**No. 17-4039**

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEAN KENDALL,
Plaintiff and Appellant,

v.

BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, AND SALT LAKE CITY CORPORATION,
Defendants and Appellees.

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On Appeal from the United States District Court
for the District of Utah No. 2:15-cv-00862-RJS
The Honorable Robert J. Shelby

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# APPELLANT'S PETITION FOR REHEARING EN BANC

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## STATEMENT OF REASONS FOR EN BANC REVIEW

### I.

The Panel Decision permits blanket, indiscriminate police searches of hundreds or perhaps thousands of homes and curtilages simply because they (1) are located within an area where a missing boy might have wandered during the time he was missing and (2) might have been accessible to the missing boy. That is unprecedented and counter to all prior applicable emergency-aid Fourth Amendment decisions of this Court, as well those of the United States Supreme Court and other Circuit Courts.

The unprecedented vague, *ad hoc* standard of "reasonableness" applied by the Panel Decision, which provides no guidance to anyone (and hence no rule of law), led to the judicial validation of the search of the curtilage of the home of Appellant Sean Kendall ("Kendall"), regardless of the uncontroverted facts that (1) no one had any cause to believe the missing boy was on the property to be searched and (2) no one had any reason to believe there was any connection between the missing boy and the curtilage that was searched by a police officer ("Olsen").

The Panel Decision (a copy of which is attached as Appendix "A") reaches that unparalleled conclusion by dangerously expanding the meaning of "place searched" for purposes of Fourth Amendment analysis. The Panel Decision uniquely, and erroneously, refers not to *each* home or curtilage where a person has

an expectation of privacy as the "place searched," but to an ever-expanding geographic *area* that includes *wherever* a child *may* have wandered during the time he was missing.

**The Panel Decision directly conflicts with *every* applicable decision of the United States Supreme Court and several prior decisions of this Court, as well as the decisions of other Circuit Courts of Appeal, regarding the "emergency aid" exception to the warrant requirement.**

Contrary to the Panel Decision in this matter, *all* of those cases require that, before engaging in *any* search of any particular home or curtilage on the basis of the "emergency aid" exception, police officers must have reasonable cause to believe (1) a person in need of aid, or evidence relating to the emergency, is *located on the particular property searched* and (2) that *each particular area searched* has some connection with the perceived emergency giving rise to the search.

Consideration by the full Court of this matter is necessary to secure and maintain uniformity of this Court's decisions, as well as conformity by this Court with the most basic, exceptionally important federal constitutional standards for police searches and seizures.

The Panel Decision, unique in United States judicial history, conflicts with the following decisions of the United States Supreme Court:

- *Kentucky v. King*, 563 U.S. 452, 460 (2011) ("Under the 'emergency aid' exception, . . . 'officers may enter a home without a warrant to render emergency

assistance to an injured *occupant* or to protect an *occupant* from imminent injury.'" (emphasis added) (citation omitted));

- *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) ("This 'emergency aid exception' . . . . requires only 'an objectively reasonable basis for believing' (quoting *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006)) that '*a person within [the house]* is in need of immediate aid.'" (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)) (alteration in original) (emphasis added)); and

- *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (for any lawful search, there must be "reasonable cause to believe that the specific 'thing' to be searched for . . . [is] located on the property to which entry is sought.").

The Panel Decision also directly conflicts with the following prior decisions of the United States Court of Appeals for the Tenth Circuit:

- *McInerney v. King*, 791 F.3d 1224, 1237–38 (10th Cir. 2015) (holding the law was well established that it is unlawful for an officer to enter a house without a warrant and without a reasonable belief that *someone in the house* was in immediate danger);

- *Dalcour v. City of Lakewood*, 492 Fed. App'x 924, 934 (10th Cir. 2012) (unpublished);

- *United States v. Martinez*, 643 F.3d 1292, 1298, 1299–1300 (10th Cir. 2011) (holding the emergency aid exception to the warrant requirement did not apply because "officers . . . had insufficient information to objectively support a reasonable belief that *someone inside the house* was in need of aid . . . .The sanctity of the home is too important to be violated by the *mere possibility that someone inside* is in need of aid. . . ."); and

- *United States v. Gambino-Zavala*, 539 F.3d 1221, 1225–26 (10th Cir. 2008) ("To satisfy [the "emergency-aid" test] . . . the government must show the officers reasonably believed a person *inside the home* was in immediate need of aid or protection . . . . [and] the government must show the officers '*confined the search to only those places inside the home where an emergency would reasonably be associated.*' " (emphasis added)).

The Panel Decision further conflicts with the uniform decisions of United States Courts of Appeal for other circuits.[1]

**II.**

The Panel Decision and the District Court's Opinion considered dispositive facts in the light most favorable to Appellees, ignoring compelling contrary evidence supporting Kendall's claims, in conflict with the controlling standards to be applied on a motion for summary judgment. *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014); *Rhoads v. Miller*, 352 Fed. App'x 289, 291–92 (10th Cir. 2009) (unpublished).

**KENDALL'S PETITION FOR REHEARING EN BANC**

Plaintiff-Appellant Sean Kendall ("Kendall") respectfully and vigorously petitions this Court for rehearing en banc of the *Opinion* (Doc. 01019957517) of March 13, 2018 (referenced herein as "Panel Decision"), affirming the District Court's summary judgment in favor of Defendants.

[1] *See, e.g., Hill v. Walsh*, 884 F.3d 16, 19 (1st Cir. 2018); *United States v. Tepiew*, 859 F.3d 452, 456–57 (7th Cir. 2017); *Mahrt v. Beard*, 849 F.3d 1164, 1172 (9th Cir. 2017); *United States v. Dabrezil*, 603 Fed. App'x 756, 759 (11th Cir. 2015) (unpublished); *United States v. Barclay*, 578 Fed. App'x 545, 548–49 (6th Cir. 2014) (unpublished); *United States v. Timmann*, 741 F.3d 1170, 1178 (11th Cir. 2013); *Huff v. City of Burbank*, 632 F.3d 539, 547 (9th Cir. 2011); and *Schreiber v. Moe*, 596 F.3d 323, 330 (6th Cir. 2010).

## BACKGROUND

A two- or three-year-old boy was thought by his parents and by police to be missing—although he was actually sleeping on the floor of the basement in his family's home.[2] Salt Lake City Police Department (SLCPD) officers responded to a call for a missing child and fanned out in different directions from the child's family home to look for him. Appellee Brett Olsen ("Olsen") and Gordon Worsencroft ("Worsencroft"), SLCPD officers, teamed up and worked their way to Kendall's home, approximately 1/8 miles from the boy's home.

Every officer who testified conceded (1) there was no reason to believe that the boy was *located* at Kendall's home or curtilage and (2) there was no reason to believe there was any *connection* between any part of Kendall's home or curtilage and the missing boy.[3] Yet, Olsen entered Kendall's enclosed backyard and engaged

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[2] Aplt. App. at 456:1–7, 20–22; 950; 969; 971; 1058–1060; 1071–74.

[3] Examples of abundant uncontroverted testimony about the absence of any reason to believe Kendall or his home had any connection to the boy or the circumstances of his supposed disappearance are as follows:

> Q: Other than the spatial proximity of the home and the yard, did you know of any connection whatsoever between that house or yard and the missing boy or the circumstances surrounding him being missing?
> A: Just the accessibility and proximity. That the only thing. I had no reason to believe that the occupants of this house were connected to them in any way.
>
> * * *
>
> Q: And was there any particular connection between the Kendall [property] and the missing boy or the circumstances surrounding him being missing, that were any different than any connections between

any of the homes from where you started all the way down to the Kendall home?
A: No. They were all about the same length out.

Olsen Depo., Aplt. App. at 995:4, 996:20.

Q: In fact, there was no connection whatsoever between Sean Kendall's home and the backyard and the perceived emergency, other than the fact that that home was located about an eighth of a mile from the Filmore home.
A: Correct.

Purvis Depo., Aplt. App. at 506:24–507:4.

Q: Did you have reason to believe that there was any connection or nexus between the Kendall residence or that yard in which Geist was shot and the missing – the supposedly missing boy?
A: No.
Q: So, to your knowledge, you and Officer Olsen were looking around that property for the same reason you were looking around any other properties?
A: Yes.
Q: Nothing in particular about that particular property?
A: No.
Q: . . . . There was nothing specific about the Kendall home or the backyard where Geist was shot and the belief that there was a missing boy?
A: No.
Q: No connection at all?
A: No connection.

Worsencroft Depo., Aplt. App. at 1082:9–1083:6.

Other officers knew that before they could search homes or enclosed yards without a warrant, based on exigent circumstances, they must have an objectively reasonable belief that there is a connection between the property to be searched and the emergency giving rise to the need for a search. Aplt. App. at 324:17–326:25; 343:17–24; 1068:16–1070:3; 1188:21–1189:18; 1192:6–15.

in a disastrous, unnecessary search, during which he killed Kendall's beloved Weimaraner dog, Geist, because Geist barked and ran toward Olsen.[4]

Olsen's only explanation for engaging in a warrantless search of the curtilage of Kendall's home was that the missing boy *might* have been able to wander to the Kendall home during the time he had been missing and he *might* have been able to access the backyard (which was disputed by Worsencroft[5]).[6]

> Q: So, in your view, any property that's accessible and within the range of what you think a three-year-old boy could walk to, given the elapsed time, is fair game for a search by a police officer?
>
> A: Provided he could get to it and it was very accessible, yes.

Aplt. App. at 375:4–9.

The Panel Decision affirming the District Court's Opinion authorizes what roughly amounts to an area- or regional-wide "general warrant" or "writ of assistance" from the colonial era (but without the warrant and without the writ), permitting warrantless searches of homes and curtilages (which are afforded the same constitutional protections as homes[7]) simply on the basis they *might* be

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[4] Aplt. App. 379:3–11; 382:15–19; 417:10–14; 472:4–20; 811:25–812:1; 365:22–24; 369:1–372:11; 394:9–10; 394:18–23; 445; 809:28–810:4; 811:2–7.
[5] Aplt. App. 472–4–20.
[6] Aplt. App. at 375:4–9. *See also* Aplt. App. at 361:9–24.
[7] "This area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.' " *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (citation omitted).

accessible to a missing boy and are located in whatever geographic area the boy *might* have wandered during the time he was missing.[8]

## ARGUMENT

### I. THE PANEL DECISION DIRECTLY CONFLICTS WITH THE UNIFORM REQUIREMENT THAT, FOR A SEARCH OF A HOME OR ITS CURTILAGE BASED ON THE EMERGENCY-AID EXCEPTION TO THE WARRANT REQUIREMENT, THERE MUST BE REASONABLE CAUSE TO BELIEVE THAT (1) A PERSON IN NEED OF AID IS LOCATED AT THE PLACE TO BE SEARCHED AND (2) THERE IS A NEXUS BETWEEN THE AREA SEARCHED AND THE PERCEIVED EMERGENCY.

The elaboration provided by this Court in *Gambino-Zavala* of the general two-prong test announced in *United States v. Najar*,[9] was ignored by the District Court and entirely misapplied by the Panel Decision. *Gambino-Zavala* articulates the controlling law regarding emergency-aid searches in homes as follows:

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[8] The Panel Decision states, without any authority, as follows:

> The manner and scope of the search and Olsen's entry into Kendall's backyard as part of it were also reasonable. The scope of the search was defined first by proximity, that is the area around his home that a child that age might have been able to walk in the hour he had been missing. It was then refined by searching locations in this area that might have been accessible to a wandering child.

Panel Decision at 6.

[9] This Court stated the initial, general test in *Najar*:

> [O]ur test is now two-fold, whether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable (a modification of our former third prong.) [sic]

*Najar*, 451 F.3d 710, 718 (10th Cir. 2006).

> To satisfy the first prong of the *Najar* test, the government must show the officers reasonably believed a person *inside the home* was in immediate need of aid or protection.
>
> * * *
>
> The government must also show that the manner and scope of the search was reasonable. *Najar*, 451 F.3d at 718. To satisfy this requirement the government must show the officers "*confined the search to only those places inside the home where an emergency would reasonably be associated.*" *Id*. at 720.

539 F.3d at 1226–26 (emphasis added).

Entirely ignoring the special constitutional protections for one's home,[10] the Panel Decision makes the critical analytical error of not defining the "place searched" as each particular home (in this instance, Kendall's home) that is searched. The Panel Decision failed to take into account the expectation of privacy of *each* resident or homeowner, which is, of course, the necessary starting point for Fourth Amendment analysis. *Katz v. United States*, 389 U.S. 347 (1967).[11] Rather, the Panel

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[10] "[O]ne's dwelling has generally been viewed as the area most resolutely protected by the Fourth Amendment." Wayne LeFave, *Search & Seizure: A Treatise on the Fourth Amendment* (2012) § 2.3 (citation omitted). *See also Payton v. New York*, 445 U.S. 573, 586 (1980); *United States v. Najar*, 451 F.3d at 717 ("That burden [of proving exigent circumstances justified a warrantless search] is especially heavy when the exception must justify the warrantless entry of a home.") *United States v. Martinez*, 643 F.3d at 1299–1300 ("*The sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid . . . .*") (emphasis added) (citation omitted)).

[11] > The [Fourth] Amendment protects persons against unreasonable searches of "their persons [and] houses" and thus indicates that the Fourth Amendment is a *personal right* that must be invoked by an individual.

*Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (emphasis added).

Decision—disregarding the injunction that exceptions to the warrant requirement for searches of homes are "few," "specifically established," and "well-delineated," *Mincey*, 437 U.S. at 390; *Katz*, 389 U.S. at 357; *Martinez*, 643 F.3d at 1299–1300—vastly *increased* the susceptibility of homes to searches, in part by erroneously describing the "place searched" as being the several block "area where officers had reason to believe the missing child might be found, an area that included Kendall's yard."[12]

Hence, according to the Panel Decision, Kendall's home or curtilage was not the "place searched" for purposes of determining whether there was reasonable cause to believe a person in need of aid was in the "place searched" or to believe that there was a nexus between the "place searched" and the emergency. According to the Panel Decision, the "place searched" was the entire area where the boy might have walked during the hour he was "missing." Hence, in question-begging fashion, the warrantless search of a home in that area meets the requirement that there be reasonable cause to believe someone in need of assistance is in the "place searched" because, by the Panel Decision's peculiar definition, the boy was reasonably believed to be in whatever area he may have wandered.

Even that approach of defining away the issue by asserting the fiction that a particular home searched is not a "place searched" for purposes of Fourth

[12] Panel Decision at 7.

Amendment analysis cannot meet the second requirement of this Court in *Gambino-Zavala* that police officers must "confine[ ] the search to only those places inside the home [or, according to the Panel Decision, the "place searched"] where an emergency would reasonably be associated." 539 F.3d at 1226. As has been demonstrated, there was no reasonable cause, nor *any* cause at all, to believe there was any association between Kendall's enclosed backyard and the missing boy.

The unprecedented standard and analysis in the Panel Decision will result in radically reduced protections for homes and for individual expectations of privacy under the Fourth Amendment and drastic increases in the power of government agents to undermine and invade the sanctity of the home. The analysis and standard adopted in the Panel Decision is not only contrary to previously established case law in the Tenth Circuit; it also severely diminishes essential individual freedoms and security, leaving everyone vulnerable to the very real possibility that, at any time, the disappearance of someone, somewhere, could lead to the invasion of "accessible" homes and curtilages by police officers for no reason other than that the missing person *could* have travelled to where the homes and curtilages are located.

The District Court's Opinion and the Panel Decision conflict with every other court decision considering the constitutionality of searches for missing persons, including missing children. In every such case, it has not been enough to justify a warrantless search to simply say that a home searched was within the much larger

area where the missing person may have traveled. Rather, the courts have uniformly required a showing of reasonable cause to believe the missing person (or relevant evidence relating to the missing person) was in the *particular* place searched, *never* defining the "place searched" as the entire geographic area where the missing person *might* have wandered.[13]

The standard and the analysis in the Panel Decision conflicts head-on with this Court's prior rulings regarding the emergency-aid exception to the warrant requirement, leaving in serious question the governing rule of law in circumstances that are likely to arise often in the future. The established rule of law regarding emergency-aid searches must be affirmed, which requires rehearing of this matter en banc.

[13] Courts have never found a warrantless search of a home for a missing child to be reasonable simply because the home searched was believed to be accessible and within the radius of where the child might have travelled since disappearing. *See, e.g., Hunsberger v. Wood*, 570 F.3d 546 (4th Cir. 2009) (warrantless search of homeowner's home for minor girl was justified because girl's car was parked in front of the home and stepfather said girl was not supposed to be at that home); *Spebar v. City of Hammond*, 2010 WL 295299, Civil Action No. 2:08-CV-83JVB (N.D. Ind. July 22, 2010); *State v. Yoder*, 935 P.2d 534 (Utah Ct. App. 1997); *People v. Lucero*, 750 P.2d 1342 (Cal. 1988) (there was justifiable basis to believe two young girls were in a house because it was directly across the street from the park where the girls had gone to play and, after a fire ignited in the house, firefighters saw a blood stain on the carpet); *People v. Swansey*, 379 N.E.2d 1279 (Ill. 1st Dist. 1978).

## II. THE PANEL DECISION IS SQUARELY IN CONFLICT WITH THE WELL-ESTABLISHED RULE THAT THE EVIDENCE MUST BE CONSTRUED IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY.

The Panel Decision affirms the District Court's deprivation of Kendall's entitlement to a jury determination regarding the facts central to determining whether Olsen's trespass and killing of Geist were a *reasonable* search and seizure.

**The Missing Boy Did *Not* Have Access to the Backyard.** The Panel Decision concludes that "[i]t is undisputed that Kendall's backyard might have been accessible to a three-year old, because one or more of the gates was unlocked and the simple gate latch could be reached by a child that age."[14] However, that "undisputed" conclusion is disputed by the testimony of Officer Worsencroft, who did *not* think a toddler could have opened the latch on the gate.[15] The question of accessibility is one for a jury to determine.

**Geist Was *Not* an "Imminent Threat."** According to the Panel Decision, a dog barking and running[16] toward someone who has entered the dog's yard is sufficient to conclude, even in the face of overwhelming evidence about the lack of any threat by the dog,[17] that killing the pet was a reasonable seizure.[18] The Panel

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[14] Panel Decision at 6.
[15] Aplt. App. at 472:4–20.
[16] Although Olsen's accounts became more dramatic, Brief of Appellant at 28–29, his first two reports simply described Geist *barking* and *running* toward him.
[17] Aplt. App. at 590–91, ¶ 13; 625; 708–12; 795–98; 823–24; 1214.
[18] Panel Decision at 8.

Decision authorizes courts to disregard compelling contrary evidence regarding whether a beloved pet dog acted in an aggressive manner. The facts viewed in the light most favorable to Kendall support the far more likely scenario that Geist behaved in a non-aggressive manner, as he had always behaved, rendering Olsen's killing of Geist an unreasonable seizure. Again, the question of any threat reasonably perceived by Olsen is for the jury to decide.[19]

**Olsen *Was* Able to View the Entire Backyard.** The Panel Decision describes Olsen checking "the areas that had not been visible from over the gate."[20] However, the evidence reflected that had Olsen moved from his position by the gate he opened, he could have seen the entire backyard from other vantage points and did not need to enter the backyard.[21]

**Olsen Was *Not* Surprised by Geist.** The Panel Decision portrays an officer being surprised by a dog barking and running toward him. However, contrary evidence reflected that Olsen had heard Geist barking loudly before Olsen reached

[19] This very question was presented in *Gregory v. City of Vallejo*, 63 F. Supp. 3d 1171, 1179 (E.D. Cal. 2014), which held that evidence about the dog's lack of aggressiveness and his response to others who entered the property created a jury question as to whether the officer "overreacted and acted unreasonably in shooting [the dog]."
[20] Panel Decision at 2.
[21] Aplt. App. at 590, ¶ 11; 591–92, ¶ 15.

Kendall's home and he knew Geist was in the yard before he entered it.[22]

The Panel Decision and the District Court's Opinion viewed several material facts and their inferences in a light most favorable to the Appellees, contrary to the requirement that "[i]n ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' " *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (citation omitted).

## CONCLUSION

Because the Panel Decision is an aberration in the caselaw regarding the emergency aid doctrine, Kendall respectfully urges this Court to rehear this matter en banc to re-affirm the rule of law regarding the exceptionally important Fourth Amendment issues, which go to the heart of the right of privacy and protections for homes from unreasonable government intrusion.

Dated: March 26, 2018

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[22] Aplt. App. at 348:3–349:15; 351:10–352:21: 353:10–13; 367:11–368:25; 407:19–408:11; 408:19–23; 414:17–415:10; 425:12–20; 553:8–554:7; 555:5–17; 556:24–557:14; 560:24–561:24; 567:11–572:15.

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Dated: March 26, 2018

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## CERTIFICATE OF PRIVACY REDACTIONS

I hereby certify that all required privacy redactions have been made within the foregoing **APPELLANT'S PETITION FOR REHEARING EN BANC**.

Dated: March 26, 2018

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## CERTIFICATE OF HARD COPY

I hereby certify that the hard copies of the foregoing **APPELLANT'S PETITION FOR REHEARING EN BANC** submitted to the clerk's office are exact copies of the ECF filing.

Dated: March 26, 2018

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## CERTIFICATE OF VIRUS SCAN

I hereby certify that the foregoing **APPELLANT'S PETITION FOR REHEARING EN BANC**, as submitted in Digital Form via the court's ECF system, was scanned for viruses with Avast Business Security, version 18.2.2530, last updated on March 26, 2018 at 3:56 PM and, according to the program, is free of viruses.

Dated: March 26, 2018

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S PETITION FOR REHEARING EN BANC** was furnished through (ECF) electronic service to the following on this the 26th day of March, 2018:

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# APPENDIX "A"

FILED
United States Court of Appeals
Tenth Circuit

March 13, 2018

Elisabeth A. Shumaker
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

---

SEAN KENDALL,

Plaintiff - Appellant,

v.

BRETT OLSEN; BRIAN PURVIS; JOSEPH ALLEN EVERETT; TOM EDMUNDSON; GEORGE S. PREGMAN; SALT LAKE CITY CORPORATION,

Defendants - Appellees.

No. 17-4039
(D.C. No. 2:15-CV-00862-RJS)
(D. Utah)

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**ORDER AND JUDGMENT***

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Before **BALDOCK**, **KELLY**, and **O'BRIEN**, Circuit Judges.

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Sean Kendall sued Officer Brett Olsen, Lieutenant Brian Purvis and the Salt Lake City Corporation (collectively "Defendants") and others under 42 U.S.C. § 1983 and state law for a warrantless search of his property that resulted in the death of his companion dog. Kendall now appeals the district court's grant of

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

summary judgment to Defendants on his federal claims. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

## BACKGROUND

The following facts are undisputed unless otherwise noted.

In June 2014, Officer Olsen, Lieutenant Purvis and other members of the Salt Lake City Police Department responded to a call reporting that a three-year-old child was missing from his home. After officers searched the home and failed to find the boy, Lieutenant Purvis ordered Olsen and others to canvass the residential neighborhood for him, instructing them to search visually anywhere the child might have reached because the child could not communicate verbally. By this time, the child had been missing approximately one hour. Olsen and his fellow officers knew that time was of the essence in searching for missing children, with the likelihood of positive outcomes decreasing significantly after the first hour.

Olsen teamed with another officer to go house-to-house, knocking on doors and searching yards for the missing boy. Kendall's residence was approximately 10 houses from the boy's residence. When they reached it, the other officer knocked on the front door while Olsen walked up the driveway to visually check the fenced backyard. Olsen entered the yard through an unlocked gate and briefly checked the areas that had not been visible from over the gate. As he turned to leave, Kendall's dog, Geist, a 90-pound Weimaraner, appeared from behind a shed and began barking at Olsen. It is undisputed that Geist was 20-25 feet from Olsen when Olsen first saw him. Olsen testified at his deposition that the dog then charged him, barking and

growling with ears back and teeth bared. Olsen testified that he started to run towards the gate but then stood his ground when he realized he would not reach it in time. He further testified that when Geist continued to charge him aggressively, he drew his service weapon and shot and killed the dog a few feet from him. No one witnessed Olsen's confrontation with Geist. Kendall does not dispute that Geist barked loudly at Olsen and chased him when he ran, but otherwise disputes that Geist acted as Olsen described, based on his evidence that Geist was a friendly, non-aggressive dog who had never behaved in this manner. Shortly after Olsen shot Geist, the missing boy was found asleep in the basement of his home.

Kendall filed suit against Defendants and others in Utah state court, asserting federal and state claims relating to the incident. As relevant to this appeal, Kendall asserted section 1983 claims against Olsen and Purvis and a municipal liability claim against the City based on Olsen's alleged violation of Kendall's Fourth Amendment rights in the search of his property and seizure of Geist. After Defendants removed the case to federal court, the parties filed cross-motions for summary judgment on Kendall's federal constitutional claims. The district court granted summary judgment to Defendants on these claims and remanded the case to state court to resolve the state law claims. Kendall appeals.

## DISCUSSION

The district court granted summary judgment on the section 1983 claim against Olsen on qualified immunity grounds, and to Purvis and the City on the ground that their alleged liability was premised on Olsen having violated Kendall's Fourth

Amendment rights. Accordingly, our review is focused on whether the district court properly determined on summary judgment that Olsen had qualified immunity against Kendall's constitutional claims. We review this determination de novo. *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015).

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff, who must clear two hurdles in order to defeat the defendant's motion." *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). First, "[t]he plaintiff must demonstrate on the facts alleged . . . that the defendant violated his constitutional or statutory rights." *Id.* Second, the plaintiff must demonstrate "that the right was clearly established at the time of the alleged unlawful activity." *Id.*

In determining whether a plaintiff has met this burden, we take the facts "in the light most favorable to the party asserting the injury," *Scott v. Harris*, 550 U.S. 372, 377 (2007), which "usually means adopting . . . the plaintiff's version of the facts," *id.* at 378, unless that version "is so utterly discredited by the record that no reasonable jury could have believed him," *id.* at 380. *See Redmond v. Crowther*, __ F.3d __, 2018 WL 798283, at *3 (10th Cir. Feb. 9, 2018) (in reviewing grant of summary judgment based on qualified immunity, we "ordinarily accept the plaintiff's version of the facts" as long as it finds some support in the record and is

not "blatantly contradicted by the record, so that no reasonable jury could believe it" (internal quotation marks omitted)).

**A. Search**

Searches without a warrant are presumptively unreasonable and therefore violate the Fourth Amendment subject to certain exceptions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). One such exception is when "the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.* (internal quotation marks omitted). We use a two-part test to assess whether such exigent circumstances exist: (1) Did "the officers have an objectively reasonable basis to believe there [was] an immediate need to protect the lives or safety of themselves or others"? And (2) was "the manner and scope of the search . . . reasonable"? *United States v. Najar*, 451 F.3d 710, 718 (10th Cir. 2006). "We evaluate whether a reasonable belief existed based on the realities of the situation presented by the record from the viewpoint of prudent, cautious, and trained officers." *United States v. Gambino-Zavala*, 539 F.3d 1221, 1225 (10th Cir. 2008) (internal quotation marks omitted). "Reasonable belief does not require absolute certainty; the standard is more lenient than the probable cause standard." *McInerney v. King*, 791 F.3d 1224, 1232 (10th Cir. 2015) (internal quotation marks omitted).

Officer Olsen's entry and search of Kendall's backyard was plainly reasonable under this standard and thus did not violate Kendall's Fourth Amendment rights. With regard to the first element of the test, "the need to assist persons who are

seriously injured or threatened with such injury" is one of the exigencies that can justify a warrantless search. *Brigham City*, 547 U.S. at 403. Here, Olsen had an objectively reasonable basis for believing there was an immediate need to take action to protect a three-year-old child from serious injury because: the child had been reported missing from the family home; a search of the home by other officers had not found the child; if, as it appeared, the child had wandered from the home, then he was at significant risk given his age and reported inability to communicate verbally; and the chances of finding the child unharmed were decreasing rapidly with the passage of time. The totality of these circumstances provided a reasonable basis to believe that an emergency existed. *See Najar*, 451 F.3d at 720 (describing focus of first element in two-part test).

The manner and scope of the search and Olsen's entry into Kendall's backyard as part of it were also reasonable. The scope of the search was defined first by proximity, that is the area around his home that a child that age might have been able to walk in the hour he had been missing. It was then refined by searching locations in this area that might have been accessible to a wandering child. There is no dispute that Kendall's home was proximate enough to the boy's home that he could have reached it in an hour. It is also undisputed that Kendall's backyard might have been accessible to a three-year old, because one or more of the gates was unlocked and the simple gate latch could be reached by a child that age. The parties also do not dispute that Kendall's search of the yard was brief, 90 seconds or less, and that he only looked at the areas that he had not been able to view from the gate. Under these circumstances, the scope and manner of the

search, including the search of Olsen's yard, were tailored to the emergency that prompted it and were reasonable.

Kendall argues that our precedent requires more than proximity and accessibility to establish that the search was reasonable. Instead, he argues, a search of a particular house or yard is unreasonable unless there is some specific information suggesting the individual in need of assistance, the missing child in this instance, could be located there. As support, Kendall points to our decision in *Gambino-Zavala*, in which we stated that to satisfy the *Najar* test "the government must show the officers reasonably believed a person *inside the home* was in immediate need of aid or protection," 539 F.3d at 1225 (emphasis added), and that the search was confined to "those places *inside the home* where an emergency would reasonably be associated," *id.* at 1226 (emphasis added, internal quotation marks omitted). This phrasing was appropriate in that case because the place searched was a home, or an apartment to be more precise. *See id.* at 1224-25. Here, by contrast, the place searched was an area where officers had reason to believe the missing child might be found, an area that included Kendall's yard. Locations within an area can be searched without a warrant if the particular facts of the case, as here, demonstrate that the search of the area and included locations was objectively reasonable as a result of exigent circumstances.

**B. Seizure**

It is clearly established in this circuit and elsewhere that the killing of a pet dog by a law enforcement officer is a seizure that violates the owner's Fourth Amendment rights "absent a warrant or circumstances justifying an exception to the

warrant requirement." *Mayfield v. Bethards*, 826 F.3d 1252, 1256 (10th Cir. 2016); *see id.* at 1259 (noting that seven federal circuit courts have found the killing of a pet dog is a seizure within the meaning of the Fourth Amendment). One recognized exception to the warrant requirement is when exigent circumstances justify the seizure. *See United States v. Place*, 462 U.S. 696, 701 (1983). Olsen claims that exigent circumstances existed because a reasonable officer in his position would have believed that Geist posed an imminent danger to him.

The parties dispute whether Geist was acting aggressively and posed a threat to Olsen when he was shot. Even under Kendall's version of the facts, however, Geist, a large dog, appeared suddenly approximately 20-25 feet from Olsen, barking loudly, and then ran at Olsen when the officer started to run from him. Under these circumstances, Olsen would have had only a few seconds to react to the rapidly approaching dog. Under these circumstances, an officer could reasonably believe that Geist posed an imminent threat to his safety.

Kendall argues that Olsen was mistaken in this belief, and that even if Geist was a threat, shooting him was unreasonable because Olsen had other, non-lethal methods of defending himself, such as using his taser or baton. However, "[t]he calculus of reasonableness must embody allowance for the fact that police 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 v. Connor,* 490 U.S. 386, 396-97 (1989). While Olsen perhaps could have reacted differently, we cannot say that his split-second decision to use lethal force

was objectively unreasonable. *See id.* at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

## CONCLUSION

Olsen was entitled to qualified immunity because Kendall did not demonstrate that Olsen violated his Fourth Amendment rights. The district court's summary judgment in favor of Defendants on Kendall's section 1983 claims is therefore affirmed.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge