9th Cir. No. 13-56141

Published Opinion issued April 1, 2016
Panel Members: Reinhardt, Tashima, and Clifton

UNTED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARA LOWRY,
Plaintiff-Appellant,

v.

CITY OF SAN DIEGO,
Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of California
The Honorable Michael M. Anello, Presiding
United States District Court No. 11-CV-946-MMA (WMC)

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Defendant/Appellee City of San Diego respectfully petitions the Court to grant a rehearing following the filing of its ***published split panel opinion*** in this matter on April 1, 2016.

Defendant/Appellee also petitions the Court to rehear this matter *en banc* if the panel declines to order rehearing because the panel decision involves questions of exceptional importance and involves conflicts with this Court's prior rulings, rulings in other Circuits, and with United States Supreme Court precedent.

Dated: May 16, 2016 JAN I. GOLDSMITH, City Attorney

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

This case arises out of the Ninth Circuit's reversal of a grant of summary judgment in an excessive force case arising out of the City of San Diego's use of police dogs. Specifically, the officers deployed the police dog in response to a late night burglary call at a darkened warehouse. The dog approached a suspect and interacted with her for approximately two seconds before responding to a "heal" command. The incident resulted in three stitches to the suspect.

In his dissenting opinion, Justice Clifton seized on the relevant inquiry in this case:

> "Put yourself in the shoes of Sergeant Bill Nulton of the San Diego Police Department. Late one Thursday night in February, around 11:00 pm, you are dispatched to respond to a burglar alarm that has gone off at a two-story commercial building. You arrive at the scene within two or three minutes of getting the call, together with your police service dog, Bak, and two other officers. Approaching the building, you do not see anyone leaving the building or the parking lot. You inspect the building and see that two doors on the second floor are open. You go to the second floor and determine that one open door leads to a bathroom, which is empty. Another door is closed and locked. The remaining door leads to Suite 201. It is propped open. The building is dark. You cannot see inside and do not know whether anyone is there. You yell loudly, 'This is the San Diego Police Department! Come out now or I'm sending in a police dog! You may be bitten!' There is no response. You wait between 30 and 60 seconds, but still no response. You repeat the same warning one or two more times. Again, no response. Because nobody has responded to the warnings, you are concerned that if there is someone inside the building who triggered the alarm, that person may be a burglar lying in wait. You have no way of knowing whether that person is armed. What would you do?

> "Unfortunately, for Sgt. Nulton and for all law enforcement officers within the Ninth Circuit, if you release your trained service dog and follow him with a flashlight to search for a suspect, you might wind up in trial. Thanks to the majority opinion, officers will be discouraged from protecting themselves and encouraged to risk their lives by exposing themselves to any burglar who might be armed and lying in wait, either because they cannot use a dog at all or must remain so closely tethered to the dog that they necessarily have to expose themselves to the potentially armed burglar."

Dissenting Opinion of Clifton at p. 30-31. Despite these facts, the majority of the panel reversed a grant of summary judgment in favor of defendants finding that genuine issues of fact remain. The problem with this, however, is that – as Judge Clifton noted – the majority panel "does not identify what they are" and "in reality, they don't exist." *Id.* at 43.

Rehearing, either by the panel or by this Court *en banc,* is necessary on two grounds. First, the panel's ruling deviated from well-established precedent in this Circuit, other Circuits and the Supreme Court in at least four respects: a) a police service dog ("PSD") does not automatically constitute the severe use of force; b) officers are entitled to presume that a burglary suspect is a threat and that burglary is an inherently dangerous crime; c) silently hiding from an officer in face of commands supports a suspicion of evading arrest; and d) officers are not required to utilize less intrusive tactics if the tactics used were reasonable.

Second, the panel's decision was clearly erroneous in at least two respects: a) the panel improperly viewed the undisputed facts using 20/20 vision of hindsight; and b) the panel incorrectly found causation for *Monell* liability.

II. UNDERLYING FACTS

This case is about an encounter with a police service dog ("PSD"), Bak, which lasted approximately two seconds and left the plaintiff with a laceration on her upper lip requiring three stitches to repair.

At approximately 9:30 p.m. on February 11, 2009, Plaintiff Sara Lowry returned to her office after consuming at least five vodka drinks and fell asleep on the sofa. (ER 344, 124-130, 370, 358, 382-83). She woke later needing to use the restroom. (ER 344, 131-133).

Lowry triggered the burglar alarm when unlocked and opened the interior door to the adjoining suite. (ER 66-67, 344, 131-133, 338). After going to the bathroom, Lowry went back to sleep. (ER 344, 131, 133-134).

Three officers arrived at the scene to investigate the alarm. None of them saw anyone leaving the building as they approached; a door to an office suite on the second floor was open. (ER 32, 355-56, 368, 380-81).

The officers believed that whoever triggered the burglar alarm was still in the building due to the circumstances presented. (ER 357, 369, 381-82). Sgt. Nulton

shouted verbal canine warnings two or three times but did not receive a response. (ER 356-57, 369, 381).

Sgt. Nulton utilized Bak to clear the small office suite and followed very closely behind as him during the search. (ER 370, 357, and 382). At all times, Sgt. Nulton was close enough to Bak to be able to see the dog. (ER 170).

In the third and last room, Sgt. Nulton shined his flashlight and saw the contents of a purse on the floor and a lump on a sofa. (ER 171, 370, 358). At the same time, Bak was in the air moving toward the sofa. (ER 171, 370).

Sgt. Nulton immediately commanded Bak to heal. (ER 174, 370). Bak landed on Lowry then jumped off her. (ER 370, 358, 366, 382). Bak either scratched or nipped Lowry's upper lip. (ER 370, 358, 366, 382).

III. THE PANEL'S OPINION

On April 1, 2016, the panel issued a ***split published opinion*** in which it determined that the force used was severe despite the level of control over the PSD exercised by its handler and the small injury incurred by the plaintiff. The panel also determined that the government had little interest in deploying the PSD under the circumstances facing the officers using 20/20 vision of hindsight, and that causation was admitted because the City admitted in its Answer that Sgt. Nulton's deploying of Bak was within the City's policies and procedures.

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IV. LEGAL ARGUMENT

The panel should rehear this matter or, in the alternative, the Court should rehear this matter *en banc*. This decision is a matter of exceptional importance to every law enforcement agency in the Ninth Circuit and has potential national implications. It differs significantly with decisions in other Circuits as well as cases from the United States Supreme Court. By finding that the level of force used in this matter was severe and outweighed the "little interest" the City of San Diego had in allowing its officers to deploy PSDs in these circumstances, the panel has announced significant new rules and applied previously existing case law in novel ways. Further, the panel ruled upon a policy not plead by Lowry and improperly found causation under *Monell*.

A. The Panel's Ruling Deviated from Well-Established Precedents.

The panel's holding creates conflicts within this Circuit, with other Circuits and with the Supreme Court. First, the panel announced a new rule that is at odds with all prior precedent; to wit, that the use of force in this case – a PSD off lead with its handler closely following it and causing a relatively minor injury – is the severe use of force. Second, the panel deviated from case law in finding that burglary is not an inherently dangerous crime and that officers are not entitled to presume that a suspect in a burglary in progress is dangerous. Third, prior cases have found that officers reasonably infer evasion when a suspect hides and fails to

respond to commands. Fourth, the panel announced a new rule requiring officers to use less intrusive tactics in contravention of well-settled precedent.

1. The Use of PSDs is Not the Severe Use of Force.

The panel detoured from its precedents in considering the potential for harm instead of the harm done when analyzing the type and amount of force used[1]. The panel relied on *Smith v. Hemet,* 394 F.3d 689 (9th Cir. 2005), *Chew v. Gates,* 27 F.3d 1432 (9th Cir. 1994) and *Miller v. Clark County,* 340 F.3d 959 (9th Cir. 2003) for the proposition that this Court has "repeatedly held that deploying a police dog to effectuate an arrest is a 'severe' use of force." Those cases did not so rule.

In *Smith,* the Hemet Police Department, **not** the Ninth Circuit, categorized the use of a PSD as the intermediate use of force and described it as "the most severe force authorized short of deadly force." 394 F.3d 689, 701-02 (9th Cir. 2005) (*en banc*). The *Smith* Court then **considered the facts of the case**, which are very different than the facts in the instant case.

In *Chew v. Gates,* the court held that the force used was severe **under the circumstances presented** because the dog bit the plaintiff three times, dragged him between four and ten feet and "nearly severed" his arm. 27 F.3d 1432, 1441 (9th

[1] The panel focused on Lowry's deposition testimony that Sgt. Nulton said Bak could have "ripped her face off"; Sgt. Nulton does not admit saying this.

Cir. 1994). The dog was "out of sight of its handler, and hence beyond the reach of a countermanding order." *Id.*

In *Miller v. Clark*, this Circuit found, after **evaluating the circumstances presented**, that the use of force was serious. In *Miller*, it took the handler forty five to fifty seconds to reach the plaintiff after the dog bit him. The plaintiff sustained a severe injury to his arm involving shredded muscles and injuries that were bone deep. 340 F.3d 959, 961 (9th Cir. 2003).

The panel's decision also conflicts with other Circuits. No other Circuit always considers the use of a PSD "severe force." Instead, the specific facts of each particular case is analyzed in determining the type and amount of force used. See *Robinette v. Barnes,* 854 F.2d 909 (6th Cir. 1988) (finding use of canine off lead reasonable to apprehend a commercial burglary suspect); *Matthews v. Jones,* 35 F.3d 1046, 1052 (6th Cir. 1994) (finding use of PSD to apprehend suspect hidden night reasonable); *Jarrett v. Town of Yarmouth,* 331 F.3d 140 (1st Cir. 2003) (finding use of PSD causing bites to lower leg to be reasonable); *Tilson v. City of Elkhart, Ind.,* 96 Fed.Appx. 413, 416, 418 (7th Cir. 2004) (use of bite and hold trained dog objectively reasonable even though dog punctured femoral artery of a suspect pulled over for traffic violations). See also, *Mongeau v. Jacksonville Sheriff's Office,* 197 Fed.Appx. 847, 851 (11th Cir. 2006) (distinguishing *Chew* on the grounds that the handler in *Mongeau* was present and the dog was instantly called off).

Additionally, cases in other Circuits consider the extent of the plaintiff's injuries in determining the severity of the intrusion. See, e.g., *Jones v. Buchanan,* 325 F.3d 520, 527 (4th Cir. 2003); (*Johnson v. Carroll,* 658 F.3d 819, 826 (8th Cir. 2011) (degree of injury suffered is relevant to the inquiry); *Nolin v. Isbell,* 207 F.3d 1253, 1256 (11th Cir. 2000) (the minor nature of the plaintiff's injury reflects that minimal force was used).

2. Burglary is an Inherently Dangerous Crime and Officers are Entitled to Presume a Suspect is a Threat.

In *Sandoval v. Las Vegas Metro. Police Dep't,* this Court ruled that "burglary and attempted burglary are considered to carry an inherent risk of violence." 756 F.3d 1154, 1163 (9th Cir. 2014); accord *Frunz v. City of Tacoma,* 468 F.3d 1141, 1145 (9th Cir. 2006) ("[burglary] suspects will, if confronted, flee or offer armed resistance.") The California Supreme Court also indicates commercial burglary is a felony "unless and until the crime is reduced by the court to a misdemeanor." *People v. Williams,* 49 Cal. 4th 405, 461, fn 6 (2010).

Further, the Supreme Court established burglary as a serious crime. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court recognized that burglary is a serious crime. *Id.* at 21. Additionally, in *Sykes v. United States,* 564 U.S. 1 (2011), the Court indicated that "Burglary is dangerous because it can end in confrontation leading to violence." *Id.* at 9 (overruled on other grounds by *Johnson v. U.S.*, 135 S. Ct. 2551).

Other Circuits also conclude that burglary is a crime of violence. See *Dawkins v. United States,* 809 F.3d 953 (7th Cir. 2016)[2]. In *Robinette v. Barnes,* the Sixth Circuit indicated that officers may presume burglary suspects pose a threat to the safety of officers:

> a reasonably competent officer would believe that a nighttime burglary suspect … who had been warned ... that a dog would be used, and who gave every indication of unwillingness to surrender, posed a threat to the safety of the officers.

854 F.2d 909, 913-14 (6th Cir. 1988).

Additionally, other Circuits approve the use of a PSD to apprehend a suspect when officers did not know if the suspect was armed. See *Tilson v. City of Elkhart, Ind.,* 96 Fed.Appx. 413 (7th Cir. 2004) (use of a PSD to bite and hold until the officer could apprehend the suspect reasonable even where the dog punctured the suspect's femoral artery and the suspect had only committed traffic violations); and *Jarrett v. Town of Yarmouth,* 331 F.3d 140, 150 (1st Cir. 2003) (finding use of PSD to apprehend suspect who fled scene of a minor traffic accident was reasonable use of force even though officer did not know if the suspect was armed or predict the lengths to which he would go to avoid arrest). See also *Gibson v. City of Clarksville, Tenn.*, 860 F. Supp. 450, 462 (M.D. Tenn. 1993) (use of the PSD not unreasonable

[2] This case considered the ACCA, which has been found unconstitutional. *Johnson v. U.S.,* 135 S. Ct. 2551, 2557 (2015).

when there was evidence of a burglary in progress at nighttime and burglar had ignored a police warning to surrender).

3. The Failure to Respond to an Officer's Orders Supports a Suspicion that a Suspect is Evading Arrest.

This Court previously found that a suspect that defies commands to surrender, and instead, hides from police officers was attempting to evade arrest. *Doerle v. Rutherford,* 272 F.3d 1272, 1284 (9th Cir. 2001) ("[T]he giving of a warning . . . is a factor to be considered."). See also *Miller v. Clark County,* 340 F.3d 959, 967 (2003) (reasonable to deploy dog to apprehend a hiding suspect where suspect did not respond to canine warnings). Also, other Circuits consider hiding and silence as evading arrest. See *Robinette v. Barnes,* 854 F.2d 909 (6th Cir. 1988) (reasonable to use a PSD to apprehend burglary suspect hiding in a darkened building who failed to respond to canine warnings).

Additionally, District Courts throughout the country have found that police officers may reasonably believe a suspect is evading arrest when the suspect fails to respond to verbal warnings and commands. See, e.g., *Cochran v. Glover,* 2006 WL 2024958, at *4 (M.D. Fla. 2006) (reasonable to believe burglary suspect was evading when he failed to respond to canine warnings even though the suspect was drunk and had fallen asleep); *Ingram v. Pavlak*, 2004 WL 1242761, at *4 (D. Minn. 2004) (failure to comply with officers' orders to surrender was active resistance); *U.S. v. Hall,* 2009 WL 3165458, at * 19 (W.D. N.C. 2009) (plaintiff was hiding from

officers to evade arrest); *Eggerson v. Hessler,* 2005 WL 2035049, at * 9 (W.D. Michigan) (decedent "actively concealed himself" to avoid capture and failed to communicate an intention to surrender).

4. Officers are Not Required to Use Less Intrusive Tactics.

This Circuit indicates "police are required to **consider** '[w]hat other tactics if any were available' to effect the arrest." *Bryan v. MacPherson,* 630 F.3d 805, 831 (9th Cir. 2010) (emphasis added). However, this Circuit also instructs that officers are not required to consider less intrusive tactics because doing so would require them to exercise "superhuman judgment," which would keep an officer from relying on "training and common sense to decide what would best accomplish his mission." *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994). This Court also rejected the type of alternative tactics proposed by the panel. See *Miller v. Clark Cty.*, 340 F.3d 959, 968 (9th Cir. 2003) (finding the alternative measures proposed by the plaintiff to be "utterly unsuited" to the task of apprehending the suspect).

Here, keeping Bak on lead would completely obviate the usefulness of using a PSD for officer safety and would probably not have changed the result. Sgt. Nulton was only a few feet from Bak when Bak jumped on Lowry. If Lowry was a burglar,

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Sgt. Nulton may have walked into an ambush or gotten tangled up on office furniture[3].

Other Circuits focus on "whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment" as alternative measures necessarily involve the use of 20/20 vision of hindsight. *Schulz v. Long,* 44 F.3d 643, 649 (8th Cir. 1995). See also *Plakas v. Drinkski,* 19 F.3d 1143, 1149 (7th Cir. 1994) (Fourth Amendment does not require the use of a less intrusive alternative), *accord Lyons v. City of Xenia,* 417 F.3d 565, 576 (6th Cir. 2005); *Cass v. City of Abilene,* 814 F.3d 721 (5th Cir. 2016); *Medina v. Cram,* 252 F.3d 1124, 1133 (10th Cir. 2001). The Supreme Court also ruled that the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. *See, e.g., Illinois v. Lafayette,* 462 U.S. 640, 647 (1983).

B. The Panel Erroneously Applied the Legal Tests for Liability.

In a case seeking to find a municipality liable for an officer's alleged excessive force, it is necessary to determine if there is a constitutional violation using the test announced in *Graham v. Connor.* If a constitutional violation has occurred, it is then necessary to determine if the violation is due to a municipal policy, custom or

[3] Speculating officers could use night vision goggles does not take into account the availability of goggles and is similar to Lowry's suggestion that the officers silhouette themselves.

practice. The panel misapplied the *Graham* factors when it viewed the undisputed facts with the benefit of 20/20 vision of hindsight. It also incorrectly applied the test for *Monell* liability.

1. The Reasonableness of an Officer's Actions May Not Be Judged Using 20/20 Vision of Hindsight.

The panel indicates it applied the test announced in the landmark decision of *Graham v. Connor,* 490 U.S. 386 (1989). However, the panel ignored the Supreme Court's admonishment that "[t]he 'reasonableness' ... must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. Instead, the panel applied the test in the light most favorable to Lowry. As a result, the panel concluded that Lowry did not pose a threat to the officers or others, was not resisting or attempting to evade arrest, the crime was not necessarily dangerous, and that giving canine warnings was only slightly in the City's favor because, *inter alia,* Lowry was sleeping. The panel also ruled that less intrusive tactics were available. However, unlike *Torres v. City of Madera,* 648 F.3d 1119 (2011), Sgt. Nulton did not lack experience causing him to use poor judgment. Unlike *Chew v. Gates, supra,* the officers did not have the benefit of seeing Lowry to determine if she was armed. The cases from other Circuits, and the Supreme Court, make it clear this is improper.

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2. The Panel Erroneously Conducted its *Monell* Analysis.

The panel made an incorrect factual conclusion when it indicated the City has a "bite-and-hold policy." It then made an erroneous legal conclusion that the policy was the moving force behind a constitutional violation. Lowry did not allege that the City had a "bite-and-hold policy." The panel also misconstrued the City's admission that Sgt. Nulton deployed Bak in compliance with the City's official policies as an admission that a policy was the "moving force" behind unconstitutional conduct.

Lowry contended that the City's Canine Unit Operations Manual, the SDPD Police Service Dog Procedure and the Police Use of Force Procedure was unconstitutional. Those policies do not indicate a "bite and hold policy." Instead, the panel, took issue with the City's practice of training its PSDs to bite and hold, which was not Lowry's contention. Training a PSD to bite and hold is not unconstitutional. See, *Chew, Miller, Smith, supra.*

The panel did not require Lowry did not demonstrate a "direct causal link" to the municipal policy or custom as required by *City of Canton v. Harris,* 489 U.S. 378, 385 (1989) and *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690-91 (1978). "Only if a plaintiff shows that his injury resulted from a 'permanent and well settled' practice may liability attach for injury resulting from a local government custom." *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1444 (9th

Cir. 1989) overruled other grounds by *Bull v. City and County of San Francisco,* 595 F.3d 964 (9th Cir. 2010). A "single occurrence of [allegedly] unconstitutional action by a non-policymaking employee" does not constitute a policy or custom. *McDade v. West*, 223 F.3d 1135, 1141 (9th Cir. 2000).

To find the City liable for failure to train, a plaintiff must prove that the training program is inadequate to the task an officer must perform; that the inadequacy is the result of deliberate indifference; and that the inadequacy is "closely related to" or "actually caused" a constitutional violation. *City of Canton,* 489 U.S. 378 at 390–91. See also *Clouthier v. County of Contra Costa,* 591 F.3d 1232, 1249 (9th Cir. 2010) ("[C]onsiderably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation" where the policy relied upon is not itself unconstitutional. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24 (1985)).

As the *Tuttle* Court stated "[o]bviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official." 471 U.S. 808, 832 (1985). "The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell's* requirement that the particular policy by the 'moving force' behind a *constitutional* violation." *Id.* at p. 824, fn. 8.

V. CONCLUSION

The panel's opinion creates intra and inter-Circuit conflicts. The issues are also those of exceptional importance. As a result of this decision, almost, if not all, motions for summary judgment in cases involving the use of a PSD off lead will necessarily be denied. This is a departure from this Court's prior rulings and creates a conflict with the other Circuits.

For all these reasons, and those listed in the petition, the panel that originally considered this matter should grant rehearing. If that panel chooses not to grant rehearing, the defendants ask that the entire Court order an *en banc* rehearing of this matter.

Dated: May 16, 2016

JAN I. GOLDSMITH, City Attorney

By: */s/ Stacy J. Plotkin-Wolff*
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CERTIFICATE OF COMPLIANCE
(FRAP Rule 32 and Circuit Rules 35-4 and 40-1)

The foregoing Appellee's Petition for Panel Rehearing and Rehearing *En Banc* is printed with 14 point Times New Roman, a proportionally spaced typeface. The word count for the petition is 3,902 words, based on the word count provided by the word processing system on which this brief was composed.

Dated: May 16, 2016 JAN I. GOLDSMITH, City Attorney

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No. 13-56141

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SARA LOWRY,
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CITY OF SAN DIEGO,
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On Appeal from the United States District Court
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PLAINTIFF-APPELLANT SARA LOWRY'S RESPONSE TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I.

INTRODUCTION

Throughout the course of the Petition for Panel Rehearing or Rehearing en Banc, Defendant/Appellee City of San Diego (the City) attempts to demonstrate various deviations from prior precedent and resulting intra- and inter-circuit conflicts as well as misapplication of the standard of review and causation analysis.

The City's arguments regarding variations from prior precedent are all meritless. It is clear from a review of the pertinent authorities that the panel in this case followed past precedent in the Ninth Circuit, precedent that has stressed great restraint in granting summary judgment to defendants in excessive force cases. *Smith v. City of Hemet* 394 F.3d 689, 701 (9th Cir. 2005) (en banc). It is also clear the City's misapprehension of the standard of review and the standard for municipal causation led to its additional assignments of error, which are of no moment.

Therefore, the panel and the entire Court should deny rehearing by the panel and *en banc*, respectively.

II.

LEGAL STANDARD

A party may file a petition for panel rehearing and/or *en banc* rehearing within 14 days after entry of judgment, or such other time as the Court permits.

Fed. R. App. P. 35(c); 40(a)(1). A party seeking panel rehearing must demonstrate that the panel "overlooked or misapprehended" certain points of law or fact. Fed. R. App. P. 40(a)(2).

A party seeking rehearing *en banc* must demonstrate that (1) rehearing is "necessary to secure or maintain uniformity" of the Ninth Circuit's decisions; or (2) that the case involves "a question of exceptional importance." Fed. R. App. P. 35(a).

III.

REHEARING IS UNWARRANTED

The City asserts that the panel's opinion deviated from well-established precedents, that the panel improperly viewed the facts in hindsight, and that the panel erroneously concluded Lowry had demonstrated causation. For the following reasons, there is no basis for rehearing.

A. There have been no deviations from well-established precedents.

In asserting that the panel deviated from well-established precedents, the City asserts the panel (1) announced a new rule that the use of police service dogs constitutes severe force; (2) disregarded the inherently dangerous nature of burglary and attendant presumptions; (3) disregarded the idea that failure to respond to a police officer's orders constitutes evasion; and (4) required police officers to use less intrusive tactics.

The fundamental backdrop for any excessive force inquiry comes from *Graham v. Connor*, 490 U.S. 386 (1989): "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of '"the nature and quality of the intrusion on the individual's Fourth Amendment interests"' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). This requires an assessment of "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

1. The City incorrectly construes prior circuit law to prohibit consideration of the potential harm caused by a particular use of force.

In faulting the panel's analysis, the City asserts that there is no precedential support for considering the *potential* harm that can be caused by a particular use of force as opposed to the harm *actually* inflicted. However, in 1994, the Ninth Circuit held that in order "[t]o assess the gravity of a particular intrusion on Fourth Amendment rights, the factfinder must evaluate the *type* and amount of force inflicted." *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994) (emphasis added). This was derived from the Supreme Court's mandate in *Graham* to evaluate "'the nature and quality of the intrusion on the individual's Fourth Amendment interests.'" *Chew*, 27 F.3d at 1440 (quoting *Graham*, 490 U.S. at 396). The term

"nature" requires reference to the *kind* or *type* of force being used, and as the panel noted, analysis of the type of force used helps to ensure vindication of the deterrence policy behind 42 U.S.C. § 1983. *Lowry v. City of San Diego*, No. 13-56141, slip op. at 11-12 (9th Cir. Apr. 1, 2016). Thus, not only is the amount of harm actually inflicted relevant, but so is objective consideration of the characteristics of the type of force being used.

This analysis was present in every case cited by the City to the contrary. In *Chew*, the court began by describing the actual force used. *Chew*, 27 F.3d at 1441. However, it went on to discuss the training of the police dogs at issue as well as the ability of officers to control such dogs in hypothetical situations, thus turning the focus to a description of the type of force being used. *Id.*

In *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003), the panel considered the dog's training and potential for causing serious harm. *Id.* at 964. Even when evaluating the duration of the particular bite in that case, the court noted that such a duration "*might* cause a suspect pain and bodily injury," thus demonstrating a focus on the potential outcomes in addition to the actual outcome. *Id.*

Finally in *Smith*, the *en banc* court discussed the Hemet Police Department's (HPD) policies on the use of force and the fact that the HPD classified the use of a police service dog as "intermediate force," which for the HPD fell just short of

deadly force. *Id.* at 701-02. Again, such analysis demonstrates the court's focus not just on the specific force used in the given instance, but on the general type of such force used. It further demonstrates that the Court as a whole has already addressed this issue implicitly *en banc*.

As to the cases the City cites from other circuits that it claims contradict the Ninth Circuit's approach, those cases focus their inquiry on the degree of force used, but none of them stand for the proposition that simultaneous focus on the type of force used is inappropriate.

Moving on, the City makes far too much of the panel's opinion, asserting that in this case the panel has held that the use of police dogs is always severe force. In this case, the panel began by noting that the district court erroneously analyzed the nature and quality of the intrusion by failing to consider the type of force used. *Lowry*, slip op. at 10. The panel then elaborated on why the dual analysis was required and how it was to be conducted. *Id.* at 10-12. The panel concluded, "When we consider both the type and the amount of force used against Lowry *and draw all inferences in her favor*, we have little trouble concluding that the intrusion on Lowry's Fourth Amendment rights was severe." *Id.* at 12 (emphasis added). Thus, the panel made clear that the force was to be considered severe under a summary judgment, which required the Court to accept Lowry's version of events; the panel went on to state, a "reasonable juror could conclude

that releasing Bak into the suite posed a high risk of severe harm to any individual present." *Id.* at 13. This was not a determination on the merits as a matter of law, but a determination that the issue must be submitted to a jury.

2. The City incorrectly relies on the notion that burglary is so inherently dangerous that police officers can presume that a hidden suspect is present and poses a threat.

The City asserts that the panel erred by failing to consider burglary an inherently dangerous crime and by failing to presume a burglary suspect is dangerous. However, no case law has ever supported such inflexible ideas in the context of excessive force. Rather, the basic precept of excessive force analysis is that the court must make a "highly fact-intensive" inquiry into reasonableness, a "task for which *there are no per se rules*." *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011) (emphasis added) (citing *Scott v. Harris*, 550 U.S. 372, 383 (2007)). Thus, at the outset, the City's suggestion that officers are entitled to certain presumptions is antagonistic to the fundamental reasonableness inquiry.

The City places great reliance on *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154 (9th Cir. 2014), in which the court sought to distinguish burglary from the lesser included offense of prowling to demonstrate that prowling was not a violent crime. *Id.* at 1163. In doing so, the court reasoned that the Supreme Court, in *James v. United States*, 550 U.S. 192 (2006), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015), had held that burglary carried an inherent risk of violence. However, there are several problems with the City's

reliance on *Sandoval* and the Supreme Court cases the City cited.

First, the court in *Sandoval* was not confronted with facts demonstrating burglary. Indeed, the court found there was no probable cause to believe a burglary or attempted burglary occurred. *Sandoval*, 756 F.3d at 1162-63. Instead, the court used burglary as an analytical device, making no effort to thoroughly examine the question of whether burglary is "inherently dangerous"; this makes sense considering the court was not squarely confronted with that issue but instead only trying to explain the dissimilarity of prowling. *Id.* at 1163.

Second, and perhaps more importantly, *James* was specifically overruled by the Supreme Court's decision in *Johnson*, 135 S. Ct. at 2563, as was *Sykes v. United States*, 564 U.S. 1 (2011), on which the City also relies. Both cases fundamentally relied on an analysis anchored in an unconstitutionally vague statute, the federal Armed Criminal Career Act (ACCA). Thus, the entire basis of the *Sandoval* court's reasoning has been undermined.

Nonetheless, even considering its merits, *James* dealt with deciding whether burglary constituted a "violent felony" under the ACCA. 550 U.S. at 195-96. But surely no one would seriously argue that analysis of the Congressional intent behind the ACCA should have any bearing on the *constitutional* question of whether an objectively reasonable police officer may consider burglary to be inherently dangerous in determining what quantum of force to use. Indeed, the

attempt to create bright-line rules of the sort often found in legislation such as the ACCA flies in the face of the fact-specific nature of the Fourth Amendment inquiry. *Torres*, 648 F.3d at 1124.

Frunz v. City of Tacoma, 468 F.3d 1141 (9th Cir. 2006) also is of no assistance to the City. *Frunz* reasoned, "Normally, when officers suspect a burglary in progress, they have no idea who might be inside and may reasonably assume that the suspects will, if confronted, flee or offer armed resistance." *Id.* at 1145. There are two important observations to be made. First, this language refers to the "*normal*" situation—there is no indication the court was trying to establish some maxim or presumption, and there are plenty of reasons to consider the facts in this case as anything but "normal." Moreover, immediately after making the statement, the court recognized the facts before it as exceptional rather than normal, immediately demonstrating the lack of presumptive power in the statement. *Id.* at 1145.

Additionally, as the panel recognized here, *Frunz* did not concern the reasonableness of police use of force, but instead it focused on whether a particular exception to the warrant requirement was present—that is, the case didn't deal with unreasonable seizure, but instead it dealt with unreasonable search. *See Lowry*, slip op. at 19, n.7.

3.Lowry's failure to respond to police warnings did not constitute active resistance or evidence of attempted flight.

The Court did not erroneously discount Lowry's failure to respond to warnings as evidence that she was attempting to evade arrest. Rather, the court reasoned that "a reasonable jury would not necessarily be compelled to draw such an inference." *Lowry*, slip op. at 17. However, in any event, as the panel reasoned, Ninth Circuit precedent does not support a serious use of force in cases with significantly more damaging facts than this case. *See, e.g., Glenn v. Washington Cnty.*, 673 F.3d 864, 875 (9th Cir. 2011) (holding possession of pocketknife and refusal to put it down insufficient to justify use of beanbag gun); *Smith*, 394 F.3d at 703 (holding that refusal to remove hands from pockets and entry into home after being ordered not to did not warrant use of various forms of force, including police canine).

The City's citations to argue the contrary do not lend the City support. In *Doerle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), the officer *never warned* the plaintiff of the imminent use of force, and ultimately, the court reversed, remanding the case for trial. *Id.* at 1283-84, 86. The facts in *Doerle* are at best helpful to Lowry because they support reversal in the event the finder of fact were to determine no warnings were given, as Lowry argued in her opening brief. (App. Op. Brief 12.)

The facts of *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003) are highly distinguishable. There, the plaintiff was wanted for felony evasion and ran into darkened woods near his home. *Id.* at 959-60. Additionally, the opinion dealt with a *post-trial appeal*, so the standard of review was entirely different than on summary judgment, requiring review of factual findings for clear error. *Id.* at 963.

Finally, *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) is distinguishable and of marginal utility for multiple reasons. First, factually speaking, although *Robinette* involved a late-night commercial burglary alarm, officers arriving on scene found broken glass—signs of forced entry—and actually saw the suspect looking out at them from inside. *Id.* at 911. These facts make Robinette's presence at the property less likely to be legal and his failure to respond to subsequent police canine warnings more likely to constitute active resistance.

However, perhaps more importantly, the Ninth Circuit does not approve of *Robinette*. Indeed, in 1994, the Ninth Circuit observed, "We are certain that Robinette is not consistent with the law of this circuit today." *Chew*, 27 F.3d at 1447. There is no reason to think this view has changed. Not only did the Ninth Circuit disapprove of *Robinette*'s outcome, but the Ninth Circuit also noted that *Robinette* was decided before *Graham* and had used an incorrect analysis to reach its result. *Id.* at 1443, n.10.

As for the remainder of the City's citations, these are to unpublished district court cases, which have no precedential value and do not warrant discussion.

4.The panel correctly relied on the long-standing analysis of less intrusive means to balance the *Graham* factors.

In its final assignment of error in the *Graham* analysis, the City asserts that the panel announced a new rule requiring the use of less intrusive tactics. However, the panel simply observed that less intrusive tactics should be considered in the reasonableness calculation. *See Lowry*, slip op. at 22-23. The panel relied on the long-standing rule in the Ninth Circuit that available less intrusive tactics may demonstrate that use of a particular force is unreasonable. *Id.* at 23.

Additionally, it must be borne in mind that, unlike *Miller*, which rejected on-lead searching by the officer in the context of the particular case, 340 F.3d at 968, this case involves consideration of the City's overall policies on the use of police canines. As such, analysis of less intrusive means in this case requires a focused consideration of the institutional options that were available to the City in deciding if and how to use police canines. *See Chew*, 27 F.3d at 1445-46. The distinction is important because in *Chew* the court reasoned that the even where an officer's actions are found to be reasonable, the employing municipal entity could still be held liable for requiring an officer to act within a limited set of unreasonable options—that is, for the implementation of an unconstitutional policy. *Id.* at 1445.

Thus, liability in this case does not necessarily mean that Sergeant Nulton should have chosen a different means, or even that he had other such choices; rather, liability in this case means that the *City's* policy of violent, life-endangering bite-and-hold tactics caused the constitutional violation. Such considerations do not require snap judgments, but they instead may appropriately be viewed in historical context to determine whether existing policy is constitutional in light of other available feasible options.

Finally, *en banc* consideration would be inappropriate, regardless of whether there are any circuit conflicts. In *Smith*, an *en banc* case, the court expressly endorsed the analysis of less intrusive alternatives as part of the *Graham* analysis. 394 F.3d at 703. As such, further consideration by this court is inappropriate.

B. The panel did not engage in the use of the 20/20 vision of hindsight.

Conflating two entirely different legal concepts, the City argues for the first time that the Court misapplied the law by viewing the facts in the light most favorable to Lowry. The classic standard of review used in every appellate case reviewing summary judgment calls for viewing the facts in the light most favorable to the nonmoving party. *See Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011). On the other hand, *Graham* states, "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." 490 U.S. at 396 (citing *Terry*

v. Ohio, 392 U.S.1, 20-22 (1968)). There is no conflict between the two.

The standard of review determines the *weight* to afford facts on review. In this case, the standard of review instructs the reviewing court to view all facts in the light most favorable to Lowry, at least where there are genuine disputes. On the other hand, *Graham* instructs that the reasonableness of Sergeant Nulton's actions is to be judged in the moments leading up to the release of his canine, rather than in hindsight. However, as in this case, there are often serious disputes about *what* facts the officer *actually* observed at the scene. *Graham* does not require the court to throw out factual disputes and simply accept the officer's testimony as true. Rather, *Graham* in conjunction with the standard of review instructs the court to view the facts as the non-moving party does, but to judge them from the perspective of a reasonable officer at the time.

In short, the panel applied the *Graham* factors correctly in conjunction with the standard of review, and the City's argument is frivolous.

C. The panel correctly found causation under *Monell*.

The City's arguments regarding *Monell* liability are also largely frivolous. First, the City argues that the panel erred in finding that the City had a "bite-and-hold policy." However, the panel made no such finding, which one would expect considering appellate courts do not ordinarily find facts. This is not to say the record doesn't clearly support such a finding—it does. (*See* ER 154-159, 319-325.)

The City also argues that the panel erroneously concluded that the City's policies were the moving force behind the constitutional violation. However, the Amended Answer specifically states, "Defendant admits that . . . Sergeant Nulton deployed a police services dog *in conformity with the official policies and procedures adopted by the San Diego Police Department* . . . ." (ER 398 (emphasis added).) Thus, the reality is that for causation purposes, the actual content of the policies *does not matter*. What matters is that the City admitted the entire course of conduct involving the police canine occurred because of its policies. The existence of these formally adopted policies is sufficient in and of itself to warrant liability. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). However, again to the extent there is concern, the evidence in the record clearly supports a finding that the "bite-and-hold policy" was the moving force behind the constitutional violation. (*See* ER 154-177, 182-183, 185-188.)

The City's further arguments regarding failure to train can be disposed of by simply noting that this case does not involve allegations of failure to train, which renders the City's analysis superfluous and irrelevant.

IV.

CONCLUSION

Based on the foregoing discussion, Plaintiff-Appellant Sara Lowry respectfully requests this Court reverse the district court's order granting the City

summary judgment, vacate the subsequent judgment, and remand with instructions to deny the City's motion.

Dated: June 8, 2016

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