyone else. We
22 therefore vacate the judgment of the district court granting Officer Patterson qualified

* The Clerk of the Court is respectfully directed to amend the official caption in this case to conform with the caption above.

1 immunity on the existing record, and remand for expansion of the record as to the
2 grounds on which the arrest was made, and for reevaluation of Patterson's entitlement
3 to qualified immunity on the basis of an expanded record.

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5 Loraine M. Cortese-Costa, Law Offices of Loraine M.
6 Cortese-Costa, Bridgeport, CT, *for Plaintiff-Appellant*.

7
8 Robert F. Van der Waag, Deputy County Attorney *for*
9 Carnell T. Foskey, Nassau County Attorney, Mineola,
10 NY, *for Defendant-Appellee*.

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14 CALABRESI, *Circuit Judge*:

15 The case before us concerns Plaintiff Julia Johnson's appeal from the district
16 court's grant of qualified immunity to Defendant Police Officer Patterson. The district
17 court dismissed Johnson's claim against him by reason of his having seized her for
18 psychiatric evaluation based on her supposed dangerousness to her son DJM.

19 In response to reports from DJM's school that DJM's mother was behaving in an
20 irrational manner, Nassau County Child Protective Services (CPS) opened an
21 investigation, led by CPS caseworker Jodi Weitzman. As a result of her investigation,
22 Weitzman eventually summoned police to meet her at Johnson's home, where
23 according to notes from the record, she and Officer Patterson "agreed that mo[ther]
24 should be sent for a psych eval as her behavior was irrational."

We are now called on to decide whether Officer Patterson is entitled to qualified immunity, thereby barring Johnson’s claim that he violated her Fourth Amendment rights by arresting her. Unfortunately, the record evidence of what happened that evening consists only of the terse notes of the CPS caseworkers. And those notes lack indicia of, or specific observations substantiating, Johnson’s “dangerousness”; nor do they show that Patterson reasonably relied on communications from Weitzman or others in making the seizure. Moreover, and notably, there is no statement by Patterson in the record.

On the current record, we cannot affirm the district court's grant of qualified immunity to Officer Patterson on Johnson's claim. Without evidence regarding the grounds for Patterson's decision, we are unable to determine whether his actions were contrary to clearly established law. Accordingly, and without considering the many unresolved legal questions in this area, we vacate the district court's grant of qualified immunity and remand to the district court for further expansion of the record as to the basis on which the arrest was made, and for reevaluation of Patterson's entitlement to qualified immunity on the basis of an expanded record.

BACKGROUND

The case before us arises from the involvement of Officer Patterson in the August 20, 2008 seizure and involuntary hospitalization of Plaintiff-Appellant Julia Johnson. Patterson arrested Johnson in the course of an attempted interview of Johnson's son

1 pursuant to a CPS neglect investigation. Caseworker notes from that CPS investigation
2 constitute the factual corpus underlying both Patterson’s motion for summary
3 judgment and our description of the investigation and subsequent events leading to
4 Johnson’s seizure. These notes are essentially contemporaneous records of the course of
5 the CPS investigation, with entries recorded the day they occurred, or within a few
6 weeks. Weitzman, a CPS caseworker who was actively involved in the investigation of
7 Johnson and who was present during Johnson’s arrest, made the majority of the entries.

8 *The Investigation*

9 On June 20, 2008, an employee at DJM’s school called the New York state child
10 abuse hotline to allege that Johnson was acting oddly and to express “concern that there
11 would be no one to check on [the] child.” Caseworker Notes, Dist. Ct. Dkt. No. 155-3, at
12 2; *Johnson v. Myers*, No. 10-CV-1964(JS)(WDW), 2014 WL 2744624, at *1 (E.D.N.Y. June
13 16, 2014). According to the caseworker notes, the caller stated that the mother (i) had
14 refused to sign emergency contact cards with a home phone number for DJM, (ii) had
15 refused to sign permission slips for school trips, (iii) had written letters to the FBI with
16 the school cc’ed, (iv) had “attended an award assembly where she only took notes,” (v)
17 had made “unusual inquiries about other children” at the school, and (vi) had grown

1 “furious” with the school when DJM’s father picked him up, demanding to see the
2 father’s signature. Caseworker Notes, Dist. Ct. Dkt. No. 155-3, at 2.¹

3 On the same day as the school employee’s call, Weitzman tried to contact
4 Johnson by going to her home, and she was able to meet with DJM’s father, Eddie
5 Myers, Jr., at the home. According to the caseworker notes, Myers responded to the
6 allegations against Johnson by stating that DJM was “safe with” Johnson. He
7 elaborated that while Johnson had “her moments,” they were “never toward” DJM.
8 Myers “stated [that] [Johnson] does not get physical when she gets angry.” Rather,
9 according to Myers, Johnson was “like supermom,” and Myers believed “that
10 everything she does [was] in [DJM’s] best interest.” Weitzman also observed the home
11 to be “very clean and appropriate” and to contain an “ample food supply.” *Id.* at 3.

12 Two days later, CPS returned to Johnson’s home and the notes reflect what
13 appears to be CPS’s first face-to-face contact with Johnson. While Johnson initially
14 refused to grant CPS’s request to speak with DJM, she relented somewhat, allowing the
15 caseworker at least to see the child, who “indicated that he did not want to be
16 interviewed.” *Id.* at 4. Moreover, in contrast to Myers’s earlier characterization of
17 Johnson just two days before, Myers now stated that “this behavior,” seemingly

¹ The caseworker notes mention that the caller did not say that the child, DJM, reported any “unusual behavior of [Johnson],” and the family apparently had no prior CPS investigatory history. Dist. Ct. Dkt. No. 155-3, at 2.

1 referring to Johnson's obstinate actions towards CPS caseworkers, was "typical of
2 Johnson and very upsetting to [DJM] and to him."² *Id.* at 4.

3 From June to August 2008, CPS caseworkers, including but not limited to
4 Weitzman, made multiple further attempts to speak to Johnson, who was either not
5 there, not answering the door, or not willing to talk.³

6 *The Seizure*

7 On August 20, 2008, Johnson was arrested and eventually taken to Nassau
8 University Medical Center (NUMC) against her will. Weitzman's notes comprise the
9 only evidence in the record about that day.

10 Because the notes, written in shorthand, play such a primary role and are terse,
11 we reproduce the relevant section describing the arrest in its entirety, with all emphasis
12 our own:

13 C[ase]w[orker] [Weitzman] contacted police when she arrived at
14 [Johnson's home]. [Myers] met with c[ase]w[orker] outside of the home.
15 PO Patterson #658 and PO Barret[t] #476 arrived at the home. [Myers] let
16 police and caseworker into the home. [Johnson] was annoyed and stated
17 she and [DJM] were on their way out to an appointment and did not have
18 time to talk. C[ase]w[orker] told [Johnson] she [the caseworker] needed to

² According to the notes, Myers also said "he does not know if [Johnson] has mental issues" but does think she "could use therapy." Dist. Ct. Dkt. No. 155-3, at 2-3.

³ For example, on June 23, 2008, Johnson was not home, but the caseworkers made contact with a neighbor, who described Johnson as "nice enough" – the neighbor explained that she often "see[s] Johnson in the front yard . . . playing ball with her son." Dist. Ct. Dkt. No. 155-3, at 5. The neighbor emphasized both Johnson's happiness when DJM recently won an award as well as her overall impression of Johnson as a "nice person." *Id.* On August 13, 2008, CPS caseworkers were able to find Johnson at home, but according to the caseworker notes, Johnson was "suspicious of," and "refused to talk with," the caseworker. Johnson was apparently "difficult to follow as she kept going from one subject to another." *Id.* at 7.

1 talk with [DJM] for a few moments. [Johnson] refused. [Johnson] stated
2 that she doesn't always hear the doorbell and *denies having strange*
3 *behavior*. PO also tried to get [Johnson] to allow c[ase]w[orker] to talk to
4 [DJM]. [Johnson] insisted that she had an appointment and got *annoyed*.
5 [Johnson] stated that the police would have to arrest her if they wanted to have
6 [DJM] interviewed. C[ase]w[orker] and police tried to calm [Johnson]
7 down. [Johnson] was *very uncooperative*. [Johnson] started to act *irrational*
8 and was telling [DJM] not to talk with c[ase]w[orker]. PO and
9 c[ase]w[orker] agreed that [Johnson] should be sent for a psych eval as her
10 behavior was *irrational*. Police called the NC paramedics. Paramedic
11 Goldstein #148 ambulance #2351 arrived at the home. [Johnson] was
12 evaluated and transported to NUMC for psych[ological] eval[uation].
13 [Johnson] was uncooperative to paramedic.

14 C[ase]w[orker] manage[d] to speak with [DJM] briefly. [DJM] stated that
15 [Johnson] makes him meals, breakfast-waffles or french toast and
16 sandwiches or hot dogs for lunch. [DJM] stated [Johnson] does not hit
17 him. [DJM] was fearful to talk to c[ase]w[orker] so c[ase]w[orker] ended
18 the interview.

19 *Id.* at 9 (emphasis added).

20 The caseworker notes thus indicate that Johnson, despite denying that her
21 behavior was "strange," was perceived to be "annoyed," "very uncooperative," and
22 "irrational," and that the child was "fearful" of talking to the caseworker. At that point,
23 "PO and c[ase]w[orker] agreed that [Johnson] should be sent for a psych[ological]
24 eval[uation] as her behavior was irrational."⁴ Officer Patterson then arrested her.

⁴ The Defendants' Rule 56.1 statement, accompanying the motion for summary judgment and relying on the caseworker notes, states that after "CPS caseworker Jodi Weitzman and the police officers became concerned for Plaintiff Julia Johnson and [DJM's] health [and] safety," "[i]t was decided that Plaintiff Julia Johnson should be sent to NUMC for a psych evaluation." Def. Rule 56.1 Statement, Dkt No. 156, ¶8. Beyond the above listed descriptions of her behavior, the statement provides no elaboration as to what specifically inspired the concern for the safety of Johnson and DJM. Patterson's counsel's Rule 56.1 statement that "Weitzman and the police officers became concerned for Plaintiff Julia Johnson and [DJM's] health [and] safety" was not supported by any evidence in the record and, therefore, cannot be

1 *Procedural History*

2 Johnson began this action in 2010. The district court construed her *pro se*
3 complaint as stating allegations against a large number of individuals, including
4 Patterson, based on a violation of her Fourth Amendment and Fourteenth Amendment
5 rights. As particularly relevant to the instant appeal, Johnson’s complaint alleged that
6 she “was falsely arrested and unlawfully held by PO Patterson, . . . handcuffed and
7 informed by PO Patterson that he was placing [Johnson] under arrest, . . . never
8 informed by PO Patterson why he was arresting [Johnson], . . . [and] transported while
9 still in handcuffs to Nassau University Medical Center.” Complaint at 3.

10 With respect to Johnson’s false arrest claim against P.O. Patterson, the district
11 court concluded:

12 According to the County Defendants, Plaintiff was extremely agitated,
13 would not allow Weitzman to speak with DJM, and displayed
14 increasingly irrational behavior. For example, Plaintiff would not allow
15 Weitzman to speak with DJM unless Officers P[a]tterson and Barrett
16 arrested her. Based on their assessment of Plaintiff’s behavior, Weitzman
17 and the police officers believed that Plaintiff *was a danger to herself* and
18 DJM and the police officers therefore decided to send Plaintiff to the
19 NUMC Psychiatric Unit for a psychiatric Evaluation.

20 *Johnson*, 2014 WL 2744624, at *2 (emphasis added) (citations omitted).⁵

21 Although Johnson filed a “Statement of Material Fact Responses” in opposition
22 to the motion for summary judgment, Johnson’s Statement did not, in the district

relied on to support a finding of qualified immunity. See *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003).

⁵ To support this version of the alleged events, the district court cited to both Paragraph 8 of Defendants’ Rule 56.1 Statement and the caseworker notes.

1 court's view, specifically address the material facts or contain citations to the evidence.
2 Because, as the district court put it, "Plaintiff failed to file a proper 56.1
3 Counterstatement," and had also failed to abide by other procedural rules "despite
4 adequate notice," the district court found "as true the facts contained in Defendants'
5 56.1 Statements to the extent that they are supported by admissible evidence." *Johnson*,
6 2014 WL 2744624, at *1 n.1. Unsurprisingly, however, Johnson's counterstatement
7 specifically denied that her conduct demonstrated the risk of harm to herself or others
8 that is necessary to justify the seizure and involuntary hospitalization.

9 On this basis, the district court found that P.O. Patterson was entitled to qualified
10 immunity and granted him summary judgment. Prior to doing so, the court did,
11 however, determine that the defendant did not provide evidence that either P.O.
12 Patterson or Weitzman witnessed Johnson "threaten her own life" or that Johnson
13 "'manifested homicidal or other violent behavior placing' DJM at risk of serious
14 physical harm." *Id.* at *10.

15 The district court's use of "homicidal or other violent behavior" refers to the
16 language of N.Y. Mental Hyg. Law § 9.41, which governs emergency admissions of one
17 "who appears to be mentally ill and is conducting himself or herself in a manner which
18 is likely to result in serious harm to the person or others." *Id.* The New York statute
19 further defines "likely to result in serious harm" such that the legal standard for
20 detention of the parent, by reason of risk of harm to the child, depends on "substantial

1 risk of *physical* harm . . . as manifested by *homicidal* or other *violent behavior* by which
2 [the child is] placed in reasonable fear of serious *physical* harm.” N.Y. Mental Hyg. Law
3 § 9.01 (emphasis added); *see also Kerman v. City of New York*, 374 F.3d 93, 100 (2d Cir.
4 2004) (“We interpreted [New York law] as imposing the same objective reasonableness
5 standard that is imposed by the Fourth Amendment.” (internal quotation marks
6 omitted)).

7 In this respect, it is significant that the standard for involuntary detention of the
8 parent is different from the standard for removal of the child from the parent. Thus, a
9 police officer may take a child into emergency, protective custody, even in the absence
10 of a court order, if the officer “has reasonable cause to believe that the child is in such
11 circumstance or condition that his or her continuing in said place of residence or in the
12 care and custody of the parent . . . presents an imminent danger to the child's life or
13 health.” N.Y. Fam. Ct. Act § 1024. And, the risk of harm to the child need not result
14 from violence. But to seize a “mentally ill” parent, danger of physical violence is
15 needed.

16 The court nonetheless granted qualified immunity to P.O. Patterson, concluding
17 that, “based on Officer Patterson's observations and the fact that he was accompanying
18 Weitzman to Plaintiff's home as part of a continuing CPS investigation of allegations of
19 child neglect, it was objectively reasonable to believe that Plaintiff posed a danger to

1 herself and DJM.” *Id.* at *11.⁶ The court also granted motions to dismiss or motions for
2 summary judgment on all of Johnson’s claims against the other defendants.

3 A panel of our court considered Johnson’s appeal and her motions for *in forma*
4 *pauperis* (“IFP”) status and appointment of counsel; that panel dismissed all of her
5 claims except the appeal from the grant of qualified immunity to Officer Patterson, and,
6 as to that claim, appointed counsel.

7 DISCUSSION

8 We review a district court’s grant of summary judgment *de novo* to determine
9 whether the district court properly concluded that there was no genuine dispute as to
10 any material fact, such that the moving party was entitled to judgment as a matter of
11 law. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). We do so
12 “resolving all ambiguities and drawing all factual inferences in plaintiff[’s] favor as the
13 non-moving party.” *Anthony v. City of New York*, 339 F.3d 129, 134 (2d Cir. 2003).

14 I

15 The Fourth Amendment guarantees “[t]he right of the people to be secure in
16 their persons . . . against unreasonable searches and seizures.” U.S. Const. amend. IV.
17 This protection adheres whether the seizure is for purposes of law enforcement or due
18 to an individual’s mental illness. “[A]ssuming that the term ‘mental illness’ can be

⁶ The district court additionally wrote that “it cannot say that no rational jury could find that Officer Peterson lacked probable cause to believe that Plaintiff was acting in a manner that would justify” a mental-health seizure. *Johnson*, 2014 WL 2744624, at *10.

1 given a reasonably precise content and that the ‘mentally ill’ can be identified with
2 reasonable accuracy, there is still no constitutional basis for confining such persons
3 involuntarily if they are dangerous to no one and can live safely in freedom.” *Rodriguez*
4 *v. City of New York*, 72 F.3d 1051, 1061 (2d Cir. 1995) (quoting *O’Connor v. Donaldson*, 422
5 U.S. 563, 575 (1975)) (alterations omitted). To handcuff and detain, even briefly, a
6 person for mental-health reasons, an officer must have “probable cause to believe that
7 the person presented a risk of harm to [her]self or others.” *Kerman v. City of New York*,
8 261 F.3d 229, 237 (2d Cir. 2001); *see also Green v. City of N.Y.*, 465 F.3d 65, 83-84 (2d Cir.
9 2006) (likewise requiring a showing of dangerousness for seizure and transportation to
10 a hospital for treatment).

11 Governmental actors, including police officers, enjoy qualified immunity from
12 suit for constitutional violations under 42 U.S.C. § 1983. “A state actor charged under
13 § 1983 with violating a plaintiff’s constitutional rights is entitled to have the action
14 dismissed on the basis of qualified immunity if at the time of the challenged conduct
15 there was no ‘clearly established law’ that such conduct constituted a constitutional
16 violation.” *Lynch v. Ackley*, 811 F.3d 569, 578 (2d Cir. 2016) (quoting *Harlow v. Fitzgerald*,
17 457 U.S. 800, 818 (1982)). And qualified immunity attaches if it was “objectively
18 reasonable for [the officer] to believe that his actions were lawful at the time of the
19 challenged act.” *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995) (internal quotation
20 marks and citation omitted).

1 In the context of a false arrest claim, qualified immunity protects an officer if he
2 had “‘arguable probable cause’ to arrest the plaintiff.” *Garcia v. Does*, 779 F.3d 84, 92 (2d
3 Cir. 2014). “Arguable probable cause exists if either (a) it was objectively reasonable for
4 the officer to believe that probable cause existed, or (b) officers of reasonable
5 competence could disagree on whether the probable cause test was met.” *Escalera v.*
6 *Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (internal quotation marks omitted). In other
7 words, an officer lacks arguable probable cause and is not entitled to qualified
8 immunity only where “no officer of reasonable competence could have made the same
9 choice in similar circumstances.” *Lennon*, 66 F.3d at 420-21. “The doctrine of qualified
10 immunity serves to protect police from liability and suit when they are required to
11 make on-the-spot judgments in tense circumstances” and when their actions could
12 reasonably be seen as lawful. *Id.* at 424.

13 *Kerman v. City of New York* makes clear that, to determine whether a mental-
14 health seizure is justified by arguable probable cause, a court must review the specific
15 observations and information available to the officers at the time of a seizure. In that
16 case, this court reversed a grant of qualified immunity at the summary-judgment stage
17 for a plaintiff’s detention and subsequent hospitalization. Officers had responded to an
18 anonymous 911 call stating that a mentally ill man was off his medication, acting
19 “crazy,” and possibly had a gun. *Kerman*, 261 F.3d at 232. After an hour-long detention
20 of Kerman and search of his apartment, it was clear that there was no firearm. *Id.* at

1 240. The police nonetheless continued to detain Kerman and transported him to
2 Bellevue Hospital. *Id.* at 241.

3 In reversing the district court and remanding for further proceedings, we
4 emphasized that while “the police may have been entitled to hospitalize Kerman if his
5 conduct or the condition of his apartment demonstrated a dangerous mental state,”
6 there were genuine disputes as to those material facts. The police claimed that Kerman
7 was ranting and raving and that the apartment was, as the district court put it, a
8 veritable “Augean stable,” whereas Kerman, in contrast, claimed he was acting “in a
9 calm, if irritated, manner” and that the apartment was, “at worst, untidy.” *Id.* at 241.
10 This court remanded for jury factfinding to resolve precisely what the officers could
11 have observed of Kerman’s home and behavior.

12 II

13 We cannot affirm the district court’s grant of qualified immunity in the instant
14 case because the record provides insufficient detail to make a probable cause
15 determination. The district court based its ruling on the fact that “Officer Patterson’s
16 observations” could have offered him reason to believe that Johnson was dangerous to
17 herself or to others. As we discuss below, however, there is, in the current record,
18 insufficient evidence to support the conclusion that Patterson’s observations either
19 could reasonably have led him to that conclusion, or that they did.

1 **A. Patterson’s Personal Judgments and Observations**

2 We have no ability to glean the content of Officer Patterson’s observations from
3 the record before us. Patterson provided no statement to the court below. Instead, the
4 motion for summary judgment relies solely on the caseworker notes, which describe
5 Johnson as “annoyed,” “very uncooperative,” and “irrational,” but do not say that she
6 appeared dangerous. The sole specific behavior mentioned in the caseworker notes was
7 Johnson’s refusal of CPS’s request to interview DJM, with Johnson allegedly “stat[ing]
8 that the police would have to arrest her if they wanted to have [DJM] interviewed.”

9 A person may be annoyed, uncooperative, and irrational without presenting a
10 danger to herself or of violence to others. Nor does Johnson’s refusal to allow her child
11 to be interviewed by authorities establish arguable probable cause to believe Johnson
12 presented a risk of serious physical harm resulting from violent behavior. A parent’s
13 refusal to allow police to interview her child does not (by itself or inevitably) support an
14 inference that the child is at risk of serious physical harm from violence of the parent.

15 Needless to say, appropriate reports of dangerous behavior might well justify a
16 seizure. But the sketchy reports in the district court record do not support a reason for
17 Johnson’s seizure. Rather, Patterson argues that “the actual witnessing of the actions of
18 the appellant and the atmosphere o[f] the home [may have] formed the actual basis for
19 the officer’s conclusion.” Patterson Br. 11.

1 It is, of course, quite possible, that Officer Patterson made observations of
2 Johnson's dangerousness that would support arguable probable cause to arrest her. But
3 the unsworn argument of an officer's attorney cannot substitute for record evidence. If
4 the observations are in fact as indispensable as Patterson's brief appears to concede, we
5 do not deem it overly demanding to require the officer to submit a sworn statement
6 reflecting his "actual witnessing of the actions of the appellant and atmosphere o[f] the
7 home."

8 **B. Reliance on Others' Judgments and Observations**

9 The sparseness of the record is illustrated by the fact that we cannot determine
10 whether Patterson made an independent decision to arrest Johnson, or relied on what
11 he was told by Weitzman, or any combination of the two. Patterson is protected by
12 qualified immunity if Weitzman somehow communicated to him a message that
13 Patterson could have reasonably understood as Weitzman's expression of her
14 professional judgment that Johnson should be seized for psychiatric evaluation because
15 of danger of serious physical harm to the child resulting from Johnson's violence.
16 Weitzman need not have expressed the complete thought beyond giving a go-ahead for
17 the arrest, so long as Patterson could reasonably have understood Weitzman's go-ahead
18 to be based on Weitzman's professional appraisal of information she possessed.

19 While it is not clear under New York law whether a caseworker, such as
20 Weitzman, is endowed with presumed qualification to evaluate the risk that someone

1 will engage in violent behavior, that lack of clarity in New York law entitles Patterson to
2 qualified immunity if he reasonably relied on Weitzman's communication of her
3 professional judgment.

4 The issue to be considered on remand is whether, under the law as it existed at
5 the time, Patterson acted reasonably in seizing Johnson. That reasonableness could be
6 based on either of two sets of circumstances, or any combination of them: (1) any factual
7 information possessed by Patterson (regardless of whether that information comes from
8 his own personal observation or from a reliable source, including Weitzman) that
9 reasonably supported a belief that the child was at substantial risk of serious physical
10 harm resulting from Johnson's violence; and (2) as noted above, Weitzman's
11 communication of her professional judgment that Johnson should be seized for
12 psychiatric evaluation. Even if, in actuality, Weitzman did not possess the authority or
13 knowledge to make the judgment, Patterson would nonetheless be shielded by
14 qualified immunity if a reasonable officer in the circumstances would have relied on
15 Weitzman's directives and seeming knowledge. As the Seventh Circuit aptly noted,
16 "Fear of personal liability if the [original direction or information] turns out to be
17 erroneous would interfere with valuable institutions of law enforcement[, and g]iving
18 the arresting officer immunity would shift the liability back to the person who issued
19 the erroneous instructions . . . , simultaneously protecting all of the interests involved."
20 *Gordon v. Degelmann*, 29 F.3d 295, 300 (7th Cir. 1994).

1 We need not contemplate further permutations or delve any deeper into the
2 above mentioned ones. We raise these possibilities and their general place in the
3 framework of qualified immunity to emphasize the absence of crucial facts in the
4 current record. And while development of those facts may well protect Patterson from
5 trial and from liability for Johnson’s alleged civil rights violations, we cannot, without a
6 more substantive record, grant Patterson qualified immunity at this time.

7 Since more evidence regarding the encounter, including Patterson’s
8 observations, the roles played by Weitzman and the other officer, and the
9 reasonableness of any reliance on Weitzman, might support arguable probable cause to
10 arrest Johnson, we remand to the district court to examine further what occurred that
11 led to Johnson’s seizure. Johnson, however, asks us to go further, arguing that she is
12 entitled to judgment in her favor on the false arrest claim. She contends that her
13 “seizure and hospitalization was objectively unreasonable in the face of clearly
14 established law and undisputed facts.” Johnson Br. 17. We reject this argument on the
15 same ground that precludes us from granting Patterson qualified immunity. The record
16 is not sufficiently clear.⁷

⁷ We do, however, believe that an appropriate resolution of the qualified immunity issue would benefit from the appointment of counsel by the district court. This court recently “encourage[d] the district court, on remand, to seriously consider affording [Plaintiff] appointed counsel” after vacating the district court’s grant of summary judgment on a formerly *pro se* plaintiff’s action stemming from detention-related constitutional violations. *Willey v. Kirkpatrick*, 801 F.3d 51, 71 (2d Cir. 2015). Similarly, in the present case, in making our suggestion to the district court that counsel be appointed, we note the complexities inherent in the law of mental health seizures and the need to investigate facts further. *See*

III

Johnson was eventually subjected to involuntary psychological evaluation and was determined to be a danger to herself and to others. Our analysis, however, is not affected by the fact that Johnson was found to be dangerous *subsequent* to her seizure. Upon being admitted involuntarily, Johnson was diagnosed with a delusional disorder and paranoid schizophrenia. *Johnson*, 2014 WL 2744624, at *3. She told the hospital staff that she had attempted suicide. *Id.* Johnson also reported that at one point, she locked herself and DJM in DJM's bedroom in the middle of the night and made him push a heavy desk against the door because Johnson was afraid of Myers. *Id.* Accordingly, based on her suicide attempt and her paranoia, guardedness, and suspiciousness, she was deemed a danger to herself and to others. *Id.*

Shortly thereafter, in October of 2008, CPS filed a neglect petition against Johnson pursuant to the New York State Family Court Act. Two days later, Johnson underwent a second involuntary hospitalization and refused antipsychotic medications, leading the state court to order forced medication. She was released after a brief period, once she was no longer believed to be a danger to herself or to others. *Johnson*, 2014 WL 2744624, at *4.

Hodge v. Police Officers, 802 F.2d 58, 61–62 (2d Cir. 1986) (listing factors to be considered in a district court's decision to appoint counsel).

1 Johnson's parental rights were eventually severed. In 2009, the New York
2 Family Court granted CPS's neglect petition and adjudged DJM to be a "neglected
3 child" as defined under New York family law. *Id.* at *4. In 2010, the family court placed
4 DJM under the supervision of the Nassau County Department of Social Service, granted
5 custody to Myers, and issued an Order of Protection instructing Johnson to stay away
6 from DJM.⁸ *Id.* at *4.

7 These facts certainly strengthen the possibility that Weitzman or P.O. Patterson
8 did observe something on the evening of Johnson's seizure from which they could
9 legitimately find her to be dangerous. But however prescient the officer's instincts may
10 have been, we cannot grant immunity for decisions merely because *ex post* they seem to
11 have been good ones, any more than we could hold officers liable for decisions that
12 seemed reasonable when made but subsequently turned out to be wrong. Of course,
13 courts must be sympathetic to the complicated institutional environments in which
14 police officers are called on to execute difficult duties. Nevertheless, we must judge
15 their actions by the facts as observed at the time they acted. As a result, we require, at
16 this juncture in this case, a more complete record to determine whether in the end a
17 grant of qualified immunity for Patterson is appropriate.

18 Given that Patterson, upon his motion for summary judgment on qualified
19 immunity, has failed to show facts that would entitle him to qualified immunity, we

⁸ Johnson did not appeal the Family Court orders, despite being told she could, but some of her claims in this lawsuit, as originally brought, did address the orders. *Johnson*, 2014 WL 2744624, at *4.

1 would ordinarily simply reverse the grant of qualified immunity and remand for trial.
2 But, in view of the fact that the record was so inadequately developed by counsel, and
3 simply failed to set forth the basis for the arrest, we think the purposes of qualified
4 immunity would be better served by a remand for further development of the record
5 and reconsideration of the question in light of the expanded record.

6 CONCLUSION

7 Johnson's seizure, and her struggles to care for herself and her loved ones,
8 exemplify the challenges of policing when both mental health and child welfare issues
9 are central. There may well be reasons for an effort to interview a child to escalate into
10 the seizure of the child's parent, but such reasons must be properly made part of the
11 record and presented to the court before qualified immunity can attach. To date this
12 has not been done in this case. We therefore **VACATE** the judgment of the district
13 court and **REMAND** the case to that court for further proceedings consistent with this
14 opinion.