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August 5, 2022

Erich Schwiesow
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CC: Ken Anderson, Chief of Police
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Re: Nicholas Hepworth Civil Rights Violation Demand—FRE/CRE 408 Protected

Dear Mr. Schwiesow,

MAXTED LAW LLC has been retained to represent Nicholas Hepworth regarding the violation of his civil rights by Alamosa Police Department (APD) Officer Nick Smith. On December 17, 2021, without any warrant or legal justification, Defendant Smith approached, assaulted, and arrested Mr. Hepworth, who had done nothing wrong and was merely attempting to enter his own residence. Defendant Smith unlawfully grabbed Mr. Hepworth in the doorway of his home, slammed Mr. Hepworth to the ground and repeatedly punched and kneed him, breaking several ribs, while further placing his knee on Mr. Hepworth's neck in an extremely dangerous manner reminiscent of the murder of George Floyd. Defendant Smith admitted he had no lawful basis to stop or detain Mr. Hepworth, who had no active warrants and had done nothing to justify this gratuitous, excessive violence. Defendant Smith's conduct plainly violated both the state and federal constitutional rights to be free from unlawful seizure and excessive force, and the injuries, pain and suffering sustained by Mr. Hepworth is actionable.

In this demand, we explain the factual and legal bases of liability. We have obtained records including police reports and body-worn camera (BWC) which confirms Defendant Smith's misconduct. We respectfully contend that this case is indefensible on the merits. Given the clear liability in this case, we are writing to extend an offer to settle Mr. Hepworth's legal claims prelitigation. We will file state constitutional claims pursuant to C.R.S. § 13-21-131, in which qualified immunity is not a defense, though we will consider also filing claims under 42 U.S.C. § 1983 as well, including a *Monell* claim against the Chief of Police in his official capacity and the City of Alamosa, should the case proceed to litigation.

I. FACTUAL BACKGROUND

On December 17, 2021, Nicholas Hepworth was on his way home, walking down the alley towards his house, having committed no crime, and having done nothing wrong. Lacking any legal basis whatsoever, Defendant Nick Smith attempted to detain and then arrested Mr. Hepworth, while further subjecting him to a violent assault, breaking several of Mr. Hepworth's ribs and causing multiple bruises and abrasions. As Mr. Hepworth was walking home that evening, Defendant Smith turned down the same alley, and began following Mr. Hepworth as he approached the backyard of his home. Mr. Hepworth was on the phone, and he turned the corner around his house and walked to his front porch. Defendant Smith pulled the car over, exited the vehicle and advanced towards Mr. Hepworth.

As Mr. Hepworth placed his key to the door to enter his home, Defendant Smith walked onto the property without authorization, and continued to approach Mr. Hepworth. Mr. Hepworth with keys in one hand at the door and his cell phone up to his ear in the other hand, turned to face Defendant Smith. Mr. Hepworth did not attempt to flee into the house or make any movements that would suggest he was resisting lawful commands. His movements were slow and calm. This screenshot from Defendant Smith's BWC show's Mr. Hepworth moments before being assaulted:

Defendant Smith suddenly—without legal authority—strode onto Mr. Hepworth's porch and began to physically assault him. Defendant Smith seized Mr. Hepworth's wrist and yanked his arm down. This screenshot from the BWC shows the moment occurring in action:

Mr. Hepworth pleaded with Defendant Smith, stating "I didn't do anything" and instinctively reacted in order to protect himself. Defendant Smith forcefully slammed Mr. Hepworth to the ground and then dragged him off the porch. Defendant Smith continued to assault Mr. Hepworth, including kneeing him multiple times in the rib and abdomen area. At no point did Mr. Hepworth make any kind of threatening movements towards Defendant Smith or do anything to justify this senseless violence. Mr. Hepworth simply reacted like any ordinary person would to being unlawfully, violently seized and assaulted. These screenshots show how Mr. Hepworth had a phone in his hand as Defendant Smith assaulted him:

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Defendant Smith's body camera suspiciously turned off at this point—not the first time he's turned off his BWC contrary to policy—and a portion of the assault are not recorded.[1] However, it cannot be disputed (due to evidence of injury) that after Defendant Smith slammed Mr. Hepworth to the ground, he punched, kicked, and repeatedly kneed Mr. Hepworth in the abdomen and rib cage area. Officer Bertsch then arrived on scene, and her BWC footage shows Mr. Hepworth prone face down on the ground with Defendant Smith on top of him. Despite this vulnerability, Defendant Smith can be seen in the BWC choosing to knee Mr. Hepworth in the ribcage yet another time. The moment is captured on Officer Bertsch's body camera and circled in red below, showing Defendant Smith's leg and knee in motion as he violently strikes Mr. Hepworth:

Shockingly, after this gratuitous violence and the extra knee to the ribs by Defendant Smith, he then proceeded to mimic Derek Chauvin's notorious murder of George Floyd—which Defendant Smith no doubt knew about given it was worldwide news the year prior in 2020—by placing his knee in a choking position on Mr. Hepworth's neck, who was facedown with hands cuffed behind him.

[1] We have confirmed that Defendant Smith's disciplinary records show that he has previously been disciplined for improperly turning off his BWC. Given his BWC turned off at the critical moment he began assaulting Mr. Hepworth, this cannot be considered coincidental.

The BWC clearly shows Defendant Smith place his knee on the neck and hold it there unnecessarily in a manner which would obviously obstruct breathing and blood circulation:

Once he stopped the assault of Mr. Hepworth, Smith falsely attempted to justify his misconduct, claiming to Officer Bertsch that Mr. Hepworth had punched him in the face. Mr. Hepworth responded "No I did not punch you, I never touched you. Why are you lying like that? I didn't do anything to you. I didn't touch you." Mr. Hepworth fervently exclaimed "I didn't do anything wrong. I was just walking down the alley. I was literally just walking, and you beat me up!" Contrary to Defendant Smith's claim, the BWC does not show any punch of Defendant Smith by Mr. Hepworth, nor is there any injury to Defendant Smith or any other evidence indicating he was punched. This false claim by Defendant Smith is simply untrue, and clearly an attempt to justify the excessive violence he chose to use. Adding to the lie, Defendant Smith falsely claimed Mr. Hepworth had an active warrant, attempting to use that excuse to justify his conduct. In reality, Mr. Hepworth had no warrant whatsoever. According to records, Mr. Hepworth had a warrant cancelled **three weeks prior**:

11/17/2021	WFTA	Warrant Failur To Appear
11/17/2021	NOTC	Notice Filed
11/17/2021	MINC	Minute Order (print)
11/23/2021	WLEC	Warant Canceled By Law Enforce
11/24/2021	WCAN	Warrant Canceled

Thus, Defendant Smith either lied by claiming Mr. Hepworth had a warrant, or at a minimum he inexcusably failed to check as to whether Mr. Hepworth had a warrant. Had he done so, he would have learned (or perhaps he already knew) that a warrant had been issued by cancelled over three weeks earlier on November 24, 2021.

The BWC demonstrates additional falsehoods by Defendant Smith. For instance, he told another officer that Mr. Hepworth was attempting to flee into his house. Contrary to Defendant Smith's claims, the body camera footage shows that at no point in time was Mr. Hepworth attempting to flee. He walked calmly to his door and calmy turns to face and speak with Defendant Smith before being assaulted by Defendant Smith. At no point does Defendant Smith inform Mr. Hepworth he has a warrant—which suggests Defendant Smith **knew** he had no warrant, and that he instead invented this after the fact.

After being arrested, Mr. Hepworth was taken to the emergency room for medical treatment, covered in dirt and suffering from abrasions, bruises, and broken bones. Mr. Hepworth had an abrasion on his head from where his head had struck the ground after Defendant Smith slammed him down. After an X-ray and CT scan, Mr. Hepworth was informed that he had suffered fractures to two of his ribs. Although authorities initially charged Mr. Hepworth based on Officer Smith's false account with obstructing a peace officer, resisting arrest, and second-degree assault on a peace officer, those false charges were later dismissed. This dismissal confirms what the evidence makes obvious: Mr. Hepworth did nothing to warrant Defendant Smith's use of unnecessary and excessive violence, he had committed no crime that day, and Defendant Smith's seizure and use of force violated the law.

II. CLAIMS AND LEGAL AUTHORITY

The facts demonstrate that Defendant Smith violated Mr. Hepworth's right to be free from unlawful seizure and excessive force at the hands of police. We anticipate asserting several legal claims should the matter not be resolved prelitigation. We emphasize that for claims under the Colorado Constitution Defendant **will not** receive the protections of qualified immunity. C.R.S. § 13-21-131. We may also choose to file federal constitutional claims under 42 U.S.C. § 1983, including for municipal liability against the Chief of Police and City of Alamosa. Under both state and federal caselaw, Defendant Smith's was unlawful.

You should be aware that Colorado is expected to apply the state Constitution in § 13-21-131 cases against excessive force more expansively than under federal law. In other words, Colorado courts will not simply follow federal § 1983 caselaw on what constitutes excessive force or an unreasonable seizure. As the Colorado Supreme Court forcefully acknowledged, "**When interpreting our own constitution, we do not stand on the federal floor; we are in our own house.**" *Rocky Mt. Gun Owners v. Polis*, 2020 CO 66, ¶ 36, 467 P.3d 314, 324 (emphasis added). In discussing the significance of interpreting its own constitution, the Colorado Supreme Court rejected the argument that parallel text demands parallel interpretation. *See id.* at ¶ 37 (even parallel text does not mandate parallel interpretation). The Court supported the proposition by relying on this state's more expansive interpretation of Article II, Section 7 of the state constitution, the Fourth Amendment analogue at issue in this case. *Id.* (*citing People v. McKnight*, 2019 CO 36, ¶¶ 38-43, 446 P.3d 397, 406-08) (departing from Fourth Amendment jurisprudence to determine a dog sniff was a search under article II, section 7 of the Colorado Constitution where distinctive state-specific factors overcame the provisions' substantially

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similar wording). Therefore, we believe Colorado Courts will protect citizens from unlawful police seizures and excessive violence to a greater extent than federal law.

A. Warrantless Arrest In The Entryway To The Sacred Area Of The Home

As discussed herein, Defendant Smith violated Mr. Hepworth's rights regardless of where this conduct occurred—even if he had stopped and assaulted him in an alley or street, rather than at his home, he violated the law and is liable. But we stress that it makes Defendant Smith's conduct particularly reprehensible that he did this **in the entryway to Mr. Hepworth's home**. As you are no doubt aware, under both state and federal law the home is particularly sacred from government entry, and Colorado protects its citizens from such intrusions arguably greater than federal law. The Supreme Court embraces the principle that "a man's house is his castle," requiring a warrant for entry to arrest. *Payton v. New York*, 445 U.S. 573, 598 (1980). Colorado law embraces this principle, but goes even further by upholding the "castle doctrine," or so-called "make my day" rule, which "which allows a person in his own home to use deadly force in self-defense without first retreating even if a reasonably safe means of escape exists." *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000). Although the seizure and assault of Mr. Hepworth occurred in the entryway to his home on the porch, that is unequivocally part of the "curtilage" of the home protected from warrantless intrusion: "The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends," making it protected. *Fla. v. Jardines*, 569 U.S. 1, 7 (2013). Here, we will argue that under Colorado law that the warrantless seizure, arrest, and use of force against Mr. Hepworth in the entryway to his home, on the front porch, was clearly a violation of the castle doctrine and the sanctity of the home, violating Article II, Section 7.

B. Unlawful Seizure Without Reasonable, Articulable Suspicion

Defendant Smith is liable for the unlawful detention of Mr. Hepworth, lacking any warrant or reasonable, articulable suspicion to stop him under either Article II, Section 7 of the Colorado Constitution or the Fourth Amendment to the United States Constitution. Police may detain a suspect as long as three conditions are satisfied, none of which were met in this case: (1) there is a specific and articulable basis in fact for suspecting that criminal activity has taken place, is in progress, or is about to occur (that is, "reasonable suspicion"); (2) the purpose of the intrusion is reasonable; and (3) the scope and character of the intrusion are reasonably related to its purpose. *People v. Salazar,* 964 P.2d 502, 505 (Colo.1998); *see also People v. Archuleta,* 980 P.2d 509, 513 (Colo.1999); *People v. O'Hearn,* 931 P.2d 1168, 1174 (Colo.1997); *People v. Padgett,* 932 P.2d 810, 813 (Colo. 1997). Because detention is a seizure based on less than probable cause, it must be brief in duration, limited in scope, and narrow in purpose. *People v. Tottenhoff,* 691 P.2d 340, 343 (Colo.1984).

It is axiomatic in the United States that an individual's wish to avoid coming into contact with police does not, without more, justify the detention of the individual. *Padgett*, 932 P.2d at 813;*see also People v. Rahming,* 795 P.2d 1338, 1342 (Colo.1990) (holding that an officer did not have reasonable suspicion for a detention where the defendant quickly walked to his car upon seeing the police car). In *People v. Padgett,* a case directly on point to the facts here, the Court found a detention unlawful even though the individual appeared to flee from police. There, officers patrolling an area known for criminal activity at night noticed two individuals walking along the sidewalk. 932 P.2d at 813. As the police car approached the individuals, one slowed his pace and eventually stopped, but Padgett appeared to begin walking more rapidly away. The officers exited their vehicle and called out to Padgett who continued to walk away; only upon calling out to him again did he slow his pace and reluctantly turn back to the officers. The officers proceeded to check for an arrest warrant on

Padgett, an investigative detention. The Colorado Supreme Court found that the detention lacked reasonable and articulable suspicion. *Id.*

In holding the detention unlawful, the Court noted the following circumstances known to the officer's at the time of the intrusion "1) it was 1:50 a.m.; (2) criminal mischief and car break-ins had recently occurred in the neighborhood, though none had been reported that morning or the previous evening; (3) the streets and sidewalks were snow packed and icy; (4) two men were walking; and (5) one of them slipped." It ruled that those facts did "not rise to the level of an articulable and specific basis in fact to suspect that the two men were committing, had committed, or were about to commit a crime." *Id.* It further held that "**flight after the investigatory stop was initiated, cannot be utilized as a rationalization to justify the stop. The articulable facts which justify the stop must preexist.**" *Id.* (emphasis added).

In cases where police expressed even more articulable facts than Defendant Smith did here, there was still no reasonable suspicion, and the detention was ruled unlawful. For example, in *Outlaw v. People*, the Court found no reasonable or articular suspicion where police conducted a detention of an individual in a high crime area known for drug arrests, who further walked away after seeing the patrol car and appeared to have something in his hand. *Outlaw v. People*, 17 P.3d 150, 157 (Colo. 2001), *as modified on denial of reh'g* (Feb. 5, 2001). Even under those more incriminating facts compared to Mr. Hepworth's situation, the Court still found the detention unlawful.

Furthermore, it is no excuse for an officer to claim after the fact that he incorrectly believed an individual had a warrant, as Defendant Smith has claimed in this case. Even if that is true, the Supreme Court has held that an arrest without confirmation of an arrest warrant is unlawful. *People v. O'Hearn,* 931 P.2d 1168, 1174 (Colo.1997). But we do not credit Defendant Smith's post hoc claims that he believed Mr. Hepworth had a warrant, which is a convenient excuse for the unlawful arrest and brutal assault on him—particularly given the multiple other false statements by Defendant Smith, and the suspicious turning off of his BWC. Regardless, the caselaw is clear that this weak attempted justification legally fails: incorrectly believing in a warrant that did not exist fails to provide legal basis to stop or arrest, let alone use brutal violence against an individual.

Here, as in *Padgett, Outlaw, O'Hearn*, and other cases, Defendant Smith did not have reasonable suspicion to stop and detain Mr. Hepworth. As in those cases, Mr. Hepworth was within his rights to walk away from Defendant Smith's vehicle or choose not to respond to him, and none of that conduct created reasonable suspicion to detain him. 932. P.2d at 813. Just as the Court found seizures unlawful in those cases, so too was the seizure by Defendant Smith unjustified and lacking in legal basis.

C. Unlawful Arrest Without A Warrant Or Probable Cause

Defendant Smith is also liable for the unlawful arrest of Mr. Hepworth. This detention immediately escalated into an arrest when he physically assaulted Mr. Hepworth, punched and kneed him, held a knee to his neck on the ground, and physically restrained him: "the use of firearms, handcuffs, and other forceful techniques" generally exceed the scope of an investigative detention and enter the realm of an arrest. *See United States v. Melendez–Garcia,* 28 F.3d 1046, 1052 (10th Cir.1994). Under both the Fourth Amendment to the U.S. Constitution and Article II, Section 7 of the Colorado Constitution forbid law enforcement from arresting someone without a warrant if they lack probable cause to do so. *Fogarty v. Gallegos*, 523 F.3d 1147, 1156 (10th Cir. 2008); *People v. Davis*, 903 P.2d 1, 4 (Colo. 1995) ("Ensconced in the Fourth Amendment and our own constitution is the guarantee that police must have probable cause before they can subject a person to a seizure

or the deprivation of liberty that results from an arrest."); *see also* U.S. Const. Amend. IV; Colo. Const. Art. II, § 7.

"When the defendant comes forward with evidence of a seizure, the fact that police proceeded without a warrant places the burden on the prosecution to demonstrate the encounter's legality." *Outlaw,* 17 P.3d 150. "Probable cause to arrest exists only when the facts and circumstances within the Officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *United States v. Valenzuela,* 365 F.3d 892, 896 (10th Cir.2004). Here, for the same reasons he lacked reasonable, articulable suspicion to detain, Defendant Smith certainly lacked probable cause to arrest Mr. Hepworth without a warrant. *Fogarty*, 523 F.3d at 1156; *Davis*, 903 P.2d at 5.

D. Excessive Force

Officer Smith is liable for excessive force because he unnecessarily punched, kicked, and kneed Mr. Hepworth, while also slamming him to the ground and breaking several ribs among other injuries, unreasonably and without justification. Both the Fourth Amendment and Section 7 of Article II to the Colorado Constitution forbid the use of excessive force in making a seizure. **State law contains greater protections against excessive force than federal law**, which we will argue only heightens the duty on police such as Defendant Smith not to use excessive or unlawful force. For instance, this duty is informed by C.R.S. § 18-1-707(1), which requires that police "**shall apply nonviolent means, when possible, before resorting to the use of physical force.**" (emphasis added). This statute further requires that, when force is used, police shall **"[u]se only a degree of force consistent with the minimization of injury to others**," and specifically forbids the use of a "chokehold," meaning the use of pressure on the neck or throat which "**may prevent or hinder breathing or reduce intake of air**." C.R.S. § 18-1-707(2)(b), (2.5)(b)(I). These statutory requirements inform the constitutional duties of police officers in Colorado.

Even if state courts adopt the federal standard for excessive force, that test will clearly be met in this case. *Casey v. City of Federal Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007). Whether officers used excessive force under the Fourth Amendment depends on "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)); *McCowan v. Morales*, 945 F.3d 1276, 1283 (10th Cir. 2019). This analysis requires careful attention to the facts and circumstances of the 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[.]" *Graham*, 490 U.S. at 396.

In *Casey,* plaintiff was carrying a court file with him on his way back to the courthouse after exiting the court to retrieve money from his car. 509 F.3d at 1280. While on his way back to the court he was stopped by an officer demanding he return to his truck. Upon insisting the court file needed to be returned, the officer requested the file. As Casey appeared to walk away, the officer tackled him. More officers arrived and then tased, beat, and cuffed Casey. The Court of Appeals found that the officers had used excessive force because there was no reason to believe there was "an immediate threat to the safety of anybody present," Casey was neither "actively resisting arrest" nor "attempting to evade arrest by flight," and where the crime is a harmless misdemeanor "committed in a particularly harmless manner," the level of force that is reasonable to use is reduced. *Id; see also Cavanaugh v. Woods,* 625 F.3d 661 (10th Cir. 2010) (excessive for was used where officers tased an individual in the back without warning while she walking toward her front door unarmed;

Morris v. Noe, 672 F.3d 1185, 1190, (10th Cir. 2012) (excessive force was used where officers grabbed and threw individual to the ground that was backing toward them with hands up).

Here, Officer Smith's conduct was plainly excessive, even more egregiously than in *Casey*. Similar to *Casey,* where plaintiff was grabbed and tackled without provocation by police while walking away, Mr. Hepworth was calmly standing on his porch when he was grabbed and assaulted by Defendant Smith, and his conduct did not pose an immediate threat to the safety of anybody present. 509 F.3d at 1282. Additionally, the unlawfulness of the police violence Officer Smith used is even more obvious here than in Casey: Mr. Hepworth had not committed **any** crime and was calmly walking home from a friend's house when Defendant Smith assaulted him without any legal justification. *Id.* At the time that Defendant Smith seized Mr. Hepworth's wrist, Mr. Hepworth had not made any threating movements toward Officer Smith before being abruptly yanked by the arm and dragged off his front porch, then punched kicked, and kneed to the point of broken bones and other injuries. Just as *Casey* found that officer's conduct excessive, so too was the use of force by Officer Smith excessive and unjustified.

Even if Defendant Smith claims that Mr. Hepworth resisted his aggression (which we dispute) this will not save him from liability: Colorado law permits people to use self-defense from unlawful, excessive violence at the hands of police. *People v. Barrus*, 232 P.3d 264 (Colo. App. 2009); C.R.S. §§ 18–1–704(1), 18–8–104(1)(a), (2). Self-defense law states that "a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person." § 18–1–704(1), C.R.S.2009. The right of self-defense exists with no less entitlement when the person committing the unlawful force is a police officer: the law "**permits a person to defend himself when he reasonably believes that unreasonable or excessive force, as proscribed by section 18–1–707(1)(a) [C.R.S.2009], is being used by law enforcement Officers or that its use is imminent**." *People v. Fuller,* 781 P.2d 647, 650 (Colo.1989) (emphasis added).

Here, Defendant Smith used excessive and unlawful force in several respects. **First**, his initial physical assault of Mr. Hepworth was plainly unlawful: just as he had no lawful basis to detain or arrest Mr. Hepworth, Defendant Smith certainly lacked legal basis to escalate into physical violence. **Second**, Defendant Smith is doubly guilty of doubling-down on his use of excessive force, continuing to strike and knew Mr. Hepworth in the ribs, breaking them, as is apparent in the BWC we possess. This continued, gratuitous violence against Mr. Hepworth was totally unnecessary and excessive. The "gratuitous use of force" against an arrestee has been a clearly established Fourth Amendment violation at least since 2011, if not likely decades earlier. *McCowan*, 945 F.3d at 1287; *see also Salazar v. White*, No. 14-CV-02081-RM-CBS, 2015 WL 5781650, at *4 (D. Colo. Oct. 5, 2015) ("the law was clearly established such that a reasonable person in Defendant's position would have known that the use of violent physical force on a pretrial detainee who is not resisting and is handcuffed would violate that person's Fourteenth Amendment rights."); *Young v. Brock*, No. 10-CV-01513-WJM-CBS, 2011 WL 7163067, at *6-7 (D. Colo. Aug. 15, 2011) (denying motion to dismiss where detainee alleged he was grabbed by the hair and head beaten into the floor), *report and recommendation adopted,* No. 10-CV-01513-WJM-CBS, 2012 WL 385494 (D. Colo. Feb. 7, 2012); *York v. City of Las Cruces*, 523 F.3d 1205, 1209 (10th Cir. 2008) (denying qualified immunity where officers alleged to have used excessive force slamming plaintiff to the ground and injuring him when plaintiff called officer "bitch"); *Nosewicz v. Janosko*, 754 F. App'x 725, at 734–35 (as of 2014, violated clearly established law to slam jail detainee's head into wall who was "irate" and "disruptive" but did not "actively resist," reversing summary judgment as to excessive force where jail detainee did not "actively resist" and defendant slammed plaintiff's head into the wall); *Estate of Booker v. Gomez*, 745

F.3d 405, 424 (10th Cir. 2014) (violation of clearly established law to assault detainee who posed no threat and "was not resisting").

Third, echoing the murder of George Floyd, the BWC eerily shows Defendant Smith using his knee on Mr. Hepworth's neck, an extremely dangerous tactic which obstructs breathing and blood circulation, a "chokehold" in violation of C.R.S. § 18-1-707(2)(b), (2.5)(b)(I). Throughout his assault of Mr. Hepworth, Defendant Smith failed to use the minimum of force, and instead repeatedly chose to use excessive violence, to the point of a knee on Mr. Hepworth's neck.

In sum, this is a clear case of excessive force by Defendant Smith. His use of violence was gratuitous and unwarranted, particularly given Mr. Hepworth had done absolutely nothing wrong, and was merely attempting to enter his own home, posing no threat to the police or anyone else.

E. *Monell* Claim for Municipal Liability

Plaintiff will also name the Chief of Police in his official capacity, and the City will be liable for the violation of Mr. Hepworth's civil rights given clear evidence Defendant Smith was acting pursuant to his training and standard procedure, and the lack of any discipline resulting from Defendant Smith's misconduct. We therefore may also choose to file a state municipal liability claim against the Chief of Police, or may file a federal *Monell* claim under § 1983. *Monell v. Dep't of Soc. Servs.*, 435 U.S. 658 (1978).

To establish municipal liability, a plaintiff must show 1) the existence of a municipal policy, practice, or custom, and 2) a direct causal link between the policy, practice, or custom and the injury alleged. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). This policy, practice, or custom does not have to be a formal policy. A policy or custom can be established in many ways, including demonstrating the existence of

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions – and the basis for them – of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (citation and quotations omitted).

Here, *Monell* liability will be shown in several ways. **First**, it is clear Defendant Smith's conduct is standard operating procedure, as de facto policy. Other officers witnessed the misconduct, and it is obvious in the reports and BWC—and no one was disciplined or even investigated. We are confident Defendant Smith will testify he acted according to his understanding of standard procedure and their training and supervision. All of this renders the City liable. *See Moore v. Miller*, 2014 U.S. Dist. LEXIS 72452, at *27 (D. Colo. May 28, 2014) ("[I]f Defendant Police Officers testify that they acted in accordance with their training and it is found that they committed constitutional violations, the reasonable inference is that, had the City implemented a different training policy on the use of force, Mr. Moore would not have been subjected to the amount force used in this case."); *Ortega v. City & Cnty. of Denver,* 944 F. Supp. 2d 1033, 1039 (D. Colo. 2013) (Martinez, J.) ("Nixon

and Devine both testified that the amount of force that they used in this incident was in accord with how they were trained by Denver. Therefore, a reasonable juror could find that, had Denver implemented a different training policy on the use of force, Plaintiffs would not have been subjected to the amount force used in this case."); *Bass v. Pottawatomie County Public Safety Center,* 425 Fed. Appx. 713 (10th Cir. 2011) (unpublished) (affirming jury verdict for county liability given evidence "Jail's deficient supervision practices were a proximate cause of Mr. Bass's injuries"). The failure by the Chief of Police and City to train officers in this regard was deliberately indifferent "to the rights of persons with whom the police come into contact." *Canton*, 489 U.S. at 388. Deliberate indifference may be shown by "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability." *Allen*, 119 F.3d 842, citing *Board of County Comm'rs v. Brown,* 520 U.S. 397 (1997); *Canton,* 489 U.S. at 390 n.10; *see, e.g., McGill v. Corr. Healthcare Companies, Inc.*, No. 13-CV-01080-RBJ-BNB, 2014 WL 5423271, at *7 (D. Colo. Oct. 24, 2014) (unpublished) (denying summary judgment given disputed facts regarding "inadequate training").

Second, based on our initial investigation, we are aware of other instance of misconduct and violence by Defendant Smith which we will allege in a complaint and pursue aggressively in discovery. Defendant Smith is a repeat offender against the civil rights of individuals he comes into contact with. These multiple other instances of violations, combined with the facts of this case, will give rise to an inference of an informal custom or pattern of violations. *See Bordanaro v. McLeod*, 871 F.2d 1151, 1167 (1st Cir. 1989) ("Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right."); *McRorie v. Shimoda,* 795 F.2d 780, 784 (9th Cir. 1986) ("Policy or custom may be inferred if, after [constitutional violations], ... officials took no steps to reprimand or discharge the [subordinates], or if they otherwise failed to admit the [subordinates'] conduct was in error."); *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985) ("[S]ubsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy.").

Third, we also expect to establish *Monell* liability by demonstrating that Defendant Smith's conduct is endorsed, even though it violates the stated official policy of the APD. Courts have held that the implicit endorsement of the violation of policy itself constitutes *Monell* liability, and we will allege the same here. *Bass v. Pottawatomie County Public Safety Center,* 425 Fed. Appx. 713 (10th Cir. 2011) (unpublished) (affirming jury verdict for county liability where informal practices violated written policies, demonstrating deliberate indifference).

In sum, we believe there are multiple viable theories of *Monell* liability in this case against the Chief of Police and the City, and we are confident that should we be forced to litigation, discovery will reveal additional information which will buttress Mr. Hepworth's *Monell* claims.

III. DAMAGES

A. Compensatory Damages

Mr. Hepworth endured a violent, traumatic assault resulting in significant injury including several broken ribs, as well as substantial pain and suffering. Defendant Smith assaulted Mr. Hepworth at night, on the porch of Mr. Hepworth's own residence, in the doorway. His gratuitous and excessive violence not only physical harmed Mr. Hepworth, it caused mental suffering and anguish which he continues to suffer. During his

assault of Mr. Hepworth, Defendant Smith placed his knee on Mr. Hepworth's neck, an extremely dangerous tactic similar to that used in the murder of George Floyd. Needless to say, this was terrifying for Mr. Hepworth. All of these injuries are recoverable as compensatory damages.

B. Punitive Damages

In addition to compensation for Mr. Hepworth's physical injury, pain and suffering, we believe that punitive damages are likely in this case. Defendant Smith's use of violence was senseless and extremely dangerous—including repeatedly punching and kneeing Mr. Hepworth to the point of breaking ribs. Exacerbating the brutality of this attack, Defendant Smith put his knee on Mr. Hepworth's neck akin to the murder of George Floyd. The fact that he chose to use such an infamously dangerous tactic in December of 2021—over a year and a half after the killing of George Floyd—is reprehensible and outrageous. We are confident a jury will agree and will reflect its outrage through a substantial punitive damages award.

The overlapping policy goals behind civil rights legislation and punitive damages—to deter future violations—render the award of punitive damages particularly compelling in the civil rights context. *Smith v. Wade*, 461 U.S. 30, 49 (1983) (stating "the deterrence of future egregious conduct is a primary purpose of both § 1983 and of punitive damages"). In such cases, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North Am. v. Gore*, 517 U.S. 559, 575 (1996); *see also Qwest Services Corp. v. Blood*, 252 P.3d 1071, 1094 ("a punitive damages award should reflect 'the enormity of the offense' and 'the accepted view that some wrongs are more blameworthy than others.'").

This rights violation is exactly the type of misconduct punitive damages are designed to address, the purpose of such damages being "to express the community's disapproval of outrageous conduct" and "as a display of ethical indignation." *Reynolds v. Pegler*, 123 F. Supp. 36, 38 (S.D. N.Y. 1954); *Lightning Lube, Inc. v. Venuto*, 4 F.3d 1153 (3d Cir. 1993) (stating, "[i]n awarding punitive damages, the jury in a sense vents society's collective anger"); *Zarcone v. Perry*, 572 F.2d 52, 54 (2d Cir. 1978) (stating "[T]he abuse of official power here was intolerable, and when a jury has dealt with it severely, as it should, [courts] will not draw fine lines to restrain [the jury's] dispensation of justice."). For these reasons, we expect substantial punitive damages to be awarded in this case.

C. Attorney Fees and Costs

Finally, reasonable attorney fees and costs are recoverable by a prevailing plaintiff under C.R.S. § 13-21-131(3) and 42 U.S.C. § 1988. Statutory caps on attorney fees do not apply to claims brought pursuant to the state statute. C.R.S. § 13-21-131(2)(a). Even if a jury were to award Mr. Hepworth only nominal damages—which is unthinkable given he suffered injury from violence—the County would still be liable for plaintiff's attorney fees and costs. If forced to litigate this case through trial, the amount of attorney fees incurred could easily exceed **$300,000** for plaintiff's counsel alone.

D. Comparable Verdicts and Settlements

Below, we list a number of outcomes achieved by this law firm which reflect our ability to successfully litigate this matter, as well as settlements and verdicts in similar cases which inform the determination of a fair resolution and reflect the County's high exposure to liability should this matter proceed:

- *Michael Valdez v. Motyka and City and County of Denver*: In 2021 a jury reached a **$2.5 million** verdict for the unconstitutional shooting of Mr. Valdez and the City's failure to train officers regarding appropriate uses of force. David Maxted litigated the case pretrial, successfully defeating summary judgment and prevailing in the Tenth Circuit on interlocutory appeal. The Court also awarded about **$1.2 million** in attorney fees, for a total judgment of **$3.7 million**.

- *Estate of Yoemans v. Adams County*. MAXTED LAW LLC in 2021 reached a **$1.1 million** settlement with the County in this jail § 1983 wrongful death case. The jail failed to protect an incarcerated person from a violent individual, who killed him. MAXTED LAW LLC litigated the case through discovery and defeated summary judgment. A confidential settlement was also reached against a private medical provider.

- *Anonymous v. County and Private Medical Provider*. MAXTED LAW LLC in 2021 reached a **$500,000** prelitigation confidential settlement against a County and a private medical provider for failure to provide medical care in the facility, resulting in the death of the individual.

- *Rustgi v. Reams*. MAXTED LAW LLC in 2021 reached a **$325,000** with Weld County arising from the use of excessive force against a pretrial detainee. A federal judge denied the defense motion to dismiss prior to the settlement.

IV. CONCLUSION

MAXTED LAW LLC has advised Mr. Hepworth that he has meritorious legal claims under Colorado and federal law against APD Officer Nick Smith, as well as the City of Alamosa, and the Chief of Police in his official capacity. We respectfully submit that this case is indefensible on the merits. Mr. Hepworth wishes to reach a fair resolution of his legal claims and is prepared to resort to legal action. However, he is amenable to resolving his claims before the commencement of formal legal proceedings. If you are interested in discussing options to resolve these issues, please contact us by **August 19, 2022**, or we will file a lawsuit. We look forward to hearing from you.

Sincerely,

s/ David G. Maxted

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