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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GEORGE MONTON MATTHEWS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 5:17-cv-02195-ACA-JHE
	)	
MATTHEW SALTZMAN, et al.,	)	
	)	
Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The plaintiff filed an amended *pro se* complaint seeking monetary damages under 42 U.S.C. § 1983 for violations of his civil rights during his arrest on August 8, 2017, by defendant Matthew Saltzman.[1] (Doc. 17). In accordance with the usual practices of this court and 28 U.S.C. § 636(b)(1), the amended complaint was referred to the undersigned magistrate judge for a preliminary report and recommendation. *See McCarthy v. Bronson*, 500 U.S. 136 (1991).

I. Procedural History

On June 4, 2018, the undersigned entered an Order for Special Report directing the Clerk to forward copies of the amended complaint to each of the named defendants and directing the defendants to file a special report addressing the plaintiff's factual allegations. (Doc. 19). The undersigned advised the defendants the special report could be submitted under oath or accompanied by affidavits and, if appropriate, the court would consider it as a motion for summary judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure. (*Id.*). The order advised the plaintiff that, after he received a copy of the special report, he would have twenty-one

[1] Kevin Zurowski, the other named defendant, has been dismissed from this action by stipulation of the parties. (*See* doc. 63).

days to file his initial disclosures pursuant to Rule 26(a)(1), Federal Rules of Civil Procedure. (*Id*.).

After an extension of time, on August 16, 2018, the defendants filed a special report, supplemented by affidavits and other evidence. (Docs. 30 and 31). On August 20, 2018, the undersigned notified the parties the court would construe the special report as a motion for summary judgment and notified the plaintiff he had twenty-one (21) days to respond to the motion for summary judgment by filing affidavits or other material. (Doc. 32). The undersigned also advised the plaintiff of the consequences of any default or failure to comply with Fed. R. Civ. P. 56. (*Id.*). *See Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985). The plaintiff requested and received additional time to respond. (Docs. 33 and 34). The plaintiff then filed a response (doc. 35), while further requesting additional time to respond (doc. 36), which the court again allowed (doc 37).

On October 10, 2018, the plaintiff was released from jail and soon thereafter obtained counsel to represent him in this action. (Docs. 38 and 41). Plaintiff's counsel sought further time to respond to the pending motion for summary judgment, which the court again allowed. (Docs. 42 and 43). The plaintiff filed a motion to dismiss, which the court denied while granting the plaintiff still further time to respond to the defendants' motion for summary judgment. (Docs. 45-47). On November 14, 2018, the plaintiff filed a response, which included counsel's declaration that further discovery was required to properly respond to the pending motion. (Doc. 48 at 4; doc. 49-1). On November 27, 2018, the defendants filed a reply. (Doc. 50).

Thereafter, the court withdrew the order construing the special report as a motion for summary judgment and allowed additional discovery.[2] (Doc. 51). On April 15, 2019, after the completion of discovery, the court reinstated the order construing the special report as a motion for summary judgment, and adopted new deadlines for further briefing. (Doc. 68). The plaintiff filed additional evidence and a response to the motion for summary judgment (docs. 71-72), and the defendant thereafter filed a reply (doc. 73).

II. Standard of Review

Because the court construed the defendant's special report as a motion for summary judgment, Fed. R. Civ. P. 56 governs the resolution of the motion. Under Rule 56(a), summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In making that assessment, the court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences against the moving party. *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). The burden of proof is upon the moving party to establish his prima facie entitlement to summary judgment by showing the absence of genuine issues of material fact and that he is due to prevail as a matter of law. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Unless the plaintiff, who carries the ultimate burden of proving his action, is able to show some evidence with respect to each element of his claim, all other issues of fact become immaterial, and the moving party is entitled to judgment as a matter of law. *See Celotex*

[2] Because the defendant objected to the magistrate judge's order granting discovery (docs. 51; 53), the district judge held a conference by telephone regarding the objection. (Doc. 59). After hearing, the court overruled the defendant's objection and allowed discovery on two issues: (1) K-9 Ronin's bite history of extraneous individuals and (2) K-9 Ronin's training logs for the 90 days preceding the arrest of the plaintiff. (Doc. 61).

Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); *Bennett v. Parker*, 898 F.2d 1530, 1532-33 (11th Cir. 1990). As the Eleventh Circuit has explained:

> Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." [citations omitted]. Thus, under such circumstances, the public official is entitled to judgment as a matter of law, because the plaintiff has failed to carry the burden of proof. This rule facilitates the dismissal of factually unsupported claims prior to trial.

Bennett, 898 F.2d at 1532.

III. Summary Judgment Facts[3]

Almost all of the relevant events of this case were captured on bodycam video by the relevant Huntsville Police Officers.[4] Thus the following facts are not in dispute.

Multiple officers heard a report of a stolen white Chevy Equinox. (Docs. 30-1 at 3; 30-2 at 2; 30-3 at 2). Defendant Matthew Saltzman, a K-9 officer with the Huntsville Police Department, saw a vehicle fitting that description. (Doc. 30-1 at 2). The plaintiff, driving the Chevy Equinox, saw Saltzman and fled. (*Id*.). Saltzman and other officers pursued the plaintiff, who crashed the vehicle. (*Id*., at 3-4). The plaintiff exited the car and began running through a residential neighborhood of Hunstville. (Doc. 30-1 at 4; 30-3 at 3-4). Saltzman, his K-9 Ronin, and other officers chased the plaintiff on foot. (Doc. 30-1 at 4-5; *see also* Draper 12:01:06).

Saltzman released K-9 Ronin in the backyard of a residence, where he and other officers had seen the plaintiff jump a fence. (Doc. 30-1 at 5). Officer Draper ran towards them. (*Id*.). K-

[3] All citations to the record use the document and page numbering assigned by the court's online docketing system, CM-ECF.

[4] The defendant submitted the bodycam videos of defendant Saltzman, Officer Kevin Zurowski, and Officer Charles Draper. (Doc. 31). The videos are referenced by the name of the officer wearing that bodycam and the time stamp on that video.

9 Ronin attacked Officer Draper, biting into his shirt. (Doc. 30-1 at 5; doc. 30-3 at 4; Draper 12:01:27). On the bodycam video, Saltzman can be heard yelling "No!" at Ronin. (Doc. 30-1 at 5; Draper 12:01:27; Saltzman 12:01:25). Although Saltzman gave verbal commands for Ronin to release Officer Draper, Ronin failed to obey, requiring Saltzman to "choke him off."[5] (Saltzman 12:01:25).

The officers then lost sight of the plaintiff and perused the neighborhood until they again located the plaintiff in the backyard of a residence, hiding under a car. (Doc. 30-1 at 5; Draper 12:03:45 to 12:09:47). The officers can be heard yelling "Do not move," "Under the Car," and "Dog Coming, dog coming" on the bodycam video. (Draper 12:09:47 to 12:09:59). The plaintiff asserts he never heard the officers say anything about a dog. (Doc. 49-3 at 1). In the excitement, Saltzman joined Officer Davis at a fence surrounding the yard, upon which K-9 Ronin bit Officer Davis in the crotch. (Doc. 30-1 at 6; Saltzman 12:10:03). Again, Ronin refused to release on verbal command and had to be "choked off" from Officer Davis. (Saltzman 12:10:26).

Saltzman then yelled for other officers not to enter the yard where the plaintiff was hiding and put Ronin over the chain link fence. (Doc. 30-1 at 6; Saltzman 12:10:38 to 12:10:43). Saltzman jumped the fence and encouraged Ronin to apprehend the plaintiff, who was still under the car. (Doc. 30-1 at 6: Saltzman 12:10:54; doc. 71-2 at 10). Ronin bit down on the plaintiff's left armpit. (Doc. 30-1 at 6-7; Saltzman 12:11:01). The officers all yelled for the plaintiff to come out from under the car while Ronin still had his teeth in the plaintiff's left armpit. (Doc. 30-1 at 6-7). K-9 Ronin attempted to drag the plaintiff out from under the car while not releasing his bite. (Doc. 30-1 at 7; Saltzman 12:11:13). One officer then grabbed the plaintiff by the right arm while

[5] In bodycam video, Saltzman can be seen taking one of the collars around Ronin's neck and twisting it while lifting upwards to get Ronin to release. (Saltzman 12:01:25; Draper 12:01:27 to 12:02:09).

Saltzman grabbed the plaintiff's left arm and they pulled the plaintiff out from under the car. (Doc. 30-1 at 7). Saltzman took the plaintiff's lower left arm and placed it towards his other hand to assist another officer with handcuffing the plaintiff. (Doc. 30-1 at 7; Saltzman 12:11:36). K-9 Ronin maintained his hold on the plaintiff's left armpit while this occurred. (Doc. 30-1 at 7).

With the plaintiff secure, Saltzman again choked off Ronin to get him to release the plaintiff's left armpit.[6] (Saltzman 12:11:40 to 12:12:03). At that time, the officers patted down the plaintiff, learning he was unarmed. (Doc. 30-1 at 7-8). Officer Draper escorted the plaintiff to Officer Zurowski's patrol vehicle. (Doc. 30-2 at 7). Officer Davis, who suffered the bite to his crotch, was placed in an ambulance due to the bite injuries. (Doc. 30-1 at 8-9). A second ambulance was called to treat the plaintiff. (*Id.*). Paramedics stated the plaintiff's injuries from Ronin required stitches (Zurowski 12:21:42), however, a supervisor decided to have Officer Zurowski drive the plaintiff to the hospital for treatment rather than ride in the ambulance.[7] (Docs. 30-1 at 9; 30-2 at 9).

The parties dispute only whether the use of K-9 Ronin under the above scenario was a constitutionally reasonable use of force.

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[6] The plaintiff's statement in his response that "the post-handcuffing biting of Matthews was unexpected" (doc. 72 at 4) is a gross mischaracterization of the facts. No evidence supports a finding that K-9 Ronin bit the plaintiff after he was handcuffed, but evidence does support a finding that Ronin was trained to "bite and hold." (Saltzman 12:11:40 to 12:12:03; *see also* doc. 72 at 30 (where plaintiff describes the incident as "bite, hold, and pull")). No additional bite occurred post-handcuffing. "[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007). The plaintiff's generalizations concerning Saltzman's knowledge of Ronin's behavior prior to the day in question (doc. 72 at 4-5) also lack any support in the record.

[7] Although the plaintiff alleges significant injuries (*see e.g.*, doc. 49-3 at 2), he has not submitted any medical records in support of his claim.

IV. Analysis

The plaintiff asserts a claim for excessive use of force during his arrest, in violation of the Fourth Amendment to the United States Constitution. The United States Supreme Court mandates that such claims be viewed through an "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395-96 (1989). As explained by the Eleventh Circuit

> Where, as here, there is a claim of excessive force under the Fourth Amendment, we must ask whether the officers' actions were "objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Garczynski*, 573 F.3d at 1166–67 (quotation marks omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). An officer's good intentions do not "make an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397. Although we "must resist the temptation to judge an officer's actions with the 20/20 vision of hindsight," *Garczynski*, 573 F.3d at 1167 (quotation marks omitted), we are not required to close our eyes to evidence that circumstances at the time may have rendered an officer's actions objectively unreasonable. Instead, we must pay "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." *Graham*, 490 U.S. at 396.

Landon v. City of North Port, 745 F. App'x 130, 134–35 (11th Cir. 2018).

Thus, this court must consider the facts "from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate." *McCullough v. Antolini*, 559 F.3d 1201, 1206 (11th Cir. 2009). "[T]he force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight." *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002). An officer engages in excessive force when he orders a dog to attack and bite a person who poses no threat of bodily harm to the officers and does not attempt to flee or resist arrest. *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000). However,

the converse is just as true. *Id.* Moreover, reasonableness is "judged from the perspective of the reasonable officer on the scene" without the benefit of hindsight, but with an allowance for the "split-second judgment" police officers often must make. *Graham*, 490 U.S. at 396, 397.

A. Whether the Force Used was Objectively Reasonable

Viewing the facts in the light most favorable to the plaintiff, and applying the foregoing *Graham* factors, the force applied by Saltzman through K-9 Ronin was objectively reasonable. Saltzman and the other officers knew the plaintiff had stolen a car, which is a felony, attempted to flee by car, wrecked the car, and again attempted to flee on foot. When the officers located the plaintiff hiding under a car in a residential neighborhood, they had no basis to determine whether the plaintiff was armed with a weapon or not. As Saltzman explained, "You cannot see him. He's concealed. And he is --- he poses a definite danger." (Doc. 71-1 at 30). "He was digging in his pockets. I am not going to take the time to give him a warning and produce that weapon and possibly kill me or one of my other workers. No. No, sir. Under no circumstance." (Doc. 71-2 at 13).

Objectively, the plaintiff could have posed an immediate threat to the officers, as well as the public at large given the surrounding homes. Each of the *Graham* factors weighs heavily against the plaintiff. Only with the benefit of "20/20 vision of hindsight," did the officers learn the plaintiff was unarmed. *See Garczynski v. Bradshaw*, 573 F.3d 1158, 1167 (11th Cir. 2009). Given these circumstances, the undersigned finds Saltzman's "split-second judgment" to be reasonable. *See Graham*, 490 U.S. at 397.

The facts of this case are much more aligned with those of *Crenshaw v. Lister*, 556 F.3d 1283 (11th Cir. 2009) (per curiam), than *Priester, supra*. As in *Crenshaw,* here the plaintiff committed a serious crime and fled from the police, crashing the vehicle he was driving. *See id.*,

556 F.3d at 1291-92. And as in *Crenshaw*, the officers here had legitimate concerns about risk to themselves because they could not clearly see the plaintiff under the car and had no way to know if he was armed or otherwise presented a risk.[8] *Id.*

The video evidence does not support a finding that Saltzman gratuitously allowed Ronin to continue biting the plaintiff after the need for force ceased. Upon placing the plaintiff in handcuffs, Saltzman immediately attempted to have Ronin release his bite on the plaintiff. Thus, cases discussing gratuitous use of K-9s in the context of excessive force are inapposite. *Compare Edwards v. Shanley*, 666 F.3d 1289, 1292 (11th Cir. 2012) (where plaintiff stopped on suspicion of having a suspended driver's license and surrendered, officers watched the police dog continue to bite the suspect for five to seven minutes); *Priester*, 208 F.3d at 923-24 (reinstating jury verdict of excessive force in a § 1983 case where officers released a police dog on plaintiff who was lying down as instructed, and which resulted in fourteen puncture wounds on both legs from dog bites); *with Baker v. Welker*, 438 F. App'x 852, 853-854 (11th Cir. 2011) (where suspect failed to comply with instructions, "bodychecked" one officer, other officer deployed K-9, and dog was withdrawn as soon as the plaintiff was handcuffed; no excessive force found); *Crenshaw*, 556 F.3d at 1292 (where plaintiff suspected of having committed at least one armed robbery, actively fled from the police—first in his vehicle, and then by foot after crashing his vehicle—and attempted to hide; no excessive force found). The use of K-9 Ronin under the circumstances here was objectively reasonable.

[8] The plaintiff argues that Saltzman's testimony---that he could see the plaintiff under the car reaching in his pockets---is contradicted by the video, which "makes clear Matthews was not visible." (Doc. 72 at 6). The plaintiff's claim of lack of visibility makes the use of K-9 Ronin more objectively reasonable, not less. *See Crenshaw*, 556 F.3d at 1292.

B. Whether Deadly Force was Used

Although the plaintiff argues Saltzman, through K-9 Ronin, applied unnecessary deadly force (doc. 72 at 30), the evidence, and particularly the bodycam video, do not support such a finding. Ronin did not savagely attack the plaintiff in multiple places and he did not attempt to latch onto the plaintiff's jugular or other location where death could result, as in the case cited by the plaintiff, *Chew v. Gates*, 27 F.3d 1432, 1453-54 (9th Cir. 1994). Rather, Ronin bit and held in the plaintiff's armpit. While the undersigned does not belittle the pain or seriousness of the injuries this bite did cause, it simply is not in line with the cases cited by the plaintiff in support of his deadly force theory.[9] Moreover, the "objectively reasonable" standard leaves no room for the plaintiff's argument he did not pose a threat of serious physical harm. An objectively reasonable officer had no means of knowing, at the time the plaintiff was under the car, whether the plaintiff carried a gun or other weapon. *See e.g., Fils v. City of Aventura*, 647 F.3d 1272, 1287 (11th Cir. 2011); *Creshaw*, 556 F.3d at 1292; *Madson v. City of Gainesville, Fla.*, 2016 WL 10518447, *3 (N.D. Fla. 2016) (where court noted fleeing in car at high speeds, crashing, fleeing on foot and hiding in a dark area are "not normal behavior or innocuous mischief. This is gravely concerning behavior demonstrating a reckless disregard for human life. It would have been reasonable for the officers to assume that Madson was … possibly dangerous, based on his conduct although Madson claims he was only making poor decisions because he was drunk.").

Notwithstanding the plaintiff's arguments to the contrary, no factual support for a finding that deadly force was used exists in this case. As stated by the Eleventh Circuit:

> The Constitution tolerates some uses of a dog under these conditions. The *Graham* factors recognize that certain circumstances increase the reasonableness of certain

[9] The plaintiff repeatedly asserts that where a dog is used as deadly force, a prior warning of that force is constitutionally required. He points to no statute, law, Supreme Court case, or Eleventh Circuit case which supports this claim. This issue is further addressed *infra*, at note 11.

> uses of force. Here, the force necessarily caused by using a dog to track a fleeing suspect is reasonably tailored to the risk that a fleeing suspect presents. Furthermore, because the evidence shows that Edwards had not yet tried to surrender when Officer Shanley allowed his dog to first bite Edwards's leg, this is the sort of "split-second" determination made by an officer on the scene that *Graham* counsels against second guessing. *See Graham*, 490 U.S. at 396–97. In accord with that guidance, we defer to Officer Shanley's judgment ***that it was appropriate to employ extraordinary but non-deadly force in this instance.***

Edwards, 666 F.3d at 1295 (11th Cir. 2012).

C. Whether Use of K-9 Requires Forewarning of Suspect

The plaintiff asserts the Fourth Amendment required Saltzman to forewarn the plaintiff that Ronin had been released to bite. (Doc. 72 at 24). The plaintiff asserts by declaration, "When I got out of the car and fled I did not understand what the officer yelled at me. In fact, before I was bitten I did not even know the police were using a dog." (Doc. 49-3 at 1). However, "dog coming" can be heard clearly on the video.[10] (Draper 12:09:47).

The plaintiff asserts "not warning Matthews and allowing his dog to continue biting after Matthews was compliant were clear constitutional violations." (Doc. 72 at 24). The plaintiff offers no support for his suggestion that the constitution requires forewarning by police before a K-9 may

[10] Accepting as true the plaintiff's testimony that he did not hear "dog coming"---and drawing all reasonable inferences in favor of the plaintiff---does not require disbelief of the words as heard on the video. Normally, "when conflicts arise between the facts evidenced by the parties," the court must "credit the nonmoving party's version." *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005) (emphasis omitted). However, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "Thus, where an accurate video recording completely and clearly contradicts a party's testimony, that testimony becomes incredible." *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013).

assist in apprehending a fleeing suspect.[11] At best, he notes warnings were given in *Jones v. Fransen*, 857 F.3d 843, 854 (11th Cir. 2017).[12] (Doc. 72 at 26).

According to the plaintiff, the fact that officers had not been told the plaintiff was armed,[13] the plaintiff "never threatened anyone," he was "trapped under a vehicle," and he was not "attempting to evade arrest by flight," all demonstrate the force used against the plaintiff was excessive. (Doc. 72 at 25). No factual support for the foregoing claims exists. At the time Saltzman directed Ronin to act, a reasonable officer objectively knew (1) the plaintiff was driving a vehicle reported stolen in a high speed chase through a residential neighborhood; (2) after wrecking the vehicle, the plaintiff fled on foot; (3) the plaintiff was hiding under a vehicle in a

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[11] The closest the Eleventh Circuit has come to requiring a warning prior to the use of a police dog is the unpublished case of *Trammell v. Thomason*, where the court noted "While there was case law in July of 2003 from the Fourth Circuit finding a constitutional violation where a police dog similarly trained was released without an adequate warning, we have found no case from our Court, the Supreme Court of the United States, or the Supreme Court of Florida which so holds." 335 F. App'x 835, 842 (11th Cir. 2009). "[I]n this Circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Wilson v. Strong*, 156 F.3d 1131, 1135 (11th Cir. 1998) (quoting *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n. 4 (11th Cir. 1997)).

[12] There, the Eleventh Circuit held:

> …when Jones fled police, unlike Priester, he did not ultimately overtly surrender himself. Instead, he led police into physically challenging terrain with brush and boulders, similar to the place where Crenshaw fled, and he did not respond in any way to Fransen's K–9 warnings. Like the *Crenshaw* officers, a reasonable officer in one of Defendants' places could have been concerned, at the time Draco was released, about entering the heavy brush to apprehend Jones and being met by a potential ambush.

Jones v. Fransen, 857 F.3d 843, 854 (11th Cir. 2017). Nothing in *Jones* stands for the holding that police violate the Fourth Amendment by using a K-9 to apprehend a subject without first warning a dog will be used.

[13] The plaintiff thus suggests that unless police are provided specific information that a suspect is armed, police officers may not act upon such an assumption. (Doc. 72 at 25-26). No basis in law exists for such a finding.

residential neighborhood in an active attempt to evade arrest; (4) the plaintiff may or may not have been armed. While Saltzman asserted he could see the plaintiff reaching in his pockets (doc. 71-1 at 27), the plaintiff claims Saltzman could not see under the car at all (doc. 72 at 6). Under either scenario, the assumption that the plaintiff may have been armed and dangerous was objectively reasonable.

Based on those facts, the officers had no reason to believe the plaintiff was unarmed. He had certainly endangered numerous people. *See e.g., Grimes v. Yoos*, 298 F.App'x 916, 923 (11th Cir. 2008) ("The fact that Yoos failed to warn Grimes of his and the police dog's presence does not alter the conclusion that the use of force was objectively reasonable."); *Madson*, 2016 WL 10518447, *3 ("a reasonable officer would not know the extent of the danger posed by Madson, who had already shown a blatant and reckless disregard for human life and the law.").

D. Whether the Force Continued Post-Handcuffing

The plaintiff alleges "while Matthews had not technically submitted until after the initial bite, he was trapped under a car." (Doc. 72 at 26). The evidence reflects the plaintiff hid under a car attempting to avoid arrest. He was instructed multiple times to come out from under the car, but did not comply with police instructions until K-9 Ronin bit his armpit. Like the officers in *Crenshew*, 556 F.3d at 1293, the officers here had no reason to trust that the plaintiff would not attempt to flee again had Ronin not kept his hold until the plaintiff was secured.[14]

The plaintiff repeatedly states that K-9 Ronin bit the plaintiff "post-handcuffing;" that Saltzman failed to stop Ronin in a timely manner; and that Saltzman knew Ronin would not release his bite upon a verbal command. (*See e.g*, doc. 72 at 4-5, 25, 30). Although questionably relevant

[14] Unlike the facts in *Crenshaw*, Ronin did not bite the plaintiff 31 times. *See Crenshaw*, 556 F.3d at 1291.

to the "objectively reasonable" analysis, on a bodycam video, Saltzman is clearly heard stating this incident was Ronin's first bite, and that he had the dog three to four months. (Zurowski 12:27:44). In his deposition, Saltzman stated he had worked with Ronin for six months, and that the plaintiff's apprehension was Ronin's first.[15] (Doc. 71-1 at 20). Moreover, even if the plaintiff's assertion that Saltzman knew Ronin would not release upon verbal command was supported by evidence, the video reflects that 23 seconds elapsed from the time the plaintiff was handcuffed until Ronin released his bite (Saltzman 12:11:40 to 12:12:03), far removed from the five to seven minutes of continued biting at issue in *Edwards*, 666 F.3d at 1293.

E. Qualified Immunity

Even if the plaintiff could establish his unsupported version of events was true, Saltzman claims he is entitled to qualified immunity. (Doc. 73 at 21). Qualified immunity protects government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Priester*, 208 F.3d at 925 (11th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In determining whether a constitutional right is clearly established, the salient question is whether the state of the law at the time of the incident gave officials fair warning that their behavior was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

"For the law to be 'clearly established,' case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law." *Priester*, 208 F.3d at 926. However, "although 'officials must have fair warning that their acts are

[15] At the time of Saltzman's deposition, Ronin had not bitten anyone else during a real apprehension. (Doc. 71-1 at 19, 33; doc 71-2 at 11).

unconstitutional, there need not be a case on all fours[ ] with materially identical facts, ... so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights.'" *Salvato v. Miley*, 790 F.3d 1286, 1294 (11th Cir. 2015) (alterations in original) (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1277 (11th Cir. 2004)).

Here, because the force used was objectively reasonable, no violation of the plaintiff's Fourth Amendment rights occurred. But even assuming that the defendant's conduct was not objectively reasonable, such that it arguably violated the plaintiff's constitutional right against the use of excessive force, defendant Saltzman is protected from liability by the doctrine of qualified immunity. *See Harlow*, 457 U.S. at 818. As set forth above, no constitutional right against the type of force used in the situation in question has been clearly established. *See Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). The plaintiff has not provided, nor has the undersigned found, a statute or constitutional provision or specific case barring the type of force used here. *See id*. at 1350–52. Nor was Saltzman's conduct so egregious as to be clearly impermissible. *See id.*, at 1350. The facts here are readily distinguishable from *Priester*, 208 F.3d at 927, where the plaintiff immediately surrendered to the police officers and was attacked by a police dog for approximately two minutes. Here, the plaintiff led the police on a car chase, then a foot chase, then attempted to elude arrest by hiding under a car in a backyard of a residential neighborhood. Factually, this case is more akin to *Grimes*, where police "did not violate a clearly established constitutional right in using canine force to apprehend Grimes," and where the Court concluded the defendants were protected by the doctrine of qualified immunity. *Id.*, 298 F.App'x at 924; s*ee Harlow*, 457 U.S. at 818. Thus, even if the plaintiff could establish violation of a constitutional right occurred, Saltzman would be entitled to qualified immunity.

V. Recommendation

For the reasons stated above, the undersigned **RECOMMENDS** the defendant's motion for summary judgment (doc. 30) be **GRANTED** as no genuine issue of material fact exists in this case and the defendant is entitled to judgment in his favor as a matter of law.

VI. Notice of Right to Object

Any party may file specific written objections to this report and recommendation. A party must file any objections with the Clerk of Court within fourteen (14) calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which objection is made and the specific basis for objecting. Objections also should specifically identify all claims contained in the complaint that the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments. An objecting party must serve a copy of its objections on each other party to this action.

Failing to object to factual and legal conclusions contained in the magistrate judge's findings or recommendations waives the right to challenge on appeal those same conclusions adopted in the district court's order. In the absence of a proper objection, however, the court may review on appeal for plain error the unobjected to factual and legal conclusions if necessary in the interests of justice. 11th Cir. R. 3-1.

Upon receipt of objections, a United States District Judge will review *de novo* those portions of the report and recommendation to which specific objection is made and may accept, reject, or modify in whole or in part, the undersigned's findings of fact and recommendations. The district judge must conduct a hearing if required by law. Otherwise, the district judge may exercise discretion to conduct a hearing or otherwise receive additional evidence. Alternately, the district

judge may consider the record developed before the magistrate judge, making an independent determination on the basis of that record. The district judge also may refer this action back to the undersigned with instructions for further proceedings.

A party may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. A party may only appeal from a final judgment entered by a district judge.

DONE this 5th day of March, 2020.

JOHN H. ENGLAND, III
UNITED STATES MAGISTRATE JUDGE