No. _____

In The
SUPREME COURT OF THE UNITED STATES

CITY OF KENNEWICK, A MUNICIPAL CORPORATION; JOHN DOE BONNALIE & JANE DOE BONNALIE, HUSBAND AND WIFE, INDIVIDUALLY AND AS MARITAL COMMUNITY; R.B. KOHN & JANE DOE KOHN, HUSBAND & WIFE, INDIVIDUALLY AND AS A MARITAL COMMUNITY; DEPUTY JOHN DOE QUAKENBUSH & JANE DOE QUAKENBUSH, HUSBAND & WIFE, INDIVIDUALLY AND AS A MARITAL COMMUNITY;

Petitioner,

v.

KEN and MARY LOU ROGERS,

Respondent.

On Petition For a Writ of Certiorari
To The United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision holding that the unexpected and unintended actions of a police canine dog in leaving its handler and jumping a fence to “bite and hold” a suspect constituted an “intentional” seizure under the Fourth Amendment?

2. Whether the police officers involved in a search with the assistance of a police canine dog are entitled to qualified immunity when the dog unexpectedly bolts from the handler’s control?

PARTIES TO THE PROCEEDING

Petitioner: The Petitioners are Kennewick Police Officers Bradley Kohn and Ryan Bonnalie, and Benton County Deputy Sheriff Jeff Quackenbush.

Respondent: The Respondents are Ken Rogers and his wife Mary Lou Rogers.

Other Defendants Below: The additional defendants below are Kennewick Police Officer Sgt. Richard Dopke, the City of Kennewick Washington and Benton County. Sgt. Dopke has filed a separate Writ of Certiorari. The trial court granted a partial summary judgment dismissing the 42 USCA 1983 claims brought against the City of Kennewick and Benton County.

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Petitioners', Officers Kohn and Bonnalie and Deputy Quackenbush respectfully request that a Writ of Certiorari issue to review the judgment and unpublished opinion of the United States Court of Appeals for the Ninth Circuit entered in this case. The Ninth Circuit, in conflict with other Circuits and prior rulings of this court, incorrectly ruled that a fourth amendment seizure had occurred and denied the petitioner police officers their right to qualified immunity where a police canine unexpectedly bolted from the control of the officers, leaped a fence and "bit and held" a person sleeping inside the fenced backyard. The officers did not intentionally seize the suspect, were not aware that the unexpected actions of the police canine could result in a constitutional violation and cannot be held liable for claimed civil rights violations as a result of their negligence.

OPINIONS BELOW

The opinion of the court of appeals is not reported but is reproduced at Pet.App. A 1a-6a. The order of the district court denying Petitioners' qualified immunity is unreported, but is reproduced at Pet. App. C 19a-67a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on August 3, 2006. (Pet. App. A 1a-6a) The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291, and jurisdiction in the district court was proper under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and 28 U.S.C. §1343.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall ... deprive any person of life, liberty or property, without due process of law ....

42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ··· subjects, or causes to be subjected, any citizen of the United States ··· to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On July 13, 2003, Sgt. Richard Dopke, of the Kennewick Police Department encountered a male suspect riding a small motorcycle. The suspect was not wearing a protective helmet, nor did the suspect have lights on the vehicle. (Pet. App. C 20a-21a) Sgt. Dopke activated his lights and siren, but the suspect did not stop. (*Id*.) The suspect drove the motorcycle directly into an open garage at 6902 W. Umatilla. The garage door closed immediately behind the suspect. (Pet. App. C 21a) Sgt. Dopke called for backup. (*Id*)

After backup officers arrived at the scene, Sgt. Dopke contacted occupants in the house and was given consent to enter and search the house. (Pet. App. C 21a) The occupants told Sgt. Dopke that the operator of the motorcycle was a person named "Troy". (*Id*) They stated that Troy had borrowed the motorcycle, had just returned and ran through the house and out the

back door. (*Id*) Sgt. Dopke did not entirely believe the witnesses about the operator of the motorcycle and decided to call for assistance of a K-9 search team to determine if the dog could detect any fresh scent in the backyard area to corroborate witness' story. (Pet. App. C 22a)

Sgt. Dopke asked Officer Bradley Kohn, a trained dog handler, to start the search at the back door of the residence where Troy ran out into the backyard. Officer Kohn complied and reported that "Deke", a trained police tracking dog, picked up a scent in the backyard. (*Id*) Sgt. Dopke then asked Officer Kohn, Officer Ryan Bonnalie and Benton County Deputy Sheriff Jeff Quackenbush to continue the search by going around the block to the adjoining yard near where the dog picked up the scent. (*Id*)

Officer Kohn started searching for the suspect with his dog under the control of a leash. (*Id*.) At one point, Officer Kohn was searching in the area of 6911 W. Victoria. The backyard of this residence borders the backyard of the residence where Deke, the police dog, first located a scent.. (*Id*.) The dog led the officers to the driveway of the residence at 6911 Victoria. Within the driveway was a boat with a trailer, an enclosed utility trailer and a mini-van. The driveway was open on three sides and bordered on the fourth side by a wooden fence. The dog's leash became entangled on the hitch of the boat trailer and Officer Kohn removed Deke from the leash to continue the search in the driveway area. (Pet. App. C 22a-23a) Officer Kohn stood at the side of the driveway so he could see if the dog left the driveway area. (Pet. App. C 23a)

A very short time passed and Officer Kohn heard someone yell "Hey". (Id) He could tell that the voice came from further back in the backyard. Unbeknownst to Officer Kohn, the dog had gone through or over the fence and contacted a suspect. Once he heard the suspect yell, Officer Kohn yelled back that he was with the Kennewick Police. (*Id*). He looked over the fence and saw Ken Rogers on his knees facing the fence. (*Id*.) The dog was holding Rogers by his left arm. (*Id*.) Officer Kohn again announced "Kennewick Police K-9 Unit, stop fighting the dog and I will release him." (*Id*) As soon as Officer Kohn yelled for Rogers to stop fighting the dog, Mr. Rogers stopped looking at Officer Kohn and then started punching the dog in the head with his right fist. (*Id*.)

Officer Kohn and Officer Bonnalie started pulling some fence boards off to get into the back yard. Officers Kohn, Bonnalie and Deputy Quackenbush then entered the backyard and subdued Rogers. (*Id*)

REASONS FOR GRANTING THE WRIT

A. The inadvertent contact by the police canine after unexpectedly bolting from the handlers control was not an intentional seizure under the Fourth Amendment.

In this case, it is undisputed that while the Officers were using Deke to search the driveway area outside of a fenced backyard, Deke unexpectedly (and uncharacteristically) bolted from the Officers control, jumped a tall wooden fence and contacted Ken Rogers inside of a fence backyard. The Officers did not verbally command Deke to enter the fenced backyard and did not intend that he do so. Despite the fact that Deke unexpectedly jumped the fence, the Ninth

Circuit incorrectly held that the police officers in this case, intentionally seized Rogers. This ruling is error and contrary to this court's holdings in a number of cases that there can be no constitutional violation for a wrongful seizure where there is no intent to seize. See, *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989); In accord, *Medeiros v. O'Connell*, 150 F.3d 164, 167 (2d Cir. 1998).

While this court has not addressed the issue with regard to police dogs, recently, the Connecticut District Court ruled on a similar situation in *Cardona v. Connolly*, 361 F.Supp.2d 25 (D.C. Conn. 2005) where while the officer was distracted, the police dog got out of the patrol car and bit the handcuffed passenger. The passenger sued, claiming excessive force and unlawful seizure. The court first analyzed whether the dog biting was a seizure at all. The court noted that a seizure must be a knowing and intentional act and not an accident. *Cardona*, 361 F.Supp.2d at 33.

> Although, [the police officer] had seized Cardona through the use of handcuffs, there is no indication that [the police officer] intended for Kemo [the police dog] to bite Cardona. That is, [the police officer] never meant to use this particular "instrumentality" (i.e. Kemo) in order to effect Cardona's seizure. There is no evidence that [the police officer] gave Kemo an order to attack Cardona, nor is there evidence that [the police officer] actually saw Kemo approach Cardona.

Cardona, 361 F.Supp.2d at 33.

The *Cardona* court acknowledged and distinguished cases where the officer ordered the dog to find and seize the suspect, and concluded:

> Accordingly, the court finds that the dog bite did not constitute Fourth Amendment seizure because [the police officer] did not intentionally use the police canine to bring about such a seizure. Without a Fourth Amendment seizure, Cardona's claim that the

> dog bite was an "unreasonable" seizure under the Fourth Amendment certainly cannot stand.

Cardona, 361 F.Supp.2d at 34.

The holding in *Cardona* is consistent with this courts ruling that a seizure occurs only if it is intentional, as this court noted in *Brower:*.

> It is clear that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Brower, 489 U.S. at 596-97 (emphasis in original).

The court in *Andrade v. City of Burlingame*, 847 F.Supp. 760, 763-65 (N.D.Cal.1994), *aff'd sub nom. Marquez v. Andrade*, 79 F.3d 1153 (9th Cir. 1996) also recognized this intentionality requirement in a case involving an accidental biting by a police dog, where the court, in granting summary judgment dismissing the plaintiffs claims, wrote:

> In the instant case, it is undisputed that Officer Harman did not intend to use his police dog to subdue the plaintiffs. Indeed, the officer had already halted the plaintiffs' movement when the dog escaped from the car and bit Rocio Andrade and Jackie Marquez. The plaintiffs had already been seized. Plaintiffs attempt to argue that because the *dog* intended to bite the two girls, its actions were "intentional" and thus a seizure within the meaning of *Brower*. The dog is not a defendant in this suit nor could it be. Nor is the dog a government actor. At other times in their papers, plaintiffs make a more appropriate analogy: that the dog was essentially one "weapon" in Officer Harman's arsenal. Because Officer Harman did not intend to seize plaintiffs by this means, however, there can be no fourth amendment violation. The key question is whether *Officer Harman* intended to seize plaintiffs by means of the dog and the answer is indisputably "no."

Andrade, 847 F.Supp. at 764 (emphasis added).

The Court of Appeals mistakenly equated the temporary unleashing of a police dog in order to untangle his leash in an area outside of a fenced backyard with the act of verbally commanding a police dog to attack a suspect. The two situations simply do not equate. The Officers in this case do not quarrel with the proposition that if Deke had contacted a suspect in the driveway area without further verbal command or if they had intentionally commanded Deke to enter into the fenced backyard to locate a suspect, then there actions would constitute a fourth amendment seizure. However, that is not the case before this court. In this case, Deke unexpectedly left the area of the driveway and entered an enclosed backyard, on his own. The officers did not intend to seize anyone in the fenced backyard at the moment that Deke bolted from their presence.

It is undisputed that Officer Kohn did not command Deke to enter the backyard to find and hold anyone. At the very least, constitutionally, such a command is required. The Court of Appeals glosses over this fact and incorrectly concludes that "Officer Kohn had 'effectively ordered' the dog to bite the individual he was tracking". (App. C-3 Internal quotations added) Since it is undisputed that Officer Kohn did not command the dog to enter the fenced area, the Court of Appeals ruling is incongruous. In every case where a court addressing the issue has determined that a seizure occurred the officer, at the very least, gave the dog a command to enter an enclosed area and locate a suspect. See, *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998); See also, *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 517 (9th Cir.1999); *Vera Cruz v.*

City of Escondido, 139 F.3d 659, 663 (9th Cir.1998); *Kuha v. City of Minnetonka,* 328 F.3d 427, 434 (8th Cir. 2003); *Matthews v. Jones,* 35 F.3d 1046, 1051 (6th Cir.1994); *Robinette v. Barnes,* 854 F.2d 909, 911 (6th Cir.1988); *Kopf v. Wing,* 942 F.2d 265, 268-69 (4th Cir.1991).

Requiring the officer to intentionally and verbally command the police dog to enter an enclosed area is an important requirement, since the officer also has a concomitant duty to shout out a warning to anyone in the enclosed area, prior to commanding the dog to enter, to give anyone in the enclosed area a chance to voluntarily come out. *See Vathekan,* 154 F.3d at 176-77. In fact, the failure of the officer to give the verbal warning to occupants before releasing the dog is, as a matter of law, unreasonable in an excessive force context and would render the officer liable for a constitutional tort. *Id.* at 179-180. However, under the Ninth Circuit's "effectively ordered" analysis, the police officer would never be able to shout out the required warnings to occupants of the enclosed space and therefore, would always be liable for the dog's contact with them. Effectively, the Ninth Circuit creates a rule where police officers are held liable for a civil rights violation *for their unintentional and accidental conduct*. The liability in *Vathekan* was clearly premised on the officers intentional verbal command to the police dog to enter an enclosed area and "Find him" without first giving a loud warning to occupants in the area. At a minimum, the officer in *Vathekan* knew that the dog was going to enter the enclosure and contact anyone inside. The court's ruling n *Vathekan* would have been far different if the officer had been

searching outside of the house for a suspect and the dog unexpectedly bolted from the officer's presence and entered the house.

The Ninth Circuit has fashioned a ruling that effectively prohibits police officers from ever using a police dog "off-lead" for fear that the dog might unexpectedly bolt into an adjacent enclosed area. This ruling would have a number of consequences to officer safety and contradicts the Eighth Circuits ruling that it is objectively reasonable to utilize a police dog off-lead. *Dennen v. City of Duluth,* 350 F.3d 786, 792 (8th Cir. 2003)

At bench, the officer did not give an intentional command to the police dog to find and bite anyone. The officer had the dog off-leash but presumably under his control to search the confined area outside of the fence area where Rogers was sleeping. Unexpectedly, "Deke", the police dog, bolted from the confined area and, without any command from the officer, located and held Rogers. The officers did not intentionally seize Rogers. The 9th Circuit's ruling, if left in place, will effectively result in holding every police dog handler constitutionally liable for any actions of any police dog while off-leash and imposes on a police officer an impossible "Catch-22" duty to give a warning before the dog under his control unexpectedly bolts from his control and bites a third person on its own. The unfortunate situation involving Rogers was simply an accident that would not have happened if the police dog had not unexpectedly bolted from the area. It did not and should not rise to the level of an intentional constitutional tort. No governmental "seizure" has occurred. The 9th Circuit's opinion should be reversed.

B. The Individual Police Officer Defendants Are Entitled To Qualified Immunity

Police Officers Bonnalie, Kohn, and Quackenbush are protected by the concept of qualified immunity from Rogers' claims against them. Qualified immunity is an important constitutional protection for our public servants. Qualified immunity is a question of law to be decided by the court. *Hunter v. Bryan*t, 502 U.S. 224, 228 (1991). "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz,* 533 U.S. 194 (2001) (*citing Mitchell v Forsyth*, 472 U.S. 511 (1985)). The privilege is an immunity from suit rather than a mere defense to liability and it is effectively lost if a case is erroneously permitted to go to trial.

Government officials performing discretionary functions are entitled to qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken. *Creighton v. Anderson,* 483 U.S. 635 (1987); s*ee also*, *Malley v. Briggs*, 475 U.S. 335, 341, (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Mitchell v. Forsyth*, 472 U.S. 511, 528, (1985) (officials are immune unless "the law clearly proscribed the actions" they took); *Hallstrom v. Garden City,* 991 F.2d 1473, 1482 (9th Cir.), *cert. denied,* 510 U.S.

991, (1993); *Davis v. Scherer*, 468 U.S. 183, 191, 1984). The entire purpose of qualified immunity is to protect police officers from civil suits because of decisions they make in the field, often under life or death situations, as long as they make the decisions competently.

This determination requires a two-part analysis. First, the court must determine whether the law governing the official's conduct was clearly established at the time the challenged conduct occurred. The second step then asks whether, under that clearly established law, a reasonable officer could have believed the conduct was lawful. This is a test of the "objective reasonableness" of the defendant's actions.

1. There Was No Clearly Established Constitutional Right Violated in the Use of the Police Dog

If the court decides that there was a seizure in this case then it must decide if the seizure was constitutional. In establishing his case, Rogers must demonstrate that the police officers, by their conduct, violated a clearly established constitutional right of Rogers. In so deciding, the court must first determine whether the facts alleged show the officer's conduct violated a particular clearly defined constitutional right. *Saucier v. Katz, supra* at 201. The court must determine the particular constitutional right at stake and cannot simply rely on a generalized right, such as the right to be free from illegal searches or seizure or the right generally to be free from the excessive use of force. *Brosseau v. Haugen*, 534 U.S. 194 (2004). Give the unique facts in this case, the particularized constitutional right at stake is:

> Whether a citizen has the constitutional right to be free from an officer's conduct in unleashing a trained police dog to continue a search in an area where the dog, unexpectedly and without any command from the handler, bolts from the officer, jumps a fence and "bites and holds" a suspect in an enclosed backyard.

Rogers cannot point to any case law or other authority that recognizes such a right. In other words, does the citizen have a constitutional right to be free from being held by a police dog that enters an enclosed area unexpectedly and without the officer commanding the dog to enter?

Certainly, our courts have sufficiently defined the constitutional rights where an officer intentionally commands a dog to bite and hold a suspect. In that situation the court requires that the officer first announce the release. *Mendoza v. Block*, 27 F.3d 1357 (9th Cir. 1994), (finding that the officers enjoyed qualified immunity when releasing a dog to bite and hold a fleeing defendant after warning him). However, our courts have not defined the particular confines of any constitutional rights violation where the police dog unexpectedly and without command "bites and holds" a suspect. Under the circumstances of this case, Officer Kohn could not reasonably have known how to pattern his conduct so as to avoid liability.

The only clearly defined and recognized limitation on the use of police dogs to track and hold suspects is the general requirement that an officer announce his intention to release the police dog prior to intentionally releasing the dog into a building or other confined area where he believes the suspect is hiding. *See Writ, supra*. The officers, at bench, were not faced with a situation where they were sending a police dog unleashed into a building to bite and hold a

suspect they believed was in the building. Here, there was no warning because the officers did not intend the police dog to leave the confined area where the dog was searching. Therefore, the advance warning requirement could not logically apply to them. Simply stated, there was no clearly established constitutional right at stake here that the officers should have known about.

2. Even If There Was A Clearly Established Right, A Reasonable Officer Could Have Believed His Conduct Lawful Under The Circumstances Of This Case

Even if the law governing the officer's conduct in this unusual case was clearly established, qualified immunity is still available if a reasonable police officer could have believed his conduct was lawful under that clearly established law. *Hallstrom,* 991 F.2d at 1482. In other words, if a reasonable K-9 officer could, under the case law, believe that it would be lawful to unleash his dog in a confined area in order to untangle the lead, then Officer Kohn would be entitled to qualified immunity. "The 'reasonableness' of a particular action must be judged from the perspective of a reasonable officer on the scene...." *Graham v. Connor,* 490 U.S. 386, 396 (1989). *See also, Anderson,* 483 U.S. at 641. The reasonableness inquiry is, however, objective, asking "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham,* 490 U.S. at 397.

Officer Kohn could have believed that his conduct was lawful under the circumstances of this case because, at the time of the incident, the existing case

law only addressed the circumstances under which a police officer could *intentionally* release and command a police dog to "bite and hold" a suspect. Indeed, a number of jurisdictions have concluded that it is lawful for a police officer to use a police dog to track, find, and when necessary, intentionally command a police dog to "bite and hold" a suspect. *Kuha v. City of Minnetonka,* supra at 434; *Jarrett v. Town of Yarmouth,* 331 F.3d 140, 150 (1st. Cir. 2003); *Matthews v. Jones,* 35 F.3d 1046, 1051 (6th Cir.1994); *Kerr v. City of West Palm Beach,* 875 F.2d 1546, 1553 (11th Cir.1989); *Mason v. Hamilton County,* 13 F.Supp.2d 829, 835 (S.D.Ind.1998)

Furthermore, it was objectively reasonable to utilize Deke off lead if the officer felt it appropriate. *Dennen v. City of Duluth,* supra. Deke was searching in an open area adjacent to an enclosed fenced backyard. Officer Kohn was concerned that the suspect might be in one of the vehicles in the driveway. It was necessary for Deke to search while the officers remained in a place of safety. The fact that Deke unexpectedly jumped the fence and located Rogers was not something that Officer Kohn would reasonably expect or anticipate. Deke was a well-trained and reliable police dog and had not given Officer Kohn any indication of any tendency to bolt. The officer's conduct, when reviewed under the guidance of the Fourth Amendment, was "objectively reasonable."

A police officer cannot negligently violate a person's civil rights. Civil Rights violations require some purposeful conduct. *See, Brower v. County of Inyo,* 489 U.S. 593, 596-97 (1989). As the Second Circuit explained:

> It makes little sense to apply a standard of reasonableness to an accident. If such a standard were applied, it could result in a fourth amendment violation based on simple negligence. The fourth amendment, however, only protects individuals against "unreasonable" seizures, not seizures conducted in a "negligent" manner. The Supreme Court has not yet extended liability under the fourth amendment to include negligence claims. Only cases involving intentional conduct have been considered by the Supreme Court. Negligence, in fact, has been explicitly rejected as a basis for liability under the fourteenth amendment.

Dodd v. City of Norwich, 827 F.2d 1, 7-8 (2d Cir.1987).

Officer Kohn, at best, acted negligently when he released the dog to untangle the leash. The evidence is undisputed that he did not intentionally command the dog to enter the backyard and locate anyone. Therefore, he cannot be held responsible for an alleged Fourth Amendment violation because of his negligence. To hold, otherwise would make Officer Kohn guilty of an intentional violation of the plaintiff's Fourth Amendment rights solely by virtue of his negligence. This is not the law in the United States. The officers' actions viewed objectively were reasonable.

CONCLUSION

The Ninth Circuit has imposed upon these police officers heavy constitutional liability for there unintentional and negligent conduct. The Court had created a rule that makes the officers liable for a "seizure" that was unintentional and unexpected by them. This rule is contrary to the previous rulings of this court and every other circuit court. For the reasons stated herein a Writ of Certiorari should issue from this court.