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Sent Via Email

Attn: Ryan Peltekian

Re: Geist Memo

Mr. Peltekian:

You have retained Salcido Law Firm PLLC to provide a legal opinion concerning the incident that occurred on June 18, 2014, when Officer Olsen of the Salt Lake City police department killed Sean Kendall's dog, Geist, after Olsen entered Kendall's backyard without a warrant while searching for a missing child. Below you will find out memorandum on the subject.

ISSUE

Did the Police Civilian Review Board ("board") accurately conclude that Detective Brett Olsen ("Olsen") was legally justified, based upon the exigent circumstances exception to the Fourth Amendment of the United States Constitution, in entering Sean Kendall's ("Kendall") backyard without a warrant and shooting his dog Geist?

BRIEF ANSWER

No.

There were no exigent circumstances justifying a police officer in Olsen's position to conclude that an exception to the warrant requirement existed. Accordingly, Olsen's presence in Kendall's backyard was illegal and his subsequent action of killing Geist was unjustified.

FACTS

Kendall believes Olsen illegally entered and searched his backyard in violation of the Fourth Amendment of the United States Constitution. He also believes Olsen killed his dog Geist unjustifiably.

(Disclaimer: The following facts are derived from the board's report exonerating Olsen of wrong doing. No independent fact gathering was performed.) On June 18, 2014, the Salt Lake Police Department received a report of a missing 3 year old boy. The boy could not verbally communicate. There was no report of the child being injured or in immediate threat of injury. Olsen and other officers were dispatched to search the neighborhood where the child was last seen. Olsen and another officer attempted to make contact at Kendall's home but no one was there. Olsen looked over the fence into Kendall's backyard and saw it was densely landscaped. He believed that there were areas of the yard where the boy could be which Olsen could not see from looking over the fence.

There were multiple gates to the backyard. Olsen believed one gate was too difficult for the boy to open but believed another gate had a latch that could have been easily opened by the child. Olsen opened the gate and began searching the backyard for the child. He opened a shed in search of the boy and found nothing. Upon closing the shed, he believed the noise aroused the dog named Geist who had most likely been sleeping. Geist angrily barked and charged the officer who drew his weapon and began to back pedal. Believing serious injury would be inflicted by the dog, Olsen shot Geist twice, killing the animal.

The board investigated the incident to determine if Kendall's allegation that Olsen improperly entered his yard and killed his dog was true. After investigating the matter, the board exonerated Olsen and found that he properly entered Kendall's yard and killed Geist. The board's conclusion that Olsen properly entered Kendall's yard was based on the exigency exception to the Fourth Amendment's warrant requirement. Specifically, the board found that exigent circumstances existed because officers reacted to an immediate life-threatening emergency and that there was a danger of physical harm to officers or other persons.

Additionally, the board found the killing of Geist was justified because Olsen was acting in self-defense.

ANALYSIS

I. Olsen Conducted an Illegal Warrantless Search

The protections of the warrant requirement extend to the curtilage of the home, as the curtilage is “part of the home itself for Fourth Amendment purposes.” *Oliver v. United States*, 466 U.S. 170, 180 (1984). The Supreme Court has established the following four factors to help courts determine what curtilage is: 1) the proximity of the area claimed to be curtilage of the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and, 4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

Using the Supreme Court’s factors, Kendall’s backyard is curtilage and entitled to Fourth Amendment protections on par with the home. Kendall’s backyard is not particularly large and it directly abuts the house. The backyard is enclosed with a fence. Backyards are typically used for private gathering and are not intended to be very open to the public eye. Finally, Kendall took steps to shield the yard from observation through the use of a fence and dense shrubbery. Thus, Olsen was required to get a warrant to search Kendall’s backyard unless an exception to the warrant requirement applied, and as will be shown below, no such exception applied.

II. Under *Lundstrom*, Olsen’s Search was Illegal

Kendall’s case is similar to *Lundstrom v. Romero*, 616 F.3d 1108 (10th Cir. 2010).

In that case, officers were called to a home based upon a neighbor’s hearing a female abusing a young child outside. When officers arrived at the home, the man who answered the door told officers there was no child at the home. Believing a child was injured or in threat of imminent injury, one police officer went into the fenced backyard to get a better look at the suspect in the home. Eventually the suspect and another person in the home came out and were arrested. The officers then searched the house for a child. No child was found. The

officers claimed the possibility of the injured child created exigent circumstances justifying their warrantless search. The court disagreed.

The Tenth Circuit found that the search was unreasonable considering the circumstances. The court concluded that not only was the search of the home unreasonable, but the entry of the backyard was unreasonable. The backyard was protected curtilage because the home “directly abuts the rear of the house, was enclosed such that the officer had to go over a fence or open a gate to access it, was used in a manner typical of an ordinary residential backyard, and was protected from observation...” *Id.* at 1128-1129.

Here, Kendall’s backyard resembles the backyard in *Lundstrom*. It abuts the rear of his house, it was enclosed requiring Olsen to open a gate to access it, it was used in a manner typical of an ordinary residential backyard, and it was protected from observation through dense shrubbery. Unlike the search in *Lundstrom*, however, Olsen’s search was not based on a witness’ sensory perception of an injured child in Kendall’s backyard. Olsen’s search was simply a guess with just a hope that maybe the child was there. Thus, Olsen’s search was as unreasonable as that found in *Lundstrom*.

III. The Board Erred in Applying the Exigent Circumstances Doctrine

The board claims the situation of finding the lost child amounted to exigent circumstances because Olsen believed he was reacting to an immediate life-threatening emergency. Generally, a warrantless search is presumptively unreasonable under the Fourth Amendment. See *Payton v. New York*, 445 U.S. 573, 586 (1980). “[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978). One such exigent circumstance “is the need to assist persons who are seriously injured or threatened with such injury.” *Id.*, at 392. “Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

However, officers must have an *objectively* reasonable basis for believing it necessary to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Id.* At 406. Reasonableness is determined from the viewpoint of “prudent, cautious, and trained officers.” *United States v. Najar*, 451 F.3d 710, 718-719 (10th Cir 2006). In *Brigham City*, officers were called to a loud party taking place at a home. When officers arrived at the home, they observed through a screen door a fight ensuing. The officers entered the home and stopped the fight. The Supreme Court upheld the officers’ behavior explaining an objectively reasonable basis existed because it was evident an assaulted man might need help and that the fight may grow worse. In viewing the standards of exigent circumstances, it is clear that Olsen did not have an objectively reasonable basis for believing exigent circumstances existed.

Olsen performed his search without a warrant; therefore, it was presumptively unreasonable and he must show exigent circumstances made the warrantless search reasonable. The board indicates that Olsen truly believed the missing child was in imminent threat of injury or was already hurt making his warrantless search reasonable. However, Olsen’s subjective beliefs are inapplicable. Case law indicates there must be an objectively reasonable basis to find exigent circumstances.

While searching for the lost child, Olsen never received information that the child was in any immediate threat of injury or that the child was injured. Olsen only knew that a 3 year old boy was missing. This situation is much different than *Brigham City* where the Court found exigent circumstances. In *Brigham City*, the officers had an objectively reasonable basis because they actually witnessed a fight and saw someone receive injuries in the brawl. Olsen saw nothing and had no other information to suggest the child was injured or in imminent danger of injury. Indeed, if the mere fact that the child was missing is sufficient to meet the exigent circumstances threshold then one could argue that Olsen could have entered any home in the neighborhood in addition to the backyards.

The board seems persuaded that Olsen’s past experience of searching for lost children somehow created an exigent circumstance but it fails to show how the two are related.

Additionally, past experiences do not create exigent circumstances. The board references the case of Destiny Norton multiple times to show that because she was killed after she went missing the boy could suffer the same fate. This analysis is unreasonable because there was no information supporting such an outcome.

CONCLUSION

The board erred in exonerating Olsen's entry of Kendall's backyard and his killing of Geist because Olsen conducted the search without a warrant and the exigent circumstances exception to the warrant requirement did not apply because (1) there was no objectively reasonable basis for Olsen to believe that someone was on the property who needed emergency help; and (2) Olsen's "training and experience" are insufficient to meet the exigent circumstances threshold. Accordingly, as Olsen was present on the property illegally, his killing of Geist was not justified.

Sincerely,

SALCIDO LAW FIRM PLLC

/s/ Jerry Salcido
/s/ Benny Salcido
Attorneys at Law