

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No: 14-cv-01471-RPM

RONALD DWAYNE BROWN,

Plaintiff,

v.

THE CITY OF COLORADO SPRINGS;

PETER CAREY, Chief of Police, Colorado Springs Police Department, in his official capacity;

VINCE NISKI, Deputy Chief of Police, Colorado Springs Police Department, individually and in his official capacity;

LT. SALVATORE FIORILLO III, Unit Commander, Tactical Enforcement Unit (Swat Team), Colorado Springs Police Department, individually and in his official capacity;

SGT. RONALD SHEPPARD, Colorado Springs Police Department, individually;

SGT. CHRIS ARSENEAU, Colorado Springs Police Department, individually;

OFFICER DAN CARTER, Colorado Springs Police Department, individually;

OFFICER WILLIAM P. BETTS, Colorado Springs Police Department, individually;

OFFICER ROBIN McPIKE, Colorado Springs Police Department, individually;

OFFICER SHAWN MAHON, Colorado Springs Police Department, individually;

OFFICER MARCUS VAN OONYEN, Colorado Springs Police Department, individually,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, the City of Colorado Springs ("City"), Chief of Police Peter Carey, Deputy Chief of Police Chief Vince Niski, Lieutenant Salvatore Fiorillo, III, Sergeant Ronald Sheppard, Sergeant Chris Arseneau, Officer Dan Carter, Officer William P. Betts, Officer Robin McPike, Officer Shawn Mahon, and Officer Marcus Van

Oonyen's (sic), by and through the Office of the City Attorney, hereby move this Court pursuant to Fed. R. Civ. P. 56 for summary judgment and state in support as follows:

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On Sunday, May 27, 2012, at approximately 6:34 p.m., Colorado Springs Police Department ("CSPD") officers were dispatched to 4887 Rusty Nail Point, #202 in Colorado Springs, Colorado in response to a reported disturbance. *Exhibit A*, Affidavit of Timothy Wihera, p. 2, ¶ 3.

2. One of the first responding officers, Officer Timothy Wihera, arrived on scene and was advised that an individual had discharged a weapon during an altercation between neighbors. *Id.* at p. 2, ¶ 4.

3. Officer Wihera was advised that the suspect had entered 4854 Rusty Nail Point, #102 after firing the weapon and had not been seen since the incident. *Id.*

4. Once Officer Theron Charles arrived as cover, the two officers approached unit #102. *Id.* at p. 2, ¶ 5.

5. While approaching the front door of the residence, Officer Charles made loud, clear verbal commands to anyone within unit #102 to exit with their hands in the air. *Id.* at p. 2, ¶ 5.

6. Officers received no response and no movement within the residence was detected. *Exhibit A*, p. 2, ¶ 5.

7. As additional officers arrived on scene, police continued to monitor unit #102 while others interviewed individuals associated with the underlying call for service. *Id.* at p. 2-3, ¶¶ 5-9. *Exhibit B*, Affidavit of Roger Vargason, p. 2, ¶¶ 6-8, p. 3, ¶¶ 11-12.

8. Officer Wihera learned from his interview of Lawson Garrison that the individual, later identified as Plaintiff, Ronald Brown, had discharged a weapon into the ground in the course of a dispute with neighbors. *Exhibit A*, p. 2-3, ¶ 6. Mr. Garrison advised Officer Wihera that he was at his girlfriend's residence when her son, Kyre Davis, ran into the house, and said that a man had chased him with a baseball bat and threatened to shoot him. *Id.*

9. According to Mr. Garrison, he then went outside and joined his girlfriend, Jocqueline Bennett, who had already confronted Plaintiff. *Id.* Mr. Garrison later advised Officer Wihera that he possessed a baseball bat during the confrontation with Plaintiff. *Id.* at p. 3, ¶ 11.

10. After speaking to him for five to ten minutes, Mr. Garrison advised Officer Wihera that he saw Plaintiff pull out a firearm from his right pocket and fired it into the ground. *Id.* at p. 2-3, ¶ 6; p. 3, ¶ 11.

11. After discharging the handgun, Mr. Garrison said Plaintiff threaten to shoot him. *Id.* at p. 2-3, ¶ 6.

12. Officer Wihera also interviewed Ms. Bennett and a neighbor, James Ruff, each of whom individually confirmed that Plaintiff fired a weapon during the dispute and made threats to kill the neighbors. *Id.* at p. 3, ¶¶ 7-8.

13. While other officers were attempting to contact Plaintiff at unit #102, Sergeant Roger Vargason called a telephone number 719-213-0254 listed to Plaintiff several times and left several voicemails. *Exhibit B*, p. 3, ¶¶ 9-10. *Exhibit D*, Deposition

of Ronald Brown, p. 182, Ins. 4-6. *Exhibit Q*, Plaintiff's Responses to Requests for Admission #4.

14. Officers discontinued attempts to contact Plaintiff at his residence after they determined that there was an eleven to twenty minute time gap from when the incident occurred and the arrival of the first officers on scene. *Exhibit C*, Affidavit of Sean Collins, p. 2, ¶ 4. *Exhibit B*, p. 2-3, ¶ 9; p. 4 ¶ 15.

15. Officers attempted to contact Plaintiff at unit #102 until approximately 8:44 p.m. on May 27, 2012. *Exhibit A*, p. 3, ¶ 9.

16. After leaving the scene, Officer Collins texted Plaintiff using Sergeant Roger Vargason's telephone requesting that Plaintiff call him. *Exhibit B*, p. 4, ¶ 19. *Exhibit C*, p. 2, ¶ 5.

17. Neither Sergeant Vargason nor Officer Collins received a response back from Plaintiff that night. *Exhibit B*, p. 4, ¶ 19. *Exhibit C*, p. 2, ¶ 6.

18. On Monday morning, May 28, 2012, Sergeant Vargason received a text message from Plaintiff. *Exhibit B*, p. 4-5, ¶ 20. The message alleged, in part, that CSPD had previously protected Plaintiff's former employer, the Transportation Security Administration ("TSA"). *Id.* The message also stated that Plaintiff wanted his attorney or it would be "[b]alls to the, drop the hammer. Your call." *Id.*

19. In response, Sergeant Vargason asked that Plaintiff call him. *Id.* at p. 5, ¶ 21.

20. No response from Plaintiff was ever received. *Id.* at p. 5, ¶ 22.

21. Later, on Monday, May 28, 2012, CSPD received a call from an anonymous source who advised police that Plaintiff was possibly on scene at 4854 Rusty Nail Point, #102. *Exhibit C*, p. 2, ¶ 7. *Exhibit B*, p. 5, ¶ 23.

22. On Monday afternoon, May 28, 2012, Officer Sean Collins, along with Officer Stacey Clark and Officer Brent Jacobsen, drove to 4854 Rusty Nail Point, #102 and conducted surveillance of the unit. *Exhibit C*, p. 2, ¶ 7.

23. The surveillance officers did not see any movement at 4854 Rusty Nail Point, #102. *Id.* at p. 2, ¶ 8.

24. Officer Collins, again, attempted to make telephonic contact with Plaintiff. Officer Collins was unsuccessful. *Id.* at p. 3, ¶ 9.

25. While at the residence, Officer Collins contacted Lucy Boyer, Plaintiff's roommate. *Id.* at p. 3, ¶ 10.

26. Officer Collins learned from Ms. Boyer that Plaintiff suffered from Post-Traumatic Stress Disorder ("PTSD"). *Id.*

27. Ms. Boyer indicated that Plaintiff goes into "war mode." *Id.* When asked to describe "war mode," Ms. Boyer indicated that Plaintiff was involved in the events depicted in the movie "Blackhawk Down." *Id.*

28. Ms. Boyer indicated that it would be a blood bath if police attempted to arrest Plaintiff. *Id.*

29. Ms. Boyer provided officers with the phone number for Plaintiff's mother and Mary Hankins. *Id.*

30. Officer Collins called Mary Hankins, Plaintiff's friend, at the number provided by Ms. Boyer and was able to reach her. *Id.* at p. 3, ¶ 11. *Exhibit D*, p. 117, Ins. 2-17.

31. Ms. Hankins advised Officer Collins that Plaintiff suffered from PTSD and had anxiety disorders. *Exhibit C*, p. 3, ¶ 11. Ms. Hankins indicated that Plaintiff was on medication for these issues. *Id.*

32. Ms. Hankins advised Officer Collins that Plaintiff possessed several guns in his residence. *Id.*

33. Ms. Hankins advised Officer Collins that Plaintiff kept to himself, disliked being in the company of others, and only had a small group of friends. *Id.*

34. Officer Collins asked if Ms. Hankins could contact Plaintiff and encourage him to speak to police. *Id.*

35. Ms. Hankins advised Officer Collins that police should not attempt to enter Plaintiff's residence and apprehend him because he disliked law enforcement. *Id.*

36. In advising Officer Collins of Plaintiff's feelings about police, Ms. Hankins indicated that Plaintiff had an incident with TSA in 2010. *Id.* Ms. Hankins declined to provide additional detail about the 2010 incident. *Id.*

37. Officer Collins then called Plaintiff's mother, Pauline Brown. *Id.* at p. 3, ¶ 12. Ms. Brown advised Officer Collins that she had been in contact with her son by way of text message communication. *Id.* Ms. Brown stated that Plaintiff usually communicates by text message. *Id.*

38. Ms. Brown informed Officer Collins that Plaintiff had spent twenty years in the Army and was currently seeing a counselor at the Veteran's Administration in Denver, Colorado. *Id.*

39. Ms. Brown informed Officer Collins that Plaintiff was diagnosed with PTSD and an anxiety disorder. *Id.*

40. Ms. Brown advised Officer Collins that Plaintiff had recently been drinking alcohol heavily. *Id.*

41. Ms. Brown told Officer Collins that Plaintiff is not himself when he drinks. *Id.*

42. Arrest and search warrants were presented to the Honorable Timothy Schutz of the Fourth Judicial District on May 28, 2012. *Exhibit E*, Affidavit of Stacey Clark, p. 2, ¶ 8. Judge Schutz signed the warrants and elevated bond to \$100,000.00. *Id.* at *Exhibits 1, 2.*

43. Officers, including Officer Geraldine Pring, conducted research into Plaintiff's past interactions with law enforcement. *Exhibit F*, Affidavit of Officer Pring, p. 2, ¶ 4.

44. Research revealed that Plaintiff had police contact in 2010 after he made threats over the telephone to former supervisors and coworkers at TSA. *Exhibit A*, p. 4, ¶ 12. *Exhibit H*, Deposition of Sergeant Ronald Sheppard, p. 34, Ins. 11-21. *Exhibit N*, Deposition of Vince Niski, p. 26, Ins. 13-15.

45. Officer Pring's research revealed that in the course of the 2010 investigation, officers located several weapons, including two 40 caliber rifles, a Walter

PPK, a 12 gauge shotgun, a 308 rifle (M-1) with scope, a .22 caliber SigSauer, 9 millimeter SigSauer, and a .45 caliber firearm at Plaintiff's residence. *Exhibit F*, p. 2, ¶ 4. This information was included in a risk assessment provided to the Tactical Enforcement Unit ("TEU"). *Id.* at Exhibit 1.

46. Plaintiff pled guilty to harassment pursuant to a deferred judgment and sentence in the 2010 matter. *Exhibit Q*, Response to Requests for Admission #3.

47. At approximately, 2:26 p.m. on May 29, 2012, Officer Pring placed a telephone call to Pauline Brown, Plaintiff's mother. *Exhibit F*, p. 2-3, ¶ 6. Officer Pring learned from Ms. Brown that she had attempted to persuade Plaintiff to surrender to police. *Id.* Officer Pring learned from Ms. Brown that Plaintiff suffered from PTSD; had a twenty year military background in the infantry; was unemployed for over two years; and was experiencing financial difficulty. *Id.*

48. At approximately 2:59 p.m. on May 29, 2012, Officer Pring placed a telephone call to Ms. Boyer. *Id.* at p. 3, ¶ 8. Ms. Boyer said Plaintiff was in a war zone and it was better to leave him alone and not force the issue. *Id.* Ms. Boyer felt that Plaintiff just needed to work through the recent events on his own. *Id.* Ms. Boyer indicated that Plaintiff had recently viewed a text message that she sent to him. *Id.* Ms. Boyer also advised Officer Pring that Plaintiff advised her to stay away from the doors of the residence. *Id.* Ms. Boyer informed Officer Pring that Plaintiff suffered from PTSD and had military experience. *Id.* Ms. Boyer informed Officer Pring that if CSPD attempted to arrest Plaintiff with force that officers would be met with force. *Id.*

49. At approximately 4:30 p.m., TEU held a briefing where members were provided information on the underlying incident on May 27th and on Plaintiff. *Exhibit C*, p. 3-4, ¶ 13. *Exhibit I*, Affidavit of Carlos Sandoval, p. 2, ¶ 3.

50. TEU was tasked with executing the warrants because they were considered high risk. *Exhibit G*, Deposition of Lieutenant Salvatore Fiorillo III, p. 5, ln. 8.

51. During the briefing, Officer Collins provided information to TEU, including Plaintiff's background in the military, his possession of multiple weapons, PTSD and that Ms. Boyer believed that it would be a blood bath if officers attempted to enter the residence. *Exhibit C*, p. 3-4, ¶ 13.

52. Lieutenant Fiorillo supervised TEU, including Sergeant Sheppard, and the Regional Explosives Unit ("REU") at all times during the course of the execution of the arrest and search warrants. *Exhibit G*, p. 4, lns. 2-10. *Exhibit H*, p. 9, lns. 8-11. *Exhibit N*, p. 8, lns. 2-6.

53. Sergeant Sheppard was the direct supervisor over TEU. *Exhibit H*, p. 5, lns. 10-15; *Exhibit N*, p. 8, lns. 2-6.

54. Members of REU involved in the execution of the warrants were Sergeant Christopher Arseneau, Sergeant William Betts, Officer Dan Carter, Officer Robin McPike and Officer Shawn Mahon. *Exhibit M*, Deposition of Christopher Arseneau, p. 23, lns. 1-13. *Exhibit L*, Deposition of William Betts, p. 10, lns. 15-16; p. 14, lns. 17-18. *Exhibit K*, Affidavit of Dan Carter, p. 1, ¶ 3. *Exhibit J*, Deposition of Robin McPike, p. 6, lns. 8-25; p. 7, ln. 1; p. 52, ln. 16-17.

55. Prior to executing the warrants, Lieutenant Fiorillo was aware that Plaintiff possessed numerous high caliber weapons; a gas mask; ballistic vests; and a Kevlar helmet. *Exhibit G*, p. 12, Ins. 3-13; p. 20, Ins. 20-25, p. 21, In. 1.

56. Prior to executing the warrants, Lieutenant Fiorillo was aware that Plaintiff had made threats to law enforcement. *Id.* at p. 12, Ins. 3-17.

57. Prior to executing the warrants, Lieutenant Fiorillo was aware that Plaintiff had PTSD and may not have been on his medication. *Id.* at p. 14, Ins. 20-25; p. 15, In. 1.

58. Prior to executing the warrants, Lieutenant Fiorillo reviewed a risk assessment which details the weapons owned by Plaintiff, his military experience, his experience with TSA and PTSD diagnosis. *Id.* at p. 46, Ins. 7-11; *Exhibit P*, Affidavit of Salvatore Fiorillo, p. 2, ¶ 4.

59. Lieutenant Fiorillo and Sergeant Sheppard decided against a dynamic entry and elected to conduct a “contain and call-out” operation to execute the warrants. *Exhibit G*, p. 19, Ins. 5-14; *Exhibit N*, p. 15, Ins. 1-11.

60. At approximately 4:58 p.m., Officer Pring received information from dispatch that the last ping from Plaintiff’s phone came from a tower at Panorama Park which is just north of Plaintiff’s residence at approximately 9:30 a.m. Tuesday, May 29, 2012. *Exhibit F*, p. 3-4, ¶ 11.

61. At approximately 5:04 p.m., Officer Pring spoke with Plaintiff’s friend, Brian Sheridan. *Id.* at p. 4, ¶ 12. Mr. Sheridan informed Officer Pring that he received a text from Plaintiff that morning at 9:00 a.m. *Id.* From the text, Mr. Sheridan said that Plaintiff

seemed very upset and felt justified in what he did during the underlying incident with the neighbors. *Id.* Mr. Sheridan said he did not believe Plaintiff was right in the head. *Id.* Mr. Sheridan thought that Plaintiff was in his basement and did not trust anyone. *Id.* Mr. Sheridan stated that Plaintiff would voluntarily surrender to police in a short time. *Id.* Mr. Sheridan stated that Plaintiff ended the text exchange with him with an acronym which meant “see you on the other side.” *Id.*

62. During the execution of the arrest and search warrants, Lieutenant Fiorillo and Commander Skip Arms were the principal decision makers and comprised command staff. *Exhibit P*, p. 3, ¶ 10.

63. At approximately 6:15 p.m., TEU arrived at 4854 Rusty Nail Point, #102 and began evacuating nearby residences. *Exhibit I*, p. 2, ¶ 4.

64. Lieutenant Fiorillo was stationed in the command post two blocks away from 4854 Rusty Nail Point, #102. *Exhibit G*, p. 20, Ins. 1-4.

65. At approximately 6:00 p.m., CSPD negotiators, Officers Geraldine Pring and Eric Frederic, began attempts to contact Plaintiff via telephone and text message. *Exhibit F*, p. 4, ¶ 13. Negotiators sent text messages and placed telephone calls to Plaintiff’s telephone every three minutes for one and a half to three hours then every five minutes for three to four hours and every ten minutes until the standoff concluded. *Id.*

66. At approximately 6:43 p.m., bullhorn announcement commenced in the front of unit #102. *Exhibit I*, p. 2, ¶ 4.

67. The bullhorn announcements were loud and clear, and were heard from the opposite direction from which they originated. *Exhibit P*, p. 2, ¶ 6.

68. At approximately 6:52 p.m., CSPD commenced bullhorn announcements in the rear of unit #102. *Exhibit I*, p. 2, ¶ 4.

69. In the bullhorn announcements, CSPD broadcasted its presence and advised Plaintiff to surrender himself peacefully. *Exhibit P*, p. 2, ¶ 6.

70. The bullhorn announcements continued until officers had contact with Plaintiff. *Id.* at p. 2, ¶ 6.

71. At approximately 7:00 p.m., CSPD commenced launching chemical munitions into the main level of unit #102. *Exhibit I*, p. 2, ¶ 4.

72. The chemical munitions were used as part of a plan to prevent Plaintiff from fortifying or barricading himself in unit #102. *Exhibit G*, p. 20, Ins. 20-25; p. 21, Ins. 1-12.

73. Secured metal grates covered the window wells to the basement. *Exhibit K*, p. 2, ¶ 7.

74. TEU attempted to place grappling hooks on a front window and remove the grate, but were unable to do so. *Exhibit H*, p. 57, Ins. 24-25; p. 58, Ins. 5-15.

75. CSPD had two robots—a larger robot, the Andros, and a smaller robot, the Point Man. *Id.* at p. 84, Ins. 21-25. *Exhibit G*, p. 25, Ins. 8-19.

76. At approximately 7:38 p.m., the Point Man robot, remotely operated by Officer Robin McPike, breached the front door. *Exhibit I*, p. 2, ¶ 4; *Exhibit J*, p. 44, Ins. 18-20.

77. At approximately 7:52 p.m., the robot remotely piloted by Officer McPike was introduced into the main level of the residence. *Exhibit I*, p. 2, ¶ 4; *Exhibit J*, p. 46, Ins. 10-12. *Exhibit G*, p. 25, Ins. 20-22.

78. Officer McPike made announcements through the robot once inside unit #102. *Exhibit J*, p. 42, Ins. 10-16.

79. Using a camera mounted on the robot, officers were able to observe the main level of unit #102. *Id.* at p. 44, Ins. 22-25.

80. Through the camera mounted on the robot, no activity was observed on the main level. *Exhibit G*, p. 25, Ins. 23-25, p. 26, Ins. 1-2.

81. At approximately 8:31 p.m., Officer McPike attempted to breach the interior door to the garage in order to determine if a vehicle was present inside. *Exhibit J*, p. 46, Ins. 23-25; p. 47, Ins. 1-12. *Exhibit H*, p. 61, Ins. 16-19.

82. Based on intelligence, officers knew that if Plaintiff's vehicle was located in the garage that Plaintiff was within the residence. *Exhibit H*, p. 62, Ins. 7-9.

83. At approximately 9:32 p.m., using a water charge on the robot, Officer McPike used a robot to puncture the garage door and confirmed that Plaintiff's vehicle was located in the garage. *Exhibit J*, p. 48, Ins. 3-15. *Exhibit H*, p. 62, Ins. 15-20.

84. The Point Man started down the stairs to the basement where contact with the unit was lost. *Exhibit G*, p. 27, Ins. 11-17. *Exhibit J*, p. 106, Ins. 17-19.

85. Officer Robin McPike then remotely operated and sent the Andros robot into unit #102 to retrieve the Point Man robot. *Exhibit G*, p. 27, Ins. 18-19. *Exhibit H*, p. 75, Ins. 11-18. *Exhibit J*, p. 106, Ins. 17-19.

86. Sergeant Sheppard requested that Officer Carter attempt to breach the grate covering a front window well. *Exhibit K*, p. 2, ¶ 7.

87. Officers Betts, Carter and McPike created and detonated a charge which bent the grate. *Id. Exhibit L*, p. 28, Ins. 23-25; p. 29, Ins. 1-7.

88. Through the bent grate, Officer Wolf attempted to puncture the basement window with a pole in an attempt to introduce CS gas into the basement. In the course of prodding the window, the pole broke. *Exhibit K*, p. 2, ¶ 7.

89. Since the pole broke in the course of attempting to break the window, the windows to the basement appeared to be fortified. *Exhibit K*, p. 2, ¶ 7.

90. Between 10:30 p.m. and 10:45 p.m., Deputy Chief Vince Niski arrived on scene. *Exhibit N*, p. 41, Ins. 19-20.

91. Upon his arrival, Deputy Chief Niski was actively involved in the decision-making process. *Id.* at p. 35, Ins. 18-19. *Exhibit P*, p. 3, ¶ 10.

92. Command staff discussed and considered a number of options to access the basement and persuade Plaintiff into surrendering. *Exhibit N*, p. 43, In. 25; p. 44, Ins. 1-7.

93. The safety of Plaintiff was a concern during these discussions. *Exhibit G*, p. 35, Ins. 17-25; p. 36, Ins. 1-3.

94. One option discussed, but not acted upon was flooding the basement with water because officers could not control the water level and Plaintiff could be harmed. *Exhibit O*, Affidavit of Vince Niski, p. 2, ¶ 3.

95. Another option discussed, but not acted upon, was porting a hole in basement wall because it was discovered during the inspection of the comparable unit that the basement had concrete walls. *Id.*

96. Another option Lt. Fiorillo considered, but declined to use was nontoxic gas for concern it could harm Plaintiff. *Exhibit G*, p. 22, Ins. 20-25; p. 23, Ins. 1-9.

97. A throw phone could not be used because officers had been unable to access the basement. *Exhibit P*, p. 2, ¶ 7.

98. The door at the bottom of the stairs was closed. *Exhibit G*, p. 38, ln. 5. *Exhibit L*, p. 84, Ins. 22-25; p. 103, Ins. 3-6.

99. Command staff was concerned that the door at the bottom of the stairs was barricaded. *Exhibit G*, p. 47, Ins. 2-5; p. 48, Ins. 8-11. *Exhibit N*, p. 45, Ins. 23-24; p. 51, Ins. 14-16, p. 75, ln. 21.

100. The room under the stairs contained military gear and many of his weapons. *Exhibit G*, p. 37, Ins. 1-7. *Exhibit N*, p. 80, Ins. 5-7. *Exhibit D*, p. 198, Ins. 3-5, Ins. 12-17; p. 203, Ins. 11-25; p. 204, Ins. 1-2.

101. Sergeant Sheppard, Sergeant Arseneau, members of command staff and others viewed a nearby townhouse with a similar construction as unit #102. *Exhibit H*, p. 65, Ins. 2-15. *Exhibit G*, p. 35, Ins. 23-25; p. 36, Ins. 1-3. *Exhibit M*, p. 33, Ins. 6-14. *Exhibit N*, p. 79, Ins. 7-11.

102. The purpose of viewing the nearby townhome was to obtain a better understanding of the layout of the basement and to consider options. *Exhibit M*, p. 33,

Ins. 10-25; p. 34, Ins. 1-2. *Exhibit N*, p. 79, Ins. 7-11. *Exhibit G*, p. 35, Ins. 23-25; p. 36, Ins. 1-3.

103. A female friend of Plaintiff's was brought in to the basement of the nearby townhouse while officers viewed it. *Exhibit H*, p. 65, Ins. 4-5.

104. The female advised officers that Plaintiff had a man cave in the basement with thousands of rounds of ammunition, and a supply of food and water which would last for months. *Id.* at p. 65, Ins. 6-8. *Exhibit K*, p. 2, ¶ 8.

105. The female told officers that Plaintiff would likely be located in the man cave area. *Exhibit H*, p. 65, Ins. 9, 12-15. *Exhibit K*, p. 2, ¶ 8.

106. The female confirmed that the layout of the basement was the same as unit #102. *Exhibit H*, p. 65, Ins. 10-12. *Exhibit K*, p. 2, ¶ 8.

107. Consensus among command staff was that the Andros robot was too large to navigate down the stairs. *Exhibit H*, p. 85, Ins. 12-13. *Exhibit N*, p. 45, Ins. 20-25; p. 46, Ins. 1-3.

108. Command staff was concerned that the Andros robot would get stuck if it was led down the stairs leading to the basement. *Exhibit H*, p. 84, Ins. 21-25. *Exhibit M*, p. 30, Ins. 16-22. *Exhibit N*, p. 45, Ins. 20-25; p. 46, Ins. 1-3.

109. At all times during the execution of the warrants and prior to the detonation of the charge, command staff believed that Plaintiff was located in a back bedroom or in the closet of the bedroom underneath the stairs to the basement. *Exhibit G*, p. 35, Ins. 21-23; p. 36, Ins. 10-17; p. 37, Ins. 1-7. *Exhibit M*, p. 35, Ins. 16-18. *Exhibit N*, p. 56, Ins. 10-20; p. 59, Ins. 1-8.

110. The closet of the bedroom was referred to as Plaintiff's cave. *Exhibit H*, p. 65, Ins. 4-15.

111. Police contacted the United States Army base at Fort Carson, Colorado to inquire about the availability of a robot. *Exhibit G*, p. 27, Ins. 23-25; p. 28, Ins. 1-14.

112. The robot available from Fort Carson was called a TALON. *Exhibit L*, p. 101, ln. 1.

113. The TALON has a gripper, an arm and a camera on it. *Id.* at p. 101, Ins. 3-4, 7.

114. The TALON could only manipulate unlocked doors. *Id.* at p. 101, Ins. 7-9, p. 102, Ins. 11-13.

115. The TALON could not open an unlocked door and carry a gas canister simultaneously. *Exhibit L*, p. 103, Ins. 3-9.

116. Lieutenant Fiorillo was concerned that the TALON could become an obstacle to officers if the door at the bottom of the stairs was barricaded. *Exhibit G*, p. 48, Ins. 4-11.

117. The robot from the United States Army base at Fort Carson was not used prior to discharging the entry device because its capabilities were unknown to Command staff. *Id.* at p. 34, Ins. 9-14; p. 38, Ins. 11-12; p. 45, Ins. 11-12.

118. Command staff decided to use a charge to create a porthole in the flooring in order to view the basement and potentially introduce chemical munitions. *Id.* at p. 30, Ins. 7-8; p. 33, Ins. 1-2, 13-15. *Exhibit N*, p. 75, Ins. 8-10.

119. Command staff decided against placing the charge in the kitchen near the stairwell because they believed that Plaintiff was most likely located in the bedroom below the kitchen. *Exhibit N*, p. 59, Ins. 1-8.

120. Officers Arseneau, Betts, Carter and McPike discussed using the water cannon on the Andros to port a hole in the flooring. *Exhibit J*, p. 51, Ins. 21-25; p. 52, Ins. 1-20.

121. The water cannon could not be used because there was not a shot strong enough to make a hole in the flooring. *Id.* at p. 52, Ins. 1-14.

122. Officers Betts, Carter and McPike constructed the charge using a sixteen inch by sixteen inch prebuilt gryphon frame with four sheets of C1 explosives. *Exhibit L*, p. 65, Ins. 15-17; p. 72, Ins. 7-12; p. 94, Ins. 17-22; p. 99, Ins. 11-12. *Exhibit M*, p. 39, Ins. 8-11.

123. TEU had a fire extinguisher on hand. *Exhibit P*, p. 3, ¶ 11.

124. The gryphon frame selected was the smaller of the two frames REU had in its inventory. *Exhibit M*, p. 46, Ins. 16-20.

125. The gryphon frame uses water to tamp the charge. *Exhibit J*, p. 70, Ins. 18-25.

126. A gryphon frame guides a charge in a focused, directional manner. *Exhibit L*, p. 66, Ins. 8-15; p. 71, Ins. 6-11. *Exhibit M*, p. 48, Ins. 1-16, 21-23.

127. REU had not breached a floor operationally or in training. *Exhibit M*, p. 43, Ins. 1-8. *Exhibit L*, p. 46, Ins. 4-7; p. 68, Ins. 7-9. *Exhibit J*, p. 18, Ins. 3-17.

128. REU had breached walls and similar construction materials as a floor. *Exhibit M*, p. 43, Ins. 1-8. *Exhibit L*, p. 46, Ins. 4-7. *Exhibit J*, p. 18, Ins. 3-11.

129. Officer Carter placed the charge three feet from the front door in unit #102. *Exhibit K*, p. 3, ¶ 9.

130. The charge was set off at approximately 11:55 p.m. *Exhibit H*, p. 94, Ins. 8-11.

131. The location of the charge was far away from where command staff thought Plaintiff would be found. *Exhibit N*, p. 56, Ins. 10-20; p. 77, Ins. 22-25; p. 78, Ins. 1-6; p. 80, Ins. 5-11, p. 81, Ins. 13-16, 24-25, p. 82, Ins. 1-3. *Exhibit G*, p. 37, Ins. 1-7.

132. The charge created approximately a sixteen inch by sixteen inch hole on the main floor. *Exhibit L*, p. 64, Ins. 3-4, p. 96, Ins. 10-13.

133. The charge broke approximately four to five feet of drywall on the ceiling of the basement. *Id.* at p. 64, Ins. 10-13.

134. After the charge was set off, it was difficult for officers to see anything through the camera mounted on the Andros robot. *Exhibit H*, p. 94, Ins. 22-25; p. 95, Ins. 1-2; p. 97, Ins. 14-15. *Exhibit P*, p. 2-3, ¶ 8.

135. Officer McPike changed cameras on the Andros robot, reentered unit #102 and snaked the arm of the robot into the hole in order to view the basement. *Exhibit J*, p. 105, Ins. 12-18.

136. Initially, through the video feed, it appeared that blankets were balled up on the bed under the blast. *Exhibit H*, p. 95, Ins. 1-2.

137. Plaintiff was under a blanket. *Id.* at p. 97, Ins. 14-15.

138. Using a camera mounted on the Andros robot to view the basement through the porthole created by the entry device, officers discovered that Plaintiff was under the blast. *Exhibit G*, p. 43, Ins. 4-7. *Exhibit J*, p. 105, Ins. 12-18.

139. Material from the flooring landed on Plaintiff, injuring his lower leg. *Exhibit D*, p. 206, Ins. 5-8; p. 210, ln. 11.

140. Using communication equipment on the Andros robot, officers communicated with Plaintiff. *Exhibit H*, p. 96, Ins. 7-10.

141. Plaintiff was wearing a helmet, flak vest, load bearing vest, gas mask and ear plugs. *Exhibit D*, p. 193, Ins. 21-24; p. 194, Ins. 5-14.

142. From the video feed streaming from the Andros, it appeared that Plaintiff had several magazines containing ammunition on his load bearing vest. *Exhibit P*, p. 2-3, ¶ 8.

143. From the video feed, command staff confirmed that the door at the bottom of the stairs was not barricaded. *Exhibit N*, p. 65, Ins. 11-12.

144. Through the communication device on the Andros robot, Plaintiff was instructed to remove his helmet, gas mask and body armor. *Exhibit J*, p. 108, Ins. 5-9.

145. Command staff was concerned that Plaintiff had booby trapped the basement and had explosives on his person. *Exhibit H*, p. 89, Ins. 17-18.

146. The TALON was then deployed to the basement, navigated the stairs and opened the unlocked basement door. *Id.* at p. 87, Ins. 18-21.

147. The TALON contacted Plaintiff in the basement and was able to ensure that the basement was not booty trapped. *Id.*

148. Thirty minutes elapsed between when Plaintiff's location was confirmed and when he was taken into custody. *Exhibit J*, p. 111, Ins. 20-22.

149. Officers attempted to make contact with Plaintiff throughout the call. *Exhibit G*, p. 21, Ins. 16-17. *Exhibit F*, p. 4, ¶ 13.

150. On May 29, 2012, Plaintiff never had contact with CSPD prior to setting off the explosive device. *Exhibit N*, p. 28, Ins. 15-16; p. 30, Ins. 16-23; p. 37, In. 20; p. 42, Ins. 19-20; p. 54, Ins. 14-15. *Exhibit G*, p. 26, Ins. 10-12; p. 45, In. 6. *Exhibit D*, p. 195, Ins. 1-3, 14-23.

151. Plaintiff pled guilty to Failure or Refusal to Leave Premises or Property upon Request of a Peace Officer in violation of C.R.S. § 18-9-119(2), (4). *Exhibit Q*, Response to Requests for Admission #1.

152. Plaintiff pled guilty to Menacing a class five felony in violation of C.R.S. § 18-3-206. *Exhibit Q*, Response to Request for Admission #2. *Exhibit D*, p. 166, Ins. 14-21.

153. During the execution of the search warrant for 4854 Rusty Nail Point, #102, officers located and seized weapons from Plaintiff. *Exhibit D*, p. 220, Ins. 10-12, 18-25; p. 221, Ins. 1-13.

154. Weapons seized from Plaintiff's basement were a Bond Arms C2K Defender .45 caliber handgun, Bond Arms Texas Defender Cowboy .45 caliber handgun, Ruger P94 .40 caliber handgun, Crossfire 223/12 gauge combo .223 caliber

long gun, Ruger Ranch Rifle .223 caliber long gun, and Ruger Carbine .40 caliber rifle. *Id.* at p. 220, Ins. 10-12, 18-25; p. 221, Ins. 1-13.

155. Deputy Chief Vince Niski has received training on the rights secured under Fourth Amendment and the use of force. *Exhibit N*, p. 4, Ins. 22-25; p. 5, Ins. 1-4.

156. Lieutenant Fiorillo has received training on the rights secured under the Fourth Amendment and the use of force. *Exhibit G*, p. 3, Ins. 22-25; p. 4, Ins. 13-19.

157. Sergeant Sheppard has received training on the rights secured under the Fourth Amendment and the use of force. *Exhibit V*, Affidavit of Ronald Sheppard, p. 1, ¶ 2.

158. Sergeant Arseneau has received training on the rights secured under the Fourth Amendment and the use of force. *Exhibit M*, p. 6, Ins. 15-23.

159. Officer Carter has received training on the rights secured under the Fourth Amendment and the use of force. *Exhibit K*, p. 1, ¶ 2.

160. Officer Betts has received training on the rights secured under the Fourth Amendment and the use of force. *Exhibit R*, Affidavit of William Betts, p. 2, ¶ 3.

161. Officer McPike has received training on the rights secured under the Fourth Amendment and the use of force. *Exhibit S*, Affidavit of Robin McPike, p. 1, ¶ 2.

162. Officer Shawn Mahon has received training on the rights secured under the Fourth Amendment and the use of force. *Exhibit T*, Affidavit of Shawn Mahon, p. 1, ¶ 2.

163. Officer Marcus Van Ooyen has received training on the rights secured under the Fourth Amendment and the use of force. *Exhibit U*, Affidavit of Marcus Van Ooyen, p. 1, ¶ 2.

ARGUMENT

I. QUALIFIED IMMUNITY SHIELDS ALL DEFENDANTS SUED IN THEIR INDIVIDUAL CAPACITY FROM PLAINTIFF’S CLAIMS

Deputy Chief Niski, Lieutenant Fiorillo, Sergeant Sheppard, Sergeant Arseneau, Officer Carter, Officer Betts, Officer McPike, and Officer Mahon (collectively, “Individual City Defendants”) are entitled to qualified immunity. Police officers are entitled to qualified immunity when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

After a defendant asserts qualified immunity, the burden shifts to plaintiff to satisfy a “heavy two-part burden,” *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995), to show that defendant has violated a constitutional right which was clearly established at the time of the alleged unlawful conduct. See *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The Court may decide “which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Id.* at 236. Though the evidence is viewed “in the light most favorable to the nonmoving party, the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity.” *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (internal citation omitted).

a. The actions of Individual City Defendants were objectively reasonable

“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 v. Connor*, 490 U.S. 386, 396 (1989). The central question in analyzing an excessive force claim is whether the officers’ actions were objectively reasonable. *Id.* at 397. “Whether the force used by police officers is ‘excessive’ or ‘reasonable’ is an objective inquiry depending on the ‘facts and circumstances of each particular case.’” *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1248 (10th Cir. 2013) (internal quotation marks omitted). The Court’s analysis entails carefully balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396. This “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.*

A search and arrest warrant which “is reasonably executed will withstand constitutional scrutiny.” *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997). Officers have discretion to determine how, specifically, a warrant may be executed. See *Dalia v. United States*, 441 U.S. 238, 257 (1979). “Occasionally, such details include damaging property, detaining residents, or taking action necessary to protect the searching officers.” *Lawmaster*, 125 F.3d at 1349. Officers who execute a warrant

do not have to “use alternative ‘less intrusive’ means[.]” *Medina*, 252 F.3d at 1133 (internal quotation marks omitted), so long as their conduct is reasonable. *Id.*

Here, Plaintiff was inadvertently injured after officers used an explosive device to port a hole in the flooring of Plaintiff’s residence. Officers ported the hole in order to view the basement and, potentially, introduce gas. *Exhibit G*, p. 30, Ins. 7-8; p. 33, Ins. 1-2, 13-15. *Exhibit N*, p. 75, Ins. 8-10. The device was used only after a lengthy five-hour standoff. *Exhibit I*, p. 2, ¶ 4. During the standoff, officers made numerous attempts to contact Plaintiff over loud speakers, *Exhibit P*, p. 2, ¶ 6, by text message and telephonically, *Exhibit F*, p. 4, ¶ 13, and through a robot which had entered the unit. *Exhibit J*, p. 42, Ins. 10-16. Officers also utilized several less intrusive tactics to prod Plaintiff from the basement while ensuring that the lives of officers would not be jeopardized.

The standoff occurred after Plaintiff discharged a firearm and threatened to kill neighbors, *Exhibit A*, p. 2-3, ¶¶ 6-8; after officers obtained search and arrest warrants, *Exhibit E*, p. 2, ¶ 8; after officers allowed Plaintiff approximately forty five hours or roughly two days to contact or surrender himself to police, *Exhibit A*, p. 3, ¶ 9, *Exhibit I*, p. 2, ¶ 4; after officers had numerous conversations with friends and family of Plaintiff in hopes that others could persuade Plaintiff to speak to police, *Exhibit C*, p. 3, ¶¶ 10-12, *Exhibit F*, p. 2-3, ¶¶ 5-6, 8, p. 4, ¶ 12; after police learned that Plaintiff possessed numerous high powered weapons, was hostile to law enforcement and had an extensive military background, *Exhibit C*, p. 3, ¶ 10; *Exhibit P*, p. 2, ¶ 4; and after police received their only contact with Plaintiff, a threat. *Exhibit B*, p. 4, ¶ 20. Police also

spent over two hours attempting to contact Plaintiff during their investigation into the initial incident. *Exhibit A*, p. 2, ¶ 3, p. 3, ¶ 9.

The arrest and search warrants arose out of an incident where Plaintiff made threats to neighbors and discharged a firearm. *Id.* at p. 2-3, ¶ 6. Plaintiff made these threats and fired the weapon after he chased a young neighborhood boy and menaced him with a bat. *Id.* at p. 3-4, ¶ 10. Both of these incidents were felonious. See C.R.S. § 18-3-206. The events, detailed in affidavits which were presented to the Honorable Timothy Schutz of the Fourth Judicial District, State of Colorado, who issued the warrants and elevated bond from \$10,000.00 to \$100,000.00. *Exhibit E*, p. 2, ¶ 8, Exhibit 1.

After law enforcement's initial response on Sunday, May 27th, officers began to research Plaintiff and discovered the danger that he presented. Officers learned that Plaintiff possessed several high powered firearms. *Exhibit F*, p. 2, ¶ 4. Officers also discovered that Plaintiff was former military; dealt with PTSD; and had the provisions to wage a protracted standoff. *Exhibit C*, p. 3, ¶¶ 10-12.

Coupled with Plaintiff's capabilities, officers also discovered Plaintiff's sentiment towards law enforcement. Officers learned through multiple conversations with Plaintiff's friends and family that police should expect fierce resistance from Plaintiff. *Exhibit C*, p. 3, ¶¶ 10-12. *Exhibit F*, p. 3, ¶ 8. Specifically, officers learned from friends and family that it would be a "blood bath" if police attempted to arrest Plaintiff, *Exhibit C*, p. 3, ¶ 10; that officers would be met with force, *Exhibit F*, p. 3, ¶ 8; and that he had a distain for police. *Exhibit C*, p. 3, ¶ 11. Officers only contact with Plaintiff reaffirmed that

he was dangerous. In the single contact officers had with Plaintiff from Sunday to early Wednesday, Plaintiff threatened police. In a text message received by Sergeant Vargason on Monday, May 28, 2012, Plaintiff voiced his displeasure with CSPD's prior handling of events with TSA and stated in unequivocal terms that it would be "balls to the wall, drop the hammer" if police attempted to apprehend him. *Exhibit B*, p. 4-5, ¶ 20. Nothing about Plaintiff's statements or the statements of those who knew him best suggested that Plaintiff would surrender to police peacefully. Officers had to proceed with extreme caution and presume that Plaintiff posed a continuing threat to the officers and the neighborhood if he was not apprehended.

The significant passage of time between the initial menacing incident on Sunday and the execution of the warrants on Tuesday demonstrated that Plaintiff had little appetite for surrendering voluntarily. Moreover, Plaintiff had already displayed the ability to react violently to otherwise minor situations. Any additional passage of time would not have reduced the danger posed by Plaintiff to police and the public. Further, nothing throughout the course of CSPD's initial investigation, research into Plaintiff's background, contact with him, or the events during the execution of the warrants diminished the threat posed by Plaintiff.

During the execution of the warrants, Plaintiff's barricaded position in the basement provided him with a substantial tactical advantage over officers. Officers could not view the interior of the basement from anywhere outside of unit #102. *Exhibit K*, p. 2, ¶ 7. Plaintiff controlled access to the basement. The windows were covered and secured with grates, *Id.*, and the door at the bottom of the stairwell was closed.

Exhibit G, p. 38, ln. 5. Officers were unable to access the basement through the windows after multiple attempts, *Exhibit K*, p. 2, ¶ 7, *Exhibit H*, p. 57, lns. 24-25; p. 58, lns. 5-15, and lost contact with the robot after they attempted to navigate it down the stairs. *Exhibit G*, p. 27, lns. 11-17. Officers could not enter the residence without the risk of encountering gunfire through the floor and stairs. Command staff was left with increasingly limited options to view the basement and, ultimately, extract Plaintiff.

Faced with dwindling options, command staff considered the few alternatives available. Command staff considered flooding the basement, but declined to do so for concern that Plaintiff might be incapacitated and harmed by the introduction of water. *Exhibit O*, p. 2, ¶ 3. Command staff also contemplated porting a hole in a basement wall from an adjacent townhouse. *Id.* Command staff declined this option because the wall was made of concrete. *Id.* After considerable discussion, command staff decided to port a hole in the flooring. *Exhibit G*, p. 30, lns. 7-8; p. 33, lns. 1-2, 13-15. *Exhibit N*, p. 75, lns. 8-10.

REU chose to use a Gryphon frame with four sheets of C-1 explosives. The frame created a directional force which focused the energy downward in a specific, confined area. *Exhibit L*, p. 66, lns. 8-15; p. 71, lns. 6-11. *Exhibit M*, p. 48, lns. 1-16, 21-23. The charge created a sixteen inch by sixteen hole on the ground level floor. *Exhibit L*, p. 64, lns. 3-4, p. 96, lns. 10-13. It also removed a portion of the drywall on the basement ceiling. *Exhibit L*, p. 64, lns. 10-13.

Leading up to the use of the explosive device, command staff had a well-founded, through ultimately mistaken, idea of Plaintiff's location in the basement of the

residence. Command staff was aware that Plaintiff would likely be found in his bedroom or in a large closet which was situated under the stairway to the basement. *Exhibit G*, p. 35, Ins. 21-23; p. 36, Ins. 10-17; p. 37, Ins. 1-7. *Exhibit M*, p. 35, Ins. 16-18. *Exhibit N*, p. 56, Ins. 10-21; p. 59, Ins. 1-8. *Exhibit H*, p. 65, Ins. 9, 12-15. *Exhibit K*, p. 2, ¶ 8. During the standoff, command staff sent a robot into the residence and confirmed that Plaintiff, nor anyone else, was not located on the main level. *Exhibit G*, p. 25, Ins. 23-25, p. 26, Ins. 1-2. Officers confirmed that Plaintiff's vehicle was in the garage and based on intelligence, command staff knew that the presence of the vehicle meant that Plaintiff was in the residence. *Exhibit H*, p. 62, Ins. 7-9. Thus, at the time that command staff made the decision to port a hole in the flooring, police had a reasonable basis to believe that Plaintiff was a significant distance away from the blast site.

In light of these circumstances, Deputy Chief Niski, Lieutenant Fiorillo, Sergeant Sheppard, Sergeant Arseneau, Officer Carter, Officer Betts, Officer McPike and Officer Mahon acted reasonably. The officers were faced with challenging circumstances with a dangerous individual. The officers waited over five hours into the standoff before utilizing the entry device. Additionally, command staff carefully weighed the increasingly limited options available to them. Continuing to wait outside of Plaintiff's residence would not have changed the dynamics at the scene. Officers had no contact with Plaintiff during the standoff, and nothing that law enforcement encountered during this time suggested that Plaintiff would suddenly begin to communicate with the passage of time. Thus, officers used force which was reasonably necessary to advance the goals

of executing the warrant and ensuring their own safety. As such, they are entitled to qualified immunity.

b. No clearly established constitutional right was violated

Individual City Defendants did not violate a clearly established right when executing the warrants. “The contours of [a] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The “clearly established” prong of qualified immunity should not be defined “at a high level of generality.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). Instead, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* at 2083. Immunity should be denied only “if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the conduct at issue was lawful]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In order “for a right to be clearly established, 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.” *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007) (internal quotation marks omitted). “Summary judgment based on qualified immunity is appropriate if the law did not put the officer on notice that his conduct would be clearly unlawful.” *Id.* at 1114.

“In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search.” *Los Angeles*

Cty., California v. Rettele, 550 U.S. 609, 614 (2007). Officers executing a warrant must use conduct which is “reasonably necessary to effectuate the warrant’s purpose.” *Lawmaster*, 125 F.3d at 1349.

Here, no Tenth Circuit, Supreme Court decision or clearly established weight of authority puts Defendants on notice that their conduct was clearly unlawful. Specifically, no authority establishes that the use of an explosive device in the course of a protracted standoff with a barricaded dangerous suspect to port a hole to gain access and a visual of an area is clearly unconstitutional. The authority, instead, suggests that the actions of officers were constitutional.

In an opinion addressing the reasonableness of using a flash-bang device in the course of executing a warrant, the Tenth Circuit noted in *United States v. Myers*, 106 F.3d 936 (10th Cir. 1997) that “[t]he use of a ‘flashbang’ device in a house where innocent and unsuspecting children sleep gives us great pause.” *Id.* at 940. The court also cautioned against using such devices as a matter of routine. *Id.* However, the court “recognize that we must review the agents’ actions from the perspective of reasonable agents on the scene who are legitimately concerned with not only doing their job but with their own safety.” *Id.* (internal citation omitted). The court concluded that the use of a flash-bang device did not violate the Fourth Amendment. *See id.*

Similarly, in an unpublished opinion, *Kirk v. Watkins*, 182 F.3d 932, 1999 WL 381119 (10th Cir. 1999), the Tenth Circuit discussed the use of a flash-bang device in the course of executing a warrant. The court found that “[t]he use of a flashbang device is neither per se objectively reasonable nor unreasonable.” *Id.* at *3. Although the court

had concerns regarding the introduction of a flash-bang into a room without first viewing it, the court declined to find that the actions violated clearly established law. See *id.* at *4.

No Tenth Circuit case has addressed the unusual circumstances officers faced in this incident let alone put the question beyond debate. Further, no Supreme Court case is on point nor is there a prevailing weight of authority which demonstrates that Defendants violated a clearly established constitutional right. As such, Defendants are entitled to qualified immunity.

II. CLAIMS AGAINST DEFENDANTS CHIEF CAREY AND OFFICER VAN OOYEN IN THEIR INDIVIDUAL CAPACITY SHOULD BE DISMISSED FOR WANT OF AN AFFIRMATIVE LINK

a. Claims against Officers Van Ooyen should be dismissed since Plaintiff has not shown his personal involvement

“Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.” *Footte v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997). Here, Plaintiff has not shown that Officer Van Ooyen was personally involved in the underlying incident. As such, Officer Van Ooyen should be dismissed from this suit.

c. Claims against Chief Carey should be dismissed since Plaintiff has not demonstrated supervisory liability

Merely acting as a supervisor to one who violates the constitution is insufficient to support § 1983 liability. See *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10th Cir. 2008). Supervisory liability only attaches when there is: “(1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind.” *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010).

Specifically, to carry his burden, Plaintiff must show “the supervisor’s subordinates violated the constitution. Then, a plaintiff must show an ‘affirmative link’ between the supervisor and the violation, namely the active participation or acquiescence of the supervisor in the constitutional violation by the subordinates.” *Serna v. Colorado Dep’t of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006). Finally, a showing of mere negligence is inadequate to meet the state of mind requirement. See *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997). Instead, the supervisor must have acted knowingly or with deliberate indifference. See *id.* Deliberate indifference means that the supervisor “know[s] he is creating a substantial risk of bodily harm.” *Id.* (internal quotation marks omitted).

Plaintiff has not shown that Chief Carey was involved in underlying incident to the degree necessary to maintain his claims against him. Devoid as well is any suggestion that Chief Carey acted with the requisite intent. In light of these deficiencies, the claims against Chief Carey in his individual capacity should be dismissed.

III. PLAINTIFF’S CLAIM AGAINST THE CITY, CHIEF CAREY, DEPUTY CHIEF NISKI AND LT. FIORILLO IN THEIR OFFICIAL CAPACITY, SHOULD BE DISMISSED SINCE NO CONSTITUTIONAL VIOLATION OCCURRED, AND SINCE PLAINTIFF’S ALLEGED DAMAGES WERE NOT CAUSED BY THE MOVING FORCE OF A POLICY OR CUSTOM

Preliminarily, it is well settled that § 1983 claims against a government official in their official capacity are claims against the governmental entity. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Accordingly, claims asserted against Chief Carey, Deputy Chief Niski and Lt. Fiorillo in their official capacity are duplicative of those against the City, and should be dismissed. See *Stump v. Gates*, 777 F. Supp. 808, 816 n. 3 (D.

Colo. 1991) (“Naming either is sufficient. Naming both is redundant.”).

Plaintiff asserts that the City failed to train or supervise its officers in the area of excessive force. See Doc. No. 10, filed 8/26/14, p. 10-11, ¶¶ 63, 67. The City is not liable for the acts of its employees under a *respondeat superior* theory of liability. See *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175, 1188 (10th Cir. 2010). Rather, Plaintiff must show: “(1) official policy or custom, (2) causation, and (3) state of mind.” *Schneider v. City of Grand Junction Police Dep’t*, 717 F.3d 760, 769 (10th Cir. 2013). The custom or policy must be the moving force behind the constitutional infringement. See *Myers v. Oklahoma Cty. Bd. of Cty. Comm’rs*, 151 F.3d 1313, 1316 (10th Cir. 1998). Finally, municipal liability can only attach when there is an underlying constitutional violation. See *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993).

Liability for a practice of failing to train or supervise attaches when “that failure results from ‘deliberate indifference’ to the injuries that may be caused.” *Brammer-Hoelter*, 602 F.3d at 1189. In this context, deliberate indifference is

satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. In a ‘narrow range of circumstances,’ however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a ‘highly predictable’ or ‘plainly obvious’ consequence of a municipality’s action or inaction, such as when a municipality fails to train an employee in specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations.

Barney v. Pulsipher, 143 F.3d 1299, 1307-08 (10th Cir. 1998) (internal citations omitted).

Here, Plaintiff has not shown that any CSPD officers lack training in the use of force under the Fourth Amendment. Moreover, Plaintiff has not shown that any failure to train has been a result of the City's deliberate indifference. Accordingly, Plaintiff's failure to train or supervise claim against the City should be dismissed.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this Honorable Court enter an order granting Defendants' Motion for Summary Judgment and dismiss Plaintiff's claims with prejudice, and for any other relief this Court deems appropriate.

Respectfully submitted this 18th day of December, 2015.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 18th day of December, 2015, I electronically filed the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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