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APPENDIX D

FILED
United States Court of Appeals
Tenth Circuit

October 15, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC ST. GEORGE,

Plaintiff - Appellant,

v.

CITY OF LAKEWOOD, COLORADO, et al.,

Defendants - Appellees.

No. 22-1333
(D.C. No. 1:18-CV-01930-WJM-STV)
(D. Colo.)

ORDER

Before **MORITZ**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix A

FILED
United States Court of Appeals
Tenth Circuit

August 7, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC ST. GEORGE,

Plaintiff - Appellant,

v.

CITY OF LAKEWOOD, COLORADO; DEVON TRIMMER, a/k/a Devon Myers; JASON MAINES; JEFF LARSON; DAN MCCASKY,

Defendants - Appellees.

No. 22-1333
(D.C. No. 1:18-CV-01930-WJM-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MORITZ**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

Eric St. George was convicted of numerous crimes stemming from an altercation with an escort and an ensuing shootout with police. After he was convicted, he asserted federal claims for excessive force, failure to prevent

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

excessive force, and municipal and supervisory liability. He also asserted several state-law tort claims. The district court dismissed the federal claims as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), determined two defendants were entitled to qualified immunity, and declined to exercise supplemental jurisdiction over the state-law claims. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's judgment.

I

This case is on appeal from the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6), so we accept as true all well-pleaded allegations in the operative complaint (here, the fifth amended complaint) and any documents it incorporates by reference. *See Gee v. Pacheco*, 627 F.3d 1178, 1183-86 (10th Cir. 2010). According to an affidavit St. George attached to the fifth amended complaint, his trouble began when he solicited a female escort to his apartment in Lakewood, Colorado. A dispute arose, and thirty minutes into their encounter the escort stopped, pushed St. George, and attempted to leave. He followed her outside with a gun, and when she wielded a can of mace, he fired a warning shot into the air and then a second shot at her, although St. George denies firing the second shot. The escort fled and called 911, reporting that he "made illicit sexual contact." R., vol. 4 at 123, para. 11. St. George went out for dinner and drinks.

Four Lakewood police officers, including defendants Devon Trimmer and Jason Maines, arrived at the apartment in marked police vehicles. After canvassing the area, they determined there was no immediate danger. An hour after the police arrived, St. George returned home, unaware the police were present. The officers entered his backyard and observed him through the windows at his computer with a glass of wine. They did not knock on the door, but they called him on his phone six times in fifteen minutes. St. George did not answer three of the calls, but on the three calls he did answer, the officers identified themselves as Lakewood police officers. On the fourth call, an officer told St. George the officer's "friends" were in the backyard and he should go outside to talk with them. *Id.* at 130, para. 22.00 (bolding, capitalization, and internal quotation marks omitted). St. George saw no one outside and became paranoid, believing the officers were associates of the escort who planned to ambush him. During his last call with the police, he denied officers were on scene, and when the officer with whom he was speaking told him to go outside with nothing in his hands, St. George replied, "I have something in my hands," *id.* at 134, para. 33 (internal quotation marks omitted). The officer radioed to the other officers that St. George was being threatening.

St. George then walked out his backdoor with a shotgun and loudly pumped the action to announce his presence. Trimmer and Maines took cover: Trimmer hid behind a truck, while Maines hid in the shadows behind foliage.

St. George stood in the backyard for some six minutes and then began walking along the building with his shotgun in the low-ready position. Maines radioed to Trimmer that St. George was walking fast in her direction. Trimmer heard his footfalls, but St. George did not know she was there. When he came into Trimmer's view, she opened fire and shot him in the leg. St. George returned fire, and Maines began shooting as well. The firefight lasted less than 90 seconds, after which St. George managed to return to his apartment and call 911, reporting he had been shot. He then crawled back outside with a handgun and fired four more rounds. Officers confronted him at the front door, and St. George surrendered.

St. George was charged in state court with several crimes. He went to trial and was convicted on two counts of attempted second-degree murder, two counts of first-degree assault, three counts of felony menacing, one count of illegal discharge of a firearm, and one count of unlawful sexual contact. He was sentenced to a total of thirty-two years in prison.

II

Following his convictions, and while in custody serving his sentence, St. George commenced this lawsuit, amending his complaint several times. A prior iteration of the complaint alleged excessive force by Trimmer and derivative claims for failure to prevent excessive force against Maines, supervisory liability against Lakewood Police Chief Dan McCasky, and

municipal liability against the City of Lakewood. The district court dismissed that iteration for failure to state a claim, but granted leave to amend so St. George could reassert the excessive-force and failure-to-prevent-excessive-force claims. The district court advised him it would not reconsider any claim for supervisory or municipal liability.

St. George filed a fourth amended complaint reasserting his claims for excessive force and failure to prevent excessive force, but once again, the district court dismissed for failure to state a claim. This time, however, St. George appealed, and we reversed, concluding he plausibly alleged a Fourth Amendment violation against Trimmer based on the foregoing allegations. *See St. George v. City of Lakewood*, No. 20-1259, 2021 WL 3700918, at *1-3 (10th Cir. Aug. 20, 2021).

On remand, St. George sought to reinstate the previously dismissed supervisory and municipal liability claims because they were predicated on the underlying excessive-force claim that we concluded was plausible. The district court directed him to file the fifth amended complaint solely to reassert his supervisory and municipal liability claims. Thus, the fifth amended, operative complaint, asserts several state-law tort claims, as well as federal claims under 42 U.S.C. § 1983, alleging Trimmer used excessive force in violation of the Fourth Amendment and Maines failed to prevent Trimmer's excessive

force. It also asserts federal claims for supervisory and municipal liability against McCasky and the City of Lakewood.

A magistrate judge recommended that the claims be dismissed without prejudice. He determined the federal claims were barred by *Heck* and that Trimmer and Maines were also entitled to qualified immunity. And he recommended that the district court decline to exercise supplemental jurisdiction over the state-law claims. St. George attempted to object to the recommendation, seeking several extensions of time to do so, which were granted. But when he filed his timely objections, the district court struck them for failure to comply with applicable page limitations. Although the district court granted St. George an additional twelve-day extension—until September 12, 2022—to file amended objections, he failed to meet that deadline. But he did request another extension on that date, which the district court did not consider.

Consequently, on September 21, 2022, the district court reviewed the magistrate judge's report and recommendation for clear error and, finding none, adopted the recommendation and dismissed the action, though it modified its disposition to dismiss the excessive-force and failure-to-prevent-excessive-force claims with prejudice. The district court received St. George's amended objections later that same day; they were nine days

late. The district court struck the amended objections because it had already dismissed the case and entered judgment.

St. George timely appealed the district court's dismissal order. He also contemporaneously moved to vacate the judgment to the extent the district court declined to consider his amended objections. On September 6, 2023, the district court construed the motion to vacate as a Federal Rule of Civil Procedure 60(b) motion and denied it. St. George did not appeal that order. Shortly thereafter, this court directed him to show cause why his merits appeal should not be dismissed for failure to comply with the firm waiver rule given his failure to object to the report and recommendation. In a handwritten response dated October 3, 2023, and in a typed response dated October 6, 2023, he described his efforts to comply with the firm waiver rule and argued it should not apply. The firm waiver issue, the merits of the appeal, and whether to consider an untimely appeal of the district court's denial of Rule 60(b) relief are now before us.

III

We first consider whether St. George waived appellate review by failing to properly object to the magistrate judge's report and recommendation. "Under the firm waiver rule, a party who fails to make a timely objection to the magistrate judge's ruling waives appellate review of both factual and legal questions." *Sinclair Wyo. Ref. Co. v. A & B Builders,*

Ltd., 989 F.3d 747, 781 n.23 (10th Cir. 2021) (brackets and internal quotation marks omitted). We may decline to invoke the rule in the interests of justice based on "[1] a *pro se* litigant's effort to comply, [2] the force and plausibility of the explanation for his failure to comply, and [3] the importance of the issues raised." *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010) (internal quotation marks omitted). The requirements of the interests-of-justice exception are satisfied here.

First, St. George diligently tried to comply with the firm waiver rule. He filed three timely motions to extend the objection deadline, and the district court granted two extensions. But when he filed his objections, which were timely, the district court struck them for exceeding its page limitations. Although the district court gave him twelve more days to file amended objections, it would have been difficult for a pro se prisoner to meet that deadline, particularly given prison restrictions due to Covid-19 at the time, as St. George asserts. He therefore sought another extension, which the district court did not consider; rather, the district court adopted the magistrate judge's report and recommendation. Later that same day, St. George filed proposed amended objections, which the court also did not consider.

Second, the force and plausibility of St. George's efforts to comply weigh in favor of excepting him from the firm waiver rule. His efforts are

undisputed and are borne out by the record. Moreover, he aptly identifies the difficulties facing pro se prisoners who attempt to satisfy short filing deadlines.

Finally, the importance of the issues weigh in St. George's favor. He claims Trimmer violated the Fourth Amendment by using excessive force. He was shot in a gunfight with police, and we already concluded in *St. George* that he plausibly alleged a constitutional violation. Given these circumstances, it is in the interests of justice to excuse him from the firm waiver rule and consider the merits of the appeal.

IV

As stated above, we review a Rule 12(b)(6) dismissal de novo, accepting the well-pleaded factual allegations as true and viewing them in the light most favorable to the non-moving party. *Straub v. BNSF Ry. Co.*, 909 F.3d 1280, 1287 (10th Cir. 2018). We disregard conclusory legal statements. *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

A. Heck Doctrine

We now consider the district court's dismissal of the federal § 1983 claims under *Heck*. The *Heck* doctrine provides that when a plaintiff seeks damages under § 1983, the claim is barred if "a judgment in favor of the plaintiff would *necessarily* imply the invalidity of h[is] conviction or

sentence." *Torres v. Madrid*, 60 F.4th 596, 600 (10th Cir. 2023) (internal quotation marks omitted). In other words, a civil claim is barred if it seeks to retry the same facts and legal issues from a prior case where the civil plaintiff has already been convicted beyond a reasonable doubt as a criminal defendant. "An excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer." *Havens v. Johnson*, 783 F.3d 776, 782 (10th Cir. 2015). If the claim is that "the officer used too much force to respond to the assault or that the officer used force after the need for force had disappeared[,] . . . *Heck* may bar the plaintiff's claims as to some force but not all." *Torres*, 60 F.4th at 600 (internal quotation marks omitted). "To determine the effect of *Heck* on an excessive-force claim, the court must compare the plaintiff's allegations to the offense he committed." *Havens*, 783 F.3d at 782. If the plaintiff's theory of the claim is completely inconsistent with his conviction, "the excessive-force claim must be barred in its entirety." *Id.* at 783.

St George was convicted of numerous offenses, including attempted second-degree murder. Criminal attempt requires that "he engage[d] in conduct constituting a substantial step toward the commission of the offense" "with the kind of culpability otherwise required" by the underlying offense. Colo. Stat. Ann. § 18-2-101. And a person commits second-degree murder if he "knowingly cause[s] the death of a person." *Id.* § 18-3-103. The

question is therefore whether St. George's convictions for taking a substantial step toward knowingly causing the death of the officers is consistent with the allegations underlying his excessive-force claim. Relevant to this question, St. George also raised an affirmative defense—"defense of person"—which authorizes use of physical force if:

> 1. he used that physical force in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of *unlawful physical force by that other person*, and
>
> 2. he used a degree of force which he reasonably believed to be necessary for that purpose, and
>
> 3. he was not the initial aggressor, or, if he was the initial aggressor, he had withdrawn from the encounter and effectively communicated to the other person his intent to do so, and the other person nevertheless continued or threatened the use of *unlawful physical force.*

R., vol. 4 at 43 (jury instruction) (emphasis added).

St. George argues that Trimmer's use of force when she shot him was too great. He alleges that without a warrant, probable cause, or exigent circumstances, Trimmer "attempt[ed] to [m]urder [him] using her aggressive opening of gunfire upon him." *See id.* at 89, para. 6. He says Trimmer and the other officers "laid siege with firearms to [his] home in such a way as to prevent him from being able to leave." *Id.*, para. 9. And he claims Trimmer's "intent was to set [him] to flight, assault her prey[,] and arrest him . . . to effect an illicit arrest." *Id.*, paras. 10-11. Additionally, he

avers that "Maines fail[ed] to prevent Trimmer[']s use of excessive force," *id.* at 91, para. 20, despite knowing her "act was one of [a]ttempted [m]urder," *id.* at 92, para. 28; *see also id.* at 114-15, 145 (alleging Trimmer committed attempted first-degree murder and Maines was complicit in Trimmer's attempted first-degree murder).

The jury rejected St. George's self-defense claim and convicted him of attempted second-degree murder. That means the jury did not accept that he was defending himself against Trimmer's "unlawful physical force"; instead, the jury concluded he took a substantial step toward knowingly causing the death of the officers. *See* Colo. Stat. Ann. § 18-2-101; R., vol 4 at 43. The jury's conclusion and St. George's convictions are entirely inconsistent with his theory in his civil complaint, which is essentially that "he did nothing wrong," *Hooks v. Atoki*, 983 F.3d 1193, 1201 (10th Cir. 2020) (quoting *Havens*, 783 F.3d at 783). The claims are therefore barred by *Heck*.[1]

As for the municipal and supervisory liability claims, they require an underlying violation. *See Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (explaining that supervisory liability requires a violation of

[1] On appeal, St. George raises a new argument: that Trimmer and Maines engaged in mutual combat with him. *See* Aplt. Opening Br. at 26. Because St. George failed to preserve this argument in the district court, we do not consider it. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011).

federally protected rights); *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers."). Under *Heck*, however, St. George cannot make that showing unless and until his convictions are invalidated, at which time he may reassert his municipal and supervisory liability claims. *See McCarty v. Gilchrist*, 646 F.3d 1281, 1288-90 (10th Cir. 2011) (explaining that accrual of municipal and supervisory liability claims occurs upon the date the conviction is no longer outstanding). Hence, the district court properly dismissed the § 1983 claims under *Heck*, and we affirm the district court's dismissal without prejudice, *see Fottler v. United States*, 73 F.3d 1064, 1065 (10th Cir. 1996) ("When a § 1983 claim is dismissed under *Heck*, the dismissal should be without prejudice.").[2] But because the district court also dismissed the claims against Trimmer and Maines *with prejudice* based on qualified immunity, we evaluate that ruling next.

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[2] St. George contends applying *Heck* to his municipal and supervisory liability claims contravenes *St. George*. *See* Aplt. Opening Br. at 14. That is not correct. *St. George* concluded he plausibly alleged a Fourth Amendment violation, *see* 2021 WL 3700918, at *8, but that conclusion did not foreclose the alternative ruling on remand that *Heck* barred his claims. St. George also contends defendants waived the *Heck* bar by failing to raise it in response to prior iterations of the operative, fifth amended complaint. But regardless of what arguments defendants made in response to claims asserted in the prior complaints, the fifth amended complaint superseded all others. *See Mink v. Suthers*, 482 F.3d 1244, 1254 (10th Cir. 2007).

B. Qualified Immunity

Qualified immunity shields government officials from suit under § 1983 unless the "plaintiff demonstrates (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Mocek v. City of Albuquerque*, 813 F.3d 912, 922 (10th Cir. 2015) (internal quotation marks omitted). For a right to be clearly established, ordinarily "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.* (internal quotation marks omitted). "We do not define the relevant constitutional right at a high level of generality[,] and the clearly established law must be particularized to the facts of the case." *Flores v. Henderson*, 101 F.4th 1185, 1197 (10th Cir. 2024) (brackets, ellipsis, and internal quotation marks omitted).

It was not clearly established that an officer violates the Fourth Amendment by using deadly force without warning when facing an armed suspect under the circumstances in this case. St. George disputes this conclusion, but the cases he relies upon are distinguishable.

He first cites *Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016), *vacated by White v. Pauly*, 580 U.S. 73 (2017), arguing "it [was] clearly established law that warnings must be given," Aplt. Opening Br. at 15. In *Pauly*, police

shot and killed Samuel Pauly. 814 F.3d at 1064. Samuel's brother, Daniel, had been involved in a road-rage incident, and responding officers went to his and his brother's house to investigate. *Id.* at 1065-66. When the brothers saw flashlights coming toward the house, they shouted, "'Who are you?' and, 'What do you want?'" *Id.* at 1066. One officer replied, "Hey (expletive), we got you surrounded. Come out or we're coming in." *Id.* (internal quotation marks omitted). Another officer shouted once, "Open the door, State Police, open the door," although Daniel did not hear the police announcement until the altercation was over. *Id.* (internal quotation marks omitted). The brothers, believing they were facing a home invasion, armed themselves and shouted, "We have guns." *Id.* (internal quotation marks omitted). Just as they made that statement, a third officer, Ray White, arrived on scene and took cover behind a stone wall fifty feet away. *Id.* at 1066. Seconds later, Daniel fired two warning shots, and a few seconds after that, Samuel pointed his weapon out the front window in the direction of White. *Id.* at 1066-67. From his position behind the stone wall fifty feet away, White shot and killed Samuel through the window. *Id.* at 1067.

As an initial matter, the obvious problem with *Pauly* is that it was vacated by the Supreme Court, which ruled that White did *not* violate clearly established law under the foregoing facts. *White*, 580 U.S. at 78. The Court explained that *Pauly* erred in concluding it was clearly established

that a reasonable officer in White's position was required to warn a dangerous suspect to drop his weapon before using deadly force. *See id.* at 77-78. The Court determined the error was because *Pauly* incorrectly defined "clearly established law" at a high level of generality, rather than requiring that it be "particularized to the facts of the case." *Id.* at 79 (internal quotation marks omitted). The Court emphasized that *Pauly*'s clearly-established-law analysis should have "identif[ied] a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id.* These admonishments severely undermine St. George's reliance on *Pauly*.

But *Pauly* was not only vacated by the Supreme Court; it is also distinguishable for at least four important reasons. First, the officers were investigating a relatively minor road-rage incident, while Trimmer and Maines were investigating a report of an unlawful sexual contact by a suspect who had allegedly fired two rounds, one into the air and a second at a fleeing woman. Second, in *Pauly*, the officers did not identify themselves as police, except for one officer saying, "Open the door, State Police, open the door," which the surviving brother did not hear. 814 F.3d at 1066. By contrast, the officers here identified themselves as Lakewood police three times on the phone, and Trimmer knew of the calls because she

was told on the radio he was being threatening.[3] Third, in *Pauly*, White shot and killed Samuel from a protected position fifty feet away, even though Samuel was not advancing toward him. Here, however, Trimmer was merely hiding behind a truck and could hear St. George's footfalls advancing toward her. She heard him pump the action on the shotgun when he came outside, and Maines radioed that he was walking in her direction. Fourth, White shot and killed Pauly whereas Trimmer shot St. George in the leg, which might indicate an intent to wound and mitigate the threat, not to kill. Given these distinctions, *Pauly* is not "particularized to the facts of the case." *Flores*, 101 F.4th at 1197 (internal quotation marks omitted).

St. George also cites *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013), and *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), but these cases are distinguishable too. In *Cooper*, two officers responded to a mobile home after reports of two men screaming at one another. 735 F.3d at 155. As the officers approached the mobile home, one officer tapped on the window, but neither of them announced his presence or identified himself as police. *Id.* One of the men—Cooper—heard the sound at the window, peered out the back

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[3] St. George now denies that the officers identified themselves and argues this fact contradicts our previous decision in *St. George*. *See* Aplt. Opening Br. at 18. But our previous decision clearly indicates the officers identified themselves three times during their calls with St. George, as he alleged. *See* 2021 WL 3700918, at *2-3; R., vol. 4 at 129, ¶ 19; *id.* at 130, ¶ 22; *id.* at 134, ¶ 32.

door, and saw nothing. *Id.* He picked up a shotgun by the back door and exited two or three steps onto the back porch, pointing the shotgun muzzle to the ground. *Id.* By that time, the officers had advanced to the porch, and one of them stumbled on a concrete block. *Id.* at 155-56. As the officer regained his balance, Cooper walked onto the porch, and when the officers saw him with the shotgun, they shot him repeatedly without warning. *Id.* at 156. The Fourth Circuit affirmed the denial of qualified immunity, noting Cooper held a shotgun but made no moves, made no threats, and disobeyed no commands. *Id.* at 159, 161. The court also observed the officers had no information indicating he posed a threat, nor did they identify themselves as police. *Id.* at 159.

Cooper is distinguishable because the officers were not responding to a crime, they did not identify themselves, Cooper did not pump his shotgun in a threatening manner, and Cooper was not advancing on them. But here the officers were responding to reports of a serious crime with shots fired, they identified themselves three times, and St. George was advancing on Trimmer having already behaved in a threatening manner.

As for *George*, the Ninth Circuit affirmed the denial of qualified immunity to three officers who responded to a domestic disturbance in which a woman was heard exclaiming, "No!" and "My husband has a gun!" 736 F.3d at 832, 840 (internal quotation marks omitted). The officers were

met by the woman who asked them not to scare her husband; he was on their balcony patio with a gun. *Id.* at 832. The officers established a perimeter, and one officer identified himself as law enforcement. *Id.* Another officer left his post upon hearing yelling. *Id.* The third officer saw the husband holding a walker and a pistol with the barrel pointed down. *Id.* Twelve seconds after the officers broadcast that he had a firearm, the husband was shot. *Id.* at 833.

George is distinguishable because, again, unlike this case, the police were not responding to a serious crime, there had been no shots fired, and the husband was not advancing on them. Although one officer did identify himself to the husband, the remaining distinctions are too significant to apply *George* to the facts of this case.

Accordingly, St. George fails to demonstrate the law was clearly established such that Trimmer and Maines should be denied qualified immunity. We affirm the district court on this ground as well.

C. State-Law Claims

St. George contends the district court should have exercised supplemental jurisdiction over his state-law tort claims. But having dismissed all the federal claims, the district court properly acted within its discretion in declining to exercise supplemental jurisdiction over the state-law claims. *See Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011)

(reviewing for abuse of discretion and recognizing that "[w]hen all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims") (internal quotation marks omitted).

V

Finally, St. George challenges the district court's denial of Rule 60(b) relief, through which he sought to vacate the judgment to the extent the district court declined to consider his amended objections to the magistrate judge's report and recommendation. A timely appeal from the denial of Rule 60(b) relief is jurisdictional and requires an appellant to file a new notice of appeal or an amended notice of appeal. *See Husky Ventures, Inc. v. B55 Invs., Ltd.*, 911 F.3d 1000, 1010 (10th Cir. 2018) ("When an appellant challenges an order ruling on a motion governed by Appellate Rule 4(a)(4)(B)(ii), a new or amended notice of appeal is necessary . . . ."). St. George did not amend his notice of appeal, but his response to our show-cause order is the functional equivalent of a notice of appeal. *See Smith v. Barry*, 502 U.S. 244, 248-49 (1992).

To be the functional equivalent of a notice of appeal, a document must be filed within the time prescribed by Federal Rule of Appellate Procedure 4 and "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court

to which the appeal is taken." *Id.* at 247-48 (internal quotation marks omitted)). The district court denied St. George's motion to vacate the judgment on September 6, 2023. Thus, he had thirty days—until October 6—to appeal. *See* Fed. R. App. P. 4(a)(1)(A). His handwritten response and his identical typed response to our show cause order were timely under the prison mailbox rule because they were deposited into the prison legal mail system on October 3 and October 4, 2023, respectively.[4] Further, the responses identify St. George as the party seeking to appeal, they indicate he sought to appeal the district court's orders striking his amended objections and denying his motion to vacate the judgment, and they name this court as the court to which the appeal was to be taken. The responses fulfill the requirements of a notice of appeal. *See Smith*, 502 U.S. at 248-49. We therefore consider St. George's challenge to the denial of Rule 60(b) relief.

We review the denial of Rule 60(b) relief for an abuse of discretion. *Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir. 2016). "Rule 60(b) relief is

[4] The prison mailbox rule provides that a prisoner's notice of appeal will be deemed timely if the prisoner deposits it in the prison's internal mail system on or before the last day for filing. *See United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (10th Cir. 2004). If there is no prison mail system, timely filing must be established by declaration in compliance with 28 U.S.C. § 1746 or a notarized statement setting forth the date of deposit and that first-class postage has been prepaid. *Id.* at 1143-44.

extraordinary and may only be granted in exceptional circumstances." *Id.* (internal quotation marks omitted). "We will not reverse the district court's decision on a Rule 60(b) motion unless that decision is arbitrary, capricious, whimsical, or manifestly unreasonable." *Id.* (internal quotation marks omitted). We will reverse the denial of relief under Rule 60(b)(6), which has been described "as a grand reservoir of equitable power," "only if we find a complete absence of a reasonable basis and are certain that the decision is wrong." *Johnson v. Spencer*, 950 F.3d 680, 700-01 (10th Cir. 2020) (internal quotation marks omitted).

There was no abuse of discretion here. The district court concluded St. George offered no grounds for relief under Rule 60(b)(1)-(5) and he was not entitled to relief under Rule 60(b)(6). The district court reasoned that he failed to comply with its page limitations and submit timely objections despite receiving several extensions. On appeal, St. George does not dispute his noncompliance; he instead contends it was unreasonable to reject his amended objections given his efforts to comply with the district court's rules. But that argument does not demonstrate the denial of Rule 60(b) relief was arbitrary, capricious, whimsical, or lacking a reasonable basis. Consequently, St. George's challenge to the denial of Rule 60(b) relief is unavailing.

VI

The district court's judgment is AFFIRMED. St. George's motion to proceed on appeal without prepayment of costs and fees is granted.

Entered for the Court

Richard E.N. Federico
Circuit Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 18-cv-1930-WJM-STV

ERIC ST. GEORGE,

Plaintiff,

v.

CITY OF LAKEWOOD;
DEVON TRIMMER, a/k/a Devon Myers;
JASON MAINES;
JEFF LARSON; and
DAN MCCASKY,

Defendants.

ORDER ADOPTING JULY 13, 2022
RECOMMENDATION OF MAGISTRATE JUDGE

This matter is before the Court on the July 11, 2022 Recommendation of United States Magistrate Judge Scott T. Varholak (the "Recommendation") (ECF No. 171) that Defendants' Motion to Dismiss ("Motion") (ECF No. 153) be granted. The Recommendation is incorporated herein by reference. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). The Recommendation advised the parties that specific written objections were due within fourteen days after being served with a copy of the Recommendation. (ECF No. 171 at 35 n.15.)

For the reasons explained below, the Recommendation is adopted as modified.

I. BACKGROUND

The factual background of this case and the claims brought by Eric St. George ("Plaintiff") against the City of Lakewood and four of its police officers (collectively,

"Defendants") is laid out in detail in the Recommendation. (*Id.* at 2–12.) The Court incorporates that background by reference.

A. Procedural Background

Plaintiff is *pro se* and currently incarcerated. (*See, e.g.*, ECF No. 175.) Because of his incarceration and lack of representation, he faces challenges proceeding with this litigation that others before this Court do not. For example, Plaintiff has limited access to the law library and lacks legal training. (*Id.*) The Court is aware of these circumstances and, holding them in mind, has construed Plaintiff's filings liberally throughout the course of this litigation. (*See e.g.*, ECF No. 108.) Yet, the leeway given to *pro se* litigants is not boundless. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008) ("*Pro se* status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure.") (internal quotation marks omitted).

Plaintiff has filed six complaints in this civil rights suit. (*See* ECF Nos. 1, 8, 12, 14, 82, 143.) Plaintiff initially filed his Complaint on July 30, 2018. (ECF No. 1.) The next day, United States Magistrate Judge Gordon P. Gallagher issued an order directing Plaintiff to correct a technical filing error. (ECF No. 7.) Plaintiff corrected the technical error by using the correct form in his Amended Complaint (ECF. No. 8) but rather than including a claim for relief, he attempted to incorporate by reference his initial, improperly filed Complaint. (ECF No. 11 at 1.)

On September 10, 2018, Judge Gallagher issued an order directing Plaintiff to file a Second Amended Complaint. (ECF No. 11.) Judge Gallagher's order also noted several legal deficiencies in the claims as pleaded in the initial Complaint, including that *Heck v. Humphrey*, 477 U.S. 512 (1994) potentially barred some of Plaintiff's claims.

(*Id.* at 3–4, 7.) Plaintiff filed the Second Amended Complaint on October 9, 2018. (ECF No. 12.)

On October 16, 2018, Judge Gallagher again found Plaintiff's operative complaint deficient due to a filing error and again noted several legal deficiencies, including that *Heck* was a potential bar. (ECF No. 13 at 3, 6–7.) Judge Gallagher's order noted that Plaintiff is *pro se*, and therefore afforded him "one final opportunity to file a pleading that provides a clear and concise statement of his claims." (*Id.* at 3.) Plaintiff filed his Third Amended Complaint on November 13, 2018. (ECF No.14.)

Defendants moved to dismiss the Third Amended Complaint. (ECF No. 30.) While that motion was pending, this case was reassigned to the undersigned, and all motions were referred to Judge Varholak. (ECF Nos. 34, 35.) On May 13, 2019, Judge Varholak recommended granting the motion and dismissing Plaintiff's excessive force claims with prejudice, his due process claims without prejudice, and his state law claims without prejudice. (ECF No. 62 at 26.) The May 13, 2019, recommendation relied upon *Heck* in the context of Plaintiff's due process claims. (*Id.* at 21–24.) On September 15, 2019, the Court adopted Judge Varholak's May 13, 2019, recommendation as modified. (ECF No. 76 at 44.) In a detailed conclusion section, the Court laid out exactly which claims against which defendants were dismissed with prejudice and which were dismissed without prejudice. (*Id.* at 44–46.) "Solely in the interest of justice, the Court *sua sponte* grant[ed] St. George leave to file a final amended complaint consistent with [its] Order." (*Id.* at 44.)

Plaintiff filed his Fourth Amended Complaint on October 28, 2019. (ECF No. 82.) Defendants moved to dismiss the Fourth Amended Complaint. (ECF No. 89.) On April

10, 2020, Judge Varholak found that Agent Trimmer had acted reasonably under the circumstances[1] and recommended dismissing Plaintiff's excessive force claims with prejudice. (ECF No. 105 at 26.) Because the excessive force claims were the only federal claims reasserted in the Fourth Amended Complaint, Judge Varholak recommended the Court decline to exercise jurisdiction over the remaining state law claims and dismiss those claims without prejudice. (*Id.* at 26–27.) On June 30, 2020, the Court adopted the April 10, 2020, recommendation in its entirety (ECF No. 108) and issued a judgment dismissing the case (ECF No. 109.)

Plaintiff appealed (ECF No. 110), and the U.S. Court of Appeals for the Tenth Circuit reversed and remanded to this Court on August 20, 2021 (ECF Nos. 114, 116–17). The Tenth Circuit held that "[b]ased on the facts alleged in the Complaint, it is at least plausible that Trimmer was unreasonable in believing that St. George posed a sufficiently immediate threat to justify deadly force." (ECF No. 116 at 19.)

Following Plaintiff's successful appeal, Plaintiff moved to reinstate his supervisory liability claims against Chief McCasky and the City of Lakewood. (ECF No. 134.) Defendants filed their Second Motion to Dismiss Fourth Amended Complaint, arguing that *Heck* barred the excessive force claims and asserting qualified immunity. (ECF No. 135.) On December 9, 2021, the Court issued an Order granting Plaintiff's motion, denying Defendants' Second Motion to Dismiss Fourth Amended Complaint as moot without prejudice, and directing Plaintiff to file the Fifth Amended Complaint.[2]

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[1] Judge Varholak reasoned that because Plaintiff's excessive force claim against Agent Trimmer (the officer who shot Plaintiff) was legally insufficient, the failure-to-prevent an excessive use of force claim against Sergeant Maines was also legally insufficient. (ECF No. 108 at 8.)

[2] In its Order, the Court listed exactly which claims Plaintiff was granted leave to include

(ECF No. 138.) Plaintiff initially filed his Fifth Amended Complaint on January 10, 2022 (ECF No. 143), however, the Court struck the Fifth Amended Complaint for failure to adhere to the Court's guidance not to "incorporate by reference claims or factual allegations from prior versions of the complaint." (ECF No. 145.)

On January 28, 2022, Plaintiff re-filed the Fifth Amended Complaint without incorporating claims or factual allegations from prior versions. (ECF No. 149.) On February 7, 2022, Defendants moved to dismiss the Fifth Amended Complaint, relying on *Heck* and qualified immunity. (ECF No. 153.) Plaintiff filed a response to the motion (ECF No. 161), and Defendants filed a reply (ECF No. 162). On July 12, 2022, Judge Varholak issued the Recommendation now before the Court. (ECF No. 171.) Judge Varholak's thorough analysis determined that: (i) Plaintiff's excessive force and municipal liability claims are barred by *Heck* unless his state criminal conviction is overturned; and (ii) Trimmer and Maines are entitled to qualified immunity. (*Id.* at 21, 33–34.) Therefore, Judge Varholak recommended dismissing the Fifth Amended Complaint without prejudice. (*Id.* at 35.)

Notable for our purposes here is the fact that in the more than two months since the Recommendation, Plaintiff has failed to properly file a timely objection. On July 25, 2022, Plaintiff filed a motion for an extension of time to file an objection to the Recommendation. (ECF No. 172.) On July 29, 2022, the Court granted Plaintiff an extension to file his objection no later than August 22, 2022. (ECF No. 173.) On August 18, 2022, Plaintiff again moved for an extension. (ECF No. 175.) On August 22, 2022 the Court granted Plaintiff another extension, permitting him to file his

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in the Fifth Amended Complaint. (*See* ECF No. 138.)

objection by no later than August 29, 2022. (ECF No. 176.) The Court's August 22, 2022, Order provided in underlined, capital letters that "NO FURTHER EXTENSION OF THIS FILING DEADLINE WILL BE GRANTED." (*Id.*) Plaintiff filed his Objection to Recommendation of United States Magistrate Judge ("Objection") (ECF No. 179) on August 29, 2022; however, Plaintiff's filing was twice the length permitted by the undersigned's Revised Practice Standards. The Court struck Plaintiff's overlong filing and *yet again* granted Plaintiff "leave to file an Amended Objection . . . on or before **September 12, 2022**." (ECF No. 180.) Plaintiff has since filed two more motions for extension (ECF Nos. 182, 183) but no Amended Objection.

II. STANDARD OF REVIEW

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine de novo any part of the magistrate judge's [recommendation] that has been properly objected to." An objection to a recommendation is properly made if it is both timely and specific. *United States v. 2121 East 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*

III. ANALYSIS

As a *pro se* litigant, Plaintiff is at a distinct disadvantage compared to represented parties. This is true with respect to substantive legal issues and more

mundane aspects of litigation, such as determining the correct filing deadlines and page limits. In recognition of this disadvantage, the undersigned and Judge Varholak have granted Plaintiff numerous extensions to submit various filings. (*See* ECF Nos. 28, 46, 78, 160, 173, 176.) Similarly, Plaintiff has been given ample opportunities to properly file his complaint. While the sheer number of amended complaints is slightly inflated by the dismissal and later reinstatement of Plaintiff's claims against McCasky and the City of Lakewood, Plaintiff has had his fair share of "bites at the apple." Further, with respect to the Recommendation, the Court gave Plaintiff approximately six weeks to object and an additional 12 days to file an Amended Objection after striking his initial objection for exceeding the page limits. (ECF No. 180.)

Plaintiff explains that his Objection was long because he applied Judge Varholak's Civil Practice Standards, under which his filing would have been permissible. (ECF No. 182 at 1.) But this is not Plaintiff's first objection to a recommendation from Judge Varholak,[3] and—in any event—the Court granted Plaintiff leave to correct his error and refile. (ECF No. 180.) Given that there is no *proper* objection to the Recommendation, the Court considers the Recommendation as if there is no objection at all.

The Court concludes that the Judge Varholak's analysis was thorough and sound, and that there is no clear error on the face of the record. *See* Fed. R. Civ. P. 72(b) advisory committee's note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the

[3] Plaintiff's adherence to the undersigned's page limit in prior objections has been inconsistent; but neither of his prior objections were as long as the Objection, which is nearly twice the 10-page limit. (ECF Nos. 63, 106.)

recommendation."); *see also Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) ("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate."). Therefore, the Recommendation is adopted with one modification, explained below.

A. Excessive Force Claims Are Dismissed with Prejudice

In recommending dismissal of Plaintiff's excessive force and municipal liability claims based on *Heck*, Judge Varholak noted that *Heck* would no longer bar Plaintiff's claims if his state conviction is overturned. (ECF No. 171 at 21.) As such, Judge Varholak recommended dismissing those claims without prejudice so that Plaintiff could refile in the unlikely event that his state conviction is overturned. (*Id.*) Judge Varholak also recommended that the excessive force claims be dismissed without prejudice on the alternative ground of qualified immunity. (*Id.* at 34.)

Here, the Court's view diverges somewhat from the Recommendation. The Recommendation thoroughly analyzes whether Trimmer and Maines are entitled to qualified immunity based on the "clearly established" prong and concludes that they are. (*Id.* at 21–34.) Critically, the Recommendation's analysis does not rest on the fact of Plaintiff's state conviction. (*See id.*) Therefore, even if Plaintiff's state conviction were overturned and he refiled this lawsuit, his excessive force claims would still be dismissed. Because any such future refiling would be futile, the Court dismisses the excessive force claims *with prejudice*. *See Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir. 1999) ("The futility question is functionally equivalent to the question whether a complaint may be dismissed for failure to state a claim.").

Because the Recommendation reasons that Trimmer and Maines are entitled to qualified immunity based on the "clearly established" prong, it does not necessarily

follow that Plaintiff's claim against the City of Lakewood is also futile. *Hinton v. City of Elwood*, 997 F.2d 774, 782–83 (10th Cir. 1993) ("When a finding of qualified immunity is predicated on the basis that the law is not clearly established, it is indeed correct that there is nothing anomalous about allowing a suit against a municipality to proceed when immunity shields the individual defendants, for the availability of qualified immunity does not depend on whether a constitutional violation has occurred.") (alterations and internal quotations omitted). The Recommendation does not address McCasky's entitlement to qualified immunity, and the Motion does not assert it on his behalf. (*See* ECF Nos. 153, 171. Therefore, the Court cannot find at this time that a refiled supervisory liability claim against McCasky would be futile.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. The Recommendation (ECF No. 171) is ADOPTED as modified;
2. The Motion to Dismiss Fifth Amended Complaint (ECF No. 153) is GRANTED;
3. Plaintiff's excessive force claims are DISMISSED WITH PREJUDICE;
4. Plaintiff's municipal liability and supervisory liability claims are DISMISSED WITHOUT PREJUDICE;
5. Plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE;
6. Plaintiff's Motion to Expand Time to File Amended Objection to Recommendation of the Magistrate Judge (ECF No. 182) and Motion to Expand Time to File Objection Per Order (ECF No. 183) are DENIED AS MOOT;
7. The Clerk shall enter judgment consistent with this Order;
8. The Clerk shall terminate this case; and

9. All parties will bear their own costs.

Dated this 21st day of September, 2022.

BY THE COURT:

William J. Martínez
United States District Judge

Appendix C DOC 171

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01930-WJM-STV

ERIC ST. GEORGE,

Plaintiff,

v.

CITY OF LAKEWOOD, COLORADO,
DEVON TRIMMER, a/k/a DEVON MYERS,
JASON MAINES,
JEFF LARSON, and
DAN MCCASKY,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter comes before the Court on Defendants' Motion to Dismiss (the "Motion") [#153], which has been referred to this Court [#154]. This Court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motion. For the following reasons, this Court respectfully **RECOMMENDS** that the Motion be **GRANTED**.

I. BACKGROUND[1]

A. Facts

On July 31, 2016, Plaintiff contacted a female escort through a website known for advertising sex workers. [#149-1 at 10-11] At approximately 9:00 p.m. that night, the escort arrived at Plaintiff's residence in Lakewood and took $220 in cash off Plaintiff's kitchen counter as payment for services. [*Id.* at 11] After she took the cash Plaintiff asked for the money back, stating that he did not believe that she was what he was looking for that evening. [*Id.*] The escort refused to refund the money and called her agency. [*Id.*]

Plaintiff was "alarmed" that the escort contacted an agency because she had advertised herself as a "solo operator." [*Id.*] Nonetheless, he spoke with the agent and agreed to receive a massage and "body glide" from the escort. [*Id.*] Throughout the course of her service, the escort made multiple phone calls and text messages, which Plaintiff found suspicious. [*Id.* at 12] After thirty minutes of the one-hour service, the escort announced her intention to leave. [*Id.*] Plaintiff demanded that she return his money; the escort refused, pushing Plaintiff and exiting the residence. [*Id.*] Fearing that

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[1] The facts are drawn from the allegations in Plaintiff's Fifth Amended Complaint (the "Complaint") [#149] and the Affidavit submitted with the Fifth Amended Complaint [#149-1], which must be taken as true when considering a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)). Plaintiff also submitted numerous other exhibits, many of which are not referenced in the Complaint or whose relevance remains unclear. [##149-3-149-13] The Court therefore does not consider those exhibits because their inclusion violates the "short and plain statement" requirement of Federal Rule of Civil Procedure 8 and "it is not the Court's responsibility to sift through those exhibits to determine how they might support the claims [Plaintiff] is asserting in this action." *Cohen v. Vandello*, No. 09-cv-00736-BNB, 2009 WL 1034217, at *1 (D. Colo. Apr. 9, 2009); *see also Schupper v. Edie*, 193 F. App'x 744, 745 (10th Cir. 2006) (upholding dismissal of 38-page complaint containing 292 paragraphs, plus 120 pages of exhibits, as violative of the "short and plain statement" requirement).

he was being robbed and that the escort may have a pimp waiting in the parking lot, Plaintiff armed himself with a small handgun. [*Id.*] When the escort was within a few feet of her vehicle, she turned and confronted Plaintiff with a can of mace. [*Id.* at 13] Plaintiff raised his arm overhead and fired one round into the air. [*Id.*] Plaintiff then lowered his arm and took aim at the escort, who fled. [*Id.*] Shortly after the incident, the escort contacted the Lakewood Police Department ("LPD") through a 911 call. [*Id.* at 13] She told LPD that Plaintiff had made illicit sexual contact with her and that Plaintiff had fired two shots, one in the air and one at her.[2] [*Id.*] She "identified herself as an 'escort,' [] presented herself histrionically, and [wa]s refusing to meet with law enforcement in person." [*Id.* at 14]

After the incident, Plaintiff left his residence and went to a restaurant for dinner and drinks. [*Id.* at 14] Plaintiff was not aware at the time that the escort had called the police, but he "did anticipate that a neighbor might contact police to report the sound of a gunshot, or might report excessive noise to neighborhood management." [*Id.*] Plaintiff, who had a history of noise complaints with management, thought that if the police were responding to an excessive noise complaint, they would simply perform a perfunctory investigation and leave. [*Id.* at 15] On the other hand, if the police were responding to a reported gunshot, Plaintiff believed they would respond promptly, be visible when Plaintiff returned from the restaurant, and would knock on Plaintiff's door to question him. [*Id.*]

LPD officers responded to Plaintiff's private gated community at 10:13 p.m. [*Id.* at 16] LPD officers did not contact Plaintiff to gain entrance to the neighborhood but instead

[2] According to Plaintiff, he only fired his weapon once, into the air, and the escort lied about the second shot. [#149-1 at 13-14]

used a code provided to them by dispatch. [*Id.*] LPD deliberately parked marked vehicles in a location that could not be observed from Plaintiff's residence. [*Id.*] LPD officers investigated the scene attempting to corroborate the escort's allegations. [*Id.*] A neighbor, who identified herself as a former law enforcement officer, told Defendant LPD Agent Devon Trimmer that she heard "a car backfire, or a bottle rocket," not a gunshot. [*Id.*] Officers did not find bullet casings on the street, nor did they observe bullet holes or ricochet marks in the nearby surroundings. [*Id.* at 17] LPD Agent Eric Brennan confirmed that there had not been any other reports of gunshots in the area, and Agent Trimmer noted that, at that point in the investigation, there was no imminent threat of danger. [*Id.*]

Plaintiff returned home from dinner at approximately 11:15 p.m. [*Id.* at 16] He did not see the police vehicles and was not contacted by the police. [*Id.*] LPD officers walked along Plaintiff's backyard and observed Plaintiff inside with a glass of wine, seated at his computer. [*Id.*] The officers confirmed that Plaintiff had a lack of criminal or violent history, did not have any outstanding warrants, and had two phone numbers, including the one Plaintiff had given to the escort.[3] [*Id.* at 15, 17-18] The officers discussed applying for "some type of warrant" but determined that they lacked probable cause for a warrant. [*Id.* at 18]

At 12:17 a.m. on August 1, 2016, Agent Brennan called Plaintiff at the number Plaintiff had used to contact the escort. [*Id.* at 15, 18] The caller ID was blocked, and Plaintiff did not answer. [*Id.* at 18] At 12:20 a.m., Agent Brennan called again. [*Id.* at 19] Though the caller ID was blocked, Plaintiff nonetheless answered the phone. [*Id.*] Agent

[3] Plaintiff used the other phone number to communicate with his neighborhood management. [#149-1 at 15, 18]

Brennan identified himself as an agent with the LPD and instructed Plaintiff to come outside and talk to the police. [*Id.*] Plaintiff opened the front door, looked outside, and did not see any LPD officers. [*Id.*] LPD officers did not call out or announce their presence. [*Id.*]

At 12:23 a.m., LPD officers made a third phone call to Plaintiff. [*Id.* at 20] Once again, the caller ID was blocked, and Plaintiff did not answer. [*Id.*] One minute later, LPD Sergeant Nathan Muller called Plaintiff. [*Id.*] The Caller ID was blocked, but Plaintiff nonetheless answered the call. [*Id.*] Sergeant Muller identified himself as a sergeant with the LPD, told Plaintiff that his "friends" were in the backyard of Plaintiff's residence and could see Plaintiff through the window, and told Plaintiff to come outside to talk to the police. [*Id.*] During the call, Sergeant Muller radioed to Defendant LPD Sergeant Jason Maines to ask whether Plaintiff had a gun in his hand, and Sergeant Maines responded, no, Plaintiff had a cellular telephone in his hand. [*Id.* at 21] Sergeant Muller has reported that Plaintiff was upset, unsettled, and paranoid, and that Plaintiff did not believe that the call was from an LPD officer. [*Id.*] Plaintiff turned off the light in his master bedroom so that he could try to see who was outside. [*Id.*]

At 12:30 a.m., LPD officers placed a fifth call to Plaintiff. [*Id.*] The caller ID was blocked, and Plaintiff did not answer. [*Id.*] Plaintiff, unarmed, exited his residence onto the patio in his backyard to try to identify who has been calling him. [*Id.* at 21-22] Sergeant Maines and Agent Trimmer were in the backyard, hiding in the shadows along the fence line. [*Id.* at 22] Sergeant Maines radioed that Plaintiff had exited his residence. [*Id.*] Sergeant Maines reported that Plaintiff "looked tentative" and that Sergeant Maines was waiting for Plaintiff to take additional steps away from the house so that Sergeant

Maines could grab him. [*Id.*] The officers did not identify themselves and, at 12:32 a.m., Plaintiff went back inside his home. [*Id.*] Plaintiff believed that the callers were not police officers, but instead were individuals sent by the escort to hurt Plaintiff. [*Id.* at 23]

After Plaintiff returned inside his home, Sergeant Muller again called Plaintiff's cell phone. [*Id.* at 24] Once again, the caller ID was blocked, but Plaintiff answered the call. [*Id.*] Sergeant Muller told Plaintiff that he was with the police and that there were police outside. [*Id.*] Plaintiff, having not seen the police on his previous trips outside, told Sergeant Muller "you aren't (out) there." [*Id.*] Sergeant Muller told Plaintiff to come out with nothing in his hands, to which Plaintiff responded, "I have something in my hands." [*Id.*] In response to Plaintiff's comment, Agent Brennan aired on the radio that Plaintiff was being threatening on the phone. [*Id.*] Plaintiff, believing somebody was impersonating a police officer and was luring him outside, grabbed a shotgun and once again exited the door leading to the backyard. [*Id.*] Plaintiff loudly pumped the action of his shotgun, ejecting a shell to the ground. [*Id.*] Agent Trimmer aired by radio, "Did you hear that gun rack?" [*Id.*]

At this point, Agent Trimmer and Sergeant Maines hid behind a truck, but did not confront Plaintiff. [*Id.*] At 12:38 a.m., Sergeant Maines radioed: "Okay, yeah, send us some more cars, he just came out and racked a gun. We moved around to the [e]ast side of the apartment building." [*Id.*] Sergeant Muller and Agent Brennan positioned themselves on the west end of Plaintiff's building, and Sergeant Maines moved behind some foliage on the northwest corner of the adjacent apartment building. [*Id.* at 24-25] Sergeant Maines observed the light of Plaintiff's cell phone but did not see Plaintiff holding a shotgun. [*Id.* at 25] Sergeant Muller radioed, "Okay, so we don't have a crossfire

situation [Agent Brennan] and I are gonna move up to the white truck and maintain our position there." [*Id.*]

Plaintiff began to walk at an average speed from the backyard to the front of the building, around the east side of the building. [*Id.* at 26, 28] At 12:43 a.m., five minutes and 43 seconds after Plaintiff had racked the shotgun, Sergeant Maines radioed, "Alright [Agent Trimmer], he's coming [e]ast, he's walkin' fast, straight towards you." [*Id.* at 26] Agent Trimmer, who was hiding behind a truck in a communal driveway between Plaintiff's apartment building and the adjacent apartment building, has reported that she heard crunching gravel and footfalls and hoped that Plaintiff would not know where she was located. [*Id.* at 26-27] Agent Trimmer observed Plaintiff walking through the communal driveway between the two apartment buildings, with his weapon pointed downward in the "low ready" position. [*Id.* at 27] At 12:44 a.m., when Plaintiff came into her view, Agent Trimmer shot Plaintiff in the leg. [*Id.*] In the approximately six minutes between Plaintiff exiting his home and Agent Trimmer shooting Plaintiff, none of the LPD officers announced a warning. [*Id.* at 24-27]

After being shot, Plaintiff returned fire on Agent Trimmer. [*Id.* at 28] Plaintiff retreated north, and Agent Trimmer fired a second round at Plaintiff, missing him. [*Id.* at 29] Plaintiff again returned fire. [*Id.*] Agent Trimmer then fired a third shot at Plaintiff, missing him. [*Id.*] Sergeant Maines, who was hidden behind a bush on the northwest corner of one of the apartment buildings, activated a flashlight under the barrel of his handgun and aimed it at Plaintiff. [*Id.*] Plaintiff, still not realizing any of the individuals were police officers, fired at Sergeant Maines. [*Id.*] Plaintiff fired three times, twice striking an apartment building and once striking a tree. [*Id.*] Sergeant Maines radioed,

"he's got a shotgun," but still did not identify himself. [*Id.*] The exchange of gunshots between Plaintiff and the officers occurred in a timespan of less than 90 seconds. [*Id.* at 30]

Plaintiff then retreated to his residence where he called 911. [*Id.*] At the time, Plaintiff still did not know that the individuals outside were police officers, and 911 dispatch did not advise Plaintiff that police were already on the scene. [*Id.* at 30-31] Plaintiff began to crawl out of his home on his hands and knees to look for the paramedics outside. [*Id.* at 31] He made his way down the hallway and out of his front door, firing a shot with his handgun to warn away any would-be intruders. [*Id.*] Plaintiff then fired three additional shots from inside the house. [*Id.* at 31, 34] LPD officers then opened the front door, and Plaintiff fired an additional shot into the ceiling. [*Id.* at 31] When the police officer commanded Plaintiff to show them his hands, he complied immediately. [*Id.*] Plaintiff was then taken into custody at 1:00 a.m. [*Id.*]

At the time of the incident, LPD officers had not obtained an arrest warrant for Plaintiff. [*Id.* at 32] Plaintiff alleges that during the ensuing investigation, the LPD officers and the escort made numerous false statements to Defendant Detective Jeff Larson and the other officers conducting the investigation. [*Id.* at 33-36] On August 2, 2016, Detective Larson filed an affidavit in support of a warrant for Plaintiff's arrest. [*Id.* at 36] Plaintiff maintains that Detective Larson's affidavit was false and that his entire investigation was "mired in fraud." [*Id.* at 37-39] Plaintiff also maintains that Detective Larson perjured himself at a subsequent preliminary hearing. [*Id.* at 39-41] According to Plaintiff, the escort, Agent Trimmer, and Sergeant Maines all perjured themselves during Plaintiff's criminal trial in February 2018. [*Id.* at 42-43]

B. Procedural Posture

On July 30, 2018, Plaintiff filed the instant action. [#1] On May 13, 2019, this Court issued a Recommendation that all claims in the then-operative Third Amended Complaint be dismissed. [#62] On September 16, 2019, Judge Martinez adopted this Court's Recommendation as modified. [#76] Specifically, Judge Martinez: (1) dismissed Plaintiff's excessive force claim against Agent Trimmer and Plaintiff's failure to prevent excessive force claim against Sergeant Maines without prejudice; (2) dismissed Plaintiff's due process claims against all Defendants based upon their alleged perjury and withholding of evidence without prejudice, with leave to re-file should his criminal conviction be overturned; (3) dismissed Plaintiff's supervisory liability for excessive force claim against Defendant LPD Chief of Police Dan McCasky with prejudice; (4) dismissed Plaintiff's municipal liability for excessive force claim against the City of Lakewood with prejudice; and (5) dismissed Plaintiff's due process claims related to Defendants' alleged failure to comply with LPD policies with prejudice. [*Id.* at 43-44] Judge Martinez did not address the merits of Plaintiff's state law claims and deferred decision on whether the Court would exercise supplemental jurisdiction over the state law claims. [*Id.* at 42-43, 45-46] Judge Martinez allowed Plaintiff leave to file a Fourth Amended Complaint, but held that "such a complaint shall only include, at most, [Plaintiff's:] (1) excessive force claim against Defendant Agent Trimmer; (2) failure to prevent excessive force claim against Defendant Sergeant Maines; (3) [and] state tort claims against the Defendants that are currently alleged in the Third Amended Complaint." [*Id.* at 45] Judge Martinez cautioned Plaintiff that "no further amendment w[ould] be permitted without a showing of substantial good cause arising out of truly compelling circumstances." [*Id.* at 44-45]

On October 28, 2019, Plaintiff filed a Fourth Amended Complaint. [#82] The Fourth Amended Complaint asserted the following claims: (1) excessive use of force against Agent Trimmer, (2) failure to prevent excessive force against Sergeant Maines, and (3) various state law tort claims against all Defendants.[4] [*See generally id.*] On December 23, 2019, Defendants filed a motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) seeking dismissal of Plaintiff's Fourth Amended Complaint. [#89] On April 10, 2020, this Court issued a Recommendation that Defendants' motion to dismiss be granted, that Plaintiff's excessive force claims against Agent Trimmer and Sergeant Maines be dismissed with prejudice because Plaintiff had failed to plausibly allege a violation of his constitutional rights, and that Plaintiff's state law claims be dismissed without prejudice with leave to refile in state court. [#105] On June 30, 2020, Judge Martinez adopted this Court's Recommendation [#108] and judgment was entered in favor of Defendants [#109].

On July 9, 2020, Plaintiff filed a timely notice of appeal as to Judge Martinez's Order adopting this Court's Recommendation. [#110] On August 20, 2021, the Tenth Circuit reversed, finding that Plaintiff had pleaded a plausible claim of excessive force against Agent Trimmer. *St. George v. City of Lakewood*, No. 20-1259, 2021 WL 3700918 (10th Cir. 2021). Nonetheless, the Tenth Circuit left open the possibility that the

[4] The Fourth Amended Complaint also included causes of action for: (1) supervisory liability for excessive force claims against Chief McCasky and the City of Lakewood, (2) due process claims against all Defendants for failure to follow promulgated policies, and (3) due process claims against all Defendants for perjury and the withholding of evidence. [#82 at 19] However, Plaintiff acknowledged that these claims were dismissed by Judge Martinez without leave to be included in the Fourth Amended Complaint, and the Fourth Amended Complaint did not include any substantive allegations in support of the claims. [*Id.*]

Defendant officers may be entitled to qualified immunity if the law was not clearly established at the time of the episode. *Id.* at *8.

On November 26, 2021, Plaintiff filed a Motion to Reinstate, which asked the Court to "reinstate" Claim Nine of the Fourth Amended Complaint.[5] [#134] On December 9, 2021, Judge Martinez granted the Motion to Reinstate and ordered Plaintiff to file a Fifth Amended Complaint. [#138] Consistent with Judge Martinez's Order, on January 28, 2022, Plaintiff filed the operative Fifth Amended Complaint. [#149] The Fifth Amended Complaint asserts nine claims: (1) excessive force in violation of the Fourth Amendment against Agent Trimmer (Claim One); (2) failure to prevent excessive force in violation of the Fourth Amendment against Sergeant Maines (Claim Two); (3) emotional distress by outrageous conduct, a Colorado state tort, against Sergeant Maines and Agent Trimmer (Claim Three); (4) civil fraud, a Colorado state tort, against Chief McCasky, Sergeant Maines, and Agent Trimmer (Claim Four); (5) injury to property, a Colorado state tort, against all Defendants (Claim Five); (6) personal injury, a Colorado state tort, against all Defendants (Claim Six); (7) civil trespass, a Colorado state tort, against all Defendants (Claim Seven); (8) civil negligence, a Colorado state tort, against all Defendants (Claim Eight); and (9) supervisory liability for excessive force against Chief McCasky and the City of Lakewood (Claim Nine).[6] [*Id.*]

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[5] Claim Nine of the Fourth Amended Complaint had asserted a claim for supervisory liability for excessive force against Chief McCasky and municipal liability for excessive force against the City of Lakewood, claims which had been previously dismissed by Judge Martinez without leave to refile in response to Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint. *See supra* n.2.

[6] The Fifth Amended Complaint also contains two claims that Plaintiff acknowledges were previously dismissed and Plaintiff does not appear to be pursuing these claims as part of the Fifth Amended Complaint.

On February 7, 2022, Defendants filed the instant Motion. [#153] The Motion argues: (1) the excessive force claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994); (2) the individual Defendants are entitled to qualified immunity on the excessive force claims; (3) Plaintiff has failed to plausibly allege a claim for municipal liability or supervisory liability on his excessive force claims; and (4) the Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims if his federal claims are dismissed. [*Id.*] Plaintiff has responded to the Motion [#161] and Defendants have replied [#162]

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (alteration in original) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242,

1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* (quoting *Twombly*, 550 U.S. at 556). The Court's ultimate duty is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III. ANALYSIS

Through the Motion, Defendants seek dismissal of Plaintiff's excessive force claims arguing that such claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). [#153 at 9-15] Alternatively, Defendants argue that Agent Trimmer and Sergeant Maines are entitled to qualified immunity on Plaintiff's excessive force claims. [*Id.* at 15-18] Next, Defendants argue that Plaintiff's supervisory liability claim against the City of Lakewood and Chief McCasky should be dismissed for failure to state a claim. [*Id.* at 18-23] To the extent these federal claims are dismissed, Defendants argue that the Court should refrain from exercising supplemental jurisdiction over Plaintiff's state law claims. [*Id.* at 24] The Court addresses each of these arguments in turn.

A. *Heck*

Defendants maintain that Plaintiffs' excessive force claim, failure to prevent excessive force claim, and supervisory and municipal liability claims are precluded by *Heck v. Humphrey*, 512 U.S. 477 (1994). [#153 at 9-15] In *Heck*, the Supreme Court held that a prisoner's claim for damages is not cognizable under Section 1983 if a judgment in the plaintiff's favor would imply the invalidity of his conviction or sentence, unless the conviction or sentence already has been overturned or otherwise invalidated. 512 U.S. at 486-87. In other words, if the prisoner's success in the Section 1983 suit for damages "would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence." *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam).

Plaintiff makes three arguments against the application of *Heck*. First, Plaintiff argues that Defendants waived the application of *Heck* to Plaintiff's excessive force claims by not raising it in response to Plaintiff's earlier complaints. [#161 at 2-3] Second, Plaintiff maintains that the applicability of *Heck* to his excessive force claims has already been decided by the Tenth Circuit and the doctrine of law of the case thereby prohibits relitigating the issue. [*Id.* at 3-4] Finally, Plaintiff argues that his excessive force claims are not necessarily inconsistent with his convictions related to the July 31/August 1 incident, and therefore *Heck* does not apply. [*Id.* at 4-9] The Court addresses each argument below.

1. Waiver

First, Plaintiff argues that Defendants waived the application of *Heck* to Plaintiff's excessive force claims by not raising this argument in response to Plaintiff's earlier complaints. [*Id.* at 2-3] However, Plaintiff filed an amended complaint—his Fifth Amended Complaint—that asserted a claim not raised in his Fourth Amended Complaint; namely, his municipal and supervisory liability claim. That new claim is necessarily premised upon Agent Trimmer's allegedly unconstitutional use of excessive force, thus requiring the Court to conduct a *Heck* analysis as to the excessive force claim itself in order to address the municipal and supervisory liability claim. And, as detailed below, the Court would not have needed to address the *Heck* issue at all had Plaintiff not included the municipal and supervisory liability claim because the Court concludes that Plaintiff's individual excessive force claims should be dismissed based upon the second prong of the qualified immunity analysis. *See infra* Section III.B.

In any event, even if Defendants should have raised *Heck*'s application to the excessive force claims in their earlier motions to dismiss, "it is clear that [Defendants] could raise [their] new [*Heck*] arguments in a Rule 12(c) motion[,] [an] option . . . contemplated and permitted under Rule 12(h)(2)." *Gilbert v. USA Taekwondo, Inc.*, No. 18-cv-00981-CMA-MEH, 2020 WL 2800748, at *4 (D. Colo. May 29, 2020). "Therefore, if this Court refused to consider [Defendants' *Heck*] arguments now, the Court would only cause unneeded delay in a case that has already proceeded for over two years, requiring [Defendant] 'to take . . . additional steps [that] would [serve] no practical purpose under the circumstances' other than to add delay." *Id.* (quoting *Albers v. Bd. of Cnty. Comm'rs*

of Jefferson Cnty. Colo., 771 F.3d 697, 703 (10th Cir. 2014)). Accordingly, the Court will not apply the waiver doctrine to Defendants' *Heck* argument.

2. Law of the Case

Second, Plaintiff maintains that the applicability of *Heck* to his excessive force claims has already been decided by the Tenth Circuit's order remanding the case and, as a result, the doctrine of law of the case prohibits relitigating the issue. [#161 at 3-4] The Tenth Circuit has explained that "[t]he doctrine [of law of the case] applies to issues previously decided either explicitly or by necessary implication." *Copart, Inc. v. Admin. Rev. Bd.*, 495 F.3d 1197, 1201 (10th Cir. 2007) (alterations in original and quotation omitted). The Tenth Circuit's opinion on remand did not explicitly decide whether *Heck* applied to Plaintiff's excessive force (or municipal/supervisory liability) claims. *See generally St. George*, 2021 WL 3700918. Thus, this Court must determine whether the Tenth Circuit implicitly decided the issue.

The Tenth Circuit has identified three grounds under the law of the case doctrine by which a court may conclude that an issue was implicitly resolved by a prior appeal:

> (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; and (3) the issue is so closely related to the earlier appeal its resolution involves no additional consideration and so might have been resolved but unstated.

Copart, 495 F.3d at 1201-02 (quotation omitted). Here, none of these grounds applies.

First, resolution of the issue was not a necessary step in resolving the earlier appeal. As Plaintiff acknowledges, Defendants did not raise the application of *Heck* to Plaintiff's excessive force claims in their prior motion to dismiss. [#161 at 3] Nor is a *Heck* analysis necessary to assess the plausibility of an excessive force allegation under

Section 1983. *See St. George*, 2021 WL 3700918, at *4-*8 (stating that a "valid Fourth Amendment excessive-force claim requires a plaintiff to show both that a seizure occurred and that the seizure was unreasonable" and applying *Graham* and *Larson* factors to assess reasonableness prong (emphasis and quotation omitted)). Moreover, the Tenth Circuit has held that "it is arguable whether *Heck*'s limitation on § 1983 suits is jurisdictional" and therefore neither district courts nor the Tenth Circuit needs to sua sponte address *Heck*'s impact on a claim. *Johnson v. Spencer*, 950 F.3d 680, 697-98 (10th Cir. 2020). As a result, resolution of *Heck*'s impact on Plaintiff's excessive force claims was not a necessary step in resolving the earlier appeal.

Second, resolution of the issue would not abrogate the Tenth Circuit's prior decision. In the prior decision, the Tenth Circuit concluded that—assuming the truth of the allegations in Plaintiff's Fourth Amended Complaint—Plaintiff plausibly pled an excessive force claim. As detailed below, a finding in favor of Plaintiff on his excessive force claims would necessarily undermine the criminal jury's rejection of Plaintiff's defense of person affirmative defense. *See infra* Section III.A.3. But, unlike the Tenth Circuit addressing the plausibility of Plaintiff's Fourth Amended Complaint, the criminal jury was not required to accept Plaintiff's version of events. *Compare St. George*, 2021 WL 3700918, at *1 (accepting as true the facts alleged in the complaint for the purpose of assessing a motion to dismiss) *with U.S. v. Smalls*, 752 F.3d 1227, 1247 (10th Cir. 2014) (stating duty to "weigh conflicting evidence or consider witness credibility" is "delegated exclusively to the jury"). As a result, a conclusion that *Heck* bars Plaintiff's excessive force claim does not abrogate the Tenth Circuit's conclusion that Plaintiff plausibly *alleged* a constitutional violation.

Finally, the issue of whether *Heck* bars Plaintiff's excessive force claims is not so closely related to the earlier appeal that its resolution involves no additional consideration and so might have been resolved but unstated. As detailed below, resolution of the *Heck* issue involves a complex legal analysis that includes assessment of the jury instructions from Plaintiff's state criminal case. *See infra* Section III.A.3. Neither *Heck* nor the criminal jury instructions were mentioned *at all* in the prior appeal. *See generally St. George*, 2021 WL 3700918. Indeed, the Tenth Circuit did not even acknowledge Plaintiff's conviction resulting from the July 31/August 1 incident. *Id.* Thus, the Court cannot conclude that the Tenth Circuit resolved *Heck*'s application to Plaintiff's excessive force claims but left that resolution unstated.

Accordingly, the Court concludes that the doctrine of law of the case does not preclude an analysis of the application of *Heck* to Plaintiff's excessive force (and municipal/supervisory liability) claims.

3. Application of *Heck*

Finally, Plaintiff argues that his excessive force claim is not necessarily inconsistent with his convictions related to the July 31/August 1 incident. [#161 at 4-9] A jury found Plaintiff guilty of numerous charges related to the July 31/August 1 incident, including second degree attempted murder and two counts of assaulting a police officer with a weapon. [#62-1 (Judgment of Conviction and Disposition Record from *Colorado v. St. George*, No. 2016CR002509, Jefferson County, Colorado District Court)][7] In

[7] The Court takes judicial notice of the proceedings in the criminal action. "[F]acts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment." *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006). "This includes another court's publicly filed records 'concerning matters that bear directly upon the disposition of the case at hand.'" *Hodgson*

defending those charges, Plaintiff raised several affirmative defenses, including defense of person. [#168-1 at 14] With respect to that affirmative defense, the jury was instructed that Plaintiff "was legally authorized to use physical force upon another person without first retreating" if:

> 1. [H]e used that physical force in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of unlawful physical force by that other person, and
>
> 2. [H]e used a degree of force which he reasonably believed to be necessary for that purpose, and
>
> 3. [H]e was not the initial aggressor, or, if he was the initial aggressor, he had withdrawn from the encounter and effectively communicated to the other person his intent to do so, and the other person nevertheless continued or threatened the use of unlawful physical force.

[*Id.*] In finding that Plaintiff was guilty of second degree attempted murder, the jury concluded that the prosecution had "disprove[d], beyond a reasonable doubt, at least one of the above[-]numbered conditions." [*Id.*] Based upon the facts alleged in the Complaint, any conclusion that Agent Trimmer used unlawful and excessive force against Plaintiff would be inconsistent with the jury's rejection of Plaintiff's defense of person affirmative defense.

Plaintiff alleges that Agent Trimmer "sought to effect an illicit arrest" by luring Plaintiff out of his home and then unlawfully attempted to murder Plaintiff by firing upon him "with intent to kill." [#149 at ¶¶ 10-14] Plaintiff further alleges that only after Agent Trimmer shot him did he return fire on Agent Trimmer. [#149-1 at 28] Thus, if the allegations in Plaintiff's Complaint are true, Plaintiff only used "physical force in order to

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v. Farmington City, 675 F. App'x 838, 841 (10th Cir. 2017) (quoting *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007)).

defend himself . . . from what he reasonably believed to be the use or imminent use of unlawful physical force by [Agent Trimmer]." [#168-1 at 14 (first element of defense of person affirmative defense)]

Similarly, because Plaintiff alleges that he only returned fire in response to Agent Trimmer shooting with the intent to kill Plaintiff, Plaintiff necessarily alleges that he "used a degree of force which he reasonably believed to be necessary to defend himself." [*Id.* (second element of defense of person affirmative defense)] Finally, Plaintiff alleges that Agent Trimmer, not Plaintiff, was the initial aggressor.[8] [*Id.* (third element of defense of person affirmative defense)] Thus, acceptance of the allegations in Plaintiff's excessive force claims necessarily requires a rejection of the jury's second degree attempted murder verdict. As a result, *Heck* bars Plaintiff's excessive force claims. *Hooks v. Atoki*, 983 F.3d 1193, 1201 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 2764 (2021) (finding *Heck* barred plaintiff's excessive force claim where he had pleaded no contest to assaulting police officers, then alleged in his civil action that he "did nothing wrong")[9]; *Havens v. Johnson*, 783 F.3d 776, 783 (10th Cir. 2015) (finding *Heck* barred the plaintiff's excessive

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[8] This fact is underscored by the Tenth Circuit's conclusion in remanding the matter that "[Plaintiff's] carrying a gun in the low-ready position to protect himself as he walked around his house late at night to see who it was that wanted him to come outside and talk was not a hostile or threatening action." *St. George*, 2021 WL 3700918, at *7.

[9] The *Hooks* court determined:

> Mr. Hooks's no contest plea to two counts of assault and battery of a police officer means he admitted repeatedly hitting the officers before he was subdued. For Mr. Hooks to prevail on his excessive force claim with respect to these uses, he would need to prove that it was unreasonable for the officers to defend themselves by subduing him. In other words, Mr. Hooks would need to show he did nothing wrong. That inquiry would necessarily entail an evaluation of whether and to what extent Mr. Hooks used force against the officers, an inquiry that would take aim at the heart of his criminal plea, thereby violating the spirit of *Heck*.

Hooks, 983 F.3d at 1201 (quotation omitted).

force claim where the plaintiff was convicted of attempted first degree assault on an officer and his complaint alleged not that the officers used excessive force in response to that first degree assault, but that the plaintiff had not done anything wrong).

Accordingly, the Court respectfully RECOMMENDS that the Motion be GRANTED to the extent it seeks dismissal of Claims One and Two and that those Claims be DISMISSED WITHOUT PREJUDICE with leave to refile should Plaintiff's criminal conviction be overturned. Moreover, because Plaintiff's Ninth Claim for relief—alleging municipal and supervisory liability for excessive force against Chief McCasky and the City of Lakewood—is necessarily premised upon Agent Trimmer's alleged unconstitutional use of excessive force, Plaintiff's municipal and supervisory liability claims are likewise barred by *Heck*. *McCarty v. Gilchrist*, 646 F.3d 1281, 1289 (10th Cir. 2011) (applying *Heck* to toll municipal and supervisory liability claims until conviction was overturned when the underlying allegedly unconstitutional action, if determined to be unlawful, would have rendered a conviction or sentence invalid). The Court therefore respectfully RECOMMENDS that the Motion be GRANTED and that Claim Nine be DISMISSED WITHOUT PREJUDICE with leave to refile should Plaintiff's criminal conviction be overturned.

B. Qualified Immunity: Excessive Force Claims

In Claim One, Plaintiff seeks relief under 42 U.S.C. § 1983 for the alleged use of excessive force by Agent Trimmer, in violation of Plaintiff's Fourth Amendment rights. [#149 at 6-8] In Claim Two, Plaintiff seeks relief under Section 1983 for Sergeant Maines' alleged failure to prevent Agent Trimmer's use of excessive force. [*Id.* at 8-11] Agent Trimmer and Sergeant Maines each maintain that that they are entitled to qualified

immunity on these claims. [#153 at 15-18] As explained above, the Court believes that *Heck* bars Plaintiffs' excessive force claims. Nonetheless, because the Tenth Circuit remanded for an analysis of Defendants' qualified immunity defense, and in the event the district court rejects this Court's *Heck* analysis, the Court separately addresses Defendants' qualified immunity defense.

"Qualified immunity 'protects governmental officials 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.'" *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation omitted)). To defeat a claim of qualified immunity, a plaintiff must demonstrate: (1) that the facts alleged make out a violation of a constitutional right (the "constitutional violation prong"), and (2) that the right at issue was "clearly established" at the time of the defendant's alleged misconduct (the "clearly established prong"). *See Thomas v. Durastanti*, 607 F.3d 655, 662 (10th Cir. 2010).

With respect to the constitutional violation prong, "claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). "The reasonableness of the use of force is evaluated under an 'objective' inquiry that pays 'careful attention to the facts and circumstances of each particular case.'" *Cnty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (quoting *Graham*, 490 U.S. at 396). In particular, *Graham* identified the following factors the Court should consider: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat

to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "The operative question in excessive force cases is whether the totality of the circumstances justifie[s] a particular sort of search or seizure." *Mendez*, 137 S. Ct. at 1546 (quotation omitted). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

With respect to the second *Graham* factor, because Agent Trimmer used deadly force,[10] her use of force is only justified if she had "probable cause to believe that there was a *threat of serious physical harm to [herself]* or to others." *Estate of Larsen ex rel Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (quotation omitted). In assessing the degree of threat facing officers, the Tenth Circuit considers four non-exclusive factors (the "*Larsen* factors"). *Id.* These include:

> (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.

Id. In its earlier opinion, the Tenth Circuit concluded that Plaintiff had plausibly alleged facts satisfying the constitutional violation prong, but remanded the matter for the district court to analyze the clearly established prong. *St. George*, 2021 WL 3700918, at *8.

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[10] "Deadly force is such force that create[s] a substantial risk of causing death or serious bodily harm." *Clark v. Bowcutt*, 675 F. App'x 799, 806 (10th Cir. 2017) (emphasis omitted) (quoting *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1313 (10th Cir. 2009)). The Tenth Circuit has applied the reasonable use of deadly force standard where the plaintiff was shot but survived. *Havens*, 783 F.3d at 781-82.

The requirement that the right be clearly established presents a "demanding standard" intended to ensure the protection of "all but the plainly incompetent or those who knowingly violate the law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). In determining whether the constitutional right was clearly established at the time of the misconduct, the Tenth Circuit has explained:

> A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although plaintiffs can overcome a qualified-immunity defense without a favorable case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate. The dispositive question is whether the violative nature of the *particular conduct* is clearly established. In the Fourth Amendment context, the result depends very much on the facts of each case, and the precedents must squarely govern the present case.

Aldaba v. Pickens, 844 F.3d 870, 877 (10th Cir. 2016) (quotations and citations omitted). The Supreme Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *Wesby*, 138 S. Ct. at 591 n.8. The Tenth Circuit, however, has stated that "[o]rdinarily this standard requires either that there is a Supreme Court or Tenth Circuit decision on point, or that the 'clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.'" *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017) (quoting *Klen v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011)).

The Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced."

Wesby, 138 S. Ct. at 590 (quotation omitted). "[T]he 'specificity' of the rule is especially important in the Fourth Amendment context." *Id.* (quotation omitted).

Here, Plaintiff cites a single Tenth Circuit case[11] and two out-of-circuit cases in support of his assertion that the right was clearly established.[12] [#161 at 9-12 (*citing Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016) ("*Pauly I*"), *judgment vacated by White v. Pauly*, 137 S. Ct. 548 (2017);[13] *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013); *George*

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[11] Plaintiff also cites to *Jiron v. City of Lakewood*, 392 F.3d 410 (10th Cir. 2004), but he does not appear to cite *Jiron* for the proposition that it clearly establishes the right at issue. [#161 at 12] In any event, the *Jiron* Court found that the plaintiff had "failed to allege facts supporting the violation of a constitutional or statutory right." *Id.* at 419. As a result, the Court fails to see how *Jiron* could clearly establish the right at issue in this case.

[12] As another court in this district has recognized:

> The Court is mindful that the Tenth Circuit's admonition that a plaintiff bears the burden of citing to the Court clearly established law, *see Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010), typically involves plaintiffs who are represented by counsel. *See, e.g.*, *Gutierrez v. Cobos*, 841 F.3d 895, 903 (10th Cir. 2016); *Rojas v. Anderson*, 727 F.3d 1000, 1005-06 (10th Cir. 2013); *Smith v. McCord*, 707 F.3d 1161, 1162 (10th Cir. 2013). However, the Tenth Circuit has reversed a trial court's dismissal of a pro se plaintiff's excessive force claim—where the trial court found the plaintiff had failed to identify a case demonstrating his right was clearly established—by itself pointing to a Supreme Court case sufficiently similar to the facts alleged and finding the plaintiff's right was clearly established. *See Ali v. Duboise*, 763 F. App'x 645, 651–52 (10th Cir. 2019).

Brandt v. Crone, No. 19-CV-03103-MEH, 2021 WL 681441, at *5 (D. Colo. Feb. 22, 2021), *aff'd*, No. 21-1093, 2022 WL 898761 (10th Cir. Mar. 28, 2022). "Therefore, the Court has conducted an additional inquiry to determine whether the relevant law was clearly established as of the dates of the events." *Id.*

[13] *Pauly I* was issued on February 9, 2016. 814 F.3d 1060. The incident at the center of the instant case occurred on July 31/August 1, 2016. [*See generally* #149-1] On January 9, 2017, the Supreme Court vacated *Pauly I*, holding that "[o]n the record described by the Court of Appeals, [the defendant officer] did not violate clearly established law." *White v. Pauly*, 137 S. Ct. at 552. Nonetheless, the Supreme Court remanded to the Tenth Circuit to allow the Tenth Circuit to consider an alternative ground for affirmance. *Id.* On October 31, 2017, the Tenth Circuit issued an opinion in *Pauly v. White*, 874 F.3d 1197 (10th Cir. 2017) (*Pauly II*), finding that the right at issue was not clearly established.

v. Morris, 736 F.3d 829 (9th Cir. 2013)] The Court agrees with Defendants that these cases do not clearly establish the right at issue here.

In *Pauly I*, Daniel Pauly became involved in a road rage incident with two females on the highway, one of whom called 911 to report a drunk driver. 814 F.3d at 1065. A state police dispatcher notified Officer Truesdale about the 911 call. *Id.* Officer Truesdale met with the women who told him that Daniel was driving recklessly. *Id.* By that time, Daniel was no longer on the scene. *Id.* Officers White and Mariscal joined Officer Truesdale and the three officers agreed that they lacked probable cause to arrest Daniel and that no exigent circumstances existed at the time. *Id.* Officers Mariscal and Truesdale proceeded to Daniel's residence while Officer White remained behind. *Id.* at 1065-66. Officers Mariscal and Truesdale approached the main house at Daniel's residence but did not see Daniel's vehicle. *Id.* at 1066. They then decided to approach the second house to attempt to locate Daniel's vehicle. *Id.* As they walked toward that second house, the officers did not activate their security lights and only intermittently used their flashlights. *Id.* When they located Daniel's vehicle, they notified Officer White to join them. *Id.*

At approximately 11:00 p.m., Daniel and his brother Samuel could see "through the front window two blue LED flashlights, five or seven feet apart, coming toward the house." *Id.* Daniel could not tell who was holding the flashlight, but he feared it could be intruders related to the prior road rage altercation. *Id.* The brothers hollered several times

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Because *Pauly I* (but not *Pauly II*) was issued prior to the incident at issue in this case, and because the Supreme Court did not reverse the *Pauly I* Court's analysis of the excessive force claim, the Court considers whether *Pauly I* clearly established the right at issue here.

seeking identification. *Id.* In response, the officers laughed and said: "Hi, (expletive), we got you surrounded. Come out or we're coming in." *Id.* Though Officer Truesdale shouted once "Open the door, State Police, open the door," Daniel did not hear anyone say "State Police" until after the altercation was over. *Id.*

"Believing that an invasion of their home was imminent, Samuel retrieved a loaded handgun for himself as well as a shotgun and ammunition for Daniel." *Id.* One of the brothers then hollered, "We have guns." *Id.* While Officers Truesdale and Mariscal attempted to coax the brothers outside, Officer White arrived at the scene and approached the house in the back, using his flashlight periodically. *Id.* Officer White heard the brother say, "We have guns" and he therefore drew his weapon and "took cover behind a stone wall fifty feet away from the front of the brothers' house." *Id.* Daniel then stepped partially out of the back door and fired two warning shots while screaming loudly to warn anyone off. *Id.* at 1066-67. A few seconds later, Officers Mariscal and White observed Samuel open the front window and point a handgun in Officer White's direction. *Id.* at 1067. Four to five seconds later, Officer White shot Samuel "from his covered position fifty feet away." *Id.*

On behalf of Samuel's estate, his father brought an action claiming that the officers had used excessive force in violation of the Fourth Amendment. *Id.* at 1064. The officers moved for summary judgment; asserting qualified immunity. *Id.* The district court denied their motions and the Tenth Circuit affirmed that decision. *Id.*

Three significant differences exist between *Pauly I* and the instant case, such that *Pauly I* does not clearly establish the right at issue. First, in *Pauly I*, it was "unclear from the record what, if any, crime was committed during the road rage incident" and "[a]t best,

the incident might be viewed as a minor crime such as reckless driving while intoxicated." *Id.* at 1077. As a result, the *Pauly I* Court concluded that the first *Graham* factor "weigh[ed] in favor of Plaintiff's estate." *Id.* By contrast here, Plaintiff "had committed two offenses: unlawful sexual contact and attempted murder" and, even if the officers did not believe they had probable cause to arrest Plaintiff for these violent offenses, the first *Graham* factor nonetheless "weighs somewhat in favor of the officers." *St. George*, 2021 WL 3700918, at *5.

Second, and perhaps more importantly, the *Pauly I* Court emphasized that Officer White was behind cover fifty feet away before Samuel even opened the window, and concluded that "for purpose of analysis on summary judgment Samuel Pauly did not pose an immediate threat to the safety of the officers or others." *Pauly I*, 814 F.3d at 1077-78 (emphasis and quotations omitted). Indeed, the *Pauly I* Court noted that "not only was Officer White fifty feet away from Samuel Pauly, Officer White was sequestered behind a rock wall and Samuel was aiming his gun through the open window of a lighted house toward a target obscured by the dark and rain." *Id.* at 1081. By contrast here, "[Plaintiff] and [Agent] Trimmer were separated at most by the width of a pickup truck and some portion of a communal driveway [and Plaintiff] was close enough to [Agent] Trimmer to inflict serious injury on short notice." *St. George*, 2021 WL 3700918, at *7.

Third, in this case—unlike in *Pauly I*—the officers at the scene identified themselves to Plaintiff over the phone on at least three occasions. [#149-1 at 18-20, 24] Crucially, it was Agents Brennan and Muller—not Agent Trimmer or Sergeant Maines—who called Plaintiff. [#149-1 at 18-20, 24] Plaintiff alleges that he was suspicious of the calls because they came from a blocked number [*id.* at 18 ("Blocked Caller ID is not the

activity of genuine police")], but admits that a phone call from a number associated to a police department or police officers with displayed Caller-ID is a sufficient way for police to announcement their presence. [*Id.* at 20] Yet there is no indication that Agent Trimmer or Sergeant Maines knew that the circumstances of the call made Plaintiff doubt whether he was contacted by actual police, nor is there any allegation that they were made aware by radio contact that Plaintiff had questioned the authenticity of Agents Brennan and Muller's claims. [*See Id.* at 22 (alleging only that radio traffic said Plaintiff was told to come out and talk); 23 (stating that Agent Muller's report said that Plaintiff did not believe it was the police, but not indicating that this information was conveyed to Agent Trimmer or Sergeant Maines); 23 (conclusory allegation that "all officers" were aware that they had "insufficiently identified themselves")] The Court thus strains to infer that *Agent Trimmer* was aware that Plaintiff's knowledge of police presence was in question.[14]

Indeed, the Fifth Amended Complaint alleges that Agent Trimmer was aware that her supervisors had spoken to Plaintiff by phone [#149-1 at 24], and that "[n]o supervisor on scene ever radio[ed] to Officers on scene, 'We need to shout out 'Lakewood PD' and order this man to put down his weapon" [*id.* at 26]. Instead, Agent Trimmer had been informed over the radio that "[Plaintiff was] being threatening on the phone." [*Id.* at 24] She then heard Plaintiff pump the action of his shotgun and was told that Plaintiff was

[14] Plaintiff criticizes the officers for not further identifying themselves when he stepped outside [*id.* 18-24], but he does not explain why (or if) he would have been any more likely to believe an individual purporting to be an officer in the dark of night than the same person over the phone. And while the officers can certainly be criticized for not employing their flashing lights—which would have indisputably identified them as police—Plaintiff has not alleged that this was a decision made by Agent Trimmer, as opposed to one made by her supervisory officers. *Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011) (stating personal participation is a requirement of a Section 1983 claim).

approaching her position. [*Id.*] Thus, her next opportunity to further identify herself came: (1) as Plaintiff was approaching her with a loaded and armed weapon, (2) after she was informed that Plaintiff had received telephone notice that police were on site, (3) after receiving radio communication that Plaintiff was behaving in a threatening manner, and (4) as Plaintiff was becoming "close enough to [Agent] Trimmer to inflict serious injury on short notice." *St. George*, 2021 WL 3700918, at *7. This differs drastically from the facts in *Pauly I*, where Officer White shot Samuel: (1) after arriving late and without announcing himself, (2) without knowing whether the police presence had been announced at all, and (3) from a covered position 50 feet away from any threat. *Pauly I*, 814 F.3d at 1077-78.

These distinctions are critical. Given these distinctions, the Court cannot conclude that *Pauly I* is "clear enough that every reasonable official would interpret it to establish the particular rule [Plaintiff] seeks to apply." *Wesby*, 138 S. Ct. at 590. Accordingly, the Court concludes that *Pauly I* does not clearly establish the right at issue here.

That then leaves the Court with the two out-of-circuit cases cited by Plaintiff. In *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013), the plaintiff lived in a mobile home in rural North Carolina. At about 11:00 p.m., a neighbor called 911 to report a noisy altercation, like "two males screaming at each other," on the property. *Id.* at 155 (internal quotations omitted). "The dispatcher did not indicate whether the men were armed or otherwise dangerous." *Id.* Two officers in separate vehicles (one a marked patrol car) drove to the vicinity of the home and approached it; the officers heard screaming coming from the property and saw a man (not the plaintiff) on the home's back porch who appeared to see the two cars as they arrived. *Id.* One officer tapped on the window to alert those inside to their presence, but they failed to identify themselves as officers.

See id. Responding to the tapping, the plaintiff "called out for anyone in the yard to identify himself, but no one responded." *Id.* He then emerged from his back door "[w]ith the butt of [his shotgun] in his right hand and its muzzle pointed toward the ground." *Id.* The plaintiff had made "no sudden moves," "made no threats," and "ignored no commands." *Id.* at 159. Without warning, the officers shot him multiple times. *Id.* at 156.

The plaintiff brought suit asserting various federal and state claims. *Id.* The officers moved for summary judgment asserting qualified immunity. *Id.* The district court granted summary judgment in favor of the officers on most counts, but denied it on the plaintiff's excessive force claim and certain state law claims. *Id.* The Fourth Circuit affirmed the district court's denial of qualified immunity. *Id.* at 158-60.

In *George*, Carol George called 911 exclaiming "No!" and "My husband has a gun!" 736 F.3d at 832. Deputies were dispatched to the residence for a domestic disturbance involving a firearm. *Id.* They met Carol at the front door and she asked them to be quiet and not to scare her husband, Donald, as he was on the patio with a gun. *Id.* The deputies attempted to establish a perimeter around the house. *Id.* They observed Donald exit the door to a balcony using a walker and holding a firearm. *Id.* at 832-833. One of the deputies then identified himself as a law enforcement officer and instructed Donald to show his hands. *Id.* at 832. Twelve seconds after the deputies broadcast that Donald had a firearm, the dispatch log records "shots fired." *Id.* at 833. After Donald fell to the ground, a deputy continued to shoot and, in total, three deputies fired approximately nine shots, killing Donald. *Id.* Carol brought two constitutional claims including a claim for excessive force. *Id.* The deputy defendants moved for summary judgment asserting

qualified immunity. *Id.* The district court denied summary judgment and the Ninth Circuit affirmed. *Id.* at 836-39.

Once again, however, important differences exist between *Cooper* and *George* and the instant case. In *Cooper*, as in *Pauly I*, it is unclear that any crime had even occurred, as the officers were simply responding to two males screaming at each other. 735 F.3d at 155. At most, the officers were aware of a potential minor crime, such as disturbing the peace. Similarly, in *George*, "it [wa]s undisputed that [Donald] had not committed a crime." 736 F.3d at 838. Thus, the first *Graham* factor weighed against the officers in both cases. By contrast here, Plaintiff "had committed two offenses: unlawful sexual contact and attempted murder" and, even if the officers did not believe they had probable cause to arrest Plaintiff for these violent offenses, the first *Graham* factor nonetheless "weighs somewhat in favor of the officers." *St. George*, 2021 WL 3700918, at *5. Indeed, the *Cooper* Court emphasized that the officers "had no . . . information [besides the plaintiff holding a shotgun in one hand with the muzzle pointed at the ground] that [the plaintiff] might harm them." *Cooper*, 735 F.3d at 159. By contrast here, the officers had information that Plaintiff had fired a shot at an escort earlier in the evening. *St. George*, 2021 WL 3700918, at *1. Moreover, unlike in *Cooper*, the officers in this case had attempted to notify Plaintiff—on several occasions—of their presence. 735 F.3d at 155. And unlike *George*, there is evidence here that Agent Trimmer believed that Plaintiff had been behaving in a threatening manner toward the officers. 736 F.3d at 832-33.

Given the lack of similarity between these two cases and the instant case, the Court cannot conclude that the clearly established weight of authority from outside the Tenth Circuit would have put a reasonable official in Agent Trimmer's position on notice

that her use of force was excessive. *Bird v. Martinez-Ellis*, No. 21-CV-0139-SWS, 2022 WL 868179, at *8 (D. Wyo. Jan. 28, 2022) ("Neither does the precedent from four other circuits constitute a clearly established weight of authority which would have put a reasonable official in Warden Pacheco's position on notice that his supervisory conduct related to the COVID-19 vaccine distribution would effect a due process violation." (quotation omitted)); *Walker v. Jemez Mountain Sch. Dist.*, No. CV 19-714 JAP/GBW, 2020 WL 3402058, at *5 (D.N.M. June 19, 2020) ("In the Court's opinion, cases from three circuits—which are not on all fours with the facts here—do not constitute clearly established weight of authority from other courts[.]" (quotation omitted)); *Padilla v. W. Las Vegas Indep. Sch. Dist.*, No. CV 04-916 WJ/DJS, 2006 WL 8444321, at *8 (D.N.M. Mar. 3, 2006) ("Further, two cases from other circuits are clearly not on point, nor do they constitute a weight of authority from other courts." (quotation omitted)); *Prison Legal News, Inc. v. Simmons*, 401 F. Supp. 2d 1181, 1192 (D. Kan. 2005) ("While there is no bright line of demarcation, a synthesis of [Tenth Circuit] cases shows that ordinarily a court would expect to see cases from at least three other circuits before concluding that a right is clearly established based on the clearly established weight of authority from other courts. . . . [I]n order for the law to be clearly established by a lesser showing, the right at issue ought to be fairly obvious." (quotation and citation omitted)); *cf. Ullery v. Bradley*, 949 F.3d 1282, 1297 (10th Cir. 2020) (finding the right clearly established by the authority of six circuits).

Accordingly, the Court concludes that neither Tenth Circuit precedent nor the clearly established weight of authority from other courts at the time of the incident clearly establish the unconstitutionality of Agent Trimmer's actions. As a result, to the extent the

district court does not dismiss Claim One based upon *Heck*, the Court respectfully RECOMMENDS that the Motion be GRANTED to dismiss Claim One based upon qualified immunity. Similarly, because it was not clearly established that Agent Trimmer's use of force was unconstitutional, it was likewise not clearly established that Sergeant Maines had a duty to intervene in preventing Agent Trimmer's use of force. Accordingly, to the extent the district court does not dismiss Claim Two based upon *Heck*, the Court respectfully RECOMMENDS that the Motion be GRANTED to the extent it seeks dismissal of Claim Two based upon qualified immunity.

C. State Tort Claims

Plaintiff also asserts various state tort claims against all Defendants. [#149] A district court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. 1367(c)(3); *see also Gaston v. Ploeger*, 297 F. App'x 738, 746 (10th Cir. 2008) (concluding that the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over a plaintiff's remaining state-law negligence claims and stating that "we have repeatedly recognized that this is the preferred practice"). Because the Court recommends that all of Plaintiff's federal claims be dismissed, the Court further RECOMMENDS that the Court decline to exercise jurisdiction over Plaintiff's state tort claims and that those claims be DISMISSED WITHOUT PREJUDICE to bringing such claims in state court. *See Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995) (holding "[n]otions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary," and such notions support a refusal to exercise supplemental jurisdiction over state law claims when the federal claims have been

dismissed (quotation omitted)); *Fitzgerald v. Corrs. Corp. of Am.*, No. 08-cv-01189-CMA-KMT, 2009 WL 1196127, at *5 (D. Colo. Apr. 30, 2009) ("[T]he Tenth Circuit has indicated that if federal claims are dismissed before trial, as in the instant case, leaving only issues of state law, the Court should decline to exercise jurisdiction over the state claims."), *amended on other grounds by*, 2009 WL 1765672 (D. Colo. June 22, 2009).

IV. CONCLUSION

For the foregoing reasons, the Court respectfully **RECOMMENDS** that Defendants' Motion to Dismiss [#153] be **GRANTED** and that Plaintiff's Fifth Amended Complaint be **DISMISSED WITHOUT PREJUDICE**.[15]

DATED: July 11, 2022

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

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[15] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).

APPENDIX D

FILED
United States Court of Appeals
Tenth Circuit

August 20, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC ST. GEORGE,

Plaintiff - Appellant,

v.

CITY OF LAKEWOOD, COLORADO, et al.,

Defendants - Appellees.

No. 22-1333
(D.C. No. 1:18-CV-01930-WJM-STV)
(D. Colo.)

ORDER

Before **MORITZ**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

This matter comes before the court on Appellant's Motion to Extend the Time to File a Petition for Rehearing En Banc. The motion is granted. Any petition for rehearing shall be filed on or before September 20, 2024.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D

No. 22-1333

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Eric St. George,

Plaintiff-Appellant

v.

The City of Lakewood Colorado, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado (Civil Action No. 18-cv-01930-WJM-STV Judge William J. Martinez)

PETITION FOR REHEARING EN BANC

Eric St. George, pro-se
c/o FCF--180161
PO Box 999
Canon City, CO 81215-0999

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EXCEPTIONAL IMPORTANCE

Mr. St. George's case raises a number of questions of exceptional importance that merit the attention of the full court en banc. The safety and security of the citizenry from police violence is a matter of supreme importance; the Tenth Circuit contains four of the top seven states with the highest per capita police shootings according to the Proceedings of the National Academy of Sciences.[1] The development of the Qualified Immunity doctrine is a matter of exceptional importance. The doctrine leaves the citizen feeling powerless in a nation that values justice above all else; the doctrine emboldens the conduct of police that would use force with reckless abandon. Clarity to police who would choose to act within the confines of the law is due to them. Maintaining the proper application of Supreme Court clearly established law is a matter of exceptional importance. The right of an aggrieved plaintiff to trial being summarily abrogated in the face of substantially disputed fact is a matter of exceptional importance. (eg. Can police substitute a cell phone call from a blocked Caller ID for knock-and-announce, a shouted identification, and shouted use-of-force warning?) Addressing all of the issues that are presented in the district court below in an appellate review is of exceptional importance. Relegating raised theories of the case to dismissal in footnotes denies an appellant due process. This dissuades pro-se litigants from trying to vindicate their claims, believing they will be ignored by the courts.

Use of the Heck Doctrine in a manner that promotes weaponization of the courts in an era when weaponization of the judicial system is top-of-mind in the media is an issue of exceptional importance. Police agencies will continue to prosecute their victims as long as the tactic functions as a shield to liability and accountability for their conduct. For the foregoing reasons and likely many more that have been omitted, this court must vote to rehear this case en banc.

1. See Knox, D., et al., "Making inferences about racial disparities in police violence." Proc. Natl. Acad. Sci. Vol. 117, pp. 1261-62 (2020)
See Esposito, Michael et al., "Risk of being killed by police use of force in the United States by age, race-ethnicity, and sex." Proc. Natl. Acad. Sci. 116(34): 16793-16798.

PROCEDURAL HISTORY

The events giving rise to this case occurred in the evening of 31 July 2016 into the early morning. On 30 July 2018 the complaint in this case was filed. The complaint underwent several ordered amendments early in the litigation, with the FAC [DOC 82] being most relevant. The FAC was dismissed on 30 June 2020, and the dismissal reversed on 20 August 2021 in the first appeal. (2021 U.S.App.LEXIS 24934) The judge below ordered another amendment in response to a motion to reinstate an erroneously dismissed Count Nine (2021 U.S.Dist.LEXIS 235617); this gave rise to the 5AC. The 5AC was dismissed 21 September 2022 (2022 U.S.Dist.LEXIS 170903). The instant appeal followed and the judgment issued 7 August 2024 (2024 U.S.App.LEXIS 19757). Mr. St. George sought an expansion of time to petition for rehearing en banc on 14 August 2024. This petition follows.

INTRODUCTION

Mr. St. George was ambushed and shot during a backyard raid at his home by Lakewood Police. The officers ordered him from his house by cellphone; their caller ID blocked. When he twice emerged unarmed to investigate, LPD hid and refused to announce themselves. When Mr. St. George exited a third time, armed with a shotgun, LPD laid in wait and chose not to shout out a required warning of potential--imminent--force. When he began to walk the perimeter of his home he came into view of a hiding Officer Trimmer who opened fire without warning. Mr. St. George defended himself to the extent he was able. In an attempt to avoid liability for the assault, the LPD referred Mr. St. George to the sympathetic local prosecutor to be convicted of crimes. The resistance of the courts to permit this case to be put to a jury insures that the only means to survive contact with law enforcement is to never have contact with law enforcement. This petition seeks to reverse the unconstitutional dismissal of Mr. St. George's civil action against the Lakewood Police. He prays the Court rehear the appeal en banc.

SUMMARY OF THE ARGUMENT

(1) Pauly v. White (Pauly I), 814 F.3d 1060 (10th Cir 2016) was clearly established law in the Tenth Circuit from 9 February 2016 until 9 January 2017. It drew clearly established authority from Garner, Allen, Graham, Larsen, Bliss, Heller, and many more. To use Pauly I's later reversal in the analysis of Mr. St. George's 31 July 2016 assault by Lakewood Police violates Tolan v. Cotton, 512 US @ 656. Pauly I is as on-point to Mr. St. George's case as cases come; no distinguishing material facts exist. Mr. St. George's was an "obvious case" of violation of clearly established law.

(2) Mr. St. George presented to the district court deliberate and reckless conduct that creates a perceived need to use force as a rebuttal to the defendants' Heck Doctrine defense. Mr. St. George presented to the district court the Mutual Combat theory as rebuttal to the defendants' Heck Doctrine defense. Neither theory was considered by the panel. Mr. St. George did not waive or abandon these theories for appellate review as asserted by the panel. See DOC 161, 179, 186.

ARGUMENT

I. The method of the Panel's analysis of Mr. St. George's reliance on Pauly I violates Tolan v. Cotton

Pauly I was clearly established law on July 31, 2016, the night of Lakewood Police Department's ambush and assault on Mr. St. George. This was fully litigated and settled in the District Court below. See St. George v. City of Lakewood, 2022 U.S.Dist.LEXIS 171481 *34 n.13. The Magistrate's recommendation read: "Pauly I was issued on February 9, 2016. 814 F.3d 1060. The incident at the center of the instant case occured on July 31/August 1 2016. On January 9, 2017, the Supreme Court vacated Pauly I, holding that 'on the record described by the Court of Appeals, [the defendant officer] did not violate clearly established law.' White v. Pauly 137 S.Ct. @ 552." The panel judgment analysis reads, "As an initial matter, the obvious problem with Pauly is that it was vacated by the Supreme Court, which ruled that White did not violate clearly established law." St. George, 2024 U.S.App.LEXIS 19757 *16.

In Tolan v. Cotton, 512 US 650, 656 (2014) the SCOTUS wrote, "The salient question is whether the state of the law at the time of an incident provided 'fair warning' to the defendants that their alleged conduct was unconstitutional." This was in the context of a QI analysis determination of the clearly established second prong inquiry. This Dist. has cited to the very principle as recently as last month in Thompson v. Mericle, 2024 U.S.Dist.LEXIS 148576 *7. "[White v. Pauly], decided after the shooting at issue, is of no use in the clearly established inquiry." City of Tahlequah v. Bond, 595 US 9, 13 (2021); Brosseau v. Haugen, 543 US 194, 200 n.4 (2004). That Pauly I was reversed five months after the LPD ambush of Mr. St. George is irrelevant.

The Pauly I holdings that were important to this incident were: (1) disputed facts remained as to whether police adequately identified themselves, necesitating denial of QI, (2) reasonable officers should have known their conduct would cause the Paulys to defend their home, and (3) the officers failed to warn.

The LPD did not properly identify themselves

The panel's decision reads: "St. George now denies that the officers identified themselves..." St. George, 2024 U.S.App.LEXIS 19757 *17 n.3 Mr. St. George has always argued that, like in Pauly I, the police identification was so inadequate as to constitute no identification. In Pauly I, police did indeed shout "State Police!" Pauly I @ 1066. We will never know if Samuel heard this, and Daniel denied

that he had. In three phone calls with blocked Caller IDs, LPD claimed to be police. Yet, when Mr. St. George tried to corroborate the callers' claims, LPD hid all indicia of legitimate police activity. No police cars, no police lights, no police badges, no police orders shouted. Indeed, we know Mr. St. George did not believe the callers after he had walked outside twice to look for police, because Sergeant Muller (the caller) told us so in his interview. This was all well chronicled in the Complaint, in responses below, in the first appeal, in the oral argument before Hartz, Phillips, and Tymkovich, and in the second appeal. Whether or not LPD adequately identified themselves is a disputed fact that cannot be decided in a qualified immunity context. "...issues of disputed material fact are dispositive of the qualified immunity inquiry..." Gonzales v. Duran, 590 F.3d 855, 860 (10th Cir 2009)

If the LPD had shouted out "Lakewood Police!" even just once, Mr. St. George could be forced to concede this line of argument. All officers have confessed that no shouts of identification were made, ever, even when Mr. St. George exited his home and was visibly unarmed. All neighborhood witnesses corroborated a lack of any announcements prior to gunfire; no shouts, no identifications. What will pass for "adequate identification" next time? This is a dangerous slippery slope down. A police text message? A police tweet? A police email? "Come outside. -Lakewood Police" Imagine being downtown in a restaurant, a man in plain clothes says, "Mr. St. George, there are police outside who need to speak with you." You exit the front door, finding nobody. You walk toward your car parked on a dark side street. You draw a concealed firearm because you're frightened of an ambush, and as you reach your vehicle a shot rings out. Would the stranger's advisement of police suffice? Of course not. Police ID is person-to-person, a shout out loud, a badge, blue and red police lights. The full court must rehear to resolve this conflict.

LPD created these circumstances

Just as in Pauly I, the Lakewood Police surrounded Mr. St. George's home in the middle of the night, failed to adequately identify themselves, and never issued a shouted warning before using force. Both sets of officers saw their target through the windows of their own homes. Both White and Trimmer were hidden behind impenetrable cover. The similarities between the facts of Pauly I and in St. George are well outlined in the briefing from the first appeal, 20-1259. St. George argued this further below in [DOC 161], and in the Objection and Amended Objection to the Recommendation of the Magistrate [DOC 171]. The deliberate and reckless conduct that created this incident; the hiding, the failure to knock-and-announce, failure to warn

before using force, were the totality of the circumstances that must be considered because it was clearly established law that an officer is responsible for deliberate and reckless conduct that precipitates the need to use force.

" 5 seconds" Pauly I held that five seconds is sufficient to issue a warning before force is used. LPD had six minutes after Mr. St. George armed himself. Nothing about this incident unfolded quickly. The five second holding was based on clearly established law that preceeded Pauly I. (Garner, etc.) This was controlling law at the time and a proper QI analysis would evaluate the instant case in light of this holding. This was well presented below in DOC 161, the objections (plural), and the briefing instantly in this appeal.

Distinguishable

The panel strains itself to distinguish the facts of Pauly I from Mr. St.George's case. In the QI analysis, there is to be an objective inquiry that pays careful attention to the facts and circumstances of the particular case. Graham, 490 US @ 396. The facts are to be taken in the light most favorable to the party asserting the injury and "all justifyable inference to be drawn in his favor." Tolan v. Cotton, 572 US @ 651-57. The panel's analysis does not follow these dictates of Tolan. In a fact-dependent QI inquiry it is critical that the facts be correctly apprehended.

"All cases are factually distinguishable at some level. Lawyers learned in law school that the true 'white horse' case that is 'on all fours' with the facts of a given live dispute rarely, if ever exists." In re Bading, 376 B.R. 143, 151 n.9 (W.D. Tex. 2007) "Most cases are factually distinguishable in some respect." (in a general "clearly established law" inquiry context) Williams v. Taylor, 529 US 362, 377 n.9 (2000) "Virtually all cases are factually distinguishable, but that does not vitiate the underlying rule of law to be derived from [a prior decision.] U.S. v. Schuster, 684 F.2d 744, 748 (11th Cir 1982) The relevant inquiry is if the distinguishing facts are **material**.

The panel says that the police were investigating a reported road rage incident in Pauly 1, versus a reported sex misdemeanor and discharge of a firearm in St. George. The material fact is that when police arrived in both instances, there was no activity. The Paulys were in their home watching TV, St. George drinking a glass of wine at his computer. The police deliberately and recklessly created a perceived need to use force in both cases by failure to knock-and-announce, failure to adequately identify themselves, failure to warn before use of force, appearing to be intruders related to immediately preceeding confrontations (a road rage incident, a theft by a prostitute, respectively) There is no material difference in these facts.

In Pauly I, the police did shout "State Police!" and the adequacy of this was disputable. In St. George, the police made calls from a blocked Caller ID, and when St. George followed the caller's demand to come outside, police hid themselves and laid in wait to ambush. This is also an inadequate form of announcement and identification. "Knock and Announce" is a common-law imperative pursuant to Wilson v. Arkansas, 514 US 927 (1995). Announcement of presence is common sense, and one must be present and announce it aloud. No precedent exists anywhere to support that a phone call from a blocked Caller ID and hiding fulfills the knock-and-announce requirement. This is an issue of disputed material fact.

In Pauly I, Officer White took cover behind a rock wall and in St. George Trimmer hid behind a truck. The rock wall was fifty feet away from Samuel. Trimmer's truck was around the corner of a building and much more than fifty feet from St. George's patio. Trimmer's deliberate and reckless decision to not shout out a warning and to remain hiding in wait to ambush while St. George approached her only makes her more culpable. There is no material difference between a rock wall and a truck around a corner of a building. Would an earthen berm be distinguishable? A masonry brick wall? A herd of cattle? No. A "protected position" is a protected position irrespective of what it is comprised. In Pauly I, Mariscal took cover behind a truck just like Trimmer. This evaluation has been considered before.

The panel's fourth distinguishing proposition is disgusting. That Samuel Pauly was cruelly slaughtered at the hands of NM police and Mr. St. George survived the LPD attack is not a material difference to be considered in a QI analysis. Are police officers permitted to shoot people in the legs as a less-than-lethal form of force? Are they to be granted QI whenever their uses of force fail to kill? "Deadly force is 'force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm.' Purposefully firing a firearm in the direction of another person... constitutes deadly force." Pauly I @ 1070 n.4 citing Jiron v. City of Lakewood. Devon Trimmer shot Mr. St. George with intent to kill, she merely missed her mark; Mr. St. George suffered serious bodily harm. Trimmer continued to fire at Mr. St. George as he fled, bleeding.

From an objective viewpoint considering material differences, viewing the universe of facts in the light most favorable to Mr. St. George and drawing justifiable inferences in his favor as the law demands, there is no daylight between Pauly I and St. George. Mr. St. George implores Judge Moritz to read the dissent written in Pauly I anew with the instant case and facts in mind. That dissent was

the blueprint for the SCOTUS decision in White v. Pauly.

> "Undeniably, Samuel Pauly's tragic shooting should never have occurred. So at first glance, it's hard to find fault with the majority's lengthy and compelling discussion of Officers Mariscal's and Truesdale's questionable actions leading up to the tragedy. But the majority's preliminary focus on those two officers, though effectively placed, is legally misplaced. That's because neither Officer Mariscal nor Officer Truesdale shot Samuel Pauly. Instead, Officer White fired the bullet that killed Samuel Pauly..."

In the instant case, Maines and Trimmer were akin to Mariscal and Truesdale. They hadn't arrived late. They had personally failed to identify themselves. They'd been on the scene for three hours! Nothing occurred "split-second." And Trimmer did shoot Mr. St. George. The upshot of Judge Moritz's dissent is that had Mariscal or Truedale shot Pauly, QI would be denied to them, but White shot Samuel Pauly. Here, Trimmer and Maines engaged in the same conduct as Mariscal and Truesdale, and if differentiable more culpable, and Trimmer shot Mr. St. George.

Mr. St. George further asks the court re-read Justice Ruth Bader Ginsburg's concurrence in White v. Pauly. She was very concerned about the adequacy of the police identification, in spite of a shout of "State Police!" as a fact in the record. An additional concern was the lack of an order to drop the weapon being made to Samuel. In St. George, zero shouts or orders were ever made, a fact confessed by all LPD officers.

The panel ignores fully any discussion of the LPD's deliberate and reckless conduct, laying in wait to ambush, and never once shouting any identification or warning. The panel reiterates repeatedly that Mr. St. George was "advancing" on Trimmer. Mr. St. George never left his front stoop or back patio during the first or second times he exited his home unarmed. On the third, when armed, he did not leave his patio for six entire minutes, longer than the entire Pauly incident. That Mr. St. George began to walk around his own home to investigate and unwittingly walked into Trimmer's ambush where she had the drop on him cannot be used to distinguish these cases. To do so ignores the deliberate choice to not shout out a warning to Mr. St. George, a requirement as held in Pauly I. This also ignores the theory of the case based on Havens v. Johnson, 783 F.3d @ 778 (10th Cir 2015).

Cooper and George were both cases where police were responding to domestic violence calls, which the case law recognizes are most dangerous. There were guns pointed down and in plain view in both. The known quantities were effectively identical. The distinguishing details are immaterial. Police may not open fire on a man in his home or its curtilige merely for possessing a firearm.

II. HECK DOCTRINE

The panel's determination based on Heck fully ignores Mr. St. George's theories of the case argued below, and in his briefing. The judgment relies on the illicit conviction against Mr. St. George as a full bar against his claims. This ignores the deliberate and reckless creation of the incident by Lakewood Police. Had LPD knocked and announced at the front door or merely approached Mr. St. George to speak with him on either occasion when he exited to speak to callers alleging to be police, the incident would never have occurred. Had LPD not conducted an illicit search through Mr. St. George's backyard windows, the incident would never have occurred. If, once the LPD led Mr. St. George to believe he needed to protect his home and person, shouted a warning to drop his weapon, this incident would not have happened. (The court below asked what would have evidenced that St. George would have complied. He'd come outside, compliant with the calls.) "Stop! Drop your weapon! Police!" Five shouted words would have sufficed. They're mandated by national policing standards and clearly established law, after all. The totality of the circumstances taken into account would lead to a decision akin to the scenario contemplated in Havens, 783 F.3d @ 778.

The panel fully ignored Mr. St. George's Mutual Combat theory, which was presented below in the 5AC by inference and factual basis, and explicitly in [DOC 161] Objection to the Motion to Dismiss. (Properly a "Response" and titled "Objection" due to pro-se naïveté.)

The panel wrote: "On appeal, St. George raises a new argument: that Trimmer and Maines engaged in mutual combat with him. See Aplt. Opening Br. @ 26. Because St. George failed to preserve this argument in the district court, we do not consider it." St. George, 2024 U.S.App.LEXIS 19757 *13 n.1. Mr. St. George wrote in the court below: (quoting DOC 161)

> "The Defendants try to create in their motion a false dichotomy that excessive force claims between Lakewood Police and the public are an either-or proposition. It is a logical fallacy: Either the police are the victims or the citizen is a victim. Reality is excessive force is an either-or-both-neither proposition. The same set of premises as in "**mutual combat**" underpins the idea that even while a man may be convicted of an assault against an officer, the reckless and/or deliberate conduct of those officers fomented the circumstances surrounding that incident. A reasonable jury could find that Trimmer's conduct of lying-in-wait without any ID or warning was active conduct of tacit acquiescence to what she believed to be mutual combat. In her own statement, Trimmer tells us that her belief in the moments before shooting St. George was, "I think he's hunting me, that's how I take it... he had ammo in his pocket, he was coming out for a fight." She

> didn't have this belief earlier, before St. George armed himself, a situation that her silence recklessly or deliberately created. While this belief was untrue, Trimmer tells us that she believed it at the time and yet she never shouted out any ID or any warning. She had plenty of time. These facts are suggestive of a willing, voluntary, mutual combat on Trimmer's part if she genuinely believed what she reported. This is precisely the reason why failure to give a warning is deemed so important as to often be dispositive; the failure to warn (as de-escalation), has all the markers of an implied agreement to mutual combat. see United States v.Mayberry 567 Fed.Appx 643 (10th Cir 2014), Harrison v. Marshall 2010 U.S.Dist.LEXIS 136943 *3, Salas v. Faulk 2016 U.S.Dist.LEXIS 185507 We cannot forget, these defendants arrived at St. George's home, he didn't seek them out. They called him out of his house in the middle of the night. They intended to use force on him well before they'd even called him out (to "grab" him,) and did nothing to de-escalate the situation they created by not ID-ing or warning after they believed (incorrectly) St. George was looking for a fight. Instead, they discussed crossfire issues, and drew their weapons, in preparation for a fight." DOC 161, page 8

The Mutual Combat argument was not new to the appeal. Mutual combat was supported by facts in the 5AC and affidavit [DOC 149 & 149-1] and re-summarized in the Objection [DOC 179] (VI)(B)(2) pp. 14-16 titled "Trimmer and Maines were engaged in an illicit mutual combat with St. George," and again in the Amended Objection [DOC 186] (VI)(B)(2) p. 9 titled "Defendants engaged in a Mutual Combat." This argument was preserved below, erroneously ignored on appeal, and a rehearing is necessary to consider it en banc.

Moral Hazard

Mr. St. George warns the court of the moral hazard of applying the Heck Doctrine so liberally. Police agencies are all very aware of the Doctrine, and use it as a shield to liability for their unconstitutional conduct that violates the rights of the citizenry. If referral of their victims to a sympathetic local prosecutor and judge to be convicted protects officers from accountability, the violence will never cease. The citizenry end up paying the cost. Had the LPD zealots, before ambushing him, properly investigated the allegations of the prostitute that robbed Mr. St. George that evening, his life could have been spared. Today it's been lost to a wrongful incarceration. While the panel slanders Mr. St. George in repeating the debunked "second gunshot" falsehood -- Mr. St. George was acquitted of this at trial[2] -- the remainder of the charges would have been dropped. But for the LPD's need for a liability shield, a prosecutor might not have been so willing to compromise his integrity and protect his police colleagues.

2. See St. George v. Weiser, 2022 U.S.App.LEXIS 35937; St. George v. E(mily) E(lliott) 144 S.Ct. 201; St. George v. Denver Post 19CV31 ; St. George v. Larson 17CV416

CONCLUSION

Mr. St. George has had his right to be free from the use of excessive force violated by Devon Trimmer of the Lakewood Police Department. She did have fair warning that her conduct was unconstitutional. At the time of this incident, the Lakewood Police should have been on high alert of excessive force amid its ranks. Their own Agent Davies was senselessly slaughtered in a friendly fire incident that was settled in Spring 2016, months before the instant matter. The city was litigating several additional excessive force suits in parallel at that time. Pauly I was decided that spring also, and LPD officers would have been on notice that shouted announcements of presence were required, and uses of force require shouted warnings precede them.

LPD culture is aggressive. Aggresive policing is likely effective policing. The moral hazard is that hyper-aggression results in uses of excessive force. Where officers are trained to fight, the training wil lead to engaging in mutual combat with their targets. Even when targets would preferably choose to avoid combat, aggressive policing tactics compels the perception that targets are "looking for a fight," and fights ensue. LPD culture does not encourage de-escalation. In a true mutual combat, both parties are guilty of assault. This is a theory of a case that would permit a suit to advance to trial in spite of a conviction for assault foisted upon a plaintiff alleging excessive force.

Mr. St. George is not unsympathetic to the reversals this Court has endured from the SCOTUS. No doubt the holdings feel diametrically opposed -- don't define clearly established law too generally, yet is to be no scavenger hunt for identical facts. Identical facts never occur because every case may be distinguished in some manner. Mr. St. George's is an "obvious case" that meets the strictures and must go forward to trial. The choices made by LPD in ambushing a man in his own home without properly identifying themselves as police with shouts, and police cars, and badges, and red and blue lights is conduct that "knowingly violates the law."

To deny LPD defendants Qualified Immunity is a reasonable judgment based upon the facts in this case and upon clearly established law. It is overcautious error to favor LPD with a grant of immunity. Mr. St. George prays this Court vote to rehear this appeal en banc and consider all of the arguments preserved below and presented in the briefings instantly.

CERTIFICATE OF SERVICE

I certify that on _____ I did cause a true copy of the foregoing PETITION FOR REHEARING EN BANC to be emailed to the counsel of record for the Defendants-Appellees, and an additional hard copy to be mailed first-class US Mail with sufficient postage affixed.

A. Dorotik, adorotik@lakewood.org
445 S. Allison Pkwy.
Lakewood, CO 80226

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In Re: Order and Judgment:

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Signature: _____

Eric St. George
c/o FCF--180161
PO Box 999
Canon City, CO 81215

FILED
United States Court of Appeals
Tenth Circuit

August 20, 2021

Christopher M. Wolpert
Clerk of Court

Appendix E

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC ST. GEORGE,

Plaintiff - Appellant,

v.

CITY OF LAKEWOOD, COLORADO; DEVON TRIMMER, a/k/a Devon Myers; JASON MAINES; JEFF LARSON; DAN MCCASKY,

Defendants - Appellees.

No. 20-1259
(D.C. No. 1:18-CV-01930-WJM-STV)
(D. Colo.)

2021 U.S. App. LEXIS 24934

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

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*1

Defendant Devon Trimmer, an agent with the Lakewood Police Department (LPD), allegedly shot plaintiff Eric St. George without warning. The shooting culminated a bizarre late-night police investigation involving Trimmer, LPD Sergeant Jason Maines (another defendant), and two other LPD officers. The officers, wishing to interview St. George about his firing a gun during an altercation with an escort at his home earlier in the evening, called St. George six times in 15 minutes to instruct him to exit his apartment and speak with them in his yard. Yet on the three occasions that he

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

emerged, the officers hid from view and failed to identify themselves. The first two times he stepped outside it was apparent that he was not carrying a firearm; and during the fourth call it was apparent that he did not believe the callers were police officers. When he finally walked into his yard carrying a shotgun, the hiding Trimmer allegedly shot him without a prior word.

St. George filed suit in the United States District Court for the District of Colorado, raising several state-law claims and claims under 42 U.S.C. § 1983 that his Fourth Amendment rights were violated because Trimmer used excessive force in shooting him and Maines failed to prevent the shooting. The district court granted the officers' motion to dismiss under Rule 12(b)(6) on the ground that St. George's operative complaint, his Fourth Amended Complaint (the Complaint), failed to state an excessive-force claim against Trimmer and therefore failed to state the derivative claim against Maines; it then exercised its discretion to dismiss the state-law claims without prejudice. St. George appeals. Reading the Complaint in the light most favorable to St. George, we determine that it pleaded a plausible claim of excessive force against Trimmer. We have jurisdiction under 28 U.S.C. § 1291 and reverse.

I. BACKGROUND

A. Factual Background

Because this case comes to us on review of a dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, we accept as true the well-pleaded allegations in the Complaint and any documents that it incorporates by reference. *See Gee v. Pacheco*, 627 F.3d 1178, 1183–86 (10th Cir. 2010). The following version of events is from

St. George's 2019 Amended Affidavit, which was incorporated by reference into the Complaint.

On the evening of July 31, 2016, St. George arranged for a female escort to meet him at his home in Lakewood, Colorado. The escort arrived about 9:00 p.m. to find cash equaling her advertised hourly rate on the kitchen counter. She took the cash, but a dispute arose, and St. George asked for his money back. The escort refused and called her agency. This alarmed St. George because the escort had advertised as a "solo operator," and he did not want other parties involved in the transaction. Aplt. App., Vol. 2 at 178 (internal quotation marks omitted). St. George nonetheless spoke with the agency and reached an agreement for one hour of service. Thirty minutes later, however, the escort ceased services and said she was leaving. St. George again demanded return of his money, but the escort refused, pushed St. George, and left the apartment. St. George grabbed a handgun (for which he held a valid license) and followed the escort. Once outside, the escort brandished a can of mace, and St. George responded by raising his gun over his head and firing a warning shot into the air. He then lowered his gun and took aim at the escort, who fled the scene. Several minutes later the escort called 911 and reported that St. George had made unlawful sexual contact and fired two shots, one in the air and one at her. St. George maintains that he never fired a second shot at the escort.

After the incident St. George went to a local restaurant to eat and drink, unaware of the escort's call to the police. At 10:13 p.m. four LPD officers—Trimmer, Maines, Sergeant Nathan Muller, and Agent Eric Brennan—arrived at the apartment complex to investigate. They parked their marked vehicles out of view from St. George's apartment.

Trimmer spoke with a neighbor, a former law-enforcement officer, who reported hearing a single sound akin to "a car backfire, or a bottle rocket . . . not a gunshot." *Id.* at 183 (internal quotation marks omitted). The officers searched for bullet casings or bullet holes but found none. They ultimately determined that there was no "active shooter" and "[no] imminent threat of danger." *Id.* at 184 (internal quotation marks omitted).

St. George returned home at 11:15 p.m. When he arrived, he did not see the officers' vehicles, nor did they contact him. They walked into his backyard, looked through his windows, and observed him sitting at his computer with a glass of wine. With information from their various observations, the officers were able to confirm St. George's identity and learn that he had no violent or criminal history nor any outstanding warrants. The officers decided that they lacked probable cause to obtain a warrant.

The officers never knocked on St. George's door to speak with him. Instead, they called him six times over the course of 15 minutes, beginning at 12:17 a.m. Each was from a blocked number, so St. George could not use Caller ID to identify the caller. Agent Brennan made the first call, which St. George did not answer; he associated blocked numbers with prank callers, telemarketers, stalkers, and other persons with bad intentions. Brennan called again at 12:20 a.m., and this time St. George answered. Brennan identified himself as an LPD officer and instructed St. George to come outside to talk. St. George opened his front door and looked outside, but he did not see any signs of the officers because they remained hidden around the corner of the building's breezeway. The officers made no attempt to make their presence known.

The third call was placed at 12:23 a.m., and again St. George did not answer. Meanwhile, Trimmer and Maines had taken positions in St. George's backyard. The backyard, which was on the north side of the apartment building, extended to a fence between 15 and 25 feet from St. George's back door, beyond which lay an open nature preserve. Little light reached the backyard at night, and the two officers hid in the shadows near the fence.

At 12:24 a.m. Sergeant Muller placed the fourth call, which St. George answered. During the five-minute call Muller introduced himself as an LPD sergeant and said that his "friends" were in the backyard watching St. George through the apartment windows. *Id.* at 187 (capitalization and internal quotation marks omitted). He instructed St. George to go outside and speak with them. Based on this conversation, Muller reported that St. George did not believe he was speaking with police and that he seemed "upset," "unsettled," and "paranoid." *Id.* at 188 (internal quotation marks omitted). St. George turned off his bedroom lights to get a better view into his backyard. Maines reported this and told the other officers that St. George appeared unarmed.

The fifth call was placed at 12:30 a.m., but St. George did not answer. He instead exited his back door to investigate whether anyone was lurking nearby. He was unarmed and appeared tentative as he used his cell phone as a light source. Trimmer and Maines watched from their hiding spots near the fence. Even though they knew St. George had been instructed to go out and talk with them, they made no attempt to announce their presence. (Maines has reported that he planned to grab St. George if he moved further away from his home.) Failing to discern any sign of the police, St. George reentered his

apartment at 12:32 a.m. By this point, he believed that the callers were affiliated with the escort, and he was "terrified" that they would ambush him. *Id.* at 190.

Just after he returned inside, he received the sixth and final call. Muller again identified himself and said there were officers outside. St. George responded by saying, "[Y]ou aren't out there." *Id.* at 191 (parentheses and internal quotation marks omitted). After Muller told him to come outside with nothing in his hands, St. George replied, "I have something in my hands." *Id.* (internal quotation marks omitted). Brennan radioed the other officers that St. George was "being threatening on the phone." *Id.* (internal quotation marks omitted).

Having concluded that he was under threat from a malicious actor impersonating the police, St. George exited his back door armed with a shotgun. Once outside, he loudly "pumped" the shotgun to announce his presence, ejecting a live shell in the process. *Id.* Trimmer and Maines heard this and moved to more protected locations to the east of St. George's building. Maines hid behind foliage at the northwest corner of the adjacent building, while Trimmer moved to a communal driveway on the east side of the apartment building and took cover behind a parked pickup truck; the other two officers were on the west side of the building. St. George stood in his backyard, unknowingly being watched by Maines. At some point he put down his shotgun and, while holding a smartphone, said, "C'mon, call me back man!" *Id.* at 192 (internal quotation marks omitted). Still, the officers failed to make their presence known.

After nearly six minutes outside, St. George started to walk around the east side of his building from his backyard to the front of the building via the communal driveway.

He walked at an average pace and carried his shotgun in the low-ready position. *See Reeves v. Churchich*, 484 F.3d 1244, 1248 n.5 (10th Cir. 2007) ("The 'low ready' position involves [an individual] gripping the gun with both hands in front of him while pointing it to the ground."). Maines radioed to Trimmer (who was still behind the pickup truck) that St. George was heading toward her. Trimmer stayed hidden with her gun drawn as she started to hear "crunching gravel and footfalls." Aplt. App., Vol. 2 at 193. St. George still did not know of Trimmer's presence as he walked down the driveway.

St. George came into Trimmer's view 21 seconds after Maines reported that he was on the move. At that moment Trimmer opened fire, hitting St. George in the leg. She still did not identify herself. Wounded and still believing his assailant was not the police, St. George returned fire but missed Trimmer. The two exchanged several more errant shots. Maines, hidden behind a bush, also began firing at St. George and St. George fired back. The entire shootout lasted less than 90 seconds.

*10

St. George then retreated into his apartment, where he called 911 and reported, "I've been shot! Shot! I've been shot!" *Id.* at 215. When dispatchers asked who shot him, he replied, "I don't [expletive] have a clue." *Id.* Still bleeding, St. George crawled back out of his apartment with his handgun and fired four additional shots to warn off perceived assailants. Finally, 16 minutes after Trimmer's first shot, the officers identified themselves. St. George immediately complied with their orders to show his hands and was taken into custody.

B. Procedural History

Proceeding pro se in district court,[1] St. George filed suit against Trimmer and Maines, alleging claims under 42 U.S.C. § 1983 that Trimmer used excessive force in violation of the Fourth Amendment when she shot him and that Maines failed to prevent Trimmer's excessive force.[2] *See Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996) ("[A] law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983."). The Complaint also raised Colorado tort claims against both officers.

The officers moved to dismiss the Complaint under Rule 12(b)(6), arguing that it failed to state a constitutional violation and that the claims were barred in any event by qualified immunity. They further argued that the district court should decline supplemental jurisdiction over the state-law claims or, alternatively, rule that those claims were barred by state sovereign immunity.

The district court dismissed with prejudice the claims against Trimmer and Maines on the ground that the allegations in the complaint did not support a claim that Trimmer had used excessive force. It then exercised its discretion under 28 U.S.C. § 1367(c)(3) to dismiss without prejudice the state-law claims.

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[1] We appointed pro bono counsel to represent St. George on appeal. We thank counsel and his students for their able representation in this matter.

[2] St. George has also raised claims against other defendants, but those claims are not at issue in this appeal.

II. DISCUSSION

A. Legal Framework

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). To achieve "facial plausibility," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This plausibility standard "does not impose a probability requirement," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), but it demands more than mere conceivability, *see id.* at 570. In assessing a claim's plausibility, we must "draw on [our] judicial experience and common sense." *Iqbal*, 556 U.S. at 679. St. George's pro se pleadings "are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). But pro se status "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Id.* "We review de novo the grant of a . . . motion to dismiss for failure to state a claim." *Gee*, 627 F.3d at 1183.

A valid Fourth Amendment excessive-force claim requires a plaintiff to show "*both* that a seizure occurred and that the seizure was unreasonable." *Bond v. City of Tahlequah*, 981 F.3d 808, 815 (10th Cir. 2020) (internal quotation marks omitted). Because St. George was intentionally shot, there is no question a seizure occurred. *See Torres v. Madrid*, 141 S. Ct. 989, 994 (2021). We therefore turn to the question whether the seizure was unreasonable.

Our task is to determine "whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008); *see Cnty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) ("Reasonableness is always the touchstone of Fourth Amendment analysis." (brackets and internal quotation marks omitted)). In this highly fact-dependent inquiry, we must carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake," *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted), allowing for the fact that an officer's use-of-force decision often turns on "split-second judgments" made under "tense, uncertain, and rapidly evolving" circumstances, *id.* at 397.

In *Graham* the Supreme Court said that "proper application" of the reasonableness test requires consideration of the particulars of each case, including "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. We have stated that the second *Graham* factor is "undoubtedly the most important and fact intensive." *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017) (internal quotation marks omitted).

A frequent concern of the courts is the use of deadly force—that is, "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm." *Jiron v. City of Lakewood*, 392 F.3d 410, 415 n.2 (10th Cir. 2004) (internal quotation marks omitted); *see id.* (shooting a firearm at

someone constitutes deadly force). To assess the seriousness of a threat that precipitated an officer's use of deadly force, we consider four nonexclusive factors set forth in *Estate of Larsen*: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d at 1260. Although these so-called *Larsen* factors are significant, they are only aids in making the ultimate determination of whether the totality of circumstances justifies the use of deadly force from the perspective of a reasonable officer. *See Estate of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1061 (10th Cir. 2020).

B. Application to this Case

We now apply the *Graham* factors to this case, although we take them out of order, leaving the second factor for last.

1. First *Graham* Factor

The first *Graham* factor is "the severity of the crime at issue." 490 U.S. at 396. This factor weighs in favor of the officers.

According to the Complaint, Trimmer and Maines were investigating a report that St. George had committed two offenses: unlawful sexual contact and attempted murder (by firing two shots, including one aimed at the escort).[3] Attempted murder is a felony

[3] The Complaint alleges that the escort knowingly exaggerated in her statements to the police by, for example, falsely claiming that he had fired not only a warning shot into the air but also a second shot at her. But it never alleges that Trimmer or Maines knew that the escort was exaggerating, and we must evaluate their actions "from the perspective of

offense, *see* Colo. Rev. Stat. §§ 18-2-101(4), 18-3-102(3), 18-3-103(3), and "the first *Graham* factor weighs against the plaintiff when the crime at issue is a felony," *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1170 (10th Cir. 2021). The seriousness of the offense establishes the need to investigate and to apprehend a perpetrator and also may suggest * 15 the danger posed by the suspect.

St. George argues that this factor nonetheless favors him because the officers had concluded that they lacked probable cause for an arrest well before they drew him out of his home. This fact, says St. George, shows that the officers "d[id] not believe that [he] ha[d] committed a crime" and, accordingly, they could not "rely on that crime to justify the use of force." Aplt. Reply Br. at 7; *see also id.* at 6–7 (citing *Pauly*, 874 F.3d at 1215 (where officers were investigating possible misdemeanor offenses, first *Graham* factor weighed in favor of plaintiff since officers lacked probable cause to arrest and did not believe there were any exigent circumstances)). He also argues that the two-hour time interval since the incident "eliminated the possibility of exigent circumstances." Aplt. Br. at 22. These points are well taken. They both suggest less of a need for immediate action by the officers. But this factor still weighs somewhat in favor of the officers. *See McCoy v. Meyers*, 887 F.3d 1034, 1050 n.17 (10th Cir. 2018) (first *Graham* factor weighs in favor of officers even though crime was complete at time of alleged use of excessive force).

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a reasonable officer on the scene." *Bond*, 981 F.3d at 812 n.3 (internal quotation marks omitted).

2. Third *Graham* Factor

The third *Graham* factor asks "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. This factor weighs strongly in favor of St. George.

The officers had determined well before the shooting that they had no basis to arrest St. George. St. George could not have been actively resisting arrest if Trimmer and Maines had no intention of arresting him. *See Bond*, 981 F.3d at 820; *Pauly*, 874 F.3d at 1222. Nor do the Complaint's allegations support the notion that St. George was evading the police. Twice he responded to police requests (demands) to leave his home to talk to them. And even after he had expressed doubts that the callers were police officers, he went outside after the sixth and final call and stood in his backyard for nearly six minutes before starting to walk around the side of his building at an average pace.

The officers acknowledge that this factor weighs in favor of St. George but suggest that the weight is minimal because he "disobeyed the command to exit without anything in his hands." Aplee. Br. at 36. We disagree. In light of the officers' refusal to identify themselves on the prior two occasions and their knowledge that St. George (for very good reason) doubted that the callers were officers, it would have been highly unreasonable for them to think that his carrying a shotgun when he exited the third time indicated any lack of respect for law-enforcement authority.

3. Second *Graham* Factor

The second *Graham* factor is the immediacy of the threat posed by the suspect. *See* 490 U.S. at 396. "[D]eadly force is justified *only if* a reasonable officer in the

officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others." *Bond*, 981 F.3d at 820 (emphasis added) (internal quotation marks omitted). The four *Larsen* factors guide our assessment of this second *Graham* factor. *See Estate of Larsen*, 511 F.3d at 1260.

a. First *Larsen* Factor

First, we consider "whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands." *Id.* The Supreme Court has said that "deadly force may be used if necessary to prevent escape [of one who threatens an officer with a weapon], and *if, where feasible, some warning has been given.*" *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (emphasis added). Here, Trimmer never even identified herself, much less provided warning that she might use deadly force, despite having ample opportunity to do so. The officers concede this factor. They do not seem to appreciate, however, that the failure to warn when feasible and without excuse is so fundamental that it is often dispositive.

b. Second *Larsen* Factor

The second *Larsen* factor—"whether any hostile motions were made with the weapon towards the officers," *Estate of Larsen*, 511 F.3d at 1260—also favors St. George. True, officers "need not await the glint of steel before taking self-protective action." *Id.* (internal quotation marks omitted). But there is a fundamental distinction between mere *possession* of a weapon and *hostile movements* with it. *See Bond*, 981 F.3d at 820–21.

The Fourth Circuit's decision in *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013), is instructive. Cooper lived in a mobile home in rural North Carolina. About 11:00 p.m. one night a neighbor called 911 to report a noisy altercation, like "two males screaming at each other," on the property. *Id.* at 155 (internal quotation marks omitted). Two officers in separate vehicles (one a marked patrol car) drove to the vicinity of the home and approached it; the officers heard screaming coming from the property and saw a man (not Cooper) on the home's back porch who appeared to see the two cars as they arrived. *See id.* One officer tapped on the window to alert those inside to their presence, but they failed to identify themselves as officers. *See id.* Responding to the tapping, Cooper "called out for anyone in the yard to identify himself, but no one responded." *Id.* He then emerged from his back door "[w]ith the butt of [his shotgun] in his right hand and its muzzle pointed toward the ground." *Id.* Without warning, the officers shot him multiple times. *See id.* at 156. Cooper had made "no sudden moves," "made no threats," and "ignored no commands." *Id.* at 159. The appellate court affirmed the district court's denial of qualified immunity, stating that "the mere possession of a firearm by a suspect is not enough to permit the use of deadly force," which "may only be used by a police officer when, based on a reasonable assessment, the officer or another person is *threatened* with the weapon." *Id.* Emphasizing that the officers had never identified themselves, the court concluded that "the facts fail to support the proposition that a reasonable officer would have had probable cause to feel threatened by Cooper's actions." *Id.*; *see also George v. Morris*, 736 F.3d 829, 835, 838 (9th Cir. 2013) (officers responding to domestic-violence call would have used unreasonable force if they shot

suspect who had not ignored commands to drop his gun, had only pointed it toward the ground, and had made no threatening gestures such as pointing it at the officers).

St. George's carrying a gun in the low-ready position to protect himself as he walked around his house late at night to see who it was that wanted him to come outside and talk was not a hostile or threatening action. If he knew (or, more accurately, if the officers reasonably thought that he knew) that those outside his home were law-enforcement officers, his wielding a gun might reasonably be perceived as hostile. But in light of the officers' prior failure to identify themselves and Muller's report to the other officers after the fourth phone call that St. George did not believe that the callers were police officers, it would have been unreasonable of those officers to think that St. George believed that he was dealing with law enforcement. This factor weighs strongly in favor of St. George.

c. Third *Larsen* Factor

The third *Larsen* factor is "the distance separating the officers and the suspect." *Estate of Larsen*, 511 F.3d at 1260. St. George and Trimmer were separated at most by the width of a pickup truck and some portion of a communal driveway. St. George was close enough to Trimmer to inflict serious injury on short notice. The situation is similar to that in *Estate of Valverde*, where the parties stood on opposite sides of a parked sedan. 967 F.3d at 1065. Although the estate alleged that the car "could be used as cover," we pointed out that the victim-suspect "could have taken three or four steps around the hood of the car and shot the crouching [officer] at close range." *Id.* (internal quotation marks omitted). This factor clearly favors the officers.

d. Fourth *Larsen* Factor

The final *Larsen* factor is the "manifest intentions of the suspect." *Estate of Larsen*, 511 F.3d at 1260. Assuming the truth of the allegations in the Complaint, St. George manifested only an intent to protect himself from unknown intruders, not to harm police officers. After the second call St. George opened his front door while unarmed and simply looked around for the officers. After the fourth call, Maines reported that St. George had extinguished his apartment lighting to get a better view into his dark backyard, apparently to see if anyone was there. After the fifth call, St. George exited his back door—tentative and unarmed—carrying a cell phone, apparently to use as a light source, and went back inside after about two minutes. When St. George left his home carrying his shotgun after the sixth call, he apparently called into the darkness, "C'mon, call me back man!" Aplt. App., Vol. 2 at 192 (internal quotation marks omitted). It would have been unreasonable to view these actions as manifesting an intent to harm police officers. St. George was clearly trying only to identify who, if anyone, might be lurking around his residence and what threat they might pose.

The officers point to the fact that St. George pumped his shotgun once he got outside after the sixth call. But this action is fully consistent with what has already been said. It was not an act of hostility to law enforcement. One can plausibly infer from the Complaint that any reasonable officer would have realized that it was the act of a frightened man facing hidden foes who were acting nothing like one would expect from the police. This factor strongly favors St. George.

4. Synthesis

A review of the *Larsen* factors compels the conclusion that St. George has plausibly pleaded that it was unreasonable for the officers to believe that St. George posed a threat of grave danger to them or anyone else. Although St. George was close enough to Trimmer to pose a significant threat with his shotgun, no officer had come forward to identify himself or herself, much less to order him to drop the shotgun; and he made no hostile *#23 motions or manifested any intention to harm an officer. Under the second *Graham* factor, "the decisive question is whether [Trimmer] was reasonable in believing that [St. George] was going to fire his gun at [Trimmer] or other officers." *Estate of Valverde*, 967 F.3d at 1062; *see Bond*, 981 F.3d at 820 ("[D]eadly force is justified *only if* a reasonable officer in the officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others." (emphasis added) (internal quotation marks omitted)). And the simple answer to that question is no.

Not only did the officers acknowledge that they lacked probable cause to believe that St. George had fired a shot at the escort; but they had no reason to believe that he would refuse to comply with orders from properly identified police officers. He had not carried a weapon on the first two occasions that he opened his door in response to directions to come outside to talk with purported officers. When he did carry a firearm on the third occasion, he had already expressed doubts (which were eminently reasonable in the circumstances) that there were officers outside his home who, for inexplicable reasons, would hide and not even verbally identify themselves. *#24 And even then, St.

George did not say or do anything threatening with his shotgun, obviously carrying it for protection rather than for aggression. Nor did the officers need to make any split-second decisions. Trimmer's shot at St. George came 21 seconds after she was alerted that he was walking around the building and close to six minutes after he had come outside.

Based on the facts alleged in the Complaint, it is at least plausible that Trimmer was unreasonable in believing that St. George posed a sufficiently immediate threat to justify deadly force. Having adequately pleaded that it was unreasonable to believe that he posed a danger, St. George has survived a motion to dismiss the unreasonable-force claim against Trimmer. Even though the offense being investigated was a serious one (*Graham* factor 1), law enforcement has no right to use deadly force against even a heinous criminal who poses no danger (factor 2) and is neither resisting arrest nor attempting to flee (factor 3).

As for the derivative failure-to-intervene claim against Maines, the only basis articulated for dismissal, both by the district court below and Maines on appeal, was that the claim must fail if the unreasonable-force claim against Trimmer fails. That basis is no longer sound. The same is true of the basis for the dismissal of the state-law claims, over which the district court declined to exercise supplemental jurisdiction only after it dismissed the federal claims. *See* 28 U.S.C. § 1367(c)(3).

Even if the officers violated St. George's Fourth Amendment rights, they may still be entitled to qualified immunity if the law they violated was not clearly established at the time of the episode. But on appeal they do not seek affirmance on that ground,

requesting only that the matter be left to the district court on remand. We agree that that is the appropriate course to follow.

III. CONCLUSION

We **REVERSE** the district court's dismissal of St. George's claims against Trimmer and Maines in the Fourth Amended Complaint and **REMAND** for further proceedings consistent with this opinion. We also **GRANT** St. George's motion to proceed *in forma pauperis*.

Entered for the Court

Harris L Hartz
Circuit Judge

20-1259, *St. George v. City of Lakewood, et al.*
TYMKOVICH, Chief Judge, dissenting

"The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm." *Est. of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1064 (10th Cir. 2020). The majority's opinion concludes Agent Trimmer should have revealed herself to a hostile suspect with a loaded and racked shotgun before attempting to use any force. But it is not for judges "from the comfort of [their] chambers" to determine whether an officer's actions in making a high-pressure, life-threatening, and split-second decision were unnecessary or incorrect. *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005). Rather, we must determine, from the "perspective of a reasonable officer on the scene, [whether] the totality of the circumstances justified the use of force." *Est. of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008). Conduct that may seem "unnecessary when reviewed" may "nonetheless be reasonable under the circumstances presented to the officer at the time." *Phillips*, 422 F.3d at 1080.

Here, Agent Trimmer acted reasonably given St. George's threatening and hostile behavior. I respectfully dissent.

As detailed by the majority, Lakewood Police Department was alerted by a female escort that St. George had fired two shots in front of his apartment, one in the air and another directed at the woman. Police arrived at his home, aware that he was armed and potentially violent. The officers then called St. George by phone six times to alert him that police were outside. Each time, he was uncooperative and slow to respond. He

explained after the fact that he suspected the individuals outside were impersonating police officers and had intended to do him harm. But St. George did not take any action to verify these suspicions, such as calling 911 or asking for the uniformed officers to show a badge or send identifying information by phone. After numerous efforts, the police officers took cover when he came outside.[1]

St. George exited with a shotgun and pumped it, clearly signaling that he was willing to use violent force against anyone he encountered. A few minutes later, St. George, with a shotgun in a "low-ready" position, walked towards Agent Trimmer, who was secreted behind a truck. Once St. George came into her view, Agent Trimmer shot him in the leg. He returned fire. After a brief exchange of gunfire with Agent Trimmer, Sergeant Maines turned on the flashlight under the barrel of his handgun and aimed it at St. George. St. George then fired shots at Sergeant Maines. Afterwards, St. George crawled inside the house and, only then, called 911. He then used a handgun to fire three more shots from inside his apartment and a fourth shot into the ceiling of the breezeway outside of his home. Soon thereafter, police entered his home and took him into custody.

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[1] The majority states that the first two times St. George stepped outside "it was apparent that he was not carrying a firearm," and St. George alleges "officers . . . confirmed [St. George] is not armed" but it is unclear how this fact would be apparent to law enforcement responding to a call about a man threatening someone with a firearm. Maj. Op. at 2; Aplt. App., Vol. II, at 187.

*28

Looking at these alleged facts, the majority concludes St. George has made out a plausible case that Agent Trimmer's use of force was unreasonable. I disagree. The majority incorrectly balanced the *Graham* factors in St. George's favor, and so I would find that St. George has not plausibly presented an excessive force claim.

The Fourth Amendment prohibits state and federal governments from making "unreasonable . . . seizures." U.S. Const. amend. IV. A police officer's use of force in the course of arrest "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). That standard asks whether police employed objectively reasonable force given the totality of the circumstances. *See Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1313 (10th Cir. 2009). In *Graham*, the Supreme Court identified the following factors to consider when evaluating whether the officer's use of force was excessive: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. We examine the "facts and circumstances as they existed at the moment the force was used, while also taking into consideration the events leading up to that moment." *Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020). In this case, while there were multiple police officers interacting with St. George, we must look to the actions and knowledge of Agent Trimmer specifically.

*29

1. Severity of the Crime

St. George and the majority do not dispute that the crime reported to the officers in this case is a severe crime. On her 911 call, the female escort indicated that St. George had made illicit sexual contact with her and then later fired two rounds from a handgun, one aimed at the escort, as she left.

St. George argues that this factor still weighs in his favor because the officers admit they lacked probable cause for an arrest. Whether or not police had probable cause to arrest St. George for any crime is irrelevant. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921–22 (9th Cir. 2001) (finding that use of force may be reasonable even in the absence of probable cause). This factor may still weigh in the officer's favor even if he did not have probable cause to arrest the suspect. At most, probable cause is merely one fact among many to consider when weighing a crime's severity. *See Pauly v. White*, 814 F.3d 1060, 1077 (10th Cir. 2016) *vacated and remanded on other grounds,* 137 S. Ct. 548 (2017) (describing the considerations going into whether a crime is severe). Rather, "in an excessive force inquiry, we ask whether the force used would have been reasonably necessary *if the arrest or the detention were warranted.*" *Morris v. Noe*, 672 F.3d 1185, 1195 (10th Cir. 2012) (internal citation omitted) (emphasis original). *30

The majority suggests that because the police lacked probable cause and two hours had passed from the time of the initial report, a less immediate need for police action

existed. But it is clear the officers viewed this as a serious crime—at least four police officers responded to the scene. And it is likely that the officers responded warily because they knew St. George had a firearm in his possession. This factor weighs in favor of Agent Trimmer.

2. Immediate Threat to Safety of Officers

As the majority notes, this is "undoubtedly the most important and fact intensive factor in determining the objective reasonableness" of use of force. *Pauly v. White*, 874 F.3d 1187, 1216 (10th Cir. 2017). Regardless of whether St. George subjectively believed that the individuals outside his home were police officers, his behavior still gave ample reason for Agent Trimmer to conclude that he was an immediate threat to her safety: St. George quickly approached Agent Trimmer's hiding spot with a shotgun, he had racked the shotgun moments earlier, he held the shotgun in a low-ready position, and he had just made threatening statements to officers over the phone.

To determine the *#3* extent a party presents an immediate threat to officers, we consider four non-exhaustive subfactors set out in *Estate of Larsen*, "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d at 1260. Applying the *Larsen* subfactors, I conclude St. George presented a deadly and immediate threat.

a. Officer Warnings

While Agent Trimmer did not give St. George any warning prior to firing at him, courts have never required officers to give a warning when they are faced with situations involving imminent threats of deadly force. *See Est. of Smart ex rel. Smart v. City of Wichita*, 951 F.3d 1161, 1175 (10th Cir. 2020). The majority notes that the Supreme Court has held that an officer should give warnings "where feasible" before using deadly force. Maj. Op. at 14 (citing *Tennessee v. Garner,* 471 U.S. 1, 11–12 (1985)). This language indicates the Supreme Court intended to give officers flexibility in precisely the type of situation Agent Trimmer was facing. Courts should not "fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing—particularly where, as here, such a warning might easily have cost the officer his life." *McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994). *32

The majority states that Agent Trimmer had "ample opportunity" to warn St. George of her presence and identity. The facts in the record simply do not bear this out. Once Agent Trimmer heard St. George exit his house and rack his shotgun, she hid and took cover farther away from his location. Agent Trimmer knew that St. George was holding a dangerous weapon while he was rapidly approaching the area she was hiding. She had no reason to believe St. George would have been responsive to a police warning when he had ignored instructions from police officers in the six phone calls prior to his exit from his house. A warning in these fast-moving circumstances would have revealed

her location and could have even cost her life. Given these facts, I conclude Agent Trimmer "acted in an objectively reasonable manner" in a "split-second, rapidly escalating situation involving perceived deadly force." *Carr v. Tatangelo*, 338 F.3d 1259, 1269 (11th Cir. 2003) (citing *Graham*, 490 U.S. at 396–97 (1989)).

b. Hostile Motions

St. George contends that holding a weapon in a low-ready position is not a hostile motion. This is incorrect. The cases cited by St. George involve instances where the plaintiffs were unaware that there were police outside their homes before arming themselves with a weapon. Aplt. Br. at 25 (citing *Pena v. Porter*, 316 F. App'x 303, 312 (4th Cir. 2009) (unpublished) (stating that this was not a situation where a suspect "refused to obey police commands in a tense situation"); *Johnson v. City of Roswell,* No. 15-1071, 2016 U.S. Dist. LEXIS 109994, at *35 (D.N.M Aug. 18, 2016) (unpublished) (finding that the suspect was "unadvised and otherwise unaware of the identity of the persons outside his home")). The majority cites *Cooper v. Sheehan* for support that St. George's actions were not hostile. Maj. Op. at 15. But in *Cooper*, unlike here, "no reasonable officer could have believed that [Cooper] was aware that two sheriff deputies were outside." 735 F.3d 153, 157 (4th Cir. 2014). St. George, however, had plenty of warnings and was told numerous times that there were police waiting for him outside.

St. George's behavior was undoubtably hostile. In *Cooper,* Cooper had "made no threats" and "no sudden moves" and merely emerged from his door with his shotgun held

in his hand. 735 F.3d at 159. Here, though, officers described St. George as "upset" and threatening based on their interactions over the phone. Aplt. App., Vol. II, at 188. After being informed multiple times of the police's presence outside, St. George stepped outside, loudly pumped his shotgun, and walked around with the gun in a low-ready position. These were clearly hostile motions meant to give off a threat of violence and not "mere possession" of a weapon. *Cooper*, 735 F.3d at 159. If we are to credit St. George's claims that he truly did not believe the individuals outside were police, it further bolsters the fact he meant for these actions to be threatening in an attempt to ward off his would-be assailants.

c. Distance Between Officers and Suspect

When Agent Trimmer shot St. George, she was positioned at the "driver's rear tire" of the truck and he was located "behind the pickup truck." Aplt. App., Vol. II, at 94. Once he came into her line of sight, she shot him in the leg. Seconds prior to this, Agent Trimmer could hear the sound of his footsteps crunching in the gravel and observed him walking towards her. The distance between them was minimal. The "immediacy of the danger to the police officer is important" to our analysis. *Pauly*, 814 F.3d at 1080. Given their proximity, a split-second decision to use deadly force was reasonable.

d. Manifest Intentions

The majority finds that because St. George truly believed that the individuals outside were not police officers, his manifest intentions were to defend himself from

potential assailants. But even if Agent Trimmer was mistaken in her understanding that St. George did not intend to harm a police officer, she had a "reasonable but mistaken belief" about the suspect's dangerousness, and she would still be entirely justified in her use of force. *Thomson*, 584 F.3d at 1315. The majority points to multiple allegations, such as St. George calling out "C'mon, call me back man!" and St. George opening his front door "while unarmed" to "simply [look]" around for officers. Maj. Op. at 17. We cannot, however, imbue facts from the collective knowledge of all the officers on the scene onto Agent Trimmer when examining reasonableness "at the moment" of her use of force. *Emmett*, 973 F.3d at 1135. In fact, evidence of St. George yelling "C'mon, call me back man!" was given by a neighbor on the scene, not an officer. Aplt. App., Vol. II, at 192.

Agent Trimmer and Sergeant Maines were hiding in the backyard during the phone calls to St. George and did not see him open his front door or have personal knowledge he was unarmed while doing so. It is unreasonable to expect Agent Trimmer to gather from the limited set of facts she knew that St. George believed those outside were not police officers.[2] Even if Agent Trimmer knew St. George did not believe the individuals outside

[2] The majority states that "it was apparent that [St. George] did not believe the callers were police officers." Maj. Op. at 2. The majority, however, does not cite to facts that allege Agent Trimmer in particular knew that St. George believed they were not police officers. St. George alleges "[Agent Trimmer] knows that she has never once identified herself" but does not allege facts stating Agent Trimmer knew that St. George did not believe the individuals outside were police. Aplt. App., Vol. II, at 193. St. George alleges only that Sergeant Muller told Agent Trimmer that St. George was

(continued...)

were police, she would have more reason to believe St. George's manifest intent was to harm her. Again, we look at the situation from Agent Trimmer's perspective. St. George was warned multiple times over the course of thirteen minutes that there were police officers outside his home. Despite this, he did not make any attempt to verify the officers' claims and instead chose to take a deadly weapon outside and walk around with a clear intention to shoot anyone he encountered. To Agent Trimmer, St. George manifested a deadly threat.

3. ***Attempting to Evade Arrest***

Agent Trimmer concedes that St. George could not have been found actively resisting arrest because the Lakewood Police officers were not seeking to arrest him when they initially arrived at his house. The majority suggests that it would be "highly unreasonable" that the officers would take St. George's action of carrying a shotgun as disrespectful towards law enforcement. Maj. Op. at 13. This is a questionable conclusion, especially after the police had identified themselves by name and position multiple times over the course of six phone calls.

* * *

The majority incorrectly concludes *37 the *Graham* and *Larsen* factors weigh in favor of St. George. They do not. Agent Trimmer had ample reasons to believe that all of St. George's actions represented an immediate threat to her safety and the safety of other

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[2](...continued)
"'upset,' 'unsettled,' and 'paranoid'" over the radio. *Id.* at 188.

officers on the scene. While we may not fully understand or credit the method of investigation the officers in this case used, it is not for us to determine whether there was excessive force based on the quality of police investigation. Rather, we look to the actions of the officers facing a potentially lethal threat and ask whether they were objectively reasonable. In this situation, Agent Trimmer reacted quickly to an escalating situation with a reasonable amount of force.

I respectfully dissent.

Appendix F
DOC 161

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 18-cv-01930-WJM-STV

Eric St. George
Plaintiff

v.

City of Lakewood, CO, et al
Defendants,

OBJECTION TO DEFENDANTS' MOTION TO DISMISS

The Plaintiff OBJECTS to the Defendants' Motion to Dismiss the Fifth Amended Complaint, and for cause he submits as follows:

(from the 10th Circuit Court of Appeals' 20 August 2021 Order and Judgment)

"Defendant Devon Trimmer, an agent with the Lakewood Police Department (LPD) allegedly shot plaintiff Eric St. George without warning. The shooting culminated a bizarre late-night police investigation involving Trimmer, LPD Sergeant Jason Maines (another defendant), and two other LPD officers. The officers, wishing to interview St. George about his firing a gun during an altercation with an escort at his home earlier in the evening, called St. George six times in 15 minutes to instruct him to exit his apartment and speak with them in his yard. Yet on the three occasions that he emerged, the officers hid from view and failed to identify themselves. The first two times he stepped outside it was apparent that he was not carrying a firearm; and then during the fourth call it was apparent that he did not believe the callers were police officers. When he finally walked into his yard carrying a shotgun, the hiding Trimmer allegedly shot him without a prior word."

Plaintiff adopts the Factual Background as outlined in the Order [at I(A)] as the most appropriate at this stage of the litigation on remand from that Court.

The Order and Judgment is available at St. George v. City of Lakewood 2021 U.S.App. LEXIS 24934

INTRODUCTION TO THE ISSUES

On 7 FEB 2022 (although not mailed to the Plaintiff until 7 MAR 2022, served upon him 16 MAR 2022) the Defendants file their Motion to Dismiss. This latest Motion to Dismiss seeks to dismiss the Plaintiff's Fifth Amended Complaint (hereafter, 5AC) on 3 grounds, and no other. The MOTION alleges:

I) The 5AC is barred by the Heck doctrine.

II) The Defendants Trimmer and Maines are entitled to Qualified Immunity because no clearly established precident put them on notice that their conduct was a violation of St. George's Constitutional Rights.

III) Count Nine fails to state a claim upon which relief can be granted pursuant to FRCP 12(b)(6).

All three of these grounds are erroneous. St. George's claims are not barred by the Heck doctrine. Trimmer nor Maines is entitled to Qualified Immunity, they were on notice of their unconstitutional conduct. In his Count Nine St. George has pled a claim with sufficient facts to support it, plausibly, in order to survive a motion to dismiss.

I. Heck Doctrine

1. Heck has been raised and ruled upon, abandoned, conceded or waived

A. The Defendants' instant Motion to Dismiss (7 FEB 2022) raises the Heck doctrine. Dismissal on Heck grounds must be rejected -- it has been raised and ruled upon, abandoned, conceded or waived and cannot be considered now.

The Defendants' 29 MAR 2019 Reply in Support of Motion to Dismiss from Defendants [DOC 55] raises the matter of the Heck doctrine as it applies to the Third Amended Complaint. In its 13 May 2019 Order, the Court considers how Heck would be violated by St. George's due process claims. In its 16 SEPT 2019 Order this Court dismisses St. George's due process claims on Heck grounds. This Court sua sponte grants St. George leave to amend his Complaint. On 29 OCT 2019 St. George files his Fourth Amended Complaint (FAC). The Defendants move to dismiss the FAC, 23 DEC 2019 [DOC 89]. No mention of the Heck doctrine is made. Mag. Varholak's 10 APR 2020 Reommendation [DOC 105] makes no mention of the Heck doctrine. Judge Martínez' 30 June 2020 Order [DOC 108] makes no mention of the Heck doctrine. By contrast, the Defendants have raised Qualified Immunity in their [DOC 89] Motion to Dismiss, preserving the issue for review. The Heck doctrine issue has been abandoned, conceded or waived. The Dismissal of the FAC

was appealled. Appellees make no mention of Heck on appeal. The Dismissal was reversed by the 10th Circuit Court of Appeals on 20 AUG 2021, and the case remanded with instructions for further proceedings consistent with their opinion. In the 10th Circuit's opinion, the judges specifically state that the Defendants may be entitled to Qualified Immunity if the law they violated was not clearly established. Qualified Immunity was raised below and the second prong left for the court below to rule upon. Heck was raised against the Third Amended Complaint, waived on the FAC, and now following that appeal brought against the Counts (1-8) after they've survived. The Fifth Amended Complaint (5AC) makes no change to the counts from the FAC which were remanded back to this Court. The doctrine of the law of the case tells us that because the Heck doctrine matter has been implicityly decided, it should continue to govern the case now on remand.

B. Applicable Law

The Order and Judgement 20 AUG 2021 remanding this case back from the 10th Circuit Court of Appeals states that it "is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel," on page one. The 10th Cir. holds, "the doctrine of law of the case applies to issues previously decided either explicitly or by necessary implication." Copart, Inc v. Admin. Review Board 495 F.3d 1197, 1208 (10th Cir. 2007) The Tenth goes on to say, "We held that there were three grounds under 'law of the case' doctrine by which we might conclude an issue was implicitly resolved in a prior appeal, as follows: (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; and (3) the issue is so closely related to the earlier appeal its resolution involves no additional consideration and so might have been resolved but unstated." Id., quoting Guidry 10 F.3d 700 (10th Cir. 1993) All 3 of these grounds for concusion are applicable here. The appeal was from a motion to dismiss alleging under FRCP 12(b)(6) failure to state a claim upon which relief can be granted. [21-1259, Order and Judgment, p2 s.I(A)] (1) There can be little doubt that the Heck doctrine issue has been resolved in the earlier appeal. The Heck matter was raised against the Third Amended Complaint, and this was reflected in the record on appeal. While the Defendants did not raise the issue against the FAC (abandoned, conceded or waived the matter) the Appellate court necessarily considered Heck and would have upheld dismissal on those alternate grounds had that been their intent. We can know this because

this is precisely what Judge Hartz did in Havens v. Johnson 783 F.3d 776 (10th Cir. 2015) ("We exercise jurisdiction under 28 USC s1291 and affirm on the alternate ground that Havens' claim is barred under the Supreme Court decision of Heck v. Humphrey.. " <emphasis mine>) (2) to resolve the matter here in the District after the appeal (in favor of these Defendants) would abrogate the decision of the Appellate Court. The Applellate Court has held that the Plaintiff, "...has plausibly pleaded that it was unreasonable for the officers to believe that St. George posed a threat of grave danger to them or anyone else." [Order and Judgment, 20 AUG 2021, p18 Synthesis] If this Court were to rule now that St. George's claim is barred by Heck, it would abrogate the holding from the Appeal above, so we must presume that the pane above considered this in the prior appeal. (3) One cannot state a claim on which relief can be granted if their claim is barred by Heck. These issues are so closely related that no additional consideration is need, the Heck issue must have been resolved in the earlier appeal and left unstated.

2. This Excessive Force action is not necessarily inconsistent with St. George's conviction for assaulting the Defendants.

A. There must be absolutely zero doubt that St. George has asserted and continues to assert that he is not guilty of assault or attempted murder against Trimmer or Maines. This action is not the collaterial attack against the convictions, St. George's Habeas Corpus filing is the collateral attack. (see: 21-cv-00868-LTB-GPG; 21-1391)

The Defendants' invocation of the Heck doctrine only further evidences that these Defendants and the Lakewood police believe they can use whatever level of force they wish against anyone they choose, weaponize the State's judicial machinery against their victims and walk away with impunity. They know they are guilty and want to hide behind the false conviction that they've procured.

St. George has already argued this point, and has had his claim for due process violation resultant from perjuries and evidence [misrepresentation] (properly a malicious prosecution claim) [see 5AC Count Eleven, para. 91] barred by Heck. The Plaintiff acknowledged this bar in his FAC, and the claim is preserved for after St. George's illicit conviction is overturned.

Notwithstanding, the 10th Circuit's Order and Judgment focuses explicitly on whether the Defendants used excessive force even while having full knowledge that for the time being St. George stands convicted of assaulting the officers.

The 10th Circuit's order articulates, "...no officer had come forward to identify himself or herself, much less to order him to drop the shotgun," and for these reasons, "...it is at least plausible that Trimmer was unreasonable in believing that St. George posed a sufficiently immediate threat to justify deadly force." [Id. @ II(B)(4)] The facts are that the LPD had every intention of using force against St. George from the outset, before he'd even returned home from dinner, and hour and a half before the gunfight. Because the LPD had these intentions and then unreasonably created a set of circumstances wherein they say that they preceived a need to use force, the excessive force claims in this particular case are not barred by Heck. The 10th Circuit's Judgmént clearly says that the defendants' failures to identify themselves (positively, verbally) and their failure to warn before using force were their decisive factors ("often dispositive" @ II (B)(3)(a)) and further procedings shall be consistent with that opinion.

The Defendants' Motion to Dismiss relies heavily on the Defendants' so-called "identification" via telephone, and the Plaintiff's disbelief. The 10th Circuit panel considered this. During Oral Arguments, Judge Phillips said, "It seems like their conduct was not typical police behavior... what was St. George supposed to do in this situation? Just trust that these people hiding in the shadows and were refusing to identify themselves are law enforcement?.. No rational person would have that trust." <emphasis mine> [quoting from Karlik, Michael Colorado Politics "10th Circuit finds officer acted unreasonably by shooting Lakewood man in darkness." 20 August 2021] "[St. George] had already expressed doubts (which were eminently reasonable in the circumstances) that there were officers outside his home who, for inexplicable reasons, would hide and not even verbally identify themselves." [Order and Judgment, 20 AUG 2021, p18] "Trimmer never even identified herself, much less provided warning that she might use deadly force." [Order and Judgment, 20 AUG 2021, p14] These are the facts that the Appellate Court took into account in the instant action, and for these reasons the 10th Circuit panel determined that Heck does not apply here. Had officers positively IDed themselves and issued a warning to de-escalate the situation they'd created, and St. George then used force, Heck could be a bar. Because that is not the case, Heck does not apply. The Defendants violated St. George's rights if he is factually innocent; they still violated St. George's rights even if he were actually and factually guilty as he's been convicted.

A. Applicable Law

Judge Hartz, who wrote the Order and Judgment in this earlier appeal for the instant case, held in Havens v. Johnson 783 F.3d 776 (10th Cir. 2015) "An excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer. For example, the claim may be that the officer used too much force to respond to the assault or that the officer used force after the need for force had disappeared." (5 citations omitted) Judge Hartz made this holding on 15 APR 2015, and in Havens ultimately barred that plaintiff from proceeding. By contrast, Judge Hartz was fully briefed in the instant case and did not bar this Plaintiff on appeal. The Plaintiff's Appellate Opening Brief cited Jiron v. City of Lakewood 392 F.3d 410, 415 (10th Cir. 2004) "The reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." In his consideration of the Havens case, Judge Hartz observes, "Havens' reply brief in this court states: 'Furthermore, the reckless and deliberate conduct of Johnson and other officers at the scene unreasonably created Johnson's perceived need to use force. Their plan to trap Havens in a confined area and Johnson's decision to alight from the safety of his vehicle and put himself in the middle of a chaotic situation were reckless and deliberate." [Havens @ B. Application to this case] Hartz notes this argument has come too late. In the Instant case, Plaintiff made this very argument in his Appellate Opening Brief [Brief for the Appellant, 20-1259, p34], and throughout 5 iterations of his Complaint. The "plan" was to lay-in-wait and ambush St. George by "grabbing" him. Laying-in-wait, hiding, sneaking and grabbing militates never once identifying themselves to St. George when he DID follow "orders" and came outside and never once issuing a warning of impending force. (It is known that St. George was unarmed on the first 2 of three times exiting his own home.) This is the exact deliberate conduct cited in the Appellate Order. This fits squarely into the premise that "officer[s] used too much force" cited in Havens, supra because officers created the circumstances by their own actions. A decision to bar St. George on Heck grounds would be inconsistent with the Order and Judgment and 10th Circuit binding precident. Other facts that support the premise that Defendant Trimmer used too much force and continued to use force after the need disappeared were the two gunshots at St. George's back while he retreated,

bleeding. [2019 Amended Affidavit, para. 50-54] This was LPD following through with the intended plan to shoot St. George as evidenced in the radio traffic transmission, "Okay, so we don't have a crossfire situation, Eric and I are gonna move up to the white truck and maintain our position there." [EX 410 and 2019 Amended Affidavit, para. 41.2] The Defendants rely on the jury instruction from St. George's trial (a trial that St. George maintains violated his Const. Rights), "he used that deadly physical force in order to defend himself from what he reasonably believed to be the use or imminent use of unlawful physical force by that other person..." (Defendants emphasize unlawful) [Defendants' Motion to Dismiss, IV(1)(A)] This reliance is misplaced. The question of whether law enforcement's violence was lawful has not been tried. St. George was charged and tried. The trial court specifically denied St. George an opportunity to try LPD on their policies and training, and their bloody historical record. [16CR2509, Motions] The jury instruction asked the jury to evaluate "what [St. George] reasonably believed." The same jury heard much testimony that St. George was intoxicated. The prosecution ruthlessly impressed how intoxicated St. George was at half-past midnight when he was lured out of his house. If the jury relied on evidence that St. George was too intoxicated to form a reasonable belief of any sort (as the prosecution argued) when the jury found St. George could not create a specific intent and denied the state conviction on first-degree charges; the jury plausibly made the determination that LPD's conduct was illegal, but St. George was not acting to defend himself because he was incapable of forming that reasonable belief because he was intoxicated.

Jiron and Havens held that law enforcement can use too much force by recklessly or deliberately creating the circumstances that lead to that use of force. If only these Defendant officers had positively IDed themselves and shouted a warning for St. George to put down his shotgun, St. George would have had an opportunity to respond to officers in de-escalation. St. George had affirmatively responded to the calls, coming out of his house twice (@ 12:20 & 12:30AM), and unarmed. At 1:00AM, St. George again responds affirmatively, police shouts for "hands up!" Bookended by the response it is unreasoned to believe that St. George could not have responded affirmatively to a positive shouted ID and warning at 12:38 - 12:44AM. Officers had plenty of time; they had six whole minutes. St. George was not making any hostile motions or sudden moves, there were no split-second judgment calls, and the only "gamble" that officers took was in not IDing

themselves and not issuing a warning; they escalated the incident.
The Defendants try to create in their motion a false dichotomy that excessive force claims between Lakewood Police and the public are an either-or proposition. It is a logical fallacy: Either the police are the victims or the citizen is a victim. Reality is excessive force is an either-or-both-neither proposition. The same set of premises as in "mutual combat" underpins the idea that even while a man may be convicted of an assault against an officer, the reckless and/or deliberate conduct of those officers fomented the circumstances surrounding that incident. A reasonable jury could find that Trimmer's conduct of lying-in-wait without any ID or warning was active conduct of tacit acquiescence to what **she** believed to be mutual combat. In her own statement, Trimmer tells us that her belief in the moments before shooting St. George was, "I think he's hunting me, that's how I take it... he had ammo in his pocket, he was coming out for a fight." She didn't have this belief earlier, before St. George armed himself, a situation that her silence recklessly or deliberately created. While this belief was untrue, Trimmer tells us that she believed it at the time and yet she never shouted out any ID or any warning. She had plenty of time. These facts are suggestive of a willing, voluntary mutual combat on Trimmer's part if she genuinely believed what she reported. This is precisely the reason why failure to give a warning is deemed so important as to often be dispositive; the failure to warn (as de-escalation) has all the markers of an implied agreement to mutual combat. see United States v. Mayberry 567 Fed.Appx 643 (10th Cir. 2014), Harrison v. Marshall 2010 U.S.Dist.LEXIS 136943, *3, Salas v. Faulk 2016 U.S.Dist.LEXIS 185507
We cannot forget, these Defendants arrived at St. George's home, he didn't seek them out. They called him out of his house in the middle of the night. They intended to use force on him well before they'd even called him out (to "grab" him,) and did nothing to de-escalate the situation they created by not IDing or warning after they believed (incorrectly) St. George was looking for a fight. Instead, they discussed crossfire issues, and drew their weapons, in preparation for a fight. (St. George is explicityly not arguing he was in a mutual combat with LPD. In psychological terms, Trimmer's belief is a "projection." She's been trained to seek out a fight, LPD has a pugnatious culture, and her belief permits a reasoned inference that she sees a fight in others where it doesn't exist, it is in her; LPD trained her to meet that fight with a fight.)
For the foregoing reasons, Heck has already been either waived by the Defendants,

it has been already decided and additional consideration runs contrary to the Law of the Case doctrine, or Heck does not apply because it is not inconsistent with St. George's temporary and illicit conviction. Dismissal on Heck grounds must be denied.

II. Qualified Immunity

The 10th Circuit's 20 AUG 2021 Order and Judgment states, "Even if the officers violated St. George's Fourth Amendment rights, they may still be entitled to qualified immunity if the law they violated was not clearly established at the time of the episode." [Order @ p19] The Defendants acknowledge the 10th Circuit's judgment that they have violated St. George's rights, but assert that the right was not clearly established. "Defendants' qualified immunity arguments are limited to whether Plaintiff's rights were clearly established at the time of the alleged violation." The right violated had long been established by a number of cases, on point, and additionally with weight of authority from sister districts. There can be no doubt as to whether these Defendants were on notice that their conduct was a violation of an established civil right.

A. Applicable Law

(taken directly from the Plaintiff's Opening Brief) Agent Trimmer is not entitled to Qualified Immunity. A court should deny qualified immunity when (a) "the defendant's actions violated a constitutional or statutory right" and (b) "the right at issue was clearly established at the time of the defendant's unlawful conduct." Estate of Ceballos v. Husk 919 F.3d 1204, 1212 (10th Cir. 2019). As demonstrated above, the pleadings contain sufficient allegations to support a finding that Agent Trimmer violated Mr. St. George's constitutional rights. Moreover, that violation was clearly established at the time of the incident. Pauly I, 814 F.3d 1060 (10th Cir. 2016) was controlling law at the time of the incident and provided fair warning to Trimmer that her use of force under these circumstances was unconstitutional. See supra. In both Pauly I and here, the officers were responding to 911 complaints by individuals who were no longer in any danger. In both cases, the officers chose to approach the plaintiffs' houses despite lacking probable cause to make an arrest. Both sets of officers surrounded the plaintiffs' houses in the dead of night, taking all the steps they could to make sure the plaintiffs were unaware of their presence. Both sets of officers attempted to justify this stealth as necessary to protect officer safety.

Police had a clear visual of each plaintiff inside his house and could see that the plaintiff did not pose any threat upon the officers' arrival. Despite this, the police declined to make contact, and took up hiding around each plaintiff's home. Believing an invasion was imminent, both plaintiffs grabbed a gun and gestured with it to ward off the intruders--Pauly by shouting that he had a gun, Mr. St. George by racking his shotgun. After this gesturing, the officers shot each plaintiff as he stood in his own home, unaware that the intruders were law enforcement. To the extent there are factual differences between the two cases, those differences render Agent Trimmer's conduct a more obvious violation than in Pauly I. The police in Pauly I parked their police cars in front of the house and turned on their arrest lights. Here, the police took pains to hide their cars around the block so that Mr. St. George would be unaware it was the police who were surrounding his house. In Pauly I, at least one officer announced that they were police officers. Neither Agent Trimmer nor her fellow officers identified themselves while on the scene. In Pauly I, the decedent was the first to fire his weapon. Here, Mr. St. George only fired after being shot at. Finally, the officers in Pauly I only shot the decedent immediately after he raised his gun and took aim at them. Here, Agent Trimmer shot Mr. St. George while his gun was pointed at the ground, and well after he made any gesture with the weapon. Trimmer's conduct is identical to the officers in Pauly I, except she took more steps to conceal her identity, and fired on the plaintiff before he took aim with his weapon or fired any shots. Based on these strikingly similar facts, it must be said that "the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional." Smart, 951 F.3d @1168 (internal quotations omitted)

(taken directly from Order and Judgment 20 AUG 2021) The Fourth Circuit's decision in Cooper v. Sheehan, 735 F.3d 153 (4th Cir. 2013), is instructive. Cooper lived in a mobile home in rural North CArolina. About 11:00PM one night a neighbor called 911 to report a noisy altercation, like 'two males screaming at each other," on the property. Id. @ 155 Two officers in separate vehicles (one a marked patrol car) drove to the vicinity of the home and approached it; the officers heard screaming coming from the property and saw a man (not Cooper) on the home's back porch who appeared to see the two cars as they arrived. Id. One officer tapped on the window to alert those inside to their presence, but they failed to identify themselves as officers. Id. Responding to the tapping, Cooper "called out for

anyone in the yard to identify himself, but no one responded." Id. He then emerged from his back door "[w]ith the butt of [his shotgun] in his right hand and its muzzle pointed toward the ground." Id. Without warning, the officers shot him multiple times. See Id. @ 156 Cooper had made "no sudden moves," "made no threats," and "ignored no commands." Id. @ 159 The appellate court affirmed the district court's denial of qualified immunity, stating that "the mere possession of a firearm by a suspect is not enough to permit the use of deadly force," which "may only be used by a police officer when, based on a reasonable assessment, the officer or another person is treatened with the weapon." Id. Emphasizing that the officers had never identified themselves, the court concluded that "the facts fail to support the proposition that a reasonable officer would have had probable cause to feel threatened by Cooper's actions." Id. se also George v. Morris, 736 F.3d 829, 835, 838 (9th Cir. 2013) (Officers responding to domestic-violence call would have used unreasonable force if they shot suspect who had not ignored commands to drop his gun, had only pointed it toward the ground, and had made no threatening gestures such as pointing it at the officers.) St. George's carrying a gun in the low-ready position to protect himself as he walked around his house late at night to see who it was that wanted him to come outside and talk was not a hostile or threatening action. If he knew (or, more accurately, if the officers reasonably thought that he knew) that those outside his home were law-enforcement officers, his wielding a gun might reasonably be perceived as hostile. But in light of the officers' prior failure to identify themselves and Muller's report to the other officers after the fourth phone call that St. george did not believe that the callers were police officers, it would have been unreasonable of those officers to think that St. George believed that he was dealing with law enforcement. [Order and Judgment, pp15-6]

The Defendants attempt to distinguish by stating, "[Defendants] identified themselves as police officers but Plaintiff appeared not to believe them." for one, this is factually inaccurate to St. George's first or second exit from his home. He had followed the "orders" of the so-called "police" defendants, and he believed the LPD officers at his front door at 1:00AM when they actually shoute out to him and showed themselves. It's reasonable the Plaintiff would have believed the defendants but for the fact that when he did exit his home as ordered, nobody came forward to ID themselves and talk to him. Only preceding a third exit outside, is when Muller reports that St. George doesn't believe these callers--Defendants--

are really police. Of course not. The Appellate Court addressed this often, eg, "In light of the officers' refusal to identify themselves on the prior two occasions and their knowledge that St. George (for very good reason) doubted that the callers were officers, it would have been highly unreasonable for them to think that his carrying a shotgun when he exited the third time indicated any lack of respect for law-enforcement authority." <emphasis mine> [Order @ p13] Defendants additionally attempt to mislead this Court saying, "[St. George] arm[ed] himself, leaving his residence to search out and confront officers while they seek cover--that would certainly be criminal (and in this case, was so found by a state court jury)..." [Motion to Dismiss, IV(B)(2)] The jury of St. George's criminal trial rejected this false premise. The prosecutors pushed that false narrative at trial, and these defendants perjured themselves in support of it. The jury rejected it in denying the State the first degree convictions it maliciously sought. The Court above addressed this too, stating that St. George's manifest intention "was clearly trying only to identify who, if anyone, might be lurking around his residence and what threat they might pose." [Order and Judgment, p17] "Here, Defendants knew they had identified themselves as officers and that Mr. St. George had heard them. The **only** dispute is whether Mr. St. George believed them." <emphasis mine> [Motion to Dismiss, IV(B)(2)] If that is the **only** dispute, and all else is conceded, the 10th Circuit panel has resolved the dispute in St. George's favor. Just like in Pauly I, where officers shouted "State Police" and it was deemed insufficient, or in Cooper where police tapped on a window and failed to step forward and ID as follow up, so it is here. Saying "police" on a phone with blocked caller ID and then not IDing when your target steps outside is in fact not any actual, believable ID. It is exactly the type of deliberate and reckless conduct that creates a perceived need to use force contemplated in Jiron v. Lakewood, supra. More, there was zero warning in the instant case, in Pauly I, or in Cooper. The law was clearly established, and there are cases on point.

III. Failure to state a claim pursuant to 12(b)(6)

The Defendants' Motion to Dismiss alleges that St. George's Count Nine fails to state a claim upon which relief can be granted. (Counts One through Eight of St. George's 5AC were already erroneously dismissed on these grounds, while they were the FAC, then remanded back to the District under 20 AUG 2021 Order and Judgment) St. George's Count Nine properly pleads claims for Municipal Liability and for Supervisory Liability with sufficient facts in support based upon: Failure to

Train, Deliberate Indifference to Constitutional Rights of their victims, customs and policies established by Lakewood and McCasky that are causitive to the violence, overt ratification of the violence by McCasky, and also tolerance and acquiescence to the violence. The Plaintiff is not a lawyer--he's been forced into learning these machinations (indeed, St. George opines that law is a gutter trade as it is most typically applied)--and he is entitled to have his pleadings liberally construed in his favor. Motions to dismiss are viewed with disfavor. For these reasons this court must deny the Defendants' Motion to Dismiss.

1. Applicable Law

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal 556 US 662, 678 (2009) To acchieve "facial plausibility," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. This plausibility standard "does not impose a probability requirement," Bell Atl. Corp. v. Twombly 550 US 544, 556 (2007), but it demands more than mere conceivability Id. @ 570. In assessing a claim's plausibility, Courts must "draw on judicial experience and common sense." Iqbal, 556 US @ 679. The Plaintiff's pleadings "are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Hall v. Bellmon 935 F.2d 1106, 1110 (10th Cir. 1991) "Motions to dismiss are generally viewed with disfavor." Rigg v. City of Lakewood 896 F.Supp.2d 978 (D. Colo. 2012) "[S]o long as the Plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. see Twombly, Bryson v. Gonzales 534 F.3d 1282, 1286 (10th Cir. 2008)" Hill v. True 2022 U.S.Dist.LEXIS 58681 *15 "The Supreme Court in monell v. Dept of Social Svs 436 US 658, 690 (1978), clearly rejected respondeat superior as contrary to the 'causation' language in s1983. See also Ashcroft v. Iqbal, 556 US 662, 676 (2009)" [Harvard Civil Rights-Civil Liberties Law Review Vol 47, pg 283 (2012)] The 10th Circuit has held Monell liability under s1983 is established by a "(1) formal regulation or policy statement (2) informal custom amounting to widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute custom or usage with force of law (3) decision of municipal employee with final policy-making authority (4) policymakers ratification of subordinate employees' action, and (5) failure to train or supervise employees. Murphy v. City of Tulsa

950 F.3d 641 (CA 10(Okla) 2019) A "formulaic recitation of the elements" will not suffice. Twombly @ 555 A pattern of violations is the preferred showing that "city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights." Connick v. Thompson 131 S.Ct 1350, 1360 (2011) A showing of a pattern of violations may be unnecessary where a "highly predictable or plainly obvious" consequence of a failure to train is constitutional rights violations. Bryson v. City of Oklahoma City 627 F.3d 784, 789 (10th Cir. 2010); City of Canton v. Harris 489 US 378, 390 (1989) [47 Harv.CR.L.Rev. pg310]

2. Argument

The Defendants seek to use the logical fallacies of red herring and strawmen to distract the court from the proper course in determining this Motion to Dismiss. First, they suggest that St. George's claim is on a Respondeat Superior theory. It is not, St. George's Count Nine is base soundly on the theory that the City and McCasky have established policy and custom that lead to excessive use of force. They have actively trained their officers to conduct themselves in ways that recklessly result in excessive uses of force. When their officers use excessive force, the City and McCasky do not discipline their officers and they openly ratify their subordinates' violence. These are the elements set forth in Murphy, supra and Defendants quote in their motion from Waller v. City and County of Denver 932 F.3d 1277, 1283 (10th Cir. 2019) [Motion, IV(3)(C)] as proper elements of a Monell claim of Deliberate Indifference Supervisor or municipal liability cognizable under s1983. It is the policy of the Lakewood Police to not properly identify themselves. Plaintiff pleads this at Complaint para. 89.17 and supports it in 2019 Amended Affidavit paras. 15, 15.1, 16, 17, 17.1, 17.2, 18, 18.1, 19, 20, 20.1, 20.2, 24, 31.1, 31.2, 32, 41.3, 45.2, 45.4. The Complaint opens stating "Every officer involved in the incident has testifed that their conduct was consistent with their training." St. George submits exhibits that support these facts. "...with this type of training... is it common to park your marked car in plain view of the target?.. no sir... if he doesn't like us, give him a target or let him know what's going on... okay." [Trimmer, EX 402 @ ln 930-940] "...we don't challenge him, we don't say anything we're just waitin for him to get a couple of steps away from the door so that we could-- we can grab him or, you know, whatever if he tried to move." [Maines, EX 403 @ ln 215-216] "I started the Academy in January of 2015...

any specific, uh, specialized training you've received? No. No?" [Brennan, EX 405 @ ln 8-22] "I've worked here about 17 years... specialized training... some leadership schools, incident command 100, 200, 300... 400... and which was nice is our backdrop - I'm i-wasn't buildings- it was field which I felt really confident if I had to take a shot my backdrop is-is-is clean." [Muller, EX 404, @ ln 10-20 & 244-245] (echoed in Radio Traffic, 2019 Affidavit para 41.2) From these averments, supporting facts, and officers statements, on may reasonably infer that Lakewood and McCasky have a policy of officers not positively IDing themselves, and not issuing warnings prior to use of force. The City and Chief train actively to not positively identify. Hiding the squad cars, blocking caller ID on their phones, not knocking on the door and announcing, approaching on foot by stealth, hiding in shadows, not shouting out an ID, laying-in-wait to grab someone and lining up a shot at someone from the dark are all trained conduct meant to not "let [St. George] know what's going on." Deliberately not IDing themselves is one of Lakewood's trained techniques to keep their targets from "knowing what's going on." Where the supervisor Maines is trained on the policy of approaching by stealth, luring a target out of his home, and laying-in-wait with the intent to "grab" his victim, because he's been trained on the policy of not letting his target know what's going on, the clear inference is the policy is to not warn before using force and the Supervisor has been trained to do so. One cannot sneak up and "grab" someone if they positively ID themselves and/or warn their targeted victim--it would be impossible. Plaintiff has plead this. [AFF. paras. 26-31.5] The Plaintiff encourages the court to look to the Defendants' own testimonies that they were following their training based on Lakewood and Chief McCasky's policies and customs, specifically not making positive ID, not giving warning, and "grabbing" people. The Defendants' Motion to Dismiss fully ignores Chief McCasky's ratification of the Defendants' actions. The 10th Circuit's 20 AUG 2021 Order and Judgment confirms that McCasky's officers did violate St. George's Constitutional rights, and the 5AC in paras. 89.19-21 pleads that McCasky ratified those actions. McCasky did not merely "speak at St. Geore's sentencing," [Mot. to Dismiss, IV(3)(B)] McCasky praised the acts of the officers that tried to murder St. George. McCasky called them "compassion[ate]" "digni[fied]" "courage[ous]" and "brave[]." McCasky says the officers were "serv[ing] our community." This is all high praise!! McCasky is clearly ratifying these officers'

actions. He certainly says nothing to mitigate the ratification, perhaps saying it was unfortunate that St. George was nearly murdered because his officers failed to: properly identify themselves, issue a warning, and not plot out an ambush. McCasky asks the judge to "send a clear message, loud and clear," but he doesn't train his officers to send loud and clear messages (e.g. shout "Lakewood Police, sir!" "Drop your weapon or we'll be forced to shoot!") McCasky ratified his officers conduct, just as this Plaintiff has pled. The Defendants are further unimpressed with the Plaintiff's list of Lakewood Police Department's violent, bloody exploits. "Three allegations of excessive force against a large municipal police department over the course of approximately a decade cannot be the basis of Monell liability based on custom/practice." [Mot. Dismiss, IV(3)(C)(2)] (Plaintiff reserves the right to provide a suppliment of additional published violence attributed to Lakewood) The City of Lakewood, Colorado is a beautiful suburban town nestled against the foothills of the Rocky Mountains. Its population was 157,935 people in 2019, up 9.6% since 2000. Its median income was $70,178 and the median single family home valued at $432,200. [Citydata.com] Despite, the Lakewood police are trained, and use violence as though they were soldiers in a large, urban, crime-ridden ghetto. Even sadly killing one of their own--Davies--which Defendants incredulously say was NOT an excessive use of force, an incident that had many of the same customs and practices on display as the instant one. (failure to positively ID, failure to warn before using force, sneaking and hiding in a backyard.) How many bloodied bodies stacked up would satisfy the author of this Motion to Dismiss that perhaps there is a pattern--and a problem??! St. George has in his pleading focused on a few cases that necessarily put the City and McCasky on notice to the specific issues (failure to positively ID, use of "grabbing" people unwarranted, failure to warn) in the immediately near-term preceeding the excessive force against him. Additionally, the Defendants dislike the observation that the Lakewood Police have avoided adopting body-worn cameras. That <u>is</u> the fact, not a conclusory statement. On 31 July 2016, when LPD tried to murder the Plaintiff, they did not wear cameras. To Plaintiff's best knowledge, LPD still doesn't wear cameras. Plaintiff pleads that Lakewood <u>does have</u> a policy to not implement cameras. (Opposed to a "lack of a policy" to implement them.) Plaintiff pleads that it is well known that cameras reduce police force. Plaintiff believed this was an *a priori* statement of fact, not needing support. "Indeed, the

very purpose of the 'Body-Worn Camera Program'... is to 'promote public trust and enhance service to the community by accurately documenting events, actions, conditions, and statements during citizen encounters... and to help ensure officer and public safety.'" US v. Gibson 366 F.Supp.3d 14, 26 (DC Dist Ct. 2018) "One of the purposes of the body-worn camera is to ensure that police act in accordance with the law in tense circumstances..." Sut. Mass. 488 Mass. 379, 392 "Proponents of body-worn cameras tout the utility of these devices in protecting the police from false allegations of damage, promoting police accountability and serving as a record of police-civilian interactions." [American Constitution Society for Law and Policy, Police Body Worn Cameras: Evidntiary Benefits and Privacy Threats, Blitz, May 2015.] "In 2013, approximately one-third of US municipal police departments had implemented the use of body-worn cameras." [Hyland, US Dept. of Justice Bureau of Justice Statistics, 2016] "...in 2016, 47% of general purpose law enforcement agencies in US acquired BWC's" Id. Nov. 2018 The Colorado legislature agress, in its 2020 SB-217 titled "A Bill for an act concerning measures to enhance law enforcement integrity," the very first line, "requires all local law enforcement agencies to issue body-worn cameras to their officers..." (Eff. 2023) Plaintiff has pled that this is demonstrative of a policy and culture that tolerates and acquiesces to excessive use of force. Obviously, if LPD routinely uses excessive force, they don't want it recorded. If the LPD were truly routine victims of force, they would want the recorded evidence. Having pled specific policies and customs, having pled facts to support the existence of the policies and customs, having pled facts that these actions have been trained and ratified by McCasky and the municipality, St. George has met his burden of stating a claim to relief that is plausible on its face. St. George's Count Nine must survive this Motion to Dismiss.

CONCLUSION

The three parts of the Defendants' Motion to Dismiss must be denied. No part of Plaintiff's 5AC is barred on Heck grounds. The Defendants are not entitled to Qualified Immunity, their conduct was clearly established to be a constitutional violation against St. George. Count Nine is plausibly pled, it meets the burden set forth in FRCP 12(b)(6).

CERTIFICATE OF SERVICE

I certify that on 04/12/2022 a copy of the foregoing was ffiled with the Clerk of this court, and a true copy was placed in the United States mail, first-class with sufficient postage, to:

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