No. 18-99

IN THE

Supreme Court of the United States

JOHNNY BARNES, PETITIONER

v.

JOSEPH GERHART ET AL, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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The Gerharts' oppositional brief makes no persuasive argument for denying certiorari. Instead, it focuses mostly on issues irrelevant to Barnes' petition and on trying to persuade this Court that the Fifth Circuit was correct. The fact remains that the Fifth Circuit's opinion is inconsistent with warnings from this Court, decisions from other Circuits, and even decisions from the Fifth Circuit itself. All of these inconsistences warrant certiorari.

I. The petition only seeks review of a Fourth Amendment unlawful entry claim, so all of the Gerharts' discussion about excessive force is misdirection.

Although the Gerharts filed a shotgun complaint in this case, the only remaining claim against Barnes is a Fourth Amendment unlawful entry claim. Much of the oppositional brief touts alleged mistreatment of Brett Gerhart at the hands of Deputy McAlpin, *see, e.g.*, Gerhart Br.2-4, but Deputy McAlpin has not sought review over anything the Fifth Circuit decided. The discrete issues here are whether Barnes' mistaken entry was "reasonable" under the Fourth Amendment or whether, at a minimum, he was entitled to qualified immunity. Any attempt to paint Barnes in a negative light is unfounded, for the Gerharts readily admit that Barnes was last to enter their home behind the other two officers and that Barnes promptly apologized and informed the other officers to leave the Gerharts home once he discovered he was in the wrong place. *See* Pet.6.

II. The Fifth Circuit's application of the reasonable-mistake rule is incompatible with this Court's cases as well as cases from other Circuits.

The Gerharts do not dispute the governing constitutional rule – namely, that a mistaken entry does not offend the Fourth Amendment if the law enforcement officer makes "reasonable efforts" to identify the correct house. *See* Gerhart Br.7, 12. The Gerharts also do not dispute that efforts were made by Barnes to identify the correct house – namely, that he participated in a pre-operation briefing where a detailed description of the Gerharts' home was provided.[1] *See* Gerhart Br.4. The disagreement between the parties is whether the efforts that were made were reasonable or unreasonable under the circumstances.

Central to the resolution of this question is the undisputed exigent circumstance that existed. *See* Pet.App.19-20 (acknowledging that the confidential informant's safety "was undoubtedly an exigent circumstance"). The Fifth Circuit reduced Barnes' exigency argument to a footnote, stating that the confidential informant's safety was irrelevant to the reasonableness inquiry because the confidential

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[1] As explained in Barnes' petition, a glaring problem with the Fifth Circuit's opinion is the conflation of the three officers' conduct. Even though the Gerharts admit that Barnes participated in the pre-operation briefing, the Fifth Circuit lumped all of the officers together without distinguishing each's conduct. While it makes sense that making no efforts at all necessarily means that reasonable efforts were not made, that is not the case when some efforts are made. In this latter scenario, a court must determine whether the efforts that were made were reasonable or unreasonable.

informant was not in the house that the three officers ultimately entered. *Id.* The Gerharts expound upon the footnote in their oppositional brief, arguing that the exigency was irrelevant because "reasonable" efforts were not made in advance of the exigency. Gerhart Br.13. Respectfully, neither claim makes much sense.

The conduct for which the Gerharts seek relief is Barnes' entry into their home, so liability turns on why the entry occurred. The Gerharts attribute the mistake to Barnes not doing enough to learn the location of the drug dealer's residence while Barnes attributes the mistake to the chaos that ensued when the officers learned that the confidential informant was in trouble. Who is correct depends on an evaluation of the totality of the undisputed facts, not just the cherry-picked facts from one side or the other.

This Court's decision in *Saucier v. Katz*, 522 U.S. 194, 205 (2001) offers guidance in the excessive-force context. It was explained that, in evaluating whether an officer used more force than necessary, courts must consider why the force was used. *See Saucier*, 522 U.S. at 205. *Saucier* specifically instructed courts to take into account whether the "officer reasonably, but mistakenly, believed that a suspect was likely to fight back[.]" *Id.* This Court should carry the same reasoning over to the unlawful entry context and hold that, in considering why an officer entered the wrong house, courts must take into account whether an exigency reasonably, but mistakenly, caused the officer to believe that the correct house was somewhere else.[2]

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[2] A similar point was made by this Court earlier this year. In *District of Columbia v. Wesby*, 138 S.Ct. 577, 586 (Jan. 22, 2018), it was emphasized that, in addressing the underlying constitutional question, courts must "'examine the events

Neither the Fifth Circuit nor the Gerharts have been able to cite any other case holding that an exigency does not factor into the reasonable-mistake inquiry. Other Circuits, to be sure, have held the opposite. *See, e.g., Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (reasoning that a mistake was unreasonable because there was no exigency causing the mistake).

This case provides an excellent vehicle for clarifying the reasonable-mistake doctrine and for harmonizing the Circuits. It would be hard to imagine a more noble justification for making a mistake than trying to save someone's life. The Fifth Circuit disregarded the pre-entry efforts Barnes made as well as the exigency he faced. These mistakes are cert worthy.

III. The Gerharts' contention that Barnes "didn't know the exact house" is misleading.

Throughout the oppositional brief, the Gerharts say that Barnes testified that he "didn't know the exact house." *See, e.g.*, Gerhart Br.5. But this repeated statement is misleading. It is undisputed that Barnes "knew the area the house was in[,]" although he had never been to the target home. ROA.3346. It also is undisputed, again, that Barnes participated in a

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leading up to the'" conduct at issue "'and then decide whether th[ose] historical facts, viewed from the standpoint of an objectively reasonable police officer," violate the Fourth Amendment. Under *Wesby*, courts are not allowed to limit what undisputed facts may be considered in relation to the conduct in question. But that is exactly what the Fifth Circuit did in this case.

detailed briefing where the target home was described with particularity, including a diagram of the interior and exterior of the target home, a specific location, and a Google image. *See* Gerhart Br.15. There is of course no legal authority that equates "reasonable efforts to identify a house" with a requirement that the officer actually must have been to the house on a prior occasion.

IV. The Gerharts' defense of the Fifth Circuit's qualified immunity analysis is wrong.

In all except an "obvious"[3] case, a plaintiff is required to identify "controlling" authority where an officer was held to have violated federal law under "similar" factual circumstances. *See White v. Pauly*, 137 S.Ct. 548, 552 (2017). The Gerharts repeat the Fifth Circuit's flawed conclusion that *Maryland v. Garrison*, 480 U.S. 79 (1987) alone supplies the necessary "clearly

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[3] One possibility is that the Fifth Circuit confused qualified immunity's "obviousness" exception with qualified immunity's "specificity" requirement. *See, e.g., JW by and through Tammy Williams v. Birmingham Bd. of Educ.*, ___ F.3d ___, 2018 WL 4560682, *7 (11th Cir. Sept. 24, 2018) (explaining that the "obvious" case under step two is a "narrow exception" to the ordinary qualified immunity analysis). An "obvious" case would be the example provided earlier: If an officer has made no effort whatsoever to identify the correct house, then that officer necessarily has not made "reasonable" efforts and thus there need not be a prior factually analogous case. But the obvious exception does not apply when, as here, the officer has made efforts. In this situation, a plaintiff must be able to point to a specific application of the "reasonable efforts" rule that holds that the conduct in question has been deemed unreasonable.

established law." *See* Gerhart Br.13-19. The Gerharts alternatively offer two unpublished Fifth Circuit cases, in addition to an Eleventh Circuit case and an Eighth Circuit case, as more specific applications of *Garrison*. *See* Gerhart Br.19-26. Both lines of thought are doctrinally incorrect.

Undoubtedly, *Garrison* satisfies the "controlling authority" component of the "clearly established" analysis since it is a precedent from this Court. But it does not survive the "similarity" component. *Garrison* sets forth the general rule that officers must make reasonable efforts to determine the correct house, but it does not flesh out what constitutes reasonable efforts for future cases. Pet.19-20.

Other Circuits recently have emphasized this distinction, including the Ninth Circuit which this Court "repeatedly" has had to remind through reversals. *See Wesby*, 138 S.Ct. at 590 ("We have repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'"). In *Sharp v. County of Orange*, 871 F.3d 901, 910-11 (9th Cir. 2017), the court explained that the "general rule that an unreasonable mistake" is unconstitutional could not "simply [be] appl[ied] . . . to the facts of this case." Noting that "officers encounter suspects every day in never-before-seen ways[,]" the court recognized that "[t]here are countless confrontations involving officers that yield endless permutations of outcomes and responses." *Sharp*, 871 F.3d at 912. It was held that factual analogues are accordingly necessary to determine when efforts are reasonable and when they are not. *Id.*

The Gerhart's reliance on *Garrison* not only conflicts with cases like *Sharp* but also with cases within the Fifth Circuit itself. *Thomas v. Williams*, 719 Fed. App'x 346 (5th Cir. 2018) was decided just a month before the Fifth Circuit decided this case, and the *Thomas* majority explicitly rejected Judge Dennis' position that *Garrison* alone is specific enough to "clearly establish" the law. The Panel in this case nevertheless resurrected Judge Dennis' dissent in rejecting Barnes' request for qualified immunity. Pet.App.13-14. Such a conclusion is suspicious given that Judge Dennis was a member of the Panel in this case yet *Thomas* was never cited even after Barnes pointed out the *Thomas* decision through a Rule 28(j) letter. Pet.App.95-96.

The two unpublished Fifth Circuit cases, along with the two published out-of-circuit cases, that were used in the revised panel opinion likewise do not defeat Barnes' entitlement to qualified immunity -- albeit for a different reason. Although this Court has never resolved what cases outside of those from this Court constitute "controlling authority," *see* Pet.20 (discussing *Reichle v. Howards*, 566 U.S. 658 (2012) and *Wesby*, 138 S.Ct. at 591 n.8), the Circuits have offered their views. The Fourth Circuit, through Judge Luttig, has held that unpublished opinions cannot "clearly establish" the law. *See Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996). And the Fifth Circuit itself has said that "two out-of-circuit cases . . . hardly constitute persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity[.]" *See Vincent v. City of Sulphur*, 805 F.3d 543, 549 (5th Cir. 2015). These rules, applied to this case, show that the Panel's analysis was foreign to traditional qualified immunity principles.

V. The Gerharts' are attempting to hold Barnes liable on a negligence theory.

Constitutional violations are remedied by way of Section 1983, and it has long been the law that mere negligence is insufficient to establish culpability under that statute. *See, e.g., Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005) (en banc) (relying on *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998)). Nonetheless, the Gerharts' oppositional brief makes much of an internal affairs report that advised Barnes "to pay closer attention" in the future. *See* Gerhart Br.6. The Gerharts' "inattention" argument further highlights the constitutional and qualified immunity problems with this case.

VI. At a minimum, this case should be GVR'd.

The Fifth Circuit's approach to this case does not resemble anything close to the qualified immunity framework laid down by this Court. Although qualified immunity recently has received heavy criticism from diverse factions, *see, e.g.*, Amicus Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law, *Almighty Supreme Born Allah v. Lynn Milling*, No. 17-8654 (2018), 2018 WL 3388317 (U.S. July 11, 2018), it remains the Law of the Land. If the doctrine is to be tinkered with, the tinkering must come from this Court and not through Circuit decisions applying the type of watered down "clearly established" analysis that was applied in this case. The Fifth Circuit ignored this Court's most recent qualified immunity cases, including *Kisela v. Hughes*, 138 S.Ct. 1148 (Apr. 2, 2018) and

Wesby, despite Barnes having relied on them repeatedly. Pet.App.92-99.

What's perhaps even worse is the Fifth Circuit's failure to grapple with its own conflicting precedents. Although mistaken entry cases are thankfully rare, the Fifth Circuit had decided one with similar facts just one month before this case was decided. Barnes brought *Thomas v. Williams* to the Panel's attention, even though that should not have been necessary since one of the panel members from this case had dissented in *Thomas*, but the Panel nonetheless refused to distinguish or even cite *Thomas*. Pet.App.95-96. This Court called for a response to the *Thomas* certiorari petition, and it has been distributed for the November 30, 2018 conference.

It would be entirely appropriate to GVR both this case and *Thomas* and signal to the Fifth Circuit that it's treatment of the two cases was improper. Regardless of which case is right or which case is wrong, parties are entitled to consistency. The Fifth Circuit gave these cases precisely the type of "disturbing" treatment that two Justices highlighted in *Plumley v. Austin*, 128 S.Ct. 828 (2015) (Thomas and Scalia, J.J., dissenting from denial of certiorari). *See* Pet.23-24.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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