No. 18-5102

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEXANDER L. BAXTER

Plaintiff-Appellee

v.

BRAD BRACEY; SPENCER R. HARRIS

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF OF APPELLANTS
OFFICER SPENCER HARRIS AND OFFICER BRAD BRACEY

DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, DIRECTOR OF LAW

KELI J. OLIVER
MELISSA ROBERGE
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341

CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Appellants Officer Brad Bracey and Officer Spencer Harris make the following disclosures:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

s/Melissa Roberge March 27, 2018
Melissa Roberge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

STATEMENT REGARDING ORAL ARGUMENT

This Court can resolve the issues raised in this appeal absent oral argument. Accordingly, Appellants MNPD Officers Spencer Harris and Brad Bracey waive oral argument.

JURISDICTIONAL STATEMENT

Baxter filed his original Complaint on January 7, 2015 pursuant to 42 U.S.C. § 1983 ("Section 1983") alleging violations of his Fourth Amendment rights. (Compl., Page ID # 1-30, RE 1). Baxter alleged two Fourth Amendment claims: (1) excessive force by Officer Harris, a K-9 handler who released his partner Iwo to apprehend Baxter; and (2) "failure to intervene" on the part of Officer Bracey, who failed to act to stop the K-9 apprehension. The District Court had jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 & 1343(a)(3).

Previously, this Court considered Officer Bracey's qualified immunity defense at the Motion to Dismiss stage. (Sixth Circuit Opinion, PageID# 280 -283, RE 72). A panel of this Court affirmed the District Court's order denying Officer Bracey's Motion to Dismiss. *Id*. Officer Harris did not challenge the sufficiency of the complaint.

On October 13, 2017, Officers Harris and Bracey filed their motion for summary judgment asserting that based on the record developed, Officer Harris reasonably deployed Iwo to apprehend Baxter and that Officer Bracey lacked any meaningful opportunity to intervene, based in part, that Iwo only responds to commands from Officer Harris. (Motion for Summary Judgment, PageID# 441 - 443, RE 99; Memorandum of Law in Support of Summary Judgment, PageID# 525 – 537, RE 100). Both Officers also asserted that no clearly established law put

them on notice that their conduct violated the Fourth Amendment; and, thus they were entitled to qualified immunity. *Id*. Baxter timely filed his response. (Response to Summary Judgment, PageID# 574-615, RE 102). The Officers filed a reply in support of their motion. (Reply in Support, PageID# 616-618, RE 103). Baxter, then filed a response in opposition to the Officers' Reply. (Response/Sur Reply, PageID# 619-629, RE 104).

In denying the Motion for Summary Judgment on January 22, 2018, the Court quoted extensively from this Court's order on the motion to dismiss. (Memorandum Opinion and Order, PageID# 630-632, RE 105). The District limited its consideration of the record to the facts in Baxter's testimony that matched those contained in the complaint. Based on the limited consideration of the facts submitted, the District Court concluded that a reasonable jury could find that a Constitutional violation had occurred. The District Court did not evaluate the clearly established prong of the qualified immunity analysis. *Id*. at PageID # 632.

A order denying qualified immunity is immediately appealable to the Court of Appeals under the "collateral order" doctrine. *Harrison v*. *Ash*, 539 F.3d 510, 521 (6th Cir. 2008). "[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 notwithstanding the absence of a final judgment."

Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); *Hayden v. Green*, 640 F.3d 150, 152 (6th Cir. 2011).

Accordingly, shortly after the District Court's order, on January 25, 2018, Officers Harris and Bracey timely filed the instant appeal. (Notice Of Appeal, PageID# 645-646, RE 108).

STATEMENT OF ISSUES PRESENTED

I. Was Officer Harris's use of K9 Iwo reasonable when Baxter had committed aggravated burglary, continually refused to surrender—even after the Officers issued a canine warning, and only seconds elapsed between Officer Harris being in the vicinity of Baxter and the release of Iwo?

II. Is Officer Harris entitled to qualified immunity because the facts of this case do not fit squarely within this Court's prior precedent about the use of a canine?

III. Did Officer Bracey have a meaningful opportunity to intervene when only five seconds passed between when he and Officer Harris were in the vicinity of Baxter, Officer Harris gave no indication that he would release Iwo, and Iwo only responds to commands from his handler, Officer Harris?

IV. Is it clearly established that Officer Bracey has a duty to intervene in a canine apprehension when there is no Supreme Court or Sixth Circuit precedent?

STATEMENT OF THE CASE

On January 8, 2014, Baxter walked around "looking for something" because there were people who would buy laptops and other electronics from him. (Baxter Deposition ("Baxter Depo."), PageID# 458-459, RE 99-1). He would open doors and if they were unlocked he would run in, grab a few things, and run back out. *Id*. After breaking into a home on Portland Avenue, he stole some change, car keys and a bottle of liquor. *Id*. at PageID# 462. After observing Baxter enter the home a neighbor called the police. (Declaration Spencer Harris ("Harris Dec") ¶ 8, PageID# 516, RE 99-2) While on the phone with the police, the neighbor saw Baxter leave the home and get into the car.

After seeing a police helicopter and a police car, Baxter knew the police were looking for him and he bolted from the car to a home he had previously broken into. (Baxter Depo., PageID# 463-464, RE 99-1). While fleeing, he acknowledged that "it looked pretty bad." *Id*. at PageID# 466.

Once officers arrived on the scene they verified that Baxter had committed an aggravated burglary. (Harris Dec. ¶ 8, PageID# 516, RE 99-2; *See* Tenn. Code Ann. § 39-14-402(defining aggravated burglary as burglary of a habitation)). Given Baxter's actions in fleeing and the serious crime he had committed, the K-9 unit was called in to assist in apprehension. (Harris Dec. ¶ 7-8, PageID# 516, RE 99-2).

The aviation unit tracked Baxter to a home on Fairfax Avenue, where Baxter jumped through a ground floor window that led to a basement. (Baxter Depo., PageID# 464-465, RE 99-1). He immediately ran across the room to look out another window for police, but upon hearing the police radio he went to a defensive position between a chimney and a water heater. *Id*. at PageID# 468. While light was coming in through the windows, Baxter still described the basement as dark. *Id*. at PageID# 468-469; Harris Declaration ¶ 12, PageID# 518, RE 99-2.

Baxter saw a police officer look into the windows, but does not know if the officer saw him. (Baxter Depo. PageID# 470, RE 99-1). Despite knowing police surrounded the home, hearing police officers call for his surrender, and knowing they intended to release a police dog, Baxter remained hidden and silent. *Id*. at PageID# 471-473.

Officer Bracey shouted a warning into the basement that a canine would be released. (Harris Declaration ¶10-11, PageID# 516, RE 99-2). Officer Harris then echoed the warning. *Id*. After Baxter failed to appear, Officer Harris released his K9 partner, Iwo[1]. *Id*.; Baxter Depo., PageID# 473, RE 99-1. Iwo shadowed the path Baxter himself had previously taken. (Baxter Depo., PageID# 473, RE 99-1).

[1] Iwo is a malinois police dog that has been certified since August 18, 2010. To become certified Iwo and Officer Harris completed 584 hours of training that included training on criminal apprehension. Thereafter, for five to ten hours each

Baxter then saw the two officers come around the water heater with Officer Harris eventually taking a position in front of him with Officer Bracey behind Baxter. *Id*. at PageID# 474-476.[2] Iwo came up to Officer Harris, who grabbed his chain while he reared up at Baxter. *Id*. at PageID# 477. For the next few moments, Officer Harris continued to shout at Baxter to put his hands up. *Id*. at PageID# 478-479. Baxter does not recall Officer Bracey saying anything; but, believes that Officer Bracey had a "sense" Officer Harris would let the dog go. *Id*. at PageID# 480.

At no point did Officer Harris see that Baxter's hands were up and only Seconds passed before Officer Harris released Iwo. (Harris Dec. ¶ 13, PageID# 516, RE 99-2; Baxter Depo., PageID# 479, RE 99-1). Baxter has never claimed that he told the Officers that he intended to surrender or in any way communicated that he was not a threat.

According to Baxter, Iwo lunged and bit him multiple times under his left arm pit. (Baxter Depo., PageID# 479, 482, RE 99-1). Iwo is trained to bite once then to maintain the bite until commanded to release. Baxter's medical records

---

month, Iwo and Officer Harris completed additional training. Iwo will only respond to his handler and will not obey commands from any other person, including a police officer. (Harris Dec. ¶ 4-5, PageID# 517, RE 99-2).

[2] The Defendants adopted Baxter's facts as to what transpired in the basement for purposes of summary judgment only.

reflect that he only received a single puncture wound, which is consistent with Iwo's training. (Nashville General Records, PageID 519 – 524, RE 99-3).

Once Iwo apprehended Baxter, Officer Bracey placed handcuffs on Baxter. (Baxter Depo., PageID# 488, RE 99-1). Officer Harris reached in and pulled Iwo off of Baxter. *Id*. at PageID# 484. Baxter cannot recall if Officer Harris would have also given a verbal command to Iwo to release. *Id*. at PageID# 486. Additionally, Iwo is trained to only respond to his handler, whether it be to release a bite or in any other scenario. (Harris Decl. ¶ 6, PageID# 515, RE 99-2).

SUMMARY OF THE ARGUMENT

Alexander Baxter committed aggravated burglary by breaking into an occupied home, looking for items to steal before proceeding to break into a car. A diligent neighbor observed Baxter's commission of these crimes and alerted the Metropolitan Nashville Police Department. MNPD responded by enabling aerial support and sending patrol officers to the area. In the face of this overwhelming police response, Baxter fled and broke into another home concealing himself in a dark basement. Once the police confirmed the neighbor's account, they called for a K-9 unit because of the serious nature of the crime.

At that point, Officer Harris and Officer Bracey reported to the home Baxter holed up in. Both officers gave a warning that if Baxter did not surrender a K9 dog would be released. Irrationally, Baxter refused to surrender. Officer Harris, as K9 Iwo's handler, released the dog into the basement. Officers Harris and Bracey followed Iwo into the basement and warily approached Baxter. After a fleeting moment, Officer Harris released Iwo to secure Baxter. At the time, Officer Bracey was positioned behind Baxter. Iwo bit Baxter once and secured him until Officer Bracey could place Baxter in handcuffs.

As a threshold matter, Officer Harris' actions did not constitute excessive force and no clearly established law holds that it does. Baxter's hidden position coupled with his erratic behavior in fleeing from the police when boxed in, and

continued unwillingness to surrender knowing that a police dog would be released, would give a reasonably competent officer, like Officer Harris, the justified belief that Baxter posed a threat of safety to the officers. The Supreme Court has repeatedly reminded the Federal Courts that Officers are entitled to qualified immunity unless a case is identified where an officer acting under similar circumstances was held to have violated the Fourth Amendment. Here, there is no such case as the situation confronted by Officer Harris is distinguishable from this Court's prior precedents. Therefore, he is entitled to qualified immunity.

With regard to Officer Bracey, he lacked any meaningful opportunity to intervene. Baxter's only support for his failure to intervene claim is that Officer Bracey and Officer Harris made eye contact in the seconds before Iwo was released. It is undisputed that Officer Harris did not say anything before releasing Iwo, Officer Bracey was located behind Baxter, and that Iwo will only respond to his handler and not to other police officers. Moreover, there are no cases that inform Officer Bracey of an affirmative duty to intervene in a canine apprehension under these circumstances. Officer Bracey is similarly entitled to qualified immunity.

Accordingly, this Court should reverse the District Court.

STANDARD OF REVIEW

The Court of Appeals reviews *de novo* a district court's decision to deny a summary judgment motion that is based on qualified immunity. *Hayden v. Green*, 640 F.3d 150, 153 (6th Cir. 2011).

ARGUMENT

I. BAXTER EXHIBITED COMPLETELY IRRATIONAL BEHAVIOR AS HE FLED FROM THE POLICE AFTER COMMITTING AGGRAVATED BURGLARY. DESPITE BEING GIVEN MULTIPLE OPPORTUNITIES TO ACTUALLY SURRENDER, HE REMAINED CROUCHED IN A DEFENSIVE POSITION. OFFICER HARRIS WAS ENTITLED TO VIEW BAXTER'S POSITION WITH HIS HANDS UP WITH SKEPTICSM GIVEN HIS PREVIOUS BEHAVIOR. ACCORDINGLY, OFFICER HARRIS'S USE OF IWO DID NOT VIOLATE THE FOURTH AMENDMENT.

A. The District Court Erred When It Only Considered The Testimony Of Baxter That Confirmed The Allegations In The Complaint.

In denying summary judgment, the District Court relied solely on this Court's order on the motion to dismiss, noting that Baxter's testimony "entirely corroborates all of the material facts alleged in his verified complaint, which the Sixth Circuit has already found could support a finding of excessive force." (Order and Memorandum Opinion Denying Summary Judgment, PageID# 632). Such reliance is misplaced as this Court's order only took into account the facts as Baxter chose to present them in his Complaint.

Here, the factual record that developed included Baxter's testimony about not just the events in the basement, but also what occurred immediately before, Iwo's training history, and the Officers' perspectives. In addition to the facts alleged by Baxter in the complaint, the additional undisputed facts are:

- Baxter committed aggravated burglary (Baxter Depo., PageID# 458-459, RE 99-1)
- Baxter fled from police officers and broke into another home (Baxter Depo., PageID# 463-465, RE 99-1).
- Baxter heard a K9 warning given; but, did not surrender (Baxter Depo., PageID# 471-473, RE 99-1).
- Baxter wedged himself between a water heater and chimney that was shrouded in darkness. (Baxter Depo., PageID# 468, 471-473, RE 99-1).
- Officer Harris never saw Baxter with his hands in the air. (Harris Decl. ¶ 13, PageID# 516, RE 99-2).
- Only five seconds elapsed between Officer Harris spotting Baxter and the release of Iwo. (Baxter Depo., PageID# 479, RE 99-1).
- Iwo is a highly trained police dog, who has completed 584 hours of training, including on criminal apprehension, before he received his certification on August 18, 2010. (Harris Decl.¶ 4, PageID# 515, RE 99-2). Since then, Iwo and Officer Harris completed monthly training, always receiving satisfactory scores. *Id*.

Accordingly, because there are no undisputed material facts the reasonableness of releasing Iwo "is a pure question of law." *Dunn v*. *Matata,* 549 F.3d 348, 353 (6th Cir.2008). The record shows that Baxter, a man who committed aggravated burglary, only displayed erratic behavior and a complete unwillingness to surrender, which necessitated the use of Iwo to safely apprehend Baxter. Given Baxter's behavior, and the rapidly evolving events, in which only 5 seconds elapsed between Baxter and Officer Harris facing off, Officer Harris in the interest of his safety, could not take Baxter's apparent surrender at face value. Thus, Officer Harris reasonably deployed Iwo to subdue Baxter and the District Court should be reversed.

An excessive force claim that arises in the context of an arrest is analyzed under the Fourth Amendment's "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 394–95 (1989). The Fourth Amendment standard is objective, and it is applied without reference to the officer's subjective motivations. *Graham*, 490 U.S. at 397. The " 'proper application' of the reasonableness inquiry 'requires careful attention to the facts and circumstances of each particular case ....' " *St. John v. Hickey*, 411 F.3d 762, 771 (6th Cir.2005) (quoting *Graham*, 490 U.S. at 396). Factors to be considered in determining whether a use of force was excessive include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. The standard "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir.2002).

A court must recognize that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. At the summary judgment stage of an excessive force claim, once the court has "determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record ... the reasonableness

of [the defendant's] actions ... is a pure question of law." *Dunn*, 549 F.3d at 353 (quoting *Scott v*. *Harris*, 550 U.S. 372, 381 n. 8 (2007) (emphasis omitted).

While Baxter largely confirmed the allegations in his complaint there were a number of material omissions from the complaint that came to light during discovery. For example, rather than the bland assertion that he ran and hid during the "course of the arrest," discovery revealed that prior to Iwo's deployment, Baxter committed aggravated burglary by entering a home on Portland Avenue, in Nashville. (Baxter Depo., PageID# 458-459, RE 99-1). Knowing that the police were searching for him, Baxter fled the scene. As he evaded the police, he observed both a police helicopter and a police car and acknowledged "it looked pretty bad" for him. *Id*. at PageID# 466. Having nothing to lose, Baxter continued to flee and broke into yet another home. *Id*. at PageID# 463-464.

Also, omitted from the complaint, but confirmed by Baxter in his deposition, is the fact that the Officers gave a warning that a K-9 would be used to apprehend him. *Id*. at PageID# 471-473.

At the summary judgment stage, the Court's inquiry is no longer limited to the sufficiency of the complaint. Rather it goes beyond the Complaint and considers the record as whole, "including depositions, documents…affidavits or declarations" to determine if there is a genuine dispute as to any material fact. Fed. R. Civ. P. 56(c).

Respectfully, the District Court committed reversible error when it failed to consider the entire record in deciding summary judgment. When the entire record is considered, as well as this Court's prior precedent, the District Court's decision should be reversed because the use of Iwo did not violate the Fourth Amendment.

B. Officer Harris's Actions In Deploying Iwo Were Constitutional Because He Correctly Presumed That Baxter Was Dangerous From His Irrational Behavior And He Offered Several Warnings Before Deploying A Well-Trained Canine.

Courts evaluate the use of a canine on a continuum. It is well established that when a suspect is presumed dangerous because of the crimes they have committed, or are acting irrationally, or are in a position to ambush police officers, and police officers give several warnings before deploying well trained canines, that the use of force is Constitutional. *Robinette v. Barnes,* 854 F.2d 909, 913-914 (6th Cir. 1988); *Matthews v. Jones,* 35 F.3d 1046, 1048 (6th Cir. 1994). On the opposite end of the spectrum are situations where an officer brings a poorly trained canine around an already handcuffed subject with no warning or uses a poorly trained canine to apprehend a non-violent suspect. *White v. Harmon*, 65 F.3d 169, 1995 WL 518865, at *3 (6th Cir. 1995) (Table)(denying qualified immunity to a un-trained K9 handler whose dog bit the plaintiff after other officers had apprehended and handcuffed plaintiff); *Campbell v. City of Springboro, Ohio,* 700 F.3d 779, 789 (6th Cir. 2012)(denying qualified immunity where the canine had a history of

excessive biting, had not been properly trained, and the canine was deployed without warning or command from his handler).

Here, Officer Harris's actions fall on the Constitutional portion of the spectrum because the factors present in *Robinette* and *Matthews* are also present in this case. The police pursued Baxter as a suspect in an aggravated burglary, when he began acting irrationally by refusing to surrender when he saw a police helicopter, multiple police cars, and knowing it "looked pretty bad." Before Officer Harris released Iwo into the basement, Baxter heard a warning being given. Inexplicably, Baxter continued to remain in his defensive position behind the water heater. Thus, Officer Harris could presume that Baxter was dangerous.

Importantly, the record lacks any evidence that bringing Iwo to the scene was itself irresponsible, because of a lack of training. *See Campbell*, 700 F.3d at 787, 789 ("there is ample evidence to suggest that the deployment of [the canine] in the search for Campbell was itself irresponsible and therefore unreasonable, owing to Clark's failure to adequately maintain [the canine's] training." "Even more important to this case is the question of whether or not the [the canine] was properly trained."). In contrast to the canine in *Campbell*, since completing over 500 hours of training to become certified in 2010, Iwo has also completed monthly training. Iwo achieved satisfactory scores throughout his training. (Harris Dec. ¶ 4-5, PageID# 515, RE 99-2).

Despite Baxter's subjective belief that he surrendered by continually refusing to obey police commands and hiding in a darkened space, it is undisputed that at the time Officer Harris released Iwo, Baxter was not handcuffed and could have posed a danger to the Officers. Officer Harris, for purposes of Summary Judgment, does not dispute that Baxter did actually have his hands raised. Nonetheless, Officer Harris, based on Baxter's irrational behavior in not previously surrendering—despite overwhelming police presence—was not required to take Baxter's alleged surrender at face value. *See Johnson v. Scott,* 576 F.3d 658, 660 (7th Cir. 2009)("no law that we know of required Scott to take Johnson's apparent surrender at face value, a split second after Johnson stopped running"); *Crenshaw v. Lister*, 556 F.3d 1283, 1293 (11th Cir. 2009)("it was objectively reasonable for Lister to question the sincerity of Crenshaw's attempt to [surrender] and use the canine to apprehend him. Lister was not required to risk his own life by revealing his position in an unfamiliar wooded area at night to an armed fugitive who, up to that point, had shown anything but an intention of surrendering"); *Ingram v. Pavlak,* CIV.03-2531, 2004 WL 1242761, at *5 (D. Minn. June 1, 2004)(officers reasonably could send a dog into a closet to flush out a suspect because, although the suspect said he was surrendering, he continued to hide in the closet, and the officers could not predict what he might do); *McAllister v. Dean,* 4:13–CV–2492, 2015 WL 4647913, at *6 (E.D. Mo. Aug. 5, 2015)("defendants had no way of

knowing how plaintiff was going to behave and they were not required to take his apparent surrender at face value, especially with a gun in easy reach"); *see also Mullins v. Cyranek*, 805 F.3d 760, 767 (6th Cir. 2015)(deadly force justified after the suspect threw his gun away because the officer faced a rapidly escalating situation and only five seconds elapsed between when the suspect threw his gun away and when he was shot).

Baxter's hidden position coupled with his erratic behavior in fleeing from the police when boxed in, and continued unwillingness to surrender knowing that a police dog would be released, would give a reasonable, competent officer, like Officer Harris, the justified belief that Baxter posed a threat of safety to the officers. *Robinette*, 854 F.2d at 913. Accordingly, Officer Harris's use of K9 Iwo was not excessive and the District Court's decision should be reversed.

II. THE DISTRICT COURT DID NOT DETERMINE IF THE OFFICERS' CONDUCT VIOLATED CLEARLY ESTABLISHED LAW. THIS COURT SHOULD CONSIDER THE ISSUE *DE NOVO* AND FIND THAT OFFICER HARRIS IS ENTITED TO QUALIFIED IMMUNITY BECAUSE NO CASE WITH SIMILAR CICRCUMSTANCES HAS FOUND A CONSTITUTIONAL VIOLATION.

"Under the doctrine of qualified immunity, government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of

which a reasonable person would have known.'" *Caudill v. Hollen*, 431 F.3d 900, 911 (6th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Officer Harris is entitled to an analysis of whether his conduct violated clearly established law. An analysis that the District Court's Memorandum Opinion and Order omitted. (PageID# 630-632, RE 105). As this Court's review is *de novo,* it should grant Officer Harris qualified immunity because both the lower court and Baxter "failed to identify a case where an officer under similar circumstances ... was held to have violated the Fourth Amendment." *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017) (citation and brackets omitted).[3]

"Rights at issue must be clearly established, not just in the abstract sense, but in a particularized sense." *Id*. In fact, the Supreme Court has noted that, although qualified immunity "**do[es] not require a case directly on point, [ ] existing precedent must have placed the statutory or constitutional question beyond debate.**" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added).

The Supreme Court has "repeatedly told courts…not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd* at 742. The "dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S.

[3] Alternatively, Officer Harris requests that the case be remanded back to the District Court for it to examine the clearly established prong of the qualified immunity analysis.

194, 202 (2001). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brousseau v. Haugen*, 543 U.S. 194, 198 (2004)(per curium)(quoting *Saucier*, 533 U.S. at 201). Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that "it is sometimes difficult for an officer to determine how the relevant legal doctrine…will apply to the factual situation the officer confronts." *Saucier*, 533 U.S. at 205.

Once an officer raises qualified immunity it is the plaintiff's burden to show that "no reasonable officer would have concluded, under the totality of the circumstances, that probable cause to arrest existed." *Provience v. City of Detroit,* 12-1576, 2013 WL 3357994(6th Cir. July 5, 2013)(citing *Parsons v. City of Pontiac*, 533 F.3d 492, 500-501 (6th Cir. 2008).

Over the last several years, the Supreme Court has issued multiple decisions reminding the lower courts not to define clearly established law at a high level of generality. *Mullenix v. Luna,* 136 S. Ct. 305, 308 (2015) (citations omitted); See, *e.g., City and County of San Francisco v. Sheehan,* 135 S. Ct. 1765, 1774, n. 3 (2015) (collecting cases where Supreme Court has reversed federal courts in qualified immunity cases). Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that "[i]t is sometimes

difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id*.

In *Mullenix,* the Supreme Court reversed the Fifth Circuit Court of Appeals in a deadly force case because the court had "define[d] the qualified immunity inquiry at a high level of generality—whether any governmental interest justified choosing one tactic over another—and then fail[ed] to consider that question in "the specific context of the case." *Mullenix v*. *Luna*, 136 S. Ct. 305, 311 (2015). There, the defendant officer instead of using spikes to apprehend Leija, a fleeing felon, chose to shoot at the car to stop its progress; ultimately shooting and killing Leija. *Id*. at 307. In upholding the denial of summary judgment, the Fifth Circuit agreed with the District Court that there was a disputed fact about the immediacy of the risk posed by Leija. The Supreme Court rejected that finding and chastised the Fifth Circuit for ignoring cases that supported the officer's assessment of the threat and relying on cases that were "too factually distinct to speak clearly to the specific circumstances." *Id*. at 311-312. Accordingly, because the facts presented did not fit neatly into either the constitutional or unconstitutional box the Court granted the defendant officer qualified immunity because it "protects actions in the hazy border between excessive and acceptable force."

The Eleventh Circuit recently granted qualified immunity in circumstances analogous to this case, when the use of the K9 did not fall squarely at either of the

spectrum. *Jones v. Fransen,* 857 F.3d 843 (11th Cir. 2017). Under Eleventh Circuit precedent on one end of the spectrum are cases where the crime at issue was minor, none of the circumstances indicated that the plaintiff was armed or posed an immediate threat, the plaintiff immediately submitted to the officers, and plaintiff suffered over a dozen puncture wounds. *Id*. at 853 citing *Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir. 2000). On the opposite end are cases where the crime is serious—such as armed robbery—and the plaintiff violently flees the police and hides in a darkened area that is susceptible to ambush. *Id*. at 853-854(citing *Crenshaw,* 556 F.3d at 1283). In granting qualified immunity to the officer in *Jones,* the Court noted that

> Jones's case is not directly on all fours with either *Priester* or *Crenshaw*. As a result, neither case alone could have provided Defendants Officers the type of fair notice necessary to breach qualified immunity. And considering the cases together helps no more since *Priester* and *Crenshaw* reached opposite conclusions concerning whether an excessive force violation occurred.

Jones, 857 F.3d at 854.

The same result is mandated here. Like both *Jones* and *Mullenix,* the circumstances do not fit neatly into the Court's prior precedent. As discussed above, canine cases are on a continuum and the present circumstances do not conform with the cases that found officer's conduct to be unconstitutional.

There is no case that would alert Officer Harris that his action in using Iwo to subdue an erratic, potentially threatening suspect, constituted excessive force.

The seminal case in the Sixth Circuit, *Campbell*, establishing when the use of a canine is unreasonable, is readily distinguishable from this case. In *Campbell*, the officer and his K9 partner did not conduct any follow-up training after the initial certifications. 700 F.3d at 783. Conversely, Officer Harris and Iwo completed their initial training and all follow-up training receiving satisfactory marks each time.

Additionally, in *Campbell* only two officers responded to a call about a possible domestic situation because the plaintiff had been pounding on his girlfriend's front door. *Id*. at 784. After hearing the sirens, plaintiff fled to a nearby yard and lay on the ground. *Id*. at 785. At the time, the canine officers responded there was no reason to believe the plaintiff posed a threat. *Id*. at 787. In contrast, in this case, the police response to Baxter's aggravated burglary was overwhelming with multiple police cars, aviation support, and the canine unit. Despite this vast response, and knowing it looked pretty bad, Baxter ran and broke into yet another home. He sought an advantageous position in a darkened basement between a water heater and chimney, permitting Officer Harris to infer that Baxter did not intend to surrender peacefully.

A final distinction is that the officer in *Campbell* never gave a warning before initiating the track of the plaintiff. *Id*. at 785. There, the K9 found the plaintiff lying face down with his arms to his side and bit his left leg first, and then continued to bite different places for 30 to 45 seconds. *Id*. at 785. Here, Baxter

admits to hearing the K9 warning and remaining hidden. When Officer Harris encountered Baxter barely any time passed before Officer Harris deployed Iwo. Baxter's testimony establishes that as soon as Iwo had control of Baxter, Officer Bracey placed him in handcuffs, allowing Officer Harris to safely remove Iwo. Also, Iwo did not continually attack Baxter; rather, he complied with his extensive training and bit once and held Baxter to be secured. Simply put, there is no clearly established law that Officer Harris's actions were unconstitutional. The seminal case is distinguishable. And as both *Mullenix* and *Jones* held, officers are entitled to qualified immunity when the scenarios that confronted the officer do not rest on all fours with prior cases that found the conduct unconstitutional. Therefore, this Court should reverse the District Court and award Officer Harris qualified immunity.

III. OFFICER BRACEY LACKED ANY MEANINGFUL OPPORTUNITY TO INTERVENE BECAUSE MERE SECONDS PASSED BETWEEN WHEN OFFICER HARRIS ENCOUNTERED BAXTER AND THE RELEASE OF IWO, FLEETING EYE CONTACT BETWEEN OFFICER BRACEY AND OFFICER HARRIS DOES NOT EQUATE TO NOTICE THAT EXCESSIVE FORCE WOULD BE USED, AND IWO WOULD NOT RESPOND TO COMMANDS FROM OFFICER BRACEY.

An individual officer may be held liable for failure to prevent the use of excessive force where "(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." *Turner v. Scott*,

119 F.3d 425, 429 (6th Cir. 1997). "Each defendant's liability must be assessed individually based on his own actions." *Binay v. Bettendorf,* 601 F.3d 640, 650 (6th Cir.2010).[4]

Baxter's own testimony establishes that when Officer Harris released the dog he did not communicate with Officer Bracey—who stood behind Baxter—and that approximately 5 seconds elapsed between when Officer Harris had control of Iwo until he was released. This discrete fleeting moment denied Officer Bracey the opportunity to intervene. *Wells v. City of Dearborn Heights*, 538 F. App'x 631, 640 (6th Cir. 2013)(the force to which Wells was subjected occurred at two discrete, fleeting points in time, the kneeing and the tasing, denying Ciochon and Pellerito the opportunity to intervene and prevent any harm).

Moreover, Iwo only responds to commands from his handler, Officer Harris. (Harris Dec. ¶ 6, PageID# 515, RE 99-2). The District Court offhandedly dismissed Officer Harris's averment and concluded that there was a genuine dispute as to whether Officer Bracey's intervention would have been futile. (PageID# 632). Such dismissal is unwarranted as Officer Harris is qualified to testify about Iwo's behavior and training since he was Iwo's handler and had completed 584 initial hours of training with him and then five to ten hours each month of additional training. (Harris Dec. ¶ 4-5, PageID# 515, RE 99-2).

[4] As discussed above Officer Harris's use of Iwo did not constitute excessive force and therefore there can be no failure to intervene.

Once Iwo bit Baxter he had been trained to maintain the bite until Officer Harris commanded him to release. *Id*. at ¶ 15, PageID# 516. And while Baxter states Iwo made two or three separate bites that pierced the skin (Baxter Depo., PageID# 482, RE 99-1), the medical records indicate that only one set of bite marks were found. ((Nashville General Records, PageID 519-524, RE 99-3). In other words, the medical records support that Iwo's technique conformed to his training and that Officer Bracey lacked any opportunity to either stop Iwo's apprehension or to remove Iwo prior to any additional force being used.

In similar circumstances, albeit not a canine case, the Sixth Circuit refused to hold an officer and nurse liable for a failure to intervene. In *Burgess v*. *Fisher,* while at the jail the plaintiff was taken down after mouthing off to corrections officers in a process that took approximately ten seconds. 735 F.3d 462, 470 (6th Cir. 2013). Another corrections officer and the nurse observed the takedown and plaintiff alleged they had failed to intervene. *Id*. at 476. In upholding the grant of summary judgment, the Court cited the defendants' lack of anticipation of the takedown and the duration of the takedown being ten seconds. Accordingly, the Court held there was not enough time for them to both perceive the incident and then intervene. *Id*. at 476.

Similarly, this Court should reverse the District Court because the same factors are present. Baxter testified that Officer Harris did not say anything

immediately before releasing Iwo; therefore, Officer Bracey could not have told him to stop. Nothing in the record establishes that Officer Bracey should have anticipated the release of Iwo. Baxter hypothesizes that the two Officers communicated through eye contact in the five seconds before Officer Harris released Iwo. Given that Baxter maintains that the Officers stood in front of and behind him, it is a physical impossibility for him to have observed any alleged eye contact. Moreover, no court has ever equated momentary eye contact with a meaningful opportunity to intervene.

Similarly, because Officer Bracey stood behind Baxter he could not somehow restrain Iwo before he bit Baxter. To do so would require almost super human reflexes, first to predict Officer Harris's actions, and second to get around Baxter and in a position to restrain Iwo without putting himself in danger of being bit all within less than 5 seconds. *See Ontha v. Rutherford Cnty., Tenn.,* 222 F. App'x 498, 506 (6th Cir.2007) (finding that six or seven seconds was insufficient time to compel intervention). This is a burden that that Fourth Amendment does not impose on Officer Bracey. Officer Bracey's actions in promptly placing handcuffs on Baxter after Iwo had apprehended him, which led to Officer Harris commanding Iwo to release, was all that the Fourth Amendment required. (Baxter. Depo, PageID# 484, 488, RE 99-1).

IV. THE DISTRICT COURT DID NOT DETERMINE IF THE OFFICERS' CONDUCT VIOLATED CLEARLY ESTABLISHED LAW. THIS COURT SHOULD CONSIDER THE ISSUE DE NOVO AND FIND THAT OFFICER BRACEY IS ENTITED TO QUALIFIED IMMUNITY BECAUSE NO CASE WITH SIMILAR CICRCUMSTANCES HAS FOUND A CONSTITUTIONAL VIOLATION.

Officers Bracey is also entitled to an analysis of whether his conduct violated clearly established law. As discussed above in Section II, the District Court's Memorandum Opinion and Order (PageID# 630-632, RE 105) did not contain the requisite analysis. As this Court's review is *de novo*, it should grant Officer Bracey qualified immunity because both the lower court and Baxter "failed to identify a case where an officer under similar circumstances ... was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 551–52[5]

There is no authority from the United States Supreme Court, the United States Court of Appeals for the Sixth Circuit, or district courts within the Sixth Circuit addressing the issue of what duty an officer owes to stop the release of another officer's K-9.

In denying Officer Bracey qualified immunity at the Motion to Dismiss stage this Court relied on *Turner v. Scott,* 119 F.3d 425 (6th Cir. 1997). *Turner*, merely sets forth the general law on a failure to intervene claim and actually held

[5] Alternatively, Officer Bracey also requests that the case be remanded back to the District Court for it to examine the clearly established prong of the qualified immunity analysis.

that when the no evidence indicates that when the officers did not communicate with one another prior to or between blows, and is not altered to a problem until after it occurs is not liable on a failure to intervene theory. *Id*. at 429. Since this Court's opinion in August 2016, the Supreme Court has twice reminded the lower Courts that clearly established law must be particularized to the facts of the case. *White*, 137 S. Ct. at 551–52; *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018)(the "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him). Here, there is no such clearly established law.

While there are a few cases scattered throughout the country about the duty owed to intervene in a canine case, most are distinguishable. *See Priester*, 208 F.3d at 927-928 (denying qualified immunity because the K9 officer released the dog after the plaintiff, who had been standing complied with the order to lie down, the attack may have lasted two minutes resulting in 14 puncture wounds, and the K9 officer drew his gun and threatened the plaintiff's life, giving the other officer an opportunity to intervene); *Stone v. Porter County Sheriff's Dept.,* 2:14-CV-287, 2017 WL 4357453 (N.D. Ind. Sept. 29, 2017)(officers could be liable on a failure to intervene theory when the dog continued to bite after the plaintiff had been handcuffed). Here, the attack was significantly shorter and there was a singular puncture wound. Nothing in the record hints at, much less establishes, that Officer

Bracey had a meaningful opportunity to intervene. The few court cases do not "place the constitutional question beyond debate" and could not have placed Officer Bracey on notice that his actions were unconstitutional.

Moreover, the case most closely on point, *Dickinson v. City of Kent,* C06-1215, 2007 WL 1830744, at *1 (W.D. Wash. June 25, 2007), where the District Court for the Western District of Washington granted qualified immunity to the defendant officers on a failure to intervene claim involving the use of a K-9 because they were not involved in the decision to use the K-9 and, after the K-9 had been deployed, they had no opportunity to recall him, supports Officer Bracey's position.

No facts are present that would suggest Officer Bracey had any involvement in the decision to release Iwo. Officer Harris, the officer in front of Baxter, had control of Iwo and Iwo only responds to commands from his handler. Only at the highest levels of speculation could be it said that Officer Bracey was on notice of a duty to intervene under these circumstances. Accordingly he is entitled to summary judgment and the District Court should be reversed.

CONCLUSION

Based on the foregoing reasons, this Court should reverse the District Court's denial of Officer Harris and Officer Bracey's motion for summary judgment and should grant them qualified immunity. Alternatively, the Court should remand the case back to the District Court so that it may consider the clearly established prong of the qualified immunity analysis.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER
DIRECTOR OF LAW

/s/Melissa Roberge
Keli J. Oliver (#21023)
Melissa Roberge (#26230)
108 Metropolitan Courthouse
P.O. Box 196300
Nashville, Tennessee 37219
(615)862-6341

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation prescribed in F. R. App. P. 32(a)(7)(B). It was prepared using Times New Roman 14-point type, and it contains 6,911 words.

/s/Melissa Roberge
Melissa Roberge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via U.S. First Class Mail to the following:

Alexander L. Baxter
#145056
Trousdale Turner Correctional Complex
140 Macon Way
Hartsville, TN 37074

on this 27th day of March, 2018.

/s/Melissa Roberge
Melissa Roberge

ADDENDUM

DESIGNATION OF CITED DISTRICT COURT DOCUMENTS (WITHIN THE ELECTRONIC RECORD)

RE NO.	TITLE	PageID # Range
1	COMPLAINT	1-30
72	INFORMATIONAL COPY OF SIXTH CIRCUIT ORDER	280-283
99	OFFICER HARRIS AND OFFICER BRACEY'S MOTION FOR SUMMARY JUDGMENT	441-443
99-1	BAXTER'S DEPOSITION, FILED AS EXHIBIT 1 TO THE MOTION FOR SUMMARY JUDGMENT	444-514
99-2	SPENCER HARRIS DECLARATION, FILED AS EXHIBIT 2 TO THE MOTION FOR SUMMARY JUDGMENT	515-518
99-3	NASHVILLE GENERAL MEDICAL RECORDS FOR BAXTER, FILED AS EXHIBIT 3 TO THE MOTION FOR SUMMARY JUDGMENT	519-524
100	OFFICER HARRIS AND OFFICER BRACEY'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT	525-537
102	BAXTER RESPONSE IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT	574-615
103	OFFICER HARRIS AND OFFICER BRACEY'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT	616-618
104	RESPONSE IN OPPOSITION TO THE REPLY FILED BY OFFICER HARRIS AND OFFICER BRACEY	619-629

No. 18-5102

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEXANDER L. BAXTER,
Plaintiff / Appellee,

v.

BRAD BRACEY & SPENCER HARRIS,
Defendants / Appellants.

RESPONSE BRIEF OF THE APPELLEE

Alexander L. Baxter, pro se.
TDOC #145056
Trousdale Turner Correctional
Complex (TTCC)
140 Macon Way
Hartsville, Tennessee 37074

Corporate Disclosure Statement

Pursuant to the United States Court of Appeals, Sixth Circuit, Rule 26.1, the appellee makes the following disclosures:

1) No party is an affliate or subsidiary of a publicly owned corporation;

2) There is no publicly owned corporation, Not a party to the appeal, that has a financial interest in the outcome.

Table of Contents

Table of Authorities

Statement Regarding Oral Argument

Pursuant to Rule 34 of the Federal Rules of Appellate Procedure, the appellee does not agree that oral argument should be waived. The Court should be allowed to view the emotion and demeanor of the appellee to better understand the gravity and depth of the attack suffered by the hands of the appellants. It was sadistic, it was malicious, and it was performed like a mini execution of sorts.

However, due to the appellee's present station in life as an incarcerated prisoner, oral argument is regretefully waived. But the appellee has learned through his trial by error experience that this Court is an excellent arbitrator of the facts and is able to clearly see through all the bull. The issues and decisional process should not be dimished by the absence of the appellee.

Statement Of The Issues Presented For Review

1) Whether the Court should exercise jurisdiction over this appeal, whether the appellee has stated a constitutional violation, and whether the appellee is entitled to a trial.

2) Brad Bracey is not entitled to summary judgment based on qualified immunity, nor is Spencer Harris entitled to summary judgment based on qualified immunity.

Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 42 U.S.C. 1983.

Statement of the Case

It is only by the Grace of God that the appellee has been granted the honor and the privilege to come, as a layman, before such distinguished and learned men to be fairly treated and fairly heard in such an unpopular case.

That is why the appellee wishes to take this unique opportunity to express his most heart-felt appreciation, not only for himself, but for the countless homeless men, women and children who, under color of their authority, are wrongfully assaulted by corrupt and dishonest police officers sworn to uphold the law. Nevertheless, thank you! Thank you for allowing this appellee to be fairly heard. This is indeed an Honorable Court...

For more than a month after inflicting the attack the appellee received daily chronic care for his injuries. Each and every day while being housed at the Metropolitan Nashville Davidson County Sheriffs office the appellee was called to medical where medical staff removed the gauze bandages, cleaned the wounds, took pictures, and uploaded

the images, before replacing the bandages with clean, fresh bandages. Daily calls to medical, daily chronic care, uploading of pictures - all done because of the so-called "scratch" or "one" small puncture wound portrayed by the appellants.

The appellee first began his quest for justice when in January of 2014 he began filing and exhausting all of his administrative remedies. Additional administrative complaints were filed with the MNPD Office of Professional Accountability, MNPD Sgt. Chris Warner, Lt. Christopher Gilder, Captain Dhana Jones, MNPD Chief Steve Anderson, and finally, Mayor of Nashville at the time, Karl Dean; all to no avail. The complaint along with their responses are reflected in the record.

The original complaint was filed on January 7, 2015, and on March 6, 2015, in Document No. 61, the appellants filed their Answer. Since the filing of their Answer the appellants have thrown virtually everything they could at appellee, no matter how meritless the claim.

They've asserted the defense of res judicata, statute of limitations, laches, and estoppel. They've requested costs and attorney fees, even though the appellee did not sue Metro and even though the appellants have not had to spend one dime in their own defense. They further claim that they've acted in good faith at all times.

After the case was eventually decided by the Sixth Circuit then sent back to the district court, the appellee attempted to obtain discovery for a second time. The first was stopped in its track by the appellants Motion to Stay Discovery. Counsel for the appellants, however, sent appellee a discovery request instead.

Included in that request was a form authorizing disclosure of the appellee's medical information to anybody, to anywhere, and at any time, which the apellee thought was overly broad and beyond the scope necessary for the case. Also included in that request were requests so cumulative, so burdensome, so harassing, so annoying, so expensive, so irrelevant, so oppressive, so embarrasing, and simply an extention of the

dilatory tactics employed by the appellants that the appellee found it impossible for a pro se, incarcerated litigant to answer it all.

But in a good faith attempt, on October 25, 2016, the appellee drafted and forwarded to appellants a modified version of a medical release. The modified version specifically authorized disclosure to counsel. But the attorneys for the appellants, Roberge and Oliver, were not satisfied, and they requested again to sign and forward to them their own generic version which appellant did.

Thereafter, on January 16, 2017, the appellant made another attempt at discovery. The appellants answered by sending an envelope containing 268 pages of materials. Out of the 268 pages, 247 pages were documents from Harris' dog training file; none of which appellee requested, and all of which was completely irrelevant. Nowhere in the complaint, nor anywhere in discovery, did appellee ask for or question Harris' dog training file.

What are the appellants hiding? Disclosure of the appellants' civilians complaints and disclosure of the electronic stored images is not that complicated, yet

3 years have now passed since the requests were first made but the appellants still refuse to disclose the information, even with a court order. . . .

Bracey is a liar and the truth is not in him. Bracey has been lying from the start, and he is still lying right today. Harris is much worse. One of the appellee's most impassioned fears is that the appellants will somehow be allowed to get away with the crime they committed. But common sense should dictate that if it happened in the past, if they are allowed to get away, it'll certainly happen again sometime in the future.

Another closing concern is the appellants' total lack of human compassion. They keep constantly trying to claim that all the appellee received was a minor wound. But from the start, when the bandages were first being changed, when the appellee raised his arm he could see deep inside the open cavity of his body. The "minor wound" was that serious. The appellant is eager to explain all of this information to a federal jury.

The appellee's motion for summary judgment is another concern. In their Brief before this Court, located on p. 11, Document No. 11, the appellants

state the following: "... It is undisputed that Officer Harris did not say anything before releasing Duo, Officer Bracey was located behind Baxter..." so forth and so on.

But located in the district court, in the Sworn Declaration of Officer Bracey, Document No. 81-1, p. 2, Bracey makes oath to the following: "... 10. After giving additional warnings, Officer Harris and K9 Duo entered first and then Officer Harris. While Officer Harris and K9 Duo entered the basement I stayed outside the basement window..."

Bracey further made oath, under penalty of perjury, to the following: "... After hearing Officer Harris state that Plaintiff had surrended I entered the basement..." 3:15-cv-00019, Document No. 81-1, p. 2. Have they forgotten that this is one case, not two?

The appellee is at a complete loss how the appellants are being allowed to commit multiple acts of perjury, not only before the district court, but before this Honorable Court as well. When denying the appellee's motion for summary judgment, the district court relied heavily on the submissions entered by the appellants: "... Bracey averred that he was not even in the basement when the alleged attack occurred.

Therefore, under Rule 56, there remains genuine issue of material fact..." Document No. 82, p. 3. "... Accordingly, the plaintiff's motion for summary judgment is denied..." The district court failed to rule on the appellee's second motion for summary judgment, Document No. 102, p. 8, filed after they submitted the truth...

The appellee was sitting on the ground, frozen still, with his hands raised in the air. Bracey has finally admitted that. The appellee was passively complying with the officers' commands, and the appellee did nothing whatsoever to provoke any force. That is now a proven fact.

At least 6 to 8 windows surround the bottom of the house. That is also a fact. It was daylight outside, none were covered, and lots of light was shining through the windows. That is also a fact.

Police reports reveal the officers knew exactly where in the basement the appellee sat in the basement even before appellants entered the basement. That is how the appellants were able to come straight to the appellee, while the dog, on the other hand, followed the path the appellee had taken when he entered the basement, running at first to the opposite side of the basement. These are now undisputed facts.

After Roberge came to the prison and completed the deposition, Harris suddenly decided he couldn't see the appellee's hands. How convenient. This has now been pleaded into the record despite the fact that Bracey clearly saw the appellee's hands, and despite the fact that in their Brief, located on p. 13, Document No. 11, the following statement was made: "... I. Officer Harris was entitled to view Baxter's position wit his hands up ..."

The fabrication and lies the appellee has found are too numerous to list in one pleading. The appellee can hardly wait to tell them to a jury. In the meantime, the appellants attempt to make a big fuss, falsely claiming that only a few seconds elapsed before they released the dog. But what they have conveniently forgotten to include are the 15 or 20 or so seconds that elapsed while the appellee sat surrendered with his hands in the air before the dog ever rejoined Harris.

Genuine issue of material facts remain. Harris used excessive force, and Bracey failed to intervene.

Summary

Arguments Of The Appellee

Pending before the Court is an interlocutory appeal, the second one in this case, from a 42 U.S.C. 1983 Civil Rights Complaint filed by Alexander L. Baxter, an inmate presently incarcerated at the Trousdale Turner Correctional Complex located in Hartsville, Tennessee.

The appellee, acting pro se, filed this action against Officers Spencer Harris and Brad Bracey, respectively, for the use of excessive force and failing to intervene, which violated the appellee's constitutional rights. In addition, the appellee invoked the court's supplemental jurisdiction under Title 28, U.S.C., §1367, for the criminal offense of assault and/or aggravated assault.

The plaintiff/appellee seeks relief in the form of compensatory damages, punitive damages and special damages. The appellee has suffered serious bodily injury, permanent scars, back injury, flashbacks, mental anguish, emotional distress, personal humiliation, and a mysterious illness that has entered the appellee's body since the attack. The appellee is in need of long-term treatment, and seeks accountability for his state-law claims.

To the best of the appellee's understanding, both Harris and Bracey filed a joint motion for summary judgment. Harris sought to have the case dismissed because "... Officer Harris' actions did not constitute excessive force and no clearly established law holds that it does;..." Document No. 99, p. 2. Bracey sought to have the case dismissed because "... he lacked any meaningful opportunity to intervene..." Document No. 99, p. 2. Both claimed qualified immunity.

But the appellee submits that the appellants are not entitled to summary judgment based on qualified immunity because there are genuine issues of disputed facts that merit a trial. Summary judgment based on qualified immunity would have been also improper because the appellants refused to comply with the appellee discovery requests and the appellee did not complete discovery, their claim of summary judgment based on qualified immunity is barred by the doctrines of res judicata and/or collateral estoppel, and both Harris and Bracey have committed multiple acts of perjury before the district court and before the Sixth Circuit Court of Appeals.

Argument

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No stat shall make or enforce any law which shall abridge the privileges and immunities of any citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV, Section 1.

In addition, 42 U.S.C. 1983, provides as follows: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit or equity, or other proper

proceeding for redress."

Moreover, summary judgment is to be granted only if the record before the court shows "that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

From what the appellee has read, the Fourth Amendment protects persons from the use of excessive force by law enforcement officers in the course of an arrest, investigory detention or other seizure. Moreover, police use of force is always analzed under the Fourth Amendment "reasonableness" standard which governs "all claims that law enforcement have used excessive force in the cours of an arrest." Graham v. Conner, 109 S. Ct. 1865.

In addition, personnel may be held liable for there failure to act if it results in a constitutional violation. Estelle v. Gamble, 97 S.Ct. 285; Alexander v. Perrill, 916 F.2d 1392, (officials "can't just sat on your duff and not do anything" to prevent violations of

Rights); Lewis v. Mitchell, 416 F. Supp. 2nd 935, 945 (a person may be held liable under §1983 if he "omits to perform an act which he is legally required to do that causes the deprivation of which plaintiff complains)," quoting Johnson v. Duffy, 588 F. 2d 740, 743.

Under the fourth Amendment, a plaintiff need not show malicious intent because the officers' state of mind is not important. The question is "whether the officers action are 'objectively reasonable" in the light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Conner, 490 U.S. 397.

In addition to the above, a court should not grant summary judgment against a party whose discovery requests have not been answered. Ingle v. Yelton, 439 F. 3d 191, 194. "Where the facts are in possession of the moving party, a continuous of a motion for summary judgment should be granted as a matter of course." Castlow v. U.S. 552 F. 2d 560.

The appellee sat on the ground, frozen still, with his hands raised high in the air. Harris stood in front of the appellee, while Bracey stood behind. With both hands and both arms raised high in the air, the appellee was looking at both officers looking at him. The appellee was at gunpoint, and the appellee had completely surrendered. All either officer had to do was put handcuffs on the appellee.

But with the appellee sitting passively on the ground during this 15 or 20 seconds the appellants waited until the dog rejoined them. As the appellee sat there terrified with the dog rearing up violently, another five or ten or perhaps more seconds passed then Harris let the dog go.

All the dog had to do was lunge and it was on the appellee. It latched on to the appellee's underarm and for a long time it wouldn't let go. It was the tender part of the underarm and it was extremely painful. It only let go long enough (split seconds) to catch its breath

and get a better grip. It was shaking its head viciously back and forth.

The appellants totally ignored the screams and pleas to stop coming from the appellee. The attack lasted for at least 30 seconds or more as both officers stood and watched. The puncture wound the appellee sustained was close to his heart...

On March 27, 1985, the United States decided the case of TENNESSEE V. GARNER, 471 U.S. 1, 105 S.Ct. 1694. In that case a father, whose unarmed son was shot by a police officer as son was fleeing from the burglary of a house, brought action under 42 U.S.C. 1983 against police officer, the department, and others.

The United States District Court for the Western District of TENNESSEE, after remand, rendered judgment for the defendants, and father appealed. The Sixth Circuit, however, reversed and remanded. Certiorari was granted.

In the U.S. Supreme Court, Justice White held that: (1) apprehension by deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement; (2) deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others; (3) Tennessee statute under of which police officer fired fatal shot was, unconstitutional insofar as it authorized deadly force against an apparently unarmed, non-dangerous fleeing suspect; and (4) the fact that unarmed suspect had broken into dwelling did not mean that he was dangerous.

As was the case of Garner, the appellee was an unarmed, non-dangerous suspect, and "... nothing in Garner limits its application solely to force of a deadly nather; Rather, the principles enunciated therein logically extend to any seizure excessive in terms of the degree of force used..." Garner vs. Conner, 1988 WL 1025786, p. 6, para. 8. The analysis, however, doesn't end there.

On October 6, 1986, the United States Court of Appeals for the Sixth Circuit, the Honorable J. Gilmore sitting by designation, decided the case of Carter v. City of Chattanooga, 803 F.2d 217. In that case, the mother of a man shot by police officer during an attempt to escape from the scene of a daytime burglary brought action claiming her son's Fourth Amendment rights had been violated.

The United States District Court for the Eastern District of Tennessee entered judgment for the city and the plaintiff appealed. The Court of Appeals held that evidence established that police officer shot suspect because police officer caught suspect in burglary, so that the use of deadly force to stop suspect violated Fourth Amendment.

But during the trial in this matter, the verdict of the jury was wrongfully for the city, and the appellant thusly raised three issues on appeal. She first contended that the trial court should have granted a motion for summary judgment on the issue of liability, allowing the jury to decide only the issue of damages. She next contended that the district court erred in denying her motion for judgment not withstanding the verdict based on the evidence put before the jury. And she finally contended that she should be granted a new trial on the basis that the jury's verdict was against the weight of the evidence. The

defendant cross-appealed on the issue of retro-activity regarding Garner, but the plaintiff in this case ultimately prevailed.

As the court reasoned, "where a suspect poses no immediate threat to the officers and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." "A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." Garner, Id.

The books are swamped with cases of police brutality and use of excessive force. There exists so many examples of the unconstitutional use of excessive force by police officers that they are too numerous to list in one volume of books let alone trying to list in this one pleading. But it happens, as it did in this case, and when it is brought to light of course the police will try to cover it up...

The next inquiry is whether the right to protection against the use of excessive force was clearly established at the time. "To determine whether a constitutional right was clearly established we must look first to decisions of the Supreme Court, then to the Sixth Circuit Court of Appeals, and finally to decisions in other circuits." Braun v. Lewis, 779 F.3d 401,

418-19 (6th Cir. 2015). A right is "clearly established" if its contours are "sufficiently clear that a reasonable officer would understand that what he is doing violates that right." Harris v. City of Circleville, 583 F.3d 356, 366-67 (6th Cir. 2009).

The right to be free from the excessive use of force in the context of police canine units was clearly established by 2012, when in Campbell the Court held that officers who used an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing, acted contrary to clearly established law. Campbell, 700 F.3d at 789. The right to intervention to prevent the use of excessive force was also established. See: Turner, 119 F.3d at 429.

A final issue the appellee raises is this piecemeal litigation, or what the appellee believes is an abuse of the interlocutory process. What if there were 10 defendants? Would the appellants be allowed to have 10 separate appeals? If not, then the same principle should apply to this second interlocutory appeal.

To the best of the appellee's understanding, res judicata generally means you cannot bring a claim if there has already been a judgment on the merits of the same action by a court of competent jurisdiction. The U.S. District Court for the Middle District of Tennessee, as well as this

Court are Courts of competent jurisdiction.

Collateral estoppel is the principle that a party cannot relitigate particular factual or legal issues which were litigated or decided in a prior decision. In other words, collateral estoppel serves to bar relitigating factual or legal issues that arose from the same occurrence. The appellee submits that summary judgment under the claim of qualified immunity is barred by the doctrines of res judicata and/or collateral estoppel.

The point the appellee wishes to aver is that the doctrines of res judicata and/or collateral estoppel bars relief for the appellants because there has already been a judgment on the merits of the same action by a court of competent jurisdiction. In addition, neither Harris nor Bracey should be allowed to relitigate the same factual or legal issues which have already been decided in a prior decision.

When the motion to dismiss was filed on January 24, 2015, Bracey asserted his right to do so. Harris chose, instead, not to do so. Harris' decision not to pursue qualified immunity or that he did not violate clearly established right of the appellee was a tactical decision, and the doctrines of res judicata and/or collateral estoppel now bars relitigating the same issues again.

Additionally, when Bracey filed his motion to dismiss he raised the same exact factual and legal issues that were previously rejected by the district court as well as by the Sixth Circuit Court of Appeals. Thusly, the doctrines of res judicata and/or collateral estoppel bar relief because there has already been a judgment on the merits of the same action by not one, but two Courts of competent jurisdiction. . .

In concluding, the appellee would like to bring the Court's attention to the holdings enunciated in Smith v. Kim, 70 Fed. Appx. 818:

"The Court has established that summary judgment is inappropriate where there are contentious factual disputes over the reasonableness over the use of . . . force."

"Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability."

The appellee understands that summary judgment based on qualified immunity is immediately appealable, but the germane facts are in dispute, as evidenced by the testimony of the appellee compared to the pleadings contained in the Record. To find the facts undisputed is to credit all inferences in the light most favorable to the appellants.

Conclusion

Perhaps the appellee does not posses the eloquence or the proper communication skill to express himself coherently enough before the Court, or perhaps counsel for the appellants has managed to paint such a twisted version that she has managed to distort the actual truth, but the appellee would like the Court to know that this was not a K9 apprehension. In the cover of the basement, the dog was used to commit a crime.

Harris stood directly in front of the appellee, while Bracey stood behind; while they both waited on the dog to rejoin them. Harris could see the appellee clearly. That is why the appellants were able to come straight, directly to the appellee when they jumped into the basement. The appellee was praying at the time.

The appellee had on multiple layers of clothing, including 2 or 3 t-shirts, several shirts, and 3 or 4 thick sweaters, and a Predators jersey. That's because it was freezing cold outside. The temperature was at or below freezing. The temperature that night had plunged to near zero, or rather the night before the attack.

When Harris finally stepped in and removed the dog, the appellee caught a quick glimpse. The dog's teeth, its gums and its snout was thick with the appellee's blood, even through the thick clothing.

After the attack there were no bites on the appellee's legs or arms or anywhere else on the appellee's body. The only bites the appellee received was under the pit of his arm. That's because the appellee had his arms high in the air when Harris released the dog. He gave no prior warning beforehand.

When the attack was finished Bracey did not step in and place the cuffs on the appellee. The appellee was so traumatized that they had to carry the appellee over to the window where they pushed him through to the arms of waiting officers. The handcuffs were placed on the appellee while the appellee was on the ground outside. There was snow and ice on the ground. Later, both appellants filed a false police report.

For over 4 years now the appellee has sought justice fighting this case. It has been extremely difficult because the appellee has been housed at the Trousdale prison, where he has had to undergo more than a dozen lockdowns. As of the filing

of this appeal, the facility has been on lockdown for 12 straight days. While on lockdown the appellee has been confined to his bunk. The appellee has not had access to the library.

The appellee is a homeless man - a felon convicted of crime. But throughout the course of these entire proceedings the appellee has been forthright and honest. Harris and Bracey on the other hand are commissioned police officers, sworn to uphold the law. But throughout the course of these proceedings they have lied continuously. They are dishonest and corrupt.

Bracey is not entitled to summary judgment based on qualified immunity, nor is Harris entitled to summary judgment based on qualified immunity. Genuine issues of disputed facts remain.

The appellants will continue to lie as long as they are given a platform to do so. If they were truly honest and decent men, they would tell the truth and move on.

That is why the appellee moves the Court to reject there fabrications. The appellee moves the Court to allow a trial as the Honorable Rosenberg has so ordered.

Respectfully submitted,

Mr. Alexander L. Baxter, pro se.

* Special Notice

The appellee asks the Court to forgive his sometimes sloppy handwriting.

Certificate of Service

I, Alexander L. Baxter, do hereby certify that a true and exact copy of the foregoing has been placed in the prison mailbox, with United States Postage attached, and forwarded to:

Melissa Roberge & Keli Oliver,
Assistant Metropolitan Attorneys
108 Metropolitan Courthouse
P.O. Box 196300
Nashville, Tennessee 37219-6300

Blessed are they which do hunger and thirst after righteousness, for they shall be filled... Matthew 5:6

Harris Stood Here

Bracey Stood Here

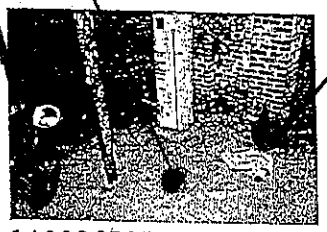
Police Central Evidence Process - Contact Sheet

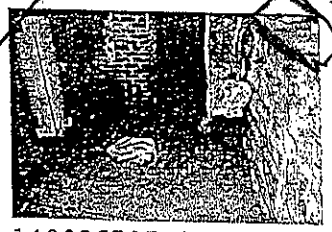
Officer:	839056:	Case Report #:
CHRISTINE OLSON	839056	140026705

Date: 01/10/2014 Time: 07:18 File(s) path: I:\Crime2014\Wpatrol\1400267

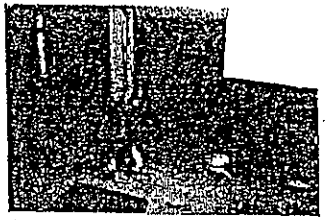
Appellee Sat Here

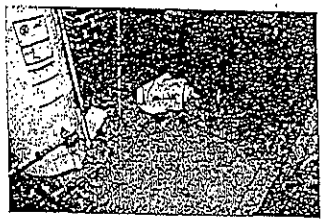
- Window up Here

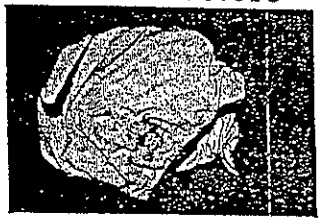

140026705-142.JPG

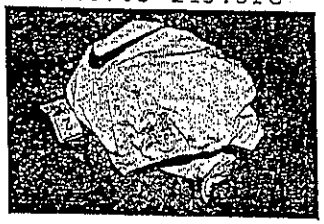

140026705-143.JPG

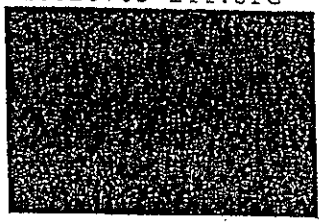

140026705-144.JPG


140026705-145.JPG


140026705-146.JPG

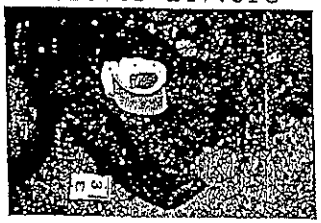

140026705-147.JPG

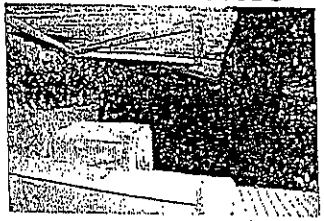

140026705-148.JPG

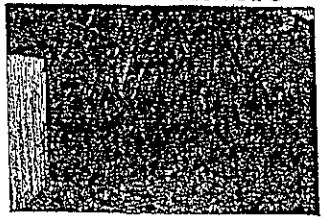

140026705-149.JPG

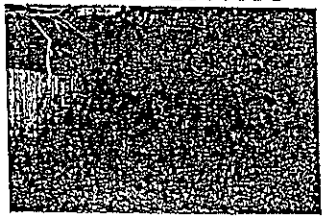

140026705-150.JPG

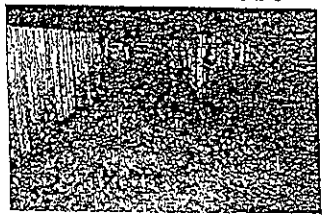

140026705-151.JPG

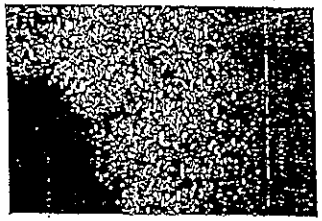

140026705-152.JPG

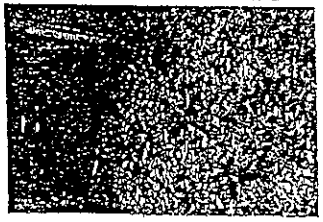

140026705-153.JPG

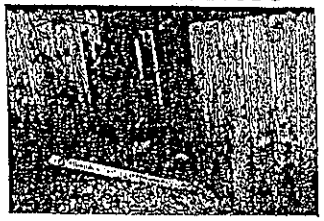

140026705-154.JPG

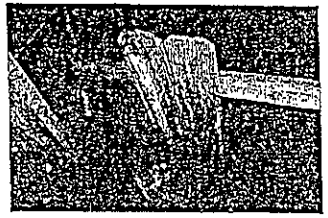

140026705-155.JPG

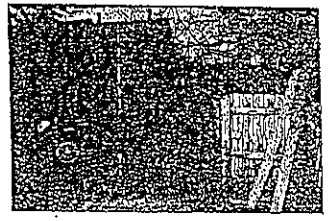

140026705-156.JPG


140026705-157.JPG


140026705-158.JPG


140026705-159.JPG


140026705-160.JPG


140026705-161.JPG

Sign Here _____

*This picture was taken 2 days later.

140 Macon Way
Hartsville, TN 37074

United States Court of Appeals
100 East fifth Street, Room 540
Potter Stewart Courthouse
Cincinnati, Ohio
45202-3988

18-5102

of this appeal, the facility has been on lockdown for 12 straight days. While on lockdown the appellee has been confined to his bunk. The appellee has not had access to the library.

The appellee is a homeless man - a felon convicted of crime. But throughout the course of these entire proceedings the appellee has been forthright and honest. Harris and Bracey on the other hand are commissioned police officers, sworn to uphold the law. But throughout the course of these proceedings they have lied continuously. They are dishonest and corrupt.

Bracey is not entitled to summary judgment based on qualified immunity, nor is Harris entitled to summary judgment based on qualified immunity. Genuine issues of disputed facts remain.

The appellants will continue to lie as long as they are given a platform to do so. If they were truly honest and decent men, they would tell the truth and move on.

That is why the appellee moves the Court to reject there fabrications. The appellee moves the Court to allow a trial as the Honorable Rosenberg has so Ordered.

Respectfully submitted,

Mr. Alexander L. Baxter, pro se.

No. 18-5102

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEXANDER L. BAXTER

Plaintiff-Appellee

v.

BRAD BRACEY; SPENCER R. HARRIS

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY BRIEF OF APPELLANTS OFFICER SPENCER HARRIS AND OFFICER BRAD BRACEY

DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, DIRECTOR OF LAW

KELI J. OLIVER
MELISSA ROBERGE
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

ARGUMENT

I. OFFICER SPENCER HARRIS AND OFFICER BRAD BRACEY ARE ENTITLED TO QUALIFIED IMMUNITY.

A. It is Not Clearly Established that Using a Well-Trained Canine to Subdue an Aggravated Burglary Suspect Who Acted Irrationally and Continually Refused to Surrender Violates the Fourth Amendment.

Baxter devotes his brief to the actions of Officer Harris, relying almost exclusively on *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Campbell v. City of Springboro, Ohio*, 700 F.3d 779 (6th Cir. 2012). *Garner* is the foundational case that requires the use of deadly force be objectively reasonable under the circumstances. *Garner*, 471 U.S. 1. But, "when a properly trained police dog is used in an appropriate manner to apprehend a felony suspect, the use of the dog does not constitute deadly force. *Robinette v. Barnes*, 854 F.2d 909, 913 (6th Cir. 1988). Here, the use of Iwo—who bit Baxter one time—is not deadly force.

Nothing in the record could support departing from the general rule in *Robinette* that the use of Iwo was not an instrument of deadly force. There is no evidence that Officer Harris intended to use Iwo in that manner or the Iwo severely lacked training. *Id*. at 913. *Garner*, adds little, if anything, to the determination of if Officer Harris is entitled to qualified immunity because it addresses the circumstances that justify deadly force, which Officer Harris did not use. And, it merely sets forth at the highest levels of generality the framework for evaluating

the use of force. To deny qualified immunity, Baxter must point to a case, or a robust line of precedent, that places the constitutional question beyond debate.

Similarly, *Campbell v. City of Springboro, Ohio,* 700 F.3d 779 (6th Cir. 2012) sets forth the broad parameters of determining if the use of a canine is reasonable. Central to this Court's determination that the officer in *Campbell* used excessive force was that the canine acted contrary to his training, that his training had not been maintained and that the canine had issues with excessive biting. *Id*. at 787. Additionally, in distinguishing *Robinette* and *Matthews v. Jones,* 35 F.3d 1048 (6th Cir. 1994), both of which approved of the use of a canine, this Court summarized the circumstances of those cases stating:

> [T]he suspects were potentially dangerous based upon the crimes they committed and their irrational behavior. Further, the spaces in which the suspects were located—an unlit building and a dark heavily wooded area—made police vulnerable to ambush. The court also found that the police dogs in these cases were properly trained and that the officers gave the suspects several warnings prior to allowing the dogs to engage the suspect.

Campbell, 700 F.3d at 789.

The underlying facts of this case align with the circumstances summarized above in *Robinette* and *Matthews*, not those present in *Campbell*. Baxter boldly committed aggravated burglary, fled the police and refused to surrender despite being given multiple opportunities to do so. Both Officer Harris and Officer Bracey warned Baxter that a canine would be used if he did not surrender his

defensive position in an un-lit basement. Finally, in direct contrast to the canine in *Campbell*, Officer Harris had conducted extensive training with Iwo, who received satisfactory marks, and there is no evidence that he had a history of excessive biting.

The general right established in *Campbell* to be free from the excessive use of force in the context of police canine units cannot clearly establish that Officer Harris's actions violated the Fourth Amendment when the underlying circumstances are readily distinguishable. The Supreme Court has warned the Federal Courts to avoid extrapolating broad constitutional rights from prior precedents particularly in the Fourth Amendment context because "use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific **facts** at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)(citations omitted)(emphasis added). This Court should reverse the District Court and grant Officer Harris qualified immunity because the existing precedent does not squarely govern the facts of this case.

B. By Failing to Address the Actions of Officer Bracey, Baxter Has Waived Any Arguments to the Contrary. As Set Forth in The Officers' Principal Brief, Officer Bracey is Entitled to Qualified Immunity.

Baxter has waived any opposition to Officer Bracey being granted qualified immunity. *See Thaddeus–X v. Blatter*, 175 F.3d 378, 403 n. 18 (6th Cir.1999);

Enertech Elec., Inc. v. Mahoning County Comm'rs, 85 F.3d 257, 259 (6th Cir.1996) (concerning waiver by failure to brief). While pro see briefs are construed liberally, a pro see party must still brief the issues advanced "with some effort at developed argumentation." *Wright v. Knox Cty. Bd. of Educ.,* 23 F. App'x 519, 520 (6th Cir. 2001) citing *United States v. Reed,* 167 F.3d 984, 993 (6th Cir. 1999).

Here, Baxter has made no effort to develop his arguments pertaining to Officer Bracey. Throughout his brief, Baxter concentrates on the actions of Officer Harris and focuses his argument there. Baxter does not make any argument about Officer Bracey's opportunity to intervene when Officer Harris released Iwo. He does not dispute the Officer Harris did not give any indication he was going to release Iwo, or that Officer Bracey lacked any knowledge that Iwo would be released. (Baxter Dep., PageID# 478-480, RE 99-1). Moreover, he presents no argument that the attack lasted for such a lengthy duration that Officer Bracey could have interceded. Indeed, the Nashville General Medical records prove there was a single dog bite. (Nashville General Records, PageID# 519–524, RE 99-3). Thus, once Iwo was released and bit Baxter there was no additional force that Officer Bracey could have prevented.

Moreover, Baxter offers no rebuttal to Officer Bracey's analysis that the law surrounding intervention in a canine apprehension was clearly established. As set

forth in the Officers' principal brief, Officer Bracey is entitled to qualified immunity because there are no cases from the Supreme Court, this Court, or the district courts that establish the parameters when an officer must intervene when a canine officer releases his canine that only responds to his commands. Accordingly, because Baxter has put forth no substantive arguments concerning Officer Bracey's conduct, he has waived any opportunity to do so. Officer Bracey is entitled to qualified immunity and the district court should be reversed.

II. THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA ARE NOT APPLICABLE BECAUSE THIS COURT'S DECISION ON THE MOTION TO DISMISS WAS NOT A FINAL JUDGMENT.

Baxter attempts to bind the Officers' to this Court's decision on the Motion to Dismiss by invoking the doctrines of collateral estoppel and res judicata. To establish collateral estoppel, it must be shown that: (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding; (2) the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issues in the prior proceeding. *See United States v. Cinemark USA, Inc.*, 348 F.3d 569, 582 (6th Cir. 2003); *Aircraft Braking Systems Corp. v. Local 856, UAW*, 97 F.3d 155, 161 (6th Cir. 1996).

Here, Baxter cannot satisfy the third element because this litigation is on-going. Accordingly, the prior proceeding has not resulted in a final judgment on the merits. With regard to Officer Harris, he did not have a full and fair opportunity to litigate his qualified immunity at the motion to dismiss stage because he did not challenge the sufficiency of the complaint. Simply put, the doctrine of collateral estoppel does not defeat the Officers' entitlement to summary judgment. Moreover, as this Court has previously recognized, the holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery. *McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000). The parties have supplemented the allegations in the complaint with discovery[1] and the Court's rulings on the Motion to Dismiss are not controlling. As set forth in the Officers principal brief and in Section I above, the Officers are entitled to qualified

[1] Baxter alludes to the idea that the Officers should be denied summary judgment to permit Baxter to engage in discovery. For support, he cites two out of circuit cases, *Ingle v. Yelton*, 439 F.3d 191, 196 (4th Cir.) and *Castlow v. U.S.*, 552 F.2d 560 (3d. Cir. 1977), both of which relied on Fed. R. Civ. P. 56(f) to argue summary judgment should be denied because the moving party—the Officers—have possession of pictures supposedly taken at the Davidson County Sheriff's Office of his wounds. The Officers work for MNPD, not the Davidson County Sheriff's Office and do not have possession of the pictures, to the extent they even exist. Moreover, Baxter seems to assume, without any foundation, that the Nashville General records that document a single dog bite will be contradicted by these pictures. There is no proof for such an assumption and Baxter's continued requests for discovery do not preclude this Court from reaching the merits of the Officers appeal.

immunity because the undisputed material facts do not establish that a violation of a clearly established right occurred.

III. THIS COURT HAS JURISDICTION OVER THE APPEAL.

This Court has jurisdiction to consider Officers Brad Bracey's and Spencer Harris's interlocutory appeal because it presents pure issues of law. Both Officer Harris and Officer Bracey assert that based on the undisputed facts their actions did not constitute a violation of clearly established law.

Nonetheless, Baxter attempts to prohibit Officers Harris and Officer Spencer from willingly conceding Baxter's version of the facts by pointing to Officer Bracey's declaration filed in support of his response to Baxter's Motion for Summary Judgment. (Baxter Appellee Brief, filing pg. 13) to create a genuine dispute of fact. *See Moldowan v. City of Warren*, 578 F.3d 351, 370 (6th Cir. 2009)(if the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal). In Officer Bracey's declaration he professes that he was not even in the basement when Iwo apprehended Baxter. (Brad Bracey Declaration, PageID# 316-317, RE 81-1).

Although they dispute Baxter's version of the story, for purposes of their summary judgment motion and this appeal, Officer Harris and Officer Bracey are entitled to willingly concede the facts as put forth by Baxter and request this Court

to find, as a matter of law based on the undisputed facts that they did not violate any clearly established rights of Baxter. Baxter cannot thwart this Court's jurisdiction and survive summary judgment by disavowing his own account of what happened.

Thus, to be clear, for purposes of this appeal, Officers Harris and Bracey concede[2]:

- Both Officers entered the basement prior to Baxter being apprehended by Iwo. (Baxter Dep., PageID# 473, RE 99-1)
- Both Officers came around the water heater with Officer Harris taking a position in front of Baxter and Officer Bracey behind Baxter. *Id*. at PageID# 474-476.
- Iwo came up to Officer Harris[3], who grabbed his chain while he reared up at Baxter. *Id*. at PageID# 477.

[2] Officers Bracey and Harris are only listing the facts that occurred in the basement. While Baxter's commission of aggravated burglary, continued irrational flight from an overwhelming show of force from MNPD, and the warnings given by Officer Bracey and Harris frame the decision to deploy Iwo once Officer Harris confronted Baxter, Baxter does not contest, or even mention, those circumstances. Similarly, Baxter does not dispute that Iwo was a well-trained police dog that will only respond to his handler.

[3] For the first time, Baxter asserts that 15-20 seconds elapsed between when Officer Harris confronted him and Iwo joined him. (Appellee Brief, filing pg. 21). In his response to the Motion for Summary Judgment Baxter never put forth this alleged fact. (Response to Summary Judgment, PageID# 574-596, RE 102). In his deposition, Baxter testified "it all happened so fast. The dog ran, came this way to this officer right here." (Baxter Depo, PageID# 477, RE 99-1). A party may not by-pass the fact-finding process of the lower court and introduce new facts in its brief on appeal. *Sovereign News Co*. *v*. *United States*, 690 F.2d 569, 571 (6th Cir. 1982).

- "It couldn't have been five or ten seconds" between when Officer Harris had Iwo by the collar and when Iwo was released. *Id*. at PageID# 479.

- In that five or ten second period, Officer Harris kept saying "show me your hands." *Id*. at PageID# 478.

- During that five or second period, Baxter was sitting on the basement floor. *Id*. at PageID# 478.

- Officer Harris did not give any warning that he was going to release Iwo. *Id*. at PageID# 478.

- Baxter's medical records reflect that he only received a single puncture wound. (Nashville General Records, PageID 519 – 524, RE 99-3).

Officer Bracey and Officer Harris have simply done what precedent permits them to do—willingly "concede an interpretation of the relevant facts in the light most favorable to the plaintiff's case, and…argue that, even on those facts, he or she is entitled to qualified immunity." *See Harrison v. Ash*, 539 F.3d 510, 517 (6th Cir. 2008) (quoting *Berryman v. Reiger*, 150 F.3d 561, 562 (6th Cir. 1998)).

Moreover, although the District Court referenced disputed facts, it is important to note that a lower court characterizing its denial of a defendant's dispositive motion as premised on the existence of disputed factual issues does not necessarily preclude this Court's jurisdiction over a defendant's appeal. *See Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 402-03 (6th Cir. 2007); *Estate of Carter v. City of Detroit*, 408 F.3d 305, 309 (6th Cir.2005). In other words, this

Court is not compelled to conclude that it lacks jurisdiction simply because the district court or the parties may say so.

As this Court has recognized, "regardless of the district court's reasons for denying qualified immunity, [this Court] may exercise jurisdiction over the [defendant's] appeal to the extent it raises questions of law." *Williams v. Mehra*, 186 F.3d 685, 689-90 (6th Cir. 1999) (*en banc*)(citations omitted); *see also Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997). And even if the defendant disputes a plaintiff's version of the facts, this Court will maintain jurisdiction over an appeal if the defendant nonetheless concedes to the most favorable view of the facts to the plaintiff for purposes of the appeal. *Moldowan*, 578 F.3d at 370.

For purposes of the appeal the Officers adopted Baxter's testimony about what occurred in the basement and rely on the unbiased medical records to establish both the number of bites and the severity of the injury. Baxter maintains Iwo bit him multiple times under his left arm pit with the teeth piercing the skin each time. (Baxter Depo., PageID# 479, 482, RE 99-1). In the summary judgment context, "appeals courts should not accept 'visible fiction' that is so utterly discredited by the record that no reasonable jury could have believed' it. *Coble v. City of White House, Tenn.*, 634 F.3d 865, 868 (6th Cir. 2011)(citations omitted).

The medical records blatantly contradict Baxter's account and only document one puncture wound. For purposes of determining this appeal, when

evaluating the force used the Court does not need to credit Baxter's "visible fiction" that Iwo bit him multiple times; rather, the Court should credit the independent medical records that reflect a single bite. *See, e.g., White v. Georgia,* 380 F. App'x 796, 798 (11th Cir.2010) (refusing to credit the plaintiff's testimony that she was shot where the medical records conclusively established that her injuries were not caused by a gunshot); *Cooper v. City of Rockford,* No. 06–C–50124, 2010 WL 3034181, at *2 n. 3 (N.D.Ill. Aug. 3, 2010) (refusing to credit a witness statement that the victim was running away when he was shot because the autopsy report was clear that the bullet entered the victim from the front).

The Officers have conceded to Baxter's versions of events, as they are permitted to do, and submit that based on the facts most favorable to Baxter they are entitled to qualified immunity. Baxter cannot defeat this Court's jurisdiction, or the qualified immunity defense by relying on statements in the record that contradict his own version of events, and by disputing unbiased independent medical records. This Court has jurisdiction over the appeal and the Officers are entitled to qualified immunity because there is no genuine dispute of fact, and under the facts as testified to by Baxter the Officers did not violate any clearly established right.

CONCLUSION

This Court should reverse the District Court's denial of Officer Harris and Officer Bracey's motion for summary judgment and should grant them qualified immunity. Based on the facts as alleged by Baxter, the use of Iwo did not constitute excessive force and there is no clearly established law that put Officer Harris on notice that his conduct violated the Fourth Amendment. With regard to Officer Bracey, Baxter did not develop any substantive argument that he is not entitled to qualified immunity and thus have waived the opportunity to do so. Accordingly, Officers Harris and Bracey request that this Court reverse the District Court and grant them qualified immunity. Alternatively, the Court should remand the case back to the District Court so that it may consider the clearly established prong of the qualified immunity analysis.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER
DIRECTOR OF LAW

/s/Melissa Roberge
Keli J. Oliver (#21023)
Melissa Roberge (#26230)
108 Metropolitan Courthouse
P.O. Box 196300
Nashville, Tennessee 37219
(615)862-6341

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation prescribed in F. R. App. P. 32(a)(7)(B). It was prepared using Times New Roman 14-point type, and it contains 2,947 words.

/s/Melissa Roberge
Melissa Roberge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via U.S. First Class Mail to the following:

Alexander L. Baxter
#145056
R.M.S.I.
7475 Cockrill Bend Industrial Blvd.
Nashville, TN 37209

Alexander L. Baxter
#145056
Trousdale Turner Correctional Complex
140 Macon Way
Hartsville, TN 37074

on this 30th day of April, 2018.

/s/Melissa Roberge
Melissa Roberge

.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: November 08, 2018

Mr. Alexander L. Baxter
Safehouse
525 40th Avenue, N.
Nashville, TN 37209

Ms. Keli J. Oliver
Ms. Melissa Roberge
Metropolitan Department of Law
P.O. Box 196300
Nashville, TN 37219

Re: Case No. 18-5102*, Alexander Baxter v. Brad Bracey, et al*
Originating Case No. : 3:15-cv-00019

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Keith Throckmorton

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 18a0566n.06

Case No. 18-5102

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 08, 2018
DEBORAH S. HUNT, Clerk

ALEXANDER L. BAXTER,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE MIDDLE DISTRICT OF
BRAD BRACEY; SPENCER R. HARRIS,	)	TENNESSEE
	)	
Defendants-Appellants.	)	**OPINION**

BEFORE: THAPAR, BUSH, and NALBANDIAN, Circuit Judges.

NALBANDIAN, Circuit Judge.

A neighbor caught Alexander Baxter burglarizing a house and called the police. Soon Baxter heard sirens and saw a helicopter looking for him, so he ran to another house (one he had broken into before) and hid in the basement. But the canine unit arrived and quickly sniffed him out. After giving several warnings, one of the officers released his dog, who apprehended Baxter with a bite to the arm. Baxter says he had already surrendered when the dog was released, and so the two officers violated his constitutional right to be free from excessive force. The case is before us now on an interlocutory appeal after the district court denied the officers' claims of qualified immunity. We reverse that decision because the officers' conduct, whether constitutional, did not violate any clearly established right.

I.

Officers Spencer Harris and Brad Bracey arrested Alexander Baxter on January 8, 2014 after he committed an aggravated burglary and fled the scene. A neighbor caught Baxter breaking into a home and called the police. He fled once he heard sirens and saw the helicopter—first hiding in a car, and then seeking refuge in the basement of a house he had previously broken into. There, Baxter hid between a chimney and a water heater while he watched and listened to the officers outside.

Harris and Bracey were part of Nashville's canine unit, which is deployed for serious crimes such as aggravated burglary. The two of them entered the house with their dog, Iwo. Bracey announced they would release the canine if Baxter did not surrender. Although Baxter heard the warnings, he stayed quiet. Harris—the dog's handler—repeated the warning. Again, Baxter remained quiet. So Harris released Iwo, who quickly found Baxter downstairs.

The two officers followed Iwo into the basement and—according to Baxter—surrounded him. Baxter claims that he raised his hands in the air when they came downstairs. But he never responded to the officers' warnings or communicated about where he was hiding. Within five to ten seconds of discovering Baxter, Harris again released Iwo—this time to apprehend him. Iwo restrained Baxter with a bite to the arm. The medical records reveal only one bite on Baxter's underarm, revealing that Iwo followed his training by apprehending Baxter with a single bite. Harris eventually commanded Iwo to release Baxter and placed him under arrest.

Baxter, proceeding pro se, sued Harris and Bracey under 42 U.S.C. § 1983. He asserts an excessive-force claim against Harris and a failure-to-intervene claim against Bracey. Originally, Bracey alone moved to dismiss the suit against him, arguing that qualified immunity shielded him from Baxter's somewhat amorphous claim that he failed to prevent the canine apprehension.

Baxter's complaint, we held, pleaded sufficient facts to withstand a motion to dismiss. But those facts must bear out during discovery for Baxter to defeat a motion for summary judgment. And that is where we are today.

After discovery, both officers moved for summary judgment, and the district court rejected both claims. The district court held that summary judgment was inappropriate because Baxter's testimony corroborated the factual assertions in the complaint that this court previously upheld against a motion to dismiss. If those facts were enough to defeat qualified immunity in a complaint, the court reasoned, Baxter's supporting testimony should do the same. Harris and Bracey then filed this interlocutory appeal. *See Plumhoff v. Rickard*, 572 U.S. 765, 771–72 (2014).

II.

Our inquiry here is guided by the interlocutory posture of the case. Because the district court denied summary judgment to the defendants, we must determine whether "the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a *prima facie* violation of clear constitutional law." *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998). We will not weigh into credibility issues or try to resolve factual disputes. *See Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005). Our task is much simpler. We must decide the "neat abstract issue[] of law" regarding whether Baxter's version of the facts amounts to a clear constitutional violation. *See Berryman*, 150 F.3d at 563 (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)).

The clarity of the constitutional violation is critical. An individual suing under § 1983 must demonstrate two things: First, that the officer violated his constitutional rights. And second, that the violation was "clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). The "clearly established" prong sets up an exacting

standard in which the plaintiff must show that "every reasonable official would understand that what he is doing is unlawful." *Id.* (internal citations and quotations omitted). "It is not enough that the rule is *suggested* by then-existing precedent"—it must be "beyond debate" and "settled law." *Id.* at 589–90 (emphasis added) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)). The effect is that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Relevant here, courts can jump straight to the second question and dispose of a claim without deciding whether the officer's conduct violated the plaintiff's constitutional rights. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). So long as the alleged violation has not been clearly established, the officers receive qualified immunity and the suit can be dismissed. *See id.* Proceeding in this way is often appropriate in "cases in which the briefing of constitutional questions is woefully inadequate." *See Pearson v. Callahan*, 555 U.S. 223, 239 (2009). By resolving the issue on only the second prong, courts avoid "expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case." *Ashcroft*, 563 U.S. at 735 (internal quotations and citations omitted).

That is the case here. The officers are entitled to qualified immunity because Harris's use of the canine to apprehend Baxter did not violate clearly established law. And because this court does not have the benefit of sophisticated adversarial briefing from both parties, we decline to resolve the more complex constitutional question raised by Baxter's claim. *See Pearson*, 555 U.S. at 239.

The Fourth Amendment's prohibition against unreasonable seizures protects individuals from an officer's use of excessive force while making an arrest. *See Graham v. Connor*, 490 U.S.

386, 394–95 (1989). Whether the force was excessive turns on its objective reasonableness under the totality of the circumstances. *Id.* at 395–96; *Kostrzewa v. City of Troy*, 247 F.3d 633, 639 (6th Cir. 2001). And the reasonableness of the officer's force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

We have demarcated the outer bounds of excessive-force cases involving canine seizures with some degree of clarity. In this circuit, for example, we have held that officers cannot "use[] an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing." *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2013). But just as clearly, we have upheld the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location. *See Robinette v. Barnes*, 854 F.2d 909, 913–14 (6th Cir. 1988). These cases and their progeny establish guidance on the ends of the spectrum, but the middle ground between the two proves much hazier.

Baxter's case looks closer to *Robinette* than *Campbell*—but the fit is not perfect. Like the suspect in *Robinette*, Baxter fled the police after committing a serious crime and hid in an unfamiliar location. He also ignored multiple warnings that a canine would be released, choosing to remain silent as he hid. And unlike *Campbell*, the canine here was properly trained with no apparent history of bad behavior. All of these facts would lead a reasonable officer to believe that the use of a canine to apprehend Baxter did not violate the Fourth Amendment. *See Graham*, 490 U.S. at 396; *Robinette*, 854 F.2d at 913–14.

Militating against those facts is Baxter's claim that he surrendered by raising his hands in the air before Harris released the dog. This conduct might show that he did not pose the kind of safety threat justifying a forceful arrest. *See, e.g., Ciminillo v. Streicher*, 434 F.3d 461, 467 (6th

Cir. 2006). But Baxter does not point us to any case law suggesting that raising his hands, on its own, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances. That's because even with Baxter's hands raised, Harris faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk—all factors the *Campbell* court identified as significant to determining whether the seizure was lawful. *See Campbell*, 700 F.3d at 788–89.

Given all of this, we cannot say that Harris violated any clearly established law in using Iwo to apprehend Baxter. Even if Baxter raised his hands, the other circumstances—undisputed in the record below—weigh against a finding that "every reasonable official would understand that what [Harris did] is unlawful." *Wesby*, 138 S. Ct. at 589 (internal quotations omitted). For that reason, Harris is entitled to qualified immunity.

We reach this decision mindful of the fact that, on appeal from the prior motion to dismiss, we held that Baxter's right to be free from excessive force was clearly established under *Campbell*. But there, we looked only at the facts as pleaded in the complaint. Baxter alleged that he surrendered before the arrest, and his complaint was understandably silent about whether Iwo had proper training or the time that elapsed before Harris released the dog. The facts revealed during discovery add much-needed color to this case—as they often do. We now know that Iwo was well-trained, that Harris released him within only a few seconds after entering the basement, and that Baxter fled the scene, hid in the basement, was warned twice, and still never communicated with the officers before being apprehended. All of these facts change the analysis and move the well-

pleaded claims to a place where we cannot say that "every reasonable official would understand that what he is doing is unlawful."[1] *Wesby*, 138 S. Ct. at 589 (internal quotation marks omitted).

Finally, it follows from there that Bracey receives the same protection of qualified immunity. Police officers "can be held liable for failure to protect a person from the use of excessive force." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). Such a claim requires proving that the officer "observed or had reason to know that excessive force would be or was being used" and "the officer had both the opportunity and the means to prevent the harm from occurring." *Id.* While there are numerous reasons to find that Baxter cannot prevail on this claim, the first is the most obvious: If it is not clearly established that Harris used excessive force in apprehending Baxter, it cannot be that Bracey observed or had reason to know that excessive force would be used.

III.

For the above-stated reasons, we **REVERSE** the district court's order denying summary judgment.

[1] It also bears mentioning that only Bracey filed the initial motion to dismiss. Harris, who is directly responsible for the canine apprehension, defends his conduct under qualified immunity for the first time.