APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-15566

D.C. Docket No. 5:16-cv-00051-LGW-RSB

AMY CORBITT, Individually and as Parent and Natural Guardian of SDC, a Minor,

Plaintiff-Appellee

versus

MICHAEL VICKERS,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Georgia

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(July 10, 2019)

Before WILSON, BRANCH, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

In this case involving an alleged use of excessive force, Defendant-Appellant Michael Vickers ("Vick-

ers") asks this Court to reverse the district court's denial of his motion to dismiss on grounds that he is entitled to qualified immunity. In addition to hearing from the parties at oral argument, we have carefully reviewed the briefs, the record, and the relevant case law. Because Vickers's actions did not violate any clearly established rights, we conclude that he is entitled to qualified immunity and that the district court should have granted his motion to dismiss.

I. BACKGROUND

A. Factual Background.

This case is before us in the posture of an appeal from the district court's denial of Vickers's Fed. R. Civ. P. 12(b)(6) motion to dismiss. We set forth below the relevant allegations of the plaintiffs'[1] complaint. At all times relevant to this appeal, Vickers was a deputy sheriff in Coffee County, Georgia. On July 10, 2014, Vickers and other officers "participated in an operation to apprehend a criminal suspect, Christopher Barnett, whom [plaintiffs] ha[d] never met." The operation spilled over onto Plaintiff-Appellee Amy Corbitt's ("Corbitt") property after Barnett "wandered into the area."

At the time of the incident, one adult (Damion Stewart) and six minor children—including Corbitt's ten-year-old child SDC and two other children under the age of three—were outside in Corbitt's yard. Corbitt and two other minors were inside. At some point after Vickers and the other officers entered Corbitt's yard, the officers "demanded all persons in the area,

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[1] Four other plaintiffs collectively sought $2,000,000 in damages (plus punitive damages), but their claims have been withdrawn or resolved and are not at issue in this appeal.

including the children, to get down on the ground." An officer handcuffed Stewart and placed a gun at his back. The children were outnumbered by the officers, and plaintiffs alleged at least four of the children (including SDC) "remained seized by deadly firearms."

Then, "while the children were lying on the ground obeying [Vickers's] orders . . . without necessity or any immediate threat or cause, [Vickers] discharged his firearm at the family pet named 'Bruce' twice." The first shot missed, and Bruce (a dog) temporarily retreated under Corbitt's home. No other efforts were made to restrain or subdue the dog, and no one appeared threatened by him. Eight or ten seconds after Vickers fired the first shot, the dog reappeared and was "approaching his owners," when Vickers fired a second shot at the dog. This shot also missed the dog, but the bullet struck SDC in the back of his right knee. At the time of the shot, SDC was "readily viewable" and resting "approximately eighteen inches from . . . Vickers, lying on the ground, face down, pursuant to the orders of [Vickers]." Barnett (the fleeing suspect) "was visibly unarmed and readily compliant" with officers. According to the complaint, "[a]t no time did SDC, or any other children . . . present any threat or danger to provoke . . . Vickers to fire two shots." Importantly, the parties do not dispute that Vickers intended to shoot the dog and not SDC.

Medical imaging confirmed a serious gunshot wound to SDC's right knee. Bullet fragments remained in the wound for an extended period of time after the shooting. SDC suffered severe pain and mental trauma. He received ongoing care from an orthopedic surgeon.

B. Procedural Background.

Corbitt, individually and as SDC's parent and guardian, brought a civil action against Vickers in his individual capacity pursuant to 42 U.S.C. § 1983. The complaint alleged deprivations of the right to be free from excessive force as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Corbitt asked the district court to award special and compensatory damages totaling $2,000,000, together with unspecified punitive damages.

In response, Vickers filed a motion to dismiss pursuant to Rule 12(b)(6). He asserted that he was entitled to qualified immunity because case law had not staked out a "bright line" indicating that the act of firing at the dog and unintentionally shooting SDC was unlawful. In support of this contention, Vickers pointed to the unpublished decision of this Court in *Speight v. Griggs*, 620 F. App'x 806 (11th Cir. 2015), which observed that "[i]n this circuit, there is no clearly established right to be free from the accidental application of force during arrest, even if that force is deadly." *Id.* at 809.

The district court found that Vickers was not entitled to qualified immunity and denied his motion to dismiss. *See generally Corbitt v. Wooten*, No. 5:16-cv-51, 2017 WL 6028640 (S.D. Ga. Dec. 5, 2017). The district court highlighted several allegations from Corbitt's complaint, including that no officer was required to discharge a gun; that no one tried to restrain the dog; and that SDC was only eighteen inches from Vickers when Vickers fired at the dog. *Id.* at *1. The district court then found that SDC was seized even before Vickers fired a shot. *Id.* at *4.

Next, the district court reasoned that this case involves an "accidental shooting" and not an "accidental

firing" because, even if Vickers did not intend to shoot SDC, he did intend to fire his gun at the dog. *Id.* at *4 & n.4. It then relied on "a reasonable inference from the allegations in the [c]omplaint, drawn in [Corbitt's] favor . . . that Vickers fired his weapon at the animal in order to keep control of SDC . . . [and] continue [his] seizure." *Id.* at *4. In other words, the district court thought "a jury could find that Vickers intended to shoot the animal in order to maintain his control of the situation and keep [SDC] from escaping." *Id.*

The district court then considered whether Vickers was entitled to qualified immunity. It noted this Court's general statement in *Thornton v. City of Macon* that "[i]t is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment." *Id.* at *5 (citing *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998)). Relying on this statement, the district court then concluded that "Vickers is not entitled to qualified immunity if he used excessive force in firing his weapon." *Id.*

In determining whether Vickers used excessive force, the district court remarked that in some cases "no factually particularized, preexisting case law [is] necessary for it to be very obvious to every objectively reasonable officer facing [the defendant's] situation that [his] conduct . . . violated [the plaintiff's] right to be free of the excessive use of force." *Id.* at *6 (alterations in original) (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002)). It then emphasized that "[t]he touchstone for reasonableness in animal shooting cases is typically officer safety," before concluding that Vickers may have acted unreasonably because the complaint alleged he fired his gun "without necessity or any immediate threat or cause" and that "no allegations suggest that Vickers was unsafe in any

way or that Bruce [the dog] exhibited any signs of aggression." *Id.* (citations and alterations omitted). The district court acknowledged that the record could develop differently following discovery—at which time Vickers might raise the defense of qualified immunity again—but it ultimately concluded that "[a]t this stage, the complaint makes sufficient allegations to proceed." *Id.* at *7. Vickers appealed to this Court, and we now consider whether the district court erred when it denied Vickers's motion to dismiss on grounds that he was not then entitled to qualified immunity.[2]

C. Arguments on Appeal.

On appeal, Vickers argues the district court erred in denying his motion to dismiss. He contends there is only a single act at issue in this case: the firing of his gun with the intent to strike a dog. He notes the lack of any cases finding similar conduct to be unlawful, and emphasizes Supreme Court precedent providing that a Fourth Amendment seizure occurs "only when

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[2] To the extent it turns on a question of law, a denial of qualified immunity at the motion to dismiss stage is an immediately appealable interlocutory order. *Behrens v. Pelletier*, 516 U.S. 299, 308, 116 S. Ct. 834, 839–40 (1996). This is true even if the district court "reserved ruling on a defendant's claim to immunity" until a later stage of the litigation because the "immunity is a right not to be subjected to litigation beyond the point at which immunity is asserted." *Howe v. City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017). Indeed, the "driving force behind creation of qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery." *Pearson v. Callahan*, 555 U.S. 223, 232–33, 129 S. Ct. 808, 815 (2009) (alteration in original) (internal quotation marks omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2, 107 S. Ct. 3034, 3039 n.2 (1987)).

there is a governmental termination of freedom of movement *through means intentionally applied*." *See Brower v. Cty. of Inyo*, 489 U.S. 593, 597, 109 S. Ct. 1378, 1381 (1989).

Vickers also argues that this Court's published decision in *Vaughan v. Cox*[3] and our unpublished decisions in *Speight*[4] and *Cooper v. Rutherford*[5] compel the conclusion that there is no clearly established right to be free from the accidental application of force. He takes issue with the district court's attempt to "fit the facts of this case into the framework of *Vaughan*" because, to Vickers, there is no plausible way to conclude from the pleadings that his goal in shooting at the dog was to continue SDC's "lawful temporary detention incidental to the arrest of Barnett." He also argues the circuit split[6] on the question of whether the Fourth

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[3] 343 F.3d 1323 (11th Cir. 2003). *See also* discussion *infra*, Part II.C.

[4] 620 F. App'x 806.

[5] 503 F. App'x 672 (11th Cir. 2012).

[6] *Compare Dodd v. City of Norwich*, 827 F.2d 1, 7 (2d Cir. 1987) (refusing to apply reasonableness standard to accidental shooting), *with Pleasant v. Zamieski*, 895 F.2d 272, 276–77 (6th Cir. 1990) (examining reasonableness even though shooting was accidental). In addition to the cases cited by Vickers, *compare Schultz v. Braga*, 455 F.3d 470, 479–483 (4th Cir. 2006) (focusing primarily on officer's lack on intent to shoot bystander in rejecting Fourth Amendment claim), *with Roach v. City of Fredericktown*, 882 F.2d 294, 296–97 (8th Cir. 1989) (rejecting Fourth Amendment excessive force claim brought by passengers of oncoming car injured as a result of high speed police chase but only after determining that officer's use of high speed chase was reasonable under the circumstances).

Amendment is ever violated by the accidental discharge of a weapon is by itself enough to show the law at issue here is not clearly established, before pointing to two district court decisions[7] from other jurisdictions that found no constitutional violation on facts somewhat similar to those presented here.

In response, Corbitt agrees with the district court that SDC was seized throughout the entire incident (even before Vickers fired his gun at the dog). She argues that Vickers's act of firing his gun at the dog violated SDC's Fourth Amendment rights. She then argues this Court should apply the objective reasonableness test from *Graham v. Connor*[8] and find that Vickers acted unreasonably. She contends it is clearly established that the use of excessive force in carrying out an arrest violates the Fourth Amendment, and that Vickers used excessive force because the complaint clearly indicates that it was not necessary to use any force at all.

II. ANALYSIS

A. Qualified Immunity in Motion to Dismiss Posture.

Although "the defense of qualified immunity is typically addressed at the summary judgment stage of a case, it may be . . . raised and considered on a motion to dismiss." *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002). Generally speaking, it is proper to grant a motion to dismiss on qualified immunity

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[7] *Brandon v. Vill. of Maywood*, 157 F. Supp. 2d 917, 924–25 (N.D. Ill. 2001); *Dahm v. City of Miamisburg*, No. C-3-95-207, 1997 WL 1764770, at *9 (S.D. Ohio 1997).

[8] 490 U.S. 386, 109 S. Ct. 1865 (1989).

grounds when the "complaint fails to allege the violation of a clearly established constitutional right." *Id.*; *see also Quiller v. Barclays Am./Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984), *aff'd en banc* 764 F.2d 1400 (11th Cir. 1985). This is a question of law that is reviewed "*de novo*, accepting the facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *St. George*, 285 F.3d at 1337. When reviewing the denial of a qualified immunity defense asserted in a motion to dismiss, appellate review is "limited to the four corners of the complaint." *Id.* "Once an officer has raised the defense of qualified immunity, the burden of persuasion on that issue is on the plaintiff." *Id.*

B. Qualified Immunity Law.

The qualified immunity defense shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[9] *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The immunity balances two important public interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009). This allows officials to work without fear of liability, protecting "all but the plainly incompetent or those

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[9] There is no question in this case that Vickers was acting in his discretionary capacity as a deputy sheriff when the challenged shooting occurred.

who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).

To overcome a qualified immunity defense, the plaintiff must make two showings. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1199–1200 (11th Cir. 2007). First, she "must establish that the defendant violated a constitutional right." *Id.* Second, she must show the violated right was "clearly established." *Id.* Although the lower federal courts were once required to consider the first prong before the second, they are now "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818.

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). This is because "officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases," and an "official's awareness of the existence of an abstract right . . . does not equate to knowledge that *his* conduct infringes the right." *Coffin v. Brandau*, 642 F.3d 999, 1015 (11th Cir. 2011) (alteration in original) (citations omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of the pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039; *see also Hope v. Pelzer*, 536 U.S. 730, 736, 739, 122 S. Ct. 2508, 2513, 2515 (2002) (rejecting this Court's earlier requirement that "federal law by which the government official's conduct should be evaluated

must be preexisting, obvious and mandatory" and not based on "abstractions" but instead only by "materially similar" cases as too rigid a gloss on qualified immunity law). Indeed, the "'salient question' . . . is whether the state of the law gave the defendants 'fair warning' that their alleged conduct was unconstitutional." *Vaughan v. Cox*, 343 F.3d 1323, 1332 (11th Cir. 2003) (quoting *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516).

"Because identifying factually similar cases may be difficult in the excessive force context," *Lee v. Ferraro*, 284 F.3d 1188, 1198–99 (11th Cir. 2002), we may find fair warning in the law without also finding a factually identical case. In fact, this Court has since *Hope* identified three different ways a plaintiff can show that the state of the law gives officials fair warning of a clearly established right. First, she can still "show that a materially similar case has already been decided." *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005). "This category consists of cases where judicial precedents are tied to particularized facts." *Loftus v. Clark-Moore*, 690 F.3d 1200, 1204 (11th Cir. 2012). In determining whether a right is clearly established under this prong, this Court looks to "judicial decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the relevant state." *Griffin Indus.*, 496 F.3d at 1199 & n.6. Second, she can "also show that a broader, clearly established principle should control the novel facts" of a particular situation. *Mercado*, 407 F.3d at 1159 (citing *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516). "[T]he principle must be established with obvious clarity by the case law so that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official

acted." *Loftus*, 690 F.3d at 1205 (alteration in original). Put another way, "in the light of pre-existing law the unlawfulness must be apparent." *Id.* Third, she could show that her case "fits within the exception of conduct which so obviously violates [the] constitution that prior case law is unnecessary." *Mercado*, 407 F.3d at 1159. Under this final test, the qualified immunity defense can be successfully overcome in an excessive force case "only if the standards set forth in *Graham* and our own case law inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful." *Lee*, 284 F.3d at 1199 (alteration in original) (citation and internal quotation marks omitted). Notwithstanding the availability of these three independent showings, this Court has observed on several occasions that "if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *See, e.g., Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) (quoting *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000)).

C. The Constitutional Right Allegedly Infringed.

With these basic qualified immunity principles in mind, our § 1983 "analysis begins by identifying the specific constitutional right allegedly infringed." *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1870 (1989). Two decisions provide relevant guidance in this regard. First, the Supreme Court in *Graham* held that the Fourth Amendment governs "a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person." *Id.* at 388, 109 S. Ct. at 1868–69. Second, "the Fourteenth Amendment guards against the use of excessive force against arrestees and pretrial detainees." *J W ex rel.*

Tammy Williams v. Birmingham Bd. of Educ., 904 F.3d 1248, 1259 (11th Cir. 2018). Consequently, it is a threshold question whether SDC was "seized" at any point during his encounter with Vickers. If SDC was already seized when Vickers fired at the dog, or if the act of shooting SDC by itself constituted a seizure, then this case is properly analyzed under Fourth Amendment standards. If SDC was not already seized, and if the act of shooting SDC by itself does not constitute a seizure, then Fourteenth Amendment standards must be applied.

What makes this case more difficult than many excessive force cases is that SDC's role in the incident does not fit neatly into any of the usual analytical categories. SDC was not the intended target of an active arrest or investigatory stop (in which case the Fourth Amendment clearly would apply), nor was he an arrestee or pretrial detainee (in which case the Fourteenth Amendment clearly would apply). Rather, SDC was a ten-year-old child who happened to be playing in his own yard when it became an arrest scene by virtue of circumstances beyond his control. SDC is best described as an innocent bystander.

Reasonably construing the allegations in the complaint in Corbitt's favor, Vickers ordered SDC and the other children to the ground and held them there at gunpoint. An adult in the yard with SDC and the other children was placed in handcuffs. Other armed officers were present, and Vickers eventually discharged his weapon twice. The second shot accidentally hit SDC. We conclude that SDC was already "seized" when Vickers fired at the dog because "in

view of all of the circumstances surrounding the incident, a reasonable person[10] would have believed that he was not free to leave." *See United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). And even though the complaint does not allege Vickers applied any physical force against SDC until Vickers's second shot struck his knee, there was without question an initial "show of authority" to which SDC clearly yielded when he lay face down on the ground pursuant to Vickers's orders. *Cf. California v. Hodari D.*, 499 U.S. 621, 626–29, 111 S. Ct. 1547, 1550–52 (1991) (finding that fleeing suspect was not seized until he was tackled because he did not yield to initial pursuit by officers).

SDC's status as an innocent bystander is not inconsistent with our conclusion that he was seized by Vickers before any shots were fired. In making this observation, we are mindful "that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology," and that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Michigan v. Summers*, 452 U.S. 692, 696 n.5, 101 S. Ct. 2587, 2591 n.5 (1981) (quoting *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877 (1968)).

This general principle applies with equal force in cases involving innocent bystanders located at the

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[10] *Cf. Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (finding seizure where "no reasonable child would have believed that he was free to leave"); *Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2005) (viewing case "through the eyes of a reasonable sixteen-year-old").

scene of an active arrest. In a case involving the execution of an anticipatory search warrant, this Court concluded that "officers were authorized to exercise 'unquestioned command of the situation' by placing all the occupants of the Premises on the ground for several minutes while securing the home and ensuring there was no danger to the officers or the public." *Croom v. Balkwill*, 645 F.3d 1240, 1253 (11th Cir. 2011) (quoting *Muehler v. Mena*, 544 U.S. 93, 99, 125 S. Ct. 1465, 1470 (2005)). This was true even with respect to an innocent bystander (the homeowner's mother Patsy Croom) who was not involved in any of the criminal activity in which her son was allegedly participating. After observing that Croom "was *seized* in the non-curtilage front yard," the Court also noted that the "officers' authority to detain Croom flowed not from the warrant, but rather from the Reasonableness Clause of the Fourth Amendment." *Id.* at 1248–49 (emphasis added). It then expressly found that there was no Fourth Amendment violation because the officers had used only *de minimis* force in "pushing Croom to the ground from her squatting position and holding her there with a foot (or knee) in the back for up to ten minutes." *Id.* at 1252–53.

We note that at least two other circuits have recognized that even innocent bystanders who are temporarily detained have been subjected to a seizure for purposes of the Fourth Amendment. *See Bletz v. Gribble*, 641 F.3d 743, 755 (6th Cir. 2011) (noting that "even absent particularized reasonable suspicion, innocent bystanders may be temporarily detained where necessary to secure the scene of a valid search or arrest and ensure the safety of officers and others" and concluding that a reasonable jury could find that hour-long detention of innocent bystander following a deadly shooting violated the Fourth Amendment);

United States v. Maddox, 388 F.3d 1356, 1362–63, 1367 (10th Cir. 2004) (applying Fourth Amendment reasonableness standard in concluding that officers may temporarily seize bystanders in area immediately adjoining arrest scene when seizure is justified by safety concerns and the scope of the seizure is reasonable under the circumstances); *Thompson v. City of Lawrence*, 58 F.3d 1511, 1517 (10th Cir. 1995) (balancing innocent bystander's Fourth Amendment rights against "governmental interest in securing the area around [the target of an arrest operation] and protecting officers from potential danger" in finding temporary detention was lawful). For purposes of this appeal, we find these cases persuasive to the extent they demonstrate that an innocent bystander who is not suspected of any wrongdoing may be seized—in some cases reasonably and in other cases potentially unreasonably—within the meaning of the Fourth Amendment.

Given our conclusion that SDC was already seized when Vickers fired at the dog, we proceed by exercising our discretion to address only the qualified immunity issue as it relates to Corbitt's claim that Vickers's second shot at the dog violated SDC's clearly established Fourth Amendment rights.[11]

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[11] Corbitt's complaint also set forth a Fourteenth Amendment claim for relief. She declined to withdraw that claim during the motion hearing before the district court, but the district court did not expressly reach the Fourteenth Amendment issue in its decision below. Although Corbitt briefed the Fourteenth Amendment issue before this Court (her arguments are not fully developed), there is no need for us to reach the issue given our conclusion that SDC was already seized—thus implicating the Fourth

D. Were Clearly Established Fourth Amendment Rights Violated?

The Fourth Amendment provides a "right of the people to be secure in their persons . . . against unreasonable . . . seizures." U.S. Const. amend. IV. The amendment "encompasses the right to be free from excessive force during the course of a criminal apprehension." *Oliver*, 586 F.3d at 905. To establish a Fourth Amendment claim for excessive force, a plaintiff "must allege (1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable." *Troupe v. Sarasota Cty.*, 419 F.3d 1160, 1166 (11th Cir. 2005).

As noted above, at the time Vickers fired at the dog, SDC just happened to be playing in his own yard when, for reasons beyond his control, his yard became the scene of an arrest operation. Although we have held that SDC was already seized at the time of the shot, SDC is best described as an innocent bystander. And although the commands of the officers that SDC and the other children lie face down on the ground were actions directed at SDC and the other children, Corbitt does not claim that those actions violated SDC's Fourth Amendment rights; rather, she claims that the action of Vickers firing at the dog and accidentally hitting SDC violated the Fourth Amendment. We hold that Vickers's action of intentionally firing at the dog and unintentionally shooting SDC did not violate any clearly established Fourth Amendment rights.

Amendment—when Vickers shot at the dog. *See Graham*, 490 U.S. at 388, 109 S. Ct. at 1868–69.

First, we note that Corbitt failed to present us with any materially similar case from the United States Supreme Court, this Court, or the Supreme Court of Georgia that would have given Vickers fair warning that his particular conduct violated the Fourth Amendment. Corbitt admitted as much during the hearing on Vickers's motion to dismiss before the district court. Moreover, neither the district court's order nor our own research has revealed any such case. Thus, the only way Corbitt can successfully overcome Vickers's assertion of qualified immunity is to show either that "a broader, clearly established principle should control the novel facts" of this case as a matter of obvious clarity, or that Vickers's conduct "so obviously violates [the] constitution that prior case law is unnecessary." *Mercado*, 407 F.3d at 1159. As our cases suggest, it is very difficult to demonstrate either.

The district court found that Vickers was not entitled to qualified immunity at the motion to dismiss stage because (1) this Court had previously stated that "[i]t is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment," *Corbitt*, 2017 WL 6028640 at *5 (quoting *Thornton*, 132 F.3d at 1400), and (2) Vickers acted unreasonably and used excessive force in firing his weapon because there was no reasonable threat of harm, *id.* at *6. This line of reasoning is an application of the second qualified immunity test that asks whether a broader, clearly established principle should, as a matter of obvious clarity, control the novel facts of a case. In so reasoning, we think the district court placed too much emphasis on this Court's statement in *Thornton*. For starters, we have expressly said otherwise in other qualified immunity cases. *See, e.g., Mercado*, 407 F.3d at 1159 ("[T]he principle that officers may not use excessive

force to apprehend a suspect is too broad a concept to give officers notice of unacceptable conduct."); *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) ("The line between lawful and unlawful conduct is often vague. [The] 'clearly established' standard demands that a bright line be crossed. The line is not found in abstractions—to act reasonably, to act with probable cause, and so on—but in studying how these abstractions have been applied in concrete circumstances."), *as modified* 14 F.3d 583 (11th Cir. 1994).

More important, perhaps, are two recent Supreme Court cases reminding courts that the qualified immunity analysis requires a clearly established right to be defined with specificity. In *White v. Pauly*, the Supreme Court—with palpable frustration—reiterated "the longstanding principle that clearly established law should not be defined at a high level of generality."___ U.S.___, ___, 137 S. Ct. 548, 552 (2017) (per curiam) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 2084 (2011)). Instead, "the clearly established law must be 'particularized' to the facts of the case." *Id.* (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039). The Supreme Court ultimately vacated a decision authored by a divided Tenth Circuit panel, faulting it for "fail[ing] to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment . . . [and for] rel[ying] on *Graham*, *Garner*, and their Court of Appeals progeny, which . . . lay out excessive-force principles at only a general level." *Id.* at ___, 137 S. Ct. at 550–52. Although the Supreme Court acknowledged that "general statements of the law are not inherently incapable of giving fair and clear warning[,]" it also emphasized that "*Garner* and *Graham* do not by themselves create clearly established law outside 'an

obvious case.'" *Id.* (first quoting *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227 (1997); then quoting *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 599 (2004)).

Just this year, the Supreme Court explained in another excessive force case:

> Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue . . . .
>
> [I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

City of Escondido v. Emmons, ___U.S. ___, ___, 139 S. Ct. 500, 2019 WL 113027, at *2–3 (2019) (per curiam) (alterations in original) (quoting *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148, 1153 (2018) (per curiam)).

In light of these basic principles, we conclude that the district court erred in relying on the general proposition that it is clearly established that the use of excessive force is unconstitutional. The unique facts of this case bear this out. Not only was SDC not the intended target of the arrest operation, he also was not the intended target of Vickers's gunshot. Both of these facts take this case outside "a run-of-the-mill Fourth Amendment violation." *White*, ___ U.S. at ___, 137 S. Ct. at 552. In other words, we are not dealing with "an obvious case," and no principles emerge from our decisions that speak with "obvious clarity" to the unique and unfortunate circumstances that befell SDC. Indeed, we are unable to identify any settled Fourth Amendment principle making it obviously clear that volitional conduct which is not intended to harm an already-seized person gives rise to a Fourth Amendment violation.

Narrower principles do emerge from our excessive force cases. *See, e.g., Vinyard*, 311 F.3d at 1348 (finding use of pepper spray on mildly intoxicated and profane misdemeanant constituted "force that was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under *Graham*"); *Oliver*, 586 F.3d at 907–08 (denying qualified immunity where repeated use of Taser on non-threatening subject was "grossly disproportionate to any threat posed" and "any reasonable officer would have recognized that his actions were unlawful"). However, unlike the present facts these cases—along with those cited by our dissenting colleague in support of an almost identical proposition—all involve conduct that was intentional as to the injured plaintiff.

Unlike any prior cases that could clearly establish the law for this case, at the time Vickers fired at the dog, SDC was not the intended target of an arrest or

investigatory stop. Nor was he the intended target of Vickers's shot; rather, he was accidentally hit when Vickers fired at the dog. The Supreme Court's decision in *Brower* indicates that a Fourth Amendment violation depends upon *intentional* action on the part of the officer. The *Brower* decision provides:

> Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. . . . In sum, the Fourth Amendment addresses "misuse of power," not the accidental effects of otherwise lawful government conduct.
>
> Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant—even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when

> there is a governmental termination of freedom of movement *through means intentionally applied*. . . .
>
> . . . .
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> . . . In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped.

489 U.S. at 596–99, 109 S. Ct. at 1381–82 (citations omitted).

Lower court decisions construing *Brower* have required, in order to state a violation of Fourth Amendment rights, that the officer's action must have been intended to stop the plaintiff, the party suing the officer. This reading of *Brower* finds strong support in the language quoted above. There is a clear indication that intentional government action directed toward the plaintiff, not accidental effects, is required. *See id.* at 596, 109 S. Ct. at 1381 ("[T]he Fourth Amendment addresses misuse of power, not the accidental effects of otherwise lawful government conduct." (citation

and internal quotation marks omitted)). Also, the Supreme Court's hypothetical of the police car rolling and pinning a person against a wall suggests that a Fourth Amendment violation occurs only when the governmental action intentionally targets the person thus pinned. And no Fourth Amendment violation occurs when the governmental action impacts an innocent passerby, or even when a serial murderer for whom there is an outstanding warrant is thus pinned, but only by lucky chance, as opposed to the murderer having been pinned by intentional action targeting him.

Lower courts have usually construed *Brower* to require such intentional action. For example, our own decision in *Vaughan*, 343 F.3d 1323, so construed *Brower*. There, this Court reversed the district court's grant of summary judgment in favor of an officer under the following circumstances. The officer, with another officer, was engaged in a high-speed chase of a red pickup truck suspected of having been stolen. The pickup truck was driven by Rayson, and the man in the passenger seat, Vaughan, matched the description of the suspect. During a high-speed chase, the officer, Cox, fired three bullets into the pickup truck, none of which disabled either the truck or the driver. However, the third bullet punctured Vaughan's spine, seriously injuring him. This Court reversed the district court's grant of summary judgment to Officer Cox, but only after we concluded that "Vaughan was hit by a bullet that was meant to stop him," and therefore "he was subjected to a Fourth Amendment seizure." *Id.* at 1329. In so holding, we rejected as inapplicable cases from other circuits which had rejected Fourth Amendment claims brought by innocent bystanders or hostages accidentally harmed by police fire, noting that those "cases are of little aid to our inquiry . . . because

Vaughan was neither an innocent bystander nor a hostage; instead, he was a suspect whom Deputy Cox sought to apprehend." *Id.* at 1328 n.4.

It is true that the Supreme Court's decision in *Brower*, and our Eleventh Circuit decision in *Vaughan* discussed above, focus on the seizure aspect of the claimed Fourth Amendment violation. And it is also true that we have held that SDC was already temporarily seized at the command of Vickers and the other officers who were controlling the scene in their attempt to capture the suspect, Barnett. Thus, Corbitt argues that *Brower*'s requirement of intentional government conduct targeting SDC is satisfied, and thus she can prove a Fourth Amendment violation pursuant solely to the objective reasonableness test without regard to any further intentionality element.

We conclude that Corbitt's argument cannot overcome Vickers's claim of qualified immunity. No case capable of clearly establishing the law for this case holds that a temporarily seized person—as was SDC in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person. In other words, Corbitt is not claiming that the officers' command that SDC and the other children lie face down on the ground violated Fourth Amendment rights. Nor is she claiming that any other action of the officers directed toward SDC and the other children violated Fourth Amendment rights. Rather, she is claiming SDC's Fourth Amendment rights were violated by Vickers's shot—an action targeting the dog, not SDC. Corbitt's Fourth Amendment claim is based on a governmental action not directed toward SDC and which only accidentally harmed SDC.

Indeed, dicta in *Brower* itself (as noted above) suggests that accidental effects do not rise to the level of a misuse of power constituting a Fourth Amendment violation.[12] *See Brower*, 489 U.S. at 596, 109 S. Ct. at 1381. Cases from other circuits are generally in accord with this principle, especially when bystanders are involved. *See Schultz v. Braga*, 455 F.3d 470, 479–83 (4th Cir. 2006) (declining to extend Fourth Amendment protections to "reasonably foreseeable" victim of officer's gunshot where victim was already seized by traffic stop and officer did not intend to shoot her but instead intended to shoot her passenger); *Childress v. City of Arapaho*, 210 F.3d 1154, 1155–57 (10th Cir. 2000) (holding no Fourth Amendment seizure occurred when two escapees abducted plaintiff and her two-year-old daughter and stole their minivan, and law enforcement officers shot intending to restrain the minivan and escapees but accidentally injured plaintiff and her daughter who were hostages in the minivan); *Medeiros v. O'Connell*, 150 F.3d 164, 167–69 (2d Cir. 1998) (in similar factual situation, holding no Fourth Amendment seizure and relying upon *Brower*, 489 U.S. at 596, 109 S. Ct. at 1381, for the proposition that the Fourth Amendment addresses misuse of power, not accidental effects of otherwise lawful conduct); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990) (in a similar factual situation, holding: "[a] police officer's deliberate decision to shoot at a car containing a robber and a hostage *for*

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[12] As indicated above, there is a circuit split as to whether government action which accidentally harms the plaintiff can rise to the level of a Fourth Amendment violation. *See* discussion *supra* note 6. This only further strengthens Vickers's claim that he is entitled to qualified immunity.

the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern," and relying upon *Brower* for the proposition that the Fourth Amendment addresses misuse of power, not accidental effects of otherwise lawful conduct);[13] *cf. Dodd v. City of Norwich*, 827 F.2d 1, 7 (2d Cir. 1987) (rejecting a Fourth Amendment claim of a § 1983 plaintiff where suspected burglar was deemed to have been already seized and holding: "It makes little sense to apply a standard of reasonableness to an accident.").[14]

The foregoing authorities do not support Corbitt's argument that once SDC was already seized in an unchallenged manner, the intent requirement of *Brower*

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[13] *See also* discussion *infra* note 17 (comparing First Circuit case finding Fourth Amendment violation where accidental effects of conduct intentionally directed toward plaintiff resulted in shooting death of plaintiff).

[14] While it is true that "only binding precedent can clearly establish a right for qualified immunity purposes," *Gilmore v. Hodges*, 738 F.3d 266, 279 (11th Cir. 2013), non-binding persuasive authority can be used to indicate that a particular constitutional right is not clearly established, *see Denno v. School Bd. of Volusia Cty.*, 218 F.3d 1267, 1272–75 (11th Cir. 2000) (concluding that school officials were entitled to qualified immunity because, in part, they could justifiably rely on "the perspective of several reasonable jurists" from outside Eleventh Circuit in navigating the "relevant legal landscape"). Thus, we need not, and expressly do not, express an opinion with respect to the correctness of cases like *Schultz*, *Childress*, *Medeiros*, *Landol-Rivera*, or *Dodd*. We cite such cases solely as examples of opinions of reasonable jurists which indicate that the relevant law is not clearly established.

is satisfied, and a Fourth Amendment violation is established if the officer's actions were objectively unreasonable. As the Second Circuit noted in *Dodd*, that would mean that a Fourth Amendment violation could be based upon simple negligence. *Dodd*, 827 F.2d at 7–8. Moreover, the cases noted above have not distinguished between the following two factual situations. In the first situation, an officer fires at the robber or escapee and the vehicle in which he is fleeing with the plaintiff-hostage, but the bullet accidentally also hits the unseized plaintiff-hostage, thus raising the issue of whether the bullet striking the plaintiff-hostage constitutes a Fourth Amendment seizure. This factual situation is presented in the *Brower* dicta, and in cases like *Childress*, *Medeiros*, and *Landol-Rivera*, all indicating there is no Fourth Amendment seizure in that situation. In the second factual situation, the plaintiff-bystander is already seized in an unchallenged manner, but then is harmed accidentally by a shot fired at someone or something other than the plaintiff-bystander. For example, in *Schultz*, the officer fired the shot at the person he believed to be a robbery suspect in the passenger seat, but "blood and glass set in motion by the gunshot" hit the already-seized Harkum in the driver's seat. *Schultz*, 455 F.3d at 483. The court held that the officer was properly granted qualified immunity from Harkum's Fourth Amendment claim "because the force employed was not directed towards her," and because the focus of the Fourth Amendment "did not involve unintended consequences of government action." *Id.* (second quotation quoting from *Brower*, 489 U.S. at 596, 109 S. Ct. at 1381). And in the instant case, the already-seized bystander, SDC, was harmed accidentally when Vickers intentionally fired at the dog. *See Dodd*, 827 F.2d at 7–8 (holding no Fourth Amendment violation in a

factual situation involving an accidental shooting during handcuffing after the suspect was deemed to have been already seized).

Not only have the cases not distinguished between these two factual situations, it is not obvious that there should be a different result in the two situations, in light of the fact that the focus of the Fourth Amendment analysis is on the "misuse of power," not the "accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596, 109 S. Ct. at 1381. In other words, it is the "accidental effect" that is significant. Stated in the language of the relevant standard, the law is not clearly established that there is a Fourth Amendment violation when an already-seized bystander, as in the instant case, is accidentally harmed as an unintended consequence of an officer's intentional shot at something else entirely.

In sum, not only is there no materially similar binding case that clearly establishes a Fourth Amendment violation; dicta from the Supreme Court and nonbinding case law indicates that reasonable jurists have found no Fourth Amendment violation in similar circumstances.[15] We conclude that the accidental shooting, as occurred here, does not constitute a clearly established Fourth Amendment violation as a matter of obvious clarity.[16] Thus, Corbitt has failed to

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[15] *See also* discussion *supra* note 14.

[16] The district court assumed the *Brower* intent requirement could be satisfied by the inference the district court derived from plaintiffs' allegations "that Vickers fired his weapon at the animal in order to keep control of SDC . . . [and] continue [his] seizure." *Corbitt*, 2017 WL 6028640, at *4. Thus, under the district court's construction, Vickers's shot was an attempt to continue

demonstrate a clearly established Fourth Amendment violation, either by the first method (a materially similar, binding case), or the second method (the violation is a matter of obvious clarity from such a binding case). We turn therefore to the third method (the challenged conduct so obviously violates the Fourth Amendment that prior case law is unnecessary).

This is not a case that so obviously violates the Fourth Amendment that prior case law is unnecessary to hold Vickers individually liable for his conduct. To find otherwise would require us to conclude that no reasonable officer would have fired his gun at the dog under the circumstances. This we are unable to do. With the benefit of hindsight, we do not doubt Vickers could have acted more carefully; the firing of a deadly weapon at a dog located close enough to a prone child that the child is struck by a trained officer's errant shot hardly qualifies as conduct we wish to see repeated. However, even the underlying constitutional issue itself (which of course is easier for a plaintiff to prove than proving that particular circumstances violate clearly established constitutional law) is evaluated pursuant to a "calculus . . . [that] must embody allowance for the fact that police officers are often

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his seizure of SDC, and thus satisfied the required intent element. However, the shot fired by Vickers—the act on which Corbitt bases her allegation of excessive force in violation of the Fourth Amendment—was clearly targeting Bruce, the dog; it is absolutely clear that it was by pure accident that the shot struck SDC. In any event, as demonstrated in the text, the district court's position is not supported by clearly established law such that it would be apparent to any reasonable officer in Vickers's shoes that his actions violated the Fourth Amendment.

forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396–97, 109 S. Ct. at 1872. In the instant qualified immunity context, we are cognizant that several cases (some of which are mentioned above) have considered similar accidental shootings of bystanders, and that many, if not most, of the jurists involved have concluded that there was no clearly established Fourth Amendment violation. Indeed, we are aware of no case and no jurist indicating that such an accidental shooting (i.e., one resulting from volitional conduct indisputably intended to stop someone or something other than the plaintiff) so obviously violates the Fourth Amendment that prior case law is unnecessary to hold that the officer violated clearly established law.[17] Moreover, the facts al-

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[17] *Cf. Stamps v. Town of Framingham*, 813 F.3d 27 (1st Cir. 2016). In *Stamps*, the First Circuit denied qualified immunity to an officer accused of using excessive force during the execution of a search warrant where the officer pointed a "loaded assault rifle at the head of a prone, non-resistant, innocent person who present[ed] no danger, with the safety off and a finger on the trigger," then accidentally shot the person to death. *Id.* at 29, 39–40.

Although relevant to our discussion here, the legal principle deemed clearly established in *Stamps* is materially different from the principle at issue in this case because *Stamps* involved the accidental consequences of conduct otherwise intentionally directed toward the plaintiff. In *Stamps*, the officer intentionally aimed his assault rifle at the plaintiff and then accidentally shot the plaintiff. Here, Vickers intentionally fired his gun at the dog and then accidentally shot SDC. Recognizing a similar distinction, the First Circuit in *Stamps* noted that its decision there was not inconsistent with its earlier decision in *Landol-Rivera*, 906

leged here involve "accidental effects" of conduct directed toward something other than the plaintiff, not the kind of "misuse of power" which *Brower* suggests is the focus of a Fourth Amendment violation. *Brower*, 489 U.S. at 596, 109 S. Ct. at 1381. We conclude that the circumstances alleged in this case do not so obviously violate the Fourth Amendment such that it would be apparent to every reasonable officer that his actions were in violation of the Fourth Amendment. *See Lee*, 284 F.3d at 1199 (recognizing that a plaintiff can surmount a qualified immunity defense by showing "that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law" and emphasizing that "[u]nder this test, the law is clearly established, and qualified immunity can be overcome, only if the standards in *Graham* and our own case law inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful" (second alteration in original) (citations and internal quotation marks omitted)).

We cannot agree with our dissenting colleague either on the facts or the law. For example, in the absence of allegations of actual facts demonstrating that

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F.2d 791. In particular, it observed that the *Landol-Rivera* court had relied on *Brower's* intent requirement in finding no Fourth Amendment violation on grounds that "it was not the officer's intent to seize the hostage." *Stamps*, 813 F.3d at 37 n.10. Put another way, *Landol-Rivera's* "holding simply has no relevance [to *Stamps*] since there is no question that Stamps was the intended target of [the officer's] seizure." *Id.* We agree and find that this case is more like *Landol-Rivera* than *Stamps* because Vickers intended to shoot the dog, not SDC.

every objectively reasonable officer in Vickers's shoes would necessarily perceive a total lack of reason to subdue a dog roaming freely at the scene of an active arrest, we decline to accept the plaintiffs' conclusory allegations that there was no need to subdue the dog. *See Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) ("[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal."). We think it even more appropriate to disregard such allegations in the context of the qualified immunity and excessive force issues raised by this case, where the Supreme Court has directed us to judge the "reasonableness at the moment" of the officer's actions not from the plaintiff's perspective, but instead "from the perspective of a reasonable officer on the scene," who was operating without the "20/20 vision of hindsight." *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872.

In any event, the allegations of the complaint are lacking in allegations of actual facts[18] that paint a scenario that so clearly and obviously presented such

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[18] Contrary to the dissent's suggestion, we do not discount the complaint's conclusory allegation that the dog presented no threat because we accept instead Vickers's conclusory allegation that he did feel the need to subdue the dog. Rather, we discount the complaint's allegation because it *is* conclusory. There are no allegations of actual fact indicating that the dog was non-threatening. In contrast to Corbitt's conclusory allegations of no threat and no justification, we suggest hypothetical illustrations of allegations of actual fact which Corbitt might have alleged depending upon what the actual facts were. For example, Corbitt might have alleged that the dog was a small and non-aggressive breed, like a toy poodle, or, if it was a breed known for aggression, that the dog was walking slowly towards its owners and not barking at all.

danger to SDC that every objectively reasonable officer confronted with the situation Vickers encountered would have known, in light of "the standards set forth in *Graham* and our own case law," *Lee*, 284 F.3d at 1199, and in the ten seconds allegedly available, that a shot at the dog would violate the Fourth Amendment. Thus, we cannot conclude that the instant allegations rise to that rare level of conduct that "lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." *Id.*; *see also Mercado*, 407 F.3d at 1159 (noting that, under the third method, the conduct at issue must rise to a level that "so obviously violates [the] constitution that prior case law is unnecessary"). As a result, we also cannot conclude that Corbitt has overcome the high legal threshold placed on plaintiffs who seek to overcome an officer's qualified immunity defense on the basis of the third method on which the dissent focused. That this complaint fails to surmount that high legal threshold is especially apparent in light of the considerable case law indicating that a Fourth Amendment violation

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We also cannot agree with our dissenting colleague that the actual facts alleged warrant the inference that the dog "was surrounded by children." The complaint does not contain allegations of actual fact to support the dissent's assertion that the dog was surrounded by children when Vickers fired at it. To the extent that the allegations focus on the relative locations of the dog to other children, they allege only that Vickers "discharged his firearm in the immediate vicinity of several innocent minor children and bystanders," and "a large number of innocent bystanders, mostly children in the immediate area." The dissent's inference that Vickers shot "into a group of children" overstates the factual allegations contained in Corbitt's complaint.

must involve official action that intentionally targets the plaintiff. Not only does that case law strongly indicate it is not clearly established that the accidental effects of official actions targeting others gives rise to a Fourth Amendment violation, it even suggests that such actions may not even constitute a Fourth Amendment violation in the first place. The relevant question is not whether a reasonable officer would have refrained from shooting the dog. Instead, the relevant question is whether every reasonable officer would have inevitably refused to do so in light of *the* Fourth Amendment standards established by Graham and our own case law. Our answer to that relevant question is in the negative.

Accordingly, Vickers's qualified immunity defense must prevail in the absence of a materially similar case or a governing legal principle or binding case that applies with obvious clarity to the facts of this case.

III. CONCLUSION

In conclusion, we hold that Vickers is entitled to qualified immunity because, at the time of the incident giving rise to this appeal, there was no clearly established law making it apparent to any reasonable officer in Vickers's shoes that his actions in firing at the dog and accidentally shooting SDC would violate the Fourth Amendment. Because we find no violation of a clearly established right, we need not reach the other qualified immunity question of whether a constitutional violation occurred in the first place. This opinion expressly takes no position as to that question. The order of the district court denying Vickers's motion to dismiss is hereby reversed, and the case is remanded to the district court with instructions to dismiss the action against Vickers.

REVERSED and **REMANDED**.

WILSON, Circuit Judge, dissenting:

The majority accurately points out that qualified immunity protects "all but the plainly incompetent." Maj. Op. at 10 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Because no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children, qualified immunity should not protect Officer Vickers. Therefore, I dissent.

I.

On July 10, 2014, several officers, including Deputy Sheriff Michael Vickers, initiated a search to locate and apprehend a criminal suspect, Christopher Barnett.[1] The search led them to Amy Corbitt's property after Barnett, "whom [plaintiffs] ha[d] never met," "wandered into the area." Barnett, Damion Steward, and six children—including Corbitt's ten-year-old child S.D.C., and two children under the age of three—were on the property's front yard. The officers detained Barnett and ordered everyone to get on the ground. An unidentified officer handcuffed Steward and held a *gun* against his back. The detained children "were [also] held at gun point, each having an officer forcefully shove the barrel of a loaded gun into their backs."

While Barnett, Damion, and the children were detained on the lawn, Vickers spotted the Corbitt family

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[1] The summary of the facts is based on the allegations made in the Complaint. *See Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019) (noting that, at the motion to dismiss stage, "[w]e are required to accept all allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor").

pet, a dog named Bruce. Although no one "appear[ed] to be threatened by [Bruce's] presence," Vickers attempted to shoot the dog. He missed, and Bruce retreated under the Corbitt's residence. Roughly ten seconds later, Bruce reemerged and was "approaching his owners" on the yard. Vickers fired another shot, again missing the pet. The errant bullet struck S.D.C. behind the knee as the child lay in a "face down position on the ground at the request of defendants." Importantly, S.D.C. was "readily viewable" *a mere eighteen inches from Vickers* at the time the shot was fired, and "[o]ther minor children were [ ] within only a few feet of [ ] Vickers." As a result of the bullet wound, S.D.C. suffered severe physical pain and mental trauma.

II.

To overcome a qualified immunity defense, the plaintiff must (1) "establish that the defendant violated a constitutional right" and (2) demonstrate that the violated right was "clearly established." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1199–1200 (11th Cir. 2007). I agree with the majority's determination that Corbitt satisfied the first requirement. *See* Maj. Op. at 14–18. I disagree, however, with the majority's conclusion that Corbitt failed to demonstrate that Vickers violated a "clearly established" constitutional right.

We have identified three ways a plaintiff can show that a right was clearly established at the time of the defendant's action. First, she can "show that a materially similar case has already been decided." *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005). Second, she can "show that a broader, clearly established principle should control the novel facts" of a particular situation. *Id.* (citing *Hope v. Pelzer*, 536

U.S. 730, 741 (2002)). Third, she can show that her case "fits within the exception of conduct which so obviously violates [the] constitution that prior case law is unnecessary." *Id.*; *see also Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002) (noting that, to show that a right is "clearly established," plaintiffs may show "that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." (citation omitted)). I believe the instant case falls within the third category.

Under this third recognized category, a plaintiff in an excessive force case can overcome an officer's qualified immunity defense "only if the standards set forth in *Graham* and our own case law inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful." *Lee*, 284 F.3d at 1199 (alteration in original) (citation and internal quotation marks omitted). In *Graham v. Connor*, the Supreme Court held that the reasonableness analysis "requires careful attention to the facts and circumstances of each particular case," including the severity of the crime at issue, the safety interests of officers and others, and any risk of violence or flight by a suspect. 490 U.S. 286, 396 (1989) (citation omitted).

Consider the present facts and circumstances: officers arrived at a home and found the subject of their search. At gunpoint, the officers ordered the suspect and all persons in the area—including six children—to the ground. Everyone complied. A nonthreatening family pet was present on the scene; there is nothing to suggest that this pet acted with hostility or threatened the safety of anyone—including the officers. With all the children and the suspect still lying on the ground pursuant to the officers' commands, Officer

Vickers shot at the family pet. He missed. He waited. He shot again. He missed again, instead striking a child who had been—at all times—lying within arm's reach of the officer.

This conduct—discharging a lethal weapon at a nonthreatening pet that was surrounded by children[2]—is plainly unreasonable. The nonthreatening nature of the pet is crucial to this conclusion.[3] We have

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[2] The majority maintains that the Complaint does not "contain allegations of actual fact to support the dissent's assertion that the dog was surrounded by children when Vickers fired at it." Maj. Op. at 37 n.18. But there are allegations in the Complaint that, considered together, lead to the reasonable inference that the dog was surrounded by children at the time Officer Vickers fired the shot. *See Sebastian*, 918 F.3d at 1307 (noting that, at the motion to dismiss stage, we must draw all reasonable inferences in favor of the nonmoving party). Specifically, the Complaint alleges that the dog was "approaching his owners," including S.D.C., on the yard when Officer Vickers fired. It also alleges that S.D.C. "was approximately eighteen inches from Defendant Vickers" and "[o]ther minor children were [ ] within only a few feet of Defendant Vickers" when Officer Vickers fired. Finally, the Complaint alleges that Officer Vickers fired a shot at the dog but instead hit S.D.C. Based on these three allegations—(1) that the dog was approaching S.D.C., (2) that Officer Vickers was a few feet from S.D.C. and the other children, and (3) that Officer Vickers fired a shot at the dog, but instead struck a child—we can, and should, reasonably infer that the dog and the children were closely situated.

[3] The majority declined to accept Corbitt's allegations that the dog was nonthreatening, reasoning that the allegations were "conclusory." Maj. Op. at 37. I disagree with such a characterization. At this stage, we must take plaintiff's allegations as true. *Sebastian*, 918 F.3d at 1307; *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002) ("While there may be a dispute as to whether the alleged facts are the actual facts, in reviewing

consistently denied qualified immunity when the defendant-officer exhibited excessive force in the face of no apparent threat. *See cf. Saunders v. Duke*, 706 F.3d 1262, 1265 (11th Cir. 2014) ("We have repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands."); *see, e.g.*, *Slicker v. Jackson*, 215 F.3d 1225, 1227 (11th Cir. 2000) (denying qualified immunity to officer who arrested plaintiff, placed him in handcuffs and then, after he had been fully secured, slammed his head into the pavement); *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926–27 (11th Cir. 2000) (denying qualified immunity to officer who allowed police dog to attack arrestee who was already subdued and lying on the ground); *Smith v. Mattox*, 127 F.3d

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the grant of a motion to dismiss, we are required to accept the allegations in the complaint as true."). We are therefore obligated to accept that the dog "posed no threat," that "[no]one appear[ed] to be threatened by its presence," and that it was merely "approaching his owners" at the time Officer Vickers fired. Instead, the majority appears to credit Officer Vickers' own conclusory account—that he shot the dog "because it was approaching him, the officers, and the detained bystanders in a manner that led him to conclude that he needed to subdue it." See Maj. Op. at 37 (concluding that some officers may find it reasonable to subdue a dog "roaming freely at the scene of an active arrest"). Neither Officer Vickers nor the majority elaborates on the dog's behavior or explains how its behavior was so outrageous as to warrant shooting into a group of children. And even if such an explanation existed, *we are required to accept Corbitt's allegations as true*. It is not for us to weigh the likelihood of either account. That is a job for the jury.

1416, 418–20 (11th Cir. 1997) (denying qualified immunity to officer who broke plaintiff's arm after plaintiff "docilely submitted" to officer's request to "get down"). It is also relevant that Officer Vickers was a mere foot and a half from S.D.C. and was only a few feet from several other children. Nonetheless, facing no apparent threat, Officer Vickers chose to fire his lethal weapon in the direction of these children.[4] No reasonable officer would engage in such recklessness and no reasonable officer would think such recklessness was lawful. Therefore, I agree with the district court that Officer Vickers should not be entitled to qualified immunity. *Lee*, 284 F.3d at 1199.

I respectfully dissent.

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[4] Officer Vickers emphasizes that he intended to shoot the dog and only accidentally struck S.D.C. He argues that such an inadvertent injury cannot be deemed a result of "excessive force." I do not dispute that the shooting of S.D.C. was accidental. I maintain that Officer Vickers' intentional action—shooting at a dog that was surrounded by children—was unreasonable.

APPENDIX B

In the United States District Court for the Southern District of Georgia Waycross Division

AMY CORBITT, individually and as parent and natural Guardian of SDC; JERRY RICH, individually; ELIZABETH BOWEN, as parent and natural guardian of AMB; TONYA JOHNSON, as parent and natural guardian of ERA; DAMION STEWART, individually and as parent and natural guardian of JDS and as parent and natural guardian of MS Plaintiffs, v. DOYLE WOOTEN, individually; and MICHAEL VICKERS, individually, Defendants.	NO. 5:16-CV-51

ORDER

Before the Court is Defendants' Motion to Dismiss (Dkt. No. 4) pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. This Motion has been fully briefed and orally argued, and is now ripe for review. For the following reasons, the Motion to Dismiss is **GRANTED** in part and **DENIED** in part.

BACKGROUND

At this stage of the case, the facts are taken from the Complaint and assumed to be true pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 10, 2014, Defendant Michael Vickers ("Vickers") and other officers of the Coffee County Sheriff's Department and the Georgia Bureau of Investigation participated in an operation to apprehend criminal suspect Christopher Barnett. Dkt. No. 1 ¶ 23. They entered Plaintiff Amy Corbitt's ("Corbitt") property at 145 Burton Road, Lot 19 and ordered all persons to get down on the ground. *Id*. ¶ 24. Inside the property were Plaintiff Corbitt and non-party minors JVR and ST. *Id*. Outside the property were Plaintiff Stewart and minor Plaintiffs Rich, JDS, MS, SDC, AMB, and ERA. *Id*. Officers handcuffed Plaintiff Stewart and placed the barrel of a gun in his back in the presence of his two children under the age of three. *Id*. Those children roamed the adjacent street, screaming and crying. *Id*. at ¶ 25. The remaining minors were each held at gunpoint, lying on the ground, when Defendant Vickers intentionally fired two shots at the family pet named "Bruce." *Id*. at ¶ 27, 28. The first shot missed. *Id*. at ¶ 28. The second shot missed the pet and hit ten-year-old SDC in the back of his right knee. *Id*. at ¶¶ 28, 32.

None of the Plaintiffs had ever met the criminal suspect Christopher Barnett. *Id*. ¶ 23. All of the plaintiffs followed Defendant Vickers's orders. *Id*. ¶ 32. The complaint alleges that no officer at the scene was required to discharge a firearm. *Id*. ¶ 29. At the time he fired two bullets at the pet, Vickers was armed with a gun, a Taser, and pepper spray. *Id*. ¶ 41. Before Vickers shot at Bruce, neither he nor any other agent attempted to restrain the animal, whether directly or

otherwise. *Id*. ¶ 28. Vickers was only eighteen inches from SDC when he shot the child. *Id*. ¶ 29.

Tests run at Coffee Regional Medical Center and the University Medical Center in Savannah, GA confirmed multiple bullet fragments throughout the area of SDC's wound, and, at the time the Complaint was filed, SDC was under evaluation by an orthopedic surgeon for the removal of the bullet fragments. *Id*. ¶ 33-34.

Eight Plaintiffs filed suit, asserting various state and federal claims against the County, the sheriff, and Vickers. The only remaining claims are by all Plaintiffs against Vickers in his individual capacity and by Plaintiffs ERA, Stewart, JDS, and MS against Wooten in his individual capacity.[1]

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). In order to state a claim for relief, a plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the

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[1] At an oral hearing on this Motion on August 31, 2017, Plaintiff voluntarily dismissed claims against Coffee County and Vickers and Wooten in their official capacities, as well as the Equal Protection claim and all state law claims. The most recent filing of Plaintiffs Corbitt, SDC, Rich, and AMB also makes clear that those Plaintiffs have dismissed their claims against Wooten in his individual capacity. The claims against Wooten in his individual capacity brought by EEW, Stewart, JDS, and MS remain.

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court accepts the allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1347 (11th Cir. 2016). However, the Court does not accept as true threadbare recitations of the elements of the claim and disregards legal conclusions unsupported by factual allegations. *Iqbal*, 556 U.S. at 678-79. At a minimum, a complaint should "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007) (per curiam) (quoting *Roe v. Aware Woman Ctr. For Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001)).

DISCUSSION

Plaintiffs have brought 42 U.S.C. § 1983 claims asserting that Vickers and Wooten[2] deprived them of their constitutional rights to be free from excessive force. In response, Vickers and Wooten have raised the defense of qualified immunity and argued that Plaintiffs have failed to state claims upon which relief may be granted.

The Supreme Court has held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of [a] 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v.*

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[2] Only Plaintiffs ERA, Stewart, JDS, and MS have remaining claims against Wooten.

Connor, 490 U.S. 386, 394 (1989). The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const, amend. IV. "To assert a Fourth Amendment claim based on the use of excessive force, the plaintiffs must allege (1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable." *Troupe v. Sarasota Cnty., Fla.*, 419 F.3d 1160, 1166 (11th Cir. 2005).

Vickers has raised the defense of qualified immunity. "The defense of qualified immunity requires courts to enter judgment in favor of a government employee unless the employee's conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Morse v. Frederick*, 551 U.S. 393, 429 (2007). "[T]he burden is on the plaintiff to show that, when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

"'Once the affirmative defense of qualified immunity is advanced . . ., [u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.'" *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) (quoting *Marsh v. Butler Cnty.*, 268 F.3d 1014, 1022 (11th Cir. 2001) (en banc)). "'Absent such allegations, '[i]t is . . . appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage.'" *Id.* (quoting *Gonzalez v. Reno*, 325 F.3d 1228, at *3 (11th Cir. 2003)).

The defense of qualified immunity presents a two-step inquiry. First, the government official must prove that he was acting within his discretionary authority. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). Then, the burden shifts to the plaintiff to show that the defendant's actions violated a constitutional right, and that such right was clearly established. *Id.* Vickers argues throughout his brief that no Fourth Amendment violation occurred because he did not intend to shoot SDC. He does not articulate whether he means that no seizure occurred or that the force was not excessive, so the Court will address the argument under both prongs.

A. Seizure

A Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement through *means intentionally applied*." *Id*. (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989) (emphasis in original)). A seizure is an "intentional acquisition of physical control" by a government actor. *Brower*, 489 U.S. at 596.

A person is "'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers [and] the display of weapons by an officer…." *Id*. "A seizure occurs even when an unintended person or thing is the object of the detention or taking … but the detention or taking itself must be willful." *Brower*, 189 U.S. at 596.

The Supreme Court applied these rules in *Brewer*. There, the plaintiff was killed when the stolen car he had been driving at high speeds to elude police crashed into a police roadblock. *Id*. at 594. The Court of Appeals had held that no seizure occurred because his freedom of movement was never restrained prior to his decision not to stop at the roadblock. *Id*. at 595. That would stretch the definition of seizure too thin, the Supreme Court reasoned. *Id*. at 598-99. The police set up a roadblock to stop the plaintiff. *Id*. at 599. The roadblock stopped the plaintiff. *Id*. It did not matter that they intended the roadblock to stop him by preventing him from driving down a particular road and it in fact stopped him by killing him when he crashed into it. *Id*.

The Eleventh Circuit has also applied these rules in defining a seizure in the context of an excessive force claim. In *Vaughan v. Cox*, the plaintiff asserting a Fourth Amendment excessive force claim against the officer who shot him was a passenger in a truck. 343 F.3d 1323, 1328 (11th Cir. 2003). The officer intended to shoot the truck, thereby disabling it and ramming it off the road, but he ultimately hit the plaintiff. *Id*. at 1327. Because the officer had not intended to shoot the plaintiff, the district court held that the plaintiff had not suffered a Fourth Amendment seizure. *Id*. at 1328. The Eleventh Circuit reversed, explaining that because the plaintiff was hit by a bullet that was meant to and did stop him, he was subjected to a Fourth Amendment seizure. *Id*. at 1328-29. In other words, a seizure occurs when an officer intentionally sets into motion an instrumentality that has the effect of restricting the plaintiff's movement. When an officer intends to stop or seize a person, and does so, it does not matter that he does so in a way other than the way in which he intended.

1. Corbitt[3], SDC, AMB, ERA, and Rich v. Vickers

Here, Plaintiffs have alleged that Vickers seized SDC, AMB, ERA, and Rich—the minor Plaintiffs held at gunpoint outside the property. Plaintiffs SDC, Rich, AMB, and ERA claim that their Fourth Amendment seizures were effected by the placement of gun barrels in their backs.

The Complaint alleges that Vickers (and fellow officers) demanded the children get down on the ground with the barrel of loaded guns shoved into their backs. Dkt. No. ¶¶ 24, 27. It further alleges that while they were lying on the ground obeying Vickers, Vickers discharged his firearm twice. *Id*. ¶ 28. This would cause reasonable people to believe they were "not free to leave." *Mendenhall*, 446 U.S. at 554. It is exactly the type of situation that *Mendenhall* prescribes as constituting a seizure: "the threatening presence of several officers [and] the display of weapons by an officer." *Id*. These allegations show that Vickers effectuated a seizure even before firing his weapon. But he did fire his weapon. And even though that satisfies the first element of a Fourth Amendment violation, the Court will now address Vickers's argument that unintentionally shooting SDC means no seizure occurred.

No Eleventh Circuit case directly addresses how to handle the case where an officer shoots someone he was not aiming to hit. Regarding the application of the Fourth Amendment to an *accidental* discharge of a

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[3] Corbitt's claim is derivative of her minor child (SDC)'s claim, and they progress or fall together.

weapon, the circuits are split, and the Eleventh Circuit has not been faced with the question.[4]

The Second Circuit declared that the Fourth Amendment only applies to shootings designed for "the purpose of seizing" the suspect. *Dodd v. City of Norwich*, 827 F.2d 1, 7 (2d Cir. 1987), *cert denied*, 484 U.S. 1007 (1988). It explained that "[i]t makes little sense to apply a standard of reasonableness to an accident" because that would extend liability to negligence claims. *Id*. at 7-8. That case dealt with the inadvertent shooting of an already apprehended burglar. *Id*. On the other hand, the Sixth Circuit in *Pleasant v. Zamieski* held that the use of force should be examined under the reasonableness standard even if the seizure was negligent rather than intentional—that is, where the shooting was undisputably accidental and not the result of the deliberate use of force. 895 F.2d 272, 276-77 (6th Cir. 1990).

At least one district court in the Eleventh Circuit has chosen to follow the second line of reasoning.[5] The Northern District of Georgia held in *Speight v. Griggs* that the accidental discharge of a firearm resulting in an unintentional shooting during the course of an arrest may constitute excessive force under the Fourth Amendment if the officer's course of conduct preceding

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[4] This is not an accidental *firing* case because the weapon was intentionally fired. Instead, this is an accidental *shooting* case. That is, the weapon was fired in order to shoot the pet. The shot hit the child accidentally. Vickers inaccurately defines the constitutional right at issue as the right to be free from the accidental application of force. Still, it is worth examining the circuit split on that analogous issue.

[5] The Court finds no courts in this Circuit that have chosen to follow the first line of reasoning.

the shooting is unreasonable under the circumstances. 13 F. Supp. 3d 1298, 1319 (N.D. Ga. 2013), *vacated on other grounds*, 579 Fed. Appx. 757 (11th Cir. 2014). In reaching its decision, the *Speight* court noted the Supreme Court's reasoning in *Brower* that the line defining a seizure cannot be drawn too fine lest one be determined not seized "'who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned.'" *Id*. at 1320 (quoting *Brower*, 489 U.S. at 598).

In the present case, Vickers had ordered Plaintiffs to the ground at gunpoint *before* any "accident" occurred. A reasonable inference from the allegations in the Complaint, drawn in Plaintiffs' favor for the purpose of this Motion, is that Vickers fired his weapon at the animal in order to keep control of SDC, AMB, ERA, and Rich – that is, in order to continue their seizure. In other words, a jury could find that Vickers intended to shoot the animal in order to maintain his control of the situation and keep Plaintiffs from escaping while the animal distracted Plaintiffs. And his action had the *effect* of continuing to seize the Plaintiffs – they did not budge when he fired his gun. Because Vickers shot his gun for the purpose of carrying out the seizure, and a seizure occurred, Vickers's not intending to shoot SDC does not negate that seizure. Just as in *Vaughan*, while the *result* of discharging the weapon may be an accident, the *actual discharge* was intentional. And the force he exerted intentionally is certainly capable of excess.

Vickers asks the Court to follow the decision in *Dahm v. City of Miamisburq*, 1997 WL 1764770 (S.D. Ohio 1997). At first blush, the facts of that case are directly analogous to the facts in this case—while attempting to arrest the plaintiff, an officer fired toward

the plaintiff's dog but actually hit the plaintiff himself. *Id*. at *8. The court looked closely at the Supreme Court's direction in *Brower* and noted that a jury could find that the officer shot the advancing dog in order to seize the plaintiff. *Id*. A closer look at the facts: the officer arrived at the plaintiff's home to execute a search warrant. *Id*. at *4. As he entered the front door, the first thing he saw was the plaintiff's dog charging at him. *Id*. at *5. He shot at the dog but missed and hit the plaintiff. *Id*. The Court concluded that the situation was too attenuated to constitute a Fourth Amendment violation, that the plaintiff was not "stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at *9. It reasoned that even if the officer had successfully shot the dog as he intended, that action would not have seized the plaintiff because it would merely have allowed the officers to safely enter the residence. *Id*.

Those facts are distinguishable from the ones here. While the officer in *Dahm* had not come into contact with the plaintiff before shooting the dog, Vickers had already ordered SDC to the ground at gunpoint. While shooting the dog in *Dahm* would only have eliminated one barrier in locating and seizing the plaintiff, shooting the pet here, according to the allegations in the Complaint, would have eliminated the only potential barrier to Vickers' complete control of the Plaintiffs. In other words, the officer in *Dahm* did not shoot his weapon at the dog in order to restrict the plaintiff's movement. Shooting the dog would have simply allowed him to later take steps to seize the plaintiff, albeit only moments later. Here, in contrast, a reasonable jury could conclude that Vickers shot at Bruce in order to prevent any of the Plaintiffs from escaping from his control. Shooting Bruce would have ensured that. Therefore, the decision in *Dahm* does not change

the conclusion that a jury could find that Vickers shot toward Bruce in furtherance of the seizure of the Plaintiffs.

2. Plaintiffs Stewart, JDS, MS

Plaintiff Stewart claims that his Fourth Amendment seizure was effected by the application of handcuffs. The problem with this claim is that the Complaint does not allege that Vickers himself handcuffed Stewart, whether directly or by ordering another to do so. It merely states that "Plaintiff Stewart was brutally handcuffed." *Id*. ¶ 24. Without linking this action to Vickers, no claim can be stated against him. Thus, the Court need not analyze whether the use of handcuffs constitutes a seizure and whether that alleged seizure was reasonable. Stewart's claim against Vickers must be dismissed.

The claims against Vickers brought by Stewart's minor children, JDS and MS, fail for the same reason. The Complaint makes no allegations that Vickers himself caused any type of injury to JDS and MS. The only injury occurred as a result of their father's handcuffing (*Id*. ¶ 25) in which Vickers played no part. These claims are also dismissed.

B. Qualified Immunity

Here, it is clear that Vickers was acting under his discretionary authority. Actions fall under a government official's discretionary function when they "'are of a type that f[a]ll within the employee's job responsibilities.'" *Crosby v. Monroe Cnty*., 394 F.3d 1328, 1332 (11th Cir. 2004) (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004)). And, "making an arrest is within the official responsibilities of a sheriff's deputy." Vickers was a sheriff's deputy performing an arrest. Dkt. No. 1 ¶¶ 14, 23.

Second, the Court must decide whether Vickers violated a clearly established constitutional right. "It is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment." *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998). Thus, Vickers is not entitled to qualified immunity if he used excessive force in firing his weapon.

No constitutional violation can be shown where an official's actions are "'objectively reasonable'—that is, if a reasonable officer in the same situation would have believed that the force used was not excessive." *Id*. at 1400 (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)). Sometimes, "no factually particularized, preexisting case law [is] necessary for it to be very obvious to every objectively reasonable officer facing [the defendant's] situation that [his] conduct … violated [the plaintiff's] right to be free of the excessive use of force." *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002).

In *Thornton*, the Eleventh Circuit concluded that the use of any force was excessive where the plaintiffs were not suspected of having committed a serious crime, posed no threat to anyone, and did not actively resist the officers. 132 F.3d 1998.

1. SDC v. Vickers

The Court turns again to *Vaughan v. Cox*. While it is not analogous in all aspects, it is a case where the officer shot an individual he was not aiming to hit, and the officer had intentionally seized the plaintiff and intentionally fired his weapon. There, the officer aimed to hit either the driver of a truck or the truck itself. 343 F.3d at 1327. He hit the passenger instead. *Id*. That the officer shot a person he was not aiming to hit did not stop the Eleventh Circuit from conducting

an excessive force analysis. In so doing, the Eleventh Circuit was examining the excessiveness of the force that the officer had *intentionally* applied. It did not ask whether shooting the passenger was excessive on its own but whether it was excessive even for the officer to shoot according to his plan. The Eleventh Circuit examined the excessiveness of the force exerted in *Cooper v. Rutherford* in a similar way. 503 Fed. Appx. 672 (11th Cir. 2012). There, the plaintiffs were seriously injured when an armed bank robber attempted to elude the police by attempting to steal the car in which they were riding. *Id*. at 673. The officers fired their guns at the suspect to prevent him from escaping with the hostages, but he hit the plaintiffs instead. *Id*. The court examined the excessiveness of the force as though it was exerted against the suspect the officer aimed to hit and held that it was not clearly established that the officer's actions in firing 24 shots were unreasonable. *Id*. at 676.

Here, though Vickers did not intend to exert any force against SDC, he did intend to exert force against the animal. This Court must therefore analyze whether or not that exertion of force was excessive or objectively reasonable.[6]

"The touchstone for reasonableness in [animal] shooting cases is typically officer safety." *Schutt v. Lewis*, 2014 WL 3908187, *3 (M.D. Fla. 2014). In *Schutt*, the officer reasonably shot a dog that was rapidly approaching him and disobeying its owner's order. *Id*. Here, in contrast, the Complaint alleges that Vickers discharged his firearm "without necessity or

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[6] At this point, the record does not indicate what kind of animal the pet was.

any immediate threat or cause." Dkt. No. 1 ¶ 28. It alleges further that Vickers never attempted to restrain the animal or ask anyone else to do so. *Id*. The first shot occurred "[w]hile the children were lying on the ground obeying the orders of Defendant Vickers," and the second shot occurred as the animal "was approaching his owners." *Id*. No one besides the officers possessed firearms, "nor did anyone appear to be threatened by [Bruce's] presence." *Id*. ¶ 29. SDC "'offered no hindrance or obstruction to the efforts of Defendant Vickers and others during the apprehension of Cristopher [sic] Barnett." *Id*. ¶ 32. Specifically, no allegations suggest that Vickers was unsafe in any way or that Bruce exhibited any signs of aggression.

It may well be that the record will develop in a much different fashion. Facts remain to be developed including details about the pet, its history, appearance, behavior, relationship to Plaintiffs, etc. At this stage, the complaint makes sufficient allegations to proceed. Therefore, Vickers's Motion to Dismiss SDCs claim is denied at this time. This does not preclude Vickers from raising the defense of qualified immunity at a later stage of the case.

2. Other Plaintiffs v. Vickers

Even assuming the truth of the Complaint, the force that Vickers exerted against Plaintiffs Rich, AMB, and ERA was reasonable. The only force that he exerted toward them was the discharge of a weapon aimed at Bruce that hit SDC. The Complaint does not allege that Vickers even pointed a gun at any of these Plaintiffs.[7] Thus, the Complaint provides an even

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[7] 'The Complaint makes other allegations that Plaintiffs "were held at gun point" with an "officer forcefully shov[ing] the barrel

weaker case of excessive force than the one deemed reasonable in *Croom v. Balkwill*. 645 F.3d 1240 (11th Cir. 2011).

There, the deputy pushed the elderly plaintiff, also a witness to an arrest, to the ground from her squatting position and held her there with his leg for ten minutes. *Id*. at 1252-53. The Eleventh Circuit affirmed summary judgment for the officer because no constitutional violation had been shown where the plaintiff was in the front yard of a house known by law enforcement to be involved in the distribution of controlled substances. *Id*. The Court held that the officers were authorized to exercise authority "by placing all the occupants of the [p]remises on the ground for several minutes while securing the home and ensuring there was no danger to the officers or the public." Here, the Complaint itself alleges that Vickers knew the suspect was on the premises. Dkt. No. 1 ¶ 35-36. Hence, he and the other officers were authorized to place the bystanders on the ground for the duration of the arrest.

3. ERA, Stewart, JDS, and MS v. Wooten

The claims of ERA, Stewart, JDS, and MS against Wooten in his individual capacity are still asserted in the case. However, they are due to be dismissed. Just like Vickers, Wooten is entitled to qualified immunity for claims against him in his individual capacity unless Plaintiffs can show that he violated a constitutional right, and that that right was clearly established. *Lee v. Ferraro*, 284 F.3d at 1158.

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of a loaded gun into their backs," but the Complaint does not allege that Vickers was the subject of these actions. Dkt. No. 1 ¶ 27.

According to the allegations in the complaint, Wooten's involvement with the incident giving rise to this litigation is limited to his supervisory role as Sheriff of Coffee County. Dkt. No. 1 ¶ 13. As Sheriff, the complaint alleges, he was responsible for establishing customs, policies, and procedures to regulate the conduct of agents and employees of the Coffee County Sheriff Department and for ensuring that employees complied with the law. *Id*.

"The standard by which a supervisor is held liable in [his] individual capacity for the actions of a subordinate is extremely rigorous." *Cottone*, 326 F.3d 1352, 1360 (11th Cir. 2003) (quoting *Gonzales v. Reno*, 325 F.3d 1228, 1234 (11th Cir 2003)). "[S]upervisory liability under § 1983 occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation." *Cottone*, 326 F.3d at 1360. "The necessary causal connection can be established 'when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so.'" *Id*. (quoting *Gonzalez*, 325 F.3d at 1234).

Here, this Court has already found that the constitutional rights of ERA, Stewart, JDS, and MS were not violated. Wooten cannot be liable under § 1983 for actions he supervised that do not constitute a constitutional violation. This Court need not consider whether Plaintiffs sufficiently alleged a history of widespread abuse that put a responsible supervisor on notice of the need to correct a deprivation. Wooten cannot be liable as a supervisor, and all remaining claims against him are dismissed.

CONCLUSION

Vickers's Motion to Dismiss SDC's § 1983 claim is hereby **DENIED**. Vickers's Motion to Dismiss all other claims of the remaining Plaintiffs—Stewart, Corbitt, Rich, AMB, ERA, JDS, and MS—is **GRANTED**. Wooten's Motion to Dismiss all remaining claims against him is hereby **GRANTED**.

SO ORDERED, this 5th day of December, 2017.

[handwritten signature]

HON. LISA GODBEY WOOD
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

AMY CORBITT, Individually and as Parent and Natural Guardian of SDC, a Minor; JERRY RICH, Individually; ELIZABETH BOWEN, as Parent and Natural Guardian of AMB, a Minor; and TONYA JOHNSON, as Parent and Natural Guardian of ERA, a Minor; DAMION STEWART, Individually and as Parent and Natural Guardian of JDS, a Minor, and as Parent and Natural Guardian of MS, a Minor; Plaintiffs, vs. COFFEE COUNTY, Georgia; DOYLE WOOTEN, Individually and in his Official Capacity as Sheriff of Coffee County; and MICHAEL VICKERS, Individually and in his Official Capacity as Deputy Sheriff of Coffee County, Georgia; Defendants.	Case No. 5:16-cv-51

COMPLAINT

COME NOW, Plaintiffs in the above styled cause, individually and as Parents and Natural Guardians, and file this complaint against the above-named Defendants, showing this Honorable Court as follows:

I. INTRODUCTION

1.

This is a civil action seeking damages against Defendant Coffee County, Georgia, Defendant Doyle Wooten, the Sheriff of Coffee County, Georgia, and Defendant Michael Vickers, a Deputy Sheriff of Coffee County, Georgia, all of which while acting under color of law, jointly and severally deprived Plaintiffs and Plaintiffs' minor children of their rights secured by the Constitution and laws of the United States, including the rights secured by the 4th and 14th Amendments to the Constitution of the United States, and as a direct and proximate result of said deprivation Defendants' negligence, gross negligence, and the wanton and willful indifference to the rights of Plaintiffs individually and the rights of Plaintiffs' minor children, caused the physical pain, suffering, mental anguish and ultimately the permanent restriction of minor SDC's use of his right leg.

II. JURISDICTION AND VENUE

2.

This action is authorized and instituted pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 1983 under the 4th and 14th Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C.

§ 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 1391, and the aforementioned constitutional and statutory provisions. Plaintiffs bring this suit against each of the above named defendants in both their individual and official capacities, and against Coffee County, Georgia, as the employer of each of the individual Defendants, jointly and severally. This Court has pendant jurisdiction to hear the related claims set forth herein.

3.

As provided by 28 U.S.C. § 1391(b), venue is proper in this judicial district. The Plaintiffs are citizens of the United States of America and residents of Coffee County, Georgia. Plaintiffs reside in this judicial district. This is the district in which the misconduct that is the subject of this action took place and one or more of the Defendants reside in this judicial district.

4.

This action is brought within the applicable statute of limitations as provided by O.C.G.A. § 9-3-22 and O.C.G.A. § 9-3-33.

5.

Each and every negligent, grossly negligent, wanton, willful, and reckless act of the Defendants as alleged herein below was an act by and under the color and pretense of the statutes, ordinances, regulations, law, customs and usage of Coffee County, Georgia, and by virtue and under the authority of the Defendants' employment with Coffee County, Georgia, and with the Coffee County Sheriff's Department.

III. PARTIES

6.

Plaintiff Amy Corbitt, is a citizen and resident of the City of Douglas, County of Coffee, State of Georgia and brings this action for herself personally. Further, said Plaintiff is the natural and legal mother of SDC, a minor, and is qualified to act as the parent and natural guardian of SDC, therefore as such, said Plaintiff also brings this action on behalf of said minor.

7.

Plaintiff Jerry Rich, is a citizen and resident of the City of Douglas, County of Coffee, State of Georgia and brings this action for himself personally. Further, said Plaintiff was a minor at the time of the subject matter incident, said Plaintiff's natural and legal mother is Plaintiff Amy Corbitt and he is the older brother to SDC.

8.

Plaintiff Elizabeth Bowen, is a citizen and resident of the City of Douglas, County of Coffee, State of Georgia and is the natural and legal mother of AMB, a minor, and is qualified to act as the parent and natural guardian of AMB, therefore as such, said Plaintiff brings this action on behalf of said minor.

9.

Plaintiff Tonya Johnson, is a citizen and resident of the City of Douglas, County of Coffee, State of Geor-

gia and is the natural and legal mother of ERA, a minor, and is qualified to act as the parent and natural guardian of ERA, therefore as such, said Plaintiff brings this action on behalf of said minor.

10.

Plaintiff Damion Stewart, is a citizen and resident of the City of Douglas, County of Coffee, State of Georgia and brings this action for himself personally. Further, said Plaintiff is the natural and legal father of two minor children, JDS, who was three years of age at the time of the subject matter incident, and MS, who was eighteen months of age at the time of the subject matter incident. Said Plaintiff is qualified to act as the parent and natural guardian of both JDS and MS, therefore as such, said Plaintiff also brings this action on behalf of said minors.

11.

Defendant Coffee County, herein referred to as "Defendant County", was at all times material hereto the governing body of Coffee County, Douglas, and was responsible for the conduct of the agents and employees of Coffee County government and the Coffee County Sheriff, including its operations, establishing customs, policies and procedures to regulate the conduct of its agents and employees of the Coffee County Sheriff and for ensuring that agents and employees of the Coffee County Sheriff obey the laws of the State of Georgia and of the United States of America.

12.

Pursuant to Rule 4(j)(2), Fed. R. Civ. P., service of process may be obtained upon Defendant County, created and established under the laws of the State of Georgia, by service upon its' Chief Executive Officer which is Tony L. Paulk I., at 224 E. Bryan Street, Douglas, Georgia 31533, and the Coffee County Administrator, Wesley Vickers, at 101 S. Peterson Avenue, Douglas, Georgia, 31533.

13.

Defendant Doyle Wooten, the Sheriff of Coffee County, Georgia, herein referred to as "Defendant Wooten", at all times mentioned herein, Defendant Wooten was the duly elected and acting Sheriff of Coffee County, Georgia, and is an employee of Coffee County and is principally responsible for the operation of the Coffee County Deputy Sheriffs and as such was the operating entity and was responsible for establishing customs, policies and procedures to regulate the conduct of agents and employees of the Coffee County Sheriff Department, and for ensuring that agents and employees of the Coffee County Sheriff Department obey the laws of the State of Georgia and of the United States of America. Defendant Wooten can be served at his office located at 825 Thompson Drive, Douglas, Georgia, 31535.

14.

Defendant Michael Vickers, a Deputy Sheriff of Coffee County, Georgia, herein referred to as "Defendant Vickers", at all times mentioned herein, Defendant Vickers was a duly appointed and acting Deputy

Sheriff of the Coffee County Sheriff's Department in Coffee County, Georgia, and as such was charged with the responsibility of protecting the rights of citizens. Defendant Vickers can be served at his office located at 825 Thompson Drive, Douglas, Georgia, 31535.

15.

Defendant Wooten, his agents and employees, and Defendant Coffee County, Georgia, acting through its employees and officials, breached the duties arising from and contained within O.C.G.A. § 34-7-20, where they failed to exercise ordinary care in the employment of Defendant Vickers as a deputy sheriff and are therefore liable for the deprivation of Plaintiffs' rights and the rights of their children.

16.

The Defendants herein named knowingly participated or acquiesced in, contributed, to, encouraged, implicitly authorized or approved of the conduct described below individually and in their official capacities.

17.

The offenses described herein resulted from the failure of Coffee County and its agents and employees to employ qualified persons for positions of authority and to properly or conscientiously train and supervise the conduct of such persons after their employment and or to promulgate appropriate operating policies and procedures either formally or by custom to protect the constitutional rights of the citizens of Coffee County and the rights of Plaintiffs.

IV. DEPRIVATION OF RIGHTS

The actions of Defendants resulted in the following:

a) The deprivation of Plaintiffs and their minor children's right to be free from excessive use of force as guaranteed by the law and the Constitution of the United States, via the 4th and 14th Amendments;

b) The deprivation of Plaintiffs' and their minor children's right to be free from assault and battery, as provided for by the laws of the State of Georgia;

c) The deprivation of Plaintiffs' and their minor children's right to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures as provided by the Constitution of the United States via the 4th Amendment and as secured by the Constitution of the State of Georgia Article I, Section I, Paragraph I, the right to life, liberty, and property.

d) The deprivation of Plaintiffs and their minor children's right to equal protection of their person and property as secured by the Constitution of the United States via the 14th Amendment and by the Constitution of the State of Georgia Article I, Section I, Paragraph II: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

e) 42 U.S.C. § 1983, 4th Amendment Violations under Color of Law.

IV. FACTS

18.

Defendants through their actions, or in some cases through their failure to act in the face of a clear duty to do so, have deprived Plaintiffs and Plaintiffs' minor children of their rights under the 4th and 14th Amendments to the United States Constitution provided under 42 U.S.C. § 1983, by acting under the color of state law provision 18 U.S.C. § 242. Defendants are personally subject to the jurisdiction of this Court under 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

19.

Sovereign immunity does not apply pursuant to O.C.G.A. § 36-33-1(b), which states that counties and municipalities shall be liable "for neglect to perform or improper or unskillful performance of their ministerial duties."

20.

Although an Ante Litem Notice as provided by O.C.G.A. § 36-33-5 is not required for claims under 42 U.S.C. § 1983, Plaintiffs have served Defendants' with such notice dated June 30, 2015, via the United States Postal Service, Certified Mail No. 7012 1010 0003 3488 5777 5784, and Certified Mail No. 7012 1010 0003 3488 5777, on July 1, 2015. A copy of said notice

and certified mail receipt is attached hereto and marked "Plaintiffs' Exhibit A".

21.

Upon information and belief, Defendant Vickers was hired by Coffee County Sheriff, Defendant Wooten. Both Defendants were employees and agents of the Coffee County Sheriff's Department at the time of the incident described herein.

22.

The claims set forth in this Complaint arise out of Defendant Vickers deliberately, unreasonably, negligently, and unlawfully discharging his firearm twice, ultimately shooting SDC, a minor and natural child of Plaintiff Amy Corbitt, in the back of the leg during an encounter on July 10, 2014.

23.

On July 10, 2014, Defendant Vickers, along with other officers of the Coffee County Sheriff's Department and agents of the Georgia Bureau of Investigation, participated in an operation to apprehend a criminal suspect, Christopher Barnett, whom Plaintiffs have never met. Said operation commenced upon property located at or near 145 Burton Road, Lot 19, Douglas, Coffee County, Georgia, at the mobile home and residence of Plaintiff Amy Corbitt, the minor child SDC, and Plaintiff Jerry Rich, in pursuit of said Christopher Barnett, who had wandered into the area.

24.

Defendants and fellow officers entered Plaintiff's property at 145 Burton Road, Lot 19, and demanded all persons in the area, including the children, to get down on the ground. Other than the suspect, one adult citizen, Plaintiff Damion Stewart was on the property outside the residence with his two children JDS and MS, both under the age of three years. While complying with the demands of the officers, Plaintiff Stewart was brutally handcuffed in the presence of his small children and the barrel of a gun was placed in his back. Others located on the property outside the said residence included, Plaintiff Jerry Rich, a minor at the time the incident, Plaintiff Amy Corbitt's minor child, SDC, Plaintiff Elizabeth Bowen's minor child AMB, and Plaintiff Tonya Johnson's minor ERA. Inside the residence included one adult, Plaintiff Amy Corbitt, and two additional minors, JVR and ST.

25.

Plaintiff Damion Stewart's children were left to roam the street adjacent to the property screaming and crying while witnessing their father being handcuffed with a gun in his back. The officers outnumbered the children, all of which remained seized by deadly firearms aimed to kill. These children were frightened and ultimately traumatized by these events. At no time did Plaintiffs or their children feel secure in their persons or free to leave nor did Plaintiffs or their children feel protected whatsoever by Defendants. It is the contentions of the Plaintiffs' that under similar circumstances no reasonable person would feel secure, free to leave, or protected whatsoever by Defendants.

26.

The question is "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California v. Hodari D.*, 499 U.S. 621, 628 (1991). When the subject of the alleged seizure is a minor, the question is whether a reasonable child of the plaintiff's same age and maturity would have "believed he was free to leave." *Doe v. Heck*, 327 F.3d 492, 510 (7th Cir.2003); see also *Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2005). If not, he is "seized" within the meaning of the 4th Amendment.

27.

The remaining minors located at the scene and outside of the residence were held at gun point, each having an officer forcefully shove the barrel of a loaded gun into their backs. These children feared for their lives and have been stripped of their confidence in the justice system.

28.

While the children were lying on the ground obeying the orders of Defendant Vickers, said Defendant unreasonably, maliciously, negligently, and without necessity or any immediate threat or cause, discharged his firearm at the family pet named "Bruce" twice. The first shot missed the animal, who retreated under the residence. At no time during the interim did Defendant Vickers ask someone to restrain the animal and at no time did any other agent or employee of

Coffee County attempt to restrain or subdue the animal. Approximately eight to ten seconds elapsed since the first shot and Defendant Vickers then discharged his firearm at Bruce a second time as it was approaching his owners. He again missed the animal and struck Plaintiff Amy Corbitt's minor child, SDC, in the back of his right knee.

29.

At the time of his injury, SDC was readily viewable to Defendant Vickers. In fact, SDC was approximately eighteen inches from Defendant Vickers, lying on the ground, face down, pursuant to the orders of said Defendant. Other minor children were also within only a few feet of Defendant Vickers. No officer or agent at the scene was required to discharge a firearm. With a large number of innocent bystanders, mostly children in the immediate area, no use of force should have been used aside from the arrest and physical restraint of Christopher Barnett, who was visibly unarmed and readily compliant with Defendants. No agent or employee at the scene had the need to shoot at the family pet, nor did anyone appear to be threatened by its presence.

30.

The 14th Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The 14th Amendment protects against certain deprivations of people's property, and "property" encompasses people's pet cats and dogs. *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009).

31.

Upon information and belief, the above-described use of force was grossly negligent and was in violation of Plaintiffs' rights as secured by the statutes and Constitution of the United States, and those of the State of Georgia. Further, these violations of Plaintiffs' rights proximately resulted in serious injury to SDC, including without limitation, mental and physical pain and suffering. Plaintiffs contend that the conduct of Defendants, and each of them individually and severally, was of such an intentional, fraudulent, malicious or reckless nature as to warrant the imposition of punitive damages under Federal and State law.

32.

At no time was there any cause or reason for the unwarranted and negligent shooting of SDC, who was only ten years of age and who offered no hindrance or obstruction to the efforts of Defendant Vickers and others during the apprehension of Cristopher Barnett, a person believed to have been attempting to evade lawful capture. Further, at no time did SDC, or any other children assembled at that time or place, present any threat or danger to provoke Defendant Vickers to fire two shots, one of which struck SDC, who was following all instructions demanded by Defendants. SDC was in fact lying in a prone, face down, position on the ground at the request of Defendants.

33.

SDC was treated for physical injuries caused by the gunshot wound, at Coffee Regional Medical Center and the University Medical Center in Savannah,

Georgia. It was confirmed by imaging that SDC suffered a serious gunshot wound to his right leg in the knee vicinity. Imaging also confirmed multiple bullet fragments throughout the area of the wound. SDC suffered not only severe pain from the gunshot wound, but has also experienced mental trauma and problems since the shooting and will continue to experience severe physical and mental pain and suffering throughout the foreseeable future. Plaintiff Amy Corbitt, as parent and natural guardian of SDC, has been damaged by the past and future medical costs involved herein, together with fright over the treatment of SDC by Defendants.

34.

SDC is currently under evaluation by an orthopedic surgeon for the removal of several bullet fragments that remain in his leg and preventing the area from healing properly. SDC was unable to attend the Coffee County public school system immediately following the shooting from fear for his safety. Plaintiff Amy Corbitt has incurred the additional expense of homeschooling SDC.

35.

Prior to said operation Defendant Vickers, along with several other agents and employees of Defendant County, attended a briefing to discuss the alleged whereabouts and apprehension of suspect Christopher Barnett. The initial plan of action stated during the brief was to watch the area via helicopter surveillance and for a canine team to track the suspect and set up a perimeter.

36.

Defendant Vickers and two other agents and employees of Defendant County drove an unmarked undercover vehicle by the residence located at 145 Burton Road, Lot 19, Plaintiff Amy Corbitt's residence, for visual observations twice prior to their decision to approach the property. *Moreland v. Las Vegas Metro. Police Dep't.*, 159 F.3d 365, 3373 (9th Cir. 1998). As the Sixth Circuit has stated: In situations wherein the implicated state, county, or municipal agent(s) are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action their actions will be deemed conscience-shocking if they were taken with "deliberate indifference" towards the plaintiffs' federally protected rights.

37.

Upon surveillance of said residence, Defendant Vickers and other agents and employees of Defendant County reassembled to discuss the next course of action, "the plan of action was to pull up in the yard, approach the residence and put everyone on the ground that was outside of the residence", per Georgia Bureau of Investigation Region 12 Investigative Summary of the interview conducted with Sheriff Deputy Jared Vickers dated July 10, 2014.

38.

Upon information and belief, Defendant Vickers' has an extensive history of using unnecessary excessive force of which Defendant Wooten is and was at the time of the subject matter incident aware of. Defendant Vickers' extensive prior excessive force record

includes approximately ten separate occurrences in the immediate three years prior to the subject matter incident, the most recent of which was when Defendant Vickers shot and killed a dog during the execution of a search warrant on or about one month prior to the instant case.

39.

Upon information and belief, Defendant Wooten, acting by and through his agents, employees, and officials, has breached his duties arising from and contained within O.C.G.A. § 34-7-20, where he failed to exercise ordinary care in the employment of Defendant Vickers as a Deputy Sheriff, and his failure to adequately train said Defendant. Defendant Wooten was aware of Defendant Vickers' prior history of using unwarranted force as a police officer.

40.

Defendant Wooten is liable for the breach of O.C.G.A. § 34-7-20, and for the shooting of SDC. At all pertinent times Defendant Wooten failed to provide adequate training and instruction as to the care and responsibility required for the safety of bystanders generally when effecting the arrest of criminal suspects, nor did he provide adequate training and instruction on alternative means of handling animals if perceived as a threat.

41.

At all times during the operation conducted on Plaintiff's property, Defendant Vickers was equipped with a Taser and pepper spray. Instead of using such

as an appropriate alternative means to subdue Bruce, Defendant Vickers recklessly endangered the safety of several citizens, including minor children, in an effort to shoot the family pet, and as a direct and proximate cause of Defendants' violations of Plaintiffs' rights, SDC suffered damages including but not limited to, physical and emotional pain and suffering and loss of enjoyment of life.

42.

Defendant Vickers, while acting under color of law, unlawfully and without due process of law, deprived the Plaintiffs of the securities, rights, privileges, liberties, and immunities secured by the Constitution of the United States of America. Defendant Vickers wantonly, intentionally, knowingly, recklessly, and excessively used unnecessary force without any reasonable justification or probable cause.

43.

In his official capacity as a law enforcement officer, under color of state law, and acting within the ordinary course and scope of his employment, or, alternatively, in his individual capacity, Defendant Vickers shot at Plaintiff's family pet a second time, ultimately striking SDC without any legal right to do so. *Altman v. City of High Point*, 330 F.3d 194 (4th Cir. 2003), establishes, privately owned pet dogs do qualify as property, such that pets are "effects" under the seizure clause of the 4th Amendment. Id. at 202-04.

44.

Defendants knew or should have known that the officers did not have the legal right to shoot at Bruce,

when Bruce posed no threat, and that other non-lethal measures and equipment were readily available and had been or could have been deployed prior to the decision to shoot at the dog.

45.

Defendant County and Defendant Wooten were fully aware that more than one of its agents and employees had previously shot and killed a companion animal, and still failed to act to provide any specific policy, training, supervision, or oversight to protect the property rights of its citizens against having their companion animals unlawfully, needlessly, or unjustifiably killed or injured by its employees.

46.

Defendants had specific knowledge of custom or practice and exhibited a deliberate indifference to the unreasonable risk of property damage or loss, which said practice posed. A “custom, or usage, of [a] State” for § 1983 purposes “must have the force of law by virtue of the persistent practices of state officials.” *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 167, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

47.

Defendants knew that animals were at risk from county employees, including its police officers. Despite more than one recent prior shooting of a pet by Defendant Vickers and more than one recent prior shooting of a pet by Deputies having occurred, Defendant

County persistently failed to put in place or implement any plan to prevent such occurrences by employees of Defendant County.

48.

Acting under color of law and pursuant to official policy, custom or widespread practice, Defendant Vickers, recklessly or with deliberate indifference and callous disregard of Plaintiff's rights, and the rights of dog owners, discharged his firearm in the immediate vicinity of several innocent minor children and bystanders. Defendant County and Defendant Wooten failed to instruct, supervise, control, equip, train, or discipline on a regular and continuing basis, police officers in their duties to refrain from unlawfully shooting at animals and using excessive force against family pets that pose no immediate danger.

49.

Defendant Wooten and Defendant Vickers, prior to this incident, knew that shooting a family pet without justification was a violation of the pet owner's property rights protected by the United States Constitution and as a direct and proximate result of such conduct, SDC, a minor child, has been damaged in various respects including, but not limited to suffering severe mental and physical anguish due to the egregious nature of the Defendants' actions and inactions, all attributable to the deprivation of his constitutional and statutory rights guaranteed by the 4th Amendment of the Constitution of the United States and protected under 42 U.S.C. § 1983.

50.

Defendant Wooten and Defendant Vickers had an affirmative duty to prevent, or aid in preventing, the commission of such wrongs and instead, knowingly, recklessly, or with deliberate indifference and callous disregard of Plaintiffs' rights and the rights of the Coffee County citizens, these defendants failed and refused to do so resulting in the shooting of a minor. A reasonable officer would have understood that it was unlawful for him to destroy a citizen's personal property in the absence of a substantial public interest that would be served by the destruction. *Brown v. Muhleberg TP*, 269 F.3d 205, 211 (3d Cir. 2001).

V. CONCLUSION

51.

Specifically, Plaintiff Amy Corbitt, Individually and as Parent and Natural Guardian of minor SDC, seeks to recover damages in the amount of $2,000,000.00 for special and compensatory damages as provided by O.C.G.A. § 51-12-7, for necessary expenses consequent to the injury of said minor, including future medical expense. In addition thereto, said Plaintiff seeks recovery for pain and suffering, emotional distress, permanent disfigurement, and punitive damages, in an amount determined by the jury.

52.

For the reasons stated herein, Plaintiffs jointly and severally seek recovery against Defendants, jointly and severally, for special and compensatory damages in addition to general and punitive damages.

WHEREFORE, Plaintiffs pray that this Honorable Court:

a) Issue process and allow all Defendants to be served as required by law;

b) That this Court enter an Order granting the Plaintiffs a judgement for special and compensatory damages in addition to punitive damages, against the Defendants, jointly and severally in the following amounts:

1) Plaintiff Amy Corbitt, Individually and as Parent and Natural Guardian of minor SDC, seeks damages in the amount of $2,000,000.00 00, in addition to punitive damages in an amount to be determined by the jury as above stated;
2) Plaintiff Jerry Rich, Individually, seeks damages in the amount of $500,000.00 in addition to punitive damages in an amount to be determined by the jury;
3) Plaintiff Elizabeth Bowen, as Parent and Natural Guardian of minor AMB, seeks damages in the amount of $500,000.00, in addition to punitive damages in an amount to be determined by the jury;
4) Plaintiff Tonya Johnson, as Parent and Natural Guardian of minor ERA, seeks damages in the amount of $500,000.00, in addition to punitive damages in an amount to be determined by the jury;
5) Plaintiff Damion Stewart, Individually and as Parent and Natural Guardian of minors JDS and MS, seeks damages in the amount of $500,000.00, in addition

to punitive damages in an amount to be determined by the jury.

c) That this Court enter an Order granting the Plaintiffs, jointly and severally, a judgment against Defendants, jointly and severally, for punitive damages, in an amount determined by the jury;

d) That this Court enter an order granting attorney's fees to the Plaintiffs in accordance with the Court's authority under Georgia Law and by virtue of 42 U.S.C. § 1988, and such other and further relief as this Court deems just and equitable;

e) That in accordance with the Federal Rules of Civil Procedure, that the Plaintiffs be granted a trial by jury on all issues;

f) Award such other, further, special, extraordinary and general relief as to which the Plaintiffs are entitled under the circumstances of this cause and as to this Court is deemed just and proper.

PLAINTIFFS DEMAND TRIAL BY JURY.

LAW OFFICE OF BEN B. MILLS, JR.

By: /s/ Ben B. Mills, Jr.

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