No. 23-3391

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Sumaya Aden, as next-of-kin and trustee for the
Estate of Isak Abdirahman Aden, Decedent,

Plaintiff-Appellee,

vs.

City of Eagan, Minnesota, Officer Jacob Peterson,
Officer Matthew Ryan, Officer Daniel Nelson,
Officer Adam Stier, Officer Anthony Kiehl,
Chief Roger New, Lieutenant Andrew Speakman,
and Sergeant Corey Cardenas,

Defendants-Appellants.

On Appeal from the United States District Court
For the District of Minnesota
Case No. 20-cv-01508 (JWB-TNL)

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

On July 2, 2019, Decedent Isak Aden—who threatened his girlfriend with a handgun and fired a round while fleeing on foot—engaged in a 4-hour standoff with police. During the standoff, Aden was ordered to surrender, but refused, keeping the gun within arm's reach at all times. In an effort to peacefully end the standoff, officers developed an apprehension plan involving using flashbangs and less-lethal munitions. When officers initiated this plan, Aden "reach[ed] for and grab[bed] his gun." Due to the threat presented by a non-compliant subject grabbing a gun during an attempt to apprehend him, five officers fired to stop the immediate deadly threat. Plaintiff claims the supervisors' authorization of the tactical plan and officers' use of deadly force violated the Fourth Amendment, constitutes common law negligence, and seeks wrongful death damages. Plaintiff also claims Chief Roger New's authorization of the apprehension plan set City policy and, therefore, supports *Monell* liability. As the tactical plan and use of deadly force were objectively reasonable, the officers are entitled to qualified and official immunity.

Appellants brought a summary judgment motion. District Court Judge Jerry Blackwell denied the motion, in part. Appellants appeal the court's denial of qualified and official immunity as their actions were objectively reasonable, the force use was not excessive, and their actions did not violate clearly established law.

Thirty minutes of oral argument is requested.

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JURISDICTIONAL STATEMENT

Sumaya Aden, as trustee for the next-of-kin of Isak Aden, commenced this action against eight officers and the City of Eagan under 42 U.S.C. § 1983, alleging officers violated Aden's Fourth Amendment rights by employing excessive less-lethal and deadly force, arguing Chief Roger New's authorization of the tactical apprehension plan set City policy, and asserting a negligence claim against all Defendants to seek wrongful death damages. (R.Doc.1). Defendants moved for summary judgment requesting dismissal of Plaintiff's claims in their entirety. (R.Doc.60). On September 29, 2023, the district court denied summary judgment on the excessive force, negligence, and *Monell* claims, but granted summary judgment on the substantive due process claims. (App.1-33, R.Doc.93, at 1-33, Add.1-33). Defendants timely filed a Notice of Appeal on October 26, 2023. (R.Doc.96).

"An order denying qualified immunity is immediately appealable even though it is interlocutory; otherwise, it would be effectively unreviewable." *Jones v. McNeese,* 675 F.3d 1158, 1160 (8th Cir.2012) (citing *Scott v. Harris,* 550 U.S. 372, 376 n.2 (2007)). An officer may appeal the Order denying summary judgment based on qualified immunity "to the extent that it turns on an issue of law" or "challenges the district court's application of qualified immunity principles to the established summary judgment facts." *Id.* at 1160-61. The Eighth Circuit "may reach issues of official immunity under the collateral order doctrine." *Gordon ex. rel. Gordon v.*

Frank, 454 F.3d 858, 861 (8th Cir.2006). As such, this Court has jurisdiction over this appeal.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN DENYING QUALIFIED IMMUNITY ON PLAINTIFF'S FOURTH AMENDMENT CLAIM ARISING OUT OF THE DEVELOPMENT AND AUTHORIZATION OF THE LESS-LETHAL TACTICAL PLAN.

Apposite Legal Authority:

Z.J. v. Kan. City Bd. of Police Comm'rs, 931 F.3d 672 (8th Cir. 2019)
Bernini v. City of St. Paul, 665 F.3d 997 (8th Cir. 2012)
Escobedo v. Martin, 702 F.3d 388 (7th Cir. 2012)
White v. Pauly, 580 U.S. 73 (2017)

II. WHETHER THE DISTRICT COURT ERRED IN DENYING QUALIFIED IMMUNITY ON PLAINTIFF'S FOURTH AMENDMENT DEADLY FORCE CLAIMS.

Apposite Legal Authority:

McElree v. City of Cedar Rapids, 983 F.3d 1009 (8th Cir. 2020)
Ching v. City of Minneapolis, 73 F.4th 617 (8th Cir. 2023)
Sabbe v. Wash. Cnty., 84 F.4th 807 (9th Cir. 2023)
White v. Pauly, 580 U.S. 73 (2017)

III. WHETHER THE DISTRICT COURT ERRED IN DENYING DISMISSAL OF PLAINTIFF'S INTERTWINED *MONELL* CLAIMS.

Apposite Legal Authority:

Brabbit v. Capra, 59 F.4th 349 (8th Cir. 2023)
Whitney v. City of St. Louis, 887 F.3d 857 (8th Cir. 2018)
Eagle v. Morgan, 88 F.3d 620 (8th Cir. 1996)

IV. WHETHER THE DISTRICT COURT ERRED IN DENYING OFFICIAL AND VICARIOUS OFFICIAL IMMUNITY ON PLAINTIFF'S NEGLIGENCE AND WRONGFUL DEATH CLAIMS.

Apposite Legal Authority:

Hassan v. City of Minneapolis, 489 F.3d 914 (8th Cir. 2007)
Rico v. State, 472 N.W.2d 100 (Minn. 1991)
Wiederholt v. City of Minneapolis, 581 N.W.2d 312 (Minn. 1998)

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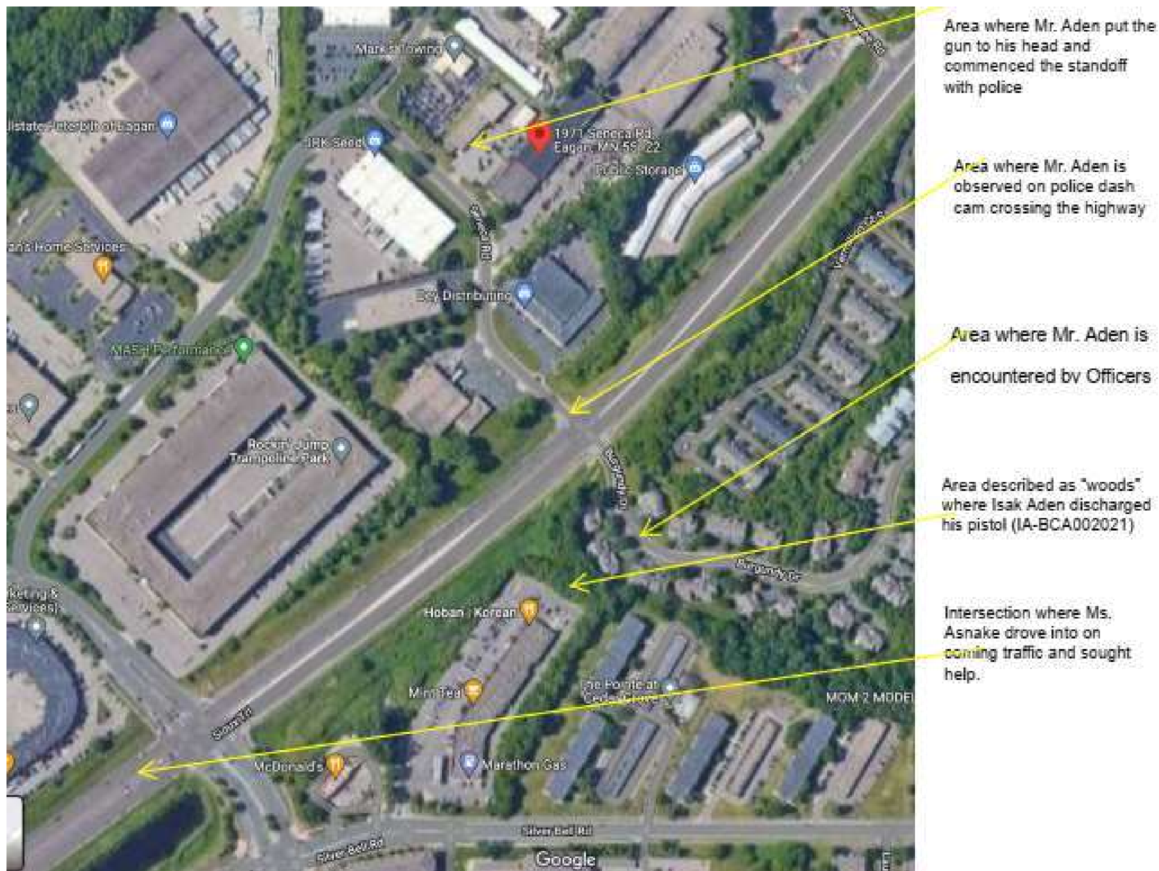
STATEMENT OF THE CASE

Defendants-Appellants set forth the following uncontroverted facts from the record in supplement to the facts contained in the district court's order that Defendants-Appellants also accept as undisputed.

Aden Threatens Girlfriend with a Gun

On July 2, 2019, Isak Aden stole a pistol from his brother and drove to his girlfriend, Tigst Asnake's house to confront her about nude photos allegedly posted online. (R.Doc.1, ⁋⁋35, 39-41). When Asnake got home, Aden entered her car, argued with her, pointed a gun at her, and "ordered her to drive." (App.51-53, R.Doc.63-1, at 1-3; App.3, R.Doc.93, at 3, Add.3).

Concerned for her safety, Asnake "drove into the oncoming traffic" to "attract attention" near the Eagan Outlet Mall at 6:00 p.m. (*Id.*). She leapt out of her car and ran to and attempted to enter another motorist's vehicle, while screaming, "he's got a gun!" (App.57, R.Doc.63-3, at 1; App.54, R.Doc.63-2, at 1). Simultaneously, Aden exited the car, tucked an object under his orange shirt, and fled, running toward a McDonalds restaurant. (App.60-62, R.Doc.63-4, at 1-3).



(App.1830, R.Doc.66-1, at 27).

At 6:05 p.m., Asnake—who saw Aden flee—returned to her car, calling 911 as she left the intersection. Asnake reported Aden "pulled out a gun on me," "pointed it towards me," and forced her to drive toward an unknown destination. (App.51-53, R.Doc.63-1, at 1-3). Officers were dispatched to a "driving domestic" to search for Aden, who was identified as the suspect. (App.63-64, R.Doc.63-5, at 1-2). Given the danger presented by an armed male, who threatened his girlfriend with a gun, officers from multiple departments responded. (App.96, R.Doc.63-6, at 1).

At 6:17 p.m., State Trooper Justin Armstrong pulled into a strip mall north of the McDonalds and spoke to a woman, who reported hearing a gunshot[1] in the small, wooded area between the strip mall and a residential neighborhood. (App.64, R.Doc.63-5, at 2; App.104, R.Doc.63-7, at 2).

Aden Flees Police

To locate Aden, Officers Jeff Thul and Chris Meade searched the residential neighborhood adjacent to the wooded area where the gunshot was heard. (App.110, R.Doc.63-8). They spotted a male matching Aden's description at 6:24 p.m. (*Id.* at 18:24:37; App.97, R.Doc.63-6, at 2). However, before they could apprehend him, Aden recognized they were police officers and fled northbound on Burgundy Drive with his hand concealed in his pocket:

[1] Aden later admitted to the discharge. (App.432, R.Doc.64-2, at 2).

(App.110, R.Doc.63-8, at 18:23:50-52; App.65, R.Doc.63-5, at 3).

Officers pursued Aden while setting up a perimeter. (*See, e.g.,* App.110, R.Doc.63-8, at 18:24:25-18:44:54; App.66-68, R.Doc.63-5, at 4-6). As Aden fled police, he clutched the handgun in his right hand:

(App.120, R.Doc.66, at 5).

Due to the danger Aden presented, Eagan, Burnsville, and Bloomington officers assisted in establishing a perimeter. (*Id.*). Despite these efforts, Aden broke through the perimeter, sprinting across Highway 13 at 6:44 p.m. (App.97, R.Doc.63-6, at 2; App.69, R.Doc.63-5, at 7).

After evading police on foot for over 20 minutes, Aden pointed the gun to his right temple and sat down on a curb in the parking lot of a commercial building located at 1971 Seneca Road. (App.97, R.Doc.63-6, at 2).

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(App.114, R.Doc.63-10, at 34:38-34:52; App.69, R.Doc.63-5, at 7).

Officer Thul, who pursued Aden to the parking lot, exited his squad and immediately ordered Aden to drop his gun. (App.110, R.Doc.63-8, at 18:45:03-18:45:11; App.3, R.Doc.93, at 3, Add.3). Aden refused. Thul began negotiating, repeatedly ordering Aden to surrender as negotiators were paged. (*Id.*; App.97, R.Doc.63-6, at 2). Aden not only refused to put down the gun, but he passed the gun between his left and right hand in a manner officers found concerning:

Movement with gun

(App.114, R.Doc.63-10, at 38:31-38:32, 41:41). At 6:57 p.m., Aden pointed the gun to his right temple. When he did so, Thul instructed his partner to move because the "gun is kinda pointed your way." (App.110, R.Doc.63-8, at 18:57:18; App.198, R.Doc.63-13, at 6).

Due to the danger presented by Aden, including his refusal to surrender the gun, prior firearm discharge, and reported assault with a firearm, Eagan and Bloomington's SWAT teams and Burnsville's tactical team were paged to the scene with armored vehicles (Bearcats and an MRAP). (App.98, R.Doc.63-6, at 3; App.191, R.Doc.63-12, at 11).

At 7:08 p.m., Aden put the gun on the ground by his feet. (App.110, R.Doc.63-8, at 19:07:53). Thul told Aden that he made a "good decision," then asked Aden to stand up and walk toward him several times. (*Id.* at 19:07:53-19:09:18). Aden refused and, instead, in the minutes that followed, picked up the gun. (*Id.* at 19:09:45, 19:10:12). When he did so, Aden was again ordered to put down the gun and warned making an adjustment with the gun could be perceived by officers as a deadly threat. (*Id.* at 19:12:56-19:13:01; App.198, R.Doc.63-13, at 6).

At 7:21 p.m., negotiators arrived and Officer Joseph Moseng took over negotiations. (App.98-99, R.Doc.63-6, at 3-4; App.4, R.Doc.93, at 4, Add.4). Meanwhile, a Command Post was established in a nearby parking lot. Eagan Lt. Andrew Speakman, Bloomington Sgt. Cory Cardenas, and Burnsville Sgt. Max

Yakovlev[2] were in the Command Post, tasked with securing the scene and developing a tactical plan to apprehend Aden, if negotiations failed. (App.131, R.Doc.63-11, at 10; App.346-47, R.Doc.63-17, at 6-7).

As SWAT members arrived, they replaced patrol officers on-scene. (App.185-86, R.Doc.63-12, at 5-6). Similarly, as armored vehicles arrived, they were tactically positioned to provide cover to officers and protect the public. (*Id.*).

At about 8:56 p.m., Aden set the gun down between his legs. (App.114, R.Doc.63-10, at 2:45:38; App.100, R.Doc.63-6, at 5). Officers delivered a cell phone to Aden in a cardboard box to facilitate ongoing negotiations at 9:23 p.m. (*Id.*). Conversations between Moseng and Aden on the phone could be monitored, allowing Speakman, Cardenas, Yakovlev, and New ("Command Staff") to remain apprised, in real-time, of negotiations. (App.138, R.Doc.63-11, at 17; App.215-16, R.Doc.63-14, at 14-15).

In the final hour of the standoff, Moseng spoke with Aden multiple times. During these calls, Moseng pleaded with Aden to surrender. Aden refused: "I'm not doing any [of] that. …I'm not willing to go to jail tonight. That's one thing that you have to…understand." (App.433, 436, 438-448, R.Doc.64-2, at 3, 6, 8-18). Despite refusing to surrender, Aden admitted:

- he stole the gun from his brother;

---

[2] All claims against Yakvolev were dismissed with prejudice. (R.Doc.53).

- when arguing, Asnake saw the gun;
- Asnake got out of the car and screamed, Aden "was gonna shoot her";
- he fled; and
- the gun discharged—allegedly "accidentally"—as he fled.

(App.432-34, R.Doc.64-2, at 2-4).

Moseng explicitly told Aden, officers viewed refusing to surrender the gun as a threat:

> I mean you're just still a quick grab of [the gun] away…[Y]ou have to understand that [the gun]'s still in play and that's still something that we have to worry about.

(App.444, 450, R.Doc.64-2, at 14, 20).

As the standoff continued, Command Staff grew increasingly concerned negotiations were at a "stalemate" due to Aden's: (1) refusal to surrender the weapon, (2) comments he would not go to jail, and (3) insistence he be allowed to see Asnake, which officers could not accommodate due to concerns for her safety. (App.142, R.Doc.63-11, at 21; App.331, R.Doc.63-16, at 7; App.357, R.Doc.63-17, at 17; App.197, R.Doc.63-13, at 5; App.187, R.Doc.63-12, at 7). Further, as Aden remained armed, refused to comply with commands, repeatedly hung up on negotiators, and it was getting dark, Command Staff were reasonably concerned Aden remained a threat to public safety. (*Id.*; App.331-32, R.Doc.63-16, at 7-8). Thus, Speakman—with assistance of Cardenas and Yakovlev—developed a tactical

plan to apprehend Aden. (*Id.*; App.144, R.Doc.63-11, at 23; App.187, R.Doc.63-12, at 7; App.385, R.Doc.63-18, at 5).

The district court described the less-lethal tactical plan as:

> officers throw[ing] flashbang grenades at Aden to disorient him, followed by firing 40 mm less-lethal foam bullet rounds. The strategy contemplated Aden leaning away from the gun in an immediate reaction, shocked and startled, which would create an opportunity for the arrest team to rush in and apprehend him. Sniper teams and other officers would provide lethal cover for the arrest team…

(App.5, R.Doc.93, at 5, Add.5; App.144-49, R.Doc.63-11, at 23-28).

Chief New approved the tactical plan, but instructed negotiators to get Aden as far away from the gun as possible. (App.195, R.Doc.63-13 at 3). In response, Moseng repeatedly requested Aden move away from the gun. (App.432-51, R.Doc.64-2, at 2-21). Aden initially complied, scooting to his left, creating 1-2 feet of separation. (App.100, R.Doc.63-6, at 5). At that distance, officers believed the tactical plan could be safely initiated and SWAT operators were advised, "will be deploying flashbang shortly." (*Id.;* App.195, R.Doc.63-13, at 3).

The less-lethal apprehension plan involved multiple officers. Officer Jacob Lucas and SWAT Medic Patrick Sweany were assigned to deploy flashbangs from the driver-side of the Bloomington Bearcat while Officer Eric Tessmer was to deploy a flashbang from the passenger-side of the Edina Bearcat. (App.565, R.Doc.64-19, at 4; App.492-93, R.Doc.64-7, at 3-4). Officers Jeremy Pilcher and Nick Melser were assigned to deploy less-lethal rounds from their respective positions at the

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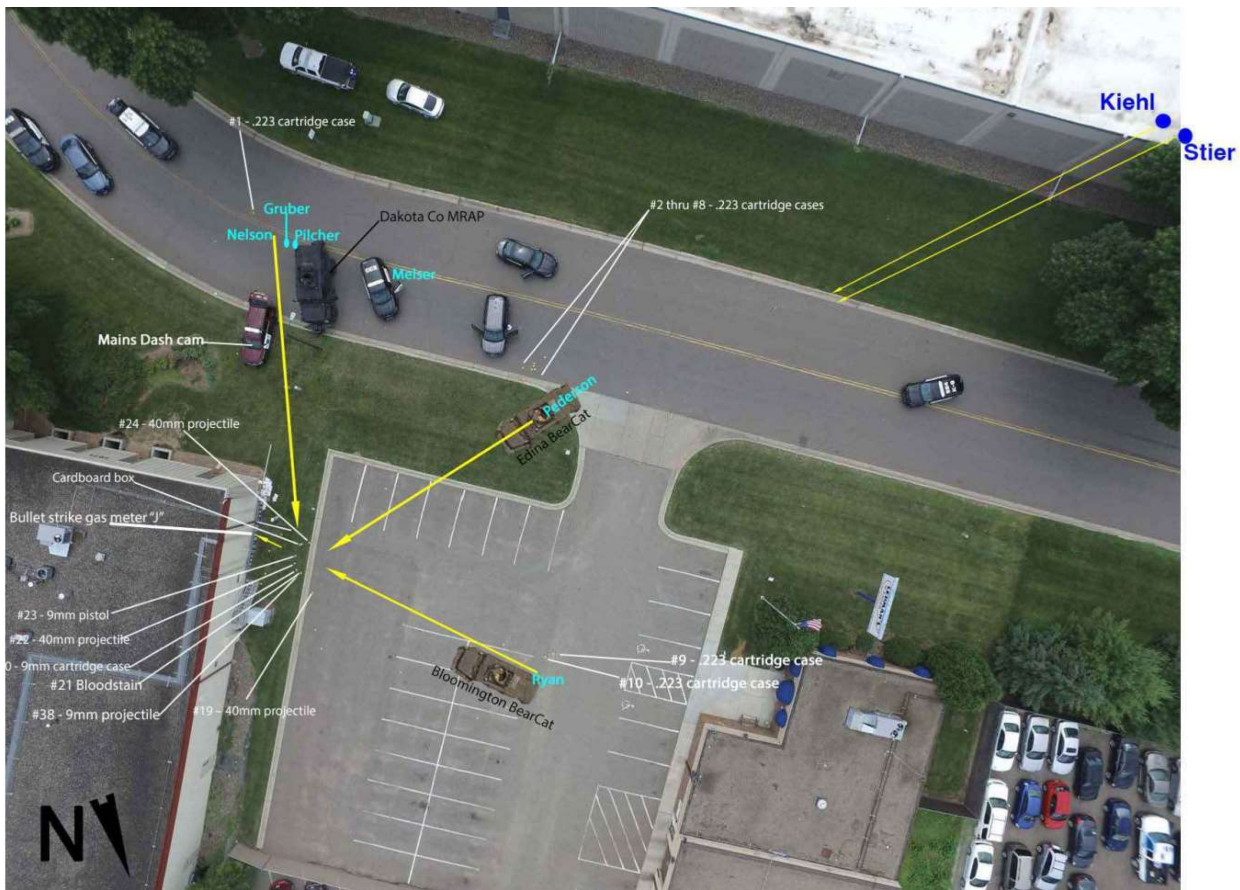
passenger-side of the Dakota County MRAP and driver-side of an Eagan squad. (App.501-02, R.Doc.64-9, at 3-4, App.509-10, R.Doc.64-10, at 2-3).

For officer safety, lethal cover for less-lethal operators was provided by: (1) Matt Ryan (Bloomington Bearcat rear passenger-side): (2) Dan Nelson (MRAP rear passenger-side); (3) Jacob Peterson (Edina Bearcat turret); and (4) Anthony Kiehl and Adam Stier (Gerten's rooftop 84-yards from Aden).[3]



(App.1831, R.Doc.66-1, at 28).

[3] Other officers—located farther from Aden—also provided lethal cover.

At 9:59 p.m., Kiehl and Stier advised Aden's gun was approximately 3-feet from his right side. (App.100, R.Doc.63-6, at 5). While officers stood by for orders to initiate the tactical plan, Moseng told Aden to surrender and/or move farther away from the gun. Officers, who knew Aden repeatedly attempted to call Asnake, recorded a message from Asnake at 10:25 p.m., in which she begged Aden to "please cooperate with the police…Just do what they say." (App.452, Ex.64-3, at 22:25:01).

Moseng played the recording for Aden. (App.448-50, R.Doc.64-2, at 18-20). Despite Asnake's pleas and Moseng's directives, Aden refused. At about 10:37 p.m., Moseng again requested Aden move away from the gun. (App.451, R.Doc.64-2, at 21). Aden, who again scooted toward the gun to within 1-2 feet of the gun, refused, stating "I'm as far as I need to be from the gun." (*Id.*; App.89, R.Doc.63-5, at 27; App.355, R.Doc.63-17, at 15 (negotiations not "progressing" as Aden "was not moving from the gun anymore."). During this call, the tactical plan was initiated:

> [b]ecause we had a suspect who had already pointed a firearm at a victim, had fled on foot from the scene, fired off a shot in a residential neighborhood, broke through a police perimeter at one point already across Highway 13, was a public safety risk, darkness was a factor. While we had a perimeter, the suspect was not contained. At any given time[,] he could've gotten up and tried to break a perimeter. He had already shown a propensity to put the gun down and pick it back up. The gun was currently down on the ground. It was an opportunity to try to take him into custody.

(App.150, R.Doc.63-11, at 29; App.923, R.Doc.73-1, at 15).

Chief New, who authorized the tactical plan, explained officers proceeded because Aden remained 1-2 feet from the gun and, at that distance, SWAT "team leaders felt confident that he was now at a distance" to execute the less-lethal apprehension plan before the window of opportunity to apprehend Aden closed since he was moving closer to the gun and nothing prevented him from picking it up again. App.923-28, 932-33, 937-39, R.Doc.73-1, at 15-20, 24-25, 29-31; App.150, R.Doc.63-11, at 29).

At 10:37 p.m., Lucas, followed by Tessmer and Sweany, threw flashbangs. (App.486, R.Doc.64-6, at 3; App.493, R.Doc.64-7, at 4; App.857-58, R.Doc.65-7, at 13-14).

(App.497, R.Doc.64-8, at 00:24).

After the first two flashbangs were deployed, Pilcher and Melser fired less-lethal foam-bullets at Aden. (*Id.* at 00:26; App.510, R.Doc.64-10, at 3; App.756, R.Doc.65-5, at 17).

(App.1839, R.Doc.66-1, at 36).

The district court found, "[i]n the split-second after being fired upon [by the foam-rounds] and seeing detonating explosives, ***Aden's immediate reaction was to reach for and grab his gun***." (App.2, 6, R.Doc.93, at 2, 6, Add.2, 6 (emphasis added); *see also* R.Doc.1, at ⁋268; App.1536, R.Doc.75-1, at 9). Officers Peterson, Ryan, Nelson, Stier, and Kiehl saw Aden reach for and grab the gun off the ground, which they reasonably perceived as a threat of death or great bodily harm to the officers on-scene. (App.464, R.Doc.64-4, at 11; App.521, 526-27, R.Doc.64-13, at 8, 13-14; App.480-83, R.Doc.64-5, at 5-8; App.535, 540, R.Doc.64-14, at 5, 10; App.545-47, R.Doc.64-15, at 3-5). Aden's hostile and aggressive movements are captured on squad video:

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(App.497, R.Doc.64-8, at 00:28-00:29).

According to the district court, “Aden was moving to his right while in a hunched posture—not standing upright—and the gun in his right hand was directed toward the ground” when Officer Peterson, the first officer who shot, fired. (App.25,

R.Doc.93, at 25, Add.25). Officer Peterson's first shot occurred a half-second *after* Aden picked up the gun and "[b]efore the gun was raised to [Aden's] knee height." (App.6, R.Doc.93, at 6, Add.6; *cf.* App.1536, R.Doc.75-1, at 9 (admitting Aden "began to raise" the gun when shots were fired); App.1691, R.Doc.75-5, at 14). At about the same time, an officer aired, "the gun, he's got the gun!" (App.90, R.Doc.63-5, at 28).

Due to the threat presented by a subject grabbing a gun during a police standoff, Peterson and Ryan fired. As shots were fired, Aden went to the ground with the gun still in his right hand. (App.497, R.Doc.64-8, at 00:29; App.464, R.Doc.64-4, at 11).

As Aden went to the ground in a seated position, Plaintiff's expert admits Aden "beg[a]n to rotate to his left and towards officers." (App.1632, R.Doc.75-2, at 26; App.497, R.Doc.64-8, at 00:47). As Aden still clutched a handgun in his right hand, he remained a deadly threat. (*Id.* at 00:48). The district court found that "[a]s [Aden] fell backwards and onto his right side, ***[his] pistol discharged.*" (App.6, R.Doc.93, at 6, Add.6 (emphasis added)).

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(App.497, R.Doc.64-8, at 00:50). Aden fired his handgun 4.23 seconds after the first flashbang exploded and only 1.6 seconds after Peterson fired the first lethal round. (App.1691-92, R.Doc.75-5, at 14-15). Due to Aden's continued control over the gun, Peterson, Ryan, Nelson, Stier, and Kiehl each fired after Aden went to the ground. (*Id.*; App.464, R.Doc.64-4, at 11; App.521, 526-27, R.Doc.64-13, at 8, 13-14; App.480-83, R.Doc.64-5, at 5-8; App.535, 540, R.Doc.64-14, at 5, 10; App.545-47, R.Doc.64-15, at 3-5). In total, five officers fired 13 rounds in 3.2 seconds. (*Id.*; App.1691-92, R.Doc.75-5, at 14-15). Aden sustained 11 gunshot wounds and succumbed to his injuries. (App.913-918, R.Doc. 68, at 1-6).

SUMMARY OF ARGUMENT

It has long-been accepted the use of deadly force is reasonable where a subject reaches for and grabs a gun during a police encounter. *Sinclair v. City of Des Moines*,

268 F.3d 594, 596 (8th Cir.2001); *McElree v. City of Cedar Rapids*, 983 F.3d 1009, 1017 (8th Cir.2020); *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir.2012). Further, excessive force cases involving less-lethal plans, designed to apprehend armed, criminal suspects engaged in police standoffs, did not provide the officers with "fair and clear warning" using flashbangs and foam-rounds to apprehend Aden was constitutionally excessive. *See, e.g., Z.J. v. Kan. City Bd. of Police Comm'rs*, 931 F.3d 672 (8th Cir.2019); *Bernini v. City of St. Paul*, 665 F.3d 997, 1006 (8th Cir.2012); *Escobedo v. Martin*, 702 F.3d 388 (7th Cir.2012)(*Escobedo II*). Accordingly, the officers are entitled to qualified and official immunity.

In denying qualified and official immunity, the district court ignored this binding precedent, questioning whether Aden "meaningfully threatened" officers. This is not the Fourth Amendment standard. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Moreover, the district court's search for, and adoption of, innocent explanations for Aden's threatening conduct subverts the Court's qualified immunity jurisprudence, which solely focuses on how an objectively reasonable officer would respond to the threat presented. *District of Columbia v. Wesby*, 583 U.S. 48, 67-68 (2018). From the calm of the judge's chambers, the district court second-guessed the officers' on-scene judgment rather than applying the undisputed facts to this Court's binding precedent. This is reversible error. In light of the volume of caselaw supporting the reasonableness of the officers' tactical decisions and use

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of deadly force, the district court erred in denying the officers' summary judgment motion and the officers are entitled to qualified and official immunity.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews "the denial of summary judgment based on qualified immunity de novo, viewing all evidence in a light favorable to the non-moving parties." *Shockency v. Ramsey County*, 493 F.3d 941, 948 (8th Cir.2007). However, the Court must not adopt a version of facts that is "blatantly contradicted by the record." *Scott,* 550 U.S. at 380-81.

II. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY ON ADEN'S FOURTH AMENDMENT CLAIMS RELATED TO THE LESS-LETHAL TACTICAL PLAN.

A. Plaintiff did not assert a Fourth Amendment direct participation theory.

It is well-established that a plaintiff cannot "manufacture claims, which were not pled, late into litigation for the purposes of avoiding summary judgment." *Singleton v. Ark. Housing Authority*, 934 F.3d 830, 837 (8th Cir.2019); *Young America's Found. v. Kaler*, 14 F.4th 879, 889 (8th Cir.2021). Rather, plaintiffs are held to the theories pled in the complaint.

The district court ignored this mandate, construing Plaintiff's less-lethal force claim (Count II) as a direct participation claim, finding New, Speakman, and Cardenas' tactical planning was an independent basis for liability. (App.13-20,

R.Doc.93, at 13-20, Add.13-20). However, Count II makes no reference to New, Speakman, or Cardenas' role in tactical planning and authorizing the less-lethal apprehension plan. (R.Doc.1, at ⁋⁋391-399). Instead, Count II asserts claims against "Law Enforcement Defendants" who allegedly violated the Fourth Amendment "by using excessive and unreasonable force, ultimately resulting in Mr. Aden's death by assaulting Mr. Aden with less lethal munitions and explosives…" (*Id.* at ⁋394). It is undisputed New, Speakman, and Cardenas did not use less-lethal force against Aden.[4] (App.7-9, R.Doc.93, at 7-9, Add.7-9).

The district court's consideration of an unpled Fourth Amendment theory was an error. *Young*, 14 F.4th at 888-89; *Wendt v. Iowa*, 971 F.3d 816, 822 (8th Cir. 2020). In *Young*, the plaintiff asserted an as-applied First Amendment claim. *Young*, 14 F.4th at 888-89. At summary judgment, the plaintiff recharacterized this claim as a "general First Amendment challenge." *Id.* at 889, n.9. The Eighth Circuit rejected the plaintiff's attempt to "read in a new claim" into its complaint. *Id.* (addressing First Amendment as-applied challenge only as no other First Amendment claim pled); *Wendt*, 971 F.3d at 821. As Count II does not contain any allegations supporting a direct participation claim against New, Speakman, and Cardenas, this unpled claim must be dismissed. *Id.*

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[4] Significantly, "Plaintiff did not sue the officers who deployed the less-lethal munitions." (App.9, R.Doc.93, at 9 n.5, Add.9).

B. The less-lethal apprehension plan was not constitutionally excessive.

Even if Plaintiff properly asserted a Fourth Amendment direct participation claim (which is denied), this claim fails as the less-lethal apprehension plan was not constitutionally excessive. Police officers are entitled to qualified immunity unless evidence establishes a violation of a constitutional right and "the unlawfulness of their conduct was 'clearly established at the time.'" *Wesby*, 583 U.S. at 62-63. Whether the use of force is reasonable turns on the totality of the circumstances, including: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether the suspect is actively fleeing or resisting. *Graham*, 490 U.S. at 396. New, Speakman, and Cardenas are entitled to qualified immunity since there is no evidence supporting the conclusion that the apprehension plan violated Aden's constitutional rights.

1. The tactical plan reasonably addressed the threat Aden posed.

The Supreme Court "caution[s] against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene." *Saucier v. Katz*, 533 U.S. 194, 205 (2001)(citing *Graham*, 490 U.S. at 393, 396). "If an officer reasonably, but mistakenly, believe[s] that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Id.*

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Despite this admonishment, the district court engaged in hindsight analysis, finding Aden was "not threatening or fleeing" because he "had been sitting in front of officers for hours without moving or threatening anyone." (App.15, R.Doc.93, at 15, Add.15). Even though Aden refused to surrender the gun that always remained within reach, the district court inexplicably concluded Aden "was unarmed." (*Compare* App.19, R.Doc.93, at 19, Add.19 *with* App.4, R.Doc.93, at 4, Add.4). In reaching these conclusions, the district court ignored the undisputed record, its factual findings, and divorced Aden's conduct from the totality of the circumstances—a reported domestic assault with a firearm, causing the alleged victim to fear for her safety and drive into oncoming traffic at rush-hour, leading to nearly half-hour foot-chase in which Aden's gun discharged, followed by a 4-hour standoff with police in which Aden repeatedly refused to comply with commands to surrender the firearm. This Court's failure to consider the totality of the circumstances is in error. *Nelson v. County of Wright*, 162 F.3d 986, 991 (8th Cir.1998); *Parks v. Pomeroy*, 387 F.3d 949, 957 (8th Cir.2004).

When officers developed, and New approved, the tactical plan, Aden was suspected of a serious crime—domestic assault with a firearm. Minn. Stat. §§609.221-609.222, §609.713. Plaintiff does not contest that domestic assault with a firearm is a serious crime or claim Aden complied with officer commands to surrender the gun. (R.Doc.73, at 17; R.Doc.1, ⁋135, 268). Until Aden surrendered

the gun, he remained a threat as a matter of law. *See Estate of Bing v. City of Whitehall*, 456 F.3d 555, 565 (6th Cir. 2006). Thus, attempting to apprehend Aden with less-lethal force was objectively reasonable. *See, e.g., Smith v. City of Minneapolis*, 754 F.3d 541, 547 (8th Cir.2014)(apprehending "potentially armed man," suspected of domestic abuse, who "refused to comply with the officer's orders" to surrender with less-lethal force reasonable); *Puskas v. Del. Cnty.*, 56 F.4th 1088, 1094-96 (6th Cir.2023)(same); *Fortunati v. State*, 503 Fed.Appx. 78, 81 (2d Cir.2012); *Escobedo II*, 702 F.3d at 403-05.

In *Puskas*, the Sixth Circuit addressed the use of less-lethal force—deploying a canine—to apprehend a domestic violence suspect who "had ready access to firearms in the yard." *Puskas,* 56 F.4th at 1094. The Court found the male, prior to putting down the gun, "twice wielded firearms in the presence of [deputies]" and still had access to guns on the ground. *Id.* In addition, despite "calmly entreating [the suspect] to come to them" and surrender, he refused. *Id.* at 1095. The Court found deploying a canine to apprehend the suspect was reasonable as it was a "paradigmatic judgment call[ ], which we do not second guess." *Id.*

Like *Puskas*, Command Staff made a "paradigmatic judgment call" on how to resolve a standoff with an armed male. However, unlike *Puskas*, the district court second-guessed the officers' tactical decision-making, ignoring the undisputed record and, instead, impermissibly substituted its judgment for the officers on-scene.

Specifically, the district court found the officers' belief that Aden was a threat was unreasonable because Aden's girlfriend "recanted" that Aden "threatened her with a gun." (App.3, 15, R.Doc.93, at 3, 15, Add.3, 15). However, a reasonable officer would not rely upon Asnake's alleged recantation because it is well-known domestic violence victims frequently refuse to cooperate with police and recant. *Furlow v. Belmar*, 52 F.4th 393, 412 (8th Cir. 2022); *United States v. Rodriguez-Ceballos*, 365 F.3d 664, 665 (8th Cir.2004); *United States v. Farmer*, 567 F.3d 343, 347 (8th Cir.2009). In fact, this Court repeatedly finds officers can reasonably credit the initial statements of domestic abuse victims over their subsequent recantations.[5] *Id.* Thus, the district court's emphasis on Asnake's alleged recantation is misplaced and officers could reasonably rely upon her initial statements.

Likewise, the district court's focus on the "many hours that elapsed" since Aden sat down in the parking lot was an error. The Eighth Circuit and multiple Circuit Courts have found "the mere passage of time" does not negate threat presented by an armed, non-compliant subject. *United States v. Jones*, 635 F.2d 1357, 1361-62 (8th Cir.1980); *Bing*, 456 F.3d at 565; *Fisher v. City of San Jose*, 558 F.3d 1069, 1080 (9th Cir.2009).

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[5] The district court found Asnake always reported Aden's conduct made her "concerned for her safety." (App.3, n.2; R.Doc.93, at 3 n.2, Add.3, n.2; App.452, R.Doc.64-3, at 21:40-43-21:41:05). Under Minnesota law, this is domestic assault. Minn. Stat. §609.2242.

In *Jones*, a male reportedly fired shots, then retreated to an apartment. *Jones*, 635 F.3d at 1358. Police responded, blocked off the area, attempted to communicate with the man, tried to gain access to the apartment, and ultimately forced entry more than one-hour after arriving on-scene. *Id.* at 1359. This Court found the delay did not mitigate the threat as "no new facts came to the attention of the police suggesting that the danger had subsided." *Id.* Further, given the earlier reports of shots fired by the apartment's suspected occupant, police reasonably believed the male was "dangerous" and may "resume shooting," putting the lives of the public and officers "in danger." *Id.* at 1360-61.

Likewise, in *Bing*, a male suspected of firing a round in a residential area retreated into his home and refused to surrender, engaging officers in an hours-long standoff. *Bing*, 456 F.3d at 565. The plaintiff argued using gas canisters and flashbangs to apprehend him was unreasonable because he did not engage in any threatening actions while police were on-scene. *Id.* at 569. The Sixth Circuit rejected this argument, finding the male "posed a serious and immediate threat to others and refused to come out of his house to be arrested. The police had a great need to disarm [the man] and place him under arrest to abate the threat that he posed." *Id.* at 570. The "mere passage of time" did not negate the threat because the male "was at all times dangerous" since "the ticking of the clock did nothing to cut off [his] access to his gun." *Id.* at 565. Further, the Court observed that waiting for SWAT operators

to arrive, attempting negotiations, and tactical planning takes time and, thus, a delay does not reflect the absence of a threat or support that the dangerous exigency has passed. *Id* at 566-67; *Fisher*, 558 F.3d at 1080 (focus on "mere passage of time" improper as it "essentially increase[s] the constitutional rights of suspect who, by their actions, both provoke and prolong the need for continuing police action.").

Like *Jones* and *Bing*, Aden remained a threat throughout the standoff as he admitted discharging a gun when fleeing a crime[6] and refused to comply with officer orders to surrender the gun. Like *Jones* and *Bing*, officers took steps to evacuate civilians, secure the area, negotiate, page SWAT operators, and develop a tactical plan to take Aden into custody. These tactical decisions take time and did not negate the danger Aden presented as "the ticking of the clock did nothing to cut off [his] access to his gun," which always remained near Aden's right foot. *Bing*, 456 F.3d at 565; *Jones*, 635 F.3d at 1360-61; *Fisher*, 558 F.3d at 1080.

Rather than addressing caselaw arising out of factually analogous circumstances, the district court questioned "[w]hether the officers involved were ***meaningfully threatened***, given their considerable numbers and having planned for

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[6] The district court gave credence to Aden's assertion that his discharge was accidental. However, the court cited no legal authority to support that a reasonable officer would believe a suspect's self-serving assertion that his firearm accidentally discharged. It failed to do so as "officers are free to disregard…innocent explanations" of criminal suspects. *Wesby*, 583 U.S. at 67-68.

cover for themselves."[7] (App.16, R.Doc.93, at 16, Add.16 (emphasis added)). This is not the standard. *Cty. of Los Angeles v. Mendez*, 581 U.S. 420, 427 (2017) (*Graham* set forth "exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment"). In fact, no federal court has applied the "meaningfully threatened" standard adopted by the district court to analyze a Fourth Amendment claim.

Similarly, the district court erred when it gave undue weight to Plaintiff's unsupported legal contention that Aden was not a "threat," finding a "reasonably jury could find that at the time less-lethal munitions were deployed Aden did not pose an immediate threat." (App.15, R.Doc.93, at 15, and Add.15). However, whether a subject's conduct is a "threat" is a question of law, not a fact issue for the jury's consideration. *Chappell v. City of Cleveland*, 585 F.3d 901, 906 (6th Cir. 2009)(whether "an imminent threat of serious harm" existed is a "purely legal issue"); *Long v. Hammer*, 727 Fed.Appx. 215, 217 (7th Cir.2018); *DeMerrell v. City of Cheboygan*, 206 Fed.Appx. 418, 426 (6th Cir.2006).

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[7] The district court also adopted Plaintiff's experts' opinions on whether Aden presented a "credible imminent life-threat." (App.27, R.Doc.93, at 27, Add.27). Like the district court's discussion of whether the officers were "meaningfully threatened," this is a false standard. *Mendez*, 581 U.S. at 427. Further, the presence of operators from multiple SWAT teams does not negate the threat Aden posed. *See Bing*, 456 F.3d at 565; *Jones*, 635 F.3d at 1360-61.

Here, the district court's factual findings demonstrate Aden was a threat as (1) he was suspected of the serious crime of domestic assault; (2) the firearm remained near his right foot; (3) officers reasonably believed the gun was loaded as Aden admitted to firing the gun when fleeing; (4) during the standoff, Aden previously set the gun down, but contrary to commands, picked the gun up again; and (5) Aden was asked to surrender, but refused. (App.3, 4, 15, R.Doc.93, at 3, 4, 15, Add.3, 4, 15). Given these factors, an objectively reasonable officer would continue to view Aden as a threat. *Puskas,* 56 F.4th at 1094; *Bing*, 456 F.3d at 565, 570; *Jones*, 635 F.3d at 1360-61.

Rather than address the facts confronting the officers, the district court minimized the threat Aden presented, comparing him to: (1) fully compliant subjects, *Rohrbough v. Hall*, 586 F.3d 582 (8th Cir.2009); (2) unarmed subjects, *Marks v. Bauer*, 20-cv-1913 (ADM/JFD), 2023 WL 1478015 (D.Minn. Feb. 1, 2023); or (3) those armed with pocketknives only, *Glenn v. Washington County*, 673 F.3d 864 (9th Cir.2011). Unlike these subjects, it is undisputed Aden had a gun, refused to surrender, and resisted arrest. As a result, he presented a far greater threat than the subjects in the cases improperly relied upon by the district court.

2. Flashbangs and less-lethal munitions were objectively reasonable.

This Court observed that flashbangs "can be an important tool for law enforcement officers to gain an element of surprise…and can at times obviate the

need for officers to use deadly force." *Z.J.*, 931 F.3d at 684. Likewise, using less-lethal munitions to apprehend an armed, non-compliant suspect to end a standoff and avoid risk the suspect could harm others is reasonable. *Bell v. Irwin*, 321 F.3d 637, 639-40 (7th Cir.2003); *Brown v. City of Bloomington*, 280 F.Supp.2d 889, 894 (D.Minn. 2003)(adopting *Bell*); *see also White v. Jackson*, 865 F.3d 1064, 1079 (8th Cir.2017); *Bernini*, 665 F.3d at 1006.

In standoffs, courts routinely find using less-lethal force to take the armed suspect into custody reasonable. *See, e.g., Escobedo II*, 702 F.3d at 403-04 (tear-gas and flashbangs); *Bing*, 456 F.3d at 569 (pepper-gas and flashbang); *Bell*, 321 F.3d at 639-40 (beanbag rounds); *Cooper v. Nebraska State Patrol*, 8:98-cv-466, 2000 U.S.Dist.LEXIS 16127, *4-6 (D.Neb. Oct. 30, 2000)(less-lethal rounds). While the Eighth Circuit has not addressed the use of less-lethal munitions to apprehend an armed suspect engaged in a prolonged standoff with police, other courts have found this use of force reasonable. *Id.*

For example, in *Cooper*, the court found using less-lethal rounds to arrest a domestic assault suspect, after hours of negotiations, reasonable because:

> this significant delay in surrendering evidenced the plaintiff's intent to resist arrest… While the plaintiff's explanation for his noncompliance may be plausible, the critical facts remain that (1) the plaintiff was alleged to have committed a serious crime of domestic violence; (2) that as long as Cooper remained at large and in close proximity to lethal weapons, he posed a threat to the safety of officers; (3) the scene of the arrest was tense and uncertain; and (4) Cooper failed to comply

> immediately with a direct order to drop the throw phone and lay on the ground.

Id. (internal citations omitted); *Estate of Devine v. Fusaro*, 676 Fed.Appx. 61, 63-64 (2d Cir.2017).

The *Cooper* factors are present here: (1) Aden's significant delay in surrendering evidenced his intent to resist arrest; (2) he was suspected of a serious crime—domestic violence; (3) as long as Aden remained in close proximity to the gun, he posed a threat to officer safety; (4) the scene was tense and uncertain; and (5) Aden failed to comply with orders to move away from the gun and surrender.

Despite properly finding that "[f]lashbangs and foam bullets are considered less-lethal types of force," the district court utilized *Cole v. Hutchins*, 959 F.3d 1127 (8th Cir.2020) and *Rahn v. Hawkins*, 73 Fed.Appx. 898 (8th Cir. 2003)—two deadly force cases—to criticize using flashbangs and foam-rounds. (*Compare* App.5, R.Doc.93, at 5, Add.5 *with id.* at 15). This is improper. *Z.J.*, 931 F.3d at 681 (analyzing flashbang as less-lethal force); *Jones v. Sandusky County*, 541.Fed.Appx.653 (6th Cir.2013)(same); *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir.2001)(analyzing cloth-cased shot as less-lethal force). As neither *Cole*, nor *Rahn* address less-lethal force, they are not relevant. Further, to the extent *Cole* and *Rahn* merit further discussion, the disparate facts of those cases reveal using flashbangs and foam-rounds in an attempt to apprehend Aden (as well as the

subsequent use of deadly force after he grabbed the gun)[8] were objectively reasonable.

The district court cited *Cole* for the proposition that "if the threat has passed, so too has the justification for the use of deadly force." (App.15, R.Doc.93, at 15, Add.15). However, *Cole* arose out of vastly different facts. In *Cole*, a male was *retreating* from the person he allegedly threatened with a long-gun when an officer fired five times, without warning or otherwise commanding the male to drop the weapon. *Cole*, 959 F.3d at 1130-33. No less-lethal force was attempted. *Id.* This Court found using *deadly* force was unreasonable as the officer did not have probable cause to believe the male posed an immediate threat to others as he was walking away from the fight for at least five seconds. *Id.* Further, this Court noted the long-gun was pointed at the ground or sky and, therefore, did not present a threat to officers justifying using deadly force without warning. *Id.*

Cole does not speak to the circumstances confronting officers on July 2, 2019. Unlike *Cole*, officers responded to a domestic assault with a firearm and as Aden fled police, he fired a round. After tracking Aden to a parking lot, Aden—who knew officers surrounded him and was repeatedly instructed to surrender—refused to do so, always keeping his firearm within reach. In response, officers employed a less-lethal plan to arrest him. *Cole* simply does not address these circumstances.

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[8] For discussion of deadly force, see *infra* Section III.

The district court's reliance on *Rahn* is even more strained. In *Rahn*, when confronted by officers and ordered to surrender, a robbery suspect surrendered, raising his empty hands above his head. *Rahn*, 73 Fed.Appx. at 900. With hands above his head, he was shot eight times. *Id.* The Court found using *deadly* force against a compliant,[9] unarmed suspect who "kept his arms raised in surrender" was unreasonable. *Id.* at 900-01.

Unlike *Cole* and *Rahn*, the threat had not passed as Aden remained armed, refusing to comply with commands to surrender. Thus, unlike *Cole* and *Rahn*, this remained a "tense and rapidly evolving" event since Aden refused to surrender his gun and, in the context of standoffs, no meaningful progress is made until the subject surrenders the weapon. *See Claro v. City of Sulphur*, Civ-16-428, 2019 U.S.Dist.LEXIS 215789, *25-26 (E.D.Okla. Dec. 16, 2019)(standoffs "tense, uncertain, and rapidly evolving" until subject surrenders weapon); *Foster v. Carroll County*, 4:09-cv-127, 2011 U.S.Dist.LEXIS 106905, *19-20 (N.D.Miss. June 23, 2011)(same); *Conlogue v. Hamilton*, 906 F.3d 150, 157-58 (1st Cir.2018). This is due, in great part, because the officers have "no way of knowing what [the armed, non-compliant subject] planned to do" next. *See Partlow v. Stadler*, 774 F.3d 497, 502 (8th Cir.2014).

[9] Like *Cole*, no less-lethal force was attempted in *Rahn*.

Further, the district court criticized the tactical plan, characterizing it as a "surprise assault."[10] Contrary to the district court's criticism, courts commonly recognize that "[s]hock and surprise may be proper and useful tools in avoiding unnecessary injury to everyone involved when dealing with potentially violent suspects." *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1245 (11th Cir. 2003); *Z.J.*, 931 F.3d at 684 ("surprise" is a legitimate police tactic); *Escobedo II*, 702 F.3d at 408. Surprise is a particularly useful tactic when officers have reason to believe the suspect is armed or will resist. *Id.*; *Ferreira v. City of Binghamton*, 975 F.3d 255, 263 (2d Cir.2020). Moreover, when officers attempt to take "advantage of a window of opportunity—of unknown duration—to restrain" a subject, it is not the court's role to second-guess the officers' tactical decisions. *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1281 (11th Cir.2004).

Here, an objectively reasonable officer would not believe deploying an arrest plan without notifying Aden would be unconstitutionally excessive as (1) he had a loaded firearm at his feet, which he could grab at a moment's notice; (2) Aden previously fled police and continued to resist arrest by refusing to surrender and repeatedly stating he was "not willing to go to jail tonight;" and (3) Aden was

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[10] The district court, in passing, suggests a warning was required before deploying less-lethal force, but cites no authority for this proposition. To the extent a warning was required (which is denied), ordering Aden to surrender dozens of times was sufficient. *See Dundon v. Kirchmeier*, 85 F.4th 1250, 1254-56 (8th Cir.2023).

suspected of a serious crime and had already fired a round earlier in the evening. Under these circumstances, it was reasonable to use surprise as a law enforcement tactic. *Id.*

Instead of addressing whether the tactical plan was objectively reasonable under the totality of the circumstances, the district court improperly considered whether less-intrusive options, including continuing negotiations, were available.[11] (App.16-17, R.Doc.93, at 16-17, Add.16-17). This is irrelevant as the Court's Fourth Amendment analysis focuses solely on the objective reasonableness of the force used. *See Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (citing *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir.1994), *cert. denied*, 513 U.S. 820 (1994)). In fact, this Court explained "the Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment." *Schulz,* 44 F.3d at 649; *Plakas*, 19 F.3d at 1148.

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[11] The court's analysis was based, exclusively on Plaintiff's expert reports, which the district court characterized as "address[ing] the reasonableness of the use of force." (App.16, R.Doc.93, at 16, Add.16). It is well-established experts' opinions on the reasonableness of police conduct are inadmissible legal conclusions. *Schmidt v. City of Bella Villa*, 557 F.3d 664, 670 (8th Cir.2009)(opinions addressing reasonableness inadmissible); *Jones v. McNeese*, 746 F.3d 887, 899 (8th Cir.2014)(admissible evidence needed to defeat summary judgment).

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Because using flashbangs and foam-munitions were reasonable to facilitate Aden's arrest, New, Speakman, and Cardenas are entitled to qualified immunity for their roles in developing and authorizing the tactical plan. *See Bernini*, 665 F.3d at 1006; *Engesser v. Fox*, 993 F.3d 626, 631-32 (8th Cir.2021).

C. The less-lethal tactical plan did not violate clearly established law.

Plaintiff has the burden to establish the alleged constitutional right violated was clearly established at the time of the incident. *Smith*, 754 F.3d at 546 (*citing Monroe v. Ark. State Univ.,* 495 F.3d 591, 594 (8th Cir.2007)). Officers "are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Davis v. Hall*, 703, 712 (8th Cir.2004). "[I]f officers of reasonable competence could disagree on the issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In recent decisions, the U.S. Supreme Court reiterated clearly established law must be particularized to the facts of the case. *White v. Pauly*, 580 U.S. 73, 79 (2017); *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018); *City of Tahlequah, Okal. v. Bond*, 142 S.Ct. 9, 12 (2021)(reversing because lower court did not identify "a single precedent finding a Fourth Amendment violation under similar circumstances."). "This generally requires a plaintiff to point to ***existing circuit precedent that involves sufficiently similar facts*** to squarely govern the officer's conduct in the specific

circumstances at issue." *Martin v. Turner*, 73 F.4th 1007, 1010 (8th Cir.2023)(*quoting Graham v. Barnette*, 5 F.4th 872, 887 (8th Cir.2021)(emphasis added)).

First, because no Supreme Court or Eighth Circuit precedent has held that "officer[s] acting under similar circumstances as [New, Speakman, and Cardenas] …violated the Fourth Amendment," the development and authorization of the tactical plan did not, and cannot, violate clearly established law. *White*, 580 U.S. at 79. In fact, Plaintiff admits "there is not a single case" that has addressed using flashbangs and less-lethal to separate an armed suspect from his gun. (R.Doc.103, at 245). This is dispositive. *White*, 580 U.S. at 79. As there was no clearly established law to put officers on notice that the tactical plan was unconstitutional, they are entitled to qualified immunity. *Id.*; *Kisela,* 138 S.Ct. at 1153.

Second, the officers rely on *White v. Jackson*, 865 F.3d 1064 (8th Cir.2017), *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir.2012), *Z.J. v. Kan. City Bd. of Police Comm'rs*, 931 F.3d 672 (8th Cir.2019), and *Cooper v. Nebraska State Patrol*, 2000 U.S.Dist.LEXIS 16127 (D.Neb. Oct. 30, 2000) for support that the alleged constitutional right to be free from less-lethal force in these circumstances was not clearly established on July 2, 2019. In contrast, the district court mistakenly relied upon *Johnson v. Carroll*, 658 F.3d 819 (8th Cir.2011), *Escobedo v. Bender*, 600 F.3d 770, 780-81 (7th Cir.2010)(*Escobedo I*), *Glenn v. Washington County*, 673 F.3d 864 (9th Cir.2011), *Wallace v. City of Alexander*, 843 F.3d 763 (8th Cir.2016), and

Atkinson v. City of Mountain View, Mo., 709 F.3d 1201 (8th Cir.2013). These cases are inapplicable, as discussed *infra* at pages 44-47, because they involve:

- using force against unarmed subjects, *Johnson*, 658 F.3d at 827; *Atkinson*, 709 F.3d at 1210; *Wallace*, 843 F.3d at 769; and
- were overruled by subsequent decisions. *Glenn*, 673 F.3d at 879, *overruled by Mendez*, 581 U.S. at 428 (rejecting provocation rule); *Escobedo I,* 600 F.3d at 780-81, *overruled by Escobedo II,* 702 F.3d at 405 (granting qualified immunity).

In comparison, the caselaw cited by the officers supports the objective reasonableness of the less-lethal tactical plan.

On July 25, 2019—approximately three weeks *after* the incident, the Eighth Circuit addressed the use of flashbangs, noting "this court has not yet addressed the reasonableness of the use of flash-bang grenades." *Z.J.*, 931 F.3d at 684. Thus, at the time of this incident, no caselaw put officers on notice that using flashbangs in these circumstances was unconstitutionally excessive. *Id.*

In *Z.J.*, a SWAT team executed a search warrant on a residence. Though officers knew the suspect was already in custody, they threw a flashbang into an occupied living room before visually clearing the room and without allowing a cooperative woman to open the door. *Id.* at 677. The flashbang caught the living room drapes on fire. *Id.*

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While this Court found throwing a flashbang into a residence "*where officers have no basis to believe they will face the threat of violence* and they unreasonably fail to ascertain whether there are any innocent bystanders in the area it is deployed" violated clearly established law, it explained flashbangs are "likely to be reasonable if the officers expect to encounter an individual who is known to be armed and dangerous" or "the situation presents a need for the element of surprise in order to protect the safety of officers or others." *Id.* at 682, 685 (emphasis in original).

Here, unlike *Z.J.*, officers were attempting to apprehend an armed, non-compliant man, who was suspected of a serious crime, and refused to be taken into custody. Thus, officers reasonably believed they faced a "threat of violence" and concluded the element of surprise was necessary so officers could approach and arrest Aden. Unlike *Z.J.*, officers visually cleared the area, confirming no innocent bystanders would be impacted. Under these circumstances, using flashbangs was not did not violate clearly established law. *Id.* at 682.

Likewise, this Court's precedent on less-lethal munitions also reveals using foam-rounds did not violate clearly established law. In both *Bernini* and *White*, this Court found using rubber bullets against non-compliant, unarmed protestors did not violate clearly established law. *Bernini*, 665 F.3d at 1006; *White*, 865 F.3d at 1079.

More compelling than *Bernini* and *White,* Aden was not an unarmed protester; he was an armed criminal suspect, who repeatedly refused to surrender, which was

reasonably viewed as ongoing resistance and constituted a continued threat. *See Cooper,* 2000 U.S.Dist.LEXIS 16127, *4-6; *Devine*, 676 Fed.Appx. at 63-64. Given this Court's guidance in *Bernini* and *White*, in conjunction with the absence of caselaw addressing the circumstances confronting the officers, Plaintiff cannot establish using foam-rounds to apprehend Aden violated clearly established law.

While the district court acknowledged its decision is contrary to *White*, the Court made no attempt to distinguish *White* and failed to address *Bernini, Z.J.,* and *Cooper.* Rather, it relied upon *Johnson*, *Atkinson, Wallace*, *Escobedo I*, and *Glenn*, which are not applicable and did not put officers on notice that using flashbangs and less-lethal rounds was unconstitutional. In using factually disparate caselaw, the district court committed the same error the Supreme Court repeatedly admonishes courts for—defining clearly established law at a high level of generality. *Bond*, 142 S.Ct. at 11; *White*, 580 U.S. at 79.

First, *Johnson* and *Atkinson* arise out of vastly different circumstances—taking down unarmed misdemeanants. *Johnson*, 658 F.3d at 823-824; *Atkinson*, 709 F.3d at 1205, 1211. The Court questioned using takedowns against these individuals because they "posed at most a minimal safety threat to the officers" and were given no opportunity to surrender. *Id.*; *Johnson*, 658 F.3d at 827.

Here, unlike *Johnson* and *Atkinson*, Aden was armed and engaged in a standoff with police, he was suspected of a serious crime, and repeatedly ordered to

surrender. The threat presented by Aden far exceeded the conduct at issue in *Johnson* (disrupting nephew's arrest) and *Atkinson* (taking a cell phone) and, therefore, it was improper for the court to draw clearly established law from these factual disparate cases.

The district court's reliance on *Wallace* is likewise misplaced. Again, in relying on Wallace, the court erred in applying a *deadly force* framework to the less-lethal force used. *See supra* pages 35-37. Further, *Wallace* is not factually analogous. In *Wallace*, a man suspected of obstructing traffic on foot advised he had a gun and, when asked to show his hands, surrendered the gun—tossing it "out of reach"—then was shot. *Wallace*, 843 F.3d at 768-69. The Court found using deadly force under those circumstances was unreasonable.

Unlike *Wallace*, Aden did not toss the gun "out of reach." Rather, he refused to surrender the gun and move the firearm "out of reach." (App.451, R.Doc.64-2, at 21). Unlike *Wallace*, Aden was suspected of a serious crime, fired his weapon while fleeing, and engaged in a standoff leading to *less-lethal* force in an attempt to apprehend him. *Wallace* does not address these circumstances and, therefore, was incapable of providing officers fair and clear warning the less-lethal plan violated clearly established law.

The district court's reliance on non-jurisdictional caselaw fails for similar reasons. In *Escobedo I*, the Seventh Circuit found deploying tear-gas, followed by

blindly throwing flashbangs into an apartment, to extricate a non-violent suicidal male, causing the tear-gas to ignite, was excessive. *Escobedo I*, 600 F.3d at 776-77; *Glenn*, 673 F.3d at 872 (criticizing using "significant" force to prevent suicide). In *Escobedo I*, the Court found the sole reason officers believed the suicidal male was a threat was that he was armed and threatening to commit suicide in his home. *Escobedo I*, 600 F.3d at 775.

However, in *Escobedo II*, the Court considered additional facts, including that: (1) negotiations were ongoing for nearly four hours and the male refused to be taken into custody, (2) the male wielded a handgun in an area surrounded by buildings, (3) the male did not want to go to jail; and (4) commanders concluded the safest time for a tactical solution was after the morning rush-hour. *Escobedo II*, 702 F.3d at 405. While the plaintiff claimed the suicidal male was a "hypothetical threat" only,[12] the Court rejected this argument as a reasonable officer would conclude otherwise based on the duration of negotiations, presence of a firearm, and non-compliance with officer orders. *Id.* Thus, the Seventh Circuit held employing a tactical plan to apprehend Escobedo was reasonable and the commanders were

[12] The district court also considered Plaintiff's argument that Aden was a "hypothetical threat." (App.16, R.Doc.93, at 16, Add.16). This argument must be rejected as a non-compliant suspect, who despite officer presence and orders, refuses to surrender a gun, remains a threat. *See supra* Section II.A.

entitled to qualified immunity for developing and authorizing the tactical plan. *Id.* at 405-06.

The district court's failure to consider the factors raised in *Escobedo II* was in error. More compelling than *Escobedo* or *Glenn*, Aden was suspected of an assault with a firearm and already fired a round. A reasonable officer would consider these actions in assessing the threat Aden presented. *See Wallace*, 843 F.3d at 768. Further, the factors establishing the existence of a threat in *Escobedo II* are present here: prolonged negotiations were unsuccessful, Aden refused to surrender a gun and commanders concluded the safest time to initiate a tactical plan was overnight before people returned to the area for work and while Aden's gun was not in his hand. In light of *Escobedo II*'s teachings—which repudiate *Escobedo I*'s conclusions—*Escobedo I* was inherently incapable of setting forth clearly established law.

In sum, as none of the cases identified by Plaintiff and the district court dealt with the factual circumstances confronting New, Speakman, and Cardenas, they were incapable of providing clear notice that the tactical plan violated Aden's constitutional rights and they are entitled to qualified immunity.

III. THE OFFICERS' USE OF DEADLY FORCE DID NOT VIOLATE ADEN'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

A. Deadly force was objectively reasonable.

It is well-established that "[t]he use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical

harm to the officer or others." *Loch*, 689 F.3d at 965. While courts evaluate the reasonableness of an officer's use of force "by looking primarily at the threat present at the time he deployed the deadly force," *Banks v. Hawkins*, 999 F.3d 521, 526-27 (8th Cir.2021), the Court must view the use of force from the totality of the circumstances rather than as a series of still-frames. *See Dooley v. Tharp*, 856 F.3d 1177, 1182-83 (8th Cir.2017).

Officers are not required to "wait before defending himself until the indication of impending harm ripens into the onslaught of actual physical injury." *Gonzalez v. City of Anaheim*, 747 F.3d 789, 800 (9th Cir.2014). Whether officers acted reasonably under settled law in the circumstances is a question of law. *Pace v. City of Des Moines*, 201 F.3d 1050, 1056 (8th Cir.2000).

Here, based on the totality of the circumstances, Officers Peterson, Ryan, Nelson, Stier, and Kiehl's use of deadly force was constitutional as—during a standoff with police—Aden admittedly grabbed a firearm. (R.Doc.1, at ⁋268; App.6, R.Doc.93, at 6, Add.6). The district court found that, after flashbangs were deployed and foam-bullets struck Aden's left side, Aden:

> moved to his right with the cell phone still in his left hand. He stumbled with his right arm extended down toward the pavement, leaning toward the gun. ***He grabbed the gun with his right hand.*** Before the gun was raised to knee height, officers shot him with lethal rounds. As he fell backwards and onto his right side, ***the pistol discharged at ground level***, firing downwards into the ground.

(App.6, R.Doc.93, at 6, Add.6 (emphasis added)). Under these predicate facts, Officers Peterson, Ryan, Nelson, Kiehl, and Stier reasonably perceived Aden as a threat of death of great bodily harm and fired.

Time-and-time again, this Court reiterates "that no constitutional or statutory right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon." *Sinclair*, 268 F.3d at 596; *Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir.2019); *Dooley*, 856 F.3d at 1183. "[W]here an officer has reasonable grounds to believe that there is an imminent threat of serious harm, the officer may be justified in using a firearm before a subject actually points a weapon at the officer or others." *Liggins v. Cohen*¸ 971 F.3d 798, 801 (8th Cir.2020). In fact, this Court has repeatedly found, ***"simply reaching for a loaded gun is enough to create a substantial risk of serious bodily injury to another person,"*** *United States v. Hill*, 583 F.3d 1075, 1078 (8th Cir.2009)(quoting *United States v. Easter*, 553 F.3d 519, 524 (7th Cir.2009)(emphasis added)), and officers can reasonably respond to this threat with deadly force. *Thompson v. Hubbard*, 257 F.3d 896, 899-900 (8th Cir.2001); *Loch*, 689 F.3d at 967; *McElree*, 983 F.3d at 1017.

In *Loch*, the use of deadly force against an unarmed man was reasonable because the male reportedly had a gun and, contrary to orders to get on the ground, the male moved his hand toward his side where he had a black object (cell phone) clipped to his belt. *Loch*, 689 F.3d at 964. Thinking the male was reaching for a gun, the officer fired.

This Court found that, even though the officer did not see the gun and the male was unarmed, "[i]n these circumstances, a reasonable officer could believe that deadly force was necessary to protect himself from death or serious harm." *Id.* at 967.

Likewise, in *Thompson*, the Eighth Circuit found it was reasonable to shoot a suspect that moved his arms as if he was reaching for a weapon at waist level because "[a]n officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves to draw a gun." *Thompson*, 257 F.3d at 899-900; *Billingsley v. City of Omaha*, 277 F.3d 990, 992 (8th Cir.2002); *see also N.S. v. Kansas City Bd. of Police Comm'r*, 35 F.4th 1111, 1114 (8th Cir.2022).

More compelling than *Loch* and *Thompson*, Aden was armed and officers watched him pick-up the firearm 4-hours into a standoff with police *before* any officer employed deadly force. (App.6, R.Doc.93, at 6, Add.6). Picking up the gun during an armed standoff with police was, in-and-of-itself, a threat of death or great bodily harm. *Hill*, 583 F.3d at 1078; *Loch*, 689 F.3d at 967; *Thompson*, 257 F.3d at 899-900; *Billingsley*, 277 F.3d at 995.

The district court improperly ignored these cases, denying summary judgment because "whether Aden posed an immediate threat to the safety of officers at the moment lethal rounds were fired" was allegedly disputed. (App.23, R.Doc.93, at 23, Add.23). The district court's refusal to address this purely legal issue based on its

predicate factual findings that Aden "reach[ed] for and grab[bed] his gun" is reversible error. In fact, this Court recently unequivocally held that "deadly force was authorized because [the suspect] pulled a gun and thus the officers were faced with an apparently loaded weapon." *McElree*, 983 F.3d at 1017. Like *McElree*, Aden's decision to grab the gun was, in-and-of-itself, a threat of death or great bodily harm and "deadly force was authorized." *Id.*

Further, the district court cited no caselaw for the proposition that an objectively reasonable officer would not perceive grabbing a firearm during a standoff as a threat simply because officers had protective gear, armored vehicles were on-scene, and snipers were providing lethal cover for officers on the ground. The district court failed to cite this caselaw because it is contrary to Eighth Circuit precedent. *See id.*; *Loch*, 689 F.3d at 967; *Thompson*, 257 F.3d at 899-900; *Billingsley*, 277 F.3d at 995. Moreover, courts considering whether the presence of cover from armored vehicles negates the threat presented by a subject grabbing a gun have rejected the district court's analysis. *Sabbe v. Wash. Cnty.*, 84 F.4th 807, 828 (9th Cir.2023).

In *Sabbe*, officers in armored vehicles attempted to end a standoff with a subject in a car by ramming his car with the armored vehicle. *Id.* at 814-15. In response, the suspect exited the car with a rifle and multiple officers stationed in the armored vehicle fired. *Id.* at 827-28. The Ninth Circuit granted qualified immunity to the officers because "when a suspect reaches for a gun…, responding with deadly force does not

violate the constitution." *Id.* at 828. The fact that officers fired from armored vehicles did not alter this conclusion. *Id.*

Like *Sabbe*, officers were confronted with a male who chose to arm himself during a standoff. Further, more compelling than *Sabbe*, several officers on-scene were ***not*** stationed in armored vehicles and, thus, the threat presented by Aden grabbing his gun exceeded the threat confronting officers protected by the armored vehicle in *Sabbe*. (*See* App.7-8, R.Doc.93, at 7-8, Add.7-8 (identifying at least seven officers near Aden that were outside armored vehicles)).

Rather than apply its factual findings to the well-established law, the Court questions the officers' use of deadly force by challenging the decision to implement the less-lethal apprehension plan: "the very objective of the tactical attack plan was to ***provoke*** Aden's immediate reaction." (App.23, 25, R.Doc.93, at 23, 25, Add.23, 25 (emphasis added)). However, the U.S. Supreme Court explicitly rejected the provocation rule as its "fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Mendez*, 581 U.S. at 427. Thus, in focusing on whether Aden was "provoked" into picking up the firearm to criticize the use of deadly force, the district court disregarded binding U.S. Supreme Court precedent.[13] *Id.* at 428; *Frederick v. Motsinger*, 873 F.3d

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[13] To the extent the district court considered alleged errors in tactical planning, it erred as evidence officers created the need to use deadly force is "irrelevant" *See Schulz*, 44 F.3d at 648-49.

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641, 645-46 (8th Cir.2017); *Carter v. Buscher*, 973 F.2d 1328 (7th Cir.1992). This is reversible error.

Similarly, the district court's focus on alleged failure to warn is misplaced. (App.24, R.Doc.93, at 24, Add.24). It is undisputed that as Aden was repeatedly ordered to surrender the weapon, which is a legally sufficient warning. *Loch*, 689 F.3d at 967 (no additional warning necessary where officer pointed weapon and repeatedly ordered suspect to get on the ground); *Rogers v. King*, 885 F.3d 1118, 1122 (8th Cir. 2018)(pointing gun and ordering suicidal person to drop the gun). In recent decisions, this Court has simply stated, "[b]efore using deadly force, officers should give ***'some warning'*** if it is 'feasible.'" *McElree*, 983 F.3d at 1017 (emphasis added)). Accordingly, dozens of warnings to surrender the gun were legally sufficient and no "more specific warning" was required.

The district court's denial of summary judgment was also premised on immaterial facts, focusing on alleged fact disputes regarding *how* Aden handled the firearm he picked up.[14] (App.27, R.Doc.93, at 27, Add.27). The district court's analysis is based on *Wilson v. City of Des Moines*, 293 F.3d 447, 452-53 (8th Cir.2002). However, *Wilson* does not provide guidance to this Court as the alleged discrepancies

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[14] The district court appears to have accepted Plaintiff's experts' frame-by-frame analysis of Aden's movements. (App.26-27, R.Doc.93, at 26-27, Add.26-27). This is improper as "law enforcement officers are not afforded the opportunity of viewing in slow motion what appears to them to constitute life-threatening action." *Dooley*, 856 F.3d at 1182-83.

in *Wilson* arose from "internal contradictions within one of the officers' testimony" and disputes between the officers' testimony and physical evidence, which created a fact issue. *Id.* (subject shot in the palm, which was "difficult to square with the alleged 'Weaver' or shooting stance described by officers"); *see also Partridge v. City of Benton*, 70 F.4th 489, 492 (8th Cir.2023)(*Partridge II*) (forensic evidence refuting officer testimony created a fact issue regarding subject's movements with the gun).

Unlike *Wilson*, Aden picked up the gun, which all officers observed. Unlike *Wilson* and *Partridge II*, no forensic evidence calls into question the officers' testimony, rather Plaintiff's experts admit Aden was armed and "began to raise" the gun before officers fired. (App.1536, R.Doc.75-1, at 9; App.1691-92, R.Doc.75-5, at 14-15). Thus, *Wilson* and *Partridge* are inapplicable.

Further, to the extent minor discrepancies exist (they do not), they cannot defeat summary judgment as the district court found as Aden "grabbed the gun with right hand" "officers shot him with lethal rounds…[b]efore the gun was raised to [Aden's] knee," and, as shots were fired, Aden "discharged" the pistol held in his right hand. (App.4, 6, 8, 25, R.Doc.93, at 4, 6, 8, 25, Add.4, 6, 8, 25). These factual findings, captured on video,[15] support that a reasonable officer would conclude Aden presented a threat of death or great bodily harm and officers had no duty to wait until Aden pointed the firearm at them to fire. *See Sabbe*, 84 F.4th at 827-28 (where subject

[15] Notably, neither *Wilson*, nor *Partridge* was captured on video.

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"reach[ed] for a gun" during a standoff, alleged fact disputes regarding *how* he handled the firearm, were "immaterial."); *see also McElree*, 983 F.3d at 1017; *Loch*, 689 F.3d at 967; *Thompson*, 257 F.3d at 899-900.

Additionally, the district court takes issue that officers continued firing after Aden went to the ground. (App.26-27, R.Doc.93, at 26-27, Add.26-27). However, in July 2023, this Court held that continuing to fire on a downed subject for "approximately one second" after the subject dropped his knife was not excessive because there was "inadequate time or opportunity for a reasonable officer to assess whether the immediate threat had passed." *Ching v. City of Minneapolis*, 73 F.4th 617, 620-21 (8th Cir.2023).

Like *Ching*, the use of deadly force occurred in seconds. However, more compelling than *Ching*, Aden maintained control over a *firearm* that he discharged during the 3.2 seconds in which officers used deadly force.[16] (App.1691-92, R.Doc.75-5, at 14-15). The fact that some shots were fired after Aden went to the ground with his firearm is not dispositive. *Ching*, 73 F.4th at 621.

This Court's decision in *Ching* is consistent with other Circuit Courts of Appeal that find using deadly force in analogous circumstances reasonable. *Palacios v.*

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[16] Any claim that Aden was attempting to surrender when he went to the ground must be rejected as his intent is irrelevant. *Hernandez v. Jarman*, 340 F.3d 617, 624 (8th Cir.2003). Further, a reasonable officer would not perceive a subject who grabbed a gun and continues to hold it as "surrendering." *Estate of Valverde v. Dodge*, 967 F.3d 1049, 1063 (10th Cir.2020)(collecting cases).

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Fortuna, 61 F.4th 1248, 1261 (10th Cir.2023); *Doxtator v. O'Brien*, 39 F.4th 852, 862 (7th Cir.2022); *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir.2007); *Clark v. City of Atlanta, Ga.*, 544 Fed.Appx. 848, 857 (11th Cir.2013). For example, in *Palacios*, the Court refused to consider the plaintiff's claims that Palacios was attempting to surrender after falling to the ground, finding "[t]he mere fact that a suspect has fallen does not mean it is unreasonable to continue to fire." *Palacios*, 61 F.4th at 1261. The Court explained:

> A reasonable officer would not perceive that the threat had ended and that Mr. Palacios was effectively subdued merely because he fell, given that he repeatedly maintained possession of the gun. Even if [the officers] were mistaken as to what Mr. Palacios was doing, it is not unreasonable to conclude that…Mr. Palacios was preparing to shoot. Mr. Palacios still had possession of his gun and was not immobile...

Id.

Like *Palacios*, Peterson, Ryan, Nelson, Stier and Kiehl reasonably perceived Aden as a threat since he maintained control over the gun. Further, even if they were mistaken as to what Aden was doing with the firearm, it was not unreasonable to conclude Aden was preparing to shoot given his decision to pick-up a gun 4-hours into a police standoff and movements after he picked up the gun. *Loch*, 689 F.3d at 966; *Dooley*, 856 F.3d at 1183; *Palacios*, 61 F.4th at 1261. Accordingly, the officers' continued use of deadly force was reasonable.

In sum, the *Graham* factors are met as Aden was suspected of a serious crime, resisting and/or fleeing by rising from a seated position and picking up the gun,

which constituted an immediate threat of death or great bodily harm. Accordingly, the use of deadly force was reasonable.

B. The use of deadly force did not violate clearly established law.

The district court made no effort to set forth the status of clearly established law at the time of this incident. Rather, it summarily concluded:

> A person does not pose an immediate threat of serious physical harm to another when, although the person is in possession of a gun, he does not point it at another or wield it in an otherwise menacing fashion. Absent probable cause to believe the suspect poses an immediate threat of death or serious bodily injury to others, an officer's use of deadly force is not objectively reasonable.

(App.21, R.Doc.93, at 21, Add.21 (internal citations omitted)). This is a general statement of law and did not give the officers fair and clear notice that using deadly force against a suspect of a serious crime, engaged in a 4-hour police standoff, who grabs a gun during efforts to apprehend him was unreasonable. *Compare id. with White*, 580 U.S. at 79-80. In fact, this Court and multiple other Courts of Appeal have held using deadly force in these circumstances reasonable. *See supra* Section III.A.

Courts that have considered a subject picking up a firearm from the ground during a standoff routinely find the use of deadly force does not violate clearly established law. *See Bifelt v. Alaska*, 854 Fed.Appx. 799, 800 (9th Cir.2021); *Puskas*, 56 F.4th at 1096-97; *see also McElree*, 983 F.3d at 1017. In 2021, the Ninth Circuit observed that there was not a "case clearly establishing that officer acting under similar circumstances—who undertook extensive efforts to deescalate a standoff yet the

suspect grabbed a firearm off the ground—were held to have violated a suspect's Fourth Amendment rights" when he responded with deadly force. *Bifelt*, 854 Fed.Appx. at 800; *Sabbe*, 84 F.4th at 828. This conclusion is consistent with this Court's longstanding jurisprudence that reaching for a weapon during a police encounter is a threat of death or great bodily harm. *McElree*, 983 F.3d at 1017; *Loch*, 689 F.3d at 967; *Thompson*, 257 F.3d at 899-900; *Billingsley*, 277 F.3d at 995.

The district court did not address *McElree*, *Loch*, *Thompson*, or *Billingsley* in its discussion of clearly established law. Rather, it relied on *Partridge* and *Cole*, which are not applicable and did not put officers on notice that using deadly force was unconstitutional.

In *Partridge* and *Cole*, which were both decided after this incident,[17] this Court found an officer could be held liable for using deadly force against a subject in "mere possession" of a firearm. *Cole*, 959 F.3d at 1132; *Partridge II*, 70 F.4th at 494. Critically, neither *Partridge*, nor *Cole* involved the threat presented, a subject picking up a gun—a "menacing" act in-an-of-itself—when officers attempt to apprehend him. *Compare* App.6, R.Doc.93, at 6, Add.6 *with Partridge II*, 70 F.4th at 492 (unreasonable to use deadly force against suicidal male who "moved his gun in compliance with commands to drop his gun"); *Cole*, 959 F.3d at 1133

[17] Cases decided after an incident are inherently incapable of providing notice to officers that their conduct would violate a suspect's constitutional rights. *See Wilson v. Layne*, 526 U.S. 603, 6 (1999).

(unreasonable to shoot male walking away from person he threatened with a gun without announcing presence and providing an opportunity to disarm). Thus, *Partridge* and *Cole* do not speak to the circumstances confronting Peterson, Ryan, Nelson, Stier, and Kiehl on July 2, 2019 and they are incapable of providing fair and clear warning to officers that using deadly force would violate Aden's constitutional rights.

In sum, because the caselaw did not clearly establish on July 2, 2019 that using deadly force to respond to the threat presented by a person, grabbing a gun—in direct violation of repeated orders to surrender the weapon—constituted a constitutional deprivation, Officers Peterson, Ryan, Nelson, Stier, and Kiehl are entitled to qualified immunity.

IV. PLAINTIFF'S *MONELL* CLAIM FAILS.

Municipality liability under § 1983 attaches "only if the constitutional violation resulted from an official municipal policy." *Brabbit v. Capra*, 59 F.4th 349, 354 (8th Cir.2023); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 (8th Cir.2018). "It follows that, absent a constitutional violation by a city employee, there can be no § 1983 or *Monell* liability for the City." *Id.* A denial of summary judgment on a *Monell* claim is immediately appealable when it is intertwined with a qualified immunity defense. *Eagle v. Morgan*, 88 F.3d 620, 628-29 (8th Cir.1996).

Here, Plaintiff's *Monell* claim is that, "Chief Roger New, in authorizing the tactical plan to proceed, set the City of Eagan's official policy."[18] (App.30, R.Doc.93, at 30, Add.30). This is intertwined with Plaintiff's Fourth Amendment claim, alleging the less-lethal apprehension plan violated clearly established law. Because the less-lethal apprehension plan was reasonable and did not violate clearly established law, *see supra* Section II, there is no basis to find municipal liability and Plaintiff's *Monell* claim must be dismissed. *Brabbit*, 59 F.4th at 354.

V. THE OFFICERS ARE ENTITLED TO OFFICIAL IMMUNITY ON PLAINTIFF'S STATE LAW CLAIMS.

A. Plaintiff's wrongful death claim is derivative of her negligence claim.

The district court improperly characterized Defendants' motion as seeking "partial" summary judgment. (App.9-10, R.Doc.93, at 9-10, Add.9-10). Contrary to the district court's characterization, Defendants moved for dismissal of "Plaintiff's claims in their entirety and with prejudice." (R.Doc.60; *see also* R.Doc.62, at 65 (addressing Plaintiff's "wrongful death and negligence claims."); R.Doc.80, at 5 n.6).

In Minnesota, "a wrongful death claim is 'derivative in nature' because the damages recovered in that claim arise out of and are dependent on injuries to the decedent." *Hanbury v. Am. Family Mut. Ins. Co.*, 865 N.W.2d 83, 89 (Minn.App.

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[18] Plaintiff did not plead this claim and, therefore, it was an error for the district court to consider this unpled theory. *See Singleton*, 934 F.3d at 837.

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2015). Thus, "a plaintiff in a wrongful death action must establish ***the same elements as required to provide a negligence claim*** but must show 'death' instead of 'injury.'" *Kruse v. City of Elk River*, 21-cv-1262 (JRT/BRT), 2022 U.S.Dist.LEXIS 171262, *17 (D.Minn. Sept. 22, 2022)(citing *Stuedemann v. Nose*, 713 N.W.2d 79, 83 (Minn.App. 2006)(emphasis added)). Absent a viable underlying cause of action, no wrongful death claim lies. *Mertes v. City of Rogers*, 17-cv-4508 (SRN/SER), 2019 U.S.Dist. LEXIS 122127, *25 (D. Minn. July 23, 2019)(failure to establish negligence elements resulted in dismissing wrongful death claim); *Hassan v. City of Minneapolis*, 489 F.3d 914, 920-21 (8th Cir. 2007). Thus, Plaintiff's wrongful death claim hinges, and is entirely dependent on, her negligence claim. Dismissal of the negligence claim requires dismissal of the wrongful death action. *See id.*

B. Official immunity bars Plaintiff's state law claims.

Defendants are entitled to official immunity unless they: (1) violated a ministerial duty or (2) willfully violated a known right while performing a discretionary duty. *Vassallo v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014). The district court found the conduct at issue is the officials' "use of force" which is "a discretionary act." (App.31-32, R.Doc.93, at 31-32, Add.31-32). The district court denied official immunity, along with vicarious official immunity, holding there is a question of fact as to whether the tactical plan and use of deadly force were "wrongful acts without legal justification." (*Id.*). The district court misapplied the law.

As outlined above, the officers' deployment and authorization of the tactical plan and subsequent use of deadly force were reasonable, and therefore, "a reasonable fact finder could not conclude the officers' conduct was willful or malicious." *Hassan*, 489 F.3d at 920; *Hayak v. City of St. Paul*, 488 F.3d 1049, 1056 (8th Cir.2007).

The terms "willful" and "malice" are synonymous and "[m]alice 'means nothing more than…***the willful violation of a known right***.'" *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991)(emphasis added). Here, the district court failed to cite one case prohibiting the officers from utilizing less-lethal force to apprehend Aden and deadly force after he picked up the gun. Much like the qualified immunity analysis, the Minnesota Supreme Court has held public employees, like police officers, should not be subject to personal liability for an act that was not previously declared unlawful. *Rico*, 472 N.W.2d at 109. The Minnesota federal district court followed this reasoning, holding:

> The Court determined…that it was not clearly established, or known, that the officers' use of deadly force in the situation at issue constituted excessive force. Thus, it cannot be said that the officers, in shooting at Fye and hitting plaintiff, willfully violated a known right. *See Rico v. State,* 472 N.W.2d 100, 107 (Minn.1991)(granting official immunity because no clearly established law or regulation prohibited the conduct). Therefore, the officers are entitled to official immunity with respect to plaintiff's state law claims.

Ivory v. City of Minneapolis, 02–4364(JRT/FLN), 2004 U.S.Dist.LEXIS 15199, *26 (D.Minn. Aug. 4, 2004).

The officers did not willfully or maliciously violate a known right because clearly established precedent did not forbid them from initiating a less-lethal plan to apprehend Aden and using deadly force after he picked up the firearm. *Id.; Rico,* 472 N.W.2d at 109; *see supra* Sections II-III. As the tactical plan and use of deadly force were both reasonable and there is no evidence of a willful violation of known right, the officers are entitled official immunity. Correspondingly, the City is entitled to vicarious official immunity. *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn.1998).

CONCLUSION

Based on the foregoing, Appellants respectfully request the Court reverse the district court's partial denial of summary judgment, and hold that Officers New, Speakman, Cardenas, Peterson, Ryan, Nelson, Stier, and Kiehl are entitled to qualified and official immunity, and the City of Eagan is entitled to vicarious official immunity.

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**Certificate of Compliance with FRAP 32(a)(7)(C)
and Eighth Cir. R. 28A(h)**

Vicki A. Hruby, attorney for Defendants-Appellants, hereby certifies that this brief complies with the requirements of Federal Rule of Civil Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rules and Procedures 28A(h) as follows: (1) The brief was prepared using Microsoft Office 365, Times New Roman font size 14, and contains 13,000 words, according to the word processing program used to prepare this brief, (2) The brief has been scanned for viruses and is virus-free, and (3) The electronic version of the brief was generated by printing to PDF from the original word processing file and is searchable and subject to copying.

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Certificate of Service

I hereby certify that on January 12, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by CM/ECF system.