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## Throw a Dog a Suspect: When Using Police Dogs Becomes an Unreasonable Use of Force Under the Fourth Amendment

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## NOTE

# THROW A DOG A SUSPECT: WHEN USING POLICE DOGS BECOMES AN UNREASONABLE USE OF FORCE UNDER THE FOURTH AMENDMENT

### INTRODUCTION

A felony suspect, hiding in the woods outside his parents' rural home in Washington State suddenly finds himself in the clutches of a police dog with a biting force of 800 to 1200 pounds per square inch, comparable to a car running over a body part.<sup>1</sup> As the suspect screams in agony, police anxiously make their way through the dark, unfamiliar woods to find him.<sup>2</sup> Although this police dog ordinarily bites a suspect for no more than four seconds, in this instance, the dog continued to bite for forty-five to sixty seconds, until police finally located the suspect.<sup>3</sup> Because of this attack, the suspect suffered extensive and permanent injuries to his upper arm.<sup>4</sup>

While the Ninth Circuit has generally held that using properly trained police dogs does not constitute deadly or excessive force, the court reexamined the issues in *Miller v. Clark County*.<sup>5</sup> Specifically, the court addressed whether a dog bite

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<sup>1</sup> *Miller v. Clark County*, 340 F.3d 959, 960-962 (9th Cir. 2003).

<sup>2</sup> *Id.* at 961.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 960, 962-963 (citing *Brewer v. City of Napa*, 210 F.3d 1093, 1098 (9th Cir. 2000)).

continuing for close to a minute was excessive or deadly force.<sup>6</sup> The court held that despite the extremely long duration of the dog bite and the extensive injuries Miller suffered as a result, the bite was neither deadly nor excessive force.<sup>7</sup>

This Note contends that a dog bite lasting up to a minute is excessive force under these circumstances and violated Miller's Fourth Amendment right against unreasonable seizures. Part I of this Note provides a general synthesis of current Fourth Amendment seizure law as it applies to using police dogs.<sup>8</sup> Part II discusses the facts of *Miller* and the court's application of current case law to those facts.<sup>9</sup> Finally, Part III argues that the court failed to properly apply existing Fourth Amendment seizure law to the facts in *Miller*, and therefore, the force used was unreasonable.<sup>10</sup>

## I. BACKGROUND

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>11</sup> A person is "seized" for Fourth Amendment purposes when arrested by a police officer.<sup>12</sup> Thus, when a police officer arrests a suspect, the Fourth Amendment prohibits using unreasonable force to make the arrest.<sup>13</sup> This, however, does not mean the officer can use *no* force, but rather the force used must be reasonable under the circumstances.<sup>14</sup> Accordingly, the United States Supreme Court has developed a reasonableness standard for deadly force, and another less rigorous reasonableness standard for all other force used by police officers.<sup>15</sup> Therefore, in the police dog context, courts must first assess whether using a dog is deadly force and if not deadly,

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 963.

<sup>8</sup> See *infra* notes 11 to 132 and accompanying text.

<sup>9</sup> See *infra* notes 133 to 184 and accompanying text.

<sup>10</sup> See *infra* notes 185 to 228 and accompanying text.

<sup>11</sup> U.S. Const. amend. IV.

<sup>12</sup> *Graham v. Connor*, 490 U.S. 386, 388 (1989).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 396.

<sup>15</sup> *Miller*, 340 F.3d at 962 n.3.

courts next examine whether the force was excessive under the less rigorous standard.<sup>16</sup>

A. *TENNESSEE V. GARNER*: WHEN USING DEADLY FORCE IS CONSTITUTIONALLY PERMISSIBLE

In *Tennessee v. Garner*, the United States Supreme Court held that it is unreasonable, and thus unconstitutional under the Fourth Amendment, for an officer to use deadly force to stop a fleeing suspect unless the officer has probable cause to believe that the suspect poses a “significant threat of death or serious physical injury to the officers or others.”<sup>17</sup> In *Garner*, a Memphis police officer shot a felony suspect in the back of the head as he fled from the scene of a burglary.<sup>18</sup> At the time of the shooting, the officer stated that he was “reasonably sure” that Garner did not have a weapon.<sup>19</sup>

Garner’s father sought damages against the officer under 42 U.S.C. section 1983, claiming the shooting violated his son’s Fourth Amendment right against unreasonable seizures.<sup>20</sup> The officer, in turn, relied on a Tennessee statute that provided, “If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to affect [*sic*] the arrest.”<sup>21</sup> After the initial trial and appeal, the Federal District Court for the Western District of Tennessee found in favor of the officer.<sup>22</sup> On subsequent appeal, the Court of Appeals for the Sixth Circuit reversed and remanded, holding the statute unconstitutional.<sup>23</sup> The State of Tennessee appealed the decision.<sup>24</sup>

The Supreme Court of the United States affirmed, holding the Tennessee statute unconstitutional because it authorized

<sup>16</sup> *Id.*

<sup>17</sup> *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (internal quotes omitted).

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.* at 3 (internal quotes omitted).

<sup>20</sup> *Id.* at 5. 42 U.S.C. § 1983 provides that “every person who under color of any statute, ordinance, regulation...subjects, or causes to be subjected, any citizen...thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” 42 U.S.C. § 1983 (1994). Thus, 42 U.S.C. § 1983 allows an individual to recover damages for injuries allegedly caused by a police officer. See *Graham*, 490 U.S. at 388.

<sup>21</sup> *Garner*, 471 U.S. at 4.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 7.

the unreasonable use of force against a suspect who posed “no immediate threat to the officer and no threat to others.”<sup>25</sup> To determine the reasonableness of a seizure under the Fourth Amendment, the Court held it is necessary to “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion.”<sup>26</sup> In applying this balancing test to the force used against Garner, the Court concluded that using deadly force to prevent his escape was unreasonable.<sup>27</sup> The Tennessee statute was thus unconstitutional because it permitted using deadly force against *all* fleeing suspects, without regard to whether the force was reasonable under the circumstances.<sup>28</sup> Therefore, because Garner presented no immediate threat to the officers, using deadly force to prevent his escape was unreasonable, and thus unconstitutional.<sup>29</sup> However, the Court went on to hold that, “Where an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”<sup>30</sup>

#### B. *GRAHAM V. CONNOR*: ASSESSING THE REASONABLENESS OF NON-DEADLY FORCE

Subsequently, in *Graham v. Connor*, the United States Supreme Court developed a standard to evaluate when force used by police, while not deadly, was nevertheless excessive given the circumstances surrounding a suspect’s arrest.<sup>31</sup> In *Graham*, police detained a diabetic whose suspicious behavior was the result of an insulin reaction.<sup>32</sup> A police officer noticed Graham and his companion quickly leave a convenience store and then drive away.<sup>33</sup> The officer followed by car, and decided

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<sup>25</sup> *Id.* at 11, 22.

<sup>26</sup> *Id.* at 8 (citing *United States v. Place*, 462 U.S. 696, 703) (internal quotes omitted).

<sup>27</sup> *Id.* at 11.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *Graham*, 490 U.S. at 396.

<sup>32</sup> *Id.* at 388-389.

<sup>33</sup> *Id.* at 389.

to make an investigatory stop.<sup>34</sup> In the midst of his insulin reaction, Graham exited the car, ran around it twice, sat down on the curb, and briefly passed out.<sup>35</sup> A number of officers arrived, handcuffed Graham, and among other things, shoved his face into the hood of the car.<sup>36</sup> Graham suffered serious injuries resulting from the arrest, including a broken foot, cuts and bruises, and a shoulder injury.<sup>37</sup> Graham later filed suit in the United States District Court for the Western District of North Carolina, alleging the officers used excessive force during his arrest.<sup>38</sup> The district court granted the defendants' motion for a directed verdict.<sup>39</sup> A divided Court of Appeals for the Fourth Circuit affirmed.<sup>40</sup>

The United States Supreme Court reversed and remanded, concluding the district court erred in failing to analyze the excessive force claim under the Fourth Amendment reasonableness standard.<sup>41</sup> The Court once again applied the balancing test used in *Garner* to determine whether the force used was reasonable.<sup>42</sup> In addition, the Court held that in analyzing non-deadly force, the balancing test "requires careful attention to the facts and circumstances of each particular case."<sup>43</sup> Factors to consider included, but were not limited to: (1) the severity of the crime, (2) whether the suspect posed an immediate threat to safety, and (3) whether the suspect was resisting arrest or attempting to flee.<sup>44</sup> In light of these factors, the Supreme

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 390.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 391.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 399. Graham alleged the officers used excessive force in violation of his Fourteenth Amendment substantive due process rights. *Id.* at 390. The district court applied a four-factor due process analysis including "(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* (citing 644 F.Supp. 246, 248 (WDNC 1986)) (internal quotes omitted). The Fourth Circuit majority agreed with the Due Process analysis. *Id.* at 391. The Supreme Court, following its *Garner* decision, held that because the force used to make an arrest is a seizure, the Fourth Amendment reasonableness standard applies and thus, a substantive due process approach is inappropriate. *Id.* at 395.

<sup>42</sup> *Id.* at 396.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Court remanded to determine if Graham's arrest was unreasonable under the Fourth Amendment.<sup>45</sup>

Thus, in applying the balancing test to deadly and non-deadly force, two reasonableness standards emerge.<sup>46</sup> When an officer uses deadly force, the *Garner* standard applies, which is appropriate only "if an officer has probable cause to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others."<sup>47</sup> On the other hand, if non-deadly force is used, the less rigorous *Graham* standard applies, and the Court must balance several relevant factors when making the reasonableness determination.<sup>48</sup>

### C. THE DOG BITE CASES: APPLYING *GARNER* AND *GRAHAM*

To appreciate the Ninth Circuit's application of existing law in *Miller*, as well as this Note's critique of that application, it is necessary to discuss briefly major Ninth Circuit cases involving police dogs. As the cases below indicate, the Ninth Circuit has consistently held that using a police dog does not constitute deadly force.<sup>49</sup> However, while the Ninth Circuit has also consistently held that using a police dog does not constitute excessive force, the court has also made it clear that under certain circumstances, an excessively long dog bite *could* constitute excessive force.<sup>50</sup>

#### 1. *Police Dogs and Deadly Force* – *Vera Cruz v. City of Escondido*

After consuming more than two six-packs of beer, Robert Vera Cruz threatened employees at a local fast-food restaurant.<sup>51</sup> He left the restaurant but returned a short while later with a knife strapped to his hip.<sup>52</sup> The restaurant employees called the police, and when Officer Eric Distel and his dog ar-

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<sup>45</sup> *Id.* at 399.

<sup>46</sup> *Miller*, 340 F.3d at 962 n.3 (2003).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *E.g. Brewer*, 210 F.3d at 1098.

<sup>50</sup> *Id.* at 964 (citing *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998)).

<sup>51</sup> *Vera Cruz v. City of Escondido*, 139 F.3d 659, 660 (9th Cir. 1997).

<sup>52</sup> *Id.*

rived, Vera Cruz was at the back of the restaurant throwing objects out the back door.<sup>53</sup> When he saw Officer Distel, Vera Cruz attempted to flee.<sup>54</sup> Officer Distel gave two warnings and then released the dog, who bit Vera Cruz's right arm, bringing him to the ground.<sup>55</sup> After disarming Vera Cruz, Officer Distel ordered the dog to release.<sup>56</sup> As a result of the bite, Vera Cruz suffered severe injuries to his right upper arm, requiring surgery and an eight-day hospital stay.<sup>57</sup> Vera Cruz filed a lawsuit in the United States District Court for the Southern District of California alleging that the force used was both deadly and excessive, and his arrest was an unreasonable seizure in violation of the Fourth Amendment.<sup>58</sup> The trial court found in favor of the officer.<sup>59</sup> On appeal, Vera Cruz claimed the district erred in refusing to instruct the jury on the *Garner* deadly force standard.<sup>60</sup>

The Ninth Circuit recognized that *Garner*, the leading Supreme Court case involving deadly force, established when deadly force is appropriate, but failed to define what constitutes deadly force.<sup>61</sup> Therefore, the Ninth Circuit, looking to the Supreme Court's rationale in *Garner*, concluded that force is deadly only when it presents "more than a remote possibility of death."<sup>62</sup> Otherwise, the court reasoned, "all uses of force would be subject to *Garner*'s deadly force requirements because almost any use of force could cause death under peculiar enough circumstances."<sup>63</sup> Thus, because Vera Cruz failed to offer evidence showing the existence of "more than a remote possibility of death" from the dog, the Ninth Circuit held that the force used was not deadly.<sup>64</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 660-661.

<sup>58</sup> *Id.* at 661.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 663.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

## 2. *Police Dogs and Excessive Force*

### a. *Mendoza v. Block*

After robbing a bank in Hacienda Heights, California, Ronald Mendoza fled the scene by car and then on foot.<sup>65</sup> Sheriff's Deputies later found Mendoza's abandoned car, ran the license plate, and discovered he had previously served time for bank robbery.<sup>66</sup> The deputies also received information warning that Mendoza may be armed.<sup>67</sup> After several hours, deputies finally located Mendoza hiding under some bushes on private property.<sup>68</sup> Numerous warnings later, deputies released a police dog, who quickly located Mendoza and dragged him out of the bushes by his right arm.<sup>69</sup> Mendoza continued struggling with the dog, and the dog bit his left side.<sup>70</sup> Once deputies handcuffed Mendoza, they ordered the dog to release.<sup>71</sup> After his arrest, Mendoza filed a lawsuit in the United States District Court for the Central District of California, claiming the deputies used excessive force.<sup>72</sup> The district court found in favor of the deputies, concluding that the deputies acted reasonably under the circumstances.<sup>73</sup>

*Mendoza* was the first Ninth Circuit excessive force case involving a police dog.<sup>74</sup> The court reasoned that a Fourth Amendment analysis is applicable to "any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog."<sup>75</sup> Accordingly, using dogs does not require a separate excessive-force analysis, thus, excessive-force claims involving police dogs are properly analyzed under the *Graham* reasonableness standard.<sup>76</sup> However, after applying the *Graham* factors in this case, the court held, "[u]sing a police dog to find Mendoza, and to secure him until

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<sup>65</sup> *Mendoza v. Block*, 27 F.3d 1357, 1358 (9th Cir. 1994).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1359.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1361.

<sup>75</sup> *Id.* at 1362.

<sup>76</sup> *Id.*

he stopped struggling and was handcuffed, was objectively reasonable under these circumstances.<sup>77</sup> Because Mendoza committed robbery, was likely armed, fled from police, and struggled with the officers, using a police dog under these circumstances was reasonable under *Graham*, and did not constitute a Fourth Amendment violation.<sup>78</sup>

b. *Watkins v. City of Oakland*

Officer Craig Chew and his dog, Nero, along with four other officers, responded to a silent alarm at an Oakland auto body shop located in a commercial warehouse.<sup>79</sup> The officers saw the suspect inside the building, but they could not tell whether he was armed.<sup>80</sup> Officer Chew gave two warnings before releasing the dog, who found Watkins hiding in a car, and bit him.<sup>81</sup> When officers reached the defendant, they ordered him to show his hands.<sup>82</sup> According to Chew, it took about thirty seconds before Watkins complied with the officers' orders but once he did, the dog was ordered to release the suspect.<sup>83</sup> Watkins suffered serious injuries to his right foot, including fractures, lacerations and puncture wounds that subsequently required two skin graft surgeries.<sup>84</sup>

Watkins filed suit in the United States District Court for the Northern District of California, claiming that Officer Chew used excessive force.<sup>85</sup> The district court denied the defendants' request for summary judgment, holding that Watkins raised a "genuine issue of material fact as to whether the force used against [Watkins], including allowing Nero to continue biting [him] until [he] showed his hands was reasonable under the

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<sup>77</sup> *Id.* at 1363.

<sup>78</sup> *Id.* at 1362-1363.

<sup>79</sup> *Watkins v. City of Oakland*, 145 F.3d 1087, 1090 (9th Cir. 1998).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* Chew and another officer at the scene both stated that it took ten to fifteen seconds for Watkins to comply with the officers' orders. *Id.* Later, in an interview with Oakland Police Department Internal Affairs, Chew stated that it took about thirty seconds before Watkins showed his hands. *Id.*

<sup>84</sup> *Id.* at 1090-91.

<sup>85</sup> *Id.* at 1090.

circumstances.”<sup>86</sup> The defendants appealed the district court’s order denying summary judgment.<sup>87</sup>

On appeal, the Ninth Circuit concluded that because an excessively long dog bite and improper encouragement by officers to prolong the bite could constitute excessive force, the district court properly denied defendants’ summary judgment motion.<sup>88</sup> Thus, although the court did not ultimately determine whether the force used here was excessive, it did make clear that a prolonged dog bite, in this instance up to thirty seconds, could constitute excessive force.<sup>89</sup>

### c. Chew v. Gates

Thane Carl Chew (no relation to Officer Chew in *Watkins v. City of Oakland*) ran and hid in a scrap yard after a police officer pulled him over for a traffic violation.<sup>90</sup> The officer discovered Chew had three outstanding arrest warrants, and called for backup.<sup>91</sup> Officer Daniel Bunch and his dog, Volker, were among those who arrived at the scene.<sup>92</sup> The officers did not know whether Chew was armed.<sup>93</sup>

Approximately two hours later, while out of the officers’ sight, Volker located Chew crouching between two metal bins, and bit him several times before Officer Bunch found them.<sup>94</sup> Chew maintained that he repeatedly tried to surrender and offered no resistance to the officers.<sup>95</sup> Officer Bunch, however, stated that when he found Chew, the suspect was “hitting the dog with a pipe.”<sup>96</sup> Bunch admitted to kicking Chew several times, “possibly in the head, face or body,” in an attempt to protect the dog.<sup>97</sup> Chew suffered severe lacerations to his left forearm and left side.<sup>98</sup>

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<sup>86</sup> *Id.* (internal quotes omitted).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1093.

<sup>89</sup> *Id.*

<sup>90</sup> *Chew v. Gates*, 27 F.3d 1432, 1436 (9th Cir. 1994).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

Chew filed a suit in the United States District Court for the Central District of California against Officer Bunch, the City of Los Angeles, and Police Chief Daryl Gates, claiming the attack violated his Fourth Amendment right against unreasonable seizures.<sup>99</sup> The district court granted summary judgment in favor of all of the defendants except Officer Bunch.<sup>100</sup> At trial, the jury returned a \$13,000 general verdict against Bunch.<sup>101</sup> After trial, Chew appealed the district court's grant of summary judgment in favor of the remaining defendants.<sup>102</sup>

On appeal, one of the main issues the Ninth Circuit addressed was whether the district court erred in finding "the Los Angeles Police Department's policy governing the use of police dogs to seize fleeing and hiding suspects" constitutional.<sup>103</sup> While the majority held that the district court had erred in finding the policy constitutional, the judges did so for slightly different reasons.<sup>104</sup> Judge Reinhardt, writing for the majority, took a *Graham* excessive-force approach, while Judge Norris preferred a *Garner* deadly-force analysis.<sup>105</sup>

In assessing the gravity of the intrusion, Judge Reinhardt concluded that the force used to apprehend Chew was severe.<sup>106</sup> Volker bit Chew three times before achieving a solid hold, and dragged him four to ten feet.<sup>107</sup> By Chew's account, the attack nearly severed his arm.<sup>108</sup> Further, by allowing Volker to seize a suspect out of officers' sight, Officer Bunch should have expected such a mauling to occur, because the dog was beyond the reach of a countermanning order if and when the officers located Chew.<sup>109</sup> In other words, because the attack occurred

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<sup>99</sup> *Id.* at 1435. Chew also alleged Fourteenth Amendment violations. *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* One of the many issues the court addressed was whether Chew was barred from obtaining further damages because of the \$13,000 jury verdict. *Id.* The Ninth Circuit noted that from the record, it was unclear whether the judgment was compensation for Chew's damages from the dog bite or from the assault by Officer Bunch. *Id.* Because the record was unclear on this issue, the court concluded that the judgment did not bar Chew from pursuing his claims for damages resulting specifically from the dog bite. *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1441.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

outside of the officers' view, they were unable to intervene to mitigate unnecessary injury.<sup>110</sup>

Next, Judge Reinhardt applied the three *Graham* factors, starting with whether Chew posed an immediate threat to the safety of others.<sup>111</sup> Here, Judge Reinhardt reasoned that because officers had no reason to believe Chew was armed, was initially stopped for a traffic violation, did not engage in any threatening activity after fleeing, and did nothing more than "hide quietly," he did not pose an immediate threat to officer or public safety.<sup>112</sup> Thus, this factor weighed in favor of Chew.<sup>113</sup>

Judge Reinhardt next addressed whether the suspect was resisting arrest or attempting to flee.<sup>114</sup> Regarding whether the suspect was "actively resisting arrest," Judge Reinhardt concluded that while the suspect did flee from police, he did not physically resist the arresting officers, nor did the officers have any reason to believe he would physically resist.<sup>115</sup> Regarding whether the suspect was attempting to evade arrest by flight, Judge Reinhardt noted the answer was "yes" and "no," reasoning that in the broad sense, he was, but more narrowly, his flight ended once he was in the scrap yard.<sup>116</sup>

Next, Judge Reinhardt addressed the severity of the crime.<sup>117</sup> He noted that Chew was stopped for a traffic violation.<sup>118</sup> Although officers received information that Chew had three prior outstanding felony warrants for his arrest, the officers did not know what the crimes of the three felony arrest warrants were; thus, the information was of "limited" significance.<sup>119</sup> In addition, because Chew was trapped in a scrap yard, surrounded by police, officers were not forced to make split-second decisions.<sup>120</sup> Nonetheless, Judge Reinhardt felt these two factors cut "slightly" in favor of the defendants.<sup>121</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1442.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (internal quotes omitted).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1443.

<sup>121</sup> *Id.*

Finally, Judge Reinhardt balanced the intrusion on Chew's Fourth Amendment interests against the government's countervailing interests.<sup>122</sup> He concluded that while close, the most important factor, whether Chew posed an immediate threat, cut "strongly" in favor of Chew.<sup>123</sup> Therefore, because there was a genuine issue of material fact regarding whether the force used was excessive, the court reversed the district court's partial summary judgment.<sup>124</sup>

Judge Norris agreed with Judge Reinhardt that the district court erred in its partial summary judgment regarding the policy department's policy using police dogs.<sup>125</sup> However, Judge Norris argued that a deadly-force analysis was appropriate.<sup>126</sup> He reasoned that a dog, depending on how it is trained, qualifies as an instrument of deadly force.<sup>127</sup> "[I]f the LAPD dogs, as trained and deployed, constitute instruments of deadly force, then the LAPD canine policy violates the Fourth Amendment in exactly the same manner as did the Tennessee statute [in *Garner*] because it fails to limit the application of deadly force to those suspects who pose a significant threat to others."<sup>128</sup> Therefore, because the issue of whether the LAPD dogs amounted to instruments of deadly force was a genuine issue of fact, the district court erred in its partial summary judgment.<sup>129</sup>

Based on the above cases, notwithstanding Judge Norris' concurring opinion in *Chew*, the Ninth Circuit has consistently held that using police dogs does not constitute deadly force.<sup>130</sup> Accordingly, the *Graham* excessive-force analysis, including the three *Graham* factors, is the appropriate standard in assessing the reasonableness of using police dogs.<sup>131</sup> Further, using dogs can be unreasonable under certain conditions, such as when a dog bites a suspect for an unusually long duration.<sup>132</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1440.

<sup>125</sup> *Id.* at 1435.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1453.

<sup>128</sup> *Id.* at 1454-55.

<sup>129</sup> *Id.* at 1455.

<sup>130</sup> *Brewer*, 210 F.3d at 1098. As recent as 2000, the Ninth Circuit held that using police dogs does not constitute deadly force. *Id.*

<sup>131</sup> *Chew*, 27 F.3d at 1441.

<sup>132</sup> *Watkins*, 145 F.3d at 1093.

## II. *MILLER V. CLARK COUNTY*: THE FACTS OF THE CASE AND THE NINTH CIRCUIT'S ANALYSIS

On the night of January 21, 2001, a Clark County Sheriff's Deputy on routine patrol became "suspicious" of a silver Pontiac Fiero, and ran a computerized check on the license plate.<sup>133</sup> The computer told the deputy that the plate belonged to a different vehicle.<sup>134</sup> Because a switched license plate is a traffic violation, and could indicate a stolen vehicle, the deputy signaled the driver to pull over, but the driver refused.<sup>135</sup>

At the foot of a long driveway, the driver slowed the car and a passenger got out.<sup>136</sup> The deputy called for backup and pursued the passenger, while the driver turned onto and proceeded up the driveway.<sup>137</sup> Other deputies soon arrived, including Deputy Bylsma and his police dog, Kimon.<sup>138</sup> The deputies walked up the long driveway and found the abandoned Fiero in front of a house.<sup>139</sup> While searching the car, Deputy Bylsma discovered a knife on the car seat.<sup>140</sup> At some point, deputies learned the driver's name was James Tracey Miller, that Miller lived in the house with his parents, his family was not "law enforcement friendly," and that a mentally ill person lived there.<sup>141</sup> Deputies also learned that Miller was wanted for "attempting to flee from police by driving a car with a wanton or willful disregard for the lives of others," a felony in Washington State.<sup>142</sup>

Deputy Bylsma, his dog, Kimon, and another deputy tracked Miller through the property's dark, densely wooded terrain.<sup>143</sup> Bylsma shouted that he would release a police dog in five seconds unless Miller surrendered.<sup>144</sup> When there was no response, Bylsma released Kimon, and ordered the dog to find

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<sup>133</sup> *Miller*, 340 F.3d at 960. The facts of the case did not indicate if Miller had stolen the Fiero.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* The knife was seven to eight inches in length. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* 960-61.

<sup>144</sup> *Id.* at 961.

Miller and seize him using a “bite and hold” technique.”<sup>145</sup> After about a minute, Deputy Bylsma heard Miller scream, and immediately ran into the woods, locating Miller within forty-five to sixty seconds.<sup>146</sup> After verifying Miller was unarmed, Deputy Bylsma ordered Kimon to release.<sup>147</sup>

Miller suffered extensive injuries during the attack, requiring surgery and several days in the hospital.<sup>148</sup> According to Miller’s hospital records, “[his] skin was torn in four places above the elbow, and the muscles underneath were shredded. [His] biceps muscle was ‘balled up’ in the antecubital [*sic*] space. His brachialis muscle—the muscle closest to the bone and alongside the brachialis artery—was torn. [His] injury went as deep as the bone.”<sup>149</sup> Miller continues to suffer from his injuries.<sup>150</sup>

Miller brought suit against Deputy Bylsma and Clark County in the United States District Court for the Western District of Washington, alleging that using a police dog under these circumstances violated his Fourth Amendment right against unreasonable seizures.<sup>151</sup> Miller alleged that using the dog constituted excessive as well as deadly force.<sup>152</sup> Relying on *Vera Cruz*’s holding that using police dogs is not deadly force, the district court granted the defendants partial summary judgment on the deadly force issue.<sup>153</sup> After a bench trial, the district court ruled in favor of both defendants on the excessive force issue, holding that using the dog was not excessive force

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<sup>145</sup> *Id.* Kimon was ordered to seize Miller by biting his arm or leg. *Id.* The “bite and hold” is a K-9 training technique in which the handling officer commands the dog to locate and seize the suspect, usually by biting an arm or leg. R.S. Eden, Handler Control vs. Bark and Hold Apprehension Techniques (last visited September 18, 2003) <<http://www.policek9.com/html/bitvsbk.html>>. If the suspect remains calm, the dog will exert only minimal pressure. *Id.* If, however, the suspect struggles, attempts to flee, or threatens the safety of the dog or officers, the dog will bite more aggressively until the suspect is subdued. *Id.* Only when the suspect is under control will the officers order the dog to release. *Id.*

<sup>146</sup> *Miller*, 340 F.3d at 961.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 961-962.

under the circumstances.<sup>154</sup> Miller appealed the district court's ruling.<sup>155</sup>

On appeal, the Ninth Circuit examined whether the force used was either deadly or excessive<sup>156</sup> Specifically, the court looked at whether "ordering a trained police dog to 'bite and hold' the suspect until officers arrived on the scene less than a minute later" violated the suspect's Fourth Amendment right against unreasonable seizures.<sup>157</sup> The court first disposed of the deadly force allegation.<sup>158</sup> While citing the Ninth Circuit's rule that using a police dog does not generally constitute deadly force, the court recognized that they had never considered the deadly force issue in the context of a dog bite lasting almost a minute.<sup>159</sup> The court considered the testimony of Dr. Craig Eddy, Miller's medical expert, who stated in an affidavit that a dog with Kimon's biting force could lacerate arteries in the arms or legs resulting in the suspect bleeding to death.<sup>160</sup> Further, if the dog punctured a critical artery in the arm or leg, the suspect could bleed to death within a few minutes.<sup>161</sup> Dr. Eddy testified that in his opinion, a prolonged dog bite to the extremities without immediate restraint constitutes the use of deadly force, and that "the force and location of the dog bite wounds [here] had a reasonable probability of causing Mr. Miller's death."<sup>162</sup>

The court also considered Deputy Bylsma's testimony, who admitted that it was "possible" Kimon could bite a suspect's head or neck if more readily available than an arm or leg, and such a bite, arguably, would more likely result in death.<sup>163</sup> Deputy Bylsma also admitted that a suspect's injuries are likely to be more severe the longer a dog is allowed to bite.<sup>164</sup> Notwithstanding these considerations, the court found the risk

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<sup>154</sup> *Id.* at 961.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 961, 963.

<sup>157</sup> *Id.* at 960.

<sup>158</sup> *Id.* at 961-962.

<sup>159</sup> *Id.* at 962.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 963 n.7. An extremity is an arm or a leg. An arm is often referred to as an upper extremity and a leg as a lower extremity. MOSBY'S POCKET DICTIONARY OF MEDICINE, NURSING, & ALLIED HEALTH 441.

<sup>163</sup> *Miller*, 340 F.3d at 962.

<sup>164</sup> *Id.* at 963.

of death from Miller's injuries remote, holding that "the possibility that a properly trained police dog could kill a suspect under aberrant circumstances *does not* convert otherwise non-deadly force into deadly force."<sup>165</sup> Relying on *Vera Cruz's* holding that deadly force is force that presents "more than a remote possibility" of death under the circumstances in which it is used, the court concluded Miller presented no evidence that he was subjected to more than a remote possibility of death.<sup>166</sup> Thus, the court affirmed the lower court's partial summary judgment on the deadly force issue.<sup>167</sup>

The court next addressed the excessive force issue.<sup>168</sup> Here, the court reiterated *Graham's* balancing test, in which the reasonableness of a seizure is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake."<sup>169</sup> In assessing the gravity of the intrusion on Miller's Fourth Amendment interests, the court agreed with the district court that the force used to seize Miller was "considerable," and "exacerbated" by the bite duration, concluding, the intrusion was a "serious" one.<sup>170</sup> Therefore, because there was a significant intrusion on Miller's Fourth Amendment interests, the second prong of the balancing test needed to outweigh this intrusion in order for the government to prevail.<sup>171</sup>

To assess the countervailing "government interests" prong of the balancing test, the court applied the three *Graham* factors.<sup>172</sup> First, because police wanted Miller on a prior felony charge as well as the misdemeanor infraction, officers had a legitimate government interest in apprehending Miller.<sup>173</sup> Second, the court held Miller posed an "immediate threat" to officer safety, as well as to others.<sup>174</sup> On this point, the court relied heavily on the fact that officers found a knife lying on the seat of Miller's car.<sup>175</sup> The court felt this fact indicated a "propensity

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<sup>165</sup> *Id.* at 963 (italics added).

<sup>166</sup> *Id.* at 962-63 (citing to *Vera Cruz*, 139 F.3d at 663) (internal quotes omitted).

<sup>167</sup> *Id.* at 963.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 964 (citing to *Graham*, 49 U.S. at 396) (internal quotes omitted).

<sup>170</sup> *Id.* (internal quotes omitted).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 965.

<sup>175</sup> *Id.*

to carry a weapon (and perhaps a weapon more lethal than the one he had left behind).<sup>176</sup> In addition, because the wooded terrain was familiar to Miller and unfamiliar to the deputies, Miller could stage an ambush, giving him a “strategic advantage.”<sup>177</sup> Therefore, the court concluded that Miller posed a serious and immediate threat to officers.<sup>178</sup> Third, since Miller fled the scene and hid from deputies, the court found that Miller was actively evading his arrest by flight.<sup>179</sup> Thus, the court found that the three factors weighed in favor of the state.<sup>180</sup>

Finally, the court balanced the intrusion on Miller’s Fourth Amendment rights against the countervailing government interests in apprehending Miller to determine whether the force used by the deputy was reasonable under the circumstances.<sup>181</sup> Here, the court reasoned that deputies had attempted to apprehend Miller first with less forceful means.<sup>182</sup> According to the court, these attempts included signaling Miller to pull over, pursuing Miller by car, pursuing Miller by foot, and audibly warning Miller before releasing the police dog.<sup>183</sup> Therefore, considering all the circumstances surrounding the arrest, including the three *Graham* factors, the court held that using a police dog to apprehend a fleeing felon, hiding in dark and unfamiliar woods, who was possibly armed, and in a position to ambush deputies, was a reasonable seizure that did not violate Miller’s fourth Amendment rights.<sup>184</sup>

### III. THE NINTH CIRCUIT FAILED TO PROPERLY APPLY THE *GRAHAM* BALANCING TEST IN *MILLER*

Applying the *Graham* balancing test to determine whether the deputies used reasonable force to seize Miller requires a careful analysis of the facts and circumstances of his particular

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 965-966.

<sup>180</sup> *Id.* at 964-966.

<sup>181</sup> *Id.* at 966.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 966, 968.

situation.<sup>185</sup> While the court recognized that the force used to apprehend Miller was “serious,” the court failed to appropriately weigh the seriousness of that intrusion against the government’s interest in apprehending Miller.<sup>186</sup> Here, the seriousness of the intrusion on Miller’s Fourth Amendment rights far outweighs the government’s interest in apprehending him, and careful analysis of the facts requires the court to find the force used as excessive.

#### A. THE INTRUSION ON MILLER’S FOURTH AMENDMENT RIGHTS WAS SERIOUS

In evaluating the gravity of the intrusion upon Miller’s Fourth Amendment interests, two factors weigh heavily in Miller’s favor: First, the length of the attack and second, that the attack occurred *outside the deputies’ presence*.<sup>187</sup> Regarding the length of the attack, it is significant that the length of the dog attack was excessively long (forty-five to sixty seconds).<sup>188</sup> In fact, Miller received a longer dog bite than in any of the previously decided dog bite cases.<sup>189</sup> For example, in *Watkins*, the suspect received a bite lasting up to thirty seconds, which the court found could be excessive.<sup>190</sup> Given the severe damage that such dog bites can inflict, common police practice attempts to limit the bite to just a few seconds.<sup>191</sup>

More important, Miller’s bite occurred outside the view and supervision of the deputies.<sup>192</sup> Prior cases have emphasized that police are less able to control a dog attack when it occurs outside their view, and that a prolonged, unsupervised attack is more likely to cause serious injuries.<sup>193</sup> For example, in *Chew*, the dog attacked the suspect, biting him three times before achieving an effective hold, and then dragged him between four and ten feet from his concealed location.<sup>194</sup> The attack

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<sup>185</sup> *Graham*, 490 U.S. at 396.

<sup>186</sup> *Miller*, 340 F.3d at 964.

<sup>187</sup> *Id.* at 961.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 962.

<sup>190</sup> *Watkins*, 145 F.3d at 1090, 1093.

<sup>191</sup> *See Miller*, 340 F.3d at 961.

<sup>192</sup> *Id.*

<sup>193</sup> *See Chew*, 27 F.3d at 1441. *See also Watkins*, 145 F.3d at 1090. *See also Mendoza*, 27 F.3d at 1359.

<sup>194</sup> *See Chew*, 27 F.3d at 1441.

occurred outside the officers' view, exacerbating Chew's injuries.<sup>195</sup> Likewise, in *Watkins*, the suspect also suffered severe injuries resulting from an attack outside the officers' control and supervision.<sup>196</sup> On the other hand, in *Mendoza*, even though the suspect struggled with the dog, because the officers were present during the entire attack, Mendoza apparently suffered only minor injuries.<sup>197</sup> Miller, however, was not within the deputies' sight during most of the attack, and deputies were too far away to intervene as the situation escalated.<sup>198</sup> As a result, Miller, like the suspects in *Chew* and *Watkins*, sustained serious injuries resulting from the prolonged, unsupervised attack.

In addition, if Kimon had accidentally punctured an artery, as Deputy Bylsma himself testified was a possibility, Miller would likely have bled to death before officers could reach him in time.<sup>199</sup> In fact, the only reason the deputies found Miller when they did was that he screamed and continued screaming until they found him.<sup>200</sup> If Miller had passed out, he likely would have bled to death even without the dog puncturing an artery.<sup>201</sup> As the Ninth Circuit pointed out, Miller was hiding in dark woods, which were unfamiliar to the deputies.<sup>202</sup> Yet, the court only found these facts persuasive in assessing the reasonableness of the deputies' actions, and chose to ignore these same facts when assessing the gravity of the Fourth Amendment intrusion.<sup>203</sup> If they had, they might have concluded the intrusion was more serious, given that Miller could have died because of the dark, unsupervised conditions.

The cases suggest that during a supervised attack, the officer can act quickly, resulting in a shorter bite and thus, a more "reasonable" intrusion into the suspect's Fourth Amendment

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<sup>195</sup> *Id.*

<sup>196</sup> *See Watkins*, 145 F.3d at 1090.

<sup>197</sup> *See Mendoza*, 27 F.3d at 1359. The court failed to mention the extent of Mendoza's injuries, but they were probably relatively minor since the court did not indicate otherwise. *Id.*

<sup>198</sup> *Miller*, 340 F.3d at 961.

<sup>199</sup> *Miller*, 340 F.3d at 962.

<sup>200</sup> *Id.* at 961.

<sup>201</sup> *Id.* at 963.

<sup>202</sup> *Id.* at 964, 966.

<sup>203</sup> *Id.* at 966.

rights.<sup>204</sup> However, when the dog attack is unsupervised, a prolonged bite is more likely to occur, resulting in injuries that are significantly more serious.<sup>205</sup> Because of the significantly increased risk of harm to the suspect during an unsupervised attack, this factor should get more weight when balancing the intrusion onto a suspect's Fourth Amendment rights. Here, however, the court failed to consider the unsupervised nature of the attack in its analysis.

#### B. THE GOVERNMENT'S INTEREST IN APPREHENDING MILLER DID NOT OUTWEIGH THE SERIOUSNESS OF THE FOURTH AMENDMENT INTRUSION

The second *Graham* prong requires an assessment of the countervailing government interests at stake.<sup>206</sup> Again, in determining the importance of the government interests, courts have traditionally looked to (1) the severity of the crime, (2) the threat posed by the suspect, and (3) whether the suspect actively resisted arrest.<sup>207</sup> Since the third factor here is undisputed, this Note focuses on the court's application of the first and second factors.

##### 1. *Severity of the Crime*

The Ninth Circuit acknowledged that Miller had allegedly committed a misdemeanor traffic violation (mismatched license plates), however, what elevated the severity level in the court's analysis was his outstanding felony warrant.<sup>208</sup> The court failed, however, to examine the particulars of the felony: Attempting to flee police by driving with wanton and willful disregard of others, in essence, reckless driving. In *Chew*, although the suspect's prior felony warrants were apparently in connection to prior burglaries, this information was not part of the district court's record, and was unknown to Officer Bunch at the time of the arrest.<sup>209</sup> However, the Ninth Circuit rea-

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<sup>204</sup> See *Chew*, 27 F.3d at 1441. See also *Watkins*, 145 F.3d at 1090. See also *Mendoza*, 27 F.3d at 1359.

<sup>205</sup> See *Chew*, 27 F.3d at 1441.

<sup>206</sup> *Graham*, 490 U.S. at 396.

<sup>207</sup> *Id.*

<sup>208</sup> *Miller*, 340 F.3d at 964.

<sup>209</sup> *Chew*, 27 F.3d at 1443 n.9.

soned that even if this information was part of the record, its inclusion would make no difference in the court's analysis.<sup>210</sup> Burglary, the court noted, rarely involves physical violence.<sup>211</sup> In other words, the mere fact that a suspect is wanted for a felony does not automatically mean that the suspect poses an immediate threat to officer or to public safety.<sup>212</sup> The nature of the felony must be considered.<sup>213</sup> In addition, the court also reasoned that the significance of Chew's warrants was further diminished because he was completely surrounded by police with little chance of escape.<sup>214</sup> While Miller allegedly committed a crime that certainly threatened the lives of others, reckless driving does not seem as menacing as burglary, and in *Chew*, the court found that crime insignificant in their dangerousness analysis.<sup>215</sup> Further, Miller was for the most part surrounded by deputies and his chances of escape were slim.<sup>216</sup>

In addition, this was not a situation where deputies were forced to make split-second decisions. For example, in *Chew*, the Ninth Circuit reasoned that because officers had confined the suspect to the large scrap yard, officers had ample time to deliberate and consult with their superiors before taking action, and thus, were not required to make split-second decisions.<sup>217</sup> Likewise, in *Miller*, deputies had confined Miller to the woods.<sup>218</sup> Although hiding in the woods was perhaps not as confined as hiding in a scrap yard, deputies arguably had the upper hand. They had control over Miller's home and vehicle, and knew the general location of where he was hiding.<sup>219</sup> The deputies had ample time to gather information and design a course of action. If nothing else, deputies merely had to wait until Miller came out of the woods. Further, even when police are forced to make split-second decisions based on the facts and circumstances confronting them in a particular situation, they

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* (citing *Garner*, 471 U.S. at 1706).

<sup>213</sup> *See id.* at 1442.

<sup>214</sup> *Chew*, 27 F.3d at 1443.

<sup>215</sup> *Miller*, 340 F.3d at 960. *Chew*, 27 F.3d at 1443 n.9.

<sup>216</sup> *See Miller*, 340 F.3d at 960-61.

<sup>217</sup> *Chew*, 27 F.3d at 1443.

<sup>218</sup> *Miller*, 340 F.3d at 960-61.

<sup>219</sup> *Id.*

must still refrain from using force beyond that which is reasonable under the circumstances.<sup>220</sup>

## 2. *Immediate Threat to the Safety of Officers and Others*

Here again, the court relied heavily on Miller's outstanding felony reckless driving warrant to conclude Miller posed an immediate threat to public safety.<sup>221</sup> However, Miller's dangerousness toward the public stemmed from driving, and Miller was hiding in the woods, while deputies had complete control over his vehicle.<sup>222</sup> It seems unlikely that once Miller was separated from his vehicle, he continued to pose a significant threat to others. Moreover, Miller hid in the woods alone, hardly a threat to the public. In short, Miller did not pose a significant threat to others. The Ninth Circuit, however, failed to address these issues.

The court also relied heavily on the fact that deputies found a knife on the seat of Miller's abandoned car, concluding that Miller was currently armed and posed an immediate danger to the deputies.<sup>223</sup> However, it is arguably just as reasonable that he left the only weapon he had behind, or that the weapon belonged to his passenger, or, perhaps, it was no weapon at all but merely a knife. Although the deputies believed that there was a "chance" Miller was not "law enforcement friendly," and possibly had mental problems, the deputies had no information that indicated Miller was specifically violent.<sup>224</sup>

In addition, the court inferred that Miller, a supposed mentally ill individual, was some sort of grand strategist.<sup>225</sup> The court reasoned that because Miller was familiar with the woods, if his "defiant and evasive tendencies turned violent," he could "ambush" the deputies.<sup>226</sup> While Miller was familiar with the woods outside his home, it seems unlikely that he held such a distinct advantage over the deputies.<sup>227</sup> There simply was not

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<sup>220</sup> See *Chew*, 27 F.3d at 1443.

<sup>221</sup> *Miller*, 340 F.3d at 965.

<sup>222</sup> *Id.* at 960.

<sup>223</sup> *Id.* at 965.

<sup>224</sup> *Id.* at 960.

<sup>225</sup> *Id.* at 965.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

enough information known to the deputies when they arrived at the scene to suggest Miller posed such a threat. Moreover, if the deputies truly believed Miller posed such a threat, they could have waited until he emerged from his hiding place, and safely arrested him then, without jeopardizing officer safety. Again, because Miller, presumably hiding alone in the woods, posed no threat to public safety, it simply was not necessary under these circumstances to send deputies into a potentially dangerous situation to capture him.<sup>228</sup>

In short, because Miller had not committed violent offenses, posed no immediate threat to public safety, and deputies had ample time to consider options other than potentially endangering their own safety, these two *Graham* factors weighed in favor of Miller. Therefore, in balancing the serious intrusion on Miller's Fourth Amendment rights against the countervailing government interest in apprehending Miller, the scale tips in favor of Miller. Thus, using a police dog to seize Miller, under these circumstances was excessive force.

#### IV. CONCLUSION

There is a point when even constitutionally permitted force becomes excessive.<sup>229</sup> The Ninth Circuit agrees that while using a police dog to effect an arrest is generally permissible, a prolonged dog bite could constitute excessive force under certain circumstances.<sup>230</sup> To determine the reasonableness of the force used requires careful attention to the particular facts of each case.<sup>231</sup> The bite Miller received far outlasted those in all other leading cases.<sup>232</sup> Yet the facts indicate Miller posed less threat than the plaintiffs in those leading cases did. Thus, when balancing the gravity of the intrusion on Miller's Fourth Amendment rights (a bite lasting forty-five to sixty seconds) against the government's countervailing interests (the need to apprehend Miller), using a police dog under these circum-

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<sup>228</sup> *Id.* at 960-961.

<sup>229</sup> *See Watkins*, 145 F.3d at 1093.

<sup>230</sup> *Miller*, 340 F.3d at 964 (citing to *Watkins*, 145 F.3d at 1093).

<sup>231</sup> *Graham*, 490 U.S. at 396.

<sup>232</sup> *Miller*, 340 F.3d at 962.

stances constituted excessive force in violation of the Fourth Amendment.<sup>233</sup>

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<sup>233</sup> *Id.* at 961.

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