

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**TYLER LUETHJE,**

**Plaintiff/Appellee,**

**v.**

**TRAVIS KYLE,**

**SCOTT KELLY,**

**Defendants/Appellants.**

**Case No. 24-1257**

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**APPELLANTS' OPENING BRIEF**

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**On Appeal from the United States District Court for the District of Colorado  
Civil Action No. 1:23-cv-03054-CNS-MEH  
The Honorable Judge Charlotte N. Sweeney**

Respectfully submitted this August 12, 2024

W. Casey Brown  
Douglas County Attorney's Office  
100 Third Street, Castle Rock, CO 80104  
wbrown@douglas.co.us  
Telephone: (303) 660-7414  
Facsimile: (303) 484-0399

*Counsel for Defendants/Appellants:  
Travis Kyle and Scott Kelly*

**ORAL ARGUMENT IS NOT REQUESTED**

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### **STATEMENT OF RELATED CASES**

Pursuant to 10th Cir. R. 28.2(C)(3), the Undersigned is not aware of any related cases on appeal.

## **JURISDICTIONAL STATEMENT**

A district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291. *See Brown v. Montoya*, 662 F.3d 1152, 1161-1162 (10th Cir. 2011). Whether Plaintiff has alleged a violation of his clearly established constitutional rights to overcome the Deputies' defense of qualified immunity is an issue of law reviewable by this Court on interlocutory appeal. *Id.*

The District Court denied the Deputies' Motion to Dismiss on the basis of qualified immunity on June 5, 2024. The Deputies filed their Notice of Appeal eight days later, on June 13, 2024, within the time permitted under Fed. R. App. P. 4. The Deputies challenge the District Court's denial of qualified immunity with respect to each of Plaintiff's claims, each of which constitutes an issue of law within this Court's jurisdiction on interlocutory appeal.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. Whether the District Court rendered unsupported conclusions based on factual allegations that do not appear in Plaintiff's Amended Complaint;
- II. Whether the District Court erroneously found an absence of exigency to justify the Deputies' warrantless search of Plaintiff's residence despite a suspected burglary in progress;
- III. Whether the District Court improperly placed upon Defendants an affirmative burden to show exigency, rather than holding Plaintiff to his burden to show an *absence* of exigency, as necessary to state a plausible claim for Unlawful Search and as required to overcome qualified immunity.
- IV. Whether the District Court erroneously found an absence of arguable probable cause to arrest Plaintiff for Criminal Mischief despite his admission that he damaged property that he did not own;
- V. Whether the District Court erroneously concluded that deployment of a canine inside a residence during a suspected burglary constituted excessive force;
- VI. Whether the District Court erroneously concluded that clearly established law placed the Deputies on notice that their actions under these specific circumstances violated Plaintiff's rights; and
- VII. Whether the District Court erroneously denied qualified immunity to each of Plaintiff's claims.

## STATEMENT OF THE CASE

This case is about a 911 call, placed by a concerned neighbor, describing what appeared to be an ongoing home-invasion burglary. The neighbor observed the suspect, later identified as Plaintiff, shatter the front window of a residence on a winter night. The neighbor observed the suspect fleeing from the scene but believed the suspect had returned and entered the residence. Defendants-Appellants (the “Deputies”), employed as deputies with the Douglas County Sheriff’s Office (“DCSO”), responded to the house and attempted to contact the occupant. The Deputies heard a voice inside the house but received no response to their announcements. Deputy Kyle suspected a burglary in progress and released his canine into the home through the broken window where it located and bit Plaintiff. After Plaintiff was taken into custody, Plaintiff informed the Deputies that he was a resident of the home.

Plaintiff brings claims for Unlawful Search, Unlawful Arrest, Excessive Force, and Failure to Intervene under the Fourth Amendment to the United States Constitution, and Article II, § 7 of the Colorado Constitution. App. at 11-18. The Deputies entered the residence under exigent circumstances, used reasonable force, and arrested Plaintiff upon arguable probable cause for Criminal Mischief. The Deputies’ actions were reasonable and justified, there was no obligation to intervene, and they are entitled to qualified immunity on each of Plaintiff’s claims.

## I. Facts Relevant to the Issues Submitted for Review<sup>1</sup>

On February 11, 2022, at approximately 6:40 p.m., a person called 911 and reported he observed a male break the front window of a neighboring house and run away. App. at 7, ¶ 15. The neighbor did not identify the suspect as a resident. App. at 7, ¶ 16. Deputies with the Douglas County Sheriff's Office responded and waited outside. App. at 7-8, ¶¶ 18-19. Plaintiff alleges there were "no reports of anyone entering the home prior to Defendants' arrival." App. at 7, ¶ 17. On the contrary, the 911 operator specifically asked the caller whether the suspect entered the house, and the caller responded, "I believe he would be inside the house." *See* App. at 23 (<https://vimeo.com/913069194/c79523e87d?share=copy> at 04:28<sup>2</sup>) (911 audio).

Deputy Kyle approached the broken window with his canine. App. at 8, ¶ 20. The weather was "freezing cold." App. at 9, ¶ 37. The Deputies heard someone speaking inside the house. App. at 14, ¶ 76. Plaintiff was alone inside the residence at the time. App. at 8, ¶ 24. As noted on the 911 audio, the Deputies elected to "start making announcements and see if we can get him to come out." *See* App. at 23 (<https://vimeo.com/913069194/c79523e87d?share=copy> at 12:30) (911 audio).

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<sup>1</sup> Citations to Appellant's Appendix ("App") refer to the date-stamped page number in blue text at the lower-right corner of each page.

<sup>2</sup> The 911 call is central to Plaintiff's claims and referred to in his Amended Complaint. *See* App. at 7, ¶ 15. The District Court properly considered the 911 audio, which contradicts Plaintiff's allegations, without converting Defendants' Motion to Dismiss into one for summary judgment. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-1385 (10th Cir. 1997) (the court may consider an exhibit referred to in the complaint and central to the claims without converting a 12(b)(6) motion to one for summary judgment, and allegations in a complaint that are contradicted by a properly considered exhibit "are not well-pleaded facts that the court must accept as true."); *see also* App. at 86, n. 4.

Plaintiff *does not* allege that the Deputies failed to make the announcements, that the announcements were insufficient, or that he responded to the announcements. *See* App. at 5-14. Deputy Kyle removed the remaining glass and ordered his canine to enter through the broken window and bite the suspect inside. App. at 8, ¶¶ 21-22. After approximately 30 seconds, the canine located and apprehended Plaintiff, the lone occupant of the house at the time. App. at 8, ¶ 24.

Deputy Kyle, waiting outside, heard Plaintiff's reaction. App. at 8, ¶ 26. The Deputies entered the house and located Plaintiff in a bedroom. App. at 8, ¶¶ 27-28. Plaintiff yelled "I live here." App. at 8, ¶ 28. Plaintiff admitted he broke the window and stated he was the only person in the house. App. at 9, ¶ 32. The canine "would not let go," but Deputy Kyle was nevertheless able to remove the canine from Plaintiff within one minute. App. at 9, ¶¶ 33-34. The Deputies handcuffed Plaintiff and escorted him to a patrol vehicle. App. at 9, ¶¶ 35; 38. When EMS arrived, the Deputies received Plaintiff's driver's license, which confirmed that he was a resident. App. at 9-10, ¶¶ 39-40. The Deputies re-entered the residence and performed a search, but Plaintiff *does not* allege that the Deputies lacked permission from the homeowner to do so. App. at 10, ¶ 42.

## **II. Relevant Procedural History**

On December 11, 2023, Plaintiff filed his Amended Complaint. App. at 5-18. Plaintiff brought claims against both Defendants for Unlawful Search and Unlawful

Arrest, against Deputy Kyle for Excessive Force, and against Deputy Kelly for Failure to Intervene. App. at 11-15.

On February 16, 2024, Deputies Kyle and Kelly raised qualified immunity and moved to dismiss each claim in Plaintiff's Amended Complaint. App. at 22-37.

On March 29, 2024, Plaintiff responded to the Motion to Dismiss. App. at 39-64.

On April 12, 2024, the Deputies replied to Plaintiff's Response. App. at 66-76.

On June 5, 2024, the District Court issued its Order denying the Deputies' Motion to Dismiss in its entirety. App. at 78-95.

On June 13, 2024, the Deputies filed their Notice of Appeal. App. at 96.

### **III. Rulings Presented for Review**

The Deputies challenge the District Court's Order of June 5, 2024, denying their Motion to Dismiss in its entirety. *See* App. at 78-95. More specifically, the Deputies challenge the District Court's conclusions that the Deputies lacked exigency to search Plaintiff's residence without a warrant, that deployment of a canine constituted excessive force, that Deputy Kelly had an obligation to intervene, that the Deputies lacked arguable probable cause for Plaintiff's arrest, and that the law clearly established each of the aforementioned violations under sufficiently analogous circumstances.

## SUMMARY OF THE ARGUMENT

Improper Factual Conclusions: The District Court improperly supplemented Plaintiff's Amended Complaint with original factual allegations of its own.

Lawful Search: The Deputies did not have a warrant authorizing a search of Plaintiff's home, but they did have a reasonable belief that a residential burglary was ongoing, and therefore, their search was justified by exigency.

Justified Force: Deputy Kyle used non-lethal force when he deployed a canine into the residence, which was justified by the severity of the crime at issue, the suspect's flight, and concerns for the safety of possible victims inside.

No Duty to Intervene: Deputy Kelly had no duty to intervene because Plaintiff's rights were not violated in the first instance.

Lawful Arrest: The Deputies had arguable probable cause for the crime of Criminal Mischief when they seized Plaintiff. Therefore, Plaintiff's arrest was justified under the Fourth Amendment.

Qualified Immunity: Plaintiff failed to plead a plausible violation of his rights and failed to identify clearly established law showing such a violation under analogous circumstances. Instead, Plaintiff offered authority with distinguishable facts and holdings that do not support his claims. Therefore, the Deputies are entitled to qualified immunity.

## ARGUMENT

### I. STANDARD OF REVIEW.

This Court reviews a district court’s denial of a motion to dismiss based on qualified immunity de novo. *See Butler v. Rio Rancho Pub. Sch. Bd. of Ed.*, 341 F.3d 1197, 1199 (10th Cir. 2003).

#### (a) Plaintiff Fails to State a Plausible Claim.

Where a plaintiff fails to plead a plausible violation of his rights, as required to overcome qualified immunity, a defendant may seek dismissal under F.R.C.P. 12(b)(6) for “failure to state a claim.” To survive such a motion, a complaint's factual allegations, assumed true, must “raise a right to relief above the speculative level” and contain “enough facts to state a claim to relief that is plausible on its face” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but asserted legal conclusions need not be taken as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court need not accept conclusory allegations without supporting factual averments. *Southern Disposal, Inc. v. Tex. Waste Mgmt.*, 161 F.3d 1259, 1262 (10th Cir. 1998). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. The ultimate duty of the court is to “determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed.” *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

For the reasons discussed below, Plaintiff has failed to state a plausible claim for relief as necessary to overcome the defense of qualified immunity.

(b) *The Deputies are Entitled to Qualified Immunity*

Individual defendants in a § 1983 action may raise the defense of qualified immunity. *Gutierrez v. Cobos*, 841 F.3d 895, 899 (10th Cir. 2016). Although frequently resolved on summary judgment, “district courts may grant motions to dismiss on the basis of qualified immunity.” *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). On a motion to dismiss, “it is the defendant's conduct alleged in the complaint that is scrutinized for objective legal reasonableness.” *Id.*

The plaintiff bears the initial burden to show both (1) violation of a constitutional right, and (2) that the right was clearly established at the time. *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 877 (10th Cir. 2014). Although evidence is viewed in the light most favorable to the plaintiff, “the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity.” *Id.* at 878. If the plaintiff succeeds, the burden shifts to the defendants to show no dispute of material fact as to whether his conduct was reasonable in light of clearly established law and information known at the time. *Id.* at 877.

“Clearly established” means, at the time of the conduct, the law was “‘sufficiently clear’ that every ‘reasonable official would understand that what he is

doing” was unlawful. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Existing law must place the constitutionality “beyond debate.” *Id.* at 741. “[T]he result depends very much on the facts of each case,’ and the precedents must ‘squarely govern’ the present case.” *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)). Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). Consequently, public officials are entitled to qualified immunity in “all but the most exceptional cases.” *Rachamim v. Ortiz*, 147 Fed.Appx. 731, 734 (10th Cir. 2005); see also *Harris v. Bd. of Educ. of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997).

As discussed below, with respect to each of Plaintiff’s claims, Plaintiff has failed to satisfy both prongs of the qualified immunity analysis.

## **II. THE DEPUTIES SEARCHED THE HOUSE LAWFULLY BECAUSE THEY SUSPECTED A RESIDENTIAL BURGLARY IN PROGRESS AND EXEGENCY COMPELLED ACTION WITHOUT A WARRANT.**

### **(a) A Warrantless Search of a Residence is Lawful Under Exigent Circumstances.**

Searches and seizures inside a home without a warrant are presumptively unreasonable, “but the presumption is not absolute.” *U.S. v. Najjar*, 451 F.3d 710, 713 (10th Cir. 2006). “When faced with special law enforcement needs ... certain general, or individual, circumstances may render a warrantless search or seizure reasonable.” *Id.* (citing *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)). Exigent

circumstances constitute a special law enforcement need, and “[t]he inquiry determining the existence of an exigency is essentially one of reasonable belief.” *Id.* at 719. Exigent circumstances exist when (1) the law enforcement officers have objectively reasonable grounds to believe that there is an immediate need to protect their lives or others, and (2) ‘the manner and scope of the search is reasonable.’” *McInerney v. King*, 791 F.3d 1224, 1231 (10th Cir. 2015) (quoting *Cortez v. McCauley*, 478 F.3d 1108, 1124 (10th Cir. 2007) (en banc)). The “reasonable belief” standard is lower than probable cause. *See United States v. Porter*, 594 F.3d 1251, 1258 (10th Cir. 2010) (“Reasonable belief does not require absolute certainty; the standard is more lenient than the probable cause standard.”).

As an initial matter, to plead an unlawful search of his residence, *Plaintiff* must show an absence of exigency. However, Plaintiff argued *the Deputies* failed to establish exigency. App. at 46-47. The District Court agreed and found that “Defendants bear the burden of demonstrating the existence of exigent circumstances.” App. at 83 (citing *McInerney*, 791 F.3d at 1231; *Mascaro v. Billings*, 656 F.3d 1198, 1205 (10th Cir. 2011)). The District Court relied upon *McInerney* and *Mascaro* as authority for this initial burden. *Id.* However, both *McInerney* and *Mascaro* cite *Welch*, a criminal case where qualified immunity was not at issue. *See Welch v. Wisconsin*, 466 U.S. 740, 740-741 (1984). In a criminal case such as *Welch*, after the government brings charges and a defendant challenges the admissibility of

evidence derived from a warrantless search, the government bears the burden to demonstrate exigent circumstances to justify the search. *Id.* at 750. Conversely, in a civil matter such as this, Plaintiff brought claims against the Deputies and the Deputies raised qualified immunity in defense. Thus, Plaintiff must bear the burden to plead an unlawful search in the first instance, which necessarily requires an absence of exigency and clearly established law showing the same. If the initial burden to show exigency is placed upon defendants, then qualified immunity ceases to exist in such cases.

Plaintiff--in denying the existence of exigency--argues the Deputies had no immediate need to protect the safety of anyone but disregards their time-sensitive concern that a resident was held captive by a home-invader. Plaintiff further argues the manner of entry was unreasonable but ignores the risk of ambush if the officers entered blindly, without canine support. As discussed below, Plaintiff's claim for Unlawful Search fails on both prongs of the qualified immunity analysis.

(b) *The Deputies Encountered Exigent Circumstances Upon Arrival at Plaintiff's Residence.*

A reasonable belief regarding a residential burglary in progress constitutes an exigency that creates a special need and renders a warrantless search of a residence reasonable under the Fourth Amendment.

On the date of the events giving rise to this case, a person committed the crime of Burglary under C.R.S. § 18-4-203(1) if:

“the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.”

In *Walker*, under analogous circumstances, officers were called to a residence on report of an unwanted person accessing an apartment and, when they knocked on the door, no one answered. *Walker v. Disner*, 50 Fed.Appx. 908, 909 (10th Cir. 2002). The officers observed signs of a burglary, so they forcibly entered the apartment without a warrant and contacted Mr. Walker inside. *Id.* at 909-910. Walker was a resident, and he shared the apartment with his wife. *See id.* However, Walker’s wife had changed the locks after an argument the night before, and Walker manipulated a lock to gain access to the apartment. *Id.* Therefore, the officers arrested Walker for criminal mischief. *Id.*

This Court held that, “[b]ecause the officers had received a burglary call, and upon arriving at the apartment, observed signs of a burglary, Officer Disner's entry into, and brief search of, the apartment were lawful pursuant to the emergency exception to the warrant requirement.” *Id.* at 910 (citing *United States v. Tibolt*, 72 F.3d 965, 970-971 (1st Cir. 1995) (holding that an officer responding to a report of a possible burglary was faced with an exigent circumstance authorizing warrantless entry into a home because “[w]ithout entering, he could not know but what an intruder had managed to get into the residence, and even injured or captured a

resident, then fled; or had been caught off guard by the police and remained in the residence with a forcibly detained resident.”)).

Here, the Deputies were presented with the same circumstances that rendered Officer Disner’s warrantless entry reasonable; they responded to a call suggesting an unwanted person accessing a house, and upon arrival, they observed a broken window, which constitutes a sign of burglary. Likewise, the Deputies’ reasonable belief that a burglary was in progress, alongside concerns that a victim may be in imminent danger, or that the suspect may escape, created an exigency and compelling need for action without time to secure a warrant.

Plaintiff attempted to distinguish *Walker* and argued the instant matter is the “type of case where the officers could surround the home and setup a perimeter in case anyone left or fled, while taking the time and opportunity to get a warrant.” App. at 47-48. But Plaintiff did not identify any heightened urgency in *Walker* that he claimed was absent in the instant matter. *See id.* Nevertheless, the Deputies had an even *stronger* basis for exigency than the officers in *Walker*, where the officers knew the suspect was a resident before entering and had no specific basis to believe the suspect’s wife or anyone else was inside and in danger. *Walker*, 50 Fed.Appx. at 909-910. In either case, where a 911 call strongly suggests a home-invasion in progress, a resident could face harm for hours while officers investigate, draft a warrant, seek a district attorney’s review, and wait for a judge’s signature after

business hours. Where seconds may be the difference between life and death, an hours-long warrant application fails to recognize the urgency. Certainly, if Plaintiff were held captive by a home-invader, he would appreciate urgency in the absence of a warrant.

Plaintiff further argued that, in the instant matter, the 911 caller was not a credible source of information because he lacked certain information. App. at 48. Plaintiff provided no authority that would require police to ignore an urgent 911 call from an identified eyewitness reporting a crime, simply because the witness lacked certain information. On the contrary, “911 calls are the predominant means of communicating emergency situations,” and emergency situations are not amenable to exhaustive recitation and contemplation of each and every fact that may—in hindsight—be pertinent. *See U.S. v. Najar*, 451 F.3d 710, 719-720 (10th Cir. 2006) (internal citations omitted).

The District Court agreed that *Walker* is “plainly distinguishable,” but in support of this conclusion, it pointed to facts that are not distinguishable. App. at 84. The District Court noted that, here, the Deputies had “no information available ... to suggest that someone else was in the home and needed assistance.” App. at 83-84. However, the officers in *Walker* also lacked information to suggest the suspect’s wife or other victim was inside the apartment and in need of assistance at the time. *See Walker*, 50 Fed.Appx. at 909-910. The District Court noted an absence of “pleas

for help” and “signs of violence” in the instant matter, but *Walker* did not involve any such plea for help or sign of violence. *See id.*; see also App. at 83-84. Regarding the suspect’s presence, the District Court noted that the officers in *Walker* knew the suspect was inside the home, whereas in the instant matter, “the 911 caller reported the suspected burglar broke the front window and then fled.” App. at 84. However, the District Court ignored that the Deputies heard a voice inside the house, and the 911 caller reported “I believe [the suspect] would be inside the house.” *See id.* Therefore, *Walker* is not distinguishable on the basis of the suspect’s presence, the victim’s presence, pleas for help, or signs of violence.

In *Najar*, under similar circumstances, this Court again held that a warrantless search of a residence was justified. *See U.S. v. Najar*, 451 F.3d 710 (10th Cir. 2006). The officers responded to a residence after a disconnected 911 call. *Id.* at 715-716. They had *no information* regarding the reason for the call. *See id.* When they arrived, they were not greeted at the door, but they heard a person inside. *Id.* at 716. The officers therefore knew that “someone in the house was reluctant to talk to police.” *See U.S. v. Martinez*, 643 F.3d 1292, 1297 (10th Cir. 2011) (discussing *Najar*). The officers eventually contacted the occupant, who claimed he was alone and denied access. *Najar*, 451 F.3d at 716. The officers then entered the residence. *Id.* at 717.

This Court noted “911 calls are the predominant means of communicating emergency situations,” and they are “distinctive in that they concern

contemporaneous emergency events, not general criminal behavior.” *Id.* at 719-720 (quoting *U.S. v. Holloway*, 290 F.3d 1331, 1339 (11th Cir. 2002)). Indeed, a “911 call is one of the most common-and universally recognized-means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help.” *Id.* (quoting *U.S. v. Richardson*, 208 F.3d 626, 630 (7th Cir. 2000)). Thus, the *Najar* Court held “the officers had reasonable grounds to believe someone inside the trailer may have been in need of emergency aid and immediate action was required.” *Id.*

Here, the Deputies also responded to a 911 call, but unlike the disconnected call in *Najar*, which relayed no information, the Deputies had specific information from an eyewitness neighbor who described a contemporaneous attempt to break entry into the residence by an unknown male under circumstances suggesting a burglary. When the Deputies arrived, they personally observed evidence of the broken entry. The idea that the *homeowner* would break his own front window after dark on a “freezing cold” February evening, and then *run away* from his own home leaving the pipes to burst, would have been unreasonable and beyond logical explanation. Therefore, the Deputies had *more* information suggesting a crime had occurred than the officers in *Najar*.

Additionally, the Deputies had reason to believe the burglary was ongoing. Although the 911 caller reported the suspect initially ran from the scene, Plaintiff

does not allege that the caller maintained visual observation of the suspect or the residence to confirm the suspect did not return and enter through the broken window or some other point of entry. *See App.* at 5-18. Thus, the suspect's precise location was unknown when the Deputies arrived. Nevertheless, as noted above, the 911 audio shows that the caller believed the suspect was inside the house. Regardless, like the officers in *Najar*, the Deputies reasonably believed the suspect was in the house and reluctant to talk to police, because they were not greeted at the door, but they heard a voice inside. It was reasonable to believe the voice was the suspect, rather than a homeowner or resident, because a resident would not ignore the broken window, decline to report the crime, and instead leave the house open to the perpetrator and the elements on a freezing cold night, unless the resident was in danger or incapacitated. Moreover, the gender of the suspect matched the voice inside the house, because the 911 caller reported a male broke the window, Plaintiff is male, and Plaintiff was the only person in the house at the time. *See App.* at 7, ¶ 15; 10, ¶ 43.

Plaintiff attempted to distinguish *Najar* on the basis that the silent 911 call originated inside the house, whereas the call in the instant matter came from an eyewitness outside. *App.* at 48-49. However, the officers in *Najar* contacted the suspect at the door before entering, thereby confirming his location and the fact that he did not pose an imminent threat to anyone inside. Here, the Deputies were not

greeted at the door, did not make visual contact with the suspect, and could not rule out imminent danger to a victim inside at the time of entry. Thus, the Deputies again had *more* information suggesting a home invasion and a *greater* basis for concern than the officers in *Najar*. By first dispatching a canine and entering moments later, they created diversion, avoided an ambush by a suspect hiding in an unknown location within, and searched for victims without wasting valuable time.

The District Court distinguished *Najar* by again citing facts that are not distinguishable, and by citing factual allegations that do not appear in Plaintiff's Amended Complaint. App. at 85-86. The District Court noted that, in *Najar*, the officers attempted to contact the occupant before entering but did not receive an answer. App. at 85. Conversely, it noted the Deputies "failed to exercise any restraint prior to releasing the dog and entering the home." *Id.* In fact, the District Court specifically found that the Deputies "did not announce their presence; nor did they ring the doorbell or knock loudly on the front door." App. at 86. However, Plaintiff's Amended Complaint is devoid of such allegations. *See* App. at 5-18.

As discussed above, the Deputies stated they would start making announcements to "see if we can get him to come out," but Plaintiff *does not* allege the Deputies failed to make the announcements, that the announcements were insufficient, or that he responded to the announcements. *See* App at 5-18. Indeed, Plaintiff makes no mention of the announcements in his Complaint, regardless of

whether they were made verbally, by knocking, or by ringing the doorbell. *See id.* Nevertheless, the District Court declined to consider the Deputies' announcements altogether because the 911 audio indicates they would "start" to make the announcements, and not that they actually "made" them. App. at 87. The District Court assumed the announcements were insufficient and that only six seconds passed between the announcements and the canine deployment despite the absence of any such allegations from Plaintiff. *Id.*; see also App. at 5-18. A plaintiff's failure to plead a fact does not equate to an affirmative assertion that the fact did not occur. A court must consider well pleaded factual allegations in the light most favorable to the plaintiff; however, where a plaintiff fails to allege a fact in his complaint, the court should not assume that fact in the plaintiff's favor or supplement the deficiency with original facts of its own. *See Whitney v. State of N.M.*, 113 F.3d 1170, 1173-1174 (10th Cir. 1997) (Courts should not "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf.").

Additionally, the District Court found the officers in *Najar* had a reasonable concern that someone inside "may have been injured." App. at 85. Conversely, the District Court found the Deputies had no such concern in the instant matter. *Id.* However, in *Najar*, there was no report, observation, or other direct evidence of a victim or injury; the concern was based solely upon a silent 911 call and speculation that an injured victim *may* have placed the call. Here, for the reasons described

above, the Deputies had the same general concern that an incapacitated victim *may* be inside. Thus, in both *Najar* and the instant matter, the responders suspected, but could not confirm, that a victim may be present inside the residence.

To the extent Plaintiff claims an unlawful search when the Deputies reentered the residence after Plaintiff was taken into custody, Plaintiff fails to allege the Deputies lacked consent from the homeowner to perform the search, and therefore fails to state such a claim. *See* App. at 5-18; see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (a warrantless search of a residence is permissible if conducted pursuant to a homeowner's consent).

The Deputies reasonably believed an exigency existed, to an even greater degree than the officers in *Walker* and *Najar*, and likewise, their entry did not violate the Fourth Amendment. Plaintiff's claim for Unlawful Entry must be dismissed for failure to state a plausible violation.

(c) *Plaintiff Fails to Identify Clearly Established Law Showing an Absence of Exigency Under Analogous Circumstances.*

To the extent Plaintiff attempts to identify clearly established law showing an absence of exigency under analogous circumstances, he relies upon *McInerney* for the premise that a residence with open windows and doors does not create a reasonable belief that an occupant is in imminent danger. App. at 50-51; *see also* *McInerney*, 791 F.3d at 1232. The Deputies agree – the simple fact that windows or doors are ajar is insufficient. However, unlike the officers in *McInerney*, the

Deputies did not arrive at Plaintiff's residence to serve him a summons and did not encounter an open window. Rather, the Deputies responded to a 911 call suggesting an active home invasion burglary and observed a *broken* window reported to have been shattered by the suspect moments earlier. The Deputies were confronted with entirely different circumstances that were more than sufficient to establish exigency. *See McInerney*, 791 F.3d at 1232 (reasonable belief of exigency "does not require absolute certainty; the standard is more lenient than the probable cause standard").

The District Court also relied solely upon *McInerney* in finding clearly established law, and in so doing, it declined to identify factual specificity and instead defined the law at the highest level of generality. App. at 88 (declining to compare underlying facts, and instead finding the general prohibition of a "warrantless search of a home absent exigent circumstances" constitutes clearly established law). The general prohibition of a warrantless search of a home without exigency is insufficient to place the Deputies on notice that their actions were illegal under *similar factual circumstances*, therefore, Plaintiff's claim for Unlawful Entry should be dismissed on the second prong of the qualified immunity analysis.

Plaintiff has not pleaded a plausible violation, and he does not identify any clearly established law showing an absence of exigency or unlawful search under remotely analogous circumstances, therefore, Plaintiff's claim for Unlawful Search should be dismissed on either prong of the qualified immunity analysis.

**III. PLAINTIFF’S ARREST WAS LAWFUL BECAUSE THE DEPUTIES HAD ARGUABLE PROBABLE CAUSE TO ARREST PLAINTIFF FOR THE CRIME OF CRIMINAL MISCHIEF.**

(a) *An Arrest is Lawful where the Arresting Officer has “Arguable” Probable Cause.*

To determine whether the law was clearly established in the context of probable cause, courts ask if a defendant had “arguable probable cause,” meaning a defendant “in the same circumstances and ... possessing the same knowledge ... could have reasonably believed that probable cause existed in light of well-established law.” *Felders*, supra at 879 (emphasis added). Consequently, the “clearly established” standard requires a high degree of specificity showing the legal principle clearly prohibits the conduct in the particular circumstances. *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018). Specificity is especially important in the warrantless arrest context, where “a body of relevant case law” is necessary to “clearly establish” the answer. *Id.* at 581. Thus, to overcome qualified immunity, Plaintiff must “identify a case where an officer acting under similar circumstances ... violated the Fourth Amendment.” *Id.* at 591.

Even where an officer lacks actual probable cause, he is entitled to qualified immunity if he reasonably but mistakenly concludes probable cause exists. *Cortez*, 478 F.3d at 1120.

Probable cause “turn[s] on the assessment of probabilities in particular factual contexts” and cannot be “reduced to a neat set of legal rules.” *Maryland v. Pringle*,

540 U.S. 366, 370-371 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). It is “incapable of precise definition or quantification into percentages.” *Id.* at 371. Courts view the totality of the circumstances rather than each fact in isolation and “look objectively at reasonable conclusions that could have been drawn based on the facts known at the time of the arrest.” *Gates*, 462 U.S. at 230-231. Probable cause “does not require evidence sufficient to support a conviction, nor even evidence demonstrating it is more likely than not that the suspect committed a crime.” *Schudel v. Miller*, 12-cv-01864, 2013 WL 12318277 at \*5 (D. Colo. 2013) (quoting *United States v. Funches*, 327 F.3d 582, 586 (7th Cir. 2003)). Probable cause “is not a high bar,” and requires only the “kind of ‘fair probability’ on which ‘reasonable and prudent [people,] not legal technicians, act.’” *Kaley v. United States*, 571 U.S. 320, 338 (2014).

Officers must interview *readily available* witnesses and investigate *basic* evidence. See *Romero v. Fay*, 45 F.3d 1472, 1476-77 (10th Cir. 1995) (emphasis added). And “probable cause does not require an officer to rule out a suspect’s innocent explanation for suspicious facts.” *Wesby*, 138 S.Ct. at 588. An officer “is under no obligation to give any credence to a suspect's story,” and even a plausible explanation in no way “require[s] the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause.” *Id.* “An officer who has probable cause to arrest is not required to conduct further

investigation for exculpatory evidence or to pursue the possibility that the suspected offender is innocent.” *Schudel*, 2013 WL 12318277 at \*5. Indeed, “an arresting officer is not required to hold a trial at the scene of an apparent crime ....” *Id.*

An arrest is lawful if probable cause existed as to *any* offense that *could* be charged. *Spalsbury v. Sisson*, 250 Fed.Appx. 238, 245 (10th Cir. 2007). “[I]t is not relevant whether probable cause existed [for] each individual charge, or, indeed, any charge actually invoked by the arresting officer ....” *Id.* (quoting *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006)).

(a) *The Deputies had Arguable Probable Cause for Criminal Mischief, and No Clearly Established Law Recognizes an Unlawful Arrest Under Similar Circumstances.*

On the date of the events giving rise to this case, the crime of Criminal Mischief was committed if:

“[a] person ... knowingly damages the real or personal property of one or more other persons, including property owned by the person jointly with another person or property owned by the person in which another person has a proprietary interest, in the course of a single criminal episode.”

C.R.S. § 18-4-501(1).

When the Deputies arrived at Plaintiff’s residence, they reasonably concluded that the crime of Criminal Mischief had occurred, because a person damaged the front window of the residence, which constitutes personal property, and then ran. The Deputies concluded that an owner of the property would not shatter his own front window and run--especially under these circumstances--in the absence of

criminal intent such as retaliation against a joint owner of the property or other person with a proprietary interest in the property. Therefore, upon arriving at the home, observing the damage, hearing a voice inside, making announcements, and not receiving a response, the Deputies had arguable probable cause that Criminal Mischief occurred.

When the Deputies entered the residence and contacted Plaintiff in a bedroom, Plaintiff admitted that he broke the window, and thereby confirmed that he was the person suspected of Criminal Mischief. Plaintiff also told the Deputies “I live here.” However, Plaintiff was the suspect, and the Deputies had no obligation to give credence to his innocent explanation for suspicious facts, or to otherwise pursue the possibility that he was innocent. *See Wesby*, 138 S.Ct. at 588. Moreover, Plaintiff does not allege that he told the Deputies he *owned* the home, that he was the sole owner of the home, that he was the sole resident of the home, or that he was the sole individual with a proprietary interest in the home – only that he *lived* there. *See App.* at 5-18. Therefore, even if the Deputies afforded Plaintiff the benefit of the doubt and believed his explanation that he lived at the residence, they had no information that Plaintiff was the sole owner of the damaged window, which would entitle Plaintiff to destroy it. Therefore, Plaintiff’s statement that he lived at the residence, even if believed, would not vitiate probable cause that he committed Criminal Mischief.

The Deputies did not observe Plaintiff driver's license or otherwise confirm his status as a resident of the house until after Plaintiff was handcuffed, removed from the residence, and transferred to a gurney for medical care. App. at 9-10, ¶¶ 39-40. Even after the Deputies confirmed Plaintiff as a resident via his driver's license, Plaintiff does not allege the Deputies had information that would identify Plaintiff as an owner, the sole owner, or the sole individual with an interest in the window. *See id.* Therefore, the Deputies had—at a minimum—arguable probable cause to arrest Plaintiff for Criminal Mischief, which was not vitiated by the driver's license, and Plaintiff failed to state a claim for Unlawful Arrest.

Plaintiff noted the 911 caller reported the suspect “*looked*” like he may have simply forgotten his keys, and claimed the caller made “*multiple*” comments suggesting the same. App. at 52-53. (emphasis added). The 911 audio shows only two passing comments regarding the possibility of lost keys, and that both were uncertain and purely speculative; at no point did the caller state the suspect “looked” like he forgot his keys. In fact, the caller stated that he “didn’t get a good look at him” immediately before the caller’s comment regarding the possibility of lost keys. *See* <https://vimeo.com/913069194/c79523e87d?share=copy> at 01:10. If the caller had reason to believe the suspect was a resident, he would not have called 911.

Plaintiff misconstrued the Deputies’ argument and claimed the Deputies asserted it is reasonable to infer criminal intent from a resident locked out in the cold

breaking a window because the police lacked proof that he was the owner and could assume that he might have damaged the property of another.” App. at 53. On the contrary, the Deputies assert that criminal intent may be inferred where an *unknown* person shatters the front window of a residence on a freezing cold night and then *runs* from the scene. The Deputies had no basis to believe that the suspect was a resident, or that he was locked out in the cold, and Plaintiff does not allege they had such information until after the canine was deployed, Plaintiff was seized, and Plaintiff told them he was a resident. App. at 8, ¶ 28. But Plaintiff asserts he was under arrest at the time the canine bit him -- *before* he informed the Deputies that he was a resident. App. at 52.

Plaintiff objected to the Deputies’ reasonable inferences regarding “criminal intent,” and argued the court must ignore those inferences because all inferences must be drawn in his favor. App. at 53-54. If, as Plaintiff contended, a court must assume an absence of the culpable mental state in every case alleging unlawful arrest, then a motion to dismiss could *never* be granted, and qualified immunity would again cease to exist in every such case. Instead, a suspect’s mental state may be inferred from the suspect’s conduct and other evidence including the circumstances surrounding the commission of the crime. *People v. Grant*, 174 P.3d 798, 812 (Colo. App. 2007). Accordingly, “[i]n determining whether an officer had probable cause to make an arrest, we look objectively at the reasonable conclusions

that *could* have been drawn based on the facts known to the officer *at the time* of the arrest.” *Spalsbury v. Sisson*, 250 Fed.Appx. 238, 245 (10th Cir. 2007) (emphasis added) (citing *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004)).

Plaintiff noted the Deputies had no information regarding his status as a resident, thus, probable cause is “defeated” because an absence of information cannot form the basis of reasonably trustworthy information. App. at 54. However, the Deputies had probable cause based on the incriminating behavior of the suspect, which was not consistent with that of a resident, and they did not rely on an absence of information regarding the suspect’s status for this reason. Had they known Plaintiff was a resident, this information may have vitiated probable cause, but they had no such information until *after* Plaintiff was arrested. The Deputies point to unknown information at the time of arrest not to establish probable cause in the first instance, but rather, to show that their arguable probable cause was not vitiated by the unknown information.

The District Court found both a violation for Unlawful Arrest and clearly established law showing the same, despite the absence of both. App. at 89-91. In so finding, the District Court concluded that the Deputies had “very little” information and “did nothing to investigate the alleged crime,” but again based its conclusions on contradicted facts and facts that do not appear in Plaintiff’s Amended Complaint. App. at 89-91.

As its basis for these conclusions, the District Court first found that the 911 caller reported the suspect fled the scene without entering, despite considering the 911 audio, where the caller clearly states, “I believe he would be inside the house.” *See id.*; see also <https://vimeo.com/913069194/c79523e87d?share=copy> at 04:28.

Next, the District Court found that the Deputies “did not hear or observe *anything* inside the home.” *Id.* However, Plaintiff acknowledged the Deputies heard someone speaking inside, but denied that they heard “signs of violence or pleas for help.” App. 14, ¶ 76. Moreover, Plaintiff did not allege that the Deputies “did nothing to investigate the crime,” and he did not allege that his Amended Complaint contains a comprehensive summary of each investigative effort undertaken by the Deputies. *See App* at 5-18. Nevertheless, the District Court appears to draw these conclusions based on the negative space in Plaintiff’s Amended Complaint, rather than the allegations contained therein. The simple fact that Plaintiff declined to discuss the investigation in his Amended Complaint does not support the affirmative conclusion that no such investigation occurred.

Additionally, the District Court concluded that the Deputies arrested Plaintiff *after* Plaintiff “*confirmed* that he lived here.” App. at 89-90 (emphasis added). However, as discussed above, Plaintiff did not “confirm” that he lived there until after EMS arrived, when he provided his driver’s license. App. at 9-10, ¶¶ 39-41. Prior to that time, Plaintiff simply “screamed, ‘I live here!’” App. at 8, ¶ 28.

Nevertheless, Plaintiff was arrested within the meaning of the Fourth Amendment when the canine bit him, *before* the Deputies spoke with him, and *before* he announced he was a resident. *See Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968) (when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.). Plaintiff admits the same. *See App.* at 52 (Plaintiff asserts he was under arrest at the time the canine bit him -- *before* he informed Deputies that he was a resident). Potentially exculpatory information such as Plaintiff’s status as a resident, gathered *after* the seizure, may not vitiate probable cause that existed at the time of the seizure.

The District Court noted that the 911 caller acknowledged the suspect *may* have been a resident with lost keys but concluded that the Deputies should have drawn the same conclusion despite the purely speculative nature of the comment, which was communicated to the 911 operator, and not to the Deputies directly. *App.* at 90. The District Court concluded that this theory involving lost keys “makes sense” because Plaintiff alleged it was a freezing cold night. *Id.* However, neither Plaintiff nor the District Court offered *any* reason why a freezing cold homeowner would shatter his own window in an act of desperation, and then *run away* from the warm home he sought to access. The suspect’s flight after breaking the window suggests precisely the opposite--avoidance of detection--which an innocent homeowner would have no reason to conceal.

The District Court did not compare the elements of Criminal Mischief to the facts of this case. Instead, the District Court simply found “a need for more pre-arrest investigation.” App. at 90. But, aside from interviewing the suspect who was inside the house at the time, the District Court did not describe any additional investigatory effort it deemed reasonable or necessary under the circumstances. App. at 90-91. An interview of the suspect before taking action would have been unreasonable due to his inaccessible location within the house, which was not “readily available,” and for the time-sensitive reasons discussed above. Even if an interview were possible under the circumstances, its utility would be limited, because the Deputies were under no obligation to rule out a suspect’s innocent explanation for suspicious facts, and they had no duty to give credence to his story. *See Wesby*, 138 S.Ct. at 588.

Regarding the “clearly established” prong of the qualified immunity analysis, the District Court’s analysis consists of a single conclusory sentence, and a citation to *Cortez*, which did not involve a broken entry or suspected burglary in progress, and instead involved a response to the known residence of a person suspected of a prior sexual assault on a child. *See Cortez*, 478 F.3d at 1113-1114. The “clearly established” standard requires a high degree of specificity showing the legal principle clearly prohibits the conduct under the particular circumstances at issue, and specificity is especially important in the warrantless arrest context, where “a body of relevant case law” is necessary to “clearly establish” the answer. *See Wesby*,

138 S.Ct. at 590. Nevertheless, the District Court relies on a single case with distinguishable facts, and declines to identify those facts, let alone compare them.

Plaintiff has failed to state a claim for unlawful arrest and failed to identify clearly established law showing such a violation under analogous circumstances. Plaintiff's claim for Unlawful Arrest should be dismissed on both prongs of the qualified immunity analysis.

#### **IV. THE CANINE FORCE UTILIZED BY DEPUTY KYLE WAS REASONABLE AND JUSTIFIED**

- (a) *Force is Justified by the Severity of the Crime at Issue, Concerns Regarding Victims, and Concerns Regarding a Suspect's Flight.*

“When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures.” *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). “Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotations omitted).

This balancing “requires careful attention to the facts and circumstances of each particular case, including (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 he is actively resisting arrest or attempting to evade arrest by flight.” *Id.*

Although “general statements of the law are not inherently incapable of giving fair and clear warning to officers,” “Graham does not by itself create clearly established law outside an obvious case.” *Hemry v. Ross*, 62 F.4th 1248, 1258 (10th Cir. 2023) (alterations omitted) (quoting *White v. Pauly*, 580 U.S. 73, 80 (2017)). Instead, to show clearly established law, the burden is on the plaintiff “to identify a case where an officer acting under similar circumstances as [the defendants] was held to have violated the Fourth Amendment.” *White*, 580 U.S. at 79.

The Supreme Court has repeatedly said that “[t]he dispositive question [for qualified immunity] is whether the violative nature of particular conduct is clearly established,” and “[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Mullenix*, 577 U.S. at 12 (quotations omitted). “It is particularly important that a Fourth Amendment right be clearly established in a specific factual scenario because it can be difficult for an officer to determine how the prohibition against excessive force will apply in novel situations.” *Arnold v. City of Olathe*, 35 F.4th 778, 793 (10th Cir. 2022).

Recently, this Court held that officers were entitled to qualified immunity in a case involving deployment of a law enforcement canine under similar circumstances. *See Martinez v. Jenneiahn*, No. 22-1219, 2023 WL 4482404 (10th Cir. Jul. 12, 2023). A suspect left a hospital without permission, while in the custody of law enforcement, and the officers used a canine to trace the suspect’s movements.

*Id.* at \*1. The suspect’s location was unknown, but the canine alerted to a closet in a nearby apartment building. *Id.* The officers employed a “dynamic entry,” whereby they opened the door, deployed the canine inside, and instructed the canine to “get him” before entering. *Id.* The canine bit the sleeping suspect until an officer entered and pulled the canine away. *Id.* This Court found an absence of controlling authority involving excessive force by a law enforcement canine on an unsubdued suspect and held that no clearly established constitutional violation occurred. *Id.* at \*4.

(b) *Deputy Kyle’s Use of Canine Force was Not Excessive Under the Circumstances.*

Here, the Deputies had similar reason to believe that a suspect—seen fleeing an apparent burglary moments earlier—had returned and entered an enclosed structure. Like the officers in *Jenneiahn*, the Deputies did not observe the suspect’s entry, and were not certain he was inside, but had a reasonable basis to believe he was. Like the officers in *Jenneiahn*, the Deputies were not certain that a victim or other person inside the enclosed structure was in danger. Like the officers in *Jenneiahn*, the Deputies employed a “dynamic entry,” and dispatched a canine into the unsubdued suspect’s confined location before entering and exposing themselves to a potential ambush. And like the officers in *Jenneiahn*, the Deputies entered and removed the canine after it bit the suspect. Therefore, like the officers in *Jenneiahn*, the Deputies did not violate any clearly established law, and they are entitled to qualified immunity.

Regarding the first *Graham* factor, severity of the crime, Plaintiff argued the Deputies should have assumed it was the *homeowner* who shattered *his own* window on a freezing winter night and ran from the scene. App. at 55-56; see also *Graham*, 490 U.S. at 396. Why would a desperate homeowner who lost his keys run away from his warm home and into the cold after shattering a window to gain access? Plaintiff offers no explanation, and no contrary inference that should be drawn in his favor. The Deputies had reasonable grounds to suspect a residential burglary, which is a felony under Colorado law. See C.R.S. § 18-4-203(2)(b)(I). Therefore, the First *Graham* factor, severity of the crime, weighs heavily in the Deputies' favor.

Regarding the second *Graham* factor, immediacy of the threat, the 911 caller believed the suspect was inside the residence, and Deputies feared a victim may be captive inside the home at 7:00 p.m. -- a time when residents would ordinarily be present. Plaintiff concluded, in summary fashion, that no such immediacy existed, because "Plaintiff was in his bed sleeping." App. at 56. However, the Deputies cannot see through walls; they had no knowledge that Plaintiff was allegedly sleeping at the time, and no other information that should have assuaged their concerns regarding the threat posed by the intruder. Therefore, the second *Graham* factor weighs in the Deputies' favor.

Regarding the third *Graham* factor, evading arrest by flight, the 911 caller reported the suspect fleeing after breaking the window moments earlier, but Plaintiff

rejected this information as specious and insufficient. App. at 57. This is true, he argued, because a suspect must first communicate with officers, and understand they are attempting to make an arrest, before the suspect may be considered to be evading arrest by flight. *Id.* He cited *Mendenhall*, which does not support this contention, and otherwise declined to explain his rationale. *Id.*; see also *U.S. v. Mendenhall*, 446 U.S. 544 (1980). But logic dictates that a person who commits a crime and flees the scene before police arrive need not formally discuss the matter with police in advance of his flight. He is fleeing the crime regardless of the immediate presence of law enforcement. Thus, each of the three *Graham* factors weighs in favor of Defendants, and Plaintiff failed to plead a plausible excessive force violation.

Beyond the *Graham* factors, Plaintiff argued the Deputies failed to provide an “adequate warning” before entering, but did not explain what he considers adequate, and his Amended Complaint makes no reference to the warning he concludes was inadequate. *See* App. at 5-19. As noted above, in the 911/dispatch audio, a Deputy is heard stating, “we’re going to start making announcements and see if we can get him to come out.” Plaintiff does not deny the announcements in his Amended Complaint or explain why they were inadequate in his Response. He therefore failed to substantiate this conclusory contention.

Nevertheless, the District Court agreed with Plaintiff and found excessive force. App. at 92. As grounds, it found “insufficient evidence to suggest that Plaintiff

posed an immediate threat to others,” because “Defendants point to no allegations or evidence that anyone else was in the home.” *Id.* It further noted that Plaintiff was sleeping in his own bed when the canine was deployed, therefore, “Plaintiff posed no threat to anyone . . . .” *Id.* But the District Court did not distinguish or even mention *Jenneiahn*, cited by the Deputies, which is analogous with respect to both of these circumstances. As discussed above, the suspect in *Jenneiahn* was alone and sleeping when the canine was deployed, just like Plaintiff. In both cases, the officers lacked certainty that the suspect was inside, or that a victim was in danger. This Court found no clearly established excessive force in *Jenneiahn*, but the District Court rendered the opposite conclusion here on the basis of analogous facts.

(c) *No Clearly Established Law Recognizes Excessive Force Under Analogous Circumstances.*

Plaintiff failed to identify clearly established law involving similar conduct. “The law is clearly established when a Supreme Court or Tenth Circuit precedent is on point or the alleged right is clearly established from case law in other circuits.” *Lowe v. Raemisch*, 864 F.3d 1205, 1208 (10th Cir. 2017). “The precedent is considered on point if it involves ‘materially similar conduct’ or applies ‘with obvious clarity’ to the conduct at issue.” *Id.* Plaintiff offered no authority involving materially similar conduct that applies to these circumstances with obvious clarity. He offered no case involving any manner of force on an unsubdued subject in a home during a suspected burglary. Instead, he applied the facts to broad legal principles at

a high level of generality, and briefly summarized cases--primarily district court opinions and cases from other jurisdictions--that do not form the basis of clearly established law. *See App.* at 59-61.

All of Plaintiff's authority is either highly distinguishable, decided after Plaintiff's arrest, or both. In *Vette*, after a traffic stop, the suspect was already apprehended when the officer punched him, hit him in the face with dog chain, and allowed the dog to attack. *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1159-60 (10th Cir. 2021). *Pettaway* was decided on January 31, 2023, nearly a year after the incident giving rise to this case. *Pettaway v. Barber*, No. 2:19-CV-008-ECM, 2023 WL 1422457, at \*10 (M.D. Ala. Jan. 31, 2023). In *Brown*, a canine was released outdoors, in a backyard unrelated to the crime at issue, where it bit a bystander visible to officers, not suspected of a crime, and not in the location of the crime. *Brown v. Whitman*, 651 F. Supp. 2d 1216, 1218-19 (D. Colo. 2009). Plaintiff refers to *Katterman* as "clearly established canine force," but the court found no clearly established law and dismissed the claim. *Katterman v. Salt Lake Cty.*, No. 2:13-CV-1122-EJF, 2017 WL 1207518, at \*8-9 (D. Utah Mar. 31, 2017). *Erickson* did not involve a suspected home invasion; officers released a canine into what they knew was the suspect's home, after only a text message warning, despite knowing he had no violent history and was suspected of only misdemeanors. *Erickson v. City of Lakewood*, 489 F.Supp.3d 1192, 1197-98 (D. Colo. Sept. 24, 2020). *Priester*

involved an outdoor pursuit of a suspect into a canal, where the officer released a canine after the suspect complied with an order to lie down. *Priester v. City of Riviera Beach*, 208 F.3d 919, 923-24 (11th Cir. 2000). In *Campbell*, the officer released a canine outdoors where it bit the plaintiff who was lying on the ground “to avoid a confrontation” with police. *Campbell v. City of Springboro*, 700 F.3d 779, 784-85 (6th Cir. 2012). In *Chew*, after a traffic stop, a canine was released in a scrapyard after the suspect attempted to surrender. *Chew v. Gates*, 27 F.3d 1432, 1436, 1436 (9th Cir. 1994). In *Thornton*, officers charged into what they knew was the suspect’s residence, and forcefully arrested him despite knowing the victim was safe outside. *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998). And in *Graves*, officers used deadly force on a suspect in a bathtub, in what they knew was the suspect’s home, despite knowing the victim was safe outside. *Graves v. Malone*, 810 Fed.Appx. 414, 416-18 (6th Cir. 2020). None of these factual scenarios apply with obvious clarity to the suspected home-invasion burglary at hand.

Likewise, the District Court again defined “clearly established law” in highly general terms, declined to identify analogous facts, and misconstrued the following cases as sufficiently on-point. *See* App. at 93-94. It found that *Casey*, involving an immediate use of a taser, without warning, upon a nonviolent misdemeanor in an open courthouse parking lot, constitutes clearly established law applicable to the highly distinguishable facts in the instant matter. *See Casey v. City of Federal*

*Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007). The District Court again found that, here, Plaintiff “was not given any ‘chance to submit peacefully to an arrest,’” despite evidence on the 911 audio to the contrary, and despite the absence of any allegation in Plaintiff’s Amended Complaint regarding a lack of adequate warning. App. at 93. The District Court again noted that Plaintiff posed no threat because he was sleeping in his bed, which is a fact that Deputies could not have known at the time the canine was deployed. *Id.*

The District Court further relied upon *Morris*, *Cavanaugh*, *Mullins*, *Cook*, and *Trujillo* as clearly established law, but none involve a suspected burglary. *Morris* involved a domestic disturbance in a front yard and the use of physical force upon a person who had recently arrived at the scene and was not suspected of any crime. See *Morris v. Noe*, 672 F.3d 1185, 1189-1190 (10th Cir. 2012). *Cavanaugh* involved a non-emergency response involving a domestic disturbance, where an officer discharged a taser into a woman’s back, without warning, as she ascended the front steps of her home. See *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 666–67 (10th Cir. 2010). *Mullins* involved a large team of officers serving a pre-planned, non-urgent arrest warrant at what they knew was the subject’s home. *Mullins v. City of Colorado Springs*, 575 F.Supp.3d 1360, 1365 (D. Colo. Dec. 15, 2021). *Cook* was decided on November 3, 2022, nearly nine months after the incident giving rise to this case, as noted in the Deputies’ Reply. *Cook v. City of Albuquerque*, 639 F. Supp.

3d 1185, 1202 (D.N.M. 2022). And in *Trujillo*, the officer released a canine in an outdoor alley without warning, where it bit an innocent bystander posing no obvious threat. *Trujillo v. City of Lakewood*, No. 08-cv-00149-WDM-CBS, 2009 WL 3260724, at \*3 (D. Colo. Oct. 9, 2009).

Conversely, the District Court cited *Crall* and *Marquez* as examples of justified force. App. at 94. In *Crall*, officers entered a residence while executing an arrest warrant, and while standing in a hallway, dispatched a canine into a bedroom where it bit an occupant. *Crall v. Wilson*, 769 Fed.Appx. 573, 574-575 (10th Cir. 2019). The officers in *Crall* had a *lesser* degree of urgency and a *lesser* basis for concern than the Deputies because the warrant service was pre-planned, they were not responding to a 911 call or other emergency, they knew the identity of the occupants, the occupants made no attempt to flee, and the officers had no reason to suspect a victim was present. *Id.* Even under these less volatile circumstances, this Court held that the deployment of the canine was *not* a clearly established example of excessive force. *Id.* Nevertheless, the District Court distinguished *Crall* on the basis that the officer provided a loud warning before deploying the canine, and again concluded that the Deputies failed to do so, despite the lack of such an allegation in Plaintiff's Amended Complaint. App. at 94. Certainly, under the emergency situation in the instant matter, and in the absence of an allegation from Plaintiff

concerning a lack of adequate warning, the Deputies are entitled to qualified immunity on the same grounds.

Finally, the District Court cited *Marquez*, where this Court also held that use of a canine was reasonable. *Marquez v. City of Albuquerque*, 399 F.3d 1216 (10th Cir. 2005). The District Court again distinguished *Marquez* on the basis that the officers warned the suspect to halt before deploying a canine, and again concluded that the Deputies provided no such warning, despite the absence of any such allegation in the Amended Complaint. App. at 94.

During the events giving rise to this case, the law did not clearly establish that the use of a canine under these circumstances constituted excessive force. In the most analogous cases— *Jenneiahn*, *Crall*, and *Marquez*—this Court held just the opposite and found an absence of a clearly established violation. This Court should reach the same conclusion here.

**V. DEPUTY KELLY HAD NO DUTY TO INTERVENE BECAUSE A CLEARLY ESTBALISHED VIOLATION OF PLAINTIFF’S RIGHTS DID NOT OCCUR IN THE FIRST INSTANCE.**

“In order to be liable for failure to intervene, the officers must have ‘observe[d] or ha[d] reason to know’ of a constitutional violation and have had a ‘realistic opportunity to intervene.’” *Jones v. Norton*, 809 F.3d 564, 576 (10th Cir. 2015) (citing *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008) (quoting *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994))). Indeed, “[i]n order

for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation[.]” *Id.* (quoting *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005)). Because no clearly established violation occurred, for the reasons discussed above, Deputy Kelly had no obligation to prevent any such violation. Therefore, Plaintiff’s claim for Failure to Intervene should be dismissed.

### CONCLUSION

For the reasons set forth above, the District Court erroneously denied the Deputies’ Motion to Dismiss and denied the Deputies qualified immunity on each claim, to which they are entitled. Defendants-Appellants respectfully request that this Honorable Court reverse the District Court’s Order denying the Motion to Dismiss and grant qualified immunity on each claim.

Respectfully submitted this 12th day of August, 2024.

OFFICE OF THE COUNTY ATTORNEY,  
COUNTY OF DOUGLAS, COLORADO

/s/ W. Casey Brown

W. Casey Brown

Senior Assistant County Attorney

100 Third Street

Castle Rock, CO 80104

Telephone: 303-660-7414

FAX: 303-484-0399

E-mail: [wbrown@douglas.co.us](mailto:wbrown@douglas.co.us)

*Attorneys for Defendants/Appellants*

*Travis Kyle and Scott Kelly*

## **TENTH CIRCUIT RULE 25.5 CERTIFICATION**

Counsel for Appellees hereby certifies that, in conformity Tenth Circuit Rule 25.5 and the Tenth Circuit's CM/ECF User Manual, Section II, Policies and Procedures for Filing Via ECF, Part J, the foregoing Appellants' Opening Brief complies with the privacy and redaction requirements of Fed. R. App. P. 25, as well as the applicable Federal Rules of Civil Procedure.

Dated: August 12, 2024

/s/ W. Casey Brown

W. Casey Brown

Senior Assistant County Attorney

100 Third Street

Castle Rock, CO 80104

Telephone: 303-660-7414

FAX: 303-484-0399

E-mail: [wbrown@douglas.co.us](mailto:wbrown@douglas.co.us)

*Attorneys for Defendants/Appellants*

*Travis Kyle and Scott Kelly*

**CERTIFICATE OF COMPLIANCE WITH  
APPLICABLE TYPE VOLUME LIMITS**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains **10,721** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32(f).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: August 12, 2024

/s/ W. Casey Brown

W. Casey Brown  
Senior Assistant County Attorney  
100 Third Street  
Castle Rock, CO 80104  
Telephone: 303-660-7414  
FAX: 303-484-0399  
E-mail: wbrown@douglas.co.us

*Attorneys for Defendants/Appellants  
Travis Kyle and Scott Kelly*

**STATEMENT REGARDING ORAL ARGUMENT**

Appellants do not believe that oral argument would materially assist the Court in the determination of this appeal.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on this 12th day of August 2024, a true and correct copy of the foregoing **DEFENDANTS'-APPELLANTS' OPENING BRIEF** was filed with the Court via *CM/ECF*, which will cause the foregoing to be served upon the following counsel of record:

s/ *Patrick D. Fiedler*  
100 Third Street  
Castle Rock, CO 80104  
Telephone: 303-660-7414  
E-mail: attorney@douglas.co.us