No. 21-2820

In The

United States Court of Appeals

For The Sixth Circuit

CORY JARVELA,

Plaintiff-Appellee,

v.

WASHTENAW COUNTY, MI, et al.,

Defendants,

and

RICHARD HOUK,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 2:19-cv-12157

DEFENDANT-APPELLANT HOUK'S BRIEF ON APPEAL

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CORPORATE DISCLOSURE

Pursuant to 6th Cir. R. 26.1, Appellant is not a subsidiary or affiliate of a publicly owned corporation, nor is there a publicly owned company that has a financial interest in the outcome of this appeal.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The district court denied qualified immunity to the defendant officer in this case by holding that, except in "exceptional circumstances," a police service dog may not be used to seize a fleeing suspect unless the officer first warns the suspect that a dog may be used against him and gives him an opportunity to surrender without being bitten by the dog.

That rule is not found in this Court's precedent. This Court has never held that a canine handler must almost always provide a pre-seizure warning to a fleeing suspect. Rather than applying "clearly established" law, the district court created a new legal rule and denied qualified immunity on that basis instead.

The district court's ruling is particularly important because, if it is not corrected, it significantly alters the manner in which police service dogs must be used and trained. There is a myriad of different circumstances in which it may be dangerous, counter-productive, or simply not feasible to provide a warning to a suspect before a dog seizes them. The district court's decision to adopt a de facto per se prior-warning rule over-simplifies the varied and often dangerous circumstances in which police service dogs are used—including in nighttime searches for fleeing suspects hiding in underbrush, as occurred in this case. Due to the significance of the issues, oral argument is appropriate in this case.

STATEMENT OF JURISDICTION

The district court entered its opinion on August 2, 2021. Deputy Houk timely filed a notice of appeal on August 10, 2021. (Notice of Appeal, RE 118, PageID.3133). This Court has jurisdiction over the appeal because the district court's order qualifies as a "final order" for purposes of 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

STATEMENT OF ISSUES

I. The district court denied Deputy Houk qualified immunity, reasoning that, absent "exceptional circumstances," a police service dog may not be used to seize a fleeing suspect unless the officer warns the suspect first and gives the suspect an opportunity to avoid being bitten by the dog. The district court, however, failed to identify any case from this Court or the Supreme Court adopting such a rule.

Did the district court err in denying Deputy Houk qualified immunity, where it is not clearly established that an officer must issue a warning before using a police service dog to seize a fleeing suspect?

II. The district court denied Deputy Houk qualified immunity despite recognizing that Jarvela admitted to "engag[ing] in some resistance against" the police dog that seized him.

Did the district court err in denying qualified immunity where Jarvela admitted that he was resisting a police dog's attempt to seize him?

INTRODUCTION

This Court's precedent holds that law enforcement officers may use a properly trained canine to apprehend a fleeing suspect in a dark and unfamiliar location. *Robinette v. Barnes*, 854 F.2d 909, 913–14 (6th Cir. 1988). That is what Deputy Houk did in this case. After Cory Jarvela led officers on a high-speed chase and crashed his pickup truck into a tree at 1:35 a.m. in a "very" rural area, he ran on foot into the dark trees and brush and disappeared into the night. Deputy Houk arrived 13 minutes later with a police service dog named Argo and began following Jarvela's trail, with Argo on a five-to-ten foot leash. After several minutes, Argo stepped into some tall weeds, and Deputy Houk suddenly saw Jarvela sit up, wrestling with Argo. Jarvela was bitten by Argo on the right bicep and was ultimately subdued and handcuffed.

The district court denied qualified immunity to Deputy Houk by holding that, except in "exceptional circumstances," a police service dog may not be used to seize a fleeing suspect unless the officer first warns the suspect that a dog may be used against him and gives him an opportunity to surrender without being seized by the dog. But this Court has never held that a canine handler must virtually always provide a pre-seizure warning to a fleeing suspect. And for good reason: Especially when tracking a fleeing felony suspect in a dark woods in the

middle of the night, it may be dangerous, counter-productive, or not feasible to provide a warning to a suspect before a dog seizes him.

Deputy Houk's failure to issue a pre-seizure warning to Jarvela was reasonable and did not violate the Fourth Amendment. At minimum, Deputy Houk's conduct did not violate any "clearly established" law. The district court erred in denying qualified immunity to Deputy Houk.

STATEMENT OF THE CASE

The following facts are presented in the light most favorable to the plaintiff, Cory Jarvela.

A. After fleeing from police officers and crashing his pickup truck into a tree at 1:35 a.m., an intoxicated Cory Jarvela escapes on foot into an unenclosed, dark, wooded area.

At approximately 1:35 a.m. on August 19, 2017, Officer Trevino was on patrol in a fully marked vehicle in the village of Clinton, Michigan when he received a call from a gas station attendant about a potentially intoxicated driver. (Trevino Dep., RE 81-3, PageID.1418, 1420; Trevino Report, RE 81-6, PageID.1681). The gas station attendant told Officer Trevino that a white male wearing shorts and a white muscle shirt and who appeared to be intoxicated had purchased cigarettes and cigars and then left the gas station alone, driving a black Chevrolet Silverado pickup truck. (Trevino Dep., RE 81-3, PageID.1421-1422; Trevino Report, RE 81-6, PageID.1681). Officer Trevino saw the truck drive past

him almost immediately, and he began following it. (Trevino Dep., RE 81-3, PageID.1422). Officer Trevino observed the truck swerve over the center line and activated his overhead lights. (*Id.*, PageID.1424).

Instead of pulling over, Jarvela (who was driving the truck), accelerated and began speeding away. (*Id.*, PageID.1425). Jarvela later admitted that he had consumed between four and six Bacardis-and-Coke and that he knew police officers were pursuing him but that he chose to flee anyway. (Jarvela Dep., RE 81-2, PageID.1279, 1282, 1284). Officer Trevino activated his lights and siren, advised dispatch that he was in pursuit of a fleeing suspect, and requested assistance. (Trevino Dep., RE 81-3, PageID.1426).

The pursuit continued for four or five minutes at high speeds on gravel roads until Jarvela lost control and crashed his vehicle headlong into a tree. (Jarvela Dep., RE 81-2, PageID.1288; Trevino Dep., RE 81-3, PageID.1427-1428). As Officer Trevino approached the wrecked truck, he saw Jarvela—in his white muscle shirt—exit the truck from the passenger side and flee into the "brush line." (Trevino Dep., RE 81-3, PageID.1430). Jarvela admitted that he ran into the foliage because he was trying to hide from the pursuing officers. (Jarvela Dep., RE 81-2, PageID.1294). Officer Trevino had "never been in that area," but there was "a large amount of trees," and all he could see was Jarvela in his white shirt disappearing into the "thick . . . trees or brush." (Trevino Dep., RE 81-3,

PageID.1431). Jarvela later agreed that it was dark out and that it was a "very" rural area. (Jarvela Dep., RE 81-2, PageID.1333; *see also* Hayes Dep., RE 81-8, PageID.1718 (agreeing that it was "a pretty secluded wooded area")).

Officer Trevino checked the car for weapons and drugs and confirmed that there was no one else in the vehicle. (Trevino Dep., RE 81-3, PageID.1432-1433). He did not immediately run into the dark after Jarvela, however, because it was "pitch black" and he "had no idea who this person that fled from me was" and did not know "[i]f they were going to circle back around and kill me or injure me." (*Id*., PageID.1435). Due to his concern for his safety, he "did not want to go in the woods alone" and "didn't feel comfortable to go search by [himself]" without backup. (*Id*., PageID.1437).

B. Deputy Houk is called to the scene and begins searching for Jarvela with his police service dog, Argo.

Deputy Richard Houk was dispatched to assist Officer Trevino. Deputy Houk has been a law enforcement officer since 2004, and he began training to become a police canine handler in January 2015. (Houk Dep., RE 81-4, PageID.1514-1515, 1536-1537; Houk Training Transcript, RE 81-23, PageID.2068). New handler training consists of 460 hours of instruction, and Deputy Houk received his certificate for completing the training on October 6, 2015. (Certificate, RE 81-24, PageID.2075). In addition to completing the new handler program, Deputy Houk completed certification programs through the

United States Police Canine Association ("USPCA") for Narcotics Detection and Tracking on May 5, 2015, and Patrol Dog 1 on November 8, 2015. (Certificate, RE 81-25, PageID.2077; Certificate, RE 81-26, PageID.2079). He also completed certification programs through the National Association of Police Canine Handlers ("NAPCH") for Police Patrol Dog, Obedience, Article Search, Area Search, Building Search, Tracking, Aggression Control, and Narcotics Detection on September 3, 2015. (Certificate, RE 81-27, PageID.2081).

Deputy Houk recertifies with the USPCA every year and with the NAPCH every two years. (Houk Dep., RE 81-4, PageID.1531). On August 19, 2017, all of Deputy Houk's certifications were current. (Certificate, RE 81-28, PageID.2083; Certificate, RE 81-29, PageID.2085; Certificate, RE 81-30, PageID.2087). In addition, Deputy Houk completed courses at annual USPCA seminars on the following dates: May 3-6, 2015, November 8, 2015, November 6, 2016, May 1-4, 2016, and May 21-24, 2017. (USPCA Certificates, RE 81-31, PageID.2089-2093). Deputy Houk also completed a training program through the Windsor Police Service. (Certificate, RE 81-32, PageID.2095). Deputy Houk also regularly trains with his police service dog, Argo, multiple times per month, including obedience training, apprehension work training, narcotic detection, article search training, area search training, and building search training. (Houk Dep., RE 81-4, PageID.1518).

When dispatch contacted Deputy Houk to assist Officer Trevino, dispatch described Jarvela's truck as traveling at 90 miles an hour. (Houk Dash-Cam Video, at 00:18-00:31).[1] Deputy Houk arrived on scene with his police service dog, Argo, approximately 13 minutes after Jarvela crashed his truck and ran into the darkness. (Houk Report, RE 81-11, PageID.1912). Deputy Houk was equipped with a body-worn camera, which recorded a 14 minute, 26 second video capturing the relevant events.[2]

When Deputy Houk arrived at the scene of Jarvela's wrecked truck, he conversed briefly with Officer Trevino, who pointed Deputy Houk to the general area where he had last seen Jarvela run into the brush. (Houk Dep., RE 81-4, PageID.1544). While Officer Trevino was waiting for backup to arrive, he ran the pickup truck's license plate and determined that Jarvela lived approximately 5 miles from the crash scene, making Officer Trevino concerned that Jarvela might have tried to run to his home. (Trevino Dep., RE 81-3, PageID.1438). The officers

[1] A copy of the dash-cam video from Deputy Houk's patrol car was submitted to the district court as Exhibit 4 in support of Houk's motion for summary judgment. (Notice of Filing Exhibits, RE 98, PageID.2274-2279). This video is cited in this brief as the "Houk Dash-Cam Video."

[2] A copy of Deputy Houk's body-cam video footage was submitted to the district court as Exhibit 6 in support of Houk's motion for summary judgment. (Notice of Filing Exhibits, RE 98, PageID.2274-2279). This body-cam video footage is cited in this brief as the "Houk Video."

agreed that Deputy Houk would use Argo to try to track and locate Jarvela if he could be found in the woods. (Houk Dep., RE 81-4, PageID.1546, 1551).

Deputy Houk retrieved Argo from his patrol vehicle and placed a harness on him with "SHERIFF" emblazoned on it in neon yellow. (Houk Video, at 00:38). Argo is a Belgian Malinois-Shepherd mix and weighs between 60 and 65 pounds. (Houk Dep., RE 81-4, PageID.1558). Deputy Houk placed a lead on Argo, which was approximately 15 feet long. (Houk Video, at 00:56; Houk Dep., RE 81-4, PageID.1546-1547). Deputy Houk choked up on the lead so that Argo was only between 5 and 10 feet away during the track. (Houk Dep., RE 81-4, PageID.1547, 1550-1551).

When Deputy Houk set out with Argo to track Jarvela, Jarvela had at least a 13-minute head start on Deputy Houk. Deputy Houk did not know if Jarvela was still in the dark, wooded area, nor did he know how far Jarvela might have traveled in the time that had elapsed since his flight into the woods. Deputy Houk also did not know whether Jarvela had a weapon or was otherwise likely to attempt to ambush the pursuing officers. Deputy Houk's body-cam captured similar sentiments from Officer Trevino, who appears to tell Deputy Houk that he decided not to chase after Jarvela alone because "I don't even know where I'm at . . . plus, I don't know if he's got a weapon." (Houk Video, at 02:29-02:32).

Because he did not know where Jarvela was or whether he was armed and dangerous, Deputy Houk did not shout a warning into the darkness when he and Argo began tracking Jarvela's trail. Jarvela had fled into an unenclosed, wooded area, and Deputy Houk explained that a warning would both compromise the officers' safety and enable Jarvela to continue to evade the officers: "You don't want to be yelling that you are where you are giving away your position, then the person can either take aggressive action and shoot at you or run away further or aggress you, however they want." (Houk Dep., RE 81-4, PageID.1649-1650).

C. Argo finds Jarvela in a clump of tall weeds, and Jarvela begins fighting with Argo.

Deputy Houk and Argo began the track to locate Jarvela with Officer Trevino trailing behind to provide cover. (Houk Dep., RE 81-4, PageID.1552). As the video indicates, it was very dark as Houk and Argo followed Jarvela's trail. (Houk Video, at 01:00-06:00).

After several minutes of searching through the brush and woods, Argo and Deputy Houk located a pair of tennis shoes and a white shirt. (Houk Video, at 06:00-06:03; Houk Dep., RE 81-4, PageID.1557). Argo sniffed at the shirt and continued tracking into the weeds, which were between 4 and 5 feet tall. (Houk Video, at 06:03-06:10; Jarvela, 66-67; Houk Dep., RE 81-4, PageID.1557-1558). Deputy Houk did not notice any discernible change in Argo's behavior when Argo sniffed at the shirt that would indicate that Jarvela was nearby. (Houk Dep., RE 81-

4, PageID.1554-1556). Deputy Houk did not shout a warning to Jarvela at that time because, based on his experience with canine searches, the presence of an article of clothing "doesn't mean the person's in the vicinity." (*Id*., PageID.1558).

Suddenly, Argo located Jarvela hiding in the weeds. (Houk Video, at 06:10). Jarvela estimated that the weeds were four or five feet tall. (Jarvela Dep., RE 81-2, PageID.1334). Argo was still attached to the lead and was "between 5 to 7 feet in front of" Deputy Houk when Argo found Jarvela. (Houk Dep., RE 81-4, PageID.1630).

As the video footage shows, Jarvela sat up and began struggling with Argo. (Houk Video, at 06:10). Jarvela claims that he was "passed out" on the ground and that he woke up when Argo bit him on the arm. (Jarvela Dep., RE 81-2, PageID.1294, 1297, 1338). Deputy Houk testified that he did not see Jarvela until Jarvela sat up and began struggling with Argo. (Houk Dep., RE 81-4, PageID.1562). There is no evidence suggesting that Deputy Houk knew that Jarvela had passed out or had been sleeping.

Deputy Houk was surprised by the sudden appearance of Jarvela fighting with Argo in the tall weeds, and he mistakenly gave Argo a German command to track ("suchen") before correcting himself and commanding Argo to apprehend Jarvela with the command "packen" (*i.e*., grip and hold). (Houk Video, at 06:11-16; Houk Dep., RE 81-4, PageID.1560-1561). Deputy Houk was

approximately five feet away from both Argo and Jarvela at the time. (Houk Dep., RE 81-4, PageID.1574).

Argo apprehended Jarvela by gripping his right bicep and then pushing Jarvela backward, consistent with the dog's training. (Houk Dep., RE 81-4, PageID.1576). Jarvela, however, rolled on top of Argo and, while on his knees, pulled Argo in toward his body. (Houk Video, at 06:24; Houk Dep., RE 81-4, PageID.1579). Jarvela weighed 210 pounds at the time—more than three times as much as Argo, who weighs between 60 and 65 pounds. (Trevino Report, RE 81-6, PageID.1678; Houk Dep., RE 81-4, PageID.1558).

Houk ordered Jarvela to get onto his stomach and on the ground. (Houk Video, at 06:26). But by his own admission, Jarvela was "fighting" with and resisting apprehension by Argo:

> . . . I'm still fighting a 90-pound dog on my arm and trying to get his mouth out of my bicep. So, I rolled over on top of Argo, to try to get his arm off—try to get his mouth off of my arm.

(Jarvela Dep., RE 81-2, PageID.1299). Jarvela explained that he was "trying to pull [Argo's] mouth off my arm" and was "trying to lift his snout off of my bicep." (*Id.*, PageID.1300). Jarvela admitted that when he rolled over on top of Argo, "I was still trying to get his mouth off of my arm." (*Id.*, PageID.1301-1302; *see also id.*, PageID.1338). The video shows that Jarvela began rolling on top of Argo before

Deputy Houk ordered Jarvela to turn onto his stomach. (Houk Video, at 06:24; Houk Video, at 06:26).

Jarvela's testimony in this respect aligns with Deputy Houk's testimony, who testified that Jarvela was "grabbing the dog's face, muzzle. He's trying to—trying to get the dog off of him is what it appears to me. He's hitting him and striking him and pulling at his muzzle, he's touching the dog and he's not where he's giving up." (Houk Dep., RE 81-4, PageID.1581).

As Jarvela was lying on top of Argo, trying to remove the dog's mouth from his arm, Deputy Houk heard Argo having difficulty breathing, and Argo appeared to be in distress. (Houk Video, at 06:28-06:32; Houk Dep., RE 81-4, PageID.1584-1585, 1647; Hayes Dep., RE 81-8, PageID.1725). Deputy Houk attempted to help Argo get out from under Jarvela by pulling on the lead, but the lead was under Jarvela, and Deputy Houk's efforts to free Argo were ineffective. (Houk Dep., RE 81-4, PageID.1585-1587).

Officer Trevino ordered Jarvela to "let go" of Argo. Jarvela did not comply. (Houk Video, at 6:32). Deputy Houk then struck Jarvela approximately seven times while ordering Jarvela to let go of Argo. (Houk Video, at 06:37-06:42; Houk Dep., RE 81-4, PageID.1587). Officer Trevino deployed his taser twice in an effort to gain compliance from Jarvela because he was afraid Jarvela was going to kill or severely injure Argo. (Trevino Dep., RE 81-3, PageID.1457, 1462).

Shortly after the strikes by Deputy Houk, Jarvela released Argo and rolled onto his back. (Houk Video, at 06:44; Jarvela Dep., RE 81-2, PageID.1304). Argo maintained his grip on Jarvela's right bicep and began to pull him out of the weeds, consistent with the dog's training. (Houk Video, at 06:52; Houk Dep., RE 81-4, PageID.1592). Deputy Houk again ordered Jarvela to get onto his stomach, and Jarvela finally complied, got off his knees, and laid down on his stomach. (Houk Video, at 06:54; Jarvela Dep., RE 81-2, PageID.1343).

Michigan State Trooper Andrew Hayes (who had arrived on the scene in the meantime) took control of Jarvela's left hand and began to place it in handcuffs. (Houk Video, at 06:58; Hayes Dep., RE 81-8, PageID.1737). Once Officer Hayes was ready to secure Jarvela, he asked Deputy Houk if he could take Jarvela's right hand, which indicated to Deputy Houk that Jarvela was under control and that Deputy Houk could safely remove Argo. (Houk Video, at 07:08; Houk Dep., RE 81-4, PageID.1596; Hayes Dep., RE 81-8, PageID.1737). Permitting a canine to hold the grip until the suspect is able to be placed into handcuffs is consistent with Deputy Houk's training as a canine handler. (Houk Dep., RE 81-4, PageID.1645).

D. Both Argo and Jarvela are treated for injuries.

Deputy Houk removed Argo from Jarvela and backed away approximately 15 feet. (Houk Video, at 07:19; Houk Dep., RE 81-4, PageID.1599).

Deputy Houk gave the command "platz" to place Argo in a down position. (Houk Video, at 07:25). Argo briefly broke his down position and Deputy Houk pulled the dog back. (Houk Video, at 08:00-8:05). Jarvela claims that Argo nipped him on the hip, though it did not break the skin. (Jarvela Dep., RE 81-2, PageID.1317, 1344).

Jarvela was promptly given first aid and medical treatment for injuries to his right arm sustained during his resistance. (Jarvela Dep., RE 81-2, PageID.1344-1346). Although Jarvela also claimed that he was struck in the head, he did not receive any follow-up medical care for a head injury other than an MRI and an x-ray. (Jarvela Dep., RE 81-2, PageID.1315-1316).

On or about August 30, 2017, Deputy Houk observed swelling around Argo's jawline. (Houk Dep., RE 81-4, PageID.1612). Dr. Lindsay Ruland examined Argo and observed swelling "just ventral to his right eye over the right maxilla." (Veterinary Records, RE 81-13, PageID.1955). A CT scan of Argo's skull showed evidence of abscesses and damage consistent with blunt force trauma. (CT Report, RE 81-14, PageID.1958). Dr. Ben Colmery, a veterinary dentist, concluded the most likely cause of the damage to Argo's teeth was blunt force aggravated by underlying apical disease. (Veterinary Records, RE 81-15, PageID.1960).

E. Jarvela pleads guilty to obstructing or resisting an officer and impaired driving.

Jarvela was subsequently charged in state court with multiple offenses relating to his conduct. Under a plea agreement, he ultimately pled guilty to felony assaulting, resisting, or obstructing a police officer and operating a motor vehicle while impaired. The remaining charges were dismissed. (Presentence Report, RE 81-33, PageID.2097).

A presentence report was prepared in his state case, and it contained the following description of Jarvela's offense:

> Argo, the dog, arrived and located the defendant in the bushes. The defendant began to swing and punch at Argo. Argo grabbed the defendant by the bicep. The defendant started to choke Argo and the deputy delivered strikes to the defendant. The defendant continued to choke Argo. The deputy attempted to taser the defendant without good success. Three state troopers arrived and assisted in gaining control of the defendant.

(Presentence Report, RE 81-33, PageID.2100–2101). Jarvela agreed that the presentence report was "factually correct." (Transcript, RE 81-34, PageID.2114).

Jarvela was sentenced to five years of probation and 200 hours of community service. (Transcript, RE 81-34, PageID.2119-2120). In Washtenaw County, Jarvela was charged and acquitted of two counts of assaulting, resisting, or obstructing a police officer and one count of injuring or harassing a police animal while committing a crime. (Opinion, RE 116, PageID.3092).

F. Jarvela files a civil rights lawsuit in the district court, and the district court denies Deputy Houk's motion for summary judgment.

Jarvela subsequently filed a complaint asserting in relevant part that each of the arresting officers violated his federal constitutional rights and his rights under state law. (Second Amended Complaint, RE 37, PageID.233). Pertinent to this appeal, Jarvela's complaint alleged that Deputy Houk used unconstitutionally excessive force when apprehending him through the use of a canine. (*Id*., PageID.239-240).

After discovery, each of the defendants filed motions for summary judgment. (Def. MSJ, RE 81, PageID.1228-2123).

Ultimately, the district court granted the motions for summary judgment with respect to every claim except for the excessive-force claim against Deputy Houk. With respect to that claim, the district court ruled that the facts, viewed in the light most favorable to Jarvela, would allow a jury to conclude that Deputy Houk "violated Jarvela's clearly established right to be given an opportunity to surrender without being attacked by a dog." (Opinion, RE 116, PageID.3094).

The district court reached this conclusion despite recognizing that "no Supreme Court or Sixth Circuit cases have adopted a bright-line rule that an officer must warn a suspect before allowing a dog to bite." (Opinion, RE 116,

PageID.3098). In fact, when discussing a decision from the Eastern District of Michigan—*Miller v. Ribicki*, 259 F. Supp. 3d 688, 699 (E.D. Mich. 2017), in which officers who were tracking a fleeing suspect in a dark, wooded area declined to provide warning to the suspect before allowing the dog to bite him—the district court opined that *Miller* "demonstrates the wisdom of avoiding bright line rules such as a per se duty to warn." (Opinion, RE 116, PageID.3099). The district court acknowledged that a per se duty to warn "could create real danger for officers" in circumstances where they were searching for a potentially dangerous suspect in dark and unfamiliar territory. (*Id*.).

But despite the lack of case law imposing a bright-line duty to warn upon canine handlers, the district court nevertheless found that Jarvela could defeat qualified immunity in this case. (*Id*., PageID.3098). First, the district court reasoned that an unpublished decision of this Court—*Rainey v. Patton*, 534 F. App'x 391, 397 (6th Cir. 2013)—represented "a baseline rule that the use of a canine is unreasonable when the suspect has not been afforded an opportunity to avoid the encounter." (Opinion, RE 116, PageID.3098). After holding that there is a default mandatory warning requirement for canine handlers, the district court ruled that the right to receive a warning can be lost only in "the kind of exceptional circumstances illustrated by *Miller*." (*Id*., PageID.3100). The district court held that "this is a fact-bound question" (*id*., PageID.3099), and determined that the

particular facts of this case were not sufficiently analogous to *Miller* to justify relieving Deputy Houk from the obligation of providing a warning to Jarvela before Argo bit him. (*Id*., PageID.3100).

The district court also ruled that a jury could find that Deputy Houk used excessive force after Argo had already gripped Jarvela's arm. The district court acknowledged that, "[o]nce the encounter began, Jarvela engaged in some resistance against Argo" and that "Jarvela admitted to struggling with Argo." (Opinion, RE 116, PageID.3104). Nevertheless, the district court reasoned that "[a] jury could reasonably conclude that Jarvela was reacting defensively in the face of terrifying circumstances, not actively resisting." (*Id*., PageID.3105).

Deputy Houk timely filed this interlocutory appeal. (Notice of Appeal, RE 118, PageID.3133-3135).

SUMMARY OF THE ARGUMENT

Deputy Houk's failure to issue a pre-seizure warning to Jarvela violated neither the Fourth Amendment nor any "clearly established" law. It was reasonable for Deputy Houk not to issue a warning when he and Argo started tracking Jarvela, because Deputy Houk did not know if Jarvela was still in the vicinity nor did he know whether Jarvela was armed and dangerous. Jarvela had crashed his truck after a dangerous high-speed chase, had fled into a dark and wooded area in the middle of the night, and had a 13-minute head start on the pursuing officers. It was reasonable for Deputy Houk to believe that a shouted warning would either expose the officers to potential ambush or facilitate Jarvela's attempts to continue to escape them. And it was reasonable for Deputy Houk not to issue a warning to Jarvela when Argo found him hiding in the weeds, because it is undisputed that Deputy Houk employed Argo in a track and locate manner and did not see Jarvela until Jarvela sat up and began struggling with Argo. At no time before Argo seized Jarvela did Deputy Houk see Jarvela lying passively on the ground.

At minimum, Deputy Houk is entitled to qualified immunity. Even the district court recognized that there is no "bright line" rule requiring canine handlers to provide pre-seizure warnings to fleeing suspects.

To the extent that the district court factored into the analysis Deputy Houk's conduct after Argo seized Jarvela, the district court erred in denying qualified immunity in that respect, as well. Jarvela admits that, when Argo bit his bicep, Jarvela began struggling with Argo in an attempt to remove the dog's mouth from his arm. It was objectively reasonable for Deputy Houk to use limited hand strikes to prevent Jarvela's continued resistance to being seized by Argo. In fact, the district court granted qualified immunity to Officer Trevino for Officer Trevino's use of a taser against Jarvela for precisely the same resistive conduct to which Deputy Houk was responding.

In any event, Deputy Houk's conduct did not violate clearly established law. The district court's qualified immunity analysis was limited to its analysis of a purported requirement to provide a pre-seizure warning. The district court failed to identify any clearly established law indicating that it was unreasonable for Deputy Houk to administer limited hand strikes to a suspect who admits that he was resisting a police canine who had seized him. The district court's order should be reversed.

ARGUMENT

I. Deputy Houk is entitled to qualified immunity with respect to his decision not to provide a verbal warning before beginning to track and locate Jarvela with a canine.

Qualified immunity is appropriate in this case because there was no constitutional violation and—even if there was—Deputy Houk's conduct was not prohibited by clearly established law. *See Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012) (noting two-part test for qualified immunity).

Given the interlocutory nature of this appeal, this Court must review the question of qualified immunity on the facts as found by the district court, except where the video footage contradicts the district court's findings. *Younes v. Pellerito*, 739 F.3d 885, 889 (6th Cir. 2014); *Mattox v. City of Forest Park*, 183 F.3d 515, 519 (6th Cir. 1999). On those facts, the district court was mistaken to deny Deputy Houk qualified immunity. *See Pollard v. City of Columbus*, 780 F.3d 395, 401 (6th Cir. 2015) (noting that, where defendant officers "concede the facts in the light most favorable to [the appellee], they 'raise a pure issue of law,'" that is appropriate for interlocutory review (internal citation omitted)).

Once a defendant invokes qualified immunity, it is the plaintiff's burden to show that qualified immunity is inappropriate. *Quigley v. Tha*i, 707 F.3d 675, 681 (6th Cir. 2013).

A. There was no constitutional violation.

1. This Court has generally approved of officers' use of a canine to track and seize a suspect in a dark and unfamiliar location except where the canine was improperly trained.

The factors that inform the determination whether an officer's use of force is reasonable under the Constitution are "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015). The Court analyzes use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," recognizing that officers must "make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id*.

Particularly when officers are searching for fleeing suspects in dark and unfamiliar locations, this Court has generally endorsed the officers' decision to enlist the assistance of a canine rather than resorting to other, more lethal forms of force. That is in part because "[t]he use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders and the suspect." *Robinette v. Barnes*, 854 F.2d 909, 914 (6th Cir. 1988).

This Court has established the outer parameters that mark when a law enforcement officer's use of a canine is or is not reasonable:

> In this circuit, . . . we have held that officers cannot "use[] an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing." *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2012). But just as clearly, we have upheld the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location. *See Robinette v. Barnes*, 854 F.2d 909, 913–14 (6th Cir. 1988). These cases and their progeny establish guidance on the ends of the spectrum, but the middle ground between the two proves much hazier.

Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018).

Despite the "haziness" between the two poles of this authority, this Court recently noted that "most of this circuit's excessive-force precedents involving police dogs find no violation at all" and that "[t]he only exception involved a poorly trained dog that attacked suspects without warning or command." *Ashford v. Raby*, 951 F.3d 798, 803 (6th Cir. 2020) (citing *Campbell*, 700 F.3d at 789). *See also Burgess v. Bowers*, 773 F. App'x 238, 246–47 (6th Cir. 2019) (canvassing precedent).

This Court's precedent in the context of police canines has generally turned on those factors—the potential danger to officers and the sufficiency of the dog's training—not on whether a suspect was given a warning before a seizure command is issued. In *Robinette*, for example, the Court approved of the use of the

canine in large part because "this is a case where an officer was forced to explore an enclosed unfamiliar area in which he knew a man was hiding." *Robinette*, 854 F.2d at 914. The Court reached a similar result in *Baxter*, where a burglary suspect fled from the police into the basement of a home. *Baxter*, 751 F. App'x at 872. Even though the suspect raised his hands in surrender before the canine was released into the basement to apprehend him, this Court held that the officer was entitled to qualified immunity "because even with Baxter's hands raised, [the officer] faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk." *Id*.

On the other side of the coin, the Court in *Campbell* ruled that the Fourth Amendment was violated primarily because the dog was improperly trained and the officer allowed the dog to bite unresisting suspects "in areas unlikely to expose police to ambush and the suspects were not believed to be a threat to anyone at the time the canine unit was called in." *Campbell*, 700 F.3d at 789. The decision in *Campbell* did not turn on whether a warning had or had not been given. The dispositive issue was the dog's insufficient training. *Id*.

2. This Court has not adopted a per se rule that a warning must be given before a canine track is commenced.

Despite *Robinette*'s general approval of the use of canines to locate and seize suspects who have fled into dark and unfamiliar locations, the district court divined a rule that purportedly requires officers always to provide a warning

(presumably, a verbal warning) before using a canine even to track a fleeing suspect, absent "exceptional circumstances." (Opinion, RE 116, PageID.3100). That requirement is not found in this Court's precedent.

Although this Court has sometimes remarked favorably on the fact that officers have warned a suspect before permitting a canine to grip them, the Court has never ruled that the Constitution requires a warning to be given in almost every instance. *See Miller*, 259 F. Supp. 3d at 698–99 ("Miller has not identified a single decision from the Supreme Court or Sixth Circuit adopting a bright-line rule that an officer must warn a suspect before allowing a dog to bite.").

There are good reasons for this Court's decision not to impose a per se warning requirement. To begin with, as the district court in *Miller* recognized, it may expose pursuing officers to danger:

> There is a reasonable argument that Miller's proposed bright-line, warn-first rule could create real danger for officers in circumstances like those confronted by [the defendant officer]. As [the officer] explained, he believed that he was tracking a potentially-armed suspect in a dark, densely-wooded area. Under these circumstances, an oral warning could have revealed his position and left him vulnerable to attack.

Miller, 259 F. Supp. 3d at 699 n.5.

A per se mandatory warning rule also ignores "the myriad circumstances that officers confront in the field." *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 395 (8th Cir. 2007) (en banc). The district court's analysis, for

example, assumes that all officers use canines in an identical manner. But that assumption is incorrect. To give just one example, using a dog to track a fleeing suspect is much different than releasing the dog in order to apprehend the suspect. "There is a vast difference between an officer releasing a dog off a leash knowing with a good degree of certainty that it will find and bite its target and an officer exercising substantial control over a leashed animal with the expectation of being able to prevent any injury." *Melgar v. Greene*, 593 F.3d 348, 358 (4th Cir. 2010). A warning may be good practice in the former circumstance (particularly where the suspect is known to be in an enclosed area and cannot escape) but may be counter-productive or unnecessary in the latter.

Due to the varied settings and uses of police canines, the Fourth Circuit recognized in *Melgar* that it is inappropriate to impose in the police-dog context a one-size-fits-all prior-warning rule. *Id*. The *Melgar* court held that even if a warning is generally appropriate before an officer releases a dog from its leash, a warning is not always required when an officer keeps the dog leashed and uses him to track, because the officer could expect that "his control over the animal by means of the leash would render any warning unnecessary." *Id*. *See also Szabla*, 486 F.3d at 394–95 (noting the difference between when "a canine is 'deployed' by release from a leash or the physical control of an officer" and when the dog remains leashed).

Many other courts have declined to adopt such a per se rule, as well. For example, the court in *Escobar v. Montee*, 895 F.3d 387 (5th Cir. 2018), held that there was no constitutional violation where an armed robbery suspect abandoned his vehicle and fled into the woods after a high-speed chase and the officer "released a canine without warning" even after the suspect "yelled his location and intent to surrender." *Id*. at 395–96. Likewise, the court in *Crenshaw v. Lister*, 556 F.3d 1283 (11th Cir. 2009), held that there was no constitutional violation when an officer failed to alert an armed robbery suspect "that he had a canine" after the suspect fled into a densely wooded area, even though the suspect had shouted out his location and that he intended to surrender. *Id*. at 1293 & n.6. *See also Thomson v. Salt Lake Cty*., 584 F.3d 1304, 1321 (10th Cir. 2009) ("A warning is not invariably required even before the use of deadly force, let alone here, where the release of the dog was nondeadly force used in the face of an imminent threat."); *Grimes v. Yoos*, 298 F. App'x 916, 923–24 (11th Cir. 2008) (no constitutional violation where police dog bit the plaintiff, who was sleeping in the bushes, and the officer stated that he declined to warn the suspect "because he did not know whether the suspect was on the inside or outside of the fence and did not want the suspect to flee").

Nor have courts generally adopted mandatory warning requirements in other contexts involving the use of force. For example, this Court observed in

2017 that there is no clearly established law requiring officers to warn suspects before deploying a taser, "however prudent it may have been" for the officers to do so. *Thomas v. City of Eastpointe*, 715 F. App'x 458, 461 (6th Cir. 2017). There is not even a per se requirement to give a warning when officers use deadly force; instead, a warning need be given only "where feasible." *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

This Court has not adopted a mandatory warn-first rule in the context of seizures by police canines. In this circuit, the reasonableness of the particular use of a canine turns primarily upon the sufficiency of the dog's training, whether the suspect is fleeing or resisting, and whether the dog is being used in an unfamiliar or dark location that poses some degree of potential danger to the officer. *Baxter*, 751 F. App'x at 872. The presence or absence of warnings is not dispositive, nor is it even primary in the analysis.

3. In the circumstances of this case, the Fourth Amendment does not require that a warning be given.

In addition to erroneously imposing a de facto warn-first requirement that is not found in this Court's precedent, the district court erred in concluding that Deputy Houk's decision not to warn Jarvela in this particular case violated the Fourth Amendment.

a. The facts of this case are closer to *Robinette* than to *Campbell*.

As noted in *Baxter*, the two poles of the "spectrum" of canine-apprehension cases in this circuit are *Campbell* and *Robinette*. *Campbell* turned primarily on the fact that the dog in question was insufficiently trained. 700 F.3d at 789 ("Even more important to this case is the question of whether or not Spike was properly trained."). In *Campbell*, the officer admitted that the dog in question "had issues with excessive biting," yet the officer failed to maintain the dog's training. *Campbell*, 700 F.3d at 787. Nothing of the sort is suggested on the record here.

Instead, this case is much closer to *Robinette*, where this Court ruled that officers did not violate the Fourth Amendment when releasing a dog in order to seize "a suspected felon hidden inside a darkened building in the middle of the night" because the canine handler could reasonably believe that the suspect was a threat to "his safety and the safety of the other officers present." 854 F.2d at 913.

In this case, Jarvela led police on a high speed chase that ended with Jarvela crashing his vehicle into a tree. Jarvela then fled on foot into a dark, wooded area. It was approximately 1:35 a.m., and by the time that Deputy Houk arrived on scene, Jarvela already had a 13-minute head start. He did not know where Jarvela was, and he did not know whether Jarvela was within earshot. Deputy Houk knew that Jarvela had committed a felony (eluding the police), and he did not know whether Jarvela was armed or otherwise dangerous. Deputy Houk

reasonably believed that shouting a warning to Jarvela could have exposed him to a danger of ambush. (Houk Dep., RE 81-4, PageID.1649-1650).

This case is therefore much closer to *Robinette* than to *Campbell*. Judged against the two poles of this Court's precedent in the police-canine context, Deputy Houk's decision not to warn Jarvela under the facts of this case was reasonable. *See, e.g.*, *Robinette*, 854 F.2d at 914; *Burgess*, 773 F. App'x at 247. As a result, it did not violate the Fourth Amendment. *Mullins*, 805 F.3d at 765.

b. The district court's reliance upon *Rainey* is unfounded.

The district court court relied upon *Rainey v. Patton*, 534 F. App'x 391 (6th Cir. 2013), to find a violation in this case. But the circumstances of *Rainey* are far different from the circumstances that are at issue here. In *Rainey*, the plaintiff—an unarmed, 150-pound woman—was pulled over for a minor traffic violation: failure to yield. *Id.* at 392. The plaintiff did not pull over her vehicle immediately, but she eventually did so once she got to a place for her to safely pull over, a parking lot. *Id. at* 395. The defendant officer ordered the plaintiff to get out of her vehicle and get on the ground. *Id.* After the plaintiff was already on the ground, the officer retrieved his police dog, brought the dog within two feet of the plaintiff, and loosened the leash, which allowed the dog to approach the plaintiff and bite her. *Id*. at 394. This Court observed that the plaintiff was not resisting arrest or attempting to flee and that she posed little or no risk to the officer's safety,

making the introduction of the canine an unreasonable escalation of force. *Id*. at 395. As the Court put it, "it would be clear to a reasonable officer that employing a police dog against an unarmed suspect detained on the basis of a traffic offense, who was on the ground and not attempting to flee, would constitute excessive force." *Rainey*, 534 F. App'x at 397.

This case is nothing like *Rainey*. *Rainey* involved an officer's decision to use a police dog to seize an already-compliant and non-threatening suspect who had been pulled over for a mere traffic violation and was lying on the ground. *Rainey* did not involve officers' attempts to track and locate a felony suspect who fled into a dark woods in the middle of the night after crashing his vehicle into a tree at the end of a high-speed car chase. And even if *Rainey* did have some bearing on this case, *Rainey* does not hold that a suspect must be given a verbal warning before a canine is used to *track* a suspect. *Rainey* hinged on the fact that the defendant officer was not in danger and that the suspect was being detained for only a minor traffic violation and was not resisting arrest. *Id*. at 397. The decision in *Rainey* did not turn on whether the officer warned or failed to warn her that he would be using a police dog.

Contrary to the district court's analysis, the decision in *Miller* contains a better elucidation of the appropriate rule. There, the plaintiff fled into a densely wooded area after he got in a bar fight with other patrons, threw broken drinking

glasses at them, and threatened to kill some of them. 259 F. Supp. 3d at 692. When police arrived, they determined that the suspect had committed the felony of aggravated felony assault because he had thrown shot glasses. *Id*. at 693. A canine handler was called, was informed that the suspect had been involved in an altercation involving a knife, and began tracking the plaintiff into the woods. *Id*. The canine handler had the dog on a 30-foot lead and tracked the suspect in "stealth" mode, meaning the officer did not announce his presence or give any warnings that he was approaching. *Id.* The officer proceeded in this manner because it was late at night and "he was concerned that he would be vulnerable to 'ambush' in the dark woods if he revealed his presence and location." *Id*. Eventually, the canine located the suspect and apprehended him by biting his leg. *Id*.

The *Miller* court rejected the plaintiff's argument that the officer was required to issue a warning to the suspect, noting that no Supreme Court or Sixth Circuit cases have "adopt[ed] a bright-line rule that an officer must warn a suspect before allowing a dog to bite." *Id*. at 699. The same analysis should have controlled here.

c. The district court's reasoning fails to accommodate the varied and potentially dangerous circumstances confronting officers during nighttime pursuits of felony suspects.

The district court also rejected the notion that a warning would have posed potential safety concerns for Deputy Houk during the search. On the one hand, the district court agreed with *Miller*'s observation that "there is a reasonable argument" that a per se duty to warn "could create real danger for officers in circumstances like those confronted by [the officer]." 259 F. Supp. 3d at 695 n.5. Yet the district court rejected this concern in this case because it held that Deputy Houk was not subjectively apprehensive during this particular search, relying on the fact that, among other things, Deputy Houk did not turn off his police radio during the track. (Opinion, RE 116, PageID.3101).

But an officer's subjective intent is irrelevant to the Fourth Amendment inquiry, which is an objective test. *Dunigan v. Noble*, 390 F.3d 486, 493 (6th Cir. 2004) (noting that an officer's "subjective intentions are irrelevant"). As an objective matter, it is not unreasonable for an officer who is tracking a felony suspect who fled into a dark woods at 1:30 a.m. to decide not to broadcast his position to the suspect in order to avoid the potential for a dangerous ambush. *See Lister*, 556 F.3d at 1293 ("[The officer] was not required to risk his own life by revealing his position in an unfamiliar wooded area at night to an armed fugitive who, up to that point, had shown anything but an intention of surrendering.").

The district court's mandatory-warning requirement also fails to explain how officers like Deputy Houk must comply with the Fourth Amendment in these circumstances. *See Ashford*, 951 F.3d at 802–03 ("Common sense says that a court should not condemn police officers' on-the-ground actions without some idea of what the officers should have done instead."). Most obviously, the district court fails to identify precisely when Deputy Houk was required to give a verbal warning to Jarvela. The district court does not state that Deputy Houk was required to shout a warning into the darkness as soon as he retrieved Argo from his cruiser. Nor does the district court state that Deputy Houk was required to shout a warning every few minutes as he and Argo followed Jarvela's trail. Nor does the district court state that Deputy Houk was required to warn Jarvela after Argo found Jarvela in the weeds.

The district court's failure in this respect is important, because Deputy Houk's failure to give a warning at any of these junctures was reasonable. It was reasonable for Deputy Houk not to shout a warning into the void when he retrieved Argo from his cruiser, because Jarvela had a 13-minute head start, and Deputy Houk did not know whether he was within earshot (such that a warning would have been useless) or whether Jarvela was dangerous. For the same reasons, it was reasonable for Deputy Houk not to shout episodic warnings into the darkness every minute or every few minutes while Argo was tracking Jarvela. Deputy Houk did

not know if Jarvela was still in the area, did not know if he was armed and dangerous, and did not want to enable Jarvela to be able to prolong his flight and continue to evade the pursuing officers. (Houk Dep., RE 81-4, PageID.1649-1650).

It was likewise reasonable for Deputy Houk not to provide a warning to Jarvela when Argo found Jarvela in the weeds because it is undisputed that Deputy Houk did not see Jarvela until Jarvela was already wrestling with Argo. When assessing qualified immunity, this Court must consider "only the facts that were knowable to the defendant officers." *Reich v. City of Elizabethtown, Ky.*, 945 F.3d 968, 979 (6th Cir. 2019) (citation omitted). Jarvela was hidden in the underbrush. Deputy Houk did not know that Argo had found Jarvela until Jarvela sat up and began struggling with Argo. (Houk Video, at 06:10). There is no evidence in the record indicating that Deputy Houk saw Jarvela passively sleeping on the ground or that Deputy Houk had an opportunity to prevent Argo from seizing Jarvela in response to the struggle once Argo found him in the weeds.

The district court's analysis trivialized the potential danger posed to officers in nighttime pursuits in unfamiliar areas and over-simplified the variety of circumstances that officers in such situations can face. It may be relatively simple for an officer to provide a pre-seizure warning to a suspect who is known to be hiding in a particular enclosed space or building. It is much more difficult (and potentially more dangerous) for an officer to be able to warn a suspect who ran into

an unenclosed, wooded area in the middle of the night a quarter of an hour before the officer arrived on the scene and is nowhere to be found until he suddenly appears out of the underbrush, already struggling with the dog. On the facts viewed in the light most favorable to Jarvela, Deputy Houk did not violate the Fourth Amendment.

B. Even if the Constitution imposes a per se warning requirement, Deputy Houk's conduct did not violate clearly established law.

Regardless of whether there was a constitutional duty to warn in this case, the district court erred at the second step of the qualified immunity analysis, because any such rule is not "clearly established" in the case law. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (noting that a court may grant qualified immunity on the basis of the second prong of the test without opining on whether there was a constitutional violation).

1. To overcome qualified immunity, the plaintiff must identify clearly established law that is sufficiently particularized to the facts of the case.

Qualified immunity gives officers "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft*, 563 U.S. at 743. "When properly applied," the doctrine of qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Id*. (internal quotation marks omitted).

Deputy Houk is entitled to qualified immunity unless the constitutional right in question "was clearly established at the time of the incident"—that is, before August 19, 2017. *See Hagans*, 695 F.3d at 508. "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Latits v. Phillips*, 878 F.3d 541, 552 (6th Cir. 2017) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)). "For this to occur, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id*. (quoting *Mullenix*, 577 U.S. at 12). A decision denying qualified immunity may not rely upon cases that are decided after the relevant incident occurred, because those "later decided cases . . . could not have given fair notice to [the officer]." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (internal quotation marks omitted). Only where the constitutional rule applied by the district court is "beyond debate" may qualified immunity be denied, and that cannot be the case where the courts did not place the matter at rest before the officer's conduct occurred. *Stanton v. Sims*, 571 U.S. 3, 11 (2013) (citation omitted).

When determining whether the officers are entitled to qualified immunity, the term "'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citation omitted). Instead, for a legal rule to defeat qualified immunity, "the clearly established law

must be 'particularized' to the facts of the case." *Id*. In other words, the qualified-immunity analysis requires Jarvela not merely to identify a generalized principle of constitutional law but to find "controlling authority, extant at the time of the violation, entailing similar conduct and circumstance." *Latits*, 878 F.3d at 552. "In order to meet the clearly established prong, a plaintiff must 'identify a case where an officer acting under similar circumstances . . . was held to have violated the [Eighth] Amendment." *Scott v. Kent Cnty*., 679 F. App'x 435, 440-41 (6th Cir. 2017) (quoting *White*, 137 S. Ct. at 552). "[A] plaintiff must identify a case with a similar fact pattern that would have given 'fair and clear warning to officers' about what the law requires." *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 993 (6th Cir. 2017) (citation omitted). *See also Beck v. Hamblen Cty.*, 969 F.3d 592, 603 (6th Cir. 2020).

It is not enough if the rule is merely suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. *See Reichle v. Howards*, 566 U.S. 658, 666 (2012). Otherwise, the rule is not one that "every reasonable official" would know. *Id.* at 664.

2. The district court failed to identify a similar case holding that there was a constitutional violation.

The district court failed to identify a sufficiently similar case here. In this circuit, there is no "bright-line" rule mandating a warning any time a canine

handler uses a dog, either for tracking or by releasing the dog from its leash. *Miller*, 259 F. Supp. 3d at 699. In fact, the district court recognized that every situation is fact-intensive, and this Court has likewise observed that the middle ground between cases like *Campbell* and cases like *Robinette* is "haz[y]." *Baxter*, 751 F. App'x at 872. That is not the sort of test that is likely to provide officers with "fair notice" of the particular factual scenarios that violate the Constitution, such that qualified immunity may be overcome. *Ashford*, 951 F.3d at 804. In fact, the opposite is true: "[Q]ualified immunity operates in the 'hazy border between excessive and acceptable force.' When in such a haze . . . the proper course is to grant summary judgment to the officers, even if the court would hold the officers' conduct unconstitutional in hindsight." *Rudlaff v. Gillispie*, 791 F.3d 638, 644 (6th Cir. 2015) (internal citations omitted).

At minimum, an officer who was familiar with the holdings in *Robinette* and *Campbell* would be reasonable in concluding that *Robinette* is closer to the circumstances of this case than *Campbell* and that his conduct was therefore justified. Unlike in *Campbell*, there is no suggestion that Argo was inadequately trained, and it is undisputed that Jarvela fled from officers first in his vehicle and then on foot. A reasonable officer in Deputy Houk's shoes could conclude that *Robinette* allowed him to use a well-trained canine to track and apprehend a fleeing

suspect in a dark, unbounded, and unfamiliar location. *Baxter*, 751 F. App'x at 872.

The district court primarily relied upon *Rainey* as support for the supposed "default" rule requiring a warning except in exceptional circumstances. (Opinion, RE 116, PageID.3098). But *Rainey* is an unpublished case. "Unpublished Sixth Circuit decisions cannot 'clearly establish' a principle or the proper application of a principle to a set of facts, because such decisions are not binding…" *Crehan v. Davis*, 713 F. Supp. 2d 688, 696 (W.D. Mich. 2010). *Rainey* is also easily distinguishable, as it did not involve a felony suspect, a flight into the woods in the middle of the night, or even the use of a dog for tracking a suspect who was in an unknown location. *Rainey*, 534 F. App'x at 394-95.

Contrary to the district court's ruling, there is no case from the Sixth Circuit or the Supreme Court that requires a canine handler always to provide a warning except in "exceptional circumstances." Even if it would be a best practice to provide a warning when feasible, no case from this Court has held that a warning is constitutionally required. Even in the Eighth-Circuit case adopting a per se prior-warning rule, the defendant officers were dismissed on the basis of qualified immunity. *See Kuha v. City of Minnetonka*, 365 F.3d 590, 603 (8th Cir. 2003), *abrogated on other grounds by Szabla*, 486 F.3d at 385. The district court

erred in denying Deputy Houk qualified immunity for his decision not to warn Jarvela before tracking him with Argo.

II. Deputy Houk is entitled to qualified immunity for his actions taken while Jarvela was struggling with Argo.

A. The district court's denial of qualified immunity hinges upon its finding that Deputy Houk was required to provide a warning.

The district court also found that it was "worth considering" the reasonableness of Deputy Houk's conduct after Argo seized Jarvela. (Opinion, RE 116, PageID.3102). But the district court elsewhere ruled that Officer Trevino, who used his taser against Jarvela twice while Jarvela was struggling with Argo, was justified in using this force because of Jarvela's continued attempts to free himself from Argo: "When Trevino used force, Jarvela was resisting, at least somewhat, and was not subdued." (Opinion, RE 116, PageID.3115; *id*., at PageID.3114).

Paradoxically, the district court found that Deputy Houk was not entitled to qualified immunity for his attempts to control Jarvela during precisely the same time that Trevino was tasering Jarvela. *Cf. Burgess*, 773 F. App'x at 248 (finding simultaneous use of a taser and a canine to be reasonable). The district court reached this inconsistent result by asserting that Deputy Houk "unnecessarily created the risk of a violent encounter" by failing to give a warning to Jarvela before Argo bit him. (*Id*., PageID.3104).

In other words, the district court's denial of qualified immunity to Deputy Houk rises and falls with its holding that the Constitution necessarily requires a pre-seizure warning when a canine is involved. If this Court rejects the district court's assertion that a pre-seizure warning was required, it should also reject the district court's assertion that Jarvela has a viable claim for Deputy Houk's conduct after the initial seizure.

B. There was no constitutional violation.

To the extent that any portion of the district court's ruling is independent of its holding that the Constitution requires a prior warning, each of the factors under *Graham v. Connor*, 490 U.S. 386 (1989), indicates that there was no constitutional violation in this case.

1. Jarvela was a felony suspect who was fleeing the police.

The first *Graham* factor—which assesses the severity of the crime—cuts in favor of Deputy Houk's use of force. Contrary to the district court's holding, felony fleeing and eluding is a serious crime. Jarvela led Officer Trevino on a high-speed chase that endangered the safety of the pursuing officers as well as the general public and ultimately resulted in a serious collision. "[B]y making a deliberate choice to disobey a police officer, the motorist provoke[d] an inevitable, escalated confrontation with the officer." *United States v. Martin,* 378 F.3d 578, 582 (6th Cir. 2004). Although felony fleeing and eluding arguably is less severe

than an offense like armed robbery, the offense nevertheless "generally end[s] with a confrontation between the officer and the . . . fleeing driver." *Id*. at 583. At minimum, the offense is much more severe than the misdemeanor for evading service of civil process that served as the basis for the use of a canine in *Burgess*—which this Court approved. *Burgess*, 773 F. App'x at 247.

2. Jarvela posed a potential threat to the safety of the officers and others.

The second *Graham* factor also cuts in favor of Deputy Houk because Jarvela posed a potential safety threat both to officers and to the public. This Court's decision in *Matthews v. Jones*, 35 F.3d 1046 (6th Cir. 1994), is directly on point:

> Neither is it disputed . . . that the police officer pursuing Matthews had legally sufficient grounds to stop him, and that before the officer could do so, Matthews fled from his car into a densely wooded area in the dark of night. Matthews was obviously fleeing in an attempt to evade the police; the area into which he fled in the darkness provided a strategic advantage to Matthews in that he could easily ambush the officers; and Matthews's extreme behavior provided cause for the officers to believe that he was involved in activity considerably more nefarious than mere traffic violations. We hold that a reasonable police officer under these circumstances would have believed that Matthews posed a threat to the officers' safety as well as the safety of others, and that this case cannot be distinguished from *Robinette* . . .

Id. at 1051.

The district court ruled that *Matthews* was irrelevant because, in *Matthews*, the officer was able to warn the suspect before releasing the dog and allowing the dog to bite him. *Id*. at 1048. But the presence or absence of a warning is not relevant to the second *Graham* factor, which assesses the potential safety threat that is posed by the suspect, not whether the suspect has been warned of the potential use of force. *See Mullins*, 805 F.3d at 765.

The district court also sidelined *Matthews* on the basis that *Campbell* purportedly requires that suspects be given a warning before a dog is used. (Opinion, RE 116, PageID.3104). But *Campbell* turned on the fact that the dog was inadequately trained and that the suspects were not fleeing, not on whether the officer provided a warning. *See Baxter*, 751 F. App'x at 872 (explaining *Campbell*). And in *Matthews*, the officer had the ability to warn the suspect because the dog alerted to the presence of the suspect before finding and biting him. 35 F.3d at 1048. That was not the case here; Deputy Houk did not know where Jarvela was until Jarvela sat up from amidst the weeds, already struggling with Argo.

The district court also downplayed Jarvela's potential dangerousness by observing that Deputy Houk "had no reason to believe that Jarvela was armed." (Opinion, RE 116, PageID.3104). But as in *Matthews*, it is undisputed that Deputy Houk did not know whether Jarvela was armed or not. And this Court has not

adopted a rule requiring officers to presume that fleeing suspects are not armed and are not dangerous. In fact, the Court has taken the opposite approach—namely, that if pursuing officers do not know whether a fleeing suspect is armed, it is reasonable for them to take extra precautions until they can determine that the suspect does not have a weapon. *See Matthews*, 35 F.3d at 1052 (rejecting the argument that the use of a police canine was excessive where "the officers involved did not know the nature or extent of [the plaintiff's] criminal activities and did not know whether he was armed"); *Burgess*, 773 F. App'x at 246 ("Very little light entered the openings of the crawlspace, so the area was difficult to see and none of the officers could be sure that William was not armed.").

Deputy Houk had every reason to suspect that a felony suspect who led officers on a high-speed chase, crashed his vehicle into a tree, and then continued to run into the darkness on foot was more likely than the average citizen to be willing to go to extreme measures to escape the clutches of the pursuing officers. *See Matthews*, 35 F.3d at 1051. A reasonable officer in Deputy Houk's position would have ample reason to be concerned that, if Jarvela had a weapon, it would be highly dangerous for an officer to attempt to apprehend him in a dark, wooded area in the middle of the night.

3. Jarvela resisted arrest and fought Argo.

The third *Graham* factor also favors Deputy Houk because Jarvela undisputedly resisted arrest.

The district court began its discussion of this factor by acknowledging that Jarvela fled from officers both in his vehicle and on foot. (Opinion, RE 116, PageID.3104). But the district court then held that this was irrelevant to the analysis because "the rule [under Sixth Circuit precedent] is that such flights do not, on their own, warrant deployment of a dog without an opportunity to surrender prior to encountering a dog." (*Id.*). As indicated above, that reasoning is wrong. This Court has not adopted a per se prior-warning rule.

The district court then focused on Jarvela's conduct after Argo found and seized him. The district court acknowledged that, at that point, "Jarvela engaged in some resistance against Argo." (*Id.*). Even Jarvela admitted that he was "fighting" Argo:

> . . . I'm still fighting a 90-pound dog on my arm and trying to get his mouth out of my bicep. So, I rolled over on top of Argo, to try to get his arm off—try to get his mouth off of my arm.

(Jarvela Dep., RE 81-2, PageID.1299). Jarvela admitted that when he rolled over on top of Argo, "I was still trying to get his mouth off of my arm." (*Id.*, PageID.1301-1302). Because Jarvela was admittedly resisting Argo's attempt to

seize him, it was reasonable for Deputy Houk—just like Officer Trevino—to use force to ensure his successful apprehension.

The district court discounted Jarvela's resistance by ruling that a jury could conclude that Jarvela's movements (such as his rolling over on top of Argo) were merely Jarvela's attempts to comply with the officers' orders and to "react[] defensively in the face of terrifying circumstances . . ." rather than to resist. (*Id.*, PageID.3105). But that is not the test. The test is whether a reasonable officer could interpret the suspect's conduct as resistive, even if the suspect subjectively did not intend to resist the officers. *Ashford*, 951 F.3d at 802. "Regardless of the plaintiff's 'subjective intent,' the crucial question [is] how 'a reasonable officer in the heat of the moment' could have construed the plaintiff's behavior." *Kelly v. Sines*, 647 F. App'x 572, 576 (6th Cir. 2016). An officer "c[an] not peer into [the suspect's] heart to assess his good faith." *Ashford*, 951 F.3d at 802; *Chappell v. City of Cleveland*, 585 F.3d 901, 912 (6th Cir. 2009). *See Wysong v. City of Heath*, 260 F. App'x 848, 854-58 (6th Cir. 2008) (officers reasonably construed plaintiff as resisting arrest, even if his movements were caused by involuntary muscle spasms).

The critical question in the Fourth Amendment context is how the officer acted based on what the officer knew and saw. *Reich*, 945 F.3d at 979. Although Jarvela argued in the district court that he was passed out and unresisting

on the ground when Argo bit him, the video shows that Deputy Houk did not see Jarvela until after Jarvela sat up and began wrestling with Argo. A reasonable officer in Deputy Houk's shoes could believe that Jarvela was resisting arrest when he sat up and began struggling with Argo. In fact—as the district court recognized—Jarvela admitted that he was resisting Argo's attempt to seize him. (Opinion, RE 116, PageID.3104). That should have been the end of the analysis. There is no "*de minimis* resistance exception [in] the Fourth Amendment." *Rudlaff*, 791 F.3d at 643.

The district court concluded its analysis by suggesting that a jury could find that Deputy Houk acted with an improper "mindset" of imposing retribution on Jarvela for harming Argo. (Opinion, RE 116, PageID.3109). But that is not the rule, either. As *Graham* held long ago,

> the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Graham, 490 U.S. at 397 (internal citations omitted). "Because the test is objective, the officer's intent is immaterial." *Shanaberg v. Licking County*, 936 F.3d 453, 456 (6th Cir. 2019).

Moreover, even if a blow appears in hindsight not to have been strictly necessary, that does not mean that it is necessarily unreasonable. The Fourth Amendment's reasonableness standard "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002). This is particularly true in cases like this one, where officers are "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary." *Graham*, 490 U.S. at 397. An officer's mistake does not violate the Constitution unless it is not merely erroneous but unreasonable. Thus, even if in hindsight one or more blows "may later seem unnecessary in the peace of a judge's chambers," they do not violate the Fourth Amendment unless they are not merely unnecessary but are unreasonable in light of all the circumstances. *Id.*[3]

[3] Argo's alleged nip (which Jarvela alleges occurred when Argo broke his "down" position) should not be factored into the calculus of the constitutional claim that has been asserted against his handler, Deputy Houk. An excessive force claim can occur only when there is an intentional exertion of force, not one that comes about through negligence. *Ahlers v. Schebil*, 188 F.3d 365, 373 (6th Cir. 1999). When a police dog temporarily escapes his handler's control, the handler has not intentionally applied any force to the plaintiff. *Neal v. Melton*, 453 F. App'x 572, 577–78 (6th Cir. 2011).

C. The district court failed to rule that the law was "clearly established" that Deputy Houk's conduct after Argo bit Jarvela violated the Fourth Amendment.

In addition to the fact that Deputy Houk's conduct was objectively reasonable and did not violate the Fourth Amendment, the district court failed to identify any clearly established law indicating that Deputy Houk's conduct after Argo bit Jarvela violated the Fourth Amendment.

To defeat qualified immunity, a plaintiff "must show that 'then-existing precedent' put the illegality of [the officer's] conduct 'beyond debate.'" *Ashford*, 951 F.3d at 801. "The law must have been so clear that every reasonable officer in [the officer's] shoes would have recognized that the force used was excessive—and not just in the abstract but in the precise situation [the officer] was facing." *Id*. As the Supreme Court has emphasized, "[t]his requires a high 'degree of specificity.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018).

The district court identified no such specific case here. The district court's discussion of "clearly established" law was limited to a two-page discussion of whether a prior warning was required. (Opinion, RE 116, PageID.3098-3099). The district court failed to identify any cases clearly establishing the scope of acceptable conduct after a seizure by canine had already occurred.

Nor would any such analysis have been helpful to Jarvela. Jarvela admitted that he was "fighting" Argo when Deputy Houk used hand strikes on him in an attempt to make him release the dog. The district court did not identify any cases holding that, in such circumstances, it is constitutionally excessive to use hand strikes to prevent a suspect from struggling against a canine that has seized him. Given its decision to award qualified immunity to Officer Trevino, that is not surprising: Deputy Houk's use of force responded to the same conduct on the part of Jarvela to which Officer Trevino's use of a taser responded. Just as it is not clearly established that Officer Trevino's conduct was illegal, neither is it clearly established that Deputy Houk's conduct was illegal.

This Court, in fact, has indicated as much. In *Burgess*, for example, this Court granted qualified immunity to officers who allowed a canine to continue to bite a suspect while he was being tased by officers "because he was attempting to fight off the dog." *Burgess*, 773 F. App'x at 247. The same is true here.

Regardless of whether there was a constitutional violation in this case, the district court erred in denying qualified immunity to Deputy Houk.

CONCLUSION

The district court's order denying summary judgment should be reversed.

Respectfully submitted,

Dated: November 24, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,192 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 for Windows in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, the foregoing document was served on all counsel of record through the CM/ECF system.

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Addendum

Appellant Houk's Designation of Relevant District Court Documents

Case No. 2:19-cv-12157 District Court for the Eastern District of Michigan			
District Court Record Entry No.	Date	Description	PageID Range
37	12/02/19	Second Amended Complaint	233-247
81	10/22/20	Defendants Washtenaw County and Richard Houk's Motion for Summary Judgment and Brief in Support	1228-2123
81-2	10/22/20	Exhibit 1 to Defendants' Brief in Support of Motion for Summary Judgment, Cory Jarvela Deposition Transcript	1268-1379
81-3	10/22/20	Exhibit 2 to Defendants' Brief in Support of Motion for Summary Judgment, Robert Trevino Deposition Transcript	1381-1498
81-4	10/22/20	Exhibit 3 to Defendants' Brief in Support of Motion for Summary Judgment, Richard Houk Deposition Transcript	1500-1674
81-6	10/22/20	Exhibit 5 to Defendants' Brief in Support of Motion for Summary Judgment, Trevino Report	1677-1685
81-8	10/22/20	Exhibit 7 to Defendants' Brief in Support of Motion for Summary Judgment, Andrew Hayes Deposition Transcript	1688-1774
81-11	10/22/20	Exhibit 10 to Defendants' Brief in Support of Motion for Summary Judgment, Houk Report	1909-1949
81-13	10/22/20	Exhibit 12 to Defendants' Brief in Support of Motion for Summary	1954-1956

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District Court Record Entry No.	Date	Description	PageID Range
		Judgment, Veterinary Records, Ruland Report	
81-14	10/22/20	Exhibit 13 to Defendants' Brief in Support of Motion for Summary Judgment, CT Report, VitalRads Report	1958
81-15	10/22/20	Exhibit 14 to Defendants' Brief in Support of Motion for Summary Judgment, Veterinary Records, Dixboro Patient Chart	1960-1962
81-23	10/22/20	Exhibit 22 to Defendants' Brief in Support of Motion for Summary Judgment, Houk Training Transcript	2066-2073
81-24	10/22/20	Exhibit 23 to Defendants' Brief in Support of Motion for Summary Judgment, Houk Certificate of Training	2075
81-25	10/22/20	Exhibit 24 to Defendants' Brief in Support of Motion for Summary Judgment, 2015 USPCA Narcotics Detection and Tracking Certificate	2077
81-26	10/22/20	Exhibit 25 to Defendants' Brief in Support of Motion for Summary Judgment, 2015 USPCA Patrol Dog 1 Certificate	2079
81-27	10/22/20	Exhibit 26 to Defendants' Brief in Support of Motion for Summary Judgment, 2015 NAPCH Certifications	2081
81-28	10/22/20	Exhibit 27 to Defendants' Brief in Support of Motion for Summary Judgment, 2016 USPCA Narcotics	2083

Case No. 2:19-cv-12157 District Court for the Eastern District of Michigan			
District Court Record Entry No.	Date	Description	PageID Range
		Detection and Tracking Certificate	
81-29	10/22/20	Exhibit 28 to Defendants' Brief in Support of Motion for Summary Judgment, 2016 USPCA Patrol Dog 1 Certificate	2085
81-30	10/22/20	Exhibit 29 to Defendants' Brief in Support of Motion for Summary Judgment, 2017 USPCA Narcotics Detection and Tracking Certificate	2087
81-31	10/22/20	Exhibit 30 to Defendants' Brief in Support of Motion for Summary Judgment, USPCA Seminar Certificates	2089-2093
81-32	10/22/20	Exhibit 31 to Defendants' Brief in Support of Motion for Summary Judgment, Windsor Police Service Certificate	2095
81-33	10/22/20	Exhibit 32 to Defendants' Brief in Support of Motion for Summary Judgment, Presentence Investigation Report	2097-2109
81-34	10/22/20	Exhibit 33 to Defendants' Brief in Support of Motion for Summary Judgment, Sentencing Hearing Transcript	2111-2123
98	10/28/20	Defendants Washtenaw County and Richard Houk's Notice of Filing Exhibit 4 (Houk Dash-Cam Video) and Exhibit 6 (Houk Video) as exhibits to Defendants' Motion for Summary Judgment and Brief in Support (RE 81)	2274-2279

Case No. 2:19-cv-12157 District Court for the Eastern District of Michigan			
District Court Record Entry No.	Date	Description	PageID Range
116	8/02/21	Opinion & Order	3084-3131
118	8/10/21	Defendant Richard Houk's Notice of Appeal	3133-3135