

Case No. 24-1257

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

TYLER LUETHJE,
Plaintiff-Appellee,

v.

TRAVIS KYLE and SCOTT KELLY,
Defendant-Appellants.

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

APPELLEE'S RESPONSE BRIEF

Respectfully submitted this September 11, 2024,

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF PRIOR RELATED APPEALS

Pursuant to Rule 28.2(C)(3), no other appeal in or from the same civil action in the lower court was previously before this or any other appellate court under the same or a similar title. Additionally, no cases are known to counsel to be pending in any other court that will directly affect this Court's decision in the pending appeal.

STATEMENT OF THE CASE

This is a civil rights action arising from the reckless decision by Douglas County Sheriff's Deputies Travis Kyle and Scott Kelly ("Defendants") to deploy a police canine into Mr. Luethje's home to attack him in his bed while he slept, despite having no probable cause to believe he committed any crime, nor a reasonable belief that he presented an immediate threat.

On the evening of February 11, 2022, Mr. Luethje's neighbor called 911 and reported that he saw a male break the front window of 1060 Riddlewood Ln., Highlands Ranch, Co 80129 (i.e., Mr. Luethje's home), and then run away from the home without entering. Appellants' Appendix ("App.") at 7, ¶15.¹ The neighbor was unable to provide a description of the male. *Id.* at 7, ¶16. The neighbor reported twice that the male may have simply lost his keys, indicating that there may not be any criminal activity. Dispatch Audio at 01:13 ("I don't know, I didn't get a good look at him. I'm pretty sure it's a guy. He may have just been breaking into his house in order to, like, he lost his keys or something."); *see also id.* at 06:20 ("it might be his house and he lost his keys"). Defendants responded to the call along with several other

¹ Defendants asked the District Court to go beyond the four corners of the Complaint and consider the dispatch audio recording when deciding the Motion to Dismiss, and the District Court did so. Opening Brief at 5. Plaintiff will cite to the recording as "Dispatch Audio."

deputies with long rifles and Defendant Kyle's canine. App. at 7, ¶18. Defendants received no report that the male had unlawfully entered the home and did not hear any sounds suggesting violence or that a crime was being committed in the home. *Id.* at 7-8, ¶¶17, 19. Despite the absence of an emergency, Defendants approached the broken window at the front of the house, removed the window screen, and broke out the remaining glass so that Defendant Kyle could send his canine into the home to roam and look for someone to bite. *Id.* at 8, ¶¶20-21.

After unleashing the canine and sending it in, Defendant Kyle ordered the canine to find and bite whoever it found inside the residence. *Id.* at ¶¶22-23. Within moments, the canine found and attacked Mr. Luethje while he was asleep in his bed, biting him repeatedly on his hands, abdomen, and arm. *Id.* at ¶24. Mr. Luethje vocalized his pain but did not resist the dog. *Id.* at ¶25. In response to Mr. Luethje's screams, Defendant Kyle shouted, "bring me my dog!" *Id.* at ¶26. Defendants then entered the home and found Mr. Luethje in his bedroom with the canine still attached to his arm. *Id.* at ¶¶27-28. Defendants observed the canine aggressively jerking and pulling on Mr. Luethje's arm, while he screamed out "I live here!" repeatedly. *Id.* at 8-9, ¶¶28-29. With the canine's teeth still firmly sunken into Mr. Luethje's arm, Defendants questioned him on who else was in the house and who broke the

window, while the dog continued to bite. *Id.* at 9, ¶31. Mr. Luethje immediately confirmed he had broken the window and that no one else was in the house while the canine continued to clamp down harder. *Id.* at ¶¶32-33. Defendant Kyle finally removed the canine from Mr. Luethje's arm after approximately one minute. *Id.* at ¶34.

Despite posing no threat and committing no crime in his own residence, Defendants handcuffed Mr. Luethje and escorted him outside into the freezing cold. *Id.* at ¶¶35-37. Mr. Luethje was placed in the back of a patrol vehicle and eventually transferred to a gurney when EMS arrived. *Id.* at ¶¶38-39. At that time, Defendants took possession of Mr. Luethje's driver's license, which confirmed he lived at the address of the incident. *Id.* at 9-10, ¶¶39-40. Mr. Luethje was taken to the hospital. *Id.* at 10, ¶41. Defendants conducted a secondary search of Mr. Luethje's home in his absence and did not find anyone else inside or evidence of a crime. *Id.* at ¶ 42-43.

As a result of this violent canine attack in his home, Mr. Luethje brings four claims: (1) unlawful entry/search of home, (2) unlawful arrest, (3) excessive force, and (4) failure to intervene.

ARGUMENT

I. Legal Standards

a. Rule 12(b)(6) Motion to Dismiss

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must

contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This plausibility standard reflects the requirement in Rule 8 that pleadings must provide defendants with fair notice of the nature of the claims as well as the grounds upon which each claim rests. *See Khalik v. United Air Lines*, 671 F.3d 1188, 1191–92 (10th Cir. 2012); *see also* Fed. R. Civ. P. 8(a)(2). On a motion to dismiss, the court’s analysis is limited to “the defendant’s conduct *as alleged in the complaint*.” *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021) (internal citation and quotation marks omitted). The defendants’ opportunity to present factual disputes occurs at the summary judgment stage. *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004).

b. Qualified Immunity

Qualified immunity should only protect an officer if the existing law did not put an official on fair notice that their conduct would be unconstitutional. *See Games v. Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006). Generally, “this means that there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts, must have found the law to be as the plaintiff maintains.” *Maresca v.*

Bernalillo Cty., 804 F.3d 1301, 1308 (10th Cir. 2015). But “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotation marks omitted). Consequently, “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Id.* “The *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional.” *Casey v. City of Federal Heights*, 509 F.3d 1278, 1281-86 (10th Cir. 2007).

The Supreme Court recently reaffirmed the *Hope* decision in *Taylor v. Riojas*, 141 S.Ct. 52 (2020) (per curiam) (overturning qualified immunity despite lack of identical facts). The pertinent question in a qualified immunity analysis is whether the “violative nature” of particular conduct has been clearly established. *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017). The Tenth Circuit has repeatedly counseled that “[w]e cannot find qualified immunity whenever we have a new fact pattern.” *Casey*, 509 F.3d at 1284. Thus, it has adopted a “sliding scale” to determine when law is clearly established. *Id.* at 1284-85. “The more obviously egregious the conduct in

light of the prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.” *Id.*; see also *Contreras on behalf of A.L. v. Dona Ana Cnty. Bd. of Cnty. Commissioners*, 965 F.3d 1114, 1135 (10th Cir. 2020) (“Until either this Court or the Supreme Court sounds the death knell for [the] sliding-scale approach, [the Tenth Circuit is] bound to apply it rather than merely pay lip service to it.”) (Baldock, J., concurring and dissenting in part).

When a defendant asserts a qualified immunity defense in a 12(b)(6) motion to dismiss, he subjects himself “to a more challenging standard of review than would apply on summary judgment.” *Truman*, 1 F.4th at 1235 (citing *Peterson*, 371 F.3d at 1201). That is because, at the motion to dismiss stage, the courts must accept all well-pled allegations in the complaint and view them in the light most favorable to the plaintiff. *Id.*²

II. Defendants Failed to Establish the Existence of Exigent Circumstances, and the Use of the Canine Was Unreasonable in Manner and Scope.

² Defendants erroneously cite the summary judgment standard when explaining the legal standard for qualified immunity. Opening Brief at 10 (citing *Smedley* and arguing “[i]f 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”). But Defendants did not file a summary judgment motion – they raised qualified immunity in a motion to dismiss. As a result, they assumed the “more challenging standard of review than would apply on summary judgment.” *Peterson*, 371 F.3d at 1201.

“[T]he Fourth Amendment has drawn a firm line at the entrance to the house.” *Payton v. New York*, 445 U.S. 573, 590 (1980). Searches and seizures inside a home without a warrant are presumptively unreasonable under the Fourth Amendment. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). “Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *Payton*, 445 U.S. at 590. “[E]xceptions to the warrant requirement are few in number and carefully delineated, and ... the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.” *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984) (internal quotation marks and citation omitted); see also *Mascorro v. Billings*, 656 F.3d 1198, 1205 (10th Cir. 2011). When the need to protect or preserve life is asserted as an exigency, the Tenth Circuit requires two things: (1) the law enforcement officers must 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 must be 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)). Reasonable belief is evaluated “based on the realities of the situation presented by the record from the viewpoint of prudent, cautious, and trained officers.” *McInerney*, 791 F.3d at 1232. The law is well-established that

Defendants Kyle and Kelly bear the burden of demonstrating the existence of exigent circumstances. *See id.* at 1231 (citing *Mascorro*, 656 F.3d at 1205 ("The burden is on the government to demonstrate the existence of exigent circumstances.")); *see also Welsh*, 466 U.S. at 749-50 ("the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests"); *Payton*, 445 U.S. at 578 ("[a] greater burden is placed ... on officials who enter a home or dwelling without consent") (citation omitted); *French v. City of Cortez*, 361 F.Supp.3d 1011, 1029 n.12 (D. Colo. 2019) ("While the defense of qualified immunity places the burden on the plaintiff to demonstrate that the defendant violated his clearly established constitutional rights, the Tenth Circuit looks to the criminal context and shifts the burden back to the defendant when exigent circumstances are alleged.") (citing *Mascorro*, 656 F.3d at 1205). Defendants have not met their heavy burden.

Defendants did not have a warrant, but they argue that they had "a reasonable belief that a residential burglary was ongoing, and therefore, their search was justified by exigency." Opening Brief at 8. However, Defendants' exigency argument fails on both prongs: (1) Defendants lacked objectively reasonable grounds to believe that there was an immediate need to protect their lives or others, and (2) using a canine in response to the alleged

exigency was unreasonable in scope and manner.

Defendants argue exigent circumstances existed because of a “time-sensitive concern that a resident was held captive by a home-invader.” Opening Brief at 13. However, Defendants had no evidence that anyone was being “held captive” or that there was a “home-invader.” Defendants did not hear any signs of violence or pleas for help. App. at 8, 11, 14, ¶¶19, 55, 76.

Defendants cite the burglary statute but make no effort to satisfy the elements based on the allegations in the Complaint. Unsurprisingly, the Complaint does not make such an assertion. Instead, paragraph 15 specifically alleges that the neighbor reported seeing “a male break a window of the residence ... and then run away from the residence without entering.” App. at 7, ¶15. These facts are inconsistent with the elements of burglary, which requires an unlawful entry and an intent to commit a crime therein. *See* C.R.S. § 18-4-203(1). Running away is the opposite of entering and intending to commit a crime inside the residence. Defendants make no effort to address Plaintiff’s actual allegations under the proper Rule 12(b)(6) standard. Instead, they seek to inject extraneous/false information and request inferences in their favor based on such information.

Considering the remainder of what the 911 caller reported is even worse for a reasonable belief of burglary, since the caller suggested multiple

times that the person seen may have just lost their keys. Dispatch Audio at 01:13 (“I don’t know, I didn’t get a good look at him. I’m pretty sure it’s a guy. He may have just been breaking into his house in order to, like, he lost his keys or something.”); *see also id.* at 06:25 (“it might be his house and he lost his keys”). Thus, either (1) the male ran away and no person unlawfully entered the home, or (2) the male broke the window and lawfully entered the home because he forgot his keys. Defendants cannot have it both ways. The communication did not offer sufficiently reliable and trustworthy information for a reasonable belief of criminal behavior at all, and the officers should have investigated further. Officers are required to “reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of warrantless arrest and detention.” *Cortez*, 478 F.3d at 1117. If they do not, the officers are responsible for any exculpatory information they unreasonably failed to ascertain. *Maresca*, 804 F.3d at 1310-11. Here, the officers completely failed to investigate whether Mr. Luethje was a resident of his own home and simply forgot his keys, despite the obvious possibility and suggestion of the 911 caller; that possibility turned out to be true and there was no crime.

Furthermore, Defendants do not identify any allegations supporting a reasonable belief that the person inside the home had the “intent to commit therein a crime against another person or property.” C.R.S. § 18-4-203(1). Because of the dearth of information resulting from the lack of any meaningful investigation by Defendants, it is objectively unreasonable for Defendants to have believed a burglary was in progress. The vague and equivocal 911 call from the neighbor was insufficient to establish a reasonable belief of criminal activity or exigency, and Defendants obtained no corroborating evidence supporting a burglary or potential victims when they arrived on scene. *See Storey v. Taylor*, 696 F.3d 987,995-96 (10th Cir. 2012) (reversing qualified for officers where 911 caller reported “loud” altercation but officers lacked “credible evidence” of “corroborating circumstances” justifying warrantless entry due to exigency) (collecting cases involving evidence corroborating an exigency); *see also Williams v. Maurer*, 9 F.4th 416, 433 (6th Cir. 2021) (denying qualified immunity for unlawful entry where no exigency existed because 911 caller’s report was “insufficiently corroborated”); *Thacker v. City of Columbus*, 328 F.3d 244, 254 (6th Cir. 2003) (“Gallagher’s 911 call reporting an emergency justified a police response to investigate the situation further, but did not necessarily justify entry into a private home. [Citation omitted] Only when the police

arrived at the home and observed facts indicative of exigent circumstances were they justified in entering the home.”).

The court’s analysis in *McInerney* illustrates why the police in this case lacked justification to enter Mr. Luethje’s home. 791 F.3d at 1227. In *McInerney*, the defendant went to the plaintiff’s home to serve her with a summons for harassment. *Id.* The defendant officer observed two open windows, with one missing a screen, and a third window with a piece of window trim hanging from it. *Id.* The front screen door was open with a broken shock arm, and the front door was open about six inches. *Id.* The garage door was also open, and belongings were strewn about inside. *Id.* The officer did not attempt to contact the plaintiff by phone. *Id.* at 1228. Approximately 26 minutes after arriving on the scene, the officer, with backup, knocked and announced their presence several times; however, no one came to the door. *Id.* The officers entered the home with guns drawn and soon found the plaintiff partially clothed in her bed, outraged. *Id.* The court held, “[i]n any event, none of these facts establish objectively reasonable grounds of an emergency, i.e., an immediate need to protect [the officers’] lives or others from serious injury or threatened injury.” *Id.* at 1233 (quoting *Cortez*, 478 F.3d at 1124). Similarly, Defendants Kyle and Kelly “cannot

justify [their] entry by a need to protect [themselves] where no emergency existed to justify [Defendants'] entry." *Id.* at 1235.

Defendants' reliance on *Walker* and *Najar* is misplaced, and the District Court properly distinguished those cases. In *Walker*, an unpublished case from over twenty years ago, the officer responded to a domestic violence dispute between a husband and wife, where the wife obtained a restraining order to keep the husband out, had the locks to their apartment changed, and the husband broke the lock to enter the apartment. *Walker v. Disner*, 50 Fed.Appx. 908, 910 (10th Cir. 2002). After talking to the wife, a manager for the apartments called police and reported that the unwanted and prohibited person was inside the apartment. *Id.* The husband was arrested for violating a restraining order and charged with criminal mischief. *Id.* at 910.

Unlike the plaintiff in *Walker*, there was no restraining order restricting Mr. Luethje from his own home, nor was there any apparent need to use force to protect the person(s) inside the home. Additionally, the police in *Walker* did not send an off-leash canine into the apartment to violently attack the first person it came in contact with. *Id.* Not only was there no corresponding threat regarding a person who forced his way back into a domestic violence situation in the present case, the scope and manner of the search in *Walker* was arguably reasonable. By contrast, Defendants' conduct

was divorced from what the situation called for because a canine cannot tell the difference between a suspect and an innocent bystander. Defendants had no information that a person inside the house needed emergency assistance, and the use of an off-leash/find-and-bite canine in a residence is antithetical to rendering emergency aid.

Additionally, the police in *Walker* were acting on specific information from a credible witness. 50 Fed.Appx. at 909. There, the reporting party was the apartment maintenance manager who was personally told by Mrs. Walker that she changed the locks and that Mr. Walker was not allowed in the apartment. *Id.* In fact, the maintenance manager personally encountered Mr. Walker forcing entry into the apartment, which appeared to be a crime. *Id.* By contrast, the 911 caller here had no specific knowledge related to Mr. Luethje, his home, who lived there, or any insight into the situation that occurred. He was not even able to provide a description of the suspect. He certainly could not say whether a crime occurred, and left the police to perform their own due-diligence.

In *Najar*, an early morning 911 call was disconnected and each time dispatch called back, the call was answered but quickly disconnected without a word. *United States v. Najar*, 451 F.3d 710, 716-20 (10th Cir. 2006). When police arrived at the home, they could see someone inside who initially

refused to come to the door. *Id.* at 716-17. Because of the repeated 911 calls, which were immediately disconnected by someone at the home, the court held that a reasonable person could be concerned that someone was trying to prevent communication with safety officials, not merely avoid it. *Id.* at 720. These facts are far different from the case at bar.

Through all of their arguments regarding potential burglary and victims, Defendants do not address the elephant in the room – they do not explain why it was reasonable in scope and manner to blindly send a canine into a home to bite someone when responding to the alleged exigency. Even if the Court were to accept all of Defendants’ other arguments concerning exigency, their use of the canine was an objectively unreasonable response to the situation they claim to have confronted. *If there were victims inside the home*, the canine would have likely bitten them, because a canine cannot independently distinguish between suspects and victims.

Based on the facts known to Defendants, they had insufficient information to reasonably believe that someone inside the house required immediate aid. *See, e.g., McInerney*, 791 F.3d at 1233. “The sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid—such a ‘possibility’ is ever-present.” *United States v. Martinez*, 643 F.3d 1292, 1299-00 (10th Cir. 2011). When viewing the

allegations and drawing all reasonable inferences in the light most favorable to Mr. Luethje, the District Court properly rejected Defendants’ speculative arguments regarding exigencies and threats to the officers – neither of which existed.

III. Defendants Unlawfully Entered Mr. Luethje’s Home.

a. Fourth Amendment violation

Defendants violated Mr. Luethje’s Fourth Amendment rights when they released the dog into the home to seize him, when they entered the home the first time to handcuff him, and when they entered the home a second time to conduct a search. Defendants did not have consent or a warrant to enter the home, and, as discussed above, there were no exigent circumstances justifying the warrantless entry. Without consent, a warrant, or exigencies, the officers unlawfully entered Mr. Luethje’s home. *See Groh v. Ramirez*, 540 U.S. 551, 564-65 (2004).

b. Clearly established law

“No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unreasonable.” *Groh*, 540 U.S. at 564. “[I]t was clearly established as of July 26, 2009, that exigent circumstances must involve an urgent law enforcement need.” *McInerney*, 791 F.3d at 1237

(citing *Cortez*, 478 F.3d at 1124). “[T]he cases in which [courts] have concluded that exigent circumstances justified a warrantless entry all involved facts and circumstances supporting an officer's reasonable belief that someone inside a home was in immediate danger.” *Id.* “These types of emergency situations are completely missing from [Mr. Luethje’s] case.” *See id.* “Simply put, [Defendants] had fair notice that [their] conduct in entering [Mr. Luethje]’s house without a warrant [or exigency] was unlawful.” *Id.* at 1238. The Court should affirm the denial of qualified immunity on the unlawful entry/search claims.

IV. Defendants Arrested Plaintiff Without Arguable Probable Cause.

“A police officer may arrest a person without a warrant if he has probable cause to believe that person committed a crime.” *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995). “Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense.” *Jones v. City and County of Denver*, 854 F.2d 1206, 1210 (10th Cir. 1988). A person is “seized” within the meaning of the Fourth Amendment when “a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). This is clear when

firearms, handcuffs or other forceful techniques are used. *See Ward v. City of Hobbs*, 389 F.Supp.3d 991, 1056-58 (D. N.M. 2019); *Cortez*, 478 F.3d at 1117 (handcuffing, mirandizing, and moving suspect to a confined space where he was not free to leave is an arrest).

a. Fourth Amendment violation

Mr. Luethje was arrested when the canine bit him in his bed. App. at 8, ¶¶23-24. “The off-leash use of a canine to bite an individual for several seconds unquestionably seizes the individual in a violent manner.” *Mullins v. City of Colorado Springs*, 575 F.Supp.3d 1360, 1371 (D. Colo. 2021). At that time, Defendants lacked sufficient information that any crime had been committed. Mr. Luethje remained under arrest when Defendants handcuffed him and ordered him to go outside. App. at 9, ¶¶34-37. Defendants, through their attorneys, argue in litigation that they had probable cause to arrest Mr. Luethje for criminal mischief and burglary, even though the defendant officers made no such assertions of criminal activity at the time of the incident and did not charge him with any crime.

Regarding the crime of criminal mischief, C.R.S. § 18-4-501(1), Defendants assert 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. Opening Brief at 27 (“they had *no information* that Plaintiff was the sole owner”). This argument is problematic for a few reasons. First, Defendants ask the Court to make inferences in their favor about “criminal behavior” and “criminal intent” at the motion to dismiss stage, which runs counter to the well-established principle that any inference made be in favor of the non-movant. *See Sanchez v. Hartley*, 810 F.3d 750, 754 (10th Cir. 2016). The District Court properly rejected such inferences. Second, Defendants’ concession that “they had *no information* that Plaintiff was the sole owner” defeats their own probable cause argument. Opening Brief at 27. The absence of information cannot form the basis for “reasonably trustworthy information” necessary for probable cause. *See Cortez*, 478 F.3d at 1116. Defendants never even charged Plaintiff with criminal mischief, likely because they recognized the deficiencies with the arguments now being advanced on their behalf. Third, the 911 call that Defendants attached to their Motion to Dismiss includes multiple comments from the neighbor indicating that the person may have just forgotten their keys. That information should have been further explored to ascertain the truth of whether a crime had been committed. *Id.* Based on this information, it was objectively unreasonable for Defendants to *assume* criminal intent or activity.

As discussed above, the burglary allegation has even less merit;

Defendants lacked reliably trustworthy evidence to believe the person who broke the window unlawfully entered the home *and* had the intent to commit a crime therein. The reason for the absence of information is self-evident: Defendants failed to take rudimentary steps to investigate, such as looking up and calling the residents of the home, making meaningful attempts to communicate with those inside, or interviewing the witnesses instead of relying on general information transmitted earlier. Officers are required to conduct an adequate investigation involving the collection and review of basic fundamental evidence that is readily available to them before invoking the power of warrantless arrest and detention. *Romero*, 45 F.3d at 1476-77, n. 2 (collecting cases). Reasonable avenues of investigation must be pursued, especially when it is unclear whether a crime has even taken place. *Cortez*, 478 F.3d at 1116. Here, Defendants went straight to significant force instead of gathering information. They could not have reasonably believed Plaintiff was engaged in a burglary.

b. Clearly established law

Since it has been clear for decades that a lawful arrest requires probable cause, courts in the Tenth Circuit evaluate whether officers are entitled to qualified immunity by asking “whether there was arguable probable cause.” *Mglej v. Gardner*, 974 F.3d 1151, 1164 (10th Cir. 2020).

“Arguable probable cause is another way of saying that the officers’ conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists.” *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014). An unreasonable mistake of fact cannot furnish probable cause. *Maresca*, 804 F.3d at 1310. An officer’s unreasonable belief that criminal conduct has occurred because of a mistake that could be corrected with verification, common sense, or application of instruction/training will not excuse an officer’s misguided judgment. *Id.* at 1311. A police officer may not close his eyes to facts that would help clarify the circumstances. *Baptiste v. JC Penney Co.*, 147 F.3d 1252, 1257 (10th Cir. 1998) (citing *BeVier*, 806 F.2d at 128).

Based on the allegations in the Complaint, and as discussed above, Defendants lacked even arguable probable cause to arrest Mr. Luethje. No reasonable officer would have believed probable cause existed to arrest Mr. Luethje for criminal mischief or burglary, and, in fact, the defendant officers *did not* charge him with any crime (thereby further undercutting the reasonableness of their present allegations). As a result, qualified immunity should not protect Defendants on the unlawful arrest claim.

V. Defendant Kyle’s Unreasonable Use of the Canine Constitutes Excessive Force

In evaluating a Fourth Amendment claim of excessive force, courts ask

“whether the officer’s actions are objectively reasonable in light of the facts and circumstances confronting them.” *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Answering this question “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.” *Casey*, 509 F.3d at 1281 (citing *Graham*, 490 U.S. at 396). The government’s interest at stake is determined under the totality of the circumstances and guided by the *Graham* factors: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting or attempting to flee arrest. *Graham*, 490 U.S. at 397. Beyond the *Graham* factors, the absence of an adequate warning further illustrates the unreasonableness of the force employed. *See, e.g., Casey*, 509 F.3d at 1286 (finding clearly established Fourth Amendment violation where “a large amount of force” immediately and without warning made the force “especially troubling.”); *Trujillo v. City of Lakewood, Colo.*, No. 08-cv-00149-WDM-CBS, 2009 WL 3260724, at *3 (D. Colo. Oct. 9, 2009) (denying qualified immunity in light of disputed facts as to whether officer released dog without warnings); *Smith v. City of Albuquerque*, No. CV 01-416 BB/LFG, 2002 WL 35649607, *4 (D.N.M. Oct. 8, 2002) (same).

a. Fourth Amendment violation

The excessive force analysis must account for the risk of serious injury inherent to the use of police canines. *See, e.g., Winston v. Lee*, 470 U.S. 753,761 (1985) (“A crucial factor in analyzing the magnitude of the [Fourth Amendment seizure] is the extent to which the procedure may threaten the safety or health of the individual.”). Use of an off-leash canine trained to find and bite is more significant than other uses of force in two regards: (1) the lack of control and (2) the potential for serious injury. *See, e.g., Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998) (“Police dogs were trained to and tested to bite solidly, bite hard, and hold on. The dogs were trained to rebite if needed and to bite whatever part of the person’s body is nearest to them.”); *Koistra v. Cnty. of San Diego*, 310 F. Supp. 3d 1066, 1074 (S.D. Cal. 2018) (describing “severe” injuries caused by police canine). In other words, a canine is not merely a means of apprehension/detention, such as handcuffs. It is a significant use of force requiring a “legitimate justification,” and the use of a canine to bite a suspect is unconstitutional “when a subject poses no threat.” *Vette*, 989 F.3d at 1170.

Defendants’ defense against the excessive force claim hinges on their exigency argument. As discussed above and by the District Court, Defendants failed to meet their burden of establishing exigent circumstances

– a burden they improperly attempt to shift to Plaintiff. As a result, there is no support for the allegation that there was an immediate need to protect the lives of officers or others (i.e., the second *Graham* factor).

Beginning with the first *Graham* factor, and as discussed above, Defendants did not reasonably suspect Plaintiff of committing any crime. However, even if the Court determines the officers reasonably believed that Plaintiff committed criminal mischief, such a low-level, non-violent misdemeanor weighs against the use of significant force. *See Casey*, 509 F.3d at 1282-84. Furthermore, even if this Court determines the officers reasonably believed that a burglary was in progress, the absence of any signs of violence, threats, or exigencies precludes the use of significant force. *See Vette*, 989 F.3d at 1170-71 (finding excessive canine force even where crime at issue was a felony). As a result, Defendants’ baseless allegation of burglary – involving, at most, property damage – did not justify the use of the canine because Plaintiff did not pose an immediate threat and he was not actively resisting/fleeing arrest. *Id.*

The second *Graham* factor “is undoubtedly the ‘most important’ and fact intensive factor in determining the objective reasonableness of an officer’s use of force.” *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017). The inquiry is “whether the officers were in danger at the precise moment

that they used force.” *Jordan v. Jenkins*, 73 F.4th 1162, 1173 (10th Cir. 2023) (citations omitted); *see also Sanchez v. Baker*, 457 F.Supp.3d 1143, 1154-55 (D.N.M. 2020) (finding excessive force where suspect “posed no immediate threat of danger that necessitated the release of the police dog”). Here, there was no immediate threat to justify substantial force. Defendants did not have information supporting a reasonable belief that a person inside the house had or was threatening them or anyone else. Plaintiff was in his bed sleeping. The absence of any evidence of violence or criminal activity when the officers arrived on scene precludes Defendants’ argument that they had sufficient information to reasonably believe that they were in immediate danger or a person in the house required immediate aid. “It is not objectively reasonable to ignore specific facts as they develop (which contradict the need for [significant force]), in favor of prior general information about a suspect.” *Cavanaugh v. Woods*, 625 F.3d 661, 666 (10th Cir. 2010). Therefore, this factor weighs heavily in Plaintiff’s favor. *See Chew v. Gates*, 27 F.3d 1432, 1436, 1442-43 (9th Cir. 1994) (finding the force excessive due to the absence of a threat); *Cook v. City of Albuquerque*, 639 F. Supp. 3d 1185, 1199 (D.N.M. 2022), *appeal dismissed sub nom. Cook v. McPeck*, No. 22-2148, 2023 WL 3829880 (10th Cir. Jan. 25, 2023) (holding it is clearly established “that an

officer who faces no immediate threat cannot deploy a [police serve dog] off-leash”).

The third *Graham* factor looks at whether the suspect was actively resisting or fleeing arrest. As a starting point, a person must reasonably be informed that they are under arrest before they can be reasonably suspected of resisting or fleeing from any such arrest. *See Lee v. Tucker*, 904 F.3d 1145, 1150 (10th Cir. 2018) (plaintiff sufficiently established the defendants never advised him that he was being detained and was not free to move about the house); *see also Cortez*, 478 F.3d at 1128 (“There is no indication in the record that [the plaintiff] actively resisted **seizure** or attempted to evade **seizure** by flight.”) (emphasis added); *Mendenhall*, 446 U.S. at 554 (finding person “not seized simply by reason of” police presence).³ Obviously, at least one officer would need to be present with and/or otherwise reasonably communicate with a suspect to convey that officers are attempting to make an arrest. These fundamental principles contravene Defendants’

³ In *Mendenhall*, the plurality opinion authored by Justice Stewart concluded that “a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.” 446 U.S. at 553. In other words, a seizure occurs “only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Id.* at 554; *see also Brendlin v. California*, 551 U.S. 249 (2007) (acknowledging the Court’s adoption of the objective *Mendenhall* test).

unsupported assertion that Mr. Luethje actively resisted or fled arrest prior to being seized by the canine – an impossible proposition under the facts alleged.

Additionally, Defendants did not have sufficient information to reasonably believe that “a suspect [was] seen fleeing an apparent burglary.” Opening Brief at 2, 36. The Complaint makes no mention of someone observing a suspect “fleeing an apparent burglary.” This is Defendants’ characterization of the allegations, and it is false. More importantly, it is unreasonable. The neighbor reported seeing an unidentified male break a window and then run away. Thus, neither the neighbor nor Defendants had reason to believe a burglary was in progress or that a burglar was inside (running away is contrary to entering and committing a crime inside). Moreover, the unidentified male was reported to have run away from the broken window *before police arrived on scene*.

Mr. Luethje had no reason to believe he was not free to go about his business when, unbeknownst to him, Defendants arrived outside his house. There was no dialogue between Defendants and Mr. Luethje, and he had no legal obligation to interact with the officers. Because a reasonable person in Mr. Luethje’s position would have believed he was free to disregard the police standing outside of his home (even when *assuming* he was aware of their

presence), there is no basis to argue Mr. Luethje actively resisted arrest or fled police. It defies logic for Defendants to argue that Mr. Luethje actively resisted/fled arrest before he was ever contacted by police. *Id.* As the Complaint clearly alleges, Plaintiff did not attempt to resist or flee arrest before or when the canine bit him (because he was not “seized” until the canine bit him). There are no facts indicating Mr. Luethje obstructed any officer’s attempts to place him into custody at any time before or when Defendants handcuffed him. App. at 8-10, ¶¶22-41. Thus, the third *Graham* factor weighs heavily against the use of any force.

Additionally, the Complaint alleges a lack of meaningful commands, and the dispatch recording does not include any announcements or commands. App. at 14, ¶74. It is not a reasonable inference in the light most favorable to Plaintiff to infer that Defendants made any reasonable or effective announcements at all prior to entering the home. Again, Defendants criticize the District Court for making reasonable inferences in Plaintiff’s favor, which courts are required to do at the 12(b)(6) stage.

Because all three *Graham* factors weigh in Plaintiff’s favor and Defendants did not issue any meaningful commands before using significant force, Plaintiff asserts a plausible Fourth Amendment violation. *See Mglej v. Gardner*, 974 F.3d 1151 (10th Cir. 2020) (only “minimal force” was

objectively justified where “[t]here [was] no evidence that [the suspect] was resisting or trying to evade arrest”), *cert. denied*, 2021 WL 1520808 (U.S. Apr. 19, 2021). Defendants’ conduct should be of obvious concern to this Court and the public at large; no reasonable officer would have blindly sent a canine into Mr. Luethje’s home to bite whomever it found under these circumstances.

b. Clearly established law

“Because the reasonableness inquiry overlaps with the qualified immunity analysis, a qualified immunity defense is of less value when raised in defense of an excessive force claim.” *Maresca v. Barnalillo Cty.*, 804 F.3d 1301, 1313 (10th Cir. 2015).

It is clearly established in the Tenth Circuit that a police officer may not use significant force on a non-violent, non-resisting suspect who is accused of only minor, non-violent crimes. *Casey*, 509 F.3d at 1282–84. This law is clearly established regardless of the specific force-related tool employed. *See Mullins*, 575 F.Supp.3d at 1371 (the lack of canine-specific caselaw is not dispositive, controlling law regarding other types of force clarifies the scope of right regarding reasonableness of police force) (citing *McCowan v. Morales*, 945 F.3d 1276, 1287 (10th Cir. 2019)). “For purposes of the Constitution, it matters not the manner in which the force is applied,

or the form that it takes: excessive force is excessive force.” *Mullins*, 575 F.Supp.3d at 1371; *see also Cooper*, 844 F.3d at 525 (“Lawfulness of force... does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.”).

Furthermore, “it is clearly established in the Tenth Circuit that there are limits to the reasonable amount of force an officer can use, whatever form or manner that force may take.” *Mullins*, 575 F.Supp.3d at 1371 (collecting cases). “[T]he Fourth Amendment prohibits the use of force without legitimate justification, *as when a subject poses no threat or* has been subdued.” *Vette*, 989 F.3d at 1170 (collecting cases) (emphasis added). The *Vette* court’s use of the disjunction “or” indicates that a person need not be subdued in order to have a viable excessive force claim; the same violation occurs “when a subject poses no threat.” *Id.* In *Mullins*, the court denied the defendant’s motion to dismiss in substantially similar, although less egregious, circumstances. 575 F. Supp. 3d at 1372. There, a large team of police officers arrived at the plaintiff’s home with a warrant for his arrest. *Id.* at 1365. Without issuing an adequate warning, the defendant officers unleashed the canine and sent it into the home to find and bite the plaintiff. *Id.* Unaware of the preceding events, the plaintiff stepped out of the shower

and was violently attacked by the canine. *Id.* In response to the plaintiff's screams, the officers gravitated to an upstairs bathroom, where they found the plaintiff had been bitten while naked, clearly unarmed, and not resisting or threatening. *Id.* The court held that because the second and third *Graham* factors weighed heavily in the plaintiff's favor, and the crimes that he was being arrested for were nonviolent, the defendants were not entitled to qualified immunity. *Id.* at 1369 (relying on *Vette, McCowan, McCoy, Morris, Cavanaugh, Casey, Katterman*). Similar to *Mullins*, the second and third *Graham* factors weigh heavily in Mr. Luethje's favor. However, Mr. Luethje's case is even stronger because Defendants did not reasonably suspect him of any crime – whereas, the plaintiff in *Mullins* had a warrant for his arrest.

Furthermore, *Mullins* is not an outlier. It is one of many cases within and beyond the Tenth Circuit that show the prevailing weight of authority clearly establishing that force should not be used without a threat or active resistance. *See, e.g., Cook v. City of Albuquerque*, 639 F. Supp. 3d 1185, 1202 (D.N.M. 2022) (finding “that releasing a [police service dog] off-leash into a residential neighborhood, without warning, is a clearly established constitutional violation if no imminent threat exists.”); *Pettaway v. Barber*, No. 2:19-CV-008-ECM, 2023 WL 1422457, at *10 (M.D. Ala. Jan. 31, 2023) (holding that “[a] reasonable officer would not need prior case law to know

that sending an off-leash canine into a surrounded home before adequately communicating with a solitary suspect or providing that suspect an opportunity to respond, in violation of department policy, constitutes excessive force.”) *reconsideration denied*, No. 2:19-CV-008-ECM, 2023 WL 2347062 (M.D. Ala. Mar. 3, 2023); *Brown v. Whitman*, 651 F. Supp. 2d 1216, 1227 (D. Colo. 2009) (excessive force where officers released dog to bite plaintiff who emerged from sitting in a car and could have been seen with a flashlight if officers had used it); *Katterman v. Salt Lake Cty.*, No. 2:13-CV-1122-EJF, 2017 WL 1207518, at *6-8 (D. Utah Mar. 31, 2017) (finding excessive force where canine bit suspect that had not fled or resisted arrest, and no evidence suggested he was armed); *Trujillo*, 2009 WL 3260724, at *4 (excessive force clearly established where canine bit “a subdued individual posing no obvious threat”); *Erickson v. City of Lakewood*, 489 F.Supp.3d 1192, 1199-1203 (D. Colo. 2020) (excessive force and conspiracy claims substantiated where officers enacted plan to release canine into home to bite after subject failed to respond to text message warning); *Priester v. City of Riviera Beach*, 208 F.3d 919, 927-28 (11th Cir. 2000) (excessive canine force where suspect of non-violent crime was lying down in a canal and presented no threat and did not attempt to flee or resist); *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2012) (denying qualified immunity

for officers involved in dog attack on two suspects “who were not actively fleeing and who, because of proximity, showed no ability to evade police custody.”); *Chew*, 27 F.3d at 1436, 1443 (denying qualified immunity to canine handler where dog bit man who could not move or present a threat and where the situation did not force the officers to make ‘split-second judgments’); *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (concluding “officers were not justified in using any force” where suspect was charged with felony obstruction, posed no immediate threat, and did not actively resist).

Defendants’ reliance on *Martinez*, *Crall*, and *Marquez* is misplaced. Opening Brief at 35-36, 43, 44. Unlike Mr. Luethje’s case, the police in *Martinez* knew who they were searching for and why. *Martinez v. Jenneiahn*, No. 22-1219, 2023 WL 4482404, *1 (10th Cir. July. 12, 2023). Police knew that the suspect was wanted for felony crimes and alleged that he barricaded himself behind a locked door and may have had a weapon. *Id.* Moreover, the plaintiff was seized in a place he had no reasonable expectation of privacy, an outdoor closet of an apartment building that did not belong to him. *Id.* Lastly, when the police opened the door, the handler kept the canine on leash during the deployment for control. *Id.* “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 ex rel. Melgar v. Greene*, 593 F.3d 348, 357-58 (4th Cir. 2010). Mr. Luethje’s case exemplifies this point and illustrates why Defendants’ comparison to *Martinez* is misguided. *See, e.g., Mancini v. City of Indianapolis*, No. 116CV02048TWPMJD, 2017 WL 4250112, at *5 (S.D. Ind. Sept. 26, 2017) (“The alleged excessive force consists of an officer ... releasing a police canine, specifically trained to violently seize the first person that it sees in the space in which he was deployed, in pursuit of a minor felon, inside of a fenced residential yard; circumstances where innocent bystanders could reasonably be expected to be present.”).

In *Crall*, another unpublished decision, three officers and a police canine entered the plaintiff’s trailer with a warrant to arrest a third party. *Crall v. Wilson*, 769 Fed.Appx. 573, 574-75 (10th Cir. 2019). The officers moved toward the bedroom of the trailer, which was covered by a piece of fabric. *Id.* at 575. Under the fabric, the officers could see a pair of work boots at the foot of the bed. *Id.* While standing next to the piece of fabric, the officers announced their presence and then “stated loudly” that the officers would send the dog into the bedroom to bite the occupants if they did not

exit the bedroom. *Id.* When the plaintiff did not answer, the officer sent the canine in and it bit the plaintiff. *Id.* The court in *Crall* found it was not clearly established that the officer used excessive force in these circumstances. *Id.* at 577. However, the present case directly tracks Judge Martinez’s consideration of *Crall* in *Mullins*:

[T]he fact on which the entire holding in *Crall* was based is missing in this case. As discussed above, Mullins does not allege that the officers gave a warning before releasing the canine, let alone a loud warning. Further, the officer in *Crall* was only separated from the plaintiff by a piece of fabric, which gave him good reason to believe the occupants of the bedroom heard his warning; but Defendant Officers were at the front door to a multi-[bedroom] home.

Additionally, in *Crall*, the officers were in more danger than Defendant Officers in this case. There were only three of them, whereas Defendant Officers were part of a “large team.” The officers were in close proximity to the plaintiff, in tight quarters, whereas Defendant Officers had not made contact with Mullins and were outside his home when they released the canine. Finally, Defendant Officers were serving a warrant for nonviolent crimes, while the officers in *Crall* were serving a drug-related warrant which could give them a reason to believe that their arrestee would be armed. [Citation omitted]. Therefore, the Court finds the facts in *Crall* to be insufficiently similar to the facts alleged by Mullins.

Mullins, 575 F.Supp.3d at 1371 (citing *Crall v. Wilson*, No. 17-CV-02317-REB-STV, 2018 WL 10335708, at *1 (D. Colo. May 4, 2018), *report and recommendation adopted*, No. 17-CV-02317-REB-STV, 2018 WL 10335707 (D. Colo. July 11, 2018), *aff’d*, 769 F. App’x 573 (10th Cir. 2019)). Further distinguishing *Crall* is the fact that the officers in that case were serving a

warrant (therefore, probable cause to arrest had already been decided by a judge). Unlike the officers in *Crall* and *Mullins*, Defendants Kyle and Kelly did not have a warrant to arrest anyone. Thus, there was even less justification to use a canine than there was in *Mullins*. Although *Mullins* is a district court case and therefore non-binding, the court's analysis is sound, persuasive, and relies on a body of binding caselaw demonstrating the law is clearly established with even greater force in this case.

Contrary to Defendants' assertion, *Marquez* did not hold that "use of a canine was reasonable." Opening Brief at 44. Instead, the *Marquez* court denied the plaintiff's appeal regarding her motion for judgment as a matter of law after a jury returned a verdict for the defendant officers. *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1220 (10th Cir. 2005). In *Marquez*, the 911 caller reported a burglary in progress and provided detailed descriptions of the two suspects and the vehicles in which they fled. *Id.* at 1219. Officers located and engaged in a high-speed pursuit of the vehicle with the plaintiff inside. *Id.* The vehicle crashed and the plaintiff fled on foot. *Id.* An officer ordered his canine to bite the plaintiff, which it did, and officers put her in custody. *Id.* By contrast, officers in the present case did not get a detailed description of the person who broke the window and were unclear as to whether any crime had been committed. App. at 7-8, ¶¶15-19 Defendants did

not engage in a high-speed vehicle chase, and Plaintiff never actively resisted/fled when he was seized by the canine and handcuffed by Defendants. Not only is *Marquez* highly distinguishable from the present case, the fact that *Marquez* went to a jury trial demonstrates there was sufficient evidence to require a factfinder. Because *Marquez* proceeded to trial and Plaintiff's allegations demonstrate the officers used significant force on a non-threatening, non-fleeing person, then *a fortiori* Plaintiff has plausibly alleged a clearly established Fourth Amendment violation. *See McCowan v. Morales*, 945 F.3d 1276, 1286 (10th Cir. 2019) ("if we can find cases holding an officer was not entitled to qualified immunity on a lesser subset of these salient factors, then a fortiori those cases too should have advised [the defendant officer] of the illegality of his behavior").

"Indeed, the force used by Defendant [Kyle] against [Mr. Luethje] was more severe than the force used in numerous Tenth Circuit cases that found excessive force under similar circumstances." *See Mullins*, 575 F.Supp.3d at 1372. "The use of clearly excessive force is not protected by qualified immunity merely because Defendant Officers' means of applying it are novel." *Id.* As of February 11, 2022, it was clearly established in this Circuit that there are limits to the amount of force that the deputies could use, no matter the form or manner that force may take. *See, e.g., Morris v. Noe*, 672

F.3d 1185, 1191-97 (10th Cir. 2012) (finding excessive force where officer threw down suspect who carried no weapon, made no threats, and did not get within reach of officer); *Cavanaugh*, 625 F.3d at 666-67 (finding clearly established violation where officer used taser against unarmed misdemeanant who did not pose an immediate threat and was not resisting/fleeing arrest). It does not take a constitutional scholar to recognize that Defendants' conduct flies in the face of Fourth Amendment protections. Qualified immunity should not protect Defendant Kyle for using his canine to bite Mr. Luethje without legitimate justification (i.e., where Mr. Luethje posed no threat).

VI. Defendant Kelly Failed to Intervene

An officer can be liable for failing to intervene when he was present at the scene, witnessed the constitutional violation, and had a reasonable opportunity to intervene to stop the force but failed to do so. *See Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir.1996); *see also Erickson*, 489 F.Supp.3d at 1199-1201 (citing *Mick*, 76 F.3d at 1136). The duty to intervene applies to the use of a police canine. *See, e.g., Savannah v. Collins*, 547 Fed.Appx. 874, 876-77 (10th Cir. 2013) (holding that a failure to intervene theory can apply to the use of a canine but that plaintiff had not adequately pleaded such a failure); *Erickson*, 489 F.Supp.3d at 1199-1201.

Defendant Kelly failed to intervene to prevent (1) the unlawful entry/search, (2) unlawful arrest, and (3) excessive force. First, Defendant Kelly knew it was reported that an unidentified male broke a window and ran away without entering the home. App. at 15, ¶82. Upon arrival, Defendant Kelly did not see or hear any signs of violence; he had no reason to believe there was an exigency permitting entry into the home. *Id.* at 15, ¶85; *see also supra*, Section II. Additionally, Defendant Kelly did not have reasonably trustworthy information that a crime had occurred. An investigation would have been necessary before reaching such a conclusion, which Defendants did not do. Lastly, Defendant Kelly had absolutely no information justifying the use of a police canine to find and bite whomever it found in the house. Defendant Kelly knew from discussions with Defendant Kyle on scene that their plan was to force entry into the home and use the canine to find and bite whomever it found. App. at 16, ¶86. Without evidence of an exigency, Defendant Kelly should have objected to the entry of Plaintiff's home, and especially to the use of the canine to find and bite Plaintiff. Despite the obvious lack of justification, Defendant Kelly did not object to the plan or otherwise attempt to stop the canine or officers from entering the home. This is not a situation where Defendant Kelly's only means of intervening would have been to physically restrain the canine or Defendant Kyle, although

Colorado law requires such from its officers. C.R.S. § 18-8-802(1.5)(a) (“A peace officer ... who is on-duty shall intervene to prevent or stop another peace officer, including a peace officer who is the handler of a law enforcement animal, from using physical force that exceeds the degree of force permitted, if any, by section 18-1-707.”) (emphasis added). Other alternatives included contacting a supervisor or simply removing himself from the use of excessive force instead of participating. “Had he taken even a moment to consider the clearly established law of this circuit, he would not have followed the lead of [Defendant Kyle] in entering [Plaintiff’s home]” with a canine to bite Mr. Luethje. *See McInerney*, 791 F.3d at 1236 (citation omitted).⁴

Defendant Kelly’s only argument on appeal for the failure-to-intervene claim is that he had no duty to intervene because, as he argues, no clearly established violation occurred. Opening Brief at 45. In the District Court, “Defendants did not respond to Plaintiff’s authority or arguments with respect to [the failure-to-intervene claim].” App. at 95. As a result, this Court should not entertain any new arguments from Defendant Kelly on appeal

⁴ Although *McInerney* did not involve a failure-to-intervene claim, the facts and legal pronouncements in that case put Defendant Kelly on notice that he could not merely follow along with the plan to use a canine to enter Plaintiff’s home and seize him.

regarding this claim. As discussed above, the law was clearly established regarding Plaintiff's claims for unlawful entry, unlawful arrest, and excessive force. Defendant Kelly has offered no other argument regarding this claim. Therefore, upon finding a clearly established violation for any of Plaintiff's claims, the Court should affirm the denial of qualified immunity for Defendant Kelly.

CONCLUSION

For the reasons stated herein, the Court should affirm the District Court's denial of qualified immunity and denial of Defendants' Motion to Dismiss on all claims.

ORAL ARGUMENT STATEMENT

Due to the important constitutional issues at stake, Plaintiff respectfully requests oral argument in this matter.

Dated: September 11, 2024.

Respectfully submitted,
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Dated: September 11, 2024.

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(1) I hereby certify that a copy of the foregoing **APPELLEE’S RESPONSE BRIEF**, as submitted in Digital Form via the court’s ECF system, is an exact copy of the written document filed with the Clerk.

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Dated: September 11, 2024.

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I hereby certify that a copy of the foregoing **APPELLEE'S RESPONSE BRIEF** was furnished through (ECF) electronic service to the following on this 11th day of September, 2024.

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