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Supreme Court of Kentucky

SUPREME COURT OF KENTUCKY
CASE NO. 2023-SC-0248

JAIME MORALES

APPELLANT

v.

On Appeal from
Kentucky Court Of Appeals
Case No. 2022-CA-0009-MR

Appeal from
Scott Circuit Court
Action No. 19-CI-00593

CITY OF GEORGETOWN, KENTUCKY, et al.

APPELLEES

BRIEF OF APPELLEE JAMES MICHAEL WAGONER

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CERTIFICATE OF SERVICE

I certify that on January 5, 2024, this document was electronically filed with the Kentucky Supreme Court. I further certify that on this same date, a true and correct copy of the foregoing was sent by U.S. Mail to the following: Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Thomas W. Miller, Elliott C. Miller, Elizabeth C. Woodford, Miller, Griffin & Marks, P.S.C., 271 West Short Street, Suite 600, Lexington, Kentucky 40507; L. Scott Miller, Maureen C. Malles, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, Kentucky 40507; Jeffrey C. Mando, Adams, Stepner, Woltermann &

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000002 of 000042

INTRODUCTION

Appellant Jamie Morales ["Morales"] appeals the Kentucky Court of Appeals ["COA"] decision finding that Appellee Lieutenant James Michael Wagoner ["Wagoner"] and other Appellees are entitled to qualified official immunity.

The COA cited *Haugh v. City of Louisville*, 242 S.W.3d 683 (Ky. App. 2007), and found that SWAT commander Wagoner's discretionary acts were immune. The COA affirmed the Scott Circuit Court's granting of summary judgment to Wagoner on five claims formulating a tactical plan, executing a tactical plan, communicating the plan, supervision of officers, and selection of training topics.

The COA opinion should be affirmed as to those five issues because Wagoner was exercising discretion and is entitled to qualified official immunity under Kentucky law.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee Wagoner believes that oral argument would be helpful to the Court to address the issues raised on appeal as they are fully and adequately briefed.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION..... 1

Haugh v. City of Louisville
242 S.W.3d 683 (Ky. App. 2007)..... *Passim*

STATEMENT CONCERNING ORAL ARGUMENT i

COUNTERSTATEMENT OF POINTS AND AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE..... 1

A. The Request From The United States Marshall's Office 1

B. GPD Sergeants Completed a Risk Matrix Which Scored A "14" 1

C. Wagoner Utilized Both SRT And Regular Patrol Personnel 2

D. Wagoner Made A Myriad Of Decisions In Forming A Tactical Plan 3

E. Wagoner Obtained Supervisory Approval Before Proceeding 4

F. At The Cracker Barrel Rally Point, Wagoner Explained The Plan 5

G. Some Officers Wore Tactical Vests And Some Did Not..... 8

H. The Route From Cracker Barrel To The I-75 Exit Rest Area..... 9

I. Jacobs Compromised The Plan By Running At Reynolds' Vehicle 9

J. Breaking The Mustang's Windows Was Not Part Of The Plan 10

K. Reynolds' Resistance Dictated The Officers' Response..... 11

L. The Intentional Shooting Of Reynolds And The Accidental
Shooting Of Morales..... 12

M. This Was A Tense, Dangerous, and Rapidly-Evolving Incident 12

N. The KSP Post-Incident Investigation..... 14

O. This Litigation And Procedural History 14

ARGUMENT..... 15

I. QUALIFIED OFFICIAL IMMUNITY BARS ALL CLAIMS AGAINST WAGONER.....16

A. The Qualified Official Immunity Standard.....16

Kareken v. Kehrt
 WL 1649105 (Ky. App. 2012).....16

Turner v. Nelson
 342 S.W.3d 866 (Ky. 2011).....16

Rowan County v. Sloas
 201 S.W.3d 469 (Ky. 2006).....16, 23

Haney v. Monsky
 311 S.W.3d 235 (Ky. 2010).....16, 22

Yanero v. Davis
 65 S.W.3d 510 (Ky. 2001).....16, 34

Lawrence v. George
 WL #2470985 (Ky. App. 2012).....16

Marson v. Thomason
 438 S.W.3d 292, 297 (Ky. 2014).....16

B. It Is Undisputed That Wagoner Was Acting Within The Course
 And Scope Of His Employment And In Good Faith17

C. The SRT Policy Does Not Transform Discretionary Acts
 Into Ministerial Ones17

Day v. City of Henderson
 WL 1882286 (Ky. App. 2014), *unpublished*17, 18, 28

D. Wagoner Exercised Discretion In Formulating, Communicating,
 And Executing His Tactical Plan.....18

Reich v. City of Elizabethtown
 945 F.3d 968, 982-983 (6th Cir. 2019).....19

Fakhri v. Louisville-Jefferson County Metro Govt.
 LEXIS 76267 (W.D. Ky. 2020).....19

Nichols v. Bourbon County Sheriff's Dept.
 26 F.Supp.3d 634 (E.D. Ky. 2014).....19

Case v. Sanders
 LEXIS 103949 (E.D. Ky. 2018)20

Gambrel v. Knox Co.
 WL 1457296 (E.D. Ky. 2018)20

E. Morales' Expert Sutton Concedes Wagoner Was Engaged
 In Discretionary Acts Regarding His Tactical Plan20

F. Morales Appears To Have Conceded That Wagoner Was Exercising
 Discretion Regarding The Selection Of Training Topics22

G. Morales Has No Negligent Supervision Claim Because Wagoner
 Was Exercising Discretion In Supervising These Officers.....22

H. Wagoner's Decisions Should Not Be Judged In Hindsight.....24

Darrah v City of Oak Park
 255 F.3d 301 (6th Cir. 2001)24

Graham v. Connor
 490 U.S. 386, 388 (1989).....24

Boyd v. Baeppler
 215 F.3d. 594, 602 (6th Cir. 2000)24

Smith v. Frelund
 954 F.2d 343, 347 (6th Cir. 1992)24

Abbott v. Sangamon County, Ill.
 705 F.3d 706, 714 (7th Cir. 2013)24

II. HAUGH ENTITLES WAGONER TO IMMUNITY25

A. *Haugh* Holds That A SWAT Commander's Decisions Are Immune25

B. Wagoner's Planning Actions Should Not Be Split.....26

C. The Plaintiff's Expert's Concessions Were Highly Persuasive26

D. *Haugh* Has Been The Law Since 200728

Cleveland v. Louisville Metro Gov't
 WL 1058154 (W.D. Ky. 2019)28, 29

III. WAGONER IS ENTITLED TO IMMUNITY UNDER THE CALGA.....30

A. The CALGA Applies To Individuals.....30

Godman v. City of Fort Wright
234 S.W.3d 362 (Ky. App. 2007)30

Lease v. City of Vine Grove
WL 6721273 (Ky. App. 2018).....30

KRS 65.2003.....30, 31

B. The CALGA Immunizes Discretionary Acts.....30

KRS 65.200130

C. The CALGA Immunizes Decisions About The
Use Of City Resources.....31

**IV. RIGHT OR WRONG, WAGONER'S DISCRETIONARY
ACTS ARE IMMUNE32**

Malley v. Briggs
475 U.S. 335 (1986).....32

Calloway v. Beasley
WL 8489989 (W.D. Ky. 2015)32

Jeffers v. Heavrin
10 F.3d 380 (6th Cir. 1993)32

Volentine v. Sheehy
WL 2052301 (Ky. App. 2023).....32

**V. DENYING IMMUNITY TO WAGONER WOULD RAISE
SERIOUS PUBLIC POLICY CONCERNS32**

Martin v. O'Daniel
507 S.W.3d 1, 12 (Ky. 2016)33

CONCLUSION33

CERTIFICATE OF COMPLIANCE35

APPENDIX vi

COUNTERSTATEMENT OF THE CASE

A. The Request From The United States Marshall's Office.

On September 11, 2018, Deputy United States Marshal Roger Daniel ["Daniel"] contacted the Georgetown/Scott County 911 Dispatch Center to request assistance in the apprehension of a fugitive, Edward J. Reynolds, ["Reynolds"] who was located in a silver Ford Mustang parked at a rest area on northbound I-75 in Scott County, Kentucky.

Reynolds was wanted for multiple bank robberies in Florida and North Carolina, had robbed a bank earlier that day, and was armed and dangerous. *Little Dep.*, pp. 20-21 [R-1408-1409]. He had reportedly been at the rest area for a while and Daniel believed him to be sleeping inside it. *KSP Report, Daniel Interview, KSP 0118*, p. 118, [R-1743]. As an armed serial bank robber on the run, Reynolds presented an obvious danger to the public. *Sutton Dep.*, p. 10-11 [R-1572].

There was urgency as Daniel called dispatch repeatedly, advising that with every passing moment, Reynolds could wake up, leave, elude arrest, and thereby endanger the public. *Sutton Dep.*, pp. 84-85 [R-1590-1591]. The Georgetown City Police Department ["GPD"] officers had to balance the need to try to apprehend Reynolds quickly with the necessity of taking time to form a plan. *Sutton Dep.*, pp. 11-12 [R-1572].

B. GPD Sergeants Completed a Risk Matrix Which Scored A "14".

GPD sergeants Nick Lodal and Gary Crump completed a risk matrix form, which is a guideline to assess the threat of a situation. *Risk Matrix, Georgetown-001586-001587*, [R-1744-1745]; *Sutton Dep.*, p. 16 [R-1573]. This incident scored a "14" on the risk

matrix¹ - indicating that a full SRT call-out was not required and that this mission could be handled as a patrol-level function.² *Crump Dep.*, p. 39 [R-1265]. Lodal and Crump then consulted Lieutenant Wagoner, the on-duty supervisor, a high-level officer, and the co-commander of the Georgetown/Scott County joint Special Response Team, ["SRT"] who reviewed the risk matrix, agreed with it, and went with the GPD sergeants to the dispatch building to gather additional information firsthand. *Lodal Dep.*, p. 43; 103 [R-1298. 1313]; *Crump Dep.*, p. 42 [R-1266].

C. Wagoner Utilized Both SRT And Regular Patrol Personnel.

The City of Georgetown and Scott County have formed a "joint" SRT team, which is basically a SWAT team comprise of personnel from both departments. There is a selection process for SRT team membership. *SRT General Order #047, Georgetown-0002-0009*, pp. 2-4 [R-1747-1749]. Candidates complete a written application, are interviewed, and complete an obstacle course and a firearms test. *Morales Dep.*, pp. 36-37; 157 [R-1001-1002, 1032]. An SRT officer has to complete specialized SWAT training. *Hudnall Dep.*, p. 25 [R-1449]; *Morales Dep.*, pp. 37; 63 [R-1002, 1008]. SRT personnel are more highly-trained than regular officers. *Morales Dep.*, pp. 48-49 [R-1004-1005].

Some SRT personnel were present, in person, training at the GPD facility that day. *Morales Dep.*, p. 78 [R-1012]; *Sutton Dep.*, p. 181 [R-1615]. For this mission to apprehend Reynolds, Wagoner decided to use some SRT officers due to their superior tactical training and experience, as well as regular patrol officers. *Wagoner Dep.*, p. 32 [R-1123]. As

¹ According to the risk matrix guideline criteria, a score of 25 is required before an SRT call-out is mandated. A score of 0-14 indicates the threat can be handled without consulting the SRT commander. Scores of 15-20 indicate consultation with the SRT commander is optional. Scores of 21-24 require consultation with the SRT commander.

² The SRT policy gives the SRT commander sole discretion to determine whether a call-out is warranted.

Crump describes it, "we utilized the best we had available at the time." *Crump Dep.*, p. 80 [R-1275].

D. Wagoner Made A Myriad Of Decisions In Forming A Tactical Plan.

Wagoner, as well as Lodal and Crump, made a host of additional decisions in formulating his tactical plan to apprehend Reynolds. *Crump Dep.*, pp. 80-81 [R-1275-1276]. Wagoner's tactical plan consisted of three (3) main components.

First, the SRT personnel were to do a "stack and call-out," as they were to ride to the I-75 rest stop together in a ballistically-rated armored truck, exit the truck, stand behind it for cover, and then verbally call Reynolds out of his car. *Lodal Dep.*, p. 48 [R-1299]; *Crump Dep.*, pp. 28; 45; 49 [R-1262, 1267, 1268]. Morales' own police practices expert witness, Kevin Sutton, says it was a wise decision to use the armored truck for cover. *Sutton Dep.*, p. 30 [R-1577].

Secondly, if Reynolds would not surrender peacefully, then Crump, a trained hostage negotiator, would begin negotiations. *Crump Dep.*, p. 28 [R-1262]. Crump's very presence indicated to the officers that negotiation was part of the plan. *Lodal Dep.*, pp. 100 [R-1312]. Sutton concedes that this was proper, stating that "In most ... tactical situations ... negotiations is always probably one of the key components of the tactical operation." *Sutton Dep.*, p. 31 [R-1577].

Thirdly, if Crump's negotiation efforts were unsuccessful, then Wagoner was present on site to make further decisions about how to proceed. *Lodal Dep.*, pp. 52-53; 100 [R-1300-1301, 1312]. Wagoner's tactical plan included the following additional components:

- (1) Wagoner had three patrol officers with the SRT officers at the rest area within the inner perimeter - Kevin Wallace, Jeremy Nettles and Michael Evans – who used their vehicles to help block in Reynolds, and their vehicles provided a marked presence.
- (2) Wagoner stationed four other patrol units south of the rest area, at Exit #127, to shutdown northbound I-75 traffic to prevent harm to the public. *Brinegar Dep.*, p. 33 [R-1338] *Lodal Dep.*, p. 42 [R-1298].
- (3) Wagoner stationed three patrol units north of the rest area, at Exit #129, with spike strips, or tire deflation devices, in case Reynolds fled that direction. *Lodal Dep.*, pp. 39-42 [R-1297-1298].
- (4) Wagoner had an EMS unit staged nearby on Lexus Way in the event that injury occurred. *Wagoner Dep.*, p. 53 [R-1129].
- (5) Wagoner included a paramedic, Nick Lodal, in the armored truck with the SRT officers. *Sutton Dep.*, p. 30 [R-1577].
- (6) Wagoner chose to not use certain other available equipment, such as full-body shields or flashbangs.
- (7) Wagoner designated a rally point at the Cracker Barrel parking lot to communicate the plan to everyone.

Wagoner utilized, and did not utilize, a variety of city and county resources and equipment in this mission. Sutton admits Wagoner's plan was proper and testifies, "the initial plan as far as staging officers and things was very good." *Sutton Dep.*, pp. 44; 85-86 [R-1580, 1591].

E. Wagoner Obtained Supervisory Approval Before Proceeding.

Before leaving the GPD, Wagoner spoke with his superior officer, GPD Assistant Chief Robert Swanigan. *Affidavit of Robert Swanigan*, p. 1 [R-1755]. Wagoner relayed the details of his plan to Swanigan, and after hearing it, Swanigan testifies, "I thought it

was thorough, appropriate, and was an excellent tactical plan, so I approved it and gave him authority to go forward with it that evening." *Swanigan Aff.*, p. 2 [R-1756].

Swanigan then had telephone conversations with GPD Chief Mike Bosse, wherein Chief Bosse was advised of the details of Wagoner's tactical plan. *Affidavit of Michael D. Bosse*, pp. 1-2 [R-1758-1759]. Chief Bosse also thought the plan was appropriate and authorized Wagoner to proceed. *Bosse Aff.*, p. 2 [R-1759]. Sutton admits that it is standard protocol to obtain supervisory approval, known as "command notification," and this was prudent by Wagoner. *Sutton Dep.*, pp. 46; 88-89 [R-1581, 1591-1592].

F. At The Cracker Barrel Rally Point, Wagoner Explained The Plan.

All SRT and patrol personnel involved in this incident were present at the Cracker Barrel rally point, where Wagoner discussed the plan, in detail, in a huddle. *Enricco Dep.*, p. 87 [R-1168]; *Lodal Dep.*, p. 59 [R-1302]. GPD Sergeant Gary Crump describes that Wagoner communicated the plan to everyone as follows:

- Q Let's get down to specifics. What specifically did Wagoner say during that debriefing at the Cracker Barrel?
- A I'm not going to be able to quote him.
- Q All right. So generally what you just testified to is what you recall him saying?
- A It was very -- it felt very bullet point of we're going to the rest area for a robbery suspect. Federal agents are there with eyes on. We're going to be in this vehicle. We're going to pull up behind Reynolds' vehicle. Exit our vehicle, go to the rear of our vehicle, stack up there, call Reynolds out. If he does not comply with the call out from us to come out to him, I was available to then attempt to establish communication for negotiation purposes. At which point, depending on Reynolds' actions and what we found would dictate the next steps. That was relayed to everybody that was there.

Crump Dep., pp. 52-53 [R-1268-1269]. Lodal says that the plan was clear, understandable, reasonable, and appropriate. *Lodal Dep.*, p. 96-97 [R-1311-1312]. Enrico says that the plan was clearly and unambiguously communicated, and no one expressed any uncertainty. *Enrico Dep.*, pp. 88-89 [R-1168-1169].

The opportunity to ask questions was provided, and no one asked any questions. *Lodal Dep.*, pp. 95-97 [R-1311-1312]. Wagoner discussed the plan in the huddle for 4-5 minutes. *Brinegar Dep.*, p. 79 [R-1349]. The officers were at Cracker Barrel for a total of five minutes thirty seconds. *KSP Cracker Barrel Surveillance Video Report, KSP 1069*, p. 30 [R-1764].

The plan was not just conveyed to GPD officers, but to Scott County officers as well. Scott County Sergeant Jeremy Nettles, testifies Wagoner went over the plan with everyone in the huddle, discussed the positioning of vehicles, explained that the SRT truck was to block Reynolds in, and advised that the officers were going to attempt to give verbal commands to call Reynolds out of his Mustang. *Nettles Dep.*, pp. 29-31; 33; 57; 70-71 [R-1382-1383, 1389, 1392]. Nettles states that there was a "stack order" given to the officers at Cracker Barrel. *Nettles Dep.*, p. 35 [R-1383]. Nettles remembers the threat matrix was discussed as well. *Nettles Dep.*, p. 27 [R-1381]. The plan was clearly communicated, he knew his job, and there was no ambiguity. *Nettles Dep.*, p. 73 [R-1393]. Nettles had no criticism of Wagoner's plan and it was consistent with his training and experience. *Nettles Dep.*, p. 73 [R-1393]. Nettles adds that when a hostage negotiator is present, as a police officer, you infer that negotiation is an element of the plan. *Nettles Dep.*, p. 74 [R-1393].

Scott County Sergeant Devon Brinegar, the SRT assistant team leader, was in the huddle as well and heard Wagoner go over the plan details, as he testifies as follows:

Q There was no discussion about the vehicle assault?

A The initial plan was to call him out of the vehicle, that was the plan.

...

Q All right. In particular on page 48, it says about -- down about, gosh, probably three-fourths of the way down, it says "We would try to call him out of the vehicle, and not approach it, and hope that he would surrender."

A Yes.

Q Do you see where I read that?

A Yes.

Q And was that the plan?

A Yes.

Brinegar Dep., pp. 32; 89-90 [R-1336-1337, 1352]. Brinegar knew that the plan was to try to call Reynolds out of the vehicle in hopes that he would surrender peacefully, and to not approach Reynolds' vehicle. *Brinegar Dep.*, pp. 89-90 [R-1352]. Brinegar heard Wagoner tell everyone where other units would be positioned and that Reynolds was armed and dangerous. *Brinegar Dep.*, pp. 84, 86 [R-1350-1351]. Brinegar says Wagoner's discussion of the plan was thorough, contained information they needed, he understood it, and he had the opportunity to ask questions. *Brinegar Dep.*, p. 80 [R-1349].

Scott County deputy Jordan Jacobs was present at the rally point and he too heard Wagoner go over the plan. *Jacobs Dep.*, pp. 112-113; 117; 212 [R-1209-1211, 1234].

G. Some Officers Wore Tactical Vests And Some Did Not.

There were seven SRT officers, along with three patrol officers, for a total of ten officers located within the inner perimeter at the I-75 exit. Only five of them - EPD officers Wagoner, Enrico, Lodal, Crump and Jacobs - wore tactical vests. *Sutton Dep.*, p. 63-64 [R-1585]; *Lodal Dep.*, p. 57 [R-1302]. The other five officers - SRT officers Morales and Brinegar, and patrol officers Wallace, Nettles, and Evans - did not wear tactical vests. *Sutton Dep.*, p. 63-64 [R-1585].

Morales was questioning whether or not to wear his vest. Initially, he asked his SRT assistant team leader and co-Scott County officer, Devon Brinegar, about wearing a tactical vest. *Morales Dep.*, pp. 85-87 [R-1014]. Brinegar told Morales that it was not required and left it up to his discretion. *Brinegar Dep.*, p. 88 [R-1351].

Apparently still contemplating the issue, Morales then asked another of his Scott County superior officers, Sergeant Jeremy Nettles, whether he should wear his tactical vest, and Nettles told Morales that it was not required and was his decision. *Morales Dep.*, pp. 88-89 [R-1014-1015]. Morales never asked Wagoner about wearing a vest. *Morales Dep.*, p. 147 [R-1029].

Wagoner overheard Morales asking his fellow Scott County officers about wearing his vest. *Wagoner Dep.*, p. 39 [R-1125]. Wagoner chose not to get involved in that decision between two Scott County officers because he did not believe that he had the authority to intervene to tell them what to do in a patrol level function. *Wagoner Dep.*, pp. 40; 80 [R-1125, 1135].

Morales had his vest with him in his vehicle, and saw that the GPD officers had theirs on, but he decided not to wear it. *Morales Dep.*, pp. 85-87, 94 [R-1014, 1016]. In

addition to vests, the SRT members had been issued helmets. Morales testified that he wore his helmet “in risky situations,” but that he did not consider taking his helmet with him on this particular mission. *Morales Dep.*, pp. 92-93 [R-1015-1016].

H. The Route From Cracker Barrel To The I-75 Exit Rest Area.

The SRT team boarded the armored truck and drove a short distance from Cracker Barrel to the I-75 rest area, which took seven minutes, thirty-two seconds. *Sutton Dep.*, p. 68 [R-1586]. The SRT officers had another opportunity to ask questions en route, and no one did so. *Sutton Dep.*, pp. 68-69 [R-1586-1587].

Once they arrived at the rest area, Wagoner parked the SRT truck directly behind Reynolds’ vehicle to block his rear egress. *Sutton Dep.*, pp. 33-34 [R-1578]; *Photograph of Scene, KSP1069*, p. 45 [R-1765]. Two patrol vehicles pulled in to Reynolds’ left and right respectively to block side egress. The SRT team then exited the armored truck via a side door. *Lodal Dep.*, p. 71 [R-1305].

I. Jacobs Compromised The Plan By Running At Reynolds' Vehicle.

For unknown reasons, Jordan Jacobs, the first SRT officer out of the armored truck, immediately ran on to Reynolds' Mustang. *Jacobs Dep.*, pp. 54; 61-62 [R-1195, 1197]. The idea to stack behind the SRT truck and call out Reynolds never entered his mind. *Jacobs Dep.*, p. 111 [R-1209]. In retrospect, Jacobs admits that would be a reasonable way to have approached this incident. *Jacobs Dep.*, p. 111 [R-1209].

Jacobs compromised the plan by running directly toward the driver's side door of Reynolds' Mustang. *Jacobs Dep.*, pp. 62-64 [R-1197]. Appellee Officer Joey Enricco describes it as follows:

- Q When you exited the SRT van at the rest area, how did you know where it was that you were to go, specifically?
- A Because Lieutenant Wagoner told us the plan, sir.
- Q Okay. And the plan was to approach the suspect from the rear of the suspect's car?
- A No, sir.
- Q No. Okay. Describe -- tell me again what the plan was just exactly where you were to go.
- A Sure. The plan was to stand for cover behind the SRT truck so we could attempt to call the subject out of the vehicle, initially, sir.
- Q Okay. Was that done?
- A No, sir.
- Q Why not?
- A I was following two sheriff's deputies and they went ahead and went towards straight to the vehicle immediately.

Enricco Dep., pp. 41-42 [R-1157]. As Enricco and Sutton state, "the plan was compromised at that time." *Enricco Dep.*, p. 46 [R-1158]; *Sutton Dep.*, p. 73 [R-1588]. Morales was second in line, followed Jacobs' lead. *Morales Dep.*, p. 112 [R-1020]. The remaining officers followed, not wanting to leave fellow officers uncovered. *Sutton Dep.*, pp. 72-73 [R-1587-1588].

J. Breaking The Mustang's Windows Was Not Part Of The Plan.

Nettles then ran to the passenger side of Reynolds' vehicle, which Wagoner did not authorize, and his doing so presented a dangerous cross-fire situation with officers standing on both sides of the Mustang. *Wagoner Dep.*, p. 58 [R-1130].

Nettles tried to break the passenger window with his asp unsuccessfully, which was not part of the plan. *Lodal Dep.*, pp. 78-79 [R-1307]; *Enricco Dep.*, p. 91 [R-1169]. Jacobs used his asp to try to break Reynolds' driver's side window, which was not the plan. *Jacobs Dep.*, p. 69 [R-1199]. Morales tried twice to break the driver's window, and on the second attempt did so, which also was not part of the plan. *Lodal Dep.*, pp. 79-80 [R-1307]; *Morales Dep.*, p. 162 [R-1033]. Sutton admits the breaking of the Mustang windows with asps was not the plan. *Sutton Dep.*, pp. 73-74 [R-1588]. Morales also tried to open the door of the Mustang as some point, which too was not part of Wagoner's plan. *Sutton Dep.*, p. 89 [R-1592].

K. Reynolds' Resistance Dictated The Officers' Response.

The officers shouted at Reynolds "the whole time" and said, "police, show me your hands" loud enough for Reynolds to hear. *Morales Dep.*, pp. 118-119 [R-1022]; *Lodal Dep.*, p. 76 [R-1306]; *Little Dep.*, p. 35 [R-1412]. Reynolds was given the opportunity to surrender peacefully. *Little Dep.*, p. 58 [R-1418]; *Sutton Dep.*, p. 76 [R-1588]. Reynolds remained resistant. *Enricco Dep.*, p. 91 [R-1169].

Instead of complying, Reynolds attempted to start his vehicle to back out. *Morales Dep.*, p. 119 [R-1022]. Enricco saw his taillights illuminate. *Enricco Dep.*, pp. 91-92 [R-1169]. Brinegar saw the taillights, knew the vehicle was in reverse, and this caused the officers to respond differently than planned. *Brinegar Dep.*, pp. 48; 113 [R-1341, 1358].

Morales then saw Reynolds reach for a gun in his center console and attempt to load a magazine. *Morales Dep.*, pp. 122-124; 127 [R-1023, 1024]. Morales yelled "gun," told Reynolds to drop it, yet Reynolds refused. *Morales Dep.*, p. 127 [R-1024]. Reynolds

was dictating the officers' response, and he introduced deadly force into this incident. *Morales Dep.*, p. 151-152 [R-1030].

L. The Intentional Shooting Of Reynolds And The Accidental Shooting Of Morales.

Sutton admits the use of deadly force was justified, and once Reynolds brandished a gun, the officers were acting in self-defense and had a right to assume Reynolds' weapon was loaded. *Sutton Dep.*, pp. 78; 118; 209-210 [R-1599, 1622]. Morales fired first. *Morales Dep.*, pp. 129; 131 [R-1025]. Jacobs and Enricco fired multiple shots. Reynolds never got off a shot. *Morales Dep.*, p. 132 [R-1025]. Wagoner never fired a shot. *Morales Dep.*, p. 154 [R-1031].

During this incident, Morales moved at least three times - toward Reynolds' vehicle, to his left after he struck the window with his asp, and he took a step to his right during the shooting. *Morales Dep.*, p. 132; 135 [R-1025, 1026]. Sometime during the gunfire, Morales was accidentally shot by friendly fire. Lodal, a trained paramedic that Wagoner included in the mission, saw Morales stumble, went toward him, dragged him to a place of safety, and began rendering first aid. *Lodal Dep.*, pp. 82-83 [R-1308].

Because the bullet could not be removed from his back, no one knows who shot Morales. *Little Dep.*, p. 69 [R-1421]. It is undisputed that no one intentionally shot him – this was an accident. *Sutton Dep.*, p. 92 [R-1592].

M. This Was A Tense, Dangerous, and Rapidly-Evolving Incident.

From the beginning of this incident through the shooting, there was an urgency to try to apprehend a dangerous bank robber as quickly as possible. *Crump Dep.*, p. 81 [R-1276]; *Jacobs Dep.*, p. 53 [R-1195]. This sense of urgency continued at the I-75 rest area,

as the events there were tense, dangerous and rapidly-evolving. *Lodal Dep.*, p. 99 [R-1312]; *Sutton Dep.*, p. 78 [R-1589].

Dispatch records indicate that the entire encounter at the rest area lasted only thirty-four seconds. *Detail Call for Service Report, KSP 2158* [R-1766]; *Sutton Dep.*, p. 79 [R-1589]. The shooting itself lasted only 2-3 seconds. *Sutton Dep.*, p. 91 [R-1592].

These officers, including Wagoner, had to make decisions on-the-spot and had to react quickly to what Reynolds was doing. *Lodal Dep.*, pp. 106-107 [R-1314]. Morales admits that these events occurred fast, as he testified, under oath, as follows:

Q From the time you all exited that truck, I take it the situation was fairly rapidly evolving?

A Yes.

Q And you had to make quick decisions on what to do for officer safety and to apprehend the subject?

A Correct.

Morales Dep., p. 140 [R-1027]. Kentucky State Police ["KSP"] investigator Claude Little testifies as follows:

Q In the fourth line you refer to this being a, "Rapidly unfolding, dynamic and stressful situation." Tell me why you characterized it that way.

A Because that's exactly what it was. This -- once Mr. Reynolds presented a weapon, this was -- the officers had exited the SRT vehicle. They were given verbal commands. It was unfolding rapidly, dynamic, people were moving and absolutely was stressful because they were faced with a deadly force threat.

Q And they had to use the best judgment that they could in those rapidly evolving circumstances?

A Yes, sir.

Little Dep., pp. 58-59 [R-1418]. The events at the rest area lasted mere seconds, and these officers were faced with a dangerous, and ultimately a deadly, situation. *Little Dep.*, pp. 32; 55 [R-1411, 1417].

N. The KSP Post-Incident Investigation.

Claude Little, an investigator with the KSP Critical Incident Response Team, conducted a post-incident criminal investigation of this shooting. *Little Dep.*, pp. 7-9; 74; 96 [R-1405-1406; 1422; 1427] Little found nothing wrong with Wagoner's plan and states that it was adequate for this operation. *Little Dep.*, pp. 73-74 [R-1422]. He did not find that any officer committed any criminal acts. *Little Dep.*, pp. 73-74 [R-1422].

After the incident, Little did round counts for the weapons involved and found that Morales fired six shots, Jacobs fired four, and Enricco fired five shots. *Little Dep.*, pp. 48; 50-53 [R-1415-1417]. There was a good deal of movement of the officers and that he could not pinpoint the exact position of the officers at the time shots were fired. *Little Dep.*, p. 56 [R-1417]. Six (6) loaded magazines of ammunition and alcohol were found inside Reynolds vehicle. *Little Dep.*, pp. 20; 39; 59 [R-1408, 1413, 1418].

O. This Litigation And Procedural History.

On September 6, 2019, Morales filed a complaint in the Scott Circuit Court against Defendants Enricco, Wagoner, and the City of Georgetown. The Complaint asserts a single count of negligence against the Defendant Wagoner. *Complaint*, p. 13-14 [R-26-27]

On December 27, 2021, after two years of discovery, Judge Privett granted Wagoner's motion for summary judgment on the basis of qualified official immunity, as well as similar motions filed by Appellees Enrico and the City. *Opinion*, p. 37 [R-2905].

On May 12, 2023, the COA issued its opinion granting qualified official immunity to Wagoner for his discretionary acts related to five of Morales' alleged seven claims against him. *COA Opinion*, pp. 16-17; 26, .

On June 6, 2023, Morales filed a motion for discretionary review.

On June 9, 2023, Wagoner filed a motion for discretionary review relating to the two alleged claims on which we was not found to be immune - enforcement of training attendance and failure to make sure that all officers wore tactical vests.³

On September 20, 2023, the Kentucky Supreme Court granted discretionary review in this matter.

ARGUMENT

The COA granted qualified official immunity to Wagoner for his decisions relating to the following five issues:

- (1) Creating his tactical plan
- (2) Communicating his tactical plan
- (3) Executing his tactical plan
- (4) Supervising this incident generally
- (5) Selection of training topics

COA Opinion, pp. 16-17; 26.⁴ Morales now appeals these five rulings. These COA rulings should be affirmed because Wagoner was exercising discretion for each of them.

³ Those issues are addressed in Supreme Court Case No. 2023-SC-0265.

⁴ The COA denied Wagoner was entitled to immunity for his decision not to mandate that these officers wear tactical vests and for his decisions about enforcing SRT officer training attendance. Those issues are addressed fully in Wagoner's Appellant's brief filed in Supreme Court Case No. 2023-SC-0265.

I. QUALIFIED OFFICIAL IMMUNITY BARS ALL CLAIMS AGAINST WAGONER.

A. The Qualified Official Immunity Standard.

Qualified immunity protects all but the plainly incompetent and those who knowingly violate the law. *Kareken v. Kehrt*, WL 1649105 (Ky. App. 2012).

Qualified official immunity protects government officials exercising discretion from second-guessing of their good faith decisions made in difficult situations. *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011). An official sued in his/her individual capacity enjoys qualified official immunity, which affords protection for good faith judgment calls made in a legally uncertain environment, and officials are not liable for bad guesses in gray areas. *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006).

Qualified official immunity is not just a defense to liability, “but also from suit itself.” *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010). Public officers are entitled to qualified official immunity for acts or omissions that are (1) a discretionary act or function, (2) made in good faith, and (3) within the scope of the employee's authority. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

Discretionary acts involve the exercise of judgment, personal deliberation and decision-making. *Lawrence v. George*, WL #2470985 (Ky. App. 2012), unpublished, Appendix #3. In contrast, ministerial acts involve only obedience to the orders of others or the execution of specific acts “without regard to his or her own judgment or opinion concerning the propriety of the act to be performed.” *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014).

B. It Is Undisputed That Wagoner Was Acting Within The Course And Scope Of His Employment And In Good Faith.

There is no proof, or allegation, that Wagoner was not acting within the course and scope of his employment or that he acted in bad faith. These issues are undisputed.

C. The SRT Policy Does Not Transform Discretionary Acts Into Ministerial Ones.

Morales argues that because the GPD had a written policy stating that SRT commanders were to form a plan for official SRT call-outs, which this obviously was not,⁵ that Wagoner had a ministerial duty to do so. *Morales' Brief*, p. 14. Morales is incorrect, and nothing in the joint SRT policy transforms Wagoner's decisions into ministerial acts.

This issue was addressed in *Day v. City of Henderson*, WL 1882286 (Ky. App. 2014), *unpublished*, Appendix #4, in which the COA affirmed summary judgment in favor of a K-9 police officer who was engaged in discretionary acts, despite the fact that his city police department had a written policy that guided his actions. The COA stated as follows:

While a written policy was in place for using canine units, the court found that this did not transform the discretionary acts into ministerial acts. The officers were required to make moment by moment decisions in a decidedly fluid situation taking into account multiple factors. These details do not go to the execution of a ministerial duty; instead, they go to the heart of deciding what actions need to be taken.

Id. at 5. Similarly, Wagoner was deciding what actions needed to be taken, and he was required to make "moment by moment" decisions in a "decidedly fluid situation taking into

⁵ The reasons why this clearly was not an SRT call-out are discussed more fully in Wagoner's Appellant brief filed in Supreme Court Case No. 2023-SC-0265.

account multiple factors." As was the case in *Day*, the presence of a written policy does not transform Wagoner's discretionary acts into ministerial ones.

D. Wagoner Exercised Discretion In Formulating, Communicating, And Executing His Tactical Plan.

Wagoner had to think and make decisions. There were no standard rules and no playbook for Wagoner to go by. There was no pre-conceived operational plan for Wagoner to follow regarding how to apprehend an armed and dangerous bank robber at an I-75 exit. This situation was unique and fact-sensitive. Wagoner was not just following orders or acting robotically, but used his mind to make decisions, create, and devise an appropriate tactical plan. In response to questioning regarding Wagoner's plan, GPD Sergeant Nick Lodal testifies as follows:

Q Okay. And would you agree that he [Wagoner] was the one that was **making decisions** with respect to this mission?

A Yeah. Like I said earlier, Sergeant Crump and I as patrol supervisors got everything started in terms of coming up with what we felt was the right plan. And then we handed it over to Lieutenant Wagoner as not just the SRT commander, but he was also the ranking officer on duty at the time.

Lodal Dep., p. 57 [R-1302]. [emphasis added]

Wagoner made a host of decisions. Initially, he decided that the GPD would get involved to help Daniel apprehend Reynolds. Wagoner decided it was best to try to apprehend Reynolds quickly, rather than wait and risk prolonged danger to the public. In quasi-judicial fashion, Wagoner had to balance the need for quick apprehension with the benefits of taking more time to plan.

With regard to personnel, Wagoner decided to use both SRT personnel and regular patrol units. Wagoner decided in what manner to use them, and where to position them. Wagoner decided to include a hostage negotiator and a medic.

With regard to equipment, Wagoner decided to use the ballistically-rated SRT armored truck. He decided not to use certain equipment - full-body shields, chemical weapons, or "flashbangs."

Wagoner decided to designate a rally point, thinking it was important to go over the plan with everyone at the same time. Wagoner decided what route to take from there to the rest area, and how quickly they needed to move.

His decision-making continued at the I-75 rest area. Wagoner decided to drive the SRT truck and park it to block Reynolds' path of escape to the rear. He told the patrol officers to park to the right and left to box Reynolds in and to prevent escape in those directions. Wagoner decided to let the other officers exit the SRT truck out the passenger side door before he exited.

Wagoner decided not to call Jacobs and Morales back and to follow to cover him. Wagoner decided to issue verbal commands to call Reynolds out of the vehicle. He decided not to use his asp baton to break the Mustang's windows.

When Reynolds brandished a gun, three (3) of the officers - Jacobs, Morales, Enrico - all decided to respond with deadly force and discharged their weapons. Wagoner had his pistol drawn, but decided not to fire his duty weapon. The determination of the amount of force required and the decision to use deadly force are discretionary acts. *Reich v. City of Elizabethtown*, 945 F.3d 968, 982-983 (6th Cir. 2019); *Fakhri v. Louisville-Jefferson County Metro Govt.*, LEXIS 76267 (W.D. Ky. 2020); *Nichols v. Bourbon County*

Sheriff's Dept., 26 F.Supp.3d 634 (E.D. Ky. 2014)(the determination of the amount of force required to effect an arrest is a discretionary act); *Case v. Sanders*, LEXIS 103949 (E.D. Ky. 2018)(trooper who shot and killed a suspect was entitled to qualified official immunity from liability for Kentucky state-law battery claim because he was engaged in a discretionary act when he used force); *Gambrel v. Knox Co.*, WL 1457296 (E.D. Ky. 2018)(officers who shot and killed a suspect were entitled to qualified official immunity against all Kentucky state law claims because “there can be no argument that the defendants’ actions were anything other than discretionary.”)

After the shots were fired, Wagoner decided to order the officers to pull Reynolds out of his vehicle. As a command-level officer in charge of this mission, Wagoner was continually gathering facts and evaluating the information he obtained so that he could make good judgment calls in a tense, dangerous, and rapidly-evolving situation.

Throughout the formulation, communication, and execution stages of his plan, Wagoner was using his brain and was engaged in mental processes. The Scott Circuit Court stated with regard to Wagoner as follows: "The Court finds that the actions undertaken by Lt. Wagoner during the September 11, 2018, incident were discretionary in nature." *Opinion*, p. 31 [R-2899].

Wagoner's discretionary acts are immune. The common law doctrine of qualified official immunity bars all of Morales' negligence claims against Wagoner.

E. Morales' Expert Sutton Concedes Wagoner Was Engaged In Discretionary Acts Regarding His Tactical Plan.

Interestingly, Morales and his own expert witness are not on the same page on this issue. Morales argues that Wagoner's formulation of a tactical plan was a ministerial act.

Morales Brief, p. 14. However, his retained police practices expert witness, Kevin Sutton, contradicts this argument and stipulates that Wagoner was making decisions, as follows:

Q As a tactical officer -- you have conducted tactical operations in your career, I'm assuming?

A Yes.

Q And you've probably been the lead person or the highest ranking person in the team at times?

A For 17 years.

Q Fair enough. In doing so, you have to make certain decisions about what to do in a tactical operation and what not to do in a tactical operation?

A Right.

Q And you might make decisions differently than another command officer might make; would you agree with that?

A Yes.

Q Okay. And can there be more than one successful way to construct a plan to apprehend a person in a tactical situation such as this?

A Yes. There's always -- there's always multiple ways.

Q There's no one perfect plan?

A There is no perfect plan.

Q And there are multiple ways that it can be done?

A Yes.

Q And each command officer has to use his discretion and make decisions about what he or she thinks is the proper plan to make in each given situation?

A Yes, they do.

Q Those involve mental processes or thinking or your brain, do they not?

A Absolutely.

Sutton Dep., pp. 112-113 [R-1597-1598]. [emphasis added] Sutton admits that command-level officers exercise discretion in forming tactical plans. Despite Morales' protestations to the contrary, Wagoner was engaged in discretionary acts in formulating his tactical plan, as Morales' own expert admits.

F. Morales Appears To Have Conceded That Wagoner Was Exercising Discretion Regarding The Selection Of Training Topics.

The COA stated "As for Wagoner's alleged obligation to select training topics for the SRT, this obligation is discretionary in its nature." *COA Opinion*, p. 26. Morales does not seem to address the issue of selection of training topic issue in his 40-page Appellant's brief. Morales has apparently abandoned opposition to the COA's ruling on this issue.

G. Morales Has No Negligent Supervision Claims Because Wagoner Was Exercising Discretion In Supervising These Officers.

Morales' negligent supervision claims against Wagoner are also barred by qualified official immunity.⁶

In *Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010), the Kentucky Supreme Court found that supervision is not ministerial when the official is given "little or no direction or guidance on how the supervision was to be performed." *Id.* at 243. Here, neither of Wagoner's

⁶ Morales' claim that Wagoner should have made all officers wear tactical vests appears to be part of his negligent supervision claim. Those allegations are addressed fully in Appellant Wagoner's brief filed in Supreme Court Case No. 2023-SC-0265. This brief addresses Morales' other negligent supervision claim(s).

supervisors, Swanigan nor Bosse, offered any input or changes to Wagoner's tactical plan. They also did not otherwise give direction or guidance to Wagoner.

In *Rowan County v. Sloas*, 201 S.W.3d 469, 480 (Ky. 2006), a deputy jailer was tasked with supervising a group of six inmates on work detail cutting down trees and brush by the roadside, and was provided with no guidance or clear directives as to how to do so. *Id.* at 480. The deputy had to watch them, try to anticipate what they might do, correct them as necessary, assign their duties, and see that the work was performed. The Kentucky Supreme Court deemed his supervisory responsibility to be a "complex and highly discretionary task." *Id.*

Likewise, Wagoner's ongoing supervisory responsibilities were a "highly complex and discretionary task." Initially, Wagoner formulated and communicated a plan. He then went along on the mission to supervise its execution. Once the officers arrived at the I-75 rest stop and the initial plan was compromised, Wagoner was then faced with more supervisory decisions.

For example, Wagoner did not order Jacobs to come back, but decided to follow Jacobs to the Mustang, decided to call Reynolds out of his vehicle, and Wagoner decided not to use his asp baton to break the Mustang's windows or to tell the other officers to cease doing so. Wagoner was right there, with his men near the Mustang, supervising this entire incident. Once Reynolds brandished a gun, Wagoner did not tell the officers to cease fire, believing that a deadly force threat merited a deadly force response. Wagoner decided not to shoot his duty weapon.

Regardless of whether one agrees or disagrees with his decisions, Wagoner was clearly making them throughout this incident in supervising these officers.

H. Wagoner's Decisions Should Not Be Judged In Hindsight.

In a qualified immunity analysis, the decisions of governmental officials are judged at the time they are made, based upon information and evidence available at that time, not with the 20/20 vision of hindsight. *Darrah v City of Oak Park*, 255 F.3d 301 (6th Cir. 2001). The law prohibits judicial Monday-morning quarterbacking.

In *Graham v. Connor*, 490 U.S. 386, 388 (1989), the Supreme Court denounced courts for applying hindsight in qualified immunity cases, stating as follows:

Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.

Id. at 396-397. This hindsight principle has no place in the world of qualified official immunity jurisprudence, as the following illustrates:

A court should avoid substituting personal notions of proper police procedures for the instantaneous decisions of officers at the scene, and should never allow the theoretical, sanitized world of our imaginations to replace the dangerous and complex world policemen face every day, as what constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Boyd v. Baeppler, 215 F.3d 594, 602 (6th Cir. 2000); *Smith v. Frelund*, 954 F.2d 343, 347 (6th Cir. 1992). The Court's focus in a qualified immunity analysis should be officer-centric - "to see what they saw and hear what they heard" at the time. *Abbott v. Sangamon County, Ill.*, 705 F.3d 706, 714 (7th Cir. 2013). Therefore, Wagoner's decisions should be

analyzed based upon the limited information that he knew at the time and given the exigency of the situation.

II. HAUGH ENTITLES WAGONER TO IMMUNITY.

A. Haugh Holds That A SWAT Commander's Decisions Are Immune.

In *Haugh v. City of Louisville*, 242 S.W.3d 683 (Ky. App. 2007), Louisville city police officers went to serve warrants and found Terry Hines armed and barricaded inside his house. *Id.* at 684-685. A SWAT team arrived, and after negotiations failed, the SWAT captain made a host of decisions, including a decision to storm the residence to make a quick arrest rather than to try to prolong the encounter and wait Hines out. *Id.* at 685.

While storming of the residence, Hines was seriously injured, and later succumbed to his injuries inflicted by the officers. *Id.* His estate filed a wrongful death action against the officers and criticized a myriad of the SWAT captain's decisions, such as his decision to approach the residence, the timing of his decisions, his chosen method of entry, and his decision to enter the home of a mentally ill man. *Id.*

The Jefferson Circuit Court found the SWAT commander was entitled to qualified official immunity for all of his decisions. The COA affirmed, holding that "the law affords qualified immunity to the discretionary acts of peace officers performed in an official capacity thereby shielding them 'from liability for good faith judgment calls made in a legally uncertain environment.'" *Id.* at 686.

B. Wagoner's Planning Actions Should Not Be Split.

Significantly, the *Haugh* Court did not parse the SWAT commander's actions or break them down into parts and then micro-analyze each of them separately. Instead, the COA found that all of his tactical decisions were immune.

Interestingly, the estate in *Haugh* tried to do exactly what Morales attempts to do here – separate the SWAT commander's actions into many parts and then criticize each of them in hopes that one or more would be deemed ministerial acts.

Morales tries to splinter the planning issues into three parts - creating it, communicating it, and executing it. Morales also attempts to split his negligent supervision claim into two parts - supervising the incident and mandating vest-wearing. Morales splices his training claim into two parts - selection of training topics and enforcement of training attendance. By doing so, Morales attempts to transform a single negligence claim about planning, supervision, and training into seven different claims against Wagoner.

The *Haugh* Court did not splinter the negligence claims and refused to limit the SWAT commander's immunity protections to only certain types of decisions. For example, they did not say the SWAT captain's decision to storm the residence was discretionary, but his decision to attempt to apprehend a mentally ill man was ministerial. Under *Haugh*, all of Wagoner's command-level decisions are "within police discretion" and are immune, not just some of them.

C. The Plaintiff's Expert's Concessions Were Highly Persuasive.

The *Haugh* Court found it persuasive that the plaintiff estate's expert witness admitted that the SWAT commander was engaged in discretionary acts, stating as follows:

Although the estate's retained expert testified in his deposition that the arresting officers could have chosen to wait Hines out, essentially employing a longer-term blockade or siege-style strategy, he also indicated that the decision to storm Hines's residence with nonlethal force was an action within police discretion. In light of the testimony of the estate's own retained expert, we fail to see any possible material issue of fact defeating the arresting officers' claim to qualified immunity. Clearly, the officers acted within the scope of their official discretion.

Id. at 686-687. The testimony from the estate's own retained expert established that the SWAT commander had alternatives and decided between them. In other words, he exercised discretion. In *Haugh*, the estate expert's testimony rendered that issue an undisputed fact.

That same phenomenon is present here. Morales' police practices expert, Kevin Sutton, testifies unequivocally that Wagoner was engaged in discretionary acts, as follows:

Q And each command officer has to use his discretion and make decisions about what he or she thinks is the proper plan to make in each given situation?

A Yes, they do.

Q Those involve mental processes or thinking or your brain, do they not?

A Absolutely.

Sutton Dep., pp. 112-113 [R-1597-1598]. It is undisputed that Wagoner's command-level decisions regarding forming and executing his plan were discretionary acts. The Scott Circuit Court properly noted this fact, and stated the fact that Morales' expert Sutton concedes that Wagoner's formulation and execution of his plan was a discretionary act is

an important consideration, and was in *Haugh*. *Scott Circuit Court Opinion*, p. 31 [R-2899].

D. *Haugh* Has Been The Law Since 2007.

Haugh was cited approvingly in 2014 in *Day v. City of Henderson*, WL 1882286 (Ky. App. 2014), *unpublished*, wherein the COA affirmed an award of summary judgment to an individual city police officer and the city, stating as follows:

This court addressed a similar situation in *Haugh v. City of Louisville*:

We affirm the circuit court's determination that the peace officers' decision to storm Hines's residence and to use nonlethal force to quickly subdue him is entitled to qualified immunity, because, at minimum, it was a good faith judgment call made in legally uncertain circumstances. *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007).

We believe that as in *Haugh*, *sub judice* Officer Hargitt was entitled to qualified immunity in the usage of a police dog in conducting a search of a business with a possible burglary because, at a minimum, it was a good faith judgment call made in legally uncertain circumstances.

Id. at 5. The COA in *Day* found an individual canine officer who was engaged in discretionary acts was immune, despite the presence of a written policy that guided his actions. *Id.* at 2; 5.

In 2019, the Western District decided *Cleveland v. Louisville Metro Gov't*, WL 1058154 (W.D. Ky. 2019) and cited *Haugh* in dismissing negligence claims against an individual police officer on the basis of qualified immunity, stating as follows:

Plaintiffs' negligence claim involves the actions leading up to the shooting. On this issue, all parties agree that *Haugh v. City of Louisville*, 242 S.W.3d 683 (Ky. App. 2007) governs. In *Haugh*, a SWAT team stormed the suspect's residence, resulting in his death. *Id.* at 685. The court noted that the plaintiff's retained

police expert testified that the arresting officers could have made different tactical choices. *Id.* at 686. However, the court concluded that the officers were entitled to qualified immunity because their decision was based on “a good faith judgment call made in legally uncertain circumstances.” *Id.*

...

It is clear that the decision of the officers to advance on a subject's home is a discretionary act within the officers' duties. *Haugh*, 242 S.W.3d at 686–87. Therefore, the burden falls on Plaintiffs to demonstrate that it was not clearly established that the officers could not advance. For that proposition, they cite no cases. Indeed, the Plaintiffs' own police practices expert noted that Smith would have been the “officer in charge” so it was proper for “the other officers, without having any conversation with Smith, [to] just basically follow Smith.” DN 80-15 at 18.

...

Like *Haugh*, the decision of the officers to advance on the house was a good faith judgment call made in legally uncertain circumstances and they are entitled to qualified immunity.

Id. at 10. Citing *Haugh*, the Western District in *Cleveland* held that good faith judgment calls made in legally uncertain environments about planning to, and apprehending, a suspect are immune.

Haugh is the law of the land, and has been for sixteen years. As the Scott Circuit Court stated, “The Court is persuaded that the *Haugh* case, discussed *supra*, is controlling here.” *Circuit Court Opinion*, p. 28 [R-2896]. Kentucky law is well-settled that a command-level SWAT officer's decisions made in tense, dangerous situations about when, where, how, and in what manner to apprehend a dangerous suspect are immune.

III. WAGONER IS ENTITLED TO IMMUNITY UNDER THE CALGA.

A. The CALGA Applies To Individuals.

Morales erroneously argues that the Kentucky Claims Against Local Governments Act ["CALGA"] is applicable only to the local government entity itself and, that as an individual, "Wagoner is not protected by statutory immunity." *Morales' Brief*, p. 24. The COA refuted that argument and correctly found as follows:

Our jurisprudence has interpreted the scope of CALGA immunity broadly, and we previously determined CALGA immunity applies to local government officials. *See Godman v. City of Fort Wright*, 234 S.W.3d 362 (Ky. App. 2007)(affirming application of CALGA immunity to a city and its officials for revocation of a temporary access point to the appellants' real property).

COA Opinion, p. 28. The CALGA's immunity protections apply to individuals. See also, *Lease v. City of Vine Grove*, WL 6721273 (Ky. App. 2018), *unpublished*, Appendix #5, (city and city building inspector individually both were immune from liability under KRS 65.2003).

B. The CALGA Immunizes Discretionary Acts.

The CALGA immunizes cities, and city officials, against claims involving certain acts. It states, in relevant part, as follows:

Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:

(3) **Any claim** arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:

...

(d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or

KRS 65.2003(3)(d), [R-1772]. The CALGA statute specifically applies to "**any claim**" if the actions of the city official involved the exercise of judicial, quasi-judicial, legislative, quasi-legislative authority, or the use of judgment or discretion.

As is described hereinabove, Wagoner was a command-level officer making a myriad of judgment calls in formulating and carrying out a tactical operational plan during a tense, dangerous, rapidly-evolving situation. His discretionary acts are immune under the CALGA statute. *KRS 65.2003(3)*.

C. The CALGA Immunizes Decisions About The Use Of City Resources.

The CALGA specifically immunizes a public official's decisions if they involve "The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources..." *KRS 65.2003(3)(d)*.

Throughout this incident, Wagoner made a host of decisions related to using, and not using, city and county resources. Wagoner decided to use a variety of personnel - SRT team members, patrol officers, a negotiator, and a paramedic. Wagoner chose to use certain equipment, such as the armored truck, but not other equipment chemical weapons, flashbangs, and shields. *Sutton Dep.*, pp. 38-39 [R-1579].

Sutton concedes that Wagoner had to decide what resources to use and what resources not to use with regard to personnel and equipment. *Sutton Dep.*, p. 38 [R-1579]. Wagoner's decisions about the use of city and county resources are specifically immune under *KRS 65.2003(3)(d)*.

IV. RIGHT OR WRONG, WAGONER'S DISCRETIONARY ACTS ARE IMMUNE.

Qualified immunity protects public officials from liability for “all but the plainly incompetent or knowingly [illegal]” conduct. *Malley v. Briggs*, 475 U.S. 335 (1986). The actions of police officers, even if wrong, are not actionable if they were exercising discretion. *Calloway v. Beasley*, WL 8489989 (W.D. Ky. 2015); *Jeffers v. Heavrin*, 10 F.3d 380 (6th Cir. 1993)(qualified immunity is broad enough to encompass police errors in judgment). Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments. *Volentine v. Sheehy*, WL 2052301 at 3 (Ky. App. 2023), *unpublished*, Appendix #6 (deputy sheriff Volentine's belief that he complied with this SOP entitles him to qualified immunity, even if his belief was mistaken).

For the sake of argument, even if Wagoner made improper decisions in formulating and executing his plan, or in supervising these other officers, he is still immune. Wagoner is not conceding that his decisions were mistaken; however, even if they were, his decisions are still discretionary acts and he is still entitled to immunity.

V. DENYING IMMUNITY TO WAGONER WOULD RAISE SERIOUS PUBLIC POLICY CONCERNS.

This mission ended in the tragic death of Reynolds and with a tragic injury to Morales. Those tragic outcomes do not necessarily mean that anyone was negligent, or that qualified official immunity does not apply.

There is no proof in this case that Wagoner was acting in bad faith, or with an evil or sinister motive. When our public officials are making decisions in good faith in doing their jobs, the important doctrine of qualified immunity protects them, and rightly so.

Our society depends upon first responders being able to react quickly and to make good faith decisions. If the COA's opinion granting immunity to Wagoner is reversed as to these five claims, then Wagoner would be exposed to personal, individual liability for his good faith decisions made on the job. As Justice Cunningham deftly stated:

One would have to live on the dark side of the moon today to not know the following, unfortunate truth. Law enforcement officers are under siege. Today, with our majority opinion, we break down a lawful barrier that protects these brave men and women from frivolous and unwarranted lawsuits. From henceforth, our detectives and police officers must look over their right shoulder for physical danger, and over their left shoulder for time consuming and emotionally draining lawsuits. With this extra distraction impeding their steps, our state becomes less safe.

Martin v. O'Daniel, 507 S.W.3d 1, 12 (Ky. 2016), J. Cunningham, *dissenting*. If their immunity protections are weakened or rendered illusory, police officers and government employees will be disinclined to serve if they will face personal financial responsibility for good faith decisions made on-the-job. As Justice Cunningham opined, limiting or restricting the reach of qualified official immunity makes our state less safe.

CONCLUSION

Morales asks this Court to ignore *Haugh v. City of Louisville*, a case that has been the law for over sixteen years. *Haugh* holds that all of a SWAT commander's good faith decisions in planning, executing, and supervising a tactical mission to apprehend a dangerous subject are discretionary acts. In *Haugh*, the plaintiff's expert admitted the SWAT commander was engaged in discretionary acts. Morales' police practices expert Sutton makes the same admissions about Wagoner in this case.

Thus, it is undisputed that Wagoner was (1) engaged in discretionary acts, (2) in good faith, and (3) while performing his public duties. These three elements of *Yanero* are met, and Wagoner is therefore entitled to qualified official immunity.

The evidence in this case shows that Wagoner made a plethora of decisions quickly in a time-sensitive situation that went from dangerous to deadly. As a matter of public policy, command-level officers like Wagoner must be able to make such decisions without fear of personal liability exposure in subsequent civil litigation.

The decision of the Scott Circuit Court properly granted Wagoner immunity on all claims. The decision of the COA, insofar as it granted Appellee Wagoner qualified official immunity on five issues related to formulating, executing, and communicating his tactical plan, in selecting training topics, and in supervising other officers, should be affirmed.

This the 5th day of January, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Appellee was produced in Microsoft Word, 12-point Times New Roman font and contains 9,099 words, excluding the parts of the brief exempted by RAP 15(E), thereby complying with the limitations set forth in RAP 31.

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