No. _____

In the Supreme Court of the United States

SEAN KENDALL,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court and numerous courts of appeals have held the "emergency aid" exception to the warrant requirement of the Fourth Amendment requires objectively reasonable cause to believe that a person in need of aid is in a house or curtilage to be searched. The primary question presented in this case is: When police are searching for a missing child, is there an exception to the "emergency aid" doctrine that permits police to search any curtilages that might have been accessible to the missing child in the entire area the child might have wandered, even when there is no reasonable cause to believe the child is in any particular curtilage to be searched?

2. Did the lower courts err in deeming as reasonable under the Fourth Amendment a police officer's warrantless search and consequent seizure of a pet dog by shooting it where (1) the reasonableness of the seizure and the search that led to it was challenged by substantial evidence directly disputing the evidence upon which the district court relied in granting the motion for summary judgment and (2) the officer created what he claims to have been justifying exigent circumstances?

PARTIES TO THE PROCEEDINGS

Petitioner, Sean Kendall, was the appellant in the court below. Respondents, Brett Olsen, Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman, and Salt Lake City Corporation, were the appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sean Kendall respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Tenth Circuit is not reported, but is available at 2018 WL 1294174 and reproduced at Pet. App. 1–9. The order of the court of appeals denying Kendall's petition for rehearing *en banc*[1] is not reported, but is reproduced at Pet. App. 34–35. The opinion of the district court granting summary judgment is reported at 237 F. Supp. 3d 1156 and reproduced at Pet. App. 10–33.

JURISDICTION

The court of appeals entered its judgment on March 13, 2018, Pet. App. 1, and denied a petition for rehearing *en banc* on April 6, 2018. Pet. App. 34. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

[1] Although the order denying the petition for rehearing *en banc* reflects the petition included a request for rehearing by the panel issuing the decision, Kendall's petition for rehearing sought solely a rehearing *en banc*.

> no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

The court of appeals, following the lead of the district court in this matter, formulated a new, extremely permissive standard to be applied to a search for a missing child, directly at odds with the requirements of this Court and several United States courts of appeals for a warrantless search under the "emergency aid" exception to the warrant requirement of the Fourth Amendment.

Contrary to the long-established requirements for a warrantless "emergency aid" search, the lower courts in this matter ruled that police officers in "emergency aid" situations involving missing children may enter and search curtilages (and apparently homes, in light of the courts' reasoning) without any reasonable basis for believing a missing child is on the premises or that there is any connection between the perceived emergency and the property searched.

The court of appeals created a dangerous standard, in direct conflict with decisions of this Court and those of several courts of appeals, permitting police engaged in a search for a missing child to search homes without a warrant solely on the basis of *accessibility* and *proximity*—that is, on the basis that the homes (1) might be accessible to a child believed to be missing and (2) are located within an exponentially expanding several-block (or larger) geographic area where the child might have wandered since he was first missing.

In this case, the court of appeals held a police search of a curtilage to be constitutional because a closed, latched gate leading into an enclosed curtilage *might* have been—but was not believed by the searching officer's partner to be—"accessible" to a missing child and the curtilage was within an area in which it was believed the child *might* have traveled during the approximate hour the child had been missing. Hence, under the rule adopted by the court of appeals, no unlocked home is protected from government intrusion if it might be accessible to a missing child and it is located in whatever several-block (or larger) area a child might have wandered.

The Fourth Amendment was adopted, in large part, to prohibit general warrants, which, under British rule, provided authority to government officials to search homes, papers, and belongings of people without any particularized cause or description of the places to be searched.

Consistent with the purposes underlying the Fourth Amendment, this Court has held, generally, that *any* lawful search requires a reasonable basis for believing that whatever is being searched for is located on the particular property to be searched. In the context of "emergency aid" cases, this Court has ruled that a warrantless search of a home to render emergency aid to a person in need of assistance requires an objectively reasonable basis for believing the person in need of assistance is located in that home. *Michigan v. Fisher*, 558 U.S. 45, 47 (2009). Several United States courts of appeals have announced the same rule.

Prior to the decisions of the lower courts in this matter, no court has *ever* authorized indiscriminate

blanket searches of homes or curtilages in an "emergency aid" situation when, as the officers in this case conceded, there was no reason to believe the person thought to be in need of aid (here, a missing child) was on the premises of any particular home searched and there was no reason to believe the particular places searched had any connection with the emergency.

The unprecedented, radical expansion of police powers announced by the court of appeals is an extreme departure from long-established Fourth Amendment law. The standard applied by the lower courts in this case of a missing child is at tremendous variance from the standard applied in all other "emergency aid" cases.

Such an unparalleled expansion of the ability of police to engage in warrantless searches of private homes and curtilages demeans and eviscerates "the right of a man [and a woman] to retreat into his [or her] own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961) (alteration added).

Certiorari is warranted here to resolve the split of authority and to clarify the proper scope of the "emergency aid" exception to the warrant requirement of the Fourth Amendment, particularly in instances of missing children and other missing vulnerable people.

Based on the authority of the new standard announced by the court of appeals and the district court in this case, police will now have license to engage in searches for missing people based simply on access and proximity, even when the police have no objectively reasonable basis for believing (1) any

missing person is on the particular premises to be searched or (2) that the particular places actually searched have some connection to the emergency. That immense deterioration of Fourth Amendment protections from government intrusion can be prevented only by the granting of certiorari and by an unequivocal reversal of the court of appeals decision and rejection of its rationale.

Certiorari is further warranted in this matter because (1) the court of appeals erroneously sustained the granting of summary judgment notwithstanding the presentation by Kendall of abundant material evidence, which, when viewed in the light most favorable to Kendall, would have foreclosed the entry of summary judgment and (2) the "exigent circumstances" claimed by Olsen as justifying his warrantless killing of Geist were created by Olsen.

STATEMENT OF THE CASE

1. *Factual background.*

The Search. Police officers searched within a "several-block radius" of a residential neighborhood for a missing three-year-old boy. Pet. App. 23.[2] Respondent Brian Purvis instructed officers, including respondent Brett Olsen, they were to search "everywhere" for the boy, which included entering people's yards.[3] The boy had been missing for about an

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[2] Although police officers "searched" the boy's home and did not find the boy, Pet. App. 2, he was ultimately found asleep on a floor in the basement of his family's home. Pet. App. 3, 14.

[3] Pet. App. 36–38. Purvis did not simply instruct Olsen to "search everywhere visually," as described by the district court, Pet. App. 11, or to "search visually anywhere the child might have reached," as described by the court of appeals. Pet. App. 2.

hour by the time Olsen began searching the neighborhood. Pet. App. 2, 11.

When Olsen and Officer Gordon Worsencroft[4] reached the curtilage[5] to Kendall's home, located about ten homes—or approximately 1/8 mile[6]—away from the missing boy's home, Pet. App. 3, 12, Olsen opened the closed latch on a gate handle—which Worsencroft did *not* think the missing toddler could have opened by himself[7]—then opened and walked through the gate, explored the curtilage to Kendall's

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Rather, Olsen testified he was instructed to "go search properties and houses," which "included going into yards." He understood that "going in" the Kendall backyard was "consistent with the instructions [Purvis] gave." Pet. App. 37–38. Officer Worsencroft, who paired up with Olsen for the search, also understood he was to enter people's yards even without a warrant and without permission. Pet. App. 90.

[4] The district court referred to Olsen teaming up with "another officer," Pet. App. 11, and referred to "Olsen's partner." Pet. App. 12. The court of appeals referred to Olsen teaming up with "another officer." Pet. App. 3. That other officer was Worsencroft. Pet. App. 39.

[5] The district court stated it did not find it necessary to determine if Kendall's enclosed backyard was "curtilage." Pet. App. 17. Although the district court referred five times to "open backyards," Pet. App. 19, 22–24, Kendall's backyard was unquestionably enclosed, protected curtilage. See photos of the Kendall residence, including the curtilage, which are part of the record before the lower courts, Pet. App. 96–99, 101–103, 105–06. The backyard was adjacent to Kendall's home and entirely enclosed by the house and a tall fence that protected the backyard from observation by passersby, except those who walked up to and looked over the fence or the gates. Pet. App. 92–95, ¶¶ 1–11, 15.

[6] Pet. App. 92, 94, ¶¶ 3, 12; 100.

[7] Pet. App. 91.

home for about one and a half minutes,[8] and opened the door to, and looked inside, a shed in Kendall's curtilage.[9]

The only justification offered by the officers for the search, which was deemed by the lower courts as sufficient for Fourth Amendment purposes, was that (1) Kendall's curtilage was within the growing radius of the area the boy might have wandered in the time he had been missing and (2) Olsen believed the enclosed curtilage was accessible to the boy. Pet. App. 6–7, 19–20. No one had any belief, or reasonable cause to believe, the missing boy was in Kendall's curtilage or that there was any connection between the missing boy and the particular area searched by Olsen.[10]

Olsen testified as follows:

> 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.

Pet. App. 51.

> Q: Other than the spacial proximity of the home and the yard, did you know of any connection whatsoever between that house or yard and the

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[8] Olsen testified he searched Kendall's curtilage for about one and one-half minutes. Pet. App. 111. He later said his search lasted approximately thirty seconds. Pet. App. 117, ¶ 25. His search of the curtilage was extensive and included walking all around the backyard and opening the door to and searching a shed. Pet. App. 118, ¶¶ 20–23.

[9] Pet. App. 40–45.

[10] Pet. App. 46–55, 61, 119–24.

> missing boy or the circumstances surrounding him being missing?
>
> A: Just the accessibility and proximity. That's the only thing. I had no reason to believe that the occupants of this house were connected to them in any way.

Pet. App. 57.

In fact, no one had reason to know if the missing boy was wandering alone or if he had been abducted and was, by the time of Olsen's search of Kendall's curtilage, many miles away.[11]

The Seizure. While Olsen was closing the door to the shed in Kendall's curtilage, Geist barked,[12] as dogs naturally do.[13] Then Olsen ran.[14] Only then, *after* Olsen started running, Geist was seen by Olsen and ran toward him,[15] which is what dogs normally do.[16]

Olsen could have used, but decided not to use, his Taser,[17] he had a police baton that he didn't use,[18] and

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[11] Pet. App. 64, 91, 123, 172.

[12] Pet. App. 3, 13, 65.

[13] Pet. App. 130–31, ¶¶ 6–7; 132, ¶ 12; 133–34, ¶¶ 18–23; 148, ¶¶ 5–6; 149, ¶ 11; 156, ¶ 5.

[14] Pet. App. 66, 112.

[15] Pet. App. 66, 112. The court of appeals and the district court stated the events in the opposite order, with Geist appearing and running toward Olsen *before* Olsen started running. Pet. App. 3, 13.

[16] Pet. App. 135–38, ¶¶ 9–16; 150–51, ¶¶ 7, 10, 13; 157, ¶ 7.

[17] Pet. App. 67, 113.

[18] Pet. App. 68, 114. Olsen stated in an internal affairs interview that he "didn't think about pulling" out his baton, Pet. App. 115, but he testified in his deposition that he did not use the baton

he obviously could have blocked or pushed Geist with his motorcycle patrol boots. However, without taking any of those measures, Olsen drew his gun and shot Geist dead.[19]

2. *District Court Opinion*.

Jurisdiction. Pursuant to 28 U.S.C. § 1331, the district court had jurisdiction over Kendall's claims arising under the United States Constitution and 42 U.S.C. § 1983 and, pursuant to 28 U.S.C. § 1367, supplemental jurisdiction over all other claims.

Ruling. The district court granted summary judgment for Salt Lake City Corporation, Olsen, and Purvis ("the City and Officers") "on Kendall's federal constitutional claims," Pet. App. 33, denied—or refrained from ruling on—Kendall's motion for summary judgment,[20] and remanded the case to state court for further proceedings on the state law claims. Pet. App. 31–32. The summary judgment on the federal claims was a "final decision" under 28 U.S.C. § 1291.

Search. The district court ruled the search of Kendall's curtilage was "reasonable" because (1) it was located within the several-block area the missing boy might have wandered "in the hour or so that had passed" and (2) because Olsen believed the enclosed

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because that would require him getting too close to the dog "to want to experiment." Pet. App. 69.

[19] Pet. App. 3, 14, 116.

[20] The district court did not "deny" Kendall's motion for summary judgment, but noted "[b]oth sides now move for summary judgment," Pet. App. 10, and stated during oral argument the hearing was "on cross-motions relating to the availability of qualified immunity . . . ." Pet. App. 161.

curtilage might have been accessible to the boy. Pet. App. 19–20, 23.

The district court rejected the requirement that permits an "emergency aid" search of any curtilage "only if there is a reasonable basis, aside from access and proximity, to believe the toddler is in that particular yard, as opposed to any other accessible yard within walking distance." Pet. App. 20.

Qualified Immunity - Search. The district court held that if the search were unconstitutional, Olsen would be entitled to qualified immunity because his mistake as to what the law requires would be reasonable. Pet. App. 24.

Seizure. The district court held that the killing of Geist was a Fourth Amendment seizure, Pet. App. 24, and that it was justified because, according to the court, "a reasonable officer in Olsen's position would conclude that Kendall's dog posed an imminent threat." Pet. App. 26.

Qualified Immunity – Seizure. The district court held that even if Olsen's killing of Geist was unreasonable, he was entitled to qualified immunity because "a reasonable officer would not be on notice that shooting a 90-pound dog that is running toward him and barking, with no time for the officer to escape, would violate the Fourth Amendment." Pet. App. 30.

3. ***Tenth Circuit Panel Opinion and Denial of Rehearing.***

Jurisdiction. The court of appeals had jurisdiction of the appeal from the district court order pursuant to 28 U.S.C. § 1291.

Ruling. The court of appeals panel concluded that Olsen was entitled to qualified immunity with respect to both the search and the seizure. Pet. App. 9.

Search. The court of appeals panel determined that under the test stated in *United States v. Najar*, 451 F.3d 710, 718 (10th Cir. 2006), the search of Kendall's backyard was reasonable because (1) "there was an immediate need to take action to protect a three-year-old child from serious injury;" (2) "Kendall's home was proximate enough to the boy's home that he could have reached it in an hour;" and (3) the "backyard might have been accessible to a three-year old." Pet. App. 6–7.

Rejecting the requirement that "a search of a particular house or yard" is reasonable only if there is cause to believe "the individual in need of assistance . . . could be located there," the court of appeals panel ruled that, for purposes of Fourth Amendment analysis, in this case "the place searched was an area where officers had reason to believe the missing child might be found" (*i.e.*, the expanding area around the boy's home where he might have been able to walk in the time he had been missing), "an area that included Kendall's yard." Pet. App. 7–8.

Seizure. The court of appeals panel held that "[w]hile Olsen perhaps could have reacted differently, we cannot say that his split-second decision to use lethal force was objectively unreasonable." Pet. App. 9.

Petition for Rehearing. Kendall petitioned for a rehearing *en banc*, which was denied. Pet. App. 34.

REASONS FOR GRANTING THE PETITION

1. ***The court of appeals decision regarding the scope of the "emergency aid" exception to the warrant requirement directly conflicts with decisions of other courts of appeals on the same critical matter and with relevant decisions of this Court.***

Search. Creating a new, extremely loose warrantless search standard, unsupported by any prior legal authority, the court of appeals has carved out a "missing child" exemption from the well-settled legal requirements for application of the "emergency aid" exception to the warrant requirement of the Fourth Amendment.

In "emergency aid" cases, this Court and all United States courts of appeals that have considered this issue—except in this case—have allowed a warrantless search *only* if there is an objectively reasonable belief that a person in need of aid is on the particular premises to be searched. The court of appeals in this matter disregarded that requirement, allowing a search of *any* properties that might have been accessible to a missing boy and located within a geographic area in which the boy might have wandered since he was missing.

Granting certiorari will lead to a resolution of the question as to whether the same "emergency aid" requirements apply to missing children (and perhaps other missing vulnerable people) as to other people in need of assistance. The opinion of the court of appeals permits indiscriminate searches of any and all of dozens, hundreds, or perhaps thousands of curtilages—and presumably homes, since both are

equally protected under the Fourth Amendment[21]—simply because they (1) might be accessible to a missing child and (2) are located within the exponentially expanding radius[22] of wherever the child might have wandered during the time he or she was missing. The court announced its lax search standard in this case, even though the police officers believed the boy might have been abducted,[23] which neither of the lower courts acknowledged.

That radically permissive, unprecedented standard[24] directly conflicts with the general rule of

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[21] The district court stated that "*in certain circumstances*, this prohibition [against searching a home without a warrant] extends to the area immediately surrounding the home, what is known as the 'curtilage.' " Pet. App. 17 (emphasis added). However, this Court recently stated, without qualification: "[T]he Court considers curtilage—'the area "immediately surrounding and associated with the home"'—to be '"part of the home itself for Fourth Amendment purposes."'" *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (citation omitted).

[22] The area of a circle is equal to pi multiplied by the radius squared. Hence, if the boy were assumed to be moving in the same direction and at the same speed, the area in which all "accessible" curtilages and homes could be searched under the unique standard adopted by the court of appeals would be four times as large during the second half-hour as during the first half hour, nine times as large during the third half hour, sixteen times as large during the fourth half hour, and twenty-five times as large during the fifth half hour. Neither the court of appeals nor the district court offered any limiting principle to their startling new rule that allows searches by government agents of accessible curtilages located *anywhere* within the area of wherever a missing child might have traveled for as long as the child had been missing.

[23] Pet. App. 91, 162, 172.

[24] No court in *any* jurisdiction has ever before found a warrantless search of a home for a missing child to be reasonable

this Court applicable to the reasonableness of *any* search:

> The critical element in a reasonable search . . . is that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.

Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

More specifically, the standard announced by the court of appeals in this case directly conflicts with the explicit requirement announced by this Court that warrantless searches of homes under the "emergency aid" exception to the warrant requirement of the Fourth Amendment are "reasonable" only where there is " 'an objectively reasonable basis for believing' that '*a person within [the house]* is in need of immediate aid.' " *Michigan v. Fisher*, 558 U.S. at 47 (alteration in original) (emphasis added) (citations omitted).[25]

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simply because the particular home searched was believed to be accessible and within the area 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); *United States v. Quiroga*, 160 Fed. App'x 625 (9th Cir. 2005) (unpublished); *United States v. Bradley*, 321 F.3d 1212 (9th Cir. 2003); *Spebar v. City of Hammond*, No. 2:08-CV-83JVB, 2010 WL 2952999 (N.D. Ind. July 22, 2010) (unpublished); *People v. Lucero*, 750 P.2d 1342 (Cal. 1988); *People v. Swansey*, 379 N.E.2d 1279 (Ill. 1st Dist. 1978); *State v. Yoder*, 935 P.2d 534 (Utah Ct. App. 1997).

[25] *See also 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)).

This Court did not say in *Fisher* that a police officer can enter and search a house because a person *somewhere* might be in need of aid. It held unequivocally that there must be a reasonable basis for believing that "a person *within the house*" searched is in need of aid.

The decision of the court of appeals also conflicts with the requirement of several United States courts of appeals that, for a warrantless search of a home to be justified under the "emergency aid" exception to the warrant requirement, there must be an objectively reasonable basis for believing (1) the person in need of assistance is in the home to be searched and (2) there is some reasonable basis to associate the emergency with the precise place searched. *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) ("To invoke this 'emergency aid' exception, an officer must have an objectively reasonable basis for believing both that a person is inside the house and that the person is in need of immediate aid."); *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) ("[t]here must be some reasonable basis . . . to associate the emergency with the area or place to be searched."); *Schreiber v. Moe*, 596 F.3d 323, 330 (6th Cir. 2010); *United States v. Gambino-Zavala*, 539 F.3d 1221, 1225–26 (10th Cir. 2008) ("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.'" (citation omitted)).

In *United States v. Najar*, the Tenth Circuit Court provided a vague, general standard—what the district court called a "general reasonableness requirement," Pet. App. 21—utilized by the lower courts for their determinations that Olsen's search and seizure were "reasonable." The test announced in *Najar* is "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)." 451 F. 3d at 718.

That standard likely would have resulted in qualified immunity for police officers conducting just about any search for a person in need of aid in the Tenth Circuit because the law after *Najar* was nowhere close to being "*clearly* established." What, after all, is a police officer to make of a standard that provides no more guidance than that "the manner and scope of the search is reasonable?"

Fortunately, the Tenth Circuit Court provided some badly-needed flesh on the bare bones of *Najar* in *United States v. Gambino-Zavala*, which was erroneously disregarded by the lower courts in this matter. *Gambino-Zavala* clearly established the law applicable to Olsen's search in this case:

> 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. 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*."

539 F.3d at 1225–26 (emphasis added) (citations omitted).

The court of appeals in this matter held that the rule clearly articulated in *Gambino-Zavala* was inapplicable to Olsen's search of Kendall's curtilage. Rather, the court—relying on the spare, unexplained statement of the general "reasonableness" test in *Najar*—approved the warrantless search of Kendall's curtilage, although (1) no one had any cause to believe the missing boy was in Kendall's curtilage and (2) no one had any reason to believe there was any connection between the missing boy and the area that was searched by Olsen. Pet. App. 5–8.

The court of appeals reached its conclusion by drastically expanding the meaning of "place searched" for purposes of Fourth Amendment analysis. According to that court, Kendall's curtilage was not the "place searched" in determining whether there was reasonable cause to believe a person in need of aid was in the "place searched" or whether the "place searched" had any nexus to the emergency. Rather, according to the court, the "place searched" was the *entire area* where the boy *might* have walked during the hour or so he was missing. Pet. App. 7–8.

In stating that it was not Kendall's property that was searched, but, rather, the entire geographic area where the boy might have traveled, the court of

appeals entirely ignored (1) the expectation of and personal right to privacy of *each* resident or homeowner (which is, of course, the necessary starting point[26]), (2) the heightened constitutional protections for one's home,[27] and (3) the injunction by this Court that exceptions to the warrant requirement for searches of homes are "few," "specifically established," and "well-delineated."[28]

Hence, in question-begging fashion, the warrantless search of any or all "accessible" homes located anywhere in that entire area meets the requirement that there be reasonable cause to believe someone in need of assistance is in the "place searched" because, by the peculiar, circular definition

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[26] The right to be protected from the intrusion of one's home by government agents is a personal right of each person, including each homeowner or occupant. It is not simply a right that attaches to an "area." *Katz v. United States*, 389 U.S. 347, 353 (1967). If the "place searched" were the entire geographic area where the missing boy may have wandered, and not Kendall's curtilage, no one could have challenged the search because there would not have been a "personal right" to protection against government intrusion in the "place searched." *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998) ("The 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." (emphasis added)); *Rakas v. Illinois*, 439 U.S. 128, 140–44 (1978) ("capacity to claim the protection of the Fourth Amendment depends . . . upon whether the *person* who claims the protection of the Amendment has a legitimate expectation of privacy *in the invaded place*") (emphasis added)).

[27] "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

[28] *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz*, 389 U.S. at 357.

of the court of appeals, the boy was reasonably believed to be in the "place searched" since the "place searched" is anywhere within the radius of the entire area he might have wandered.

Never before has there been such an evisceration of Fourth Amendment protections for all homeowners and occupants whose homes and curtilages are located in an expanding geographic area of at least several blocks and potentially several miles.

Seizure. The court of appeals, relying on a factual account directly contrary to evidence demonstrating the unreasonableness of the killing of Geist, applied a vague standard of "reasonableness" in finding that because Geist ran toward and barked at Olsen after he invaded the curtilage where Geist had been alone and secure, it was "reasonable" for Olsen to shoot and kill Geist. Pet. App. 8–9. As demonstrated below, evidence ignored by the district court and court of appeals, when viewed in the light most favorable to Kendall, reflects the manifest unreasonableness of the killing of Geist. The disregard of that evidence is in violation of the clear rule stated by this Court:

> When [the parties' versions of events differ substantially], courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion."

Scott v. Harris, 550 U.S. 372, 378 (2007) (alteration in original) (citation omitted).

2. ***The Lower Courts Erred in Applying the Evidence in the Light Most Favorable to the City and Officers When Kendall Presented Compelling Contrary Evidence.*** The decision of the court of appeals affirms

the district court's deprivation of Kendall's entitlement to a jury determination regarding the facts central to deciding whether Olsen's trespass and killing of Geist were *reasonable*.

When a defendant asserts qualified immunity, a two-prong test is applied. The first prong is: "[D]o the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The second prong is: Was the right alleged to have been violated clearly established at the time of the violation? *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "[U]nder either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

The district court unquestionably erred in viewing evidence and inferences in the light most favorable to the City and Officers, particularly when there is abundant compelling, contrary evidence. *Id*. at 1863 ("In 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.' ") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). That error was compounded by the court of appeals, which (1) affirmed the district court's decision, (2) ignored material facts presented by Kendall, and (3) represented in its decision that facts were not in dispute when, in fact, they were very much in dispute.

Access. The district court held it was lawful for officers to search all "places to which a toddler could have walked" during the time the boy had been missing if limited to "areas a toddler could have actually have [sic] accessed, like open and unlocked

backyards." Pet. App. 20. The court of appeals agreed. Pet. App. 6–7.

The court of appeals stated: "It 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." Pet. App. 7. However, that vital factual issue, far from being undisputed, was vigorously contested. As Kendall repeatedly pointed out to the lower courts, the backyard was *not* accessible to the boy. Even Worsencroft, the officer who partnered with Olsen, did *not* think a toddler could have opened the latch on the gate by himself. Pet. App. 91. Kendall was entitled to a jury determination regarding whether his curtilage was accessible to the missing boy.

Visibility of curtilage. Had Olsen moved from his position by the gate he opened, he could have seen the entire backyard from other vantage points without entering the curtilage.[29] There was no dispute about that. Nevertheless, the district court described the facts in the light most favorable to the City and Officers, stating that "[f]rom his vantage point at Gate B, Olsen could not see the entire backyard," Pet. App. 13, implying that his entry into the backyard was necessary because he could not see it all. Likewise, the court of appeals stated that Olsen entered the backyard and "checked the areas that had not been visible from over the gate," Pet. App. 3, ignoring the undisputed fact that Olsen could have seen the entire backyard simply by moving from his position at the gate to other areas outside of the curtilage. The

[29] Pet. App. 107, ¶ 11; 108, ¶ 15.

evidence that Olsen did not need to enter the backyard to view it in its entirety was ignored by the lower courts, but is highly material to any finding regarding reasonableness, which should be determined by a jury.

Olsen's knowledge of Geist's presence and failure to check to see if a dog was in the yard. The factual narratives by both lower courts read as if Olsen was surprised by Geist's presence and he was justified in making a "split-second" decision about killing Geist. Pet. App. 9, 29–30. However, the overwhelming evidence reflected that Olsen had heard Geist barking loudly and knew he was there before Olsen entered the backyard.[30] Also, even though he knew how to do so, Olsen neglected to ascertain if there was a dog in the yard before entering it.[31]

Olsen's provocation of Geist. Olsen created the conditions that he and the lower courts maintain justified his killing of Geist. However, an officer cannot justify a warrantless seizure by invoking "exigent circumstances" caused by that officer.

The lower courts describe the chain of events leading up to the killing of Geist in a manner at material variance from one of Olsen's accounts. The lower courts state that Olsen started running only *after* Geist appeared, barking and running toward Olsen.[32] Although his accounts changed over time, Olsen testified at his deposition that he only heard Geist barking, *then* Olsen started running, *then* he stopped running when Geist "started charging" at

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[30] Pet. App. 73–83, 125–29, 163–68.

[31] Pet. App. 84–87.

[32] Pet. App. 3, 13.

him. Olsen started running away from Geist *before* he saw Geist and *before* Geist started running toward him. Pet. App. 88–89. Hence, it is apparent that Olsen provoked Geist to run toward him,[33] causing the very "exigent circumstances" he claims as justification for killing Geist. The difference between the lower courts' account and Olsen's account is stark—and critical. Viewing the facts in the light most favorable to Kendall requires that a jury determine the reasonableness of Olsen's seizure of Geist.

Geist's "imminent threat." The court of appeals said that since Geist ran toward and barked at a police officer who entered the yard where Geist was kept, "an officer could reasonably believe that Geist posed an

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[33] One expert witness testified:

> [D]ogs, nearly any breed of dog, will chase after a person that is running. . . . As a matter of common sense, and as confirmed by my experience, I would expect that any dog in this situation would have chased Olsen. A dog chasing and barking [at] a person does not mean it intends to bite, rather, if it intended to bite it would have run quietly.

Pet. App. 152, ¶ 13.

Another expert witness testified:

> It is a matter of common knowledge and common sense that one should not run from a barking dog. Just like with many other animals, running provokes dogs to chase. . . . At the point Olsen heard Geist barking, Olsen had a number of reasonable alternatives. . . . The most unreasonable thing to do—unless perhaps he was a few feet away from exiting the yard—was to run away. No one could reasonably think he or she can outrun a dog. And anyone with even the faintest familiarity with dogs or wildlife would know that running will only escalate the confrontation. Unless an exit is within a few feet, there is no good that could come from running . . . .

Pet. App. 139, ¶¶ 9–10.

imminent threat to his safety," justifying the officer killing Geist. Pet. App. 9. That is not a call for a judge or a court of appeals to make. When the evidence is vigorously contested, as it is in this matter, the reasonableness of the seizure is for a jury to determine. Otherwise, under the reasoning of the court of appeals, every dog—at least every large dog—that barks and runs toward a police officer (even an officer who runs away from the dog before he even sees it) would, per se, be fair game for unnecessary killing.

The district court referred to Olsen's testimony about what Geist did as being "uncontradicted evidence," holding that "a reasonable officer in Olsen's position would conclude that Kendall's dog posed an imminent threat when it aggressively charged Olsen while simultaneously barking loudly and baring its teeth." Pet. App. 26. That "uncontradicted evidence" included Olsen's latest, revised account that Geist's "'ears were back, the tail [ ] w[as] straight, the teeth were bared, it was snarling, barking loudly and actually running towards [him],' " and Geist "'was leaping towards [him].' " Pet. App. 26–27 (alterations in original). Likewise, the court of appeals panel accepted Olsen's latest, revised version of the facts, describing that "the dog then charged [Olsen], barking and growling with ears back and teeth bared." Pet. App. 3.

Abundant material evidence disputing the accounts described by the lower courts was ignored by those courts. When Olsen first described the matter in his police report on the same day he killed Geist, he simply said the dog was *barking and running* toward him. Pet. App. 175–76. In his interview with Internal Affairs, he only described Geist as *barking and*

charging toward him. Pet. App. 112. The Civilian Review Board report notes that Olsen simply said the dog was aggressively *barking and "charged" him*, and that he was afraid of being bitten. Pet. App. 170. After this lawsuit began, however, Olsen's account became the far more dramatic account of Geist growling, baring his teeth, snarling, putting his ears back, and leaping toward Olsen, which account the district court called "uncontradicted," Pet. App. 26, and the court of appeals appeared to adopt. Pet. App. 3.

Substantial material evidence demonstrated that Geist was a barker and chaser, but he possessed not a bit of viciousness and could not reasonably be viewed as aggressive or vicious simply because he ran toward and barked at someone who entered the yard that was his home. The district court was presented with undisputed evidence that Geist was a friendly and loveable dog, he was never observed to be aggressive, his demeanor was relaxed, friendly, curious, well-adjusted, and well-socialized, he was friendly and, at most, excited, when people walked into the backyard when Geist was there, and he was timid of strangers, loving, and non-violent.[34] Also, Geist's ears were not about to go back. *See* Pet. App. 104. Other lay and expert testimony established that Geist was always playful and tame, and never aggressive or vicious, and that dogs generally, and Weimaraners specifically, naturally bark and run toward people who enter the places where the dogs are kept.[35]

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[34] Pet. App. 109–10, ¶ 13.

[35] Pet. App. 140–42, ¶¶ 3–8; 143–47, ¶¶ 12–23, 26, 30; 153–55, ¶¶ 5–7, 10–13; 158–60, ¶¶ 2, 4–10; 177–78, ¶¶ 2–11.

Hence, viewing the evidence in the light most favorable to Kendall, summary judgment in favor of the City and Officers was legally foreclosed.[36]

Conclusion Regarding Material Conflicts in the Evidence. The material conflicts in the evidence relate directly to *what really happened*—that is, whether Olsen's accounts, including his latest, enhanced statement about Geist's behavior, is to be believed, or whether the more believable evidence, which should have been accepted as true by the lower courts and which would have foreclosed summary judgment, is (1) the missing boy could not have accessed the curtilage; (2) Olsen could have seen the entire curtilage without entering it; (3) Olsen knew before entering the curtilage that a dog was there; (4) Olsen did nothing to check to see if a dog was present before he entered the curtilage, although he knew how to do it; (5) Olsen provoked Geist by running away from him before Geist ran toward Olsen; and (6) Geist merely barked and ran toward Olsen, like most dogs would do, harmlessly, when someone enters his space.

3. The court of appeals erred in affirming summary judgment for the City and Officers because Olsen created the exigent circumstances by which he seeks to justify the warrantless seizure of Geist.

Through the unconstitutional means of his illegal search of the curtilage, Olsen placed himself in the

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[36] Another district court, faced with the identical situation as that presented here, denied summary judgment, reasoning that, when viewing the evidence about a dog's lack of aggressiveness and people entering the property without any fear of the dog, "a jury could find [the officer] overreacted and acted unreasonably in shooting [the dog]." *Gregory v. City of Vallejo*, 63 F. Supp. 3d 1171, 1179 (E.D. Cal. 2014).

"danger" he claims as justification for the killing of Geist. "[T]he Fourth Amendment requires . . . that the steps preceding the seizure be lawful." *Kentucky v. King*, 563 U.S. at 463. In *United States v. Bonitz*, 826 F.2d 954 (10th Cir. 1987), government agents sought to justify their warrantless search of black powder and a hand grenade on the basis they threatened the neighborhood. However, the Tenth Circuit Court found that the gun powder and grenade could not pose a danger unless disturbed—just like Geist, who was safely secluded in Kendall's yard before Olsen's trespass into it. "Thus, the only immediate danger that existed was created by the officers themselves when they entered the secure area and began to handle these materials." *Id.* at 957. Exactly the same reasoning applies to Olsen, who unlawfully created his own purported exigent circumstances, upon which he relies to justify his killing of Geist.

The "exigency" by which Olsen sought to justify the warrantless seizure (*i.e.*, killing) of Geist was that Geist was "aggressive and posed an imminent threat of harm."[37] The lower courts agreed with Olsen that the killing of Geist was justified because "a 90-pound dog charged Olsen while barking aggressively," Pet. App. 29, and, "[e]ven under Kendall's version of the facts," "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." Pet. App. 8–9. However, it was Olsen himself, by his unwise provocation of Geist, that caused Geist to run to him. "Just as exigent circumstances are an exception to the warrant

[37] Pet. App. 179.

requirement, a police-manufactured exigency is an exception to an exception." *United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995).

4. ***The questions presented are ripe for the Court's review, and this case is an ideal vehicle for resolving them.*** Resolution is required for the dramatic conflict between (1) the unique "missing child" search standard adopted by the court of appeals and the district court in this matter and (2) the requirements of this Court and several United States courts of appeals in all other "emergency aid" cases.

Absent the granting of certiorari and reversal of the court of appeals opinion, police officers and other government agents seeking to find missing vulnerable people will have license—at least through the invocation of qualified immunity based on the opinion of the court of appeals—to indiscriminately search many thousands of homes and curtilages[38] simply because they (1) might be accessible to a missing

[38] An estimated 797,500 (an average of about 2,185 per day) missing children were reported as being missing in the United States in 1999. ADRIAN J. SEDLAK, ET AL., U.S. DEP'T OF JUSTICE, NATIONAL ESTIMATES OF MISSING CHILDREN: AN OVERVIEW 5–6 (October 2002), https://www.ncjrs.gov/pdffiles1/ojjdp/196465.pdf. "During 2013, law enforcement agencies entered a total of 462,567 [a daily average of more than 1,267] reports on children . . . into the NCIC missing person records (Federal Bureau of Investigation, National Crime Information Center, 2014)." ADRIAN J. SEDLAK, ET AL., U.S. DEP'T OF JUSTICE, NATIONAL ESTIMATES OF MISSING CHILDREN: UPDATED FINDINGS FROM A SURVEY OF PARENTS AND OTHER PRIMARY CARETAKERS 12 (June 2017), https://www.ojjdp.gov/pubs/250089.pdf. These figures do not include reports of missing vulnerable adults, with respect to whom the permissive search standard announced by the court of appeals also would apply.

vulnerable person and (2) are located somewhere within whatever geographic area that person may have wandered during the time he or she has been missing.

The decision of the court of appeals will have oversized significance in relation to claims of qualified immunity where searches for missing children are involved because of the dearth of other "emergency aid" cases involving missing children decided by this Court or other United States courts of appeals.[39] The decision of the court of appeals in this matter, if allowed to stand, could provide sufficient doubt about the requirements applicable to searches for vulnerable people, as compared to searches for other people in need of aid. That would render unlikely a finding that the law applicable to "emergency aid" searches is clearly established in cases involving missing people. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (to defeat a claim of qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate.").[40]

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[39] The only United States court of appeals decisions dealing with the issue of whether there was reasonable cause to search a home for a missing child, *Hunsberger v. Wood*, and *United States v. Quiroga*, discussed *supra* at 13–14, n.24, made it clear that there must be an objectively reasonable cause to believe the child is in the place to be searched. No court, anywhere, before the lower courts' decisions in the present matter, has held that, before searching a home, police officers are not required to have reasonable cause to believe a missing child is in the place to be searched.

[40] Unpublished opinions have been utilized to establish that the law is *not* clearly established for purposes of qualified immunity. *See, e.g., Green v. Post*, 574 F.3d 1294, 1305, 1308 (10th Cir.

There is no realistic prospect of the conflict regarding the standard to be applied in instances of warrantless searches for missing children being resolved without this Court's intervention. There is also no prospect, short of the grant of certiorari, for any remedy for the lower courts' (1) disregard of material evidence and their duty to view evidence and reasonable inferences in the light most favorable to the non-movant when ruling on a motion for summary judgment and (2) allowance of "exigent circumstances" to justify the warrantless search and seizure in this matter when such circumstances were created by the police officer.

Declining to grant certiorari would undoubtedly lead to many more unconstitutional searches, which will not be remedied short of extensive litigation through the district courts then to a United States court of appeals, and beyond—which is the stage at which this case is presently situated.

This case is a particularly good vehicle for addressing the important questions raised here because they are vividly presented in the context of a fully developed record.

CONCLUSION

The petition for writ of certiorari should be granted.

2009). The order of the court of appeals, although unpublished, "may be cited . . . for its persuasive value . . . ." Pet. App. 2.

Respectfully submitted,

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June 21, 2018

PETITIONER'S APPENDIX

PETITIONER'S APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 17-4039

[Filed March 13, 2018]

SEAN KENDALL,	)
	)
Plaintiff – Appellant,	)
	)
v.	)
	)
BRETT OLSEN; BRIAN PURVIS; JOSEPH ALLEN EVERETT; TOM EDMUNSON; GEORGE S. PREGMAN; SALT LAKE CITY CORPORATION,	)
	)
Defendants – Appellees.	)

ORDER AND JUDGMENT*

* 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

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

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 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.

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cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1

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, nonaggressive 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

/s/ Paul J. Kelly, Jr. Paul J. Kelly, Jr. Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

No.2:15-CV-00862-RJS-DBP

[Filed February 17, 2017]

SEAN KENDALL,	)
	)
Plaintiff – Appellant,	)
	)
v.	)
	)
BRETT OLSEN; BRIAN PURVIS; JOSEPH ALLEN EVERETT; TOM EDMUNSON; GEORGE S. PREGMAN; SALT LAKE CITY CORPORATION,	)
	)
Defendants – Appellees.	)

MEMORANDUM DECISION AND ORDER

This case arises from the 2014 shooting of Sean Kendall's dog by Salt Lake City Police Officer Brett Olsen during a search for a missing toddler. After the shooting, Kendall brought various state and federal claims against Olsen, the City, and several other officers. Both sides now move for summary judgment.

For the reasons below, the court grants Defendants' Motion for Summary Judgment on Kendall's federal constitutional claims and remands the case back to state court for further proceedings on Kendall's state claims.

BACKGROUND

On June 18, 2014, Officer Brett Olsen was patrolling the Sugar House neighborhood of Salt Lake City by motorcycle when he received word that a mother had reported her toddler missing from their home. Olsen quickly drove to the home, where several officers were already on the scene setting up a mobile command station. A supervisor, Lieutenant Purvis, instructed Olsen to begin canvassing the neighborhood in search of the missing boy. He alerted Olsen that the boy could not communicate verbally, and instructed that Olsen should therefore search everywhere visually. By the time Olsen began searching, it was believed the child had been missing for about an hour. This was significant, as time is generally thought to be crucial when searching for missing children, with the likelihood of positive outcomes decreasing significantly after about the first hour.

Olsen teamed up with another officer and began traveling north from the missing boy's home, as depicted in the map below. The officers went house to house knocking on doors. Some homeowners invited the officers into their homes and yards to look around. If nobody was home, the officers would briefly check the backyard if it was unfenced or if a fence gate was unlocked. The officers searched several homes in this manner.

Eventually, the officers arrived at Kendall's house, about ten homes away from the missing toddler's home. Olsen's partner went to the front door while Olsen walked to the side gate leading to Kendall's backyard, as depicted in the map above, and in greater detail in the overhead image of the home below. While his partner waited for a response, Olsen looked over the fence into the backyard at the location marked "Gate B" below.

From his vantage point at Gate B, Olsen could not see the entire backyard. He testified that after hearing no response from his partner's knocking at the front door, he tried the gate, which was unlocked, and entered the backyard. Olsen walked through the backyard to a shed in the corner of the property (top right corner in the image above), checked the shed, and found nothing. According to Olsen, as he turned and began to leave, he heard a dog begin barking behind him. He turned back toward the shed and saw a 90-pound dog about 20–25 feet away "running toward [him] and barking loudly." Presumably, the dog had emerged from a dog house wedged between the north side of the shed and the fence. Olsen began retreating quickly toward the gate, but the dog rapidly closed on him. Realizing he would not make it to the gate before the dog reached him, Olsen stopped, turned toward the dog, took "an aggressive stance,"

and stomped his foot, hoping the dog would back down. He did not, and, according to Olsen, instead continued to charge, barking with teeth bared. As the dog closed in to the point where Olsen felt it was "about to attack and to latch onto [him]," Olsen withdrew his service firearm and fired twice, killing the dog a few feet from where Olsen stood. Olsen secured the area and notified his supervisor of the incident by radio.

Ultimately, the missing boy was found unharmed sleeping in his family's basement underneath a box. Just over a year later, Kendall filed a Complaint in state court alleging federal and state constitutional violations as well as various other violations of state law. Defendants removed the case to federal court. Both parties now move for summary judgment on Kendall's federal constitutional claims. [41]

ANALYSIS

Both sides contend the undisputed facts entitle them to summary judgment. Kendall argues Olsen's entrance into his backyard was an unconstitutional search and the shooting of his dog was an unconstitutional seizure under the Fourth Amendment. [42] Defendants contend Olsen's entrance into Kendall's backyard was not a search, and even if it was, it was justified by exigent circumstances—namely, the urgent need to find the missing toddler.

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[41] Defendants also moved for summary judgment on Kendall's state constitutional claims, but as discussed below, the court declines to rule on those claims.

[42] In addition to his Fourth Amendment claim, Kendall initially brought a Fifth Amendment claim against Defendants, but he later withdrew this claim. Dkt. 45 at 1.

As to the seizure, Defendants argue that the shooting of Kendall's dog was reasonable because the dog acted aggressively toward Olsen. Alternatively, Defendants argue that even if the search or seizure violated the Fourth Amendment, Olsen is not liable because he is protected by qualified immunity.

I. The Qualified Immunity Doctrine

Olsen's invocation of qualified immunity changes the constitutional analysis slightly, so before delving into the constitutional claims, the court first provides a brief discussion of qualified immunity. Kendall sued the City and the officers under 42 U.S.C. § 1983, which, in essence, allows a citizen to sue a government official, like a police officer, for any constitutional violations that official commits on the job. Allowing citizens to sue police officers, however, potentially leads to the unintended consequence of deterring officers from taking action in difficult situations for fear they may ultimately be sued. Indeed, "police officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving."[43] We rely on officers to make these difficult decisions quickly, even if it is not entirely clear exactly what the law requires in every circumstance, because "[p]eople could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process."[44]

Courts have developed the doctrine of qualified immunity to balance the competing interests of

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[43]*Graham v. Connor*, 490 U.S. 386, 397 (1989).

[44]*United States v. Najar*, 451 F.3d 710, 714 (10th Cir. 2006) (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)).

vindicating citizens' important constitutional rights with affording police officers some necessary leeway to make difficult decisions. Under this doctrine, an officer is liable for violating a constitutional right only if his mistake about what the law requires is unreasonable. [45] The court determines whether an officer's mistake was reasonable based on whether it resulted in him violating a constitutional right that has been clearly established by the courts. [46] Where a constitutional right has been clearly established, an officer is expected to be aware of it and to act accordingly. But where reasonable officers could disagree about whether an action is lawful—that is, where the right has not yet been clearly established—the officer will not be liable for his mistake.

What this means for Kendall is that the law requires not only that he establish that Olsen violated the Fourth Amendment by searching his yard or seizing his dog, but also that any reasonable officer would know that the search or seizure was in violation of the Fourth Amendment in view of the specific circumstances presented. With these principles in mind, the court turns to the constitutional questions.

II. The Search

Kendall first claims that Olsen violated the Fourth Amendment by entering his backyard without a warrant. He contends that the search of a home and the surrounding area requires either a warrant or an exception to the warrant requirement, and that in this case Olsen had neither. In response, Defendants argue Olsen's limited sweep of Kendall's backyard

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[45] *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

[46] Id. at 202.

was not a "search" within the meaning of the Fourth Amendment, and even it was, the warrant requirement was excused by the exception for exigent circumstances.

The Fourth Amendment generally prohibits searching a home without a warrant.[47] And in certain circumstances, this prohibition extends to the area immediately surrounding the home, what is known as the "curtilage."[48] Here, Olsen did not enter Kendall's home, but instead entered his backyard, which, according to Kendall, is protected Fourth Amendment curtilage. Defendants disagree. They contend Kendall's backyard was not sufficiently private to constitute protected curtilage, so Olsen's entrance into the backyard was not a "search" of any Fourth Amendment-protected area.

The question of whether any particular backyard is or is not protected curtilage is not so clear cut. Indeed, it "depends upon a number of facts and factors," including how close the area is to the home, how the area is used, and what steps the homeowner has taken to ensure its privacy.[49] But the court need not answer that question today, for even assuming Kendall's backyard was protected Fourth Amendment curtilage—meaning Olsen's entrance into the backyard was a "search" for Fourth Amendment purposes—it was justified by the exigent circumstances of locating a missing child.

As discussed, the Fourth Amendment typically requires a warrant to conduct a search, especially of

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[47]*United States v. Porter*, 594 F.3d 1251, 1255 (10th Cir. 2010).

[48]*United States v. Cavely*, 318 F.3d 987, 993 (10th Cir. 2003).

[49]Id. at 993–94.

the home, but that requirement is excused when an officer faces exigent circumstances, such as "assist[ing] persons who are seriously injured or threatened with such injury." [50] A warrant, for example, "is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting, or to bring emergency aid to an injured person." [51] Warrants take time, and in certain limited circumstances where time is of the essence, courts will not require one. To demonstrate the existence of one of these circumstances and invoke the exigency exception to the warrant requirement, an officer must demonstrate: (1) he had an objectively reasonable basis to believe there was an immediate need to protect the lives or safety of himself or others; and (2) the manner and scope of the resulting search was reasonable. [52]

As to the first prong of the test, there can be no doubt that when a toddler goes missing there is an immediate need to protect life or safety. Courts have noted that "the problem of missing children is a profoundly serious one," [53] and Congress has recognized that "missing children are at a great risk."[54] Kendall himself "concedes that . . . there were

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[50]*Porter*, 594 F.3d at 1256–57 (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).

[51]*Najar*, 451 F.3d at 714 (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)).

[52]Id. at 718.

[53]*United States v. Wei Seng Phua*, No. 2:14-CR-00249-APG, 2015 WL 427862, at *17 (D. Nev. Feb. 2, 2015).

[54]*Cuevas v. City of Philadelphia*, No. CIV. A. 05-3749, 2006 WL 2345928, at *6 (E.D. Pa. Aug. 11, 2006) (citing congressional

reasonable grounds for . . . Olsen to believe there was an urgent situation" because "to [his] knowledge, a two- or three-year-old boy was missing from his home."[55] That there was an exigency does not appear to be in dispute.

What is in dispute is the second prong of the test—the reasonableness of the scope and manner of the search for the child.[56] On this point, Defendants argue the scope of the search was reasonable because officers confined the search to places a toddler could have accessed in a radius surrounding his home within which he could have wandered in the time that had passed. And as to manner, Defendants argue the officers reasonably knocked first to ask homeowners for permission to look around, and absent homeowner permission they conducted only a quick sweep of open backyards, not the inside of homes or other locked areas. Kendall disagrees, arguing it was unreasonable for officers to conduct a blanket search of any area within a certain radius of the missing child's home.

The scope of a search is reasonable when the search is limited to "the locations where a victim might likely be found," and the manner of searching is reasonable when the intrusion is no greater than necessary given the exigency.[57] Here, the toddler had been missing for an hour by the time Olsen began canvassing the

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findings related to the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601).

[55]Dkt. 45 at 78.

[56]The reasonableness of the search is a question of law for the court to resolve. *McInerney v. King*, 791 F.3d 1224, 1232 (10th Cir. 2015).

[57]*Najar*, 451 F.3d at 720.

neighborhood, and the child's mother gave officers no indication of what direction he may have wandered. Given these facts, the court finds it was reasonable for officers to confine the scope of the search to places to which a toddler could have walked in the hour or so that had passed, and within that radius to further confine the search to areas a toddler could have actually have accessed, like open and unlocked backyards. Considering the limited information officers were given, these were the locations where the toddler might likely be found. As to the manner, the court concludes that the intrusion—knocking on doors and quickly sweeping unlocked backyards—was no greater than necessary, especially considering the nature of the exigency, and, in particular, the fact that the missing boy was noncommunicative and had to be located visually.

Kendall's main area of disagreement is with the reasonableness of the scope of the search. According to Kendall, accessibility and proximity to a missing child are not enough to justify searches of neighboring yards. He contends the mere fact that a yard is accessible to a toddler and is within walking distance of the toddler's home, on its own, is insufficient to tie a search of the yard to the exigency of the missing toddler. Instead, Kendall proposes a different rule: that an exigency-based search of a yard for a missing toddler is constitutional only if there is a reasonable basis, aside from access and proximity, to believe the toddler is in that particular yard, as opposed to any other accessible yard within walking distance.

Kendall's interpretation is not borne out by the case law, nor does it comport with the realities of on-the-ground police work. In support of his proposed rule,

Kendall cites a line from *United States v. Gambino-Zavala*, where the Tenth Circuit framed the exigency exception as requiring that "the government must show the officers reasonably believed a person *inside the home* was in immediate need of aid or protection."[58] Kendall seizes on this reference to the home to support his interpretation that Olsen was required to make a home-by-home determination of whether the toddler was likely to be in that particular home, rather than merely relying on the fact that a home was one of many accessible to and within walking distance of the missing child.

The court disagrees. *Gambino-Zavala* focused on the home because in that case, the exigency was limited to one home; a neighbor heard gunshots in a particular unit, and officers subsequently searched that unit to determine if anyone inside was injured. [59] Nothing in *Gambino-Zavala*, or in Tenth Circuit law in general, purports to require the narrow focus Kendall proposes. Indeed, the Tenth Circuit used to require something similar—a "reasonable basis, approaching probable cause, to associate the emergency with the place to be searched"—but in 2006 replaced it with the more general requirement that "the manner and scope of the search [must be] reasonable." [60]

This general reasonableness requirement reflects the reality that not all exigencies are neatly confined to one home. To be sure, in the case of a neighbor reporting gunshots from a particular home, the

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[58]539 F.3d 1221, 1225 (10th Cir. 2008) (emphasis added).

[59]Id. at 1224.

[60]*Najar*, 451 F.3d at 718.

"locations where a victim might likely be found" may well be limited to that one home. [61] But in cases like this one, where a child has been missing for an hour, the child might likely be found anywhere within a several-block radius. The Tenth Circuit's reasonableness requirement accommodates this reality by recognizing that when a genuine and significant exigency spans a large area, a somewhat broader geographical search may be warranted.

This simple proposition is lost in Kendall's proposed rule. Indeed, Kendall's strict interpretation of the exigency exception—which would require officers to determine, at each home, whether there's reason to believe the child is actually there, as opposed to any other home—would all but end police assistance in missing child cases like this one, where officers know little more than where the child was last seen and how long he has been missing. Armed only with this information, there is no reason, for example, to believe the child is any more likely to be in an open backyard on the north side of the child's home than he is to be in an open backyard on the south side of the home. According to Kendall, that means neither gets searched. That doesn't comport with what we expect of officers urgently looking for missing children, and is not reflected in the law.

This is not to say, as Kendall's attorney suggested at oral argument, that all Fourth Amendment rights go out the window for any home within walking distance of and accessible to the missing toddler. Quite the contrary—even after establishing the reasonable geographic scope of a search, the Fourth

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[61] Id. at 720.

Amendment still demands that the *manner* of searching any home within that area also be reasonable (meaning the intrusion is no greater than necessary). This reflects the understanding that even among protected Fourth Amendment areas, the intrusiveness of a search can vary greatly. A sweep of the curtilage is less intrusive than breaking down a locked door and searching a living room, which is less intrusive than rummaging through a closet in the bedroom, and so forth. The Fourth Amendment cabins the intrusiveness of any search by demanding that the manner of the search be reasonable.

And like scope, what is reasonable in terms of manner will vary depending on the nature of the exigency. While it is reasonable for police to forcefully enter and search a home after reports of gunfire in that home, [62] nobody contends that Olsen could have barged into and searched any home within a fixed radius of the missing toddler. Given the nature of the exigency in this case—a missing, noncommunicative toddler—and the scope of the search—a several-block radius—it was reasonable to knock on doors and briefly sweep open backyards where a toddler may have ventured. Olsen was not free to break into homes and ransack bedrooms.

Indeed, contrary to Kendall's contention, the court's holding does not imply that Olsen had "virtually unbounded authority to enter into and search people's private homes . . . [across] the Wasatch Front, or perhaps beyond." Rather, the court holds only that where a nonverbal toddler has been missing from his home for over an hour, it is reasonable, within walking

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[62]*See Gambino-Zavala*, 539 F.3d at 1225–26.

distance of the missing toddler, for officers to knock on doors and conduct a quick sweep of open backyards into which the toddler may have wandered.

In sum, the court concludes that even if Olsen's warrantless sweep of Kendall's backyard was a Fourth Amendment search, it was not unconstitutional because it was justified by exigent circumstances. And even in the event it was an unconstitutional search, Olsen would be entitled to qualified immunity because his mistake as to what the law requires would be reasonable. On this point Kendall has the burden of pointing to Tenth Circuit or Supreme Court case law that would put a reasonable officer on notice that when a nonverbal toddler is missing, a searching officer must have a reason, aside from mere proximity, for quickly sweeping any open and accessible nearby backyard. Kendall has provided no such authority. Thus, summary judgment on Kendall's claims related to Olsen's search is granted in Defendants' favor, both on the basis that no constitutional violation occurred and that Olsen is entitled to qualified immunity.

III. The Seizure

Kendall also contends that Olsen's shooting of his dog was an unconstitutional seizure under the Fourth Amendment. The Fourth Amendment prohibits unreasonable seizures. [63] And nobody disputes that Olsen's shooting of Kendall's dog was a seizure. [64] Thus, the only question is whether the shooting was

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[63]*See* U.S. Const. amend. IV; *see also Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1188 (10th Cir. 2001).

[64]*See* Dkt. 35 at 34; *see also Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 270 (D. Conn. 2005)

reasonable in view of the facts presented. In this context, reasonableness turns on weighing the intrusiveness of the seizure against the government's reason for doing it. [65] Put simply, the less intrusive the seizure and the more compelling the government's justification for it, the more likely it is to be constitutional.

The intrusion here was quite serious. While Fourth Amendment seizures generally involve property, this case involved a dog, and courts have recognized that most dog owners "think of dogs solely in terms of an emotional relationship, rather than a property relationship." [66] Thus, when a dog is seized—and especially, as here, where it is killed, not merely injured or detained—the intrusion on the owner weighs heavily in favor of finding the seizure unreasonable and unconstitutional.

On the other side of the equation is officer safety, also a weighty concern. Officers face a changing array of threats daily. Among these threats are dogs, some of which "may harass or attack people," and "maim or even kill." [67] Thus, while many dogs pose no serious threat to officers, some do, and because officers are often forced to make split-second judgments about the threat a particular dog poses, their ability to effectively protect themselves also weighs heavily in the legal reasonableness calculus.

Courts have found a balance between the rights of dog owners and the interests of officer safety by

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[65]*Graham v. Connor*, 490 U.S. 386, 396 (1989).

[66]*Altman v. City of High Point, N.C.*, 330 F.3d 194, 205 (4th Cir. 2003).

[67]Id.

implementing a simple rule: an officer's killing of a dog is reasonable only if the dog poses an "imminent threat."[68] Whether a dog poses an imminent threat is judged "from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight."[69] In other words, the question is not whether the dog, in retrospect, actually posed an imminent threat, but instead whether a reasonable officer on the scene would perceive it that way.

In this case, the uncontradicted evidence demonstrates that a reasonable officer in Olsen's position would conclude that Kendall's dog posed an imminent threat when it aggressively charged Olsen while simultaneously barking loudly and baring its teeth. That evidence consists entirely of Olsen's testimony about the event, because he was the only one to witness it. In his police report, written hours after the incident, Olsen reported that he "saw a large gray dog running towards [him] and barking loudly," and that he "believed the dog was about to bite [him]."[70] In his deposition, he testified that "the dog had a very mean demeanor," its "ears were back, the tail[] w[as] straight, the teeth were bared, it was snarling,

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[68]*See Branson v. Price*, No. 13-cv-03090-REB, 2015 WL 5562174, at *6–7 (D. Colo. Sept. 21, 2015) (listing cases). It does not appear that the Tenth Circuit or the Supreme Court has weighed in on the proper standard in this circumstance, but as *Branson* demonstrates, the clear consensus among courts of appeal is that an officer may reasonably kill a dog that presents an imminent threat. *Id.* (examining cases from the Third, Seventh, Eighth, and Ninth Circuits, and finding no circuit decision to the contrary).

[69]Graham, 490 U.S. at 396.

[70]Dkt. 46, Ex. (A)(2)(1).

barking loudly and actually running towards [him]."[71] Olsen testified that in the moment before he pulled the trigger the dog "was leaping towards [him]."[72] Given this testimony, a reasonable officer could conclude that the 90-pound Weimaraner posed an imminent threat.

Kendall takes issue with this conclusion for several reasons. First, he contends that various inconsistencies in Olsen's testimony render him not credible and his testimony not believable. These inconsistencies include: (1) Olsen testified he may have heard his partner ring Kendall's doorbell, while his partner testified that he knocked on the door; (2) Olsen testified he heard a doorbell and knocking from his location at Gate B, but Kendall submits that was too far from the front door to hear knocking or a doorbell; (3) Olsen testified he waited to enter the backyard until it appeared that nobody would answer the door, but his partner testified that he heard gunshots shortly after he started knocking; and (4) Olsen at times reported that it took about thirty seconds to check the backyard and at other times testified it took about a minute and a half. The court finds that these are relatively minor inconsistencies that might be expected of a person trying to describe a dynamic and quickly evolving situation. They are not material inconsistencies sufficient to give rise to an inference that Olsen is deliberately lying or that his recollection of key events is suspect. Because no reasonable jury could find Olsen not credible based on his statements in the record before the court, Kendall

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[71]Dkt. 63, Ex. (A)(2) at 93.

[72]Id. at 97.

has failed to raise a triable issue of fact to defeat summary judgment.

Kendall also argues that even taking Olsen's testimony at face value, a reasonable officer could not conclude based on those facts that he faced an imminent threat. Kendall first contends that "Olsen had no lawful reason to be in [the] yard in the first place." [73] That argument addresses whether the *search* was reasonable, and the court already concluded that it was. He next argues that Olsen invited the attack because he "recklessly started running as soon as he heard [the] bark, which anyone should know would simply provoke a dog to run after him." [74] An officer's split-second decision to make a break for the gate to escape or avoid a confrontation, rather than standing his ground to face a charging 90-pound dog, is not unreasonable. Moreover, Olsen did ultimately try the tactic Kendall now suggests he should have taken: Olsen testified he first attempted to retreat, but then, realizing the dog would beat him to the fence, turned and "tried standing [his] ground and taking a more dominant stance, broadening [his] shoulders and stomping [his] foot, in an attempt to 'call [the dog's] bluff," [75] but to no avail.

Kendall also argues that Olsen should have known that Weimaraners are typically "friendly, warm, kind dogs who do not bite without being cornered." [76] While this may well be so, it tells the court nothing about how this Weimaraner acted on this specific occasion.

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[73]Dkt. 45 at 83.

[74]Id. at 84.

[75]Dkt. 36 at 4.

[76]Dkt. 45 at 85.

Just as breeds with reputations for being dangerous or aggressive may act in friendly or docile ways in many circumstances, so too can dogs typically thought to be warm and docile act aggressively at times. Regardless, officers are not charged with developing specific expertise in the nuances between breeds. To be sure, had Olsen been greeted with a 5-pound Pomeranian the analysis would be different, but he was confronted with a large, 90-pound dog, and it was reasonable to assume the charging dog posed a threat. In the same vein, Kendall argues that this particular dog was friendly and nonaggressive, as demonstrated by testimony of Kendall's sister and neighbor. This testimony may be relevant to whether Kendall's dog in fact posed a threat to Olsen, but that's not the question the court must answer; the question presented for Fourth Amendment purposes is whether a reasonable officer on the scene would believe the dog posed an imminent threat. A reasonable responding officer would not be expected to know anything about Kendall's dog's history, and would instead be expected to act reasonably based on the facts in front of him. Those facts—which, again, are not in dispute—are that a 90-pound dog charged Olsen while barking aggressively. [77]

Last, Kendall argues that Olsen acted unreasonably because he did not first try to use lesser

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[77]*See, e.g.*, *Williams v. Voss*, No. CIV. 10-2092 ADM/TNL, 2011 WL 4340851, at *4 (D. Minn. Sept. 15, 2011) (no genuine issue of fact about whether dog was aggressive where officer's "sworn affidavits stat[ed] that the dog charged at them aggressively" and plaintiff had "no specific evidence to refute that assertion" because other witnesses "could not see the dog at the time it was shot").

force, like his baton, his boot, or his taser. But the law does not require officers to try varying degrees of nonlethal force before turning to lethal force. Indeed, "an officer need not use the least harmful alternative in dealing with a dangerous situation in which officer safety is an issue." [78] This is so even where, in retrospect, a lower degree of force may have been sufficient. The standard is not what a lawyer, or a judge, or anybody scrutinizing the situation with the benefit of retrospective deliberation would have done. The standard is what a reasonable officer on the ground in the moment would have done, an officer who is "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." [79] In this case, a reasonable officer could conclude that lethal force was required.

When presented with what appears to be an imminent threat, an officer need not wait to be mauled or attacked before employing force in self-defense. Kendall has not demonstrated that Olsen's actions deviated from a what a reasonable officer would have done. And even if Olsen's actions were unreasonable—that is, even if the shooting was an unconstitutional seizure—Olsen would be entitled to qualified immunity because a reasonable officer would not be on notice that shooting a 90-pound dog that is running toward him and barking, with no time for the officer to escape, would violate the Fourth Amendment.

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[78] *McCarthy v. Kootenai Cty.*, No. CV08-294-N-EJL, 2009 WL 3823106, at *6 (D. Idaho Nov. 12, 2009).

[79] *Graham*, 490 U.S. at 396–97.

Defendants' Motion for Summary Judgment on the Fourth Amendment claim against Olsen is granted.

IV. The Claims Against the City and Lieutenant Purvis

In addition to his claim against Olsen, Kendall brought a claim against the City alleging, in essence, that if Olsen violated the Constitution, so too did the City because it had policies or practices in place that permitted or encouraged Olsen to act unconstitutionally. Because the court has now determined that Olsen did not violate the Constitution, neither did the City. Similarly, Kendall brought a claim against Lieutenant Purvis (the officer who ordered Olsen to canvass the neighborhood) alleging that Purvis has liability for any constitutional violation Olsen committed while conducting the canvass because Purvis ordered Olsen to do it. Again, because the court determined Olsen committed no constitutional violation, neither did Purvis. The court grants Defendants' Motion for Summary Judgment on the federal constitutional claims against the City and Purvis.

V. The State Law Claims

Having dismissed all of Kendall's federal claims, the court must now decide what to do with his remaining state law claims. This is a court of limited jurisdiction, meaning it is authorized to hear only certain types of claims.[80] Generally, state law claims are not among those the court can decide, unless certain conditions are met. The condition that allowed the state claims to initially go forward in this case was

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[80]*See Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035 (10th Cir. 2015).

that they were related to the federal constitutional claims, over which this court does have jurisdiction. [81] As discussed above, those claims are now dismissed. The court in some instances may continue to hear associated state claims, notwithstanding dismissal of the federal claims, but this is disfavored. [82] Indeed, the Tenth Circuit has made clear that after dismissing federal claims, "the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." [83] Given this guidance from the Tenth Circuit, and given Utah's interest in the remaining legal issues arising under state law, the court declines to exercise supplemental jurisdiction over Kendall's remaining state claims. Those claims are remanded back to state court.

CONCLUSION

This case is tragic on several levels. Parents feared their child missing, officers urgently responded, and Kendall lost his beloved companion animal. The court is mindful of the strong reactions this case has aroused among animal owners, parents, law enforcement, and community members. The case has exposed tensions that can arise between important competing interests, and the court has done its best to resolve these tensions while constraining its analysis to the facts presented by the parties and the established law.

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[81] *See* 28 U.S.C. § 1367.

[82] *See Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011).

[83] *Id.* (quoting *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998)).

For the reasons stated above, the court concludes that Kendall has failed to establish either an unconstitutional search or seizure under the Fourth Amendment. But even if Officer Olsen's search or the shooting of Kendall's companion pet amounted to a violation of a constitutional protection, Kendall has failed on the record before the court to establish that the law concerning officer conduct at the time was clearly established—providing fair notice to reasonable officers under similar circumstances that Officer Olsen's conduct was unconstitutional. The court awards summary judgment to Olsen, Purvis, and the City on Kendall's federal constitutional claims. The case is remanded back to state court to resolve Kendall's state law claims.

DATED this 17th day of February, 2017.

BY THE COURT

/s/ Robert J. Shelby
Honorable Robert J. Shelby

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 17-4039

[Filed April 6, 2018]

SEAN KENDALL,	)
	)
Plaintiff – Appellant,	)
	)
v.	)
	)
BRETT OLSEN, et al.,	)
	)
Defendants – Appellees.	)

ORDER

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

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

* * *

[R. 345:25–346:13]
[p. 55–56]

Q. Let me ask, first of all, did lieutenant Purvis tell you that he wanted you to search everywhere?

A. He reiterated that the boy could not communicate and that we needed to look everywhere we could to try to find this boy.

Q. And did he tell you to go into homes?

A. He did not use those words.

Q. But he said "everywhere"?

A. Everywhere we could.

Q. Did you understand that he meant inside homes?

A. Yes.

Q. And you understood that he meant inside enclosed yards?

A. Yes. Based on consent or exigency or whatever.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 393:13–25]
[p. 113]

Q. But he told you to go into yards?

A. Told us to go search properties and houses.

Q. And that included going into yards? You understood that?

A. Yes.

Q. And that's why you went into the Kendall yard?

A. I didn't need him to tell me to go into the Kendall yard.

Q. You understood you going in the Kendall yard was consistent with him telling you to go into yards and check?

A. I felt it was consistent with the instructions he gave.

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Excerpts of Brett W. Olsen
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June 23, 2016

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[R. 394:4–8]
[p. 114]

Q. And by that it means going into the yards if you couldn't see the entire yard from outside, search the yard, and then make note that you'd searched it and had not found anything?

A. Correct.

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Excerpts of Brett W. Olsen
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[R. 345:17–20]
[p. 55]

A. When he informed us to begin a canvas or a search of the neighborhood, I teamed up with Gordon Worsencroft who was also in the Community Intelligence Unit.

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Excerpts of Brett W. Olsen
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[R. 365:22–24]
[p. 80]

Q. And you entered -- you opened the gate and entered the yard?

A. Yes.

* * *

Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 369:1–372:3]
[p. 84–87]

Q. All right. So you opened the gate and walked into the backyard?

A. Yes.

Q. And where did you go inside the backyard?

A. Can we -- can I draw something more to scale?

Q. Sure.

A. Okay. Maybe zoom in a little bit so we can –

Q. That would be great. No. I appreciate it.

A. So, to the best of my recollection, there's a house right here which is the Kendall home. This way is, again, going to be north to the top of the paper. There is a gate -- there's a gate right here and a building right here which is a garage. And then there's a gate right here, and then that property line goes right here. After further review and going into the backyard, I found out that there is a shed over here (indicating).

Q. Could you put an S in that box?

A. Yes.

Q. Thanks.

A. And then that's got some type of an awning right here (indicating).

Q. Can you put an A there?

A. Uh-huh. Um, I entered the gate and I -- as I said, I couldn't see anything in this area or anything over here.

Q. When you say "this area and over here," for the record, that's not going to be helpful so if you could just –

A. Yeah. That's to the south of the Kendall home and to the east of the garage I couldn't see. So, as I walked through the gate, I walked towards the south and then I peeked –

Q. Could you maybe do just a dotted line showing your course of travel?

A. Uh-huh. And I peeked over to the south side of the home, and I saw that it was a very short area and that there was nothing, nothing there. There was bushes.

Q. And there's a gate there, right?

A. I think there is a small gate, yeah.

Q. Isn't that where Gordon Worsencroft entered the yard?

A. I don't know. After I checked that, I walked over to just look on this side of the garage and as I got to about here, I saw that there was actually a shed that was part of this property and so I went to the shed, and the shed was a very -- it was a very small door, easy to open. I just checked inside the shed, saw nothing, and so I kind of closed it. But then I went to -- I saw there was space over here and over here (indicating) so I looked, saw nothing. I looked over here and I just saw wood, like a wood box or whatever.

Q. A doghouse?

A. It is now, yeah. I realize that now, but it looked like just plywood.

Q. Could you put a D there?

A. (Witness complied). And then once I saw that, I said, well, there's nothing here. So I went – and that was my first indication that there -- that could be a kennel. So I thought, well, okay, but it didn't make itself known so I started -- as I started walking away, the door was not closed all the way.

Q. On the shed?

A. Yeah. On the shed. And I wanted this property to be secure, so I went over to the door and I just put my hand on the door and pushed it closed. When I pushed it closed, that's when I started hearing Geist, and it started barking very angrily, and so I thought there is a dog back there and so I started going around here as fast as I could. I wanted to get out of the backyard.

Q. Where did you go?

A. I started running up this way. It was kind of a sideways run because I wanted to keep an eye on what was coming, and I attempted to go through underneath this to get out of this gate.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 394:18–23]
[p. 114]

Q. And Exhibit 12 is the diagram you drew of the Kendall home and garage, backyard and gate, correct?

A. Yes.

Q. And the route that you took when you were in the backyard?

A. Yes.

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Excerpts of Brett W. Olsen
Deposition Transcript
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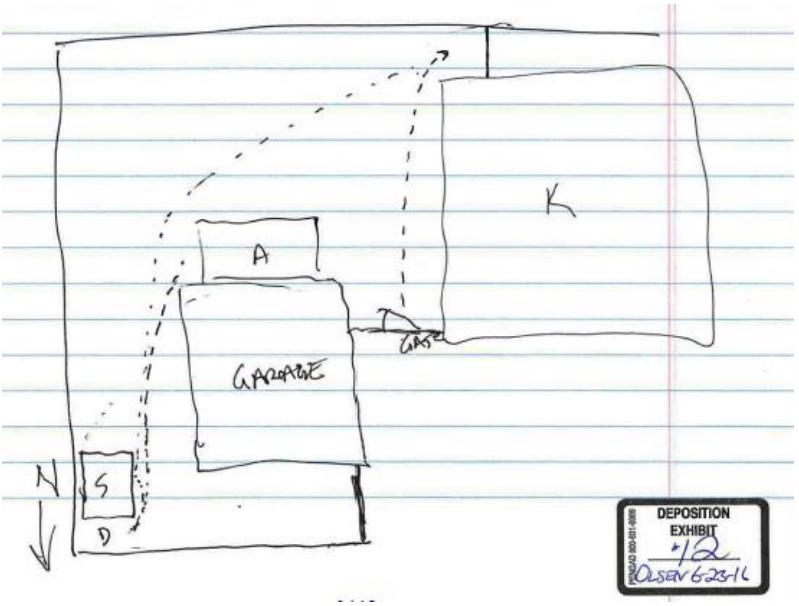
[R. 445]
[Deposition Exhibit 12]



Excerpts of Brett W. Olsen
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[R. 357:24–358:11]
[p. 72–73]

Q. And did you have any reason to believe that there was any specific connection between the Kendall home or the yard or garage close to the Kendall home and this supposedly missing boy and the circumstances surrounding his being missing?

MS. SLARK: Objection. Asked and answered.

THE WITNESS: Yes. I did. As I said, the house was well within walking distance of a three-year-old. I said before that children and criminals like to take the paths of least resistance, so as you're walking, and, obviously, this one was either getting done or just about to be done.

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Excerpts of Brett W. Olsen
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June 23, 2016

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[R. 360:1–361:24]
[p. 75–76]

Q. Okay. And I asked you earlier if you knew of any specific connection between that home or the yard and the missing boy or the circumstances surrounding the supposedly missing boy. Other than the spacial 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's the only thing. I had no reason to believe that the occupants of this house were connected to them in any way.

Q. Or that there was any connection between the house or the property around it and the missing boy they can be very accessible and they're very approximate to the house.

A. And accessibility, the ease of being able to get there.

Q. So in terms of whether there was any connection between that house and the adjoining property, there was no more connection to this missing boy and the circumstances surrounding him apparently being missing than, say, the house across the street on Parkway; is that correct?

A. Well, the crossing a busier road like that is a little bit less accessible, but, yeah, they're both -- they can be very accessible and they're very approximate to the house.

Q. Do you know about how many homes there were from the one that you first searched on Filmore and going

down on –

A. I think –

Q. -- on the west side of Filmore to Parkway?

A. I think there are five or six.

Q. And was there any particular connection between the Kendall house and the adjoining yard, driveway, shed, whatever in that 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.

Q. So it was simply that they were in the neighborhood, correct?

MS. SLARK: Objection. Asked and answered.

THE WITNESS: It was because they were well within walking distance of the three-year-old, and it was a very accessible and easy-to-get-to gate and property.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 364:6–365:16]
[p. 79–80]

Q. All right. You had no knowledge as to who the occupants of the Kendall home were, correct?

A. No idea.

Q. And nobody had given you any information that this supposedly missing boy had ever gone to that home, correct?

A. I -- the only indication that I received about the boy going anywhere was possibly to a relative's or they said that they had –

Q. Right next-door?

A. I believe it was right next-door. It was – I guess the boy had gone over there before or something.

Q. Okay. So I'm going to ask it again just to get a direct response.

A. That's fine.

Q. You had no information whatsoever that that boy had ever gone to the Kendall home or the yard around the Kendall home, correct?

A. No.

Q. That is correct, correct?

A. That's correct.

Q. And other than that home being within what you thought was walking distance of the three-year-old

given the time that had elapsed at that point, you knew of no connection whatsoever between the Kendall home or the yard around it and the missing boy or the circumstances surrounding him being missing?

MS. SLARK: Objection. You've asked that question 15 times. He's answered it 15 times. Asked and answered.

BY MR. ANDERSON:

Q. Is that correct?

A. Again, other than the proximity and the ease and the accessibility of that backyard, no.

Q. So it is correct?

A. Correct.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 375:4–9]
[p. 90]

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.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 468:6–12]
[p. 66]

Q. Was there, to your knowledge, any connection or any nexus between the fact that there was perceived to be a missing boy and any of the homes or yards or streets in that area?

A. No.

Q. Or anywhere else?

A. No.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 468:25–470:6]
[p. 66–68]

Q. So the whole purpose of the search for any of these properties was to just see if the boy had wandered there or had been taken by somebody that may have abducted him?

A. Correct. Yes.

Q. And there was no way to know whether the boy maybe had been put in a car and driven away 10 miles by then?

A. Right. No way to know.

Q. Did you have reason to believe that there was any connection or nexus between the Kendall residence or the yard in which Geist was shot and the missing -- the supposedly missing boy?

MS. SLARK: The same objection as previously.

THE WITNESS: No.

BY MR. ANDERSON:

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. And I'll ask -- I'll make that a complete question so it's clear for the record. 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.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 477:8–16]
[p. 85]

Q. * * * Up to this point we had nothing to say that he -- he wasn't, you know, not in the neighborhood, that he didn't just open the front door and, you know, wander off so I don't know. I mean, it's -- it's all speculation. I mean, it could be anything.

Q. It was speculation, wasn't it?

A. It could be anything, but we -- one thing we were certain is a child's missing.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 992:24–993:8]
[p. 72–73]

Q. And did you have any reason to believe that there was any specific connection between the Kendall home or the yard or garage close to the Kendall home and this supposedly missing boy and the circumstances surrounding his being missing?

MS. SLARK: Objection. Asked and answered.

THE WITNESS: Yes. I did. As I said, the house was well within walking distance of a three-year-old.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 995:4–12]
[p. 75]

Q. * * * Other than the spacial 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's the only thing. I had no reason to believe that the occupants of this house were connected to them in any way.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 996:9–16]
[p. 76]

Q. And was there any particular connection between the Kendall house and the adjoining yard, driveway, shed, whatever in that 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.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 999:6–1000:16]
[p. 79–80]

Q. All right. You had no knowledge as to who the occupants of the Kendall home were, correct?

A. No idea.

Q. And nobody had given you any information that this supposedly missing boy had ever gone to that home, correct?

A. I -- the only indication that I received about the boy going anywhere was possibly to a relative's or they said that they had –

Q. Right next-door?

A. I believe it was right next-door. It was – I guess the boy had gone over there before or something.

Q. Okay. So I'm going to ask it again just to get a direct response.

A. That's fine.

Q. You had no information whatsoever that that boy had ever gone to the Kendall home or the yard around the Kendall home, correct?

A. No.

Q. That is correct, correct?

A. That's correct.

Q. And other than that home being within what you thought was walking distance of the three-year-old given the time that had elapsed at that point, you knew of no connection whatsoever between the Kendall home or the yard around it and the missing boy or the circumstances surrounding him being missing?

MS. SLARK: Objection. You've asked that question 15 times. He's answered it 15 times. Asked and answered.

BY MR. ANDERSON:

Q. Is that correct?

A. Again, other than the proximity and the ease and the accessibility of that backyard, no.

Q. So it is correct?

A. Correct.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 1036:18–1037:3]
[p. 119–120]

Q. You opened up the door to the shed in the backyard, right?

A. Yes.

Q. And you felt you were entitled to do that without consent or a warrant?

A. Yes.

Q. And without cause for believing there was any connection between that shed and the young boy missing, other than the fact of spacial proximity and access?

A. Yes.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 1081:6–12]
[p. 66]

Q. Was there, to your knowledge, any connection or any nexus between the fact that there was perceived to be a missing boy and any of the homes or yards or streets in that area?

A. No.

Q. Or anywhere else?

A. No.

* * *

Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 1082:9–1083:6]
[p. 67–68]

Q. Did you have reason to believe that there was any connection or nexus between the Kendall residence or the yard in which Geist was shot and the missing -- the supposedly missing boy?

MS. SLARK: The same objection as previously.

THE WITNESS: No.

BY MR. ANDERSON:

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. And I'll ask -- I'll make that a complete question so it's clear for the record. 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.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 1082:5–8]
[p. 67]

Q. And there was no way to know whether the boy maybe had been put in a car and driven away 10 miles by then?

A. Right. No way to know.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 371:8–23]
[p. 67]

Q. Could you put a D there?

A. (Witness complied). And then once I saw that, I said, well, there's nothing here. So I went – and that was my first indication that there -- that could be a kennel. So I thought, well, okay, but it didn't make itself known so I started -- as I started walking away, the door was not closed all the way.

Q. On the shed?

A. Yeah. On the shed. And I wanted this property to be secure, so I went over to the door and I just put my hand on the door and pushed it closed. When I pushed it closed, that's when I started hearing Geist, and it started barking very angrily, and so I thought there is a dog back there and so I started going around here as fast as I could. I wanted to get out of the backyard.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 371:18–372:5]
[p. 86–87]

Q. * * * When I pushed it closed, that's when I started hearing Geist, and it started barking very angrily, and so I thought there is a dog back there and so I started going around here as fast as I could. I wanted to get out of the backyard.

Q. Where did you go?

A. I started running up this way. It was kind of a sideways run because I wanted to keep an eye on what

was coming, and I attempted to go through underneath

this to get out of this gate.

Q. So you -- you were running away from the dog?

A. Yes. I started to.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 381:15–22]
[p. 96]

A. He startled me, but I had enough time to think about using a Taser, and I felt that that would be very ineffective. Tasers are ineffective on dogs, and I was left with –

Q. And might miss him?

A. Yeah. It would be very easy to miss and you have to connect both probes, and that's just impractical on a dog.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 329:8–12]
[p. 26]

Q. Do you just carry a Taser?

A. A Taser and an ASP.

THE REPORTER: And a what?

THE WITNESS: ASP. That's an expandable baton, A-S-P.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 381:23–382:3]
[p. 96–97]

Q. What about using your -- the -- what's the stick called?

A. It's a baton.

Q. The baton?

A. That would require basically me getting too close to that dog to want to experiment.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 379:3–11]
[p. 94]

Q. So none of the training you've received since you shot and killed Geist has provided you with any knowledge or skills to avoid using lethal force against a dog like Geist under those same kinds of circumstances?

A. I didn't say that. Since that training –

Q. No. I'm asking you that.

A. -- and particularly since that incident, yeah, I particularly am more inclined to check for dogs.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 382:15–19]
[p. 97]

Q. What happened after you shot Geist?

A. After I shot Geist I got on the radio and informed dispatch that if they received any reports of shots fired that it was me and that I was okay, and then I asked for a supervisor to respond.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 417:10–14]
[p. 137]

Q. Do you see Geist dead at the end of the patio?

A. I do.

Q. So this photograph would have been taken shortly after you shot Geist?

A. Yes.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 348:3–349:15]
[p. 58–59]

Q. And you were on the south side of Parkway at that point?

A. Yes.

Q. Was there a duplex on the corner?

A. I think there's a duplex right here or there's a house right here or duplex. I think there's a corner house.

Q. Could you put a D inside of that box?

A. (Witness complied).

Q. Okay.

A. And then the house where Geist was, was on this corner.

Q. Okay. And is this 15th East?

A. I don't know. It's the house directly west of Filmore.

Q. The street directly west of Filmore?

A. Yes.

Q. Okay. And since that was the Kendall residence, could you put a K inside of that?

A. (Witness complied).

Q. Okay. And you've put a D where the duplex was?

A. Yes.

Q. And did you go into the backyard of the duplex?

A. No.

Q. There was a driveway to the west of the duplex, correct?

A. Yes.

Q. Could you just draw that in there?

A. (Witness complied).

Q. And then in the Kendall backyard there was a fence that ran along that driveway?

A. I believe there's -- the whole thing is fenced. There's a fence that runs this way and then I think there's a wall right here. This is, obviously, not to scale, but it's something like this.

Q. Okay. Can you just write "driveway" where that driveway is west of the duplex?

A. (Witness complied).

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 351:10–352:21]
[p. 66–67]

Q. So at some point you were to the west of Yvette Zayas --

A. Yes.

Q. -- on Parkway?

A. Yes.

Q. And that's before you went into the driveway and to the gate entering into the yard on the north side of the Kendall property?

A. Yes.

Q. And you heard a loud barking noise while you were walking down that sidewalk?

A. No.

Q. You didn't hear the dog bark?

A. I don't remember a dog barking.

Q. Is it possible that a dog was barking?

A. Dogs barking through the whole neighborhood so yes.

Q. So it wouldn't surprise you to know that Chris Johnson said that when he and Yvette Zayas were walking by the Kendall property that the dog jumped at them, put his nose up to the fence, and was barking loudly?

A. I -- that's what I've been told. I didn't know that.

Q. But you were certainly within hearing range of a dog barking loudly?

MS. SLARK: Objection. Calls for speculation.

THE WITNESS: I don't remember a dog doing that.

BY MR. ANDERSON:

Q. Do you remember if you heard –

A. I was never informed a dog did that. No. It's very possible. Again, there were dogs barking.

Q. All right.

A. But that wasn't -- if the dog was barking, it wasn't barking towards me so I wasn't focused on it.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 353:10–13]
[p. 68]

Q. Okay. Fair enough. So you never went west of where the gate is going into the backyard on the north side of the Kendall home, correct?

A. Prior to me going to the Kendall home, no.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 367:11–368:25]
[p. 82–83]

Q. Okay. So, if Geist had been barking loudly along the fence line of the driveway and you were somewhere along that line of travel that's indicated by the dotted line, you would have heard that, correct?

MS. SLARK: Objection. Calls for speculation.

THE WITNESS: I may have heard it, but I had no reason to believe that it would have been for this yard. I don't know if I heard Geist barking. I heard dogs barking, but I had no reason to believe that it was a dog barking in this yard.

BY MR. ANDERSON:

Q. And no reason to believe that it wasn't a dog in that yard?

A. Well, I saw no indications of a dog being there.

Q. But when you heard a dog there, it could have been a dog in that yard?

A. It's very possible. I don't know.

Q. Okay.

A. It could have been down the street. I don't know.

Q. Because it was a loud bark?

A. It was a bark.

Q. Have you seen Officer Zayas's or Officer Johnson's reports?

A. No.

Q. You didn't review those in preparation for your deposition today?

A. I reviewed over them, but I did not read them. I was more concerned with -- I don't know what they saw or did. I was more concerned with what I saw or did.

Q. You didn't know that they saw a large dog?

A. I found out later they did.

Q. And that it was barking loudly?

A. I don't know if it was barking loudly. I just real -- I found out later after I shot Geist that they had encountered a dog or that they'd probably encountered Geist.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 407:19–408:11]
[p. 127–128]

Q. Okay. As you approached the Kendall house walking down the street, isn't it true that you believe that a dog that was barking was inside a kennel?

MS. SLARK: Objection. Misstates facts not in evidence; misstates his testimony.

THE WITNESS: I don't remember saying that I believe any dog was inside of a kennel.

BY MR. ANDERSON:

Q. I'm asking you. I'm not asking you about your testimony. So her objection is really totally off point, but I'm asking you isn't it true that as you walk down the street, that as a dog was barking along the fence line and barking loudly, that you believed that dog was contained inside of a kennel?

A. I don't remember that. I remember there being dogs. I don't remember saying that I believed any dog was inside of a kennel.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 408:19–23]
[p. 128]

Q. There wasn't when you heard Geist barking loudly when you were outside the yard?

A. No. I didn't know that was Geist. I thought it was just some dog in the neighborhood, and I couldn't have told you where that barking was coming from.

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Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

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[R. 414:17–415:10]
[p. 134–135]

Q. But if he'd have been barking at other officers you would have heard it?

A. Probably. I don't know. It's the way the shrubbery was and the way that gate was, I don't know. I don't know if I would have felt it was coming from that yard or not.

Q. But you would have heard the bark?

A. Probably. If I -- when I got to that -- when I got over to the shed, yeah, I'm sure I would have.

Q. And even if you'd been over at the gate and he was barking?

A. No. The way the gate was and the distance from the shed to the gate, it would have been very easy to assume that that bark was coming from another property.

Q. But at least you would have heard the barking. It was a loud bark?

A. And, as I said, I may have. I don't know. I don't know if I heard Geist or not.

* * *

Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

* * *

[R. 425:12–20]
[p. 145]

Q. Okay. And when you walked by did you believe that this was a dog kennel?

A. No.

Q. And you don't know whether or not Geist had come up against that fence and barked?

A. I don't remember.

Q. You don't remember one way or the other, correct?

A. I do not.

* * *

Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

* * *

[R. 327:11–329:5]
[p. 24-26]

Q. Were you taught during that training how to determine if a dog was located on a property before you entered the property?

A. Um, no formalized training, just through experience of other officers or my own experience.

Q. And so during your time with the Police Department did you know how to determine if a dog was on a property before you entered the property?

A. Yes.

Q. And what was your knowledge in that respect?

A. Usually, dogs will make themselves known. They will -- as soon as you come within close distance to any of the property, they'll -- I mean, anybody that's ever been on a walk in the neighborhood will know that every dog will come at you through a fence. Or there's telltale signs or actual signs where there's, you know, excessive chew toys, or doghouses or a kennel or something like that.

Q. Dog bowls?

A. Yeah.

Q. And if they don't immediately make themselves known before entering the property, say, if there's a fence or a gate, have you known, as a police officer,

what you might do to determine if there's a dog on the property?

A. Well, if I thought there might be a dog on the property, yeah, you can rattle the gate or call out, but if you don't have any evidence of any dog being there, then you usually don't do that.

Q. Why not?

A. It could be a variety of reasons. There's -- sometimes there's calls where you don't necessarily want to alert the people that you're looking for that you're there.

Q. What if that weren't a concern?

A. If that weren't a concern, then it would probably be a good idea to do that.

Q. You knew you'd be able to call out or rattle a gate or whatever –

A. If that was going to be a concern.

Q. -- or whatever to see if the dog was present?

A. Correct.

Q. And if you'd heard a dog barking in the yard you'd certainly know that there was a dog present?

A. Yes.

* * *

Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

* * *

[R. 332:17–22]
[p. 29]

Q. Have you ever been surprised or threatened by a dog who came towards you because you entered the property without doing anything to warn the dog?

A. Yes.

Q. And Geist was one of those instances?

A. Yes.

* * *

Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

* * *

[R. 372:19–21]
[p. 87]

Q. You had done nothing before you entered the gate to determine if a dog was there, correct?

A. Correct.

* * *

Excerpts of Brett W. Olsen
Deposition Transcript
June 23, 2016

* * *

[R. 371:16–372:18]
[p. 86-87]

A. Yeah. On the shed. And I wanted this property to be secure, so I went over to the door and I just put my hand on the door and pushed it closed. When I pushed it closed, that's when I started hearing Geist, and it started barking very angrily, and so I thought there is a dog back there and so I started going around here as fast as I could. I wanted to get out of the backyard.

Q. Where did you go?

A. I started running up this way. It was kind of a sideways run because I wanted to keep an eye on what was coming, and I attempted to go through underneath this to get out of this gate.

Q. So you -- you were running away from the dog?

A. Yes. I started to.

Q. Did you ever learn that's a good way to keep a dog from coming after you?

A. To run away?

Q. Uh-huh.

A. It's just instinct. So as he started charging at me, that's when I stopped. I took an aggressive stance towards him, tried to call his bluff, stomped my foot, and it wasn't working, and he continued to charge and that was about when I was right here (indicating).

And when he had closed the distance enough that I felt he was about to attack and to latch onto me, that is when I drew out my weapon and I fired it at him.

* * *

Excerpts of Gordon Worsencroft
Deposition Transcript
June 14, 2016

* * *

[R. 463:24–464:4]
[p. 24–25]

Q. And was it also your expectation or your understanding that you were to enter people's yards?

A. If there was access to the backyard, yes, if we could check it and clear it, yes.

Q. Even without a warrant, even without permission?

A. Correct.

* * *

Excerpts of Gordon Worsencroft
Deposition Transcript
June 14, 2016

* * *

[R. 472:4–20]
[p. 74]

Q. And did either you or Officer Olsen talk about whether it would even have been possible for the missing boy to reach and open the latch to that gate?

A. Did we discuss it, I don't recall.

Q. Do you remember it crossing your mind that there's no way that this young toddler could have gone through that gate?

A. Himself, probably not, but like, again, we're going off of what is this, is this a -- just a missing child or is this an abduction, could this kid have been taken back there against his will so that – that entered my mind, obviously. I mean –

Q. Did it enter your mind that he could have been taken against his will inside the house?

A. He could have. But -- and, again, he could have been driven 10 miles away, too, could have been any of those.

* * *

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 588–92]
[p. 1–3]

1. I am Plaintiff and Counterclaim Defendant in the above-captioned matter. I have personal knowledge about the matters described below.

2. On June I 8, 2014, I resided at 2465 South 1500 East, Salt Lake City, Utah (the "Residence"). All descriptions of the physical property and the fence included in this Declaration refer to the property as it existed on June 18, 2014.

3. Attached hereto as Exhibits" 1", "2", "3", "4", and "5" are images obtained from Google Maps that accurately reflect the appearance of the Residence, the fence and gates to the backyard of the Residence, and the relation of the Residence to other properties as of June 18, 2014.

4. Attached hereto as Exhibit "6" are photos provided by Salt Lake City Corporation that accurately reflect the fence around the Residence with measurements of the height of the fence at various points.

5. The backyard of the Residence was adjacent to the home where I resided.

6. The backyard of the Residence was entirely enclosed with a fence, and the house with three secure gates.

7. The fence of the backyard of the Residence protected the backyard from observation by people passing by the Residence. A portion of the fence was chain link, but opaque slats were inserted into the entire length of that portion to prevent peop1e outside the yard from seeing into the yard.

8. The fence of the Residence was tall. The fence measured sixty-eight inches high on the chain-link portion (Exhibit 6, bates no. SLCC 0001. 06): sixty-nine inches high between the home and the garage (Exhibit 6, bates no. SLCC 000101); and sixty-seven inches high at the gate next to the garage (Exhibit 6, bates no. SLCC 000105). The view into the backyard of the Residence was even more protected from view by passersby because the yard and the base of the fence are elevated from the sidewalk and street, as seen in Exhibit" 1 ", attached hereto.

9. I chose to move into the Residence in part because of the tall fence and enclosed backyard. These characteristics were important to me so that I could (a) privately enjoy activities in my backyard and (b) provide an area for Geist, who had previously joined my family, that was secured from Geist getting loose and secured from anyone harassing, harming, or interfering with Geist.

10. Because the backyard of the Residence was enclosed with a tall fence that prevented passersby from seeing into the backyard, I expected that my activities in the backyard were private at all times. I conducted myself in the backyard of my Residence, and kept Geist there much of the time, in accordance with my expectation that the backyard was private.

11. The backyard of the Residence is secured with three gates. Whenever Geist was in the backyard, those three gates were always shut. Those gates are marked "A", "B", and " C" on Exhibit "2", attached hereto. The gate marked "C" is visible in Exhibit "3", attached hereto. To walk along the outside of the house and backyard from the gate marked "A", to the gate marked "B", to the gate marked "C" would require walking approximately one hundred feet.

12. I have measured the distance from the front door of the Horman residence at 2511 Filmore Street to the gate through which Brett Olsen has said he entered my backyard at 2465 South 1500 East and it was, as I calculated it, approximately l /8 of a mile. That is fairly consistent (only about 40 feet difference) with the Google Map depiction, attached hereto as Exhibit "4", which reflects that it is about 702 feet, or .132955 miles, from the front of the Horman residence to the same gate at my prior home at 2465 South 1500 East.

* * *

15. While the backyard is protected from view by passersby on the sidewalk or street, an adult male of average height would be able to view all portions of the backyard by (1) walking up to and looking through or over the chain link fence on the east side of the backyard and (2) walking up to and looking over the three gates that secure the backyard. The chain link fence has slats inserted to protect the yard from being viewed by passersby, but a person who is standing right next to the fence can see between them and into the yard. The gates marked *"A"* and "C" on Exhibit 2, attached hereto, are shaped with a concave curve along the top edge that facilitates viewing of the yard

to someone standing next to the gate, but not to passersby on the sidewalk or street. If an adult male of average height wanted to visually inspect all portions of the backyard, it would not be necessary to enter the yard because (1) the chain link fence can be looked over or through and (2) the position and shape of the gates securing the backyard allow clear viewing of all parts of the yard.

* * *

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 594]
[Exhibit 1]

Excerpts of Declaration of Sean Kendall
August 22, 2016

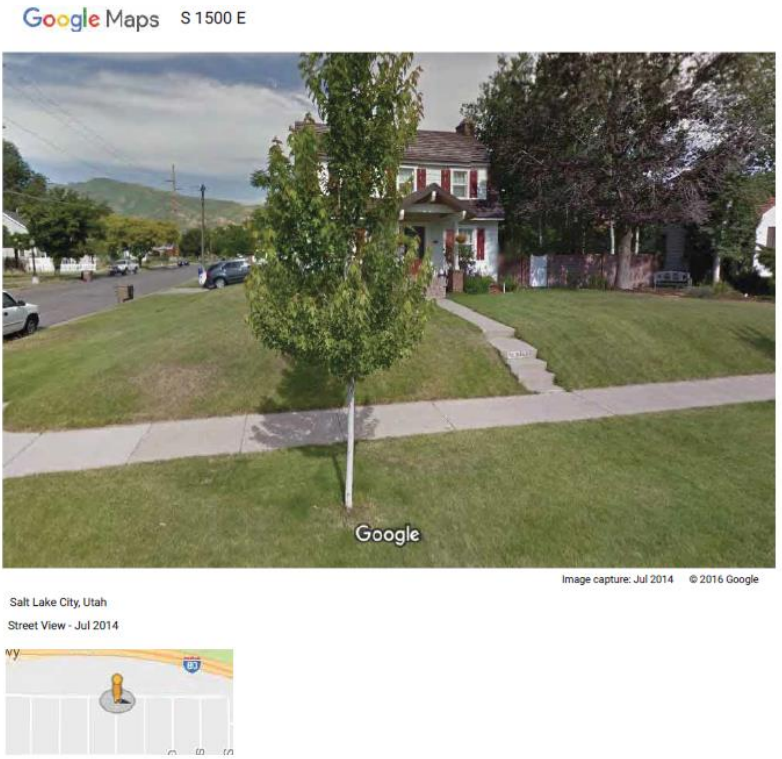
* * *

[R. 596]
[Exhibit 2]

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 598]
[Exhibit 3]



Excerpts of Declaration of Sean Kendall
August 22, 2016

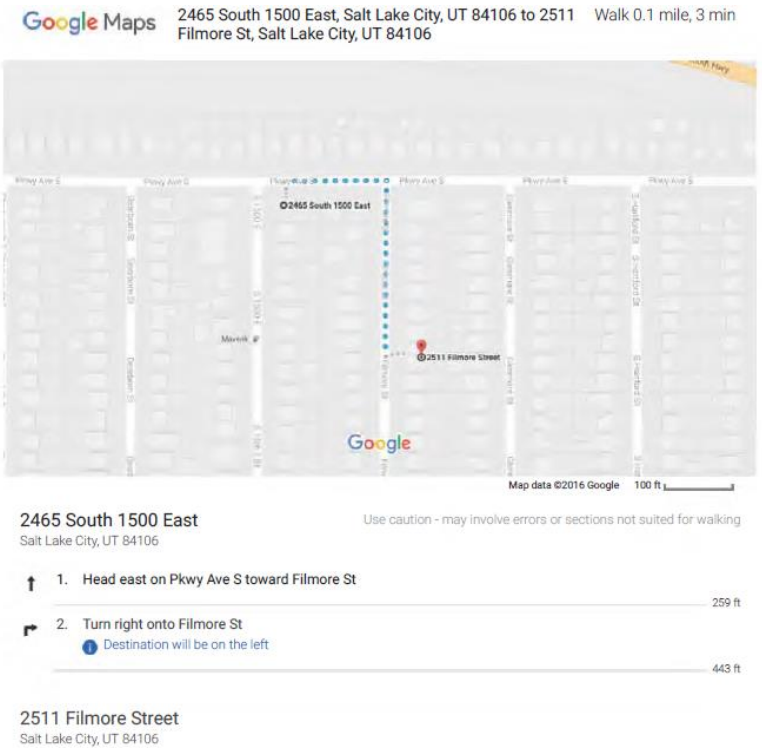
* * *

[R. 602]
[Exhibit 5]

Excerpts of Declaration of Sean Kendall August 22, 2016

* * *

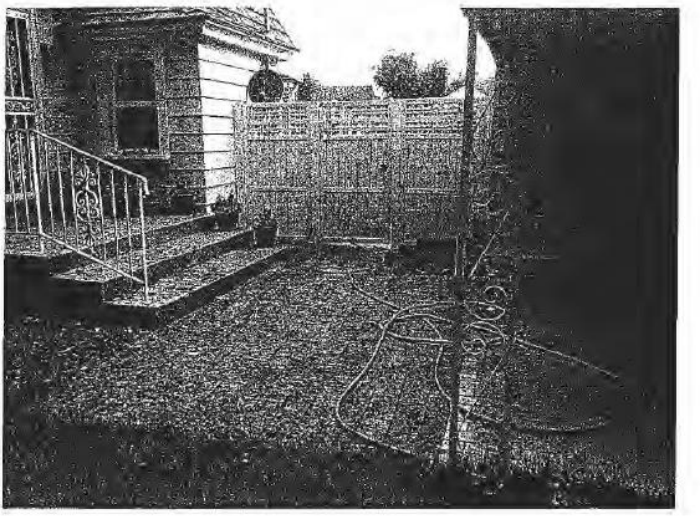
[R. 600]
[Exhibit 4]



Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 604]
[Exhibit 6]

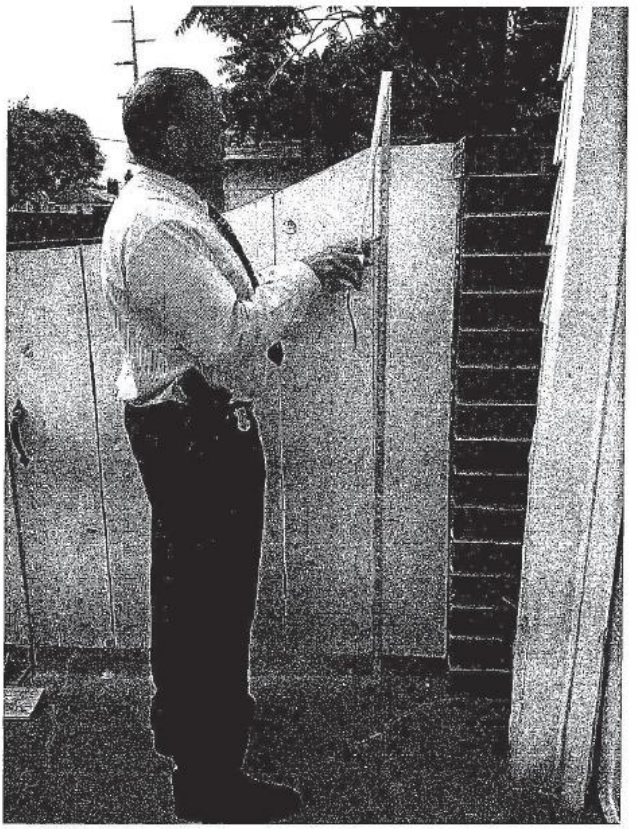


Gate measured 69"

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 605]
[Exhibit 6]

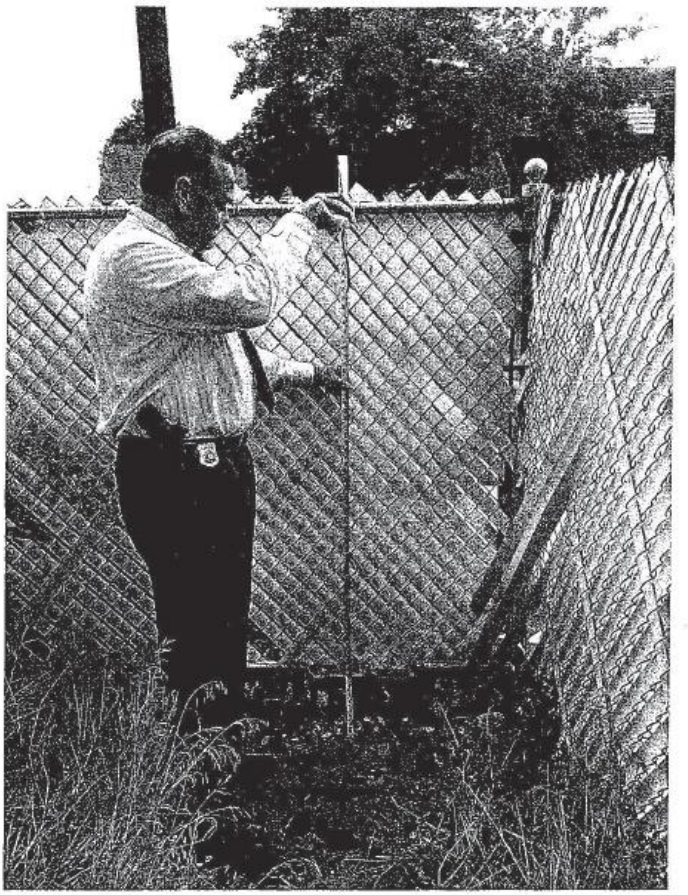


Gate next to garage measured 67"

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 606]
[Exhibit 6]

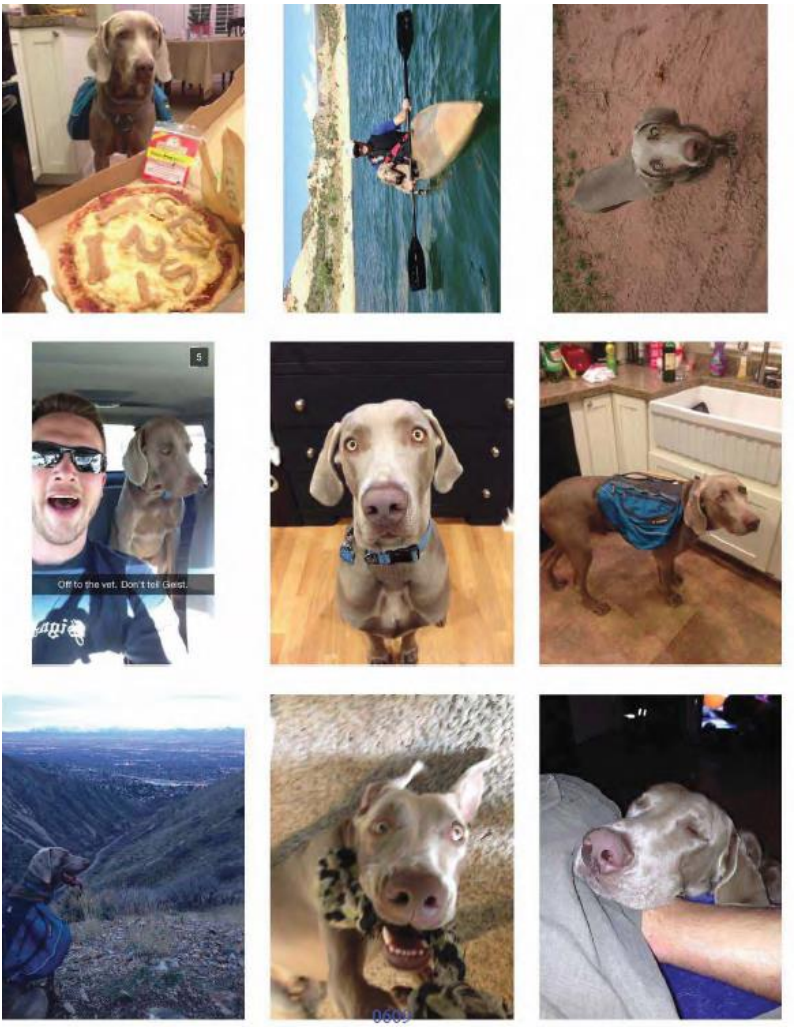


Fence close to sidewalk back side of dog house measured 68"

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 609]
[Exhibit 7]



Excerpts of Declaration of Sean Kendall
August 22, 2016

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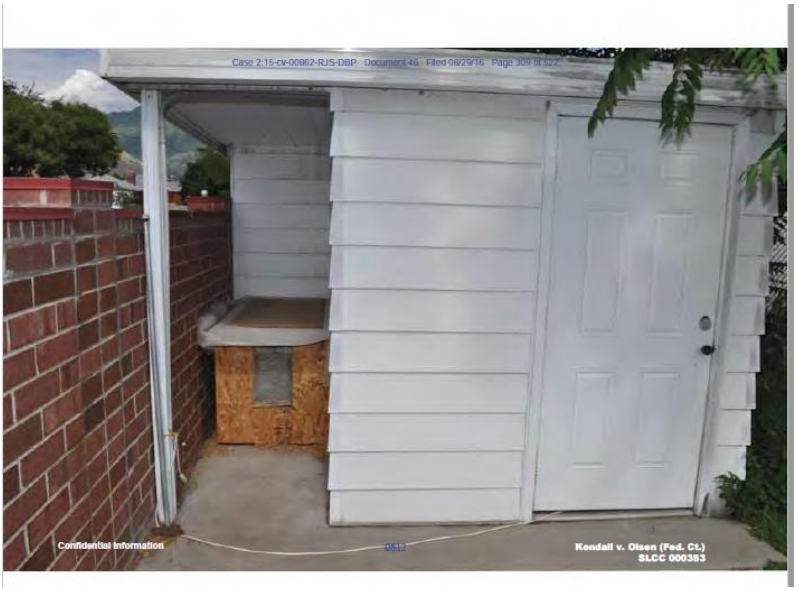
[R. 611]
[Exhibit 8]

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 612]
[Exhibit 8]



Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 590, ¶ 11]
[p. 3]

11. The backyard of the Residence is secured with three gates. Whenever Geist was in the backyard, those three gates were always shut. Those gates are marked "A", "B", and "C" on Exhibit "2", attached hereto. The gate marked "C" is visible in Exhibit "3", attached hereto. To walk along the outside of the house and backyard from the gate marked "A", to the gate marked "B", to the gate marked "C" would require walking approximately one hundred feet.

* * *

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 591–92, ¶ 15]
[p. 4–5]

15. While the backyard is protected from view by passersby on the sidewalk or street, adult male of average height would be able to view all portions of the backyard by (1) walking up to and looking through or over the chain link fence on the east side of the backyard and (2) walking up to and looking over the three gates that secure the backyard. The chain link fence has slats inserted to protect the yard from being viewed by passersby, but a person who is standing right next to the fence can see between them and into the yard. The gates marked "A" and "C" on Exhibit 2, attached hereto, are shaped with a concave curve along the top edge that facilitates viewing of the yard to someone standing next to the gate, but not to passersby on the sidewalk or street. If an adult male of average height wanted to visually inspect all portions of the backyard, it would not be necessary to enter the yard because (1) the chain link fence can be looked over or through and (2) the position and shape of the gates securing the backyard allow clear viewing of all parts of the yard.

* * *

Excerpts of Declaration of Sean Kendall
August 22, 2016

* * *

[R. 590–91, ¶ 13]
[p. 3–4]

13. Geist, weighing about ninety pounds, was a friendly and loveable dog his entire life. Geist was never observed to be aggressive by me, my friends, my family, or anyone involved in the care of Geist. Defendant Olsen, in his Declaration dated July 13th, 2016, stated that a photo of a K-9 police dog "looked exactly like Geist did on [June 18th, 2014]." (Dkt. 36, ii 35.) I spent thousands of hours with Geist and never witnessed Geist appear in a way that was even remotely comparable to the K-9 police attack dog presented by Olsen. Geist had a demeanor that was relaxed, friendly, curious, well-adjusted, and well-socialized. He appeared friendly and, at most, excited (a) when I would play with Geist with toys, (b) when we were running, mountain biking, hiking, or kayaking together, (c) when I would feed Geist or give him treats, (d) when people would walk into the backyard when Geist was there, (e) when he was barking loudly (including every time someone knocked on the door or rang the doorbell), and (f) every other time I observed Geist during his entire life. It was not possible on June 18, 2014, for Geist to appear similar to the K-9 police attack dog presented by Olsen. The K-9 police attack dog was obviously trained to attack; Geist was timid of strangers, loving, curious, friendly, and non-violent. Attached hereto as Exhibit "7" is the photo of that K-9 police attack dog,

along with several photos that are true and accurate depictions of what Geist actually looked like, through a wide range of circumstances and activities.

* * *

Excerpts of Brett Olsen's Interview
July 3, 2014

* * *

[R. 811:25–812:1]
[p. 9–10]

Jeff Kendrick: How long would you estimate you were in that backyard checking the things before that dog noticed you back there?

Brett Olsen: At least about a minute to a minute and a half.

Jeff Kendrick: Okay.

Brett Olsen: Because it was just enough time to walk, check it, close it, yeah it was about a minute and a half.

* * *

Excerpts of Brett Olsen's Interview
July 3, 2014

* * *

[R. 809:28–810:4]
[p. 9–10]

Brett Olsen: Yes, I tried to close the door and I left the walkway and noticed it didn't close and I wanted to the owner to have the stuff secured so I went back and pressed it closed. As soon as I pressed it closed and started walking away, I got to about here and I started hearing barking, and um, when I started hearing the barking, I mean I knew it was a dog, so I started to go a little bit quicker to get out and I got to about here and I looked and saw a dog that was coming back here, and it was charging at me right here.

* * *

Excerpts of Brett Olsen's Interview
July 3, 2014

* * *

[R. 811:12–15]
[p. 9]

Brett Olsen: * * * And I thought about grabbing a Taser but the Taser's are, the problem I had there was the distance we were at was so close, and it's coming straight at me and with the way the probes go I don't think I could have hit it effectively, and I just went through really quickly for a second and thought no, I couldn't do a Taser and I just drew out my gun.

* * *

Excerpts of Brett Olsen's Interview
July 3, 2014

* * *

[R. 805:16–20]
[p. 3]

Jeff Kendrick: Okay, and what type of equipment, what uniform were you in?

Brett Olsen: I was wearing the detective uniform with the shirt and the 511 pants, the tan pants and I was wearing a vest a ballistics vest, and then I was wearing my full duty belt.

Jeff Kendrick: Okay, describe what was on your full duty belt.

Brett Olsen: I have my spare set of keys, the Taser, gun, asp or baton, handcuffs, flashlight, radio, and magazines.

* * *

Excerpts of Brett Olsen's Interview
July 3, 2014

* * *

[R. 811:18–19]
[p. 9]

Jeff Kendrick: Okay, and what about baton?

Brett Olsen: I didn't, I did not, I mean I had it, I didn't think about pulling that out.

* * *

Excerpts of Brett Olsen's Interview
July 3, 2014

* * *

[R. 811:2–7]
[p. 9]

Brett Olsen: It got to probably about ten feet, it got to where, I was about right here, the dog was about probably right here, and I was about right there. And when it got to about there that's when I thought "man, I'm not going to have a choice" and I pulled out my gun and continued to go backwards, and as I got back to about right here, and the dog was four feet I want to say, it was pretty close, I mean from me to Brandon, and uh it was about right there, and so I shot twice and still continued to try to back up while I shot, and it was still coming but then it just lost energy and fell right at my feet.

* * *

Excerpts of Declaration of Brett Olsen
July 13, 2016

* * *

[R. 194, ¶ 25]
[p. 3]

25. I estimate it took approximately thirty seconds to check these areas for the missing boy.

* * *

Excerpts of Declaration of Brett Olsen
July 13, 2016

* * *

[R. 194:20–23]
[p. 3]

20. I walked to the south-west corner and checked the area behind the home.

21. I then walked to the south-east area and checked the area obscured by the garage.

22. I then walked over to the shed and pulled opened the shed door (that may have been slightly ajar) and checked inside.

23. Finally, I checked the area to the north of the shed.

* * *

Excerpts of Brian Purvis
Deposition Transcript
June 16, 2016

* * *

[R. 498:5–499:18]
[p. 55–56]

Q. Did you understand, as the Watch Commander, when all this was happening, that there was any specific connection between Sean Kendall's home or the surrounding backyard and the perceived emergency?

A. Yes. Um, the rings of the tree, um, if you -- the time frame that we were dealing with, even a small child can travel a considerable distance in that time frame. If we've checked from ring C inward, just analogy, but if we've checked from ring C inward, now our most likely location for the child is the ring D inward. If it's been five minutes, that's probably not a reasonable conclusion to draw, but I've been on these kinds of cases where a child's gone considerable distances, one from the "This is the Place" State Park across from the zoo was found behind the University of Utah. It was an autistic child. But the connection is that this child was known to be right here 45 minutes ago and now he's not. We've checked the possibility of the neighboring house. He's not there. We've checked the second most likely possibility which is the neighbor's yard, maybe somebody had a puppy, those kinds of things. Now, well, maybe this child beelined. We've got to speed up and start checking those outer rings of that tree, and that's the connection.

If you're entering D and we just checked ring C and we know the child's not from there into the middle, the next most likely place is that he's the next ring outward. That's why we checked that.

Q. So, other than the location of the home, there was no connection that you know of between that property and the perceived emergency?

A. No. I don't personally know anything about that property.

Q. Did you know of any particular connection between any home in the neighborhood other than the one next-door and the perceived emergency?

A. No.

* * *

Excerpts of Brian Purvis
Deposition Transcript
June 16, 2016

* * *

[R. 506:12–507:4]
[p. 79-80]

Q. Okay. And in the instance of this young missing boy and the shooting of Geist, you know that no one saw a young boy going into the backyard of Sean Kendall's home, correct?

A. No, not that I know of.

Q. You were never told that?

A. No.

Q. And nobody found any of the young boy's toys or clothing in the area of Sean Kendall's home?

A. No.

Q. And no one heard the young boy in the backyard?

A. No.

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.

* * *

Excerpts of Brian Purvis
Deposition Transcript
June 16, 2016

* * *

[R. 1123:12–1124:4]
[p. 79–80]

Q. Okay. And in the instance of this young missing boy and the shooting of Geist, you know that no one saw a young boy going into the backyard of Sean Kendall's home, correct?

A. No, not that I know of.

Q. You were never told that?

A. No.

Q. And nobody found any of the young boy's toys or clothing in the area of Sean Kendall's home?

A. No.

Q. And no one heard the young boy in the backyard?

A. No.

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.

* * *

Excerpts of Brian Purvis Deposition Transcript June 16, 2016

* * *

[R. 488:21–489:7]
[p. 34–35]

Q. And did you have in mind that the boy had most likely just walked away, or did you also have in mind that he may have been abducted?

A. We can't rule out anything at that point.

Q. So you had in mind either one of those or something else?

A. Right.

Q. So you didn't know whether he was in the neighborhood or 10 miles away at that point?

A. No. You can't know. No. You have to explore every possibility, and that's why you take kind of a dual approach at that point.

* * *

Excerpts of Christopher Johnson
Deposition Transcript
June 22, 2016

* * *

[R. 566:3–16]
[p. 20]

Q. Had you been provided any evidence that the supposedly missing boy had any connection at all to Sean Kendall's residence?

A. No.

Q. You know now where Sean Kendall's residence is, right?

A. I know where it is, yeah, right.

Q. Did you ever hear or have any understanding that there was any connection between the young boy or the circumstances of him supposedly being missing and the enclosed backyard at Sean Kendall's residence?

A. I didn't know of any at the time.

Q. Do you know of any now?

A. No.

* * *

Excerpts of Christopher Johnson
Deposition Transcript
June 22, 2016

* * *

[R. 567:11–572:15]
[p. 23–28]

Q. All right. And how did you exit that property?

A. Just back out onto the sidewalk.

Q. And did there come a time when you were made aware of a dog that's known now to be Geist next-door?

A. When we kept walking west to, you know, build on that radius of the search, we came along this and there was a fence right there, and we did see the dog, but then we also saw officers in front of us and so we figured their radius of search was going to hit that so we crossed the street. So at that point, yes, I did see the dog.

Q. So you came out of the duplex and started walking west –

A. Right.

Q. -- on the south side of Parkway?

A. Right.

Q. And then you saw officers in front of you?

A. Right.

Q. And so you and Officer Zayas went to the north side of Parkway?

A. Right.

Q. And were these Officers Worsencroft and Olsen?

A. Uh, I remember seeing Officer Worsencroft and Officer Olsen was with us earlier here.

Q. At the duplex?

A. Yeah.

Q. Was he searching the duplex with you?

A. I don't actually recall what he was doing. Because there were -- at this point there's a lot of officers in the area.

Q. Sure.

A. So...

Q. But Olsen was with you when you were at the duplex?

A. I remember seeing him on the sidewalk here.

Q. Okay.

A. I can't remember if it was before or after we went to the duplex or not.

Q. Uh-huh. And then you started walking westward on Parkway?

A. Uh-huh.

Q. "Yes"?

A. Yes. Sorry.

Q. And you were with Officer Zayas then?

A. I believe so, yes.

Q. And so you were going to go door-to-door on the same side of the street except that you saw Officers Worsencroft and Olsen to the west of you on Parkway, right?

A. Already working that direction, right.

Q. And so they were closer to the Geist home than you so you traveled across the street to the north?

A. Right.

Q. And at what point were you made aware of the dog on the Geist property?

A. At what point did I know that the dog was there?

Q. Yes.

A. So as soon as we kind of crossed right there and we were at that edge of the property, the dog came over and barked at us.

Q. So that's as you were walking down westward –

A. Yes.

Q. -- on Parkway?

A. Yes.

Q. And the dog barked at you through the fence?

A. Right.

Q. How would you characterize the bark?

A. Um, I'd say it was an aggressive bark. It was, um -- I have a Golden Retriever and so when it barks, you know, it's up on all fours. Its shoulders are high. It's not showing his teeth, and he just barks if he's interested in something or wants to play or whatever, but that dog lowered its chest to the ground when he was barking or he'd jump on the fence and then he actually would show his teeth, like, his upper lip would come up and you'd see his teeth so it was more aggressive than just a dog that was interested or seeing somebody for the first time.

Q. We all have Golden Retrievers.

A. Oh. Very nice. They are good dogs.

Q. Great dogs. When mine plays with a white lab in the neighborhood, he bears his teeth. Does yours do the same?

A. Uh, he actually doesn't. He -- we have a Boxer next-door and he's still pretty young, but they like to play together, but it's more of a whack-a-mole thing where our dog just likes to lay down and let the dog come pounce on him so... He's pretty easygoing actually.

Q. When you say that dog was aggressive, he was loud? He was barking?

A. Right.

Q. You don't know if he was acting any differently than he always acted when people walked by, correct?

A. Sure, yeah. That's the first time.

Q. But he was being loud?

A. Yes.

Q. Did it sort of alarm you? Did you jump at first when you heard the dog bark?

A. A little bit. Plus the dog was actually super tall. I was surprised at how big the dog was.

Q. Did he come up on his hind legs and put his front legs on the fence?

A. I remember him jumping up. I don't know if he actually remained up on the fence like that, but he was jumping.

Q. Are you familiar with the Weimaraner breed?

A. I'm not.

Q. Did you feel at any risk?

A. With the fence there, no.

Q. Do you remember you and Officer Zayas saying anything about the dog?

A. Just maybe in passing mentioning how big it was and how loud he was.

Q. Did she laugh about you jumping?

A. Uh, I don't remember that.

Q. Okay. But the two of you talked about how loud he was?

A. I remember, yeah.

Q. And did she say anything about I think he wants to eat us, anything to that effect?

A. I don't remember her saying that, but –

Q. Okay. And when that was happening Officer Olsen and Officer Worsencroft were down here to the west of you?

A. They had continued on. I don't know where they were at that point.

Q. But before Geist had barked you saw that they were to the west of you, correct?

A. Yes. Yes.

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Excerpts of Declaration of Heather Beck
August 22, 2016

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[R. 617, ¶¶ 6–7]
[p. 3]

6. I have conducted several hundred, if not over a thousand, home visits to help dog owners with their dogs that are erroneously described as being "aggressive" who exhibit behaviors of barking, snarling, and growling toward humans or other animals. *Never* have I been bitten or nipped when entering the territory of one of these dogs, even though they immediately begin barking, snarling, and growling when I enter their territory. A dog that is snarling, with its ears back, and barking in a threatening way is extremely unlikely to bite an intruder unless the dog is trapped, cornered, leashed, or otherwise has its freedom of movement impaired. It is so unlikely, in fact, that I have *never* seen or experienced such a dog biting unless it was impaired in its freedom of movement in my several hundreds of visits to the homes of supposedly "aggressive" dogs.

7. A vivid demonstration of this principle was shown on a television news segment titled "What Would Your Dog Do?" produced by CBS News in Arizona, available online at https://www.youtube.com/watch?v=hdiZqatf ReA&featu re=player_embedded. That video shows, from minute mark 1:44 to 2:20, a dog barking in a threatening way, snarling, growling, and with its ears back. But the dog does not bite—even when being

prodded in the snout. That depiction is entirely consistent with my uniform experience with barking, snarling, and growling dogs. Just like Geist, that dog was home alone without its owner present. The dog in the video was protecting its territory from an intruder, just like Geist. And, just like with Geist, the snarling, barking, growling, and holding its ears back do not show the dog intends to bite. The dog is simply trying to scare away an intruder.

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Excerpts of Declaration of Heather Beck
August 22, 2016

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[R. 619, ¶ 12]
[p. 5]

12. Because Geist was barking, snarling, and growling, it is clear he was trying to threaten and intimidate Olsen to leave Geist's yard. When Geist saw Olsen running away, it became clear to Geist that Geist's strategy was working effectively—Olsen was leaving. A dog in Geist's situation would continue to bark, growl, and snarl until the intruder was gone. In response to seeing Olsen running away, I would expect any dog to do one of two things: either chase Olsen or run the other way. When a dog is exhibiting the warning behaviors of barking, snarling, and growling and it decides to chase an intruder, the dog is trying to ensure the intruder leaves. In nearly all cases, such a dog would never bite the intruder. In a very few cases, such a dog might harmlessly *nip* at the intruder to ensure the intruder leaves. This behavior is very clearly seen in herding dogs. Herding dogs will bark, growl, snarl, and chase animals to get them to move. Some herding dogs will occasionally nip at the heels of an animal.

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Excerpts of Declaration of Heather Beck
August 22, 2016

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[R. 620–22, ¶¶ 18–23]
[p. 6–8]

18. Geist demonstrated that he was unlikely to bite Olsen because Geist was barking, growling, and snarling. But even if Geist acted like a truly aggressive dog and ran toward Olsen silently, then Olsen could have avoided any serious injury to himself or the animal by placing a police baton or other object between Olsen and Geist or by kicking, rather than shooting, Geist. A truly aggressive dog that is kicked with sufficient force will retreat. An able-bodied adult male would not have difficulty kicking a truly aggressive dog with enough force to cause it to retreat.

19. The follow-up behavior to barking and growling is not to bite, it is to run away. Dogs want to do everything they can to not have to fight. I am certain that if Olsen did not shoot Geist, Geist would not have bitten Olsen. There is a slight, extremely unlikely possibility that, because Olsen ran, Geist may have nipped Olsen in a harmless way, but then Geist would have certainly run away afterward.

20. Dogs are creatures that want to make it through the day with as little conflict as possible. They use body movement, barking, and growling responses to make that possible.

21. In Olsen's description he stated, "He was growling and barking, his ears were back, and his teeth were bared." (Declaration of Brett Olsen,

attached hereto as Exhibit 2, ¶ 32.) This is the description of a dog trying everything he can do to avoid conflict. A dog who really wanted to bite displays *none* of these traits. A truly dangerous dog that wants to bite is quiet.

22. Olsen states the dog moved from 20 to 25 feet away from Olsen to about 4 to 5 feet away from Olsen before he, "fired two rounds at Geist." During that time, Olsen "attempted to retreat" and "[took] a more dominant stance". (Declaration of Brett Olsen, attached hereto as Exhibit 2, ¶¶ 29, 37, 38, 41.) Geist acted as most any dog would under the circumstances of having a stranger on his property: Geist communicated his wariness to Olsen by barking, growling, and snarling and, when Olsen inexplicably ran away, Geist chased Olsen to ensure Olsen left the property.

23. The facts that Geist was barking, snarling, and growling and had unrestricted movement show Geist posed no risk to Olsen. The killing of a dog under these circumstances was extreme and unnecessary. I reach this conclusion both as a matter of commonsense and common knowledge and as a matter of decades of professional experience with dogs.

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Excerpts of Declaration of Heather Beck
August 22, 2016

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[R. 618–20, ¶¶ 9–16]
[p. 5–6]

9. It is a matter of common knowledge and common sense that one should not run from a barking dog. Just like with many other animals, running provokes dogs to chase. This common knowledge is confirmed by my decades of experience with all types of dogs.

10. At the point Olsen heard Geist barking, Olsen had a number of reasonable alternatives. Olsen could have simply stood still. Olsen could have backed away slowly. Olsen could have spoken to or shouted at the dog. The most unreasonable thing to do—unless perhaps he was a few feet away from exiting the yard—was to run away. No one could reasonably think he or she can outrun a dog. And anyone with even the faintest familiarity with dogs or wildlife would know that running will only escalate the confrontation. Unless an exit is within a few feet, there is no good that could come from running, and even then it would be more reasonable and safer to simply walk away backward or stand still.

11. If I entered a yard and discovered a barking dog, I would *never* run away. That is not because of my extensive experience with dogs, but simply a matter of common sense that I understood before I ever had any professional experience with dogs. I

never required any training, instruction, or direct experience to know that one should not run from a dog. My extensive professional experience with dogs over twenty years has confirmed my understanding that, without exception, running will only escalate any potential conflict with a dog. I would never advise running away from a dog over the far more reasonable alternatives of standing still, backing away slowly, and/or using one's voice. This is reflected in a video about a Meridian, Idaho, police officer who responded to a report of two "vicious" dogs and was able to calm them, without any harm to the officer or the dogs, with the use of a police baton as a distraction/bite stick and without the use of lethal force. The video, found at https://www.thedodo.com/cop-police-david-gomez-dogs -meridian-1860270299.html, is consistent with my experience with dogs that show far more supposed "aggression" than described by Officer Olsen in his interaction with Geist.

12. Because Geist was barking, snarling, and growling, it is clear he was trying to threaten and intimidate Olsen to leave Geist's yard. When Geist saw Olsen running away, it became clear to Geist that Geist's strategy was working effectively—Olsen was leaving. A dog in Geist's situation would continue to bark, growl, and snarl until the intruder was gone. In response to seeing Olsen running away, I would expect any dog to do one of two things: either chase Olsen or run the other way. When a dog is exhibiting the warning behaviors of barking, snarling, and growling and it decides to chase an intruder, the dog is trying to ensure the intruder leaves. In nearly all cases, such a dog would never bite the intruder. In a very few cases, such a dog might harmlessly *nip* at the

intruder to ensure the intruder leaves. This behavior is very clearly seen in herding dogs. Herding dogs will bark, growl, snarl, and chase animals to get them to move. Some herding dogs will occasionally nip at the heels of an animal.

13. In the very unlikely scenario that Geist would have nipped at Olsen while Olsen inexplicably ran away, it would not be possible for such a nip to injure Olsen—other than perhaps his feelings. Such a nip would most likely have occurred at or near Olsen's ankles, where Olsen would have been protected by his footwear and pants. Even on bare skin, it would be extremely unlikely for such a nip to break the skin or bruise Olsen. Such a nip, as I have seen on countless occasions, would have been followed by the dog running the other way. Because Geist was barking, snarling, and growling, it is clear that Geist was trying to *avoid* biting and simply wanted Olsen to leave.

14. If Olsen would have simply stood still or slowly walked away, then Geist would not have done more than continue to bark, snarl, and growl. If Olsen had not run away, Geist may have approached Olsen but it is extremely unlikely Geist would have chased Olsen, and certainly would not have bitten or nipped Olsen. Olsen himself, by choosing to run away and triggering Geist's instinct to chase, caused any risk of harm to himself, if there were any.

15. Other officers, being faced by a charging and barking dog, have utilized the very simple strategy of standing still and using their voice to calm the animal. This strategy can be seen in the video referenced in paragraph 11 above.

16. At the point Olsen turned around and faced Geist, Olsen again had several reasonable alternatives. He could have stood still. He could have walked away slowly. He could have yelled at the dog. Had Olsen taken any of these alternatives, it is extremely unlikely Geist would have even nipped Olsen, and even if Geist did harmlessly nip Olsen then Geist would have immediately run away and both Olsen and Geist would be without injury.

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Excerpts of Declaration of Heather Beck
August 22, 2016

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[R. 618, ¶¶ 9–10]
[p. 4]

9. It is a matter of common knowledge and common sense that one should not run from a barking dog. Just like with many other animals, running provokes dogs to chase. This common knowledge is confirmed by my decades of experience with all types of dogs.

10. At the point Olsen heard Geist barking, Olsen had a number of reasonable alternatives. Olsen could have simply stood still. Olsen could have backed away slowly. Olsen could have spoken to or shouted at the dog. The most unreasonable thing to do—unless perhaps he was a few feet away from exiting the yard—was to run away. No one could reasonably think he or she can outrun a dog. And anyone with even the faintest familiarity with dogs or wildlife would know that running will only escalate the confrontation. Unless an exit is within a few feet, there is no good that could come from running, and even then it would be more reasonable and safer to simply walk away backward or stand still.

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Excerpts of Declaration of Heather Beck
August 22, 2016

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[R. 616–17, ¶¶ 3–8]
[p. 3–4]

3. After reviewing the aforementioned information in this case, I can strongly say that Geist was acting with an intent to communicate to Olsen, *not* with an intent to harm Olsen.

4. By the officers' and Ms. Clinch's description of the incident, Geist's intention was not to cause harm to anyone. A dog who intends to harm someone is silent. I have been mauled once by a dog, a 110-pound white Doberman pinscher. It came off leash and went straight for me, without a bark, a growl, or a snarl. This is the only truly aggressive dog I have encountered in over twenty years dealing with dogs that are inappropriately described as "aggressive." If Geist wanted to attack Olsen, Geist would have been silent and Olsen never would have heard Geist coming.

5. A dog who is growling, barking, or even charging is simply communicating the dog's timidity or wariness to an intruder of the dog's territory. Such a dog is attempting to avoid a physical confrontation with the intruder. Barking, growling, and baring teeth are alternatives used by a dog to *avoid* biting. A dog who is barking, growling, or snarling will only bite when cornered, on a leash, or otherwise restricted in its movement. Geist was free in his movement and

unrestricted in the back yard. I can say unqualifiedly that Geist was not going to bite Olsen.

6. I have conducted several hundred, if not over a thousand, home visits to help dog owners with their dogs that are erroneously described as being "aggressive" who exhibit behaviors of barking, snarling, and growling toward humans or other animals. *Never* have I been bitten or nipped when entering the territory of one of these dogs, even though they immediately begin barking, snarling, and growling when I enter their territory. A dog that is snarling, with its ears back, and barking in a threatening way is extremely unlikely to bite an intruder unless the dog is trapped, cornered, leashed, or otherwise has its freedom of movement impaired. It is so unlikely, in fact, that I have *never* seen or experienced such a dog biting unless it was impaired in its freedom of movement in my several hundreds of visits to the homes of supposedly "aggressive" dogs.

7. A vivid demonstration of this principle was shown on a television news segment titled "What Would Your Dog Do?" produced by CBS News in Arizona, available online at https://www.youtube.com/watch?v=hdiZqatfReA&feature=player_embedded. That video shows, from minute mark 1:44 to 2:20, a dog barking in a threatening way, snarling, growling, and with its ears back. But the dog does not bite—even when being prodded in the snout. That depiction is entirely consistent with my uniform experience with barking, snarling, and growling dogs. Just like Geist, that dog was home alone without its owner present. The dog in the video was protecting its territory from an intruder,

just like Geist. And, just like with Geist, the snarling, barking, growling, and holding its ears back do not show the dog intends to bite. The dog is simply trying to scare away an intruder.

8. It is extremely unlikely for a dog to bite or nip when an intruder enters the home, but it is even more unlikely for a dog to bite or nip an intruder in the backyard because the dog has much greater freedom of movement.

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Excerpts of Declaration of Heather Beck
August 22, 2016

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[R. 619–24, ¶¶ 12–23, 26, 30]
[p. 5-10]

12. Because Geist was barking, snarling, and growling, it is clear he was trying to threaten and intimidate Olsen to leave Geist's yard. When Geist saw Olsen running away, it became clear to Geist that Geist's strategy was working effectively—Olsen was leaving. A dog in Geist's situation would continue to bark, growl, and snarl until the intruder was gone. In response to seeing Olsen running away, I would expect any dog to do one of two things: either chase Olsen or run the other way. When a dog is exhibiting the warning behaviors of barking, snarling, and growling and it decides to chase an intruder, the dog is trying to ensure the intruder leaves. In nearly all cases, such a dog would never bite the intruder. In a very few cases, such a dog might harmlessly *nip* at the intruder to ensure the intruder leaves. This behavior is very clearly seen in herding dogs. Herding dogs will bark, growl, snarl, and chase animals to get them to move. Some herding dogs will occasionally nip at the heels of an animal.

13. In the very unlikely scenario that Geist would have nipped at Olsen while Olsen inexplicably ran away, it would not be possible for such a nip to injure Olsen—other than perhaps his feelings. Such a nip would most likely have occurred at or near Olsen's ankles, where Olsen would have been protected by his

footwear and pants. Even on bare skin, it would be extremely unlikely for such a nip to break the skin or bruise Olsen. Such a nip, as I have seen on countless occasions, would have been followed by the dog running the other way. Because Geist was barking, snarling, and growling, it is clear that Geist was trying to *avoid* biting and simply wanted Olsen to leave.

14. If Olsen would have simply stood still or slowly walked away, then Geist would not have done more than continue to bark, snarl, and growl. If Olsen had not run away, Geist may have approached Olsen but it is extremely unlikely Geist would have chased Olsen, and certainly would not have bitten or nipped Olsen. Olsen himself, by choosing to run away and triggering Geist's instinct to chase, caused any risk of harm to himself, if there were any.

15. Other officers, being faced by a charging and barking dog, have utilized the very simple strategy of standing still and using their voice to calm the animal. This strategy can be seen in the video referenced in paragraph 11 above.

16. At the point Olsen turned around and faced Geist, Olsen again had several reasonable alternatives. He could have stood still. He could have walked away slowly. He could have yelled at the dog. Had Olsen taken any of these alternatives, it is extremely unlikely Geist would have even nipped Olsen, and even if Geist did harmlessly nip Olsen then Geist would have immediately run away and both Olsen and Geist would be without injury.

17. If Olsen were genuinely concerned about being bitten or nipped, the simple, common-sense tactic of placing an object—any object—between himself and Geist would have removed any risk of harm to Olsen. If a dog is going to nip at a person in an attempt to get the person to leave the dog's territory, then placing any object, such as a police baton, in front of oneself will cause the dog to nip at the object and be distracted from the person. This is a tactic I have used countless times, without fail. That tactic is reflected in the video referenced in paragraph 11 above.

18. Geist demonstrated that he was unlikely to bite Olsen because Geist was barking, growling, and snarling. But even if Geist acted like a truly aggressive dog and ran toward Olsen silently, then Olsen could have avoided any serious injury to himself or the animal by placing a police baton or other object between Olsen and Geist or by kicking, rather than shooting, Geist. A truly aggressive dog that is kicked with sufficient force will retreat. An able-bodied adult male would not have difficulty kicking a truly aggressive dog with enough force to cause it to retreat.

19. The follow-up behavior to barking and growling is not to bite, it is to run away. Dogs want to do everything they can to not have to fight. I am certain that if Olsen did not shoot Geist, Geist would not have bitten Olsen. There is a slight, extremely unlikely possibility that, because Olsen ran, Geist may have nipped Olsen in a harmless way, but then Geist would have certainly run away afterward.

20. Dogs are creatures that want to make it through the day with as little conflict as possible. They

use body movement, barking, and growling responses to make that possible.

21. In Olsen's description he stated, "He was growling and barking, his ears were back, and his teeth were bared." (Declaration of Brett Olsen, attached hereto as Exhibit 2, ¶ 32.) This is the description of a dog trying everything he can do to avoid conflict. A dog who really wanted to bite displays *none* of these traits. A truly dangerous dog that wants to bite is quiet.

22. Olsen states the dog moved from 20 to 25 feet away from Olsen to about 4 to 5 feet away from Olsen before he, "fired two rounds at Geist." During that time, Olsen "attempted to retreat" and "[took] a more dominant stance". (Declaration of Brett Olsen, attached hereto as Exhibit 2, ¶¶ 29, 37, 38, 41.) Geist acted as most any dog would under the circumstances of having a stranger on his property: Geist communicated his wariness to Olsen by barking, growling, and snarling and, when Olsen inexplicably ran away, Geist chased Olsen to ensure Olsen left the property.

23. The facts that Geist was barking, snarling, and growling and had unrestricted movement show Geist posed no risk to Olsen. The killing of a dog under these circumstances was extreme and unnecessary. I reach this conclusion both as a matter of commonsense and common knowledge and as a matter of decades of professional experience with dogs.

* * *

26. Olsen's comparison of Geist to the police K9 attack dog and characterization of both as

"aggressive" shows Olsen's perception of an "aggressive" dog is badly misinformed. Geist's behavior of barking, snarling, and growling shows that Geist was afraid of Olsen and sought to get Olsen out of Geist's territory. Geist was afraid to interact closely with Olsen and would not have bitten Olsen except in the extremely unlikely case that Geist may have nipped at Olsen then ran away. The police K9 attack dog, on the other hand, exhibited the behavior of barking and snarling in response to a command, while on a leash. Neither dog is seeking to cause any harm to anyone, and if the police K9 attack dog was commanded to attack someone, then the police K9 attack dog would no longer be exhibiting the "aggressive" behaviors of barking, snarling, and growling.

* * *

30. If Olsen had received even minimal training on dealing with dogs, Geist's death could have been completely avoided. I have taught classes to young children in third world countries—and police officers in those same areas—to hold still when a dog is approaching, to act like a tree. This simple concept would have saved Geist's life and would have in no way compromised Olsen's safety.

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Excerpts of Declaration of Julianne Brooks
August 22, 2016

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[R. 709, ¶¶ 5–6]
[p. 2]

5. As a breed, Weimaraners are not aggressive. They are, however, recreational barkers. They will bark for any reason, and for no reason at all. They bark loudly. The bark of a Weimaraner can be intimidating when there is a barrier, such as a fence, between the dog and the person to whom the barking is directed. In my nearly twenty years of working with Weimaraners, I have experienced that they calm down when the barrier is removed—such as by the person going into the yard.

6. Weimaraners, when confronted with an intruder in their territory, are alert, but not vicious. They *will* bark. They will sometimes run to the intruder. But they are all bark and no bite.

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Excerpts of Declaration of Julianne Brooks
August 22, 2016

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[R. 710, ¶ 11]
[p. 3]

11. As to the barking, most any dog will bark when they encounter a stranger in the yard. This is especially true of Weimaraners. Barking indicates a Weimaraner is *alert*, not that it wants to harm a person. In contrast, a dog that is charging to bite a person is quiet.

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Excerpts of Declaration of Julianne Brooks
August 22, 2016

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[R. 709–11, ¶¶ 7, 10, 13]
[p. 2–4]

7. Weimaraners have a very strong prey drive that helps them in the field hunting for birds or small varmint. Weimaraners love to play in ways that involve chasing—whether that be chasing a toy, other dogs, or people. This means if someone or something runs, then the Weimaraner will chase. A Weimaraner's instinct is to stop when the "prey" stops. This chasing is not aggressive behavior. Weimaraners do not have an instinct to bite people other than when the dog is cornered or trapped. Their instinct is to bark, chase, and/or run away. As a last resort, when they are afraid and cannot run away, they may bite.

* * *

10. Olsen described that Geist, as he was "charging," was "growling and barking, his ears were back, and his teeth were bared". (Declaration of Brett Olsen, ¶ 32, attached hereto as Exhibit 2.) Geist's behavior, as described by Olsen, was normal for a dog in those circumstances, and did not indicate Geist was going to bite Olsen.

* * *

13. As to the "charging," it is a matter of common sense that dogs, nearly any breed of dog, will chase after a person that is running. Olsen stated "I started hearing Geist, and it started barking very angrily, and so I thought there is a dog back there and so I started going around here as fast as I could. . . . I started running up this way." (Deposition of Brett Olsen, 86:19–25, attached hereto as Exhibit 1.) As a matter of common sense, and as confirmed by my experience, I would expect that any dog in this situation would have chased Olsen. A dog chasing and barking a person does not mean it intends to bite, rather, if it intended to bite it would have run quietly. In my nearly twenty years of experience with Weimaraners, it is absolutely clear that when a Weimaraner runs at a person barking, the Weimaraner's intention is to run and keep barking—not to bite. I have seen many Weimaraners charge after people, and have seen them knock children over. I have never seen a Weimaraner charge and bite a person.

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Excerpts of Declaration of Julianne Brooks
August 22, 2016

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[R. 710–11, ¶ 13]
[p. 3–4]

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Excerpts of Declaration of Julianne Brooks
August 22, 2016

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[R. 709–11, ¶¶ 5–7, 10–13]
[p. 2–4]

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6. Weimaraners, when confronted with an intruder in their territory, are alert, but not vicious. They *will* bark. They will sometimes run to the intruder. But they are all bark and no bite.

7. Weimaraners have a very strong prey drive that helps them in the field hunting for birds or small varmint. Weimaraners love to play in ways that involve chasing—whether that be chasing a toy, other dogs, or people. This means if someone or something runs, then the Weimaraner will chase. A Weimaraner's instinct is to stop when the "prey" stops. This chasing is not aggressive behavior. Weimaraners do not have an instinct to bite people other than when the dog is cornered or trapped. Their instinct is to bark, chase, and/or run away. As a last

resort, when they are afraid and cannot run away, they may bite.

* * *

10. Olsen described that Geist, as he was "charging," was "growling and barking, his ears were back, and his teeth were bared". (Declaration of Brett Olsen, ¶ 32, attached hereto as Exhibit 2.) Geist's behavior, as described by Olsen, was normal for a dog in those circumstances, and did not indicate Geist was going to bite Olsen.

11. As to the barking, most any dog will bark when they encounter a stranger in the yard. This is especially true of Weimaraners. Barking indicates a Weimaraner is *alert*, not that it wants to harm a person. In contrast, a dog that is charging to bite a person is quiet.

12. As to the growling, with ears back and teeth bared, these behaviors are also normal and—unless the dog is cornered—is simply a way for the dog to communicate its wariness and does not indicate a Weimaraner is about to bite.

13. As to the "charging," it is a matter of common sense that dogs, nearly any breed of dog, will chase after a person that is running. Olsen stated "I started hearing Geist, and it started barking very angrily, and so I thought there is a dog back there and so I started going around here as fast as I could. . . . I started running up this way." (Deposition of Brett Olsen, 86:19–25, attached hereto as Exhibit 1.) As a matter of common sense, and as confirmed by my experience, I would expect that any dog in this situation would have chased Olsen. A dog chasing and barking a

person does not mean it intends to bite, rather, if it intended to bite it would have run quietly. In my nearly twenty years of experience with Weimaraners, it is absolutely clear that when a Weimaraner runs at a person barking, the Weimaraner's intention is to run and keep barking—not to bite. I have seen many Weimaraners charge after people, and have seen them knock children over. I have never seen a Weimaraner charge and bite a person.

* * *

Excerpts of Declaration of Shea Kendall
August 24, 2016

* * *

[R. 796, ¶ 5]
[p. 2]

5. Weimaraners have a loud, alerting bark, particularly when someone enters the property where they are located. It is well-known that because Weimaraners are protective of their property and/or their families, they bark loudly if anyone comes near. That makes them good watch dogs. A Weimaraner barking can be heard by accessing the following link on YouTube: https://www.youtube.com/watch?v=XfcR1yvVKBE. That sounds very much like Geist's bark, which was never, during the hundreds of times I saw Geist, accompanied by anything that could be accurately called "aggressive," "mean," or in any way harmful or threatening.

* * *

Excerpts of Declaration of Shea Kendall
August 24, 2016

* * *

[R. 796, ¶ 7]
[p. 2]

7. Weimaraners are like many, if not most, other dogs in that they will give chase if someone enters their territory then runs away from them. It is common knowledge that if you do not want dogs to chase you, you do not run away from them. That is the common sense advice found in many places, including on the Internet at http://www.thewayofslowtravel.com/2013/12/28/5non-violent-tricks-to-deal-with-stray-dogs/, where it states as follows:

> *1. Stay calm and walk away. Don't run.*
>
> *This is the simplest, most important thing to remember. If a stray dog is barking at you from a distance, it's most likely warning you to stay off its territory. It will stand at the edge of its territory and bark to warn you against entering it. As long as you remain calm and walk away from the dog, you should have no problem. . . . Whatever you do, do not run away; dogs are likely to instinctively give chase, and there's no way you'll outrun them on a short sprint.*

* * *

Excerpts of Declaration of Shea Kendall
August 24, 2016

* * *

[R. 795–97, ¶¶ 2, 4–10]
[p. 1–3]

2. Sean Kendall is one of my brothers and we have a very close relationship. Because we saw each other frequently during the time he and his dog Geist lived with each other, I had hundreds of interactions with Geist and came to know him well.

* * *

4. I have studied a great deal about Weimaraners in addition to knowing the breed well from having Weimaraners in our family for so many years.

5. Weimaraners have a loud, alerting bark, particularly when someone enters the property where they are located. It is well-known that because Weimaraners are protective of their property and/or their families, they bark loudly if anyone comes near. That makes them good watch dogs. A Weimaraner barking can be heard by accessing the following link on YouTube: https://www.youtube.com/watch?v=XfcR1yvVKBE. That sounds very much like Geist's bark, which was never, during the hundreds of times I saw Geist, accompanied by anything that could be accurately called "aggressive," "mean," or in any way harmful or threatening.

6. Weimaraners are commonly known to be friendly, warm, kind dogs who do not bite without being cornered. That is exactly how Geist was.

7. Weimaraners are like many, if not most, other dogs in that they will give chase if someone enters their territory then runs away from them. It is common knowledge that if you do not want dogs to chase you, you do not run away from them. That is the common sense advice found in many places, including on the Internet at http://www.thewayofslowtravel.com/ 2013/12/28/5-non-violent-tricks-to-deal-with-stray-dogs/, where it states as follows:

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8. I worked in sales (satellite television and pest control) door-to-door in Iowa and Virginia for five years. I also sold for a dental company door-to-door in Utah for one year. For the past two years, I have developed, trained, and set appointments door-to-door for Auric Solar in Utah. During my several years working door-to-door, I have had encounters with

hundreds of dogs of many breeds, including pit bulls. I have never been bit because I know to stay still when a dog comes toward me or barks at me, then to slowly walk away. I also know, as I believe most people know, that if I run away from a dog that barks at me, my running will make it far more likely that the dog will run after me.

9. Running away from a dog provokes—that is, it invites—a dog to run after the person running. Dogs are chase animals; they will chase what moves quickly away from them, whether a person running or, often, bicyclists and skateboarders.

10. During the approximately one hundred times I was with Geist, either at my brother Sean's home or at my home, where Geist would sometimes stay for the weekend, Geist never ran after anyone except in play. He was friendly, gentle, and playful. Geist never bit anyone and I know for a certainty that he would not bite anyone unless he was cornered or threatened.

* * *

Excerpts of Hearing Transcript on Plaintiff's Motion for Summary Judgment (February 7, 2017)

* * *

[R. 1524:18–21]
[p. 2]

The Court: * * * So this is the time set for hearing on cross-motions relating to the availability of qualified immunity for the law enforcement officers in this case, really focused on the federal claims after our last discussion. * * *

* * *

Excerpts of Defendant's Motion for Summary Judgment and Memorandum in Support (July 13, 2016)

* * *

[R. 170]
[p. 26]

By the time Officer Olsen responded to the call, the boy had been missing for well over an hour. *See* § I, A, 2 *Material Facts*, ¶ 10. The child's home had been searched and officers had confirmed he was not at the neighboring relative's house. *Id.*, ¶¶ 2-3. It was believed that the child had wandered off, although the possibility that he had been abducted was not ruled out. *Id.*, ¶¶ 4-6. In light of the "realities of the situation presented by the record" a "prudent, cautious, and trained officer" would believe there was an immediate need to protect the life or safety of the missing three year old and that an exigency existed.

* * *

Excerpts of Yvette Zayas
Deposition Transcript
June 22, 2016

* * *

[R. 553:8–554:7]
[p. 25–26]

Q. And when you walked along the driveway, either when you first got there or as you were leaving, were you made aware of a dog in what we've referred to as the Geist yard?

A. Yes. I was aware there was a dog in that yard.

Q. And how were you aware?

A. He was barking at us.

Q. Did you do anything to arouse the dog?

A. No.

Q. Just walking there and he was barking?

A. Correct.

Q. How would you characterize his bark?

A. I would characterize it as angry.

Q. Why? How would you characterize a dog's bark as being angry?

A. How do I describe this to you. Um, based on my experience with dogs, as being a dog owner and being in law enforcement for 18 years now, seeing the dog and hearing the dog, his aggressive manner towards the fence that we were walking by and his growl and bark did not sound like a happy I'm-happy-to-see-you bark or get-my-attention-so-you-can-pet-me bark. It

was I'm going to, in my words, eat you bark, which was alarming, in my mind, to me, and I was glad there was a fence between myself and the dog.

* * *

Excerpts of Yvette Zayas
Deposition Transcript
June 22, 2016

* * *

[R. 555:5–17]
[p. 29]

Q. And did anybody do anything to get Geist's attention, do you know, or is it just you were walking there and he started barking?

A. Yeah. I was walking to the back of the duplex when the initial barking started.

Q. All right. And then you looked in the back -- in the yard of the duplex and then walked back down the driveway and then to the other side of the street, correct?

A. Correct.

Q. And as you're walking back down the driveway, was Geist still barking?

A. Yes.

* * *

Excerpts of Yvette Zayas
Deposition Transcript
June 22, 2016

* * *

[R. 556:24–557:14]
[p. 32–33]

Q. And when you say that you felt the dog was saying, quote, "I want to eat you," closed quote, I understand it might be hard to describe that, but how would you -- how did you make that determination as compared to this is just a dog that barks at people and it won't bite?

A. I have dogs. I hear when my dog barks at somebody walking by. I hear when my dog barks at the mailman or another dog that it's trying to get through the fence to and it's a different tone when dogs are barking, just like us as humans when we speak. I can say "I love you" or I can say "I love you" and it means something different, same thing when you're listening to a dog. To me, my perception was that dog wants to eat me, and I'm thankful that fence is between the dog and I. And I'm a dog lover.

* * *

Excerpts of Yvette Zayas
Deposition Transcript
June 22, 2016

* * *

[R. 560:24–561:24]
[p. 42–43]

Q. Was Chris Johnson with you as you were walking along the driveway either toward the yard of the duplex or as you were exiting the driveway?

A. I was exiting, I recall that Chris Johnson was standing next to me, yes.

Q. And did you and Chris Johnson say anything about the dog?

A. Yes. I did.

Q. And what did you say?

A. Well, I laughed first because he jumped, and then I said, "Oh, that's one big dog. He's mean. It looks like he wants to eat us." And then I'm like --we kept walking.

Q. And you laughed about it?

A. I laughed because he jumped because he didn't realize –

Q. Oh.

A. The dog startled him. I had been watching the dog as we were walking, and he jumped and it made me laugh because big guys jumping at a dog, it's funny to me.

Q. Right.

A. So I snickered and I'm, like, "Man, that's a mean dog. He wants to eat us," you know. We just kept walking, something to that context. I can't say verbatim what was said, but...

* * *

Excerpt of Police Civilian Review Board Investigation Report July 18, 2014

[R. 97–98]

* * *

* * * had been abducted and murdered.) S was assigned with Wl to conduct a neighborhood search for the boy, as were other two-officer teams. S and the other officers recalled that their instructions were to make contact with neighbors in the immediate area and seek to search the interiors and yards of those homes. If unable to establish contact with the homeowners, they were to conduct searches of the yards in an effort to determine what had occurred to the missing boy. The officers uniformly recalled that their searches were limited to locate a missing person and were for no other reason, and they explained that they looked at any place a three year old could possibly have gotten into or could be located within. Primarily, the officers stated that if they could view a yard from over the fence and the yard was visible and free of obstructions, they would not enter. However, if the yard held sheds, or dense shrubbery that could obstruct their view, they would enter the yard and do a cursory but thorough search for the missing boy. Each officer was aware that the boy would not respond to his name nor could he communicate verbally. Each officer had access to a photograph of the boy including the clothes he was wearing on the day in question, along with some other data including the statement by the family that he would not verbally communicate with them.

At C's home, W1 attempted to make contact with the unknown homeowner, C, who was not present, while S peeked over the backyard fence and noted a densely landscaped yard with two free standing structures, a garage and a smaller shed. S recounted, and photographs confirm, that the yard was irregular in shape with many small areas that were not visible from the exterior of the yard. As has been noted, the yard was heavily landscaped preventing any level of confidence that a simple viewing of the yard from over a fence would give any level of confidence the missing child was not present.

S and the other officers all stated that they believed that "Exigent Circumstances" existed and therefore the need for a search warrant was not necessary. {Note: under the law, officers routinely need a search warrant to conduct searches but there are a number of "exceptions" to this requirement, as established under the 4th Amendment to the U.S. Constitution. Examples of "exceptions" to the requirement for a warrant include the "Plain View Doctrine" as well as "Exigent Circumstances", among other exceptions. Later in this report is a full recitation of the law concerning "Exigent Circumstances". In a nutshell, this exception allows for warrantless searches under extraordinary circumstances, one of which is the immediate need for a search based upon a reasonable belief that a person may be injured or In danger.)

S admitted to entering the yard and, while checking the yard and the free standing structures, was confronted by C's dog. S stated that the dog was aggressively barking and charged him. S stated that he was in fear of being bitten and so he drew his

service weapon and fired twice at the dog from a very close distance, striking and killing the dog.

C, who was not present during the incident, has claimed that S was improperly in his yard and needlessly killed his dog.

Due to the use of deadly force, albeit usage was not on a human, this matter is being examined to determine if S's actions were within, or outside of Department policy.

Sean Kendall. herein referred to as C. is a complainant and stated:

C was not present during the incident and therefore could not provide a firsthand account of what had transpired but has given numerous media accounts about his feelings on the actions of S. C's complaint centers on two central themes, those being that S was improperly in his yard without a search warrant and that S needlessly fired his weapon, killing his dog.

Det. Brett Olsen, herein referred to as S, is a police officer, subject of this matter and stated:

S spoke about his career, experience and the fact that he has owned dogs off and on throughout his life. On the day in question, S monitored and responded to the missing child case, making contact with the Watch Commander at the command post when he arrived on the scene. S stated that he confirmed that the house where the boy was missing from had been thoroughly searched, and was told it had been searched twice.

S recalled that he partnered up with WI and they along with at least ten other officers began to canvas the neighborhood in an effort to locate the missing boy. S explained that a "search" is a much more detailed action wherein a canvas is an action designed

to locate a person. In this case S was equally concerned that the boy was simply missing, had wandered away, as well as the possibility that the boy had been taken by someone. S stated he had worked on other missing children cases, including the Destiny Norton case, and due to the fact that he arrived 45 minutes after the boy was reported missing, he was very concerned because if the missing person is not found within an hour, it likely will not have a "good ending."

S obtained a photograph of the boy, made an email, which he mailed to all involved officers and it contained additional information about the boy. S was aware that the boy was non-communicative and so he never tried to yell for the boy. Sand Wl began their search of the homes in the area and he believes he checked up to six homes, prior to the one where the shooting occurred. One of these homes had a dog in the backyard which they did not search due to the dog's presence. When they arrived at the home in question, S recalled that WI went to the front door to attempt to make contact with the homeowner, who was not at home, as he peered over the backyard fence to see if he could spot the boy. S explained that his procedure was to view any place where the boy could have gone on his own as well as any place where he could have been put by another person. S stated that as he looked over the fence he knew he would need to enter the yard due to structures and shrubbery being present as he had zero confidence he could "clear the yard" by simply looking over the fence. S stated that as WI continued to knock/ring the bell of the home, he checked a gate which he did not believe the boy could have opened but a nearby second gate had an easily

manipulated latch which he felt the boy could have opened.

Upon entry into the yard he noticed that it had a lawn, trees, shrubs and two buildings: a garage and a shed. S recalled his route through the yard which took him to the shed where he opened the door seeking the boy and then he continued on. As he retraced his steps he noticed that the shed door was still open so he then closed it, which is what he believes awoke, or startled, the dog. Up until this instant, S had no knowledge that a dog was in the yard as he did not see any indication of a dog nor did he hear the dog. S explained that he had with him on that day; on his duty belt his gun, Taser, Asp baton, radio, handcuffs, a flashlight and extra magazines.

S explained that he had been in this backyard for roughly a minute when he shut the shed door and alerted the dog to his presence. Almost immediately he heard the dog bark, which he described as an "angry" bark, and then he first gained sight of the dog which was between 20 and 25 feet from him and he believes had been lying behind the shed. S explained that he began to shuffle backwards, away from the dog who was "charging". As the dog approached to within IO feet of him he drew his weapon and continued to back pedal away. S said he fleetingly considered using his Taser but felt he could not expect success with it due to the distance and speed of the approaching dog and he further felt that even if he did get a hit with the Taser that the prongs would lodge too closely together to be effective in stopping the charging dog. S was trying to retreat out of the yard but knew he would not make it prior to the dog biting him and as

he said" ...I have been around a lot of dogs ... this one was coming with a purpose."

Fearing of being bitten and suffering a serious injury, S stated he fired two rounds from a distance of

* * *

Excerpt of Salt Lake Police Department
General Offense Hardcopy
June 18, 2014

[R. 435; Exhibit 1]
[p. 3]

* * *

Related Text Page(s).

Document: **INITIAL R/0**
Author: **K78 - Olsen, Brett**
Subject: **SHOTS FIRED AT DOG**
Related date/time: **Jun-18-2014 (Wed.)**

While assisting in the search for a 3 year old boy, I shot and killed a dog at the listed address.

I was in the area of the listed address searching for a missing juvenile under case 14-99228. I was given instructions by the watch commander to begin a systematic check of the homes and properties beginning on Fillmore moving north. Included with the instruction was the note that the boy did not respond to voices and did not communicate verbally. We would have to actually look everywhere we could for the boy. I began doing so with Detective Worsencroft and we then turned west on Parkway Avenue. When we approached the listed address, Detective Worsencroft approached the front door to knock and I began looking over the fence. There were several places in the back yard that I could not see so I approached the gate on the north side of the back yard. The gate was unlocked and I entered. I looked throughout the backyard and approached a shed in the north east corner of the property. I checked the shed and found it empty.

I then turned around and began to leave when I heard a dog barking. I turned and saw a large gray dog running

towards me and barking loudly. I began backing up quickly and it continued to close the distance. I believed the dog was about to bite me so I withdrew my weapon and fired twice, hitting the dog. The dog dropped to the ground and died due to the bullet wounds. I notified watch command via the radio and secured the scene. As of this writing, the owners of the dog have not been notified. Sgt. Cyr responded to the scene and was briefed regarding the shooting.

While shooting at the dog, the backdrop consisted of the base of the shed and the grass.

B. Olsen

Excerpts of Declaration of Haley Bowen
August 23, 2016

* * *

[R. 823–24, ¶¶ 2–11]
[p. 1–2]

2. I am the owner and resident of the home and property located at 2465 South 1500 East and have resided there continuously since 2011.

3. In July, 2013, I became aware that Sean Kendall and his dog, Geist, who was approximately one and a half years old at that time, were looking for a place to live.

4. Although Geist was a very large dog, he was a friendly and loving dog, and never showed any indication of being aggressive towards me.

5. In July, 2013, I entered into a lease arrangement with Sean Kendall and his dog, Geist, and they became tenants and house-mates with me at 2465 South 1500 East.

6. I never would have allowed Sean Kendall and Geist to reside in my home with me if Geist were aggressive in any way.

7. In the approximately eleven months that Geist lived in my home, Geist was a loud barker, but never showed any aggression toward me or any of my guests.

8. In fact, my mother, other family members, and friends would come to our residence and were able to freely walk into our backyard without any fear that Geist would be aggressive towards them.

9. When guests came to our home, Geist would often initially bark loudly at and then run toward them. When he reached them, he was always friendly

and harmless and never showed any aggression towards anyone. Geist would often bark loudly and deeply, especially if someone were on the other side of the fence, but he was always friendly and loving, with both those with whom he was familiar and strangers.

10. Geist was a friendly and loving dog and Sean Kendall was a wonderful, caring and conscientious owner, who loved his dog as much as any person loves his child.

11. When I heard the news that a police officer entered my enclosed backyard on June 18, 2014 and shot Geist, I was shocked and outraged since people had been coming and going for eleven months without any concerns that Geist was aggressive or pose any risk of harm whatsoever.

* * *

Excerpts of Reply Memorandum in Support of Motion for Summary Judgment (September 30, 2016)

* * *

[R. 883, subsection c]
[p. 50]

c. Officer Olsen did not Create an Exigency.

Kendall asserts an alternative theory that the seizure of Geist was not reasonable because Officer Olsen created the exigency. As demonstrated at length in the opening brief and this Reply, the governing standard for determining whether the seizure of a dog was reasonable is whether the dog was aggressive and posed an imminent threat of harm. Moreover, the exigency at issue in this case was the report of a missing child, which Officer Olsen did not create. Likewise, any argument that Officer Olsen created an exigency by allegedly "running away" is an argument that the seizure was not "objectively reasonable" because Officer Olsen attempted to exit the yard when he first heard Geist, which is incorrect as addressed above. *See supra* § II, A, 1, b.

* * *