No. 21-

IN THE

Supreme Court of the United States

SHARON POWELL, AS EXECUTRIX
OF THE ESTATE OF WILLIAM DAVID
POWELL, AND SHARON POWELL,

Petitioners,

v.

JENNIFER SNOOK, AS EXECUTRIX
FOR THE ESTATE OF PATRICK SNOOK

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN C. JONES
JOHN C. JONES,
ATTORNEY AT LAW
248 Roswell Road
Marietta, Georgia 30060
(404) 317-3697

BRUCE M. EDENFIELD
Counsel of Record
BRUCE M. EDENFIELD, P.C.
324 Three Sisters Road
Dahlonega, Georgia 30533
(706) 864-2123
bedenfieldlaw@windstream.net

Attorneys for Petitioners

313403

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Context:

This case involves an innocent homeowner who was shot and killed by a sheriff's deputy after he and other deputies went to the wrong residence (the Powells' house) because of an imprecise dispatcher's direction given by the 911 operator. The officers in dark uniforms arrived on the scene in stealth mode in the middle of the night with only minimal lighting from their flashlights. Awakened by their dogs barking and seeing lights outside, Mr. Powell with his wife walking beside him exited the house believing that a prowler was outside. Mr. Powell, a veteran, had a pistol in his right hand. As they slowly exited the house from the garage and onto the driveway, over seventeen seconds passed during which time Mr. Powell's pistol was pointed down at the ground and no aggressive threats or movements were made by Mr. Powell. Yet, no officers identified themselves, gave any commands, or said anything as the Powells exited the house. Unaware of the officers' presence, as Mr. Powell stopped in the driveway, he began to raise his right arm when he was shot and killed by Officer Snook.

The three questions presented are:

1. When the unconstitutionality of an officer's conduct is obvious, must the court, in addressing the "clearly established law" prong of a qualified immunity defense under the Fourth Amendment, analyze whether there are reasons, separate and apart from factually analogous precedent, why a reasonable officer could still have "fair notice"

that his actions are unconstitutional, taking into account the "*totality of the circumstances*" confronted by the officer?

2. In addressing the touchstone question of whether prior precedent can give "*fair notice*" to an officer that his conduct is unconstitutional, is it proper for the court to limit its inquiry to the moment deadly force was used without considering whether a prior warning was "*feasible*" during a time when the suspect did not pose an immediate threat of harm to the officer or others?

While Petitioners' counsel believe question number 3 below is subsumed within the first two questions presented, nevertheless, out of an abundance of caution, it is presented as a separate question.

3 In a case involving the use of deadly force against an armed suspect, does the Eleventh Circuit's holding that—in order to reach the level of "fair notice" required to defeat an officer's qualified immunity—prior precedent must clearly establish that a warning must be given "at the earliest possible time" conflict with this Court's precedent in *Tennessee v. Garner*, 471 U.S. 1 (1985) that a warning is required where it was feasible to do so?

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to the proceedings in the Eleventh Circuit, whose judgment is sought to be reviewed, are:

- Sharon Powell, as Executrix of the Estate of William David Powell, and Sharon Powell, Plaintiffs, Appellants below, and Petitioners here.

- Jennifer Snook, as Executrix of the Estate of Patrick Snook[1], Defendant, Appellee below, and Respondent here.

No corporations are parties to this proceeding.

List of related cases:

- *Sharon Powell, as Executrix of the Estate of William David Powell, and Sharon Powell v. Jennifer Snook, as Executrix for the Estate of Patrick Snook*, No. 19-13340, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered February 8, 2022.

- *Sharon Powell, as Executrix of the Estate of William David Powell, and Sharon Powell v. Patrick Snook, in his Individual Capacity*, No. 1:17-cv-3412-MHC, U.S. District Court for the Northern District of Georgia, Atlanta Division. Judgment entered July 30, 2019.

---

1. While this case was on appeal in the Eleventh Circuit Court of Appeals, Officer Patrick Snook died. His wife, Jennifer Snook, as Executrix of his Estate, was substituted as Defendant/Appellee.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

Page

STATUTES AND OTHER AUTHORITIES:

OPINIONS AND ORDERS BELOW

The panel opinion of the Court of Appeals for the Eleventh Circuit is reported at 24 F.4th 912 (2022) and is reproduced in the Pet. App. 1a.

The United States Court of Appeals for the Eleventh Circuit Order denying rehearing and rehearing *en banc* can be found and is reproduced here in the Pet. App. 23a.

The memorandum opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, granting Respondent's motion for summary judgment based upon qualified immunity can be found at *Powell v. Snook*, 2019 U.S. Dist. LEXIS 241484 (N.D. Ga., July 30, 2019) and is reproduced here in the Pet. App. 47a.

JURISDICTION

The Eleventh Circuit Court of Appeals had appellate jurisdiction because the district court's order granting Respondent's motion for summary judgment was a "final decision" dismissing all of the Petitioners' claims pursuant to 28 U.S.C. § 1291. The panel decision of the Circuit Court affirming the grant of summary judgment was entered on February 8, 2022, and Petitioners timely filed their Motion for Rehearing *en banc* on February 28, 2022.

The Eleventh Circuit denied *en banc* review on April 1, 2022. *Powell v. Snook*, 2022 U.S. App. LEXIS 8836 (11th Cir. Ga., Apr. 1, 2022). Accordingly, Petitioners are filing their petition for writ of certiorari. *See* Sup. Ct. R. 13(1), (3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners brought the underlying action pursuant to 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioners allege that Officer Patrick Snook (Respondent's decedent) violated Plaintiff's rights under the United States Constitution's Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

> be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Crediting Mrs. Powell's facts at this stage of the proceedings[1], the evidence shows:

1. Factual background.

Shortly after midnight on June 7, 2016, Henry County 911 received a call from a woman stating that she lived at 736 Swan Lake Road and heard screaming and gunshots "a few houses down." She also said that she had called 911 on an earlier occasion "because they were fighting so bad." The operator searched the 911 call history for that address but did not find a record of that earlier call. Pet. App. 3a.

The caller reported hearing a woman scream "help me please," hearing three gunshots, and then not hearing any more screaming. After that the operator asked the caller for the "nearest intersecting street." The caller reported that the nearest intersecting street was Fairview Road,

1. Because this case was resolved at the summary judgment stage, the facts and inferences are viewed in the light most favorable to Petitioner. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam). The facts are drawn primarily from the Circuit Court opinion below and the district court's order granting summary judgment. Any reference to a document in the Record on Appeal is to be referenced by the document number followed by the page, and where appropriate, the paragraph, e.g., "Doc. 52-2 at 1, ¶ 2."

and the shots came from "the second or third house past us towards Fairview." In the call report, the operator noted that Fairview was a cross street but did not include what the caller had told her about the screaming and gunshots having come from the direction of that street. *Id.* at 4a. When the operator asked, "If I'm looking at your house, where exactly would their house be?" The caller replied, "[a] couple houses down on the right towards Fairview Road … it's either the second or third house past ours." But the operator wrote in her report only that, if a person were looking at the caller's house, the noises had come from two or possibly three houses "down to the right." However, she omitted the caller's information about the noises being toward Fairview. *Id.* This is when this tragedy begins to unfold.

Based on the operator's report, a dispatcher sent police officers to 736 Swan Lake Road, explaining that if they were "looking at this location, it's two houses down on the right, maybe three houses." *Id.* Officer Snook, who was in charge of the uniform division that shift, responded to the call with two other officers, Officers Davis and Ramsey. On the way to Swan Lake Road, Snook asked dispatch if it could find the address for the place that the disturbance had actually occurred. A 911 call center supervisor, who had replaced the earlier dispatcher during a shift-change, replied that dispatch thought it was "either 690 or 634." The Powells lived at 690 Swan Lake Road. *Id.*

The officers arrived on the scene only 13 minutes and 32 seconds after the initial 911 call came into the dispatcher. Doc. 74 at p.30. When Snook and the other officers arrived on the scene, they did so cautiously with the blue lights on their patrol cars turned off. Pet. App. 4a-

5a; Doc. 53-15, ¶¶ 15, 29. Before approaching the Powell's house, Officer Davis asked the supervisor why dispatch believed 690 was the correct location and asked him to get more information from the caller. When the supervisor dialed the number that had originally called 911, the original caller's mother answered and agreed with the supervisor that the sounds had come from "the right, south of [the caller's location] going towards Gardner [Road]." From the perspective of a person standing on Swan Lake Road and looking at house 736, the Powell's house is to the right and toward Gardner Road. Pet. App. 5a.

Based on the 911 dispatch information, the officers approached the Powell residence. Snook and the other officers were wearing dark uniforms and, as they started down the Powell's driveway, they did so in stealth mode—as quiet as possible with minimal light from their flashlights. It was totally dark and no lights were on inside or outside the Powell residence. Because the officers were responding to a call involving domestic violence with shots fired, they approached cautiously and attempted to avoid allowing themselves to be targeted. *Id.* at 5a-6a; Doc 53-5, ¶¶ 15, 29.

There were two trucks at the residence and Snook asked dispatch to provide information about those vehicles. The dispatcher reported that the trucks were registered to the Powells. The dispatcher also reported that the previous 911 calls to that address involved an ambulance and an alarm, and that the Powells were in their sixties. Snook was aware that sometimes alarm or ambulance calls were related to domestic violence incidents, but the dispatcher also informed Officer Snook that police had not been previously dispatched to the Powell residence for a domestic violence incident. Pet. App. 5a.

Snook whispered to Officer Ramsey to go to the back of the residence and cover that area. Snook stood facing the front of the house, to the right-hand side of the house close to the driveway. There was no evidence at the scene of a domestic dispute having taken place earlier that evening. As Snook testified, he peered into one of the Powell's windows and shined a flashlight into the home. He did not see anything overturned, any damage to the house, any broken windows or broken glass, or kicked-in doors. Nor did he hear any screaming or see any lights on. There were no signs that a domestic dispute had occurred at the Powell residence, even though this was less than fifteen minutes from the reported call to 911. *Id*. at 6a.

Despite seeing no signs of a domestic disturbance, the officers continued their stealth surveillance. No one knocked on the door or rang the doorbell. *Id*.; Doc. 74, Attachment 6 at ¶ 12. No request was made by Snook or any other officer for the dispatcher to call the residence to see if everything was all right or, at the very least, to inform the Powells that the police were outside. Doc. 59 at p. 84.

After the officers had entered their property, the Powells were awakened by their dogs barking. The Powell's got out of bed and Mr. Powell went to the laundry room door, looked out the window, and told Mrs. Powell that he saw someone outside. Suspecting a prowler, Mr. Powell, an Air Force veteran, went to his closet, put on his pants and got his pistol. He and Mrs. Powell, still dressed in her pajamas, went to the garage and pressed the button that opened the garage door and turned on the garage light. All the other lights were still off. Pet. App. 6a.

It takes 8.8 seconds for the garage door to open. During this time, Mr. Powell and his wife waited in the lighted garage until the garage door was fully opened, but neither Officer Snook nor any other officer said anything—it was perfectly quiet. *Id.*; Doc. 74, Attachment 6 at 93.

Mr. Powell, with Mrs. Powell walking four or five steps behind him, exited the garage, walking at a normal pace. Once outside in the driveway, Mrs. Powell was facing her husband and watching him. It was pitch black outside and virtually nothing was visible to Mrs. Powell but her husband, especially since her eyes had adjusted to the light in the garage and not the darkness outside.[2] Doc. 73-1 at 4, ¶¶ 7-8. After exiting the garage onto the driveway, over the next nine seconds, Mr. Powell and Mrs. Powell were still walking at a normal pace, and Mr. Powell was standing straight up, he did not have a scowl on his face, and he was not crouching. He had a pistol in his right hand, pointing straight down at the ground as he and his wife walked toward the unidentified prowler—whom Mrs. Powell would later learn was Officer Snook. Mr. Powell was not running, he never had two hands on the pistol, he never had the pistol pointed at Officer Snook during this time, and he was not making any aggressive movements toward the officers. *Id.* at ¶ 7; Pet App. 7a.

During the 17-plus seconds as the Powells exited their garage and began walking in the driveway, neither Officer Snook nor any other officer said anything—no officer

2. Mr. Powell's sight would have been even more restricted because Snook had a flashlight attached to the barrel of his rifle which was shining directly on Mr. Powell as he exited the garage. [Doc. 59 at 102, 121].

identified themself as police; there was no warning the officers may shoot; and there was no command for Mr. Powell to drop his pistol. There was total silence. During this time, Mr. Powell posed no immediate threat to Office Snook or any other officer at the scene. *Id.*; Doc 73-1, ¶¶ 1-10; 74, Attachment 6. At this point, Mrs. Powell sensed that her husband was looking at someone in their yard. Mr. Powell stopped his walk down the driveway and began to raise his right arm. Before he could raise his pistol above his waist, Snook fired three shots with his rifle, one shot hitting Mr. Powell in his neck. As her husband fell to the ground, Mrs. Powell screamed, ran back into the house, and called 911. Pet. App. 7a-8a.

Importantly, Snook admitted in his sworn testimony that it was feasible to have given a warning. In this respect, from the time of the opening of the garage door and the garage light coming on, Snook was asked the following during his deposition,

> Q. You could have yelled ["Henry County Police"] at the instant you saw the garage light come on, couldn't you?
>
> A. Yes, sir.
>
> Q. You didn't, did you?
>
> A. No, sir.
>
> Q. You could have yelled it over and over again, couldn't you?
>
> A. Yes, sir.

Q. You didn't, did you?

A. No, sir.

[Snook Depo, Doc. 59 at 124]. Yet, while acknowledging that he had an opportunity to give a warning, his failure to do so is just the opposite of what Snook's experience had taught him in this very situation,

> ***[I]n my career I have encountered dozens of homeowners in the middle of the night who come through the garage to make contact and many have been armed … A slow approach on those other occasions allowed us an opportunity to identify ourselves as police prior to us seeing them or they seeing us.*** Doc. 52-2, ¶ 10.

In fact, Snook claims in his sworn Declaration that he gave a warning ***before*** Mr. Powell began to raise his right arm, "[W]hen I loudly announced, 'Henry County Police', the subject's face went blank, and he leaned forward and quickly raised his firearm and pointed it at us." *Id*. at ¶ 11. While this testimony is contradicted by Mrs. Powell's testimony as detailed above, Snook's Declaration is direct evidence that a warning was feasible and that he knew that a warning was required under the circumstances before Mr. Powell began to raise his right arm.

While the veracity of Mrs. Powell's testimony that no warning was given is not an issue before the court, indeed this Court must credit her version of the facts, it is telling that her first words to the 911 operator were, "***Someone just shot my husband in the driveway and***

they are trying to break into my house—please hurry." When the 911 operator told Mrs. Powell that the police were already at her house, Mrs. Powell thought the police must have found the prowler; she told the 911 operator, ***"My husband went and got his gun and then he went outside and the guy shot him."*** When the 911 operator again told her the officers were outside, Mrs. Powell then asked, ***"They're outside? They are the ones who shot my husband?"*** (Electronic recording of 911 call), Pet. App 8a; Doc 80. Mr. Powell was transported to a hospital, where he died the next day. It was only after speaking with the GBI agent who was investigating the shooting that Mrs. Powell was told the police shot her husband. Doc 74-6.

2. Trial court proceedings.

Sharon Powell, David Powell's wife, brought a § 1983 claim against Officer Snook in his individual capacity, alleging that he violated her husband's constitutional right to be free from excessive force. The district court granted Officer Snook's motion for summary judgment on July 30, 2019, finding that Snook was entitled to qualified immunity because no relevant decisional law clearly established that Officer Snook violated Mr. Powell's Fourth Amendment right to be free from excessive force. Pet. App. 23a-46a.

The district court made its ruling without addressing the 17-plus seconds that immediately preceded the shooting, focusing its qualified immunity analysis solely upon the moment shots were fired. In doing so, the court reasoned that this case was not "so obviously at the very core of what the Fourth Amendment prohibits," the "decisive factor" being that Mr. Powell "carried a gun in his right hand and began raising that gun in front of a

police officer" while facing "in the direction of the officer." *Id*. at 45a. The plaintiffs appealed the district court's ruling to the Eleventh Circuit Court of Appeals.

3. Eleventh Circuit Court of Appeals.

The Circuit Court, like the district court, hinged its ruling upon the belief that no warning was required because no prior precedent with a similar fact pattern gave Officer Snook fair notice that a warning might be required when the suspect began to raise his pistol. While recognizing in some circumstances an officer must give a warning before using deadly force when it is feasible to do so [citing to *Tennessee v. Garner*, 471 U.S. 11-12 (1985)], the panel held that *Garner* does "not clearly establish anything about whether and when a warning is required from an *armed* suspect raising a firearm in the direction of an officer." Pet. App. 19a-20a. As stated by the panel, "[W]hen David Powell started to raise his pistol while facing in Officer Snook's direction, Snook had the authority to use deadly force." *Id*. at 20a. This in turn led the panel to the following conclusion,

> Because Sharon Powell has not identified case law with materially similar facts or with a broad statement of principle giving Snook fair notice that he had to warn David Powell ***at the earliest possible moment*** before using deadly force, she has not met her burden of showing qualified immunity is not appropriate. *Id*. at 22a. [emphasis added].

However, this Court's holding in *Garner* does not require a warning "at the earliest possible moment."

Rather, *Garner* quite straightforwardly recognized that a warning is required "where feasible" if there was time and opportunity to do so before deadly force was used.

The Circuit Court affirmed the grant of summary judgment on February 8, 2022, and Petitioners timely filed their Motion for Rehearing *en banc* on February 28, 2022. The Eleventh Circuit denied *en banc* review on April 1, 2022, Pet. App. 47a-48a, and Petitioners filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This case presents a case of obvious clarity and goes to the very core of the Fourth Amendment's proscriptions. When the Circuit Court's opinion is distilled to its essence it stands for the following proposition:

> An officer is entitled to qualified immunity when he encounters an armed suspect who has his weapon pointed directly at the ground; who is not making any aggressive movement; not posing an immediate threat to the officers or others and, during a time when a warning was clearly feasible, but failing to do so, the officer waits until the suspect, who is unaware that officers are present, unknowingly makes a movement that causes the officer to use deadly force.

This cannot be the law in the United States of America and falls squarely within the tenets of the Fourth Amendment's proscription. It should have been apparent to Officer Snook that Mr. Powell was within his

lawful rights to arm himself to investigate a nocturnal disturbance on his own property. Afterall, "the need for defense of self, family and property is most acute" in one's home, *District of Columbia v. Hellar*, 554 U.S. 570, 628 (2008). Officers are not incapable of exercising common sense in such situations and cannot simply wait in ambush to see if a suspect might make a movement causing the officer to use deadly force. This is especially true when the totality of the circumstances establishes beyond debate that the officer had ample opportunity to give a prior warning or identify himself during a time when the suspect did not pose an immediate threat of physical harm, to the officers or others.

Here, not only does the evidence clearly show that a warning was feasible, but Officer Snook admits he had the opportunity to give a warning, and he actually claims he gave a warning before Mr. Powell began to raise his right arm. Thus, Officer Snook knew a warning was feasible and he had fair warning of such a requirement by this Court's prior precedent in *Garner*.

Most importantly, taking into account the totality of the circumstances, when viewed from the officer's perspective on the scene, this was not a split-second decision and, but for Officer Snook's failure to give a warning when it was feasible to do so, an innocent homeowner was killed.

The issues raised in this petition are important, addressing the fundamental significance to both society and law enforcement and the proper balance between the legal immunities afforded to public officials with the Constitution's protection to citizens under the Fourth Amendment. In resolving these issues, the Circuit Court

opinion conflicts with prior precedent of this Court by failing to recognize that this Court's decision in *Garner*, 471 U.S. 1, although cast at a high level of generality, can give "fair notice" in an obvious case involving an armed suspect. Indeed, this Court has the opportunity to reinforce what it made clear in *Garner*, *Hope v. Pelzer*, 536 U.S. 730 (2002), and their progeny that in an obvious case, when taking into account the "totality of the circumstances," a warning is required before the use of deadly force when those circumstances show there was ample time and opportunity to do so.

While counsel for petitioners believe that plenary review is appropriate, if the Court does not grant plenary review, it should summarily reverse the Circuit Court's opinion. The opinion squarely conflicts with the prior precedent of this Court and disregards the Court's long-standing rule that the lack of factually similar precedent does not immunize government officials who engage in obviously unlawful conduct.

A. The Court's prior precedent in *Garner*, although cast at a high level of generality gave "fair notice" that Officer Snook's conduct was unconstitutional when considering the totality of the circumstances confronted by Officer Snook at the scene.

In *Garner*, this Court clearly recognized that the Fourth Amendment puts restraints upon an officer's use of deadly force. The Court held that the use of deadly force is permitted *only if the officer* (1) has probable cause to believe that the suspect poses an immediate

threat of serious physical harm, either to the officer or others, or that he has committed a serious crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force is necessary to prevent escape; ***and*** (3) ***has given some warning about the possible use of deadly force, where feasible***. 471 U.S. at 11-12.

As made clear in *Garner*, when judging the reasonableness of an officer's conduct under the Fourth Amendment the operative question is ***"whether the totality of the circumstances justified" the officer's conduct***. *Id.* at 8-9. *See also*, *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546-47 (2017) (emphasizing the totality of the circumstances and requiring an "objective inquiry that pays careful attention to the facts and circumstances of each particular case.") quoting *Graham v. Conner*, 490 U.S. 386, 396 (1989).

When addressing the issue of qualified immunity, the touchstone of the court's inquiry is whether an officer had "fair warning that their conduct violated the Constitution." *Hope,* 536 U.S. at 741. Often this warning is provided by prior cases with factual symmetry. But this Court's precedent establishes that an officer can have "fair notice" that his actions are unconstitutional in an obvious case for reasons, separate and apart from factual similarity.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court addressed the level of generality at which the qualified immunity inquiry must take place, ruling that immunity may not be denied merely because the governing legal principle was clearly established at a high level of generality. *Id*. at 639. Immunity may be denied only if "the

right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense," noting that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. "This is not to say," the Court continued, "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Rather, "the unlawfulness must be apparent" in light of pre-existing law. *Ibid.* Applying those principles, this Court held in *Anderson* that the court of appeals should have examined the "fact-specific" question of "whether a reasonable officer could have believed" his conduct "to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* at 641.

Later, in *United States v. Lanier*, 520 U.S. 259 (1997), the Court had the opportunity to address the level of specificity required for there to be "clearly established" law. As explained by the Court, neither decisions of this Court nor of the Court of Appeals require extreme levels of specificity necessary in every instance to give "fair warning." The Court stated, "General statements of the law are not inherently incapable of giving fair and clear warning" and that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Id.* at 271. (quoting *Anderson,* 483 U.S. at 640).

In *Hope,* this Court once again had the opportunity to further sharpen the contours of "clearly established law" in the context of qualified immunity. The Court recognized that the decisions in *Anderson* and *Lanier*

established that a government official is not immune from liability for clear constitutional violations simply because the courts have never had an occasion to enforce the relevant constitutional right on materially similar facts. Some constitutional violations are obvious whether or not they have been addressed in prior cases. Emphasizing the point, the Court held that a government official cannot establish his immunity if judicial authority stated a constitutional rule that "appl[ied] with obvious clarity to the specific conduct in question, even though 'the very action in question' has [not] previously been held unlawful." *Hope.* 536 U.S. at 741, (quoting *Anderson*, 483 U.S. at 640). *See also, Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (An official's conduct may also be so "obvious[ly]" illegal that "[no] body of relevant case law" is necessary.).

Importantly, as cautioned in *Hope*, the search for materially similar decisions may take on a life of its own and override the principle that an officer's conduct can be both novel and clearly unconstitutional, and courts must provide a careful, principled analysis of whether a constitutional right is so obvious that any reasonable officer would have fair warning that his behavior offended the Constitution. Anything less risks "the danger of a rigid, over reliance on factual similarity." *Hope*, 536 U.S. at 742. Such a "rigid gloss on the qualified immunity standard is not consistent with our cases." *Id.* at 739.

More recently, in *White v. Pauly*, 137 S. Ct. 548 (2017), the Court again reiterated "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *Id.* at 552, (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 2084 (2011)). However, "general statements of the law" can still create

clearly established law in an obvious case. In this respect, as stated by the Court, "Of course, 'general statements of the law are not inherently incapable of giving fair and clear warning' to officers, *Lanier,* 520 U.S. at 271 (1997), but 'in the light of pre-existing law the unlawfulness must be apparent,' (citations omitted). For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law *outside 'an obvious case*.'" 137 S. Ct. at 552. (Emphasis added). [3]

---

3. In fact, *White* would have been an obvious case for the application of *Garner*'s requirement that a warning be given before the use of deadly force except for the fact that one of the officers in that case (White) arrived late on the scene and the Court found that he (Officer White) *could assume that the other officers had already given such a warning before his arrival*. As stated by the Court,

> Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, *such as officer identification, have already been followed*. No settled Fourth Amendment principle requires an officer to second-guess the *earlier steps already taken* by his fellow officers in instances like the one White confronted here. *White*, 137 S. Ct. at 552. (Emphasis added).

The concurring opinion by Justice Ginsburg emphasizes the point,

> …. As to Officer White, the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and ***whether he had adequate time to identify himself and order Samuel Pauley to drop his weapon before Officer White shot Pauley.*** *Id.* at 553. [emphasis added].

Garner, *Anderson*, *Lanier*, and *Hope* answer the three questions posed in this Petition. Those decisions establish that government officials are not immune from liability for clear constitutional violations simply because the courts have never had an occasion to enforce the relevant constitutional right on materially similar facts. The "*relevant dispositive inquiry*" is whether the case law, taking into account the "*totality of the circumstances*," would make it clear to a reasonable officer that his conduct was unlawful in the situation at issue in the case. *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001).

In this case, the Eleventh Circuit rejected the notion that this Court's holding in *Garner* could "clearly establish anything about whether and when a warning is required from an *armed* suspect raising a firearm in the direction of an officer," without any consideration of whether an officer had the time and opportunity to give a warning before he elected to use deadly force. Pet. App.19a-20a. While it is true that *Garner* did not involve an armed suspect and is cast at a high level of generality, this is precisely why *Garner* does not, by itself, give fair warning outside an obvious case. Contrary to the Circuit Court's view of *Garner, Garner* can still give fair warning in an obvious case, when the obviousness of an officer's conduct is evident taking into account *Garner*'s other admonition, namely, when analyzing the reasonableness of an officer's conduct, the court must ask the operative question of: "[w]hether the totality of the circumstances" justifies the officer's use of deadly force.

While the panel acknowledged, as it must, that clearly established law can be shown by "a broader, clearly established principle that should control the novel facts" of

a particular case (*Id.* at 12a), it never applied the analysis required by *Hope* to the facts of this case. Indeed, the Circuit Court never paused to ask a simple question demanded by this Court's decision in *Hope*—whether every reasonable officer would have known that he should give a warning under the circumstances of this case where such a warning was feasible. On this very point, the Circuit Court, at the very least, had to assume that Officer Snook knew from this Court's decision in *Garner* that he had to give a warning where it was feasible to do so and, only then, should the court ask what a reasonable officer would do.

In failing to undertake the analysis required, the Circuit Court instead parsed through circuit precedent to establish that Officer Snook was entitled to qualified immunity because no case clearly established that an officer must "always" provide a warning. As the panel stated, "But we have never held that an officer must always give a warning" (Pet. App. 17a), and "On the subject of warnings, we 'have declined to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing—particularly where such a warning might have cost the officer his life.'" Citing to *Penley v. Eslinger,* 605 F.3d 843, 854 n. 6 (11th Cir. 2010) and *Carr v. Tatangelo*, 338 F.3d 1259, 1269 n. 19 (11th Cir. 2003). Pet. App. 17a. This flawed analysis, aside from its irrelevance to the immunity question presented in this case, flows directly from the panel's failure to heed *Hope*'s required analysis. This is made evident by the panel's reliance upon dissimilar circuit precedent to support its conclusion that Snook was entitled to qualified immunity.

The panel points to *McCullough v. Antolini*, 559 F.3d 1201 (11th Cir. 2009), as the most relevant case from an

officer's perspective for assessing the reasonableness of Officer Snook's use of deadly force. Pet. App. 18a. But, in *McCullough*, the sheriff's deputies used deadly force in a split—second situation where a suspect late at night refused to pull over, engaged in a high—speed chase, and then, after pulling over, repeatedly refused to show his hands or respond to officers, then revved up his engine and drove his truck toward the deputy standing nearby in a parking lot. As emphasized by the court in *McCullough,* "the suspect posed a direct threat of serious physical harm or death [and the officers] gave an adequate warning under the circumstances and had powerful reason to believe that the use of deadly force was necessary to prevent escape."

The Circuit Court cites to *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821 (11th Cir. 2010), for three propositions, (1) when the suspect has not "drawn his gun," an officer is "not required to wait and hope for the best," Pet. App. 16a; (2) no warning is required when a reasonable officer would have believed the threat of harm was imminent, *Id.* at 19a; and (3) again for the panel's conclusion that Officer Snook had "the authority to use deadly force without giving a warning." *Id.* at 20a. However, in Jean-*Baptiste* the suspect had attempted to elude a police officer during a police chase and, after the chase ended, the suspect was "suddenly confronted by an officer eight feet away." *Jean-Baptiste* at 819. The suspect was armed and posed an immediate threat to the officer who, the panel concluded, "reasonably perceived the situation as an ambush" and was forced to decide in a matter of seconds whether to use deadly force. *Jean-Baptiste* at 821. This was a split-second decision where there was no opportunity for the officer to give a prior warning before he had to use deadly force.

The panel then turns to *Shaw v. City of Selma,* 884 F.3d 1093 (11th Cir. 2018) to "drive the point home." Pet. App. 16a. Yet, the suspect in *Shaw* was armed, noncompliant, had ignored more than two dozen orders to drop the hatchet. At the time he was shot, the suspect "presented a clear danger" as he was advancing on the officer with a hatchet in hand. *Shaw* at 1100. "He was close to him—within a few feet—and was getting closer still, yelling at [the officer] 'shoot it!' The suspect could have raised the hatchet in another second or two and struck [the officer] with it." *Id.* This is another split-second decision following commands to drop the weapon before deadly force was used.

In *Singletary v. Vargas*, 804 F.3d 1174 (11th Cir. 2015) (cited for the first proposition in *Jean-Baptiste* above, Pet. App. 17a), the officer was granted qualified immunity because the officer was faced with a split-second decision while he was in imminent danger of being run over by an accelerating car and he fired his gun in order to stop the car before the car struck and killed him. No opportunity existed for a pre-deadly force warning before the shots were fired.

In *Penley v. Eslinger*, 605 F.3d 843 (11th Cir. 2010) (cited for the proposition that the Eleventh Circuit has declined to fashion an "inflexible rule" that an officer must "always" give a warning before firing, Pet. App. 17a), a suspect brought what appeared to be a real gun to his high school. When officers arrived, he refused to drop the weapon after "repeatedly commanded to do so" while pointing the weapon several times at the officers on the scene and, at the moment he was shot, the suspect continued pointing his weapon at the officer. Contrary to

the decision in *Penley*, no command had previously been given for Mr. Powell to drop his gun and the Powell's were not aware of the presence of officers outside their house because the officers failed to identify themselves, even though the officers had ample opportunity to do so.

Similarly, in *Carr v. Tatangelo*, 338 F.3d 1259, 1264, 1269 n. 19 (11th Cir. 2003) (cited for the same proposition as in *Penley*, *Id.*) one of the officers (Fortson) heard one of the suspects "racking a round" and another officer (Tatangelo) screamed "police." Then Officer Fortson saw the suspect pointing a weapon at Officer Tatangelo and thought the two suspects were going to shoot Tatangelo. Officer Fortson believed that if they would shoot Tatangelo, they would also shoot him. In the words of the panel in that case, this was a "split-second rapidly escalating situation" and involving perceived deadly force to save the life of another officer. *Id.* at 1269. Clearly, after identifying themselves as police, Officer Fortson had to respond in a split-second decision to save a fellow officer.

All of the circuit court opinions relied upon to grant qualified immunity have two things in common—(1) split-second decisions either when no prior warning was feasible or where the officers had already identified themselves as police and/or given commands to the suspect to cease his threatening conduct, and (2) they bear no resemblance to the facts of this case and can only be cited to show that a warning is not "always" required to be given in cases involving the use of deadly force when the officer is confronted by an armed suspect and his life is in imminent danger. These decisions do not support the grant of immunity here, nor do they lessen *Garner*'s obvious application to the specific conduct in question in this case.

As a result, the Circuit Court, instead of asking what a reasonable officer would do in light of *Garner*'s required warning where feasible, the panel limited its analysis to what a reasonable officer would do when faced with what the officer believes is an imminent threat to his life. But, this analysis is exactly the opposite of what *Hope* tells us to do, resulting in the panel defining the right in this case too narrowly. See also, *Anderson,* 483 U.S. 635, 641 (requiring the court to examine the "fact specific" question of "whether a reasonable officer could have believed" his conduct "to be lawful, in light of clearly established law").

Because of the Circuit Court's flawed analysis, the panel failed to undertake the careful principled analysis required in every case by this Court's decision in *Hope*—assessing whether the obviousness of the officer's unconstitutional conduct was apparent in light of this Court's prior precedent and *Garner*'s clear application to the facts of this case.

Finally, the Eleventh Circuit panel speculated that a reasonable officer "could have decided, as Snook did, that the safest thing to do when [Mr. Powell] came out of the garage with a pistol by his side was to wait and see what Mr. Powell did with his pistol before Snook drew attention to himself and potentially escalated the situation by shouting a warning." Pet. App. 20a. However, this pure speculation by the panel is just the opposite of what Snook testified was his experience in similar situations, namely, that when a suspect is coming through a garage in a slow movement, this gave him an opportunity to give a warning before making contact with the suspect. Statement of Case, *supra* at p. 9. The speculation of the panel also ignores that Snook admits that he had the opportunity

to give a warning even before the Powells came out of the garage, and, that Snook, in fact, claims he gave a warning evidencing his knowledge that a warning was not only feasible but required under the circumstances he confronted.

More importantly, the speculation of the panel is at odds with *Garner*'s directive that a warning must be given where feasible before an officer can use deadly force and leads to the untenable conclusion that an officer who is not facing an imminent threat of harm to himself or others can simply wait in ambush to see if the suspect might make a movement causing the officer to use deadly force.

As Petitioner has previously stated, and it bears mentioning a second time, this cannot be the law in the United States of America. Here the panel's decision erodes the balance between the protections guaranteed by the Fourth Amendment to citizens of a free society and an officer's entitlement to qualified immunity by severely tilting the scale in favor of immunity contrary to this Court's precedent and skewing the balance this Court has sought to maintain over the last forty-nine years since its decision in *Garner*.

Petitioners' counsel understand and readily acknowledge the need for qualified immunity. But the Circuit Court opinion in this case is beyond the pale and condones obviously unconstitutional conduct when viewed in light of this Court's decision in *Garner* which set out a constitutional rule that "applies with obvious clarity" to the facts of this case.

B. The Circuit Court of Appeals impermissibly altered the level of "fair notice" required to defeat qualified immunity in a Fourth Amendment case involving an armed suspect contrary to this Court's precedent.

The third question presented addresses itself to the panel's penultimate conclusion—in order to reach the level of "fair notice" required to defeat qualified immunity—the prior precedent must clearly establish that a warning must be given "at the earliest possible time." Thus, the Circuit Court not only failed to follow this Court's precedent in *Garner* but also narrowed the focus of its own inquiry and elevated Petitioner's burden in order to defeat qualified immunity.

Moreover, the Court's conclusion came out of the blue and was not raised nor argued by either of the parties to this case nor mentioned in the district court order. In this regard, the thinking of the Circuit Court is hard to fathom, unless you are of the opinion, like the panel, that *Garner* has "nothing to say" about where and when an officer is required to give a warning to an armed suspect. But, the simple, straightforward, and workable directive of *Garner*, with its clear applicability to the facts of this case, answers the third question. A warning is required where it is feasible to do so, and not "at the earliest possible time."

By rejecting *Garner*'s clear application to the facts of this case, the Eleventh Circuit not only failed to follow this Court's precedent but, as a result, altered the proper focus of the qualified immunity inquiry as to what constitutes "fair notice" in order to defeat the officer's claim of immunity. In reaching its conclusion, the panel opinion moves *Garner*'s applicability to a case of excessive force

involving an armed suspect to the bottom shelf in a back room for the idly curious while discreetly ignoring this Court's precedent of its applicability in an obvious case.

With all due respect to the panel decision, the Circuit Court's holding on this point must be vacated.

C. In the alternative, the Court should summarily reverse because the officer's conduct was obviously unconstitutional.

The panel decision below sharply deviates from this Court's qualified immunity precedent. As detailed above, for decades, the Court has warned government officials that the absence of analogous precedent does not guarantee immunity for obvious constitutional violations. These cases establish that, for conduct to be obvious, the notice necessary to defeat a claim of qualified immunity is inseparable from the violation itself. In such rare cases "the unlawfulness of the officer's conduct is sufficiently clear" to defeat qualified immunity "even though existing precedent does not address similar circumstances." *City of Escondido v. Emmons,* 139 S. Ct. 500, 504 (2019).

This Court has not hesitated to summarily reverse when lower court decisions squarely conflict with its precedent. *See Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (reaffirming that precedent wasn't necessary to fairly notify officials that forcing a prisoner to sleep in a cell with excrement is unconstitutional.); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (instructing the Circuit Court to reconsider its grant of qualified immunity to an official who pepper-sprayed a prisoner in the face "for no reason at all", citing to *Taylor v. Riojas*.); *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (summarily reversing a lower

court for advancing a proposition when "this Court ha[d] previously considered—and rejected—almost that exact formulation of the qualified immunity question.)

The questions presented and the resolution of these questions will impact citizens and law enforcement officers across America on matters of grave concern. These questions and the Court's jurisdiction are not procedurally inhibited. The questions are clean, concise, and direct. In this respect, the first question is narrowly tailored to an obvious case, which is rare and ought to be, while the second question impacts more broadly the interpretation of the "totality of the circumstances" in cases involving the use of deadly force, without limitation to an obvious case. The third question addresses the panel's undercutting of *Garner*'s applicability to excessive use of force cases involving an armed suspect and, as a result, skews the balance this Court has sought to maintain between a citizen's right to be free from unreasonable seizures and the limited immunity extended to government officials.

Each of the questions presented reaches to the very heart of the qualified immunity debate across this country.

Finally, this Court has the clear opportunity to reinforce what the Court made clear in *Garner* that was not only succinct, plainspoken, and fair, but, more importantly, workable because the legal principle is based upon common sense and experience: A warning is required, not in every case where deadly force was used, but, at the very least, in those obvious cases where a warning was feasible under the totality of the circumstances confronting the officer.

The writ on these important issues should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' Petition for Writ of Certiorari, or, in the alternative, summarily reverse the decision below.

Respectfully submitted,

JOHN C. JONES
JOHN C. JONES,
ATTORNEY AT LAW
248 Roswell Road
Marietta, Georgia 30060
(404) 317-3697

BRUCE M. EDENFIELD
Counsel of Record
BRUCE M. EDENFIELD, P.C.
324 Three Sisters Road
Dahlonega, Georgia 30533
(706) 864-2123
bedenfieldlaw@windstream.net

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 8, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13340

SHARON POWELL, AS EXECUTRIX OF THE ESTATE OF WILLIAM DAVID POWELL, SHARON POWELL,

Plaintiffs-Appellants,

versus

JENNIFER SNOOK, AS EXECUTRIX FOR THE ESTATE OF PATRICK SNOOK,

Defendant-Appellee,

ANNIE DAVIS, *ET AL.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

D.C. Docket No. 1:17-cv-03412-MHC

Appendix A

Before WILSON, NEWSOM, and ED CARNES, Circuit Judges.

ED CARNES, Circuit Judge:

Lawsuits involving claims that officers used deadly force in violation of the Fourth Amendment often involve tragic circumstances. This one does. Just after midnight one evening in June of 2016, Henry County, Georgia, police sergeant Patrick Snook[1] — who was at the wrong house because of imprecise dispatch directions — shot and killed William David Powell, who was innocent of any crime and standing in his driveway. He was holding a pistol because he and his wife thought they had heard a prowler.

Sharon Powell,[2] David's wife, brought a § 1983 claim against Snook in his individual capacity, alleging that he violated her husband's constitutional right to be free from excessive force. The district court granted Snook's motion for summary judgment on grounds of qualified immunity. This is Powell's appeal.

The qualified immunity issue before us is the familiar one of whether clearly established law put Snook on notice that firing the shots he did violated David Powell's constitutional rights. More specifically, was it clearly

1. While this appeal was pending, Patrick Snook died. His wife Jennifer Snook, as executrix of his estate, was substituted as the defendant-appellee.

2. For clarity and flow purposes, we will sometimes refer to Sharon Powell as "Powell" and refer to William David Powell as "David."

established that under the circumstances of this case the Constitution required Snook to warn David Powell before shooting him?

I. SUMMARY JUDGMENT FACTS

Because this case comes to us after a grant of summary judgment, "the facts at this stage are what a reasonable jury could find from the evidence viewed in the light most favorable to" Powell. *Cantu v. City of Dothan*, 974 F.3d 1217, 1222 (11th Cir. 2020). "[W]hat we state as 'facts' in this opinion for purposes of reviewing the ruling[] on the summary judgment motion may not be the actual facts. Nonetheless, they are the facts for the present purposes, and we set them out below." *Montoute v. Carr*, 114 F.3d 181, 182 (11th Cir. 1997).

About five minutes before midnight on June 7, 2016, a Henry County 911 operator spoke to a caller who reported hearing a woman's screams and three gunshots. The caller gave her address as 736 Swan Lake Road and said the noises were coming from "a few houses down." She also said that she had called 911 on an earlier occasion "because they were fighting so bad." The operator searched the 911 call history for 736 Swan Lake but did not find a record of that earlier call.

The caller said that her mother had heard the woman scream "help me please" and then nothing else. After that the operator asked the caller for the "nearest intersecting street." She answered "Fairview Road" and added that the screaming and gunshots had come from "the second

or third house past [hers] towards Fairview." (In the call report, the operator noted that Fairview was a cross street but did not include what the caller had told her about the screaming and gunshots having come from the direction of that street.)

The operator asked a follow-up question: "[I]f I'm looking at your house where exactly would their house be?" Once again, the caller said it was a "couple houses down on the right towards Fairview Road." But the operator wrote in her report only that, if a person were looking at the caller's house, the noises had come from two or possibly three houses "down to the right." She omitted the caller's more helpful and less vague direction about the noises being toward Fairview. That is where the seeds of tragedy were sown.

Based on the operator's report, a 911 dispatcher sent police officers to 736 Swan Lake, explaining that if they were "looking at this location, it's two houses down on the right, maybe three houses." Officer Snook, who was in charge of the uniform patrol division that shift, responded to the call with Officers Matthew Davis and Ashley Ramsey. On the way to Swan Lake, Snook asked dispatch if it could find the address for the place where the disturbance had actually occurred. A 911 call center supervisor, who had replaced the earlier dispatcher during midnight shift-change, replied that dispatch thought it was "either 690 or 634." The Powells lived at 690 Swan Lake.

The three officers, who all wore police uniforms, parked their cars along the roadway with their blue lights

off. Before approaching the Powells' house, Officer Davis asked the supervisor why dispatch believed 690 was the correct location and asked him to get more information from the caller. When the supervisor dialed the number that had originally called 911, the original caller's mother answered and agreed with the supervisor that the sounds had come from "the right, south of [the caller's location] going towards Gardner [Road]." From the perspective of a person standing on Swan Lake Road and looking at house 736, the Powells' house is to the right and toward Gardner Road.

Based on the 911 dispatch information, the officers approached the Powells' house, which could not be seen from the road because of its long driveway. As the officers walked down that long driveway, there were no lights on inside or outside the house. It was very dark. Because they were going to a call involving domestic violence with shots fired, the officers approached cautiously, trying to avoid being targets for a shooter. Snook carried a rifle because of the dangerous circumstances and in case long-range fire was necessary.

There were two trucks at the house, which the supervisor told Snook were registered to the Powells, a couple in their sixties. The supervisor also told Snook that previous 911 calls for the Powells' house had involved an alarm and an ambulance. Snook knew from his experience that alarm or ambulance calls sometimes grew out of domestic violence incidents, but he also knew, because the supervisor had told him, that police had not been dispatched to the Powells' house before for a domestic violence incident.

Snook sent Ramsey to cover the back of the house while he and Davis stayed out front. Snook was close to the driveway area. He took his flashlight to look in the windows, but he didn't see any damage or lights on inside the house and didn't hear any screaming. Sharon Powell, who was inside, didn't hear any knocks on her door or rings of her doorbell, but she did hear her dogs barking, which had awakened her and David.

The two of them got out of bed but did not check their front door. Instead, David went to the laundry room door, looked out the window, and told Sharon that he saw someone outside. He went to his closet, put on his pants, and got his pistol. He then walked through a kitchen door into an attached garage and pushed a button that caused the garage door to begin opening and the garage light to come on. All the other house lights were still off.

It takes the garage door 8.8 seconds to open. When the door had fully opened, David walked out onto the driveway holding the loaded pistol in his right hand. After walking 10 to 15 steps at a normal pace, which took about nine seconds,[3] he stopped and turned to face the walkway

3. Sharon Powell has described on two occasions how long David's walk from the garage took. She testified in her deposition that it took "only a few seconds," a "short time." She later swore in her declaration that she had "retraced" David's steps "using the same pace" and that covering the distance he walked took her "approximately nine seconds." The district court used Powell's deposition testimony. But because we must view the evidence in the light most favorable to Powell, *Cantu*, 974 F.3d at 1222, and because the more specific time estimate in her declaration doesn't outright contradict the more general one in her deposition, we use the nine

leading up to his front door, which is where Officer Snook was positioned in the dark. When David Powell stopped walking, he was standing straight up and his arms were pointed straight down with the pistol in his right hand.

Sharon Powell had followed David onto the driveway and stood four or five feet behind him. She was facing his right side, focused on him, watching him. She heard no noise or voice, either while the garage door was opening or after she and her husband went outside. She specifically did not hear anyone identify themselves as police officers. It was perfectly quiet.

Sharon Powell had a sense that David was looking at someone. He started to raise his right arm — the one holding the pistol — and got the pistol hip-high. While David was doing that, Snook went down to one knee to make himself a smaller target and rapidly fired three shots with his rifle. Sharon testified that only a "very short time" — "[l]ike one second it felt like" — passed between when David started to raise his gun and when Snook began firing.[4]

---

seconds number from her declaration. *See Lane v. Celotex Corp.*, 782 F.2d 1526, 1532 (11th Cir. 1986) ("[W]e may only disregard an affidavit that contradicts, without explanation, previously given clear testimony.") (quotation marks omitted).

4. Sharon Powell's deposition testimony was unequivocal about how closely connected the shots were to her husband's act of raising his pistol:

> Q. All right. So from the point where Mr. Powell stopped, took the position and started raising the gun, how far

After Snook fired, David dropped to the ground. Sharon screamed, ran into the house, locked the door, and called 911. The officers on the scene aided David and called for an ambulance that took him to the hospital, but he died the next day.

II. PROCEDURAL HISTORY

On her own behalf and as executrix of her husband's estate, Sharon Powell filed a 42 U.S.C. § 1983 complaint in the Northern District of Georgia explicitly claiming that Snook violated David Powell's Fourth and Fourteenth Amendment rights and less explicitly claiming that Snook committed the tort of negligence in the process.[5] The parties eventually stipulated to the dismissal of all claims against Snook except for the Fourth Amendment

---

> between that point and the shots fired? Or how long did it take?
>
> A. Like one second it felt like.
>
> Q. Very, very short time?
>
> A. Very short time

Doc. 62 at 88; *see also id.* at 89 (Sharon confirming that when David "started raising the gun, quickly shots were fired, and then Mr. Powell fell.").

5. Powell's complaint also included claims against Officer Davis, Officer Ramsey, the 911 operator, the 911 supervisor, the director of the Henry County 911 service, and Henry County itself. After those defendants filed motions for summary judgment, the parties stipulated to the dismissal of all Powell's claims against them, which mooted their summary judgment motions.

excessive force claim, and Snook filed a motion for summary judgment contending that he was entitled to qualified immunity on that claim.

Powell opposed that motion, contending that Snook was not entitled to qualified immunity because precedent, specifically *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), and our case law applying it, clearly established that he could not constitutionally use deadly force against David Powell without first identifying himself as a police officer and issuing a warning. Powell argued Snook could have "easily" given that warning because David was not an immediate threat, refusing any officer's command, or attempting to escape. She asserted that our case law recognized that the "mere presence" of a firearm isn't enough to warrant the use of deadly force and that the reasonableness of any force depends on whether a suspect poses a threat of serious physical harm, with an emphasis on the level and immediacy of the threat. She also asserted that since *Garner* the law has been "abundantly clear that officers should issue a warning unless it is not feasible to do so before using deadly force" and argued that Snook had "ample opportunity (at least 17.8 seconds) to identify himself and give a proper warning before deadly force was used."

The district court granted summary judgment to Snook, holding that he was entitled to qualified immunity. The court distinguished the decisions Powell claimed clearly established a violation of the Fourth Amendment, noting that none of them involved someone who, like David Powell, "was holding a gun and raising his arm at the time

of the shooting." The court explained what the Supreme Court held in *Garner* was that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect by shooting him in the back of the head while he was running away. *See* 471 U.S. at 21. The officer in *Garner* "could not reasonably have believed" the suspect "posed any threat" and had justified his actions only by saying that he needed to prevent an escape. *Id.* In contrast, the district court noted, Snook fired the fatal shots while David "was facing Snook and in the process of raising a handgun" and "justified his actions on the basis of his belief that [David] was about to shoot him."

The district court also distinguished *Lundgren v. McDaniel*, 814 F.2d 600 (11th Cir. 1987), where officers did not have any advance report that a burglary suspect was armed and they were not apparently, much less actually, threatened with a weapon. *Id.* at 602-03. Without provocation, those officers shot a non-dangerous suspect. *Id.* The district court reasoned that what the *Lundgren* officers encountered was different from what happened here, where officers responded at night to a shots-fired domestic violence call and were confronted with an armed man facing them and raising a pistol. And, the court explained, this case is materially different from *Perez v. Suszczynski*, 809 F.3d 1213 (11th Cir. 2016), where an officer shot a man who was subdued, unarmed, and not resisting arrest. *Id.* at 1222.

After concluding there was no relevant decisional law clearly establishing that Snook violated David Powell's Fourth Amendment right to be free from excessive force,

the district court considered whether Snook's conduct "was so obviously at the very core of what the Fourth Amendment prohibits that any officer would know the conduct was illegal." In concluding that it was not, the court reasoned that the "decisive factor" was that David Powell "carried a gun in his right hand and began raising that gun in front of a police officer" and while facing "in the direction of the officer." The court granted summary judgment on qualified immunity grounds because it was not clearly established that the use of deadly force in these specific circumstances violated the Fourth Amendment.

III. ANALYSIS

We review de novo a grant of summary judgment based on qualified immunity, construing the facts and drawing all inferences in the light most favorable to the nonmoving party. *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1247 (11th Cir. 2013).

The qualified immunity doctrine protects an officer unless at the time of the officer's supposedly wrongful act the law "was already established to such a high degree that every objectively reasonable" officer in his place "would be on notice" that what he was doing was "clearly unlawful given the circumstances." *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002). The doctrine protects "all but the plainly incompetent or one who is knowingly violating the federal law." *Terrell v. Smith*, 668 F.3d 1244, 1250 (11th Cir. 2012) (quotation marks omitted). For qualified immunity to apply, an officer "must first establish that he acted within his discretionary authority." *Morton*

v. Kirkwood, 707 F.3d 1276, 1280 (11th Cir. 2013). Once the officer does that, "the burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Penley v. Eslinger*, 605 F.3d 843, 849 (11th Cir. 2010).

To overcome a qualified immunity defense where the defendant acted within his discretionary authority, the plaintiff must show that the defendant's actions not only violated one or more constitutional rights, but also that it was clearly established at the time that those specific actions did so. *See, e.g., Terrell*, 668 F.3d at 1250. Plaintiffs can meet the clearly established requirement in one of three ways: (1) by pointing to a materially similar decision of the Supreme Court, of this Court, or of the supreme court of the state in which the case arose; (2) by establishing that "a broader, clearly established principle should control the novel facts" of the case; or (3) by convincing us that the case is one of those rare ones that "fits within the exception of conduct which so obviously violates th[e] constitution that prior case law is unnecessary." *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005).

Under the first and second of these methods, the plaintiff must rely on decisional law. *See Vinyard v. Wilson*, 311 F.3d 1340, 1351 (11th Cir. 2002) (noting that in the first method we "look at precedent that is tied to the facts" while in the second method we look for "broad statements of principle in case law [that] are not tied to particularized facts") (emphasis omitted). Under the second and third methods, we look for "obvious clarity": a principle or provision so clear that, even without specific

guidance from a decision involving materially similar facts, the unlawfulness of the officer's conduct is apparent. *Id.* at 1350-51 (noting that "broad statements of principle in case law . . . can clearly establish law applicable in the future to different sets of detailed facts" and that the "words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances"); *see also Corbitt v. Vickers*, 929 F.3d 1304, 1312 (11th Cir. 2019); *Fish v. Brown*, 838 F.3d 1153, 1163 (11th Cir. 2016). In all three methods, the "'salient question' is whether the state of the law at the time of the incident gave [the officer] 'fair warning' that his conduct was unlawful." *Perez*, 809 F.3d at 1222 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).

We have recognized that obvious clarity "is a narrow exception to the normal rule that only case law and specific factual scenarios can clearly establish a violation." *Fils v. City of Aventura*, 647 F.3d 1272, 1291 (11th Cir. 2011) (quotation marks omitted). "Concrete facts are generally necessary to provide an officer with notice of the hazy border between excessive and acceptable force." *Id.* (quotation marks omitted). If "case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Corbitt*, 929 F.3d at 1312 (quotation marks omitted).

Powell does not dispute that Snook was acting within his discretionary authority, so she bears the burden of showing that qualified immunity is not otherwise

appropriate here. Like she did in the district court, Powell contends that her husband had a constitutional right to a warning before Snook used deadly force against him. And like she did in the district court, she argues that *Garner* and our case law applying it had clearly established before the encounter that night in her driveway the right to a warning that she asserts on David's behalf. But unlike she did in the district court, where she mentioned the phrase but did not argue it, Powell now also explicitly asserts that this case is one of the few to fit within the narrow obvious clarity exception to our normal rule requiring a fact-specific bright line.

A. Materially Similar Case

For all of her arguments Powell relies on case law, specifically *Garner, Lundgren, Perez, and White v. Pauly*, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017).[6] In considering those decisions, we keep in mind the general analytical framework for an excessive force claim. "We analyze a claim of excessive force under the Fourth Amendment's objective reasonableness standard." *Shaw v. City of Selma*, 884 F.3d 1093, 1099 (11th Cir. 2018) (quotation marks omitted). We view the facts "from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts," and we "balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate." *McCullough v. Antolini*, 559 F.3d 1201, 1206 (11th Cir. 2009).

6. Powell also cites *Young v. Borders*, 850 F.3d 1274, 1283 (11th Cir. 2017), but that opinion is only a concurrence in the denial of a petition for rehearing en banc, which has no precedential value.

"In cases involving excessive force claims it is doctrinal gospel that we do not view an officer's actions with the 20/20 vision of hindsight and that we make special allowance for them in tense, uncertain, and rapidly evolving situations." *Shaw*, 884 F.3d at 1100 (citations and quotation marks omitted); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018) (noting that 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") (quotation marks omitted).

The "law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." *Long v. Slaton*, 508 F.3d 576, 581 (11th Cir. 2007). Instead, an officer may use deadly force when he:

> (1) "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" *or* "that he has committed a crime involving the infliction or threatened infliction of serious physical harm;" (2) reasonably believes that the use of deadly force was necessary to prevent escape; *and* (3) has given some warning about the possible use of deadly force, if feasible.

Vaughan v. Cox, 343 F.3d 1323, 1329-30 (11th Cir. 2003) (first emphasis added) (quoting Garner, 471 U.S. at 11-

12). When considering the threat of physical harm to the officer or others, we emphasize "the level and immediacy of that threat." *Perez*, 809 F.3d at 1220.

We generally use the *Garner* factors to assess the reasonableness of deadly force, *see Terrell*, 668 F.3d at 1251, but "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott v. Harris*, 550 U.S. 372, 382, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). "The constitutional test for excessive force is necessarily fact specific," *McCullough*, 559 F.3d at 1206, so "in the end we must still slosh our way through the factbound morass of 'reasonableness,'" *Scott*, 550 U.S. at 383.

While the "mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit," *Perez*, 809 F.3d at 1220, when a suspect's gun is "available for ready use" — even when the suspect has not "drawn his gun" — an officer is "not required to wait and hope for the best," *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821 (11th Cir. 2010) (cleaned up). Our *Shaw* decision drives that point home. In that case an officer used deadly force against a mentally unstable man who had a hatchet in his hand and was advancing on the officer. 884 F.3d at 1096-97. The man had not raised the hatchet, but we affirmed the grant of summary judgment for the officer on qualified immunity grounds anyway. *Id.* at 1100-01. We did so because: "A reasonable officer could have also concluded, as [the officer] apparently did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense."

Id. at 1100; *see also Singletary v. Vargas*, 804 F.3d 1174, 1183 (11th Cir. 2015).

On the subject of warnings, we "have declined to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing — particularly where such a warning might easily have cost the officer his life." *Penley*, 605 F.3d at 854 n.6 (cleaned up); *see also Carr v. Tatangelo*, 338 F.3d 1259, 1269 n.19 (11th Cir. 2003). And the Supreme Court has instructed us that a plaintiff "cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1777, 191 L. Ed. 2d 856 (2015) (quotation marks omitted).

Sharon Powell frames her appeal in a way that asks us to focus on the third *Garner* factor, the feasibility of a pre-deadly force warning. Or as she'd call it, the right to such a warning. But we have never held that an officer must always warn a suspect before firing. As we have just noted, we have rejected exactly that kind of "inflexible rule." *See Penley*, 605 F.3d at 854 n.6. And rightfully so. Plaintiffs frequently cite *Garner* for the broad principle that a warning is always required before deadly force may be used, but *Garner* does not mandate that. *Garner* does not say "always." *Garner* says "where feasible." 471 U.S. at 11-12. Not only that, but *Garner* involved a fleeing non-dangerous suspect in a non-violent crime, *see id.* at 4-5; it did not involve an armed man facing an officer and raising a pistol, a circumstance that put would put any reasonable officer in fear for his life.

From Officer Snook's perspective, the relevant one for assessing the reasonableness of the force, *see McCullough*, 559 F.3d at 1206, he and his fellow officers had responded to a 911 report of domestic violence involving multiple gunshots and expected to find a suspect who had been violent before. A man came out into the driveway after midnight holding a pistol in his right hand. After nine seconds of walking, during which he carried the pistol but kept it pointed at the ground, the man stopped and faced the walkway leading up to his front door, where Snook was positioned in the dark. While facing Snook, the man started to raise the pistol. Only a very short time, about one second, passed between the man starting to raise his pistol and Snook firing.

Powell contends that a warning was required before Snook fired, either in the seconds her husband was walking out onto the driveway or in the single second between when her husband began to raise his pistol and when Snook fired. But three of the decisions on which Powell relies for that conclusion contain the most critical factual difference: none of them involved an officer faced with an armed suspect who was raising his firearm in the officer's direction. *See Garner*, 471 U.S. at 4, 21; *Perez*, 809 F.3d at 1217-22; *Lundgren*, 814 F.2d at 602-03 & n.1.

Powell's final decision is similarly unhelpful. In *White*, a decision in which the Supreme Court unanimously held that the officer was *entitled to* qualified immunity, "an officer who—having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other

officers—sho[t] and kill[ed] an armed occupant of the house without first giving a warning." 137 S. Ct. at 549. The Court concluded that those facts were "not a case where it is obvious that there was a violation of clearly established law under *Garner*." *Id.* at 552. *White*'s holding that there was no violation of clearly established law under those facts cannot clearly establish that there was a constitutional violation here, a later case involving materially different facts.

B. Obvious Clarity

Nor has Powell shown that precedent establishes "with obvious clarity" untethered to particularized facts that Snook was required to warn David before using deadly force. *Vinyard*, 311 F.3d at 1350-51. We have repeatedly affirmed grants of qualified immunity to officers who used deadly force against armed suspects without giving a warning when a reasonable officer would have believed the threat of harm was imminent. *See, e.g.*, *Jean-Baptiste*, 627 F.3d at 819-21 (officer "fired his pistol without warning"); *Penley*, 605 F.3d at 854 n.6 (officers had ordered the suspect to drop his weapon but had not explicitly warned they would shoot if he didn't); *Jackson v. Sauls*, 206 F.3d 1156, 1162-63, 1172-74 (11th Cir. 2000) (officers fired without identifying themselves or giving warning).

While it's clear that in some circumstances an officer must warn before using deadly force where it's *feasible* to do so, *Garner*, 471 U.S. at 11-12, decisions addressing how soon an officer is required to give a warning to an

unarmed suspect do not clearly establish anything about whether or when a warning is required for *armed* suspects raising a firearm in the direction of an officer. *See Garner*, 471 U.S. at 4, 21 (unarmed teen burglary suspect); *Perez*, 809 F.3d at 1217 (unarmed man lying on his stomach); *Lundgren*, 814 F.2d at 603 n.1 (store owner who did not threaten the officer with a weapon). There is no obviously clear, any-reasonable-officer-would-know rule that when faced with the threat of deadly force, an officer must give an armed suspect a warning at the earliest possible moment. *See White*, 137 S. Ct. at 552 (concluding, where late-arriving officer shot armed suspect without giving a warning, it was not an obvious case under *Garner*'s general principles). Instead, what's clearly established is that it "is reasonable, and therefore constitutionally permissible, for an officer to use deadly force when he has probable cause to believe that his own life is in peril." *Tillis v. Brown*, 12 F.4th 1291, 1298 (11th Cir. 2021) (quotation marks omitted).

When David Powell started to raise his pistol while facing in Officer Snook's direction, Snook had the authority to use deadly force. *See id.; Jean-Baptiste*, 627 F.3d at 821. It would not be clear and obvious to any reasonable officer that a warning was required in the 17.8 seconds between when David Powell pushed his garage door button and raised his loaded pistol in Snook's direction. A reasonable officer could have decided, as Snook did, that the safest thing to do as David came out of his garage with a pistol at his side was to wait and see what he did with the pistol before Snook drew attention to himself and potentially escalated the situation by shouting a warning.

See Penley, 605 F.3d at 854 n.6 (noting that a warning in some situations may "cost the officer his life") (quotation marks omitted).

In hindsight, that decision may have been a mistake. But, of course, we "do not view an officer's actions with the 20/20 vision of hindsight." *Shaw*, 884 F.3d at 1100 (quotation marks omitted). Qualified immunity leaves "room for mistaken judgments." *Coffin v. Brandau*, 642 F.3d 999, 1017 (11th Cir. 2011) (en banc) (quotation marks omitted).

Whether analyzed under the specific facts of prior decisions or under the narrow obvious clarity exception, "[i]nstead of clearly establishing the law against [Snook], binding precedent clearly establishes it in his favor." *Shaw*, 884 F.3d at 1100. An officer in Snook's position during the rapidly unfolding events on that dark night reasonably could have believed that the man raising a pistol in his direction was about to shoot him, and our precedent establishes he could "respond with deadly force to protect himself." *Hunter*, 941 F.3d at 1279. Snook didn't have to wait until David Powell fired his gun to return fire in self-defense. *See Long*, 508 F.3d at 581. Warnings are not always required before the use of deadly force. *See Penley*, 605 F.3d at 854 n.6; *Carr*, 338 F.3d at 1269 n.19. And as we've explained, giving a warning in the seconds before David raised his gun wasn't a clearly established requirement, *see Shaw*, 884 F.3d at 1100 (noting the "special allowance" for officers in uncertain situations), and giving a warning in the one second between David raising his gun and Snook firing wasn't feasible.

IV. CONCLUSION

Because Sharon Powell has not identified case law with materially similar facts or with a broad statement of principle giving Snook fair notice that he had to warn David Powell at the earliest possible moment and before using deadly force, she has not met her burden of showing qualified immunity is not appropriate. *Penley*, 605 F.3d at 849; *Mercado*, 407 F.3d at 1159; *Vinyard*, 311 F.3d at 1350-52. She has not shown that Snook's actions were unreasonable for qualified immunity purposes. As we have said before, "[t]he shooting . . . was tragic, as such shootings always are, but tragedy does not equate with unreasonableness" under clearly established law. *Shaw*, 884 F.3d at 1101.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED JULY 30, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION FILE NO. 1:17-CV-3412-MHC

SHARON POWELL, AS EXECUTRIX OF THE ESTATE OF WILLIAM DAVID POWELL, AND SHARON POWELL,

Plaintiffs,

v.

PATRICK SNOOK, IN HIS INDIVIDUAL CAPACITY,

Defendant.

July 30, 2019, Decided; July 30, 2019, Filed

MARK H. COHEN, United States District Judge.

ORDER

This case comes before the Court on Defendant Patrick Snook ("Snook")'s Motion for Summary Judgment [Doc. 53].[1]

1. On January 9, 2019, the parties consented to the dismissal of all claims against Defendants other than Patrick Snook. See

Appendix B

I. BACKGROUND[2]

This case arises from the tragic shooting of William David Powell ("Mr. Powell") at his home at 690 Swan Lake Road on June 7, 2016, by Henry County Police Sergeant Snook. This Court's factual summary presents the facts in the light most favorable to Plaintiffs; where noted, some of

---

Consent Stipulation to Dismissal of Parties [Doc. 67]. Accordingly, the Motion for Summary Judgment by Defendants Annie Davis, Andrew Talbert, and Henry County, Georgia [Doc. 52] and the Motion for Summary Judgment by Defendants Ashley Ramsey (f/k/a Janicak) and Matthew Davis [Doc. 54] are **DENIED AS MOOT**.

2. At the outset, the Court notes that as this case is before it on Snook's Motion for Summary Judgment, the Court views the evidence presented by the parties in the light most favorable to Plaintiffs and has drawn all justifiable inferences in favor of Plaintiffs. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Sunbeam TV Corp. v. Nielsen Media Research, Inc.,* 711 F.3d 1264, 1270 (11th Cir. 2013). In addition, the Court has excluded assertions of facts that are immaterial or presented as arguments or legal conclusions or any fact not supported by citation to evidence (including page or paragraph number). LR 56.1B(1), NDGa. Further, the Court accepts as admitted those facts in Defendants' Joint Statement of Material Facts Warranting Summary Judgment ("Defs.' SUMF") [Doc. 53-5] and Defendants' Supplemental Response to Their Joint Statement of Material Facts Warranting Summary Judgment [Doc. 64] that have not been specifically controverted with citation to the relevant portions of the record by Plaintiffs, and those facts in the Statement of Additional Facts Which Are Material and Present a Genuine Issue for Trial ("Pls.' SUMF") [Doc. 75] that have not been specifically controverted with citation to the relevant portions of the record by Defendant. *See* LR 56.1B(2), NDGa.

the officers' subjective accounts may be different. *See Fils v. City of Aventura,* 647 F.3d 1272, 1288 (11th Cir. 2011) (citing *Vinyard v. Wilson,* 311 F.3d 1340, 1347-48 (11th Cir. 2002)) ("At summary judgment, we cannot simply accept the officer's subjective version of events, but rather must reconstruct the event in the light most favorable to the non-moving party and determine whether the officer's use of force was excessive under those circumstances.").

Around midnight on June 7, 2016, Henry County 911 received a call from a woman stating that she lived at 736 Swan Lake Road in Stockbridge and heard screaming and gunshots "a few houses down." Audio Recording of 911 Call No. 1 at 00:00-00:14 [Doc. 55]. The caller reported that "we've had to call before because they were fighting so bad." *Id.* at 00:17-00:21. The initial dispatcher, Annie Davis ("Annie Davis"), looked at the history of 911 calls from 736 Swan Lake Road but did not find this previous call. Tr. Dep. Annie Davis [Doc. 57] at 51. The caller reported hearing a woman scream "help me please," hearing three gunshots, and then not hearing any more screaming. Audio Recording of 911 Call No. 1 at 00:14-00:17, 00:24-0:36. The caller reported that the nearest intersecting street was Fairview Road and the shots came from "the second or third house past us towards Fairview." *Id.* at 1:00-1:05, 1:10-1:20. When Annie Davis asked, "if I'm looking at your house where exactly would their house be?" the caller replied, "[a] couple houses down on the right towards Fairview Road. It's what it sounds like. It's either the second or third house past ours." *Id.* at 1:53-2:09.

Based on this information, a second 911 dispatcher, Carrie Denio,[3] dispatched police officers, telling them:

> [Person screaming] at 736 Swan Lake Road, 736 Swan Lake Road, across from Melanie Drive and Eulaya Court, caller heard [person screaming], three [discharges of a firearm], heard a female screaming "please help," then the [discharges of a firearm], and they haven't heard anything since. Advised ongoing problems with [domestic] at this location. . . . It's at 736 Swan Lake Road, 736 Swan Lake Road. She said if you're looking at this location, it's two houses down to the right, maybe three houses.

See Audio Recording of 911 Dispatch [Doc. 55] at 00:10-00:31, 00:50-00:59; Police Signals [Doc. 57 at 40]; *see also* Defs.' SUMF ¶ 11; Pls.' Resp. to Defs.' SUMF ¶ 11. Henry County Police officers Matthew Davis ("Matthew Davis"), Ashley Ramsey f/k/a/ Ashley Janicak ("Ramsey"), and Snook—the sergeant over the uniform patrol division for Henry County for that shift—responded to the call. *See* Defs.' SUMF ¶¶ 12, 14; Pls.' Resp. to Defs.' SUMF ¶¶ 12, 14.

The officers parked their vehicles along the Swan Lake Road roadway. Defs.' SUMF ¶ 14; Pls.' Resp. to Defs.' SUMF ¶ 14. None of their vehicles' blue lights were on. Pls.'

---

3. Annie Davis's work shift ended at midnight, shortly after the call. Defs.' SUMF ¶ 10; Resp. to Defs.' Joint Statement of Material Facts ("Pls.' Resp. to Defs.' SUMF") [Doc. 71] 41110.

SUMF ¶ 8; Defs.' Resp. to Pls.' Statement of Additional Material Facts ("Defs.' Resp. to Pls.' SUMF") [Doc. 77] ¶ 8. Before approaching Plaintiff Sharon Powell ("Ms. Powell") and Mr. Powell (collectively, "the Powells")'s house, Matthew Davis asked the 911 dispatcher why 911 believed this was the correct location and asked 911 to get more information from the caller. Defs.' SUMF ¶ 17; Pls.' Resp. to SUMF ¶ 17.

Andrew Talbert ("Talbert"), the 911 dispatch manager, called the 911 caller's telephone number and spoke to the 911 caller's mother. Defs.' SUMF ¶ 18; Pls.' Resp. to Defs.' SUMF ¶ 18. Talbert asked what made the 911 caller's mother believe that the incident was two or three houses down. Audio Recording of 911 Call No. 2 [Doc. 55] at 00:28-00:35. The 911 caller's mother stated, "we were in our backyard, and from where our bonfire pit is you can just hear the noise and it just sounded like it was just a little bit distance down from us." *Id.* at 00:35-00:45. She also reported that "once before, a couple houses down from us, the cops had to be called because the lady was screaming from the top of her lungs in the backyard like she was being beat to death. . . . she was screaming 'help me, help me.'" *Id.* at 00:45-00:58. Talbert and the 911 caller's mother had the following exchange:

> Talbert: And you believe it is to the right, south of you going towards Gardner?
>
> 911 Caller's Mother: It is, yes, definitely.
>
> Talbert: I see where one of the houses has a long driveway, is it as far back as your backyard?

> 911 Caller's Mother: Yeah, and that's why I said it's possible it is that driveway that goes back off the road.

Id. at 00:59-1:16; *see* Defs.' SUMF ¶ 22; Pls.' Resp. to Defs.' SUMF ¶ 22. The 911 caller's mother also reported that about seven or eight months ago, the police were called to the house from where they heard the screaming and gunshots. Audio Recording of 911 Call No. 2 at 1:30-1:43.

Following this call, Talbert called the officers and told them that he spoke to the complainant, who said that "they were standing in their backyard and it was behind them, like, so away from the roadway, that's why they believe it is two or three houses down." Audio Recording of 911 Dispatch at 15:10-15:22. From the perspective of a person looking from the roadway at the 911 caller's residence at 736 Swan Lake Road, the Powell residence at 690 Swan Lake Road[4] was to the right and toward Gardner Road. Defs.' SUMF ¶ 23; Pls.' Resp. to Defs.' SUMF ¶ 23. The configuration of the Powells's house, far from the road on a "flagpole" lot, was consistent with the 911 caller's and 911 caller's mother's descriptions of the location of the screaming and gunshots. *See* Defs.' SUMF ¶ 24; Pls.' Resp. to Defs.' SUMF ¶ 24.

Based on the 911 dispatch information, the officers approach the Powell residence. Defs.' SUMF ¶ 26; Pls.'

---

4. The address "690 Swan Lake *Drive*" in Defendants' SUMF appears to be a typographical error. *See* Defs.' SUMF ¶¶ 21, 26 (emphasis added).

Resp. to Defs.' SUMF 1126. The officers wore police uniforms. Defs.' SUMF ¶ 15; Pls.' Resp. to Defs.' SUMF ¶ 15. The Powell residence had a long driveway and the house could not be seen from the road. Defs.' SUMF ¶ 27; Pls.' Resp. to Defs.' SUMF ¶ 27. No lights were on inside or outside the house, and it was very dark. Defs.' SUMF ¶¶ 28, 30; Pls.' Resp. to Defs.' SUMF ¶¶ 28, 30. Because the officers were responding to a call involving domestic violence with shots fired, they approached cautiously and attempted to avoid allowing themselves to be targeted by a shooter. Defs.' SUMF ¶ 29; Pls.' Resp. to Defs.' SUMF ¶ 29. Snook carried a rifle due to the severity of the call and in case long-range shots were necessary. Defs.' SUMF ¶ 31; Pls.' Resp. to Defs.' SUMF ¶ 31.

There were two trucks at the residence, and Snook asked dispatch to provide information about them. Defs.' SUMF ¶¶ 32-33; Pls.' Resp. to Defs.' SUMF ¶¶ 32-33. The dispatcher reported that the trucks were registered to the Powells. Defs.' SUMF ¶ 34; Pls.' Resp. to Defs,' SUMF 1134. The dispatcher also reported that the previous 911 calls for the Powell residence involved an ambulance and an alarm, and that the Powells were in their 60s. Defs.' SUMF ¶ 35; Pls.. Resp. to Defs.' SUMF ¶ 35; Tr. Dep. Sgt. Patrick Snook ("Snook Dep.") [Doc. 59] at 94. Snook was aware that sometimes alarm or ambulance calls were related to domestic violence incidents. Defs.' SUMF ¶ 36; Pls.' Resp. to Defs.' SUMF ¶ 36. Snook was also informed that police had not previously been dispatched to the Powell residence for a domestic violence incident. *See* Snook Dep. at 94.

Snook whispered to Ramsey to go to the back of the residence and cover that area. Defs.' SUMF ¶ 38; Pls.' Resp. to Defs.' SUMF ¶ 38; Tr. Dep. Det. Ashley Ramsey ("Ramsey Dep.") [Doc. 61] at 59. Snook stood facing the front of the house, to the right-hand side of the house close to the driveway. Snook Dep. at 66. Snook approached a window close enough to shine a flashlight around. *Id.* at 82. He did not see anything overturned, any damage to the house, any broken windows or broken glass, or any kicked-in doors. *Id.* Nor did he hear any screaming or see any lights on. *Id.*

Ms. Powell testified at her deposition that she did not hear a doorbell ring or any knocking on the door. Tr. Dep. Sharon Powell ("Powell Dep.") [Doc. 62] at 52-53.[5] The Powells were awakened by their dogs barking. Defs.' SUMF ¶ 41; Pls.' Resp. to Defs.' SUMF ¶ 41. The Powells did not check their front door. Powell Dep. at 59. The Powells got out of bed, and Mr. Powell went to the laundry room door, looked out the window, and told Ms. Powell that he saw someone outside. *Id.* at 48-49. Mr. Powell then went to his closet, put on his pants, and got his gun. RI. at 50.

Mr. Powell walked through the kitchen door into the attached garage and activated the garage door opener. *Id.* at 65-68. Activating the garage door opener caused the garage door light to come on. *Id.* at 68. All other lights around the house remained off. *See id.* The Powells stood in the garage, Mr. Powell on the side of a truck parked

5. Matthew Davis testified at his deposition that he went to the front door of the residence, rang the doorbell, and knocked. Tr. Dep. Matthew Davis ("Matthew Davis Dep.") [Doc. 60] at 24-25.

inside and Ms. Powell at the end of the ramp. *Id.* at 77. It took approximately 8.8 seconds for the garage door to open. Decl. of Sharon Powell ("Powell Decl.") ¶ 3. Ms. Powell's hearing is excellent and there was no sound from anyone while the garage door was opening. Pls.' SUMF ¶ 20; Defs.'s Resp. to Pls.' SUMF ¶ 20.

After the garage door opened, Mr. Powell exited the garage. Snook Dep. at 88. Mr. Powell held his handgun in his right hand. Defs.' SUMF ¶ 48; Pls.' Resp. to Defs.' SUMF ¶ 48. Mr. Powell was not wearing a shirt. Powell Dep. at 78. Ms. Powell followed Mr. Powell outside the garage, who was walking at a normal pace. *See id.* at 82-83, 86. Mr. Powell walked about ten or fifteen steps over "only a few seconds," was standing straight up, was not hunched over, and was not running.[6] *Id.* at 86-87; Powell Decl. ¶ 5.

Ms. Powell followed Mr. Powell out of the garage and was about four or five feet behind him when he stopped in the driveaway. Powell Decl. ¶ 6. Ms. Powell testified at her deposition that between the time of Mr. Powell leaving the garage and being shot, she did not hear anything. Powell Dep. at 124. Ms. Powell avers that no one said anything

6. According to Snook, Mr. Powell was hunched and leaning forward "in an aggressive manner taking an offensive action." Snook Dep. at 88; Decl. of Patrick Snook ("Snook Decl.") [Doc. 53-2] ¶ 9. Snook avers that Mr. Powell "was moving in a quick and deliberate manner." *Id.* ¶ 8. He also avers that Mr. Powell seemed agitated and had a scowl on his face. Snook Dep. at 101.

or identified themselves as police officers.[7] Pls.' SUMF ¶ 33; Defs.'s Resp. to Pls.' SUMF ¶ 33.

It is undisputed that Mr. Powell started to raise his right arm holding the gun. Powell Dep. at 87; Def.'s SUMF ¶ 48; Pls.' Resp. to Def.'s SUMF ¶ 48. Ms. Powell testified at her deposition that Mr. Powell "didn't even get [the gun] to his waist. It was probably at his hip." Powell Dep. at 87. She avers that "at no time was the gun pointed at anyone and was always pointed at the ground before [Mr. Powell] was shot.[8] Powell Decl. ¶ 8. Snook went down to one knee to make himself a smaller target and fired three shots. Snook Dep. at 96, 101. A very short time, approximately one second or less, elapsed between Mr. Powell beginning to raise his gun and Snook firing. Defs.' SUMF ¶ 63; Pls.' Resp. to Defs.' SUMF ¶ 63. After Snook fired, Mr. Powell dropped to the ground. Defs.' SUMF ¶ 64; Pls.' Resp. to Defs.' SUMF ¶ 64. Ms. Powell screamed, ran into the

---

7. Snook testified at his deposition that he shined the light attached to his rifle on Mr. Powell and stated, "Henry County Police" loudly enough for anybody at that distance to hear it. Snook Dep. at 102, 121. Matthew Davis also testified at his deposition that Snook said "Henry County Police" in a voice that anyone could hear at that distance. Matthew Davis Dep. at 49. Ramsey, who was standing at the opposite corner of the residence , testified at her deposition that she did not hear Snook say, "Henry County Police" and that the next thing she heard after Snook whispered to her to go around the house was the shots being fired. Ramsey Dep. at 65, 117-18, & Ex. A.

8. Snook avers that Mr. Powell's face "went blank, and he leaned forward and quickly raised his firearm and pointed it at us." Snook Decl. ¶ 11.

house, locked the door, and called 911. Powell Dep. at 89. The officers rendered aid to Mr. Powell and called for an ambulance. Defs.' SUMF ¶ 67; Pls.' Resp. to Defs.' SUMF ¶ 67. Mr. Powell was transported to a hospital, where he died the next day. Defs.' SUMF ¶ 67; Pls.' Resp. to Defs.' SUMF ¶ 67.

On September 7, 2017, Plaintiffs filed their Complaint [Doc. 1] against Snook, Matthew Davis, Ramsey, Annie Davis, Andrew Talbert, Don Ash (Director of Henry County 911 Communications), and Henry County, Georgia, asserting claims for violations of the Fourth Amendment, the Fourteenth Amendment, and state law. On January 9, 2019, the parties consented to the dismissal of the claims against all Defendants except Snook. *See* Consent Stipulation to Dismissal of Parties. On November 30, 2018, Snook moved for summary judgment on all claims asserted against him.[9]

---

9. Count One of the Complaint asserts claims against Snook in his individual capacity for violation of the Fourth and Fourteenth Amendments. See Compl. ¶¶ 2, 52-54. Although Count Four is captioned "State Law Claims Against Annie Davis and Andrew Talbert," it appears to assert a negligence claim against Snook. *See id.* ¶ 68. However, when dismissing the remaining Defendants, the parties indicated only that the Fourth Amendment claim against Snook in his individual capacity remained. *See* Consent Stipulation of Dismissal at 2. Snook's Brief in Support of his Motion for Summary Judgment ("Def.'s Br.") [Doc. 53-6] addresses Fourth Amendment excessive force, Fourteenth Amendment due process, and state law claims. Plaintiffs attempt to withdraw their Fourteenth Amendment claim and do not discuss any state law claims. *See* Pls.' Br. in Opp'n to Def. Patrick Snook's Mot. for Summ. J. ("Pls.' Opp'n") [Doc. 70] at 8 n.8. Even if Snook

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CAT. P. 56(a). A party seeking summary judgment has the burden of informing the district court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and cannot be made by the district court

---

so stipulated, the Court could not dismiss only the Fourteenth Amendment claim. *See Perry v. Schumacher Grp. of La.*, 891 F.3d 954, 956 (11th Cir. 2018) (stating that parties cannot stipulate to dismissing a particular claim against a defendant while leaving others pending against that defendant and that a plaintiff who wishes to do so must amend the complaint pursuant to Rule 15). However, given Plaintiffs' statement and the fact that they make no arguments in opposition to the grant of Snook's motion for summary judgment as to the Fourteenth Amendment claim and any state law claims, Snook is entitled to summary judgment on those claims. *See Resolution Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) (citations omitted) ("[G]rounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned."); *Bute v. Schuller Intern., Inc.*, 998 F. Supp. 1473, 1477 (N.D. Ga. 1998) ("Because plaintiff has failed to respond to this argument or otherwise address this claim, the Court deems it abandoned. Accordingly, defendant's motion for summary judgment is [granted] with respect to this claim."). Accordingly, Snook's Motion for Summary Judgment is **GRANTED** as to the Fourteenth Amendment claim and, to the extend Plaintiffs asserted them, any state law claims.

in considering whether to grant summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see also Graham v. State Farm Mut. Ins. Co.,* 193 F.3d 1274, 1282 (11th Cir. 1999).

If a movant meets its burden, the party opposing summary judgment must present evidence demonstrating a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. *Celotex,* 477 U.S. at 324. In determining whether a genuine issue of material fact exists, the evidence is viewed in the light most favorable to the party opposing summary judgment, "and all justifiable inferences are to be drawn" in favor of that opposing party. *Anderson,* 477 U.S. at 255; *see also Herzog v. Castle Rock Entm't,* 193 F.3d 1241, 1246 (11th Cir. 1999). A fact is "material" only if it can affect the outcome of the lawsuit under the governing legal principles. *Anderson,* 477 U.S. at 248. A factual dispute is genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson,* 477 U.S. at 248. "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." *Herzog,* 193 F.3d at 1246. But, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment for the moving party is proper. *Matsushita,* 475 U.S. at 587.

III. ANALYSIS

The only remaining claim in this case is the Fourth Amendment claim brought pursuant to 42 U.S.C. § 1983 against Snook in his individual capacity. Plaintiffs contends

that Snook violated Mr. Powell's Fourth Amendment right to be free from an unreasonable seizure by using deadly force without arguable probable cause to do so. *See* Pls.' Resp. at 13-16. Snook contends that this claim fails because he is entitled to qualified immunity. *See* Def.'s Br. at 6-26.

"Qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sherrod v. Johnson,* 667 F.3d 1359, 1363 (11th Cir. 2012) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). To claim qualified immunity, a defendant must first show he was performing a discretionary function. *Moreno v. Turner,* 572 F. App'x 852, 855 (11th Cir. 2014) (citing *Whittier v. Kobayashi,* 581 F.3d 1304, 1308 (11th Cir. 2009)).

> Instead of focusing on whether the acts in question involved the exercise of actual discretion, we assess whether they are of a type that fell within the employee's job responsibilities. Our inquiry is two-fold. We ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize.

Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1265-66 (11th Cir. 2004) (citation omitted). There is

no dispute that Snook was engaged in a discretionary function. *See* Def.'s Br. at 7; Pls.' Opp'n at 9; *see also Kesinger ex rel. Estate of Kesinger v. Herrington,* 381 F.3d 1243, 1246, 1248 (11th Cir. 2004) (finding it "clear" that sheriffs deputy who shot suspect while intervening in apparent suicide attempt was acting within the scope of his discretionary authority).

"Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified immunity should not apply." *Edwards v. Shanley,* 666 F.3d 1289, 1294 (11th Cir. 2012) (quoting *Lewis v. City of W. Palm Beach,* 561 F.3d 1288, 1291 (11th Cir. 2009)). A plaintiff demonstrates that qualified immunity does not apply by showing: "(1) the defendant violated a constitutional right, and (2) the right was clearly established at the time of the alleged violation." *Whittier,* 581 F.3d at 1308.

"The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan,* 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Under the circumstances of this case, the Court chooses to exercise its discretion to first address whether the constitutional right that Snook allegedly violated was clearly established.

Snook is protected by qualified immunity unless Mr. Powell's right to be free from excessive force was clearly established at the time Snook allegedly violated it. *See*

Whittier, 581 F.3d at 1308; *Lee v. Ferraro,* 284 F.3d 1188, 1198 (11th Cir. 2002). Ms. Powell contends that

> [f]rom [*Tennessee v. Garner,* 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)] and its progeny in the Eleventh Circuit, it was clearly established to the point that it gave 'fair warning' to Officer Snook and to any officer that the use of deadly force upon Mr. Powell ***without identifying himself as the police and without issuing any warning under the circumstances of this case—a warning that could have easily been given before using deadly force***—who was not an immediate threat to the officer, who was not refusing any officer command, and who was not making any attempt to escape, is knowingly violating the Constitution.

Pls.' Resp. at 25 (emphasis in original).

A constitutional right is clearly established "only if its contours are 'sufficiently clear that a reasonable official would understand what he is doing violates that right.'" *Vaughan v. Cox,* 343 F.3d 1323, 1332 (11th Cir. 2003) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). This is because "officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases," and "official's awareness of the existence of an abstract right . . . does not equate to knowledge that his conduct infringes the right." *Coffin v. Brandau,* 642 F.3d 999, 1015 (11th Cir. 2011) (alteration in original) (citations omitted) (en banc).

Appendix B

"When we consider whether the law clearly established the relevant conduct as a constitutional violation at the time that [the government official] engaged in the challenged acts, we look for 'fair warning' to officers that the conduct at issue violated a constitutional right." *Jones v. Fransen,* 857 F.3d 843, 851 (11th Cir. 2017) (citing *Coffin,* 642 F.3d at 1013). There are three methods to show that the government official had fair warning:

> First, the plaintiffs may show that a materially similar case has already been decided. Second, the plaintiffs can point to a broader, clearly established principle that should control the novel facts of the situation. Finally, the conduct involved in the case may so obviously violate the constitution that prior case law is unnecessary. Under controlling law, the plaintiffs must carry their burden by looking to the law as interpreted at the time by the United States Supreme Court, the Eleventh Circuit, or the [relevant state supreme court].

Terrell v. Smith, 668 F.3d 1244, 1255-56 (11th Cir. 2012) (citations, quotation marks, and alterations omitted).

The first method "looks at the relevant case law at the time of the violation; the right is clearly established if 'a concrete factual context [exists] so as to make it obvious to a reasonable government actor that his actions violate federal law.'" *Fils,* 647 F.3d at 1291 (alterations in original) (quoting *Hadley v. Gutierrez,* 526 F.3d 1324, 1333 (11th Cir. 2008)). While the facts of the case need

not be identical, "the unlawfulness of the conduct must be apparent from pre-existing law." *Coffin,* 642 F.3d at 1013; *see also Gennusa v. Canova,* 748 F.3d 1103, 1113 (11th Cir. 2014) (citation and internal quotation marks omitted) ("We do not always require a case directly on point before concluding that the law is clearly established, but existing precedent must have placed the statutory or constitutional question beyond debate."). "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Kisela v. Harris,* 138 S. Ct. 1148, 1152 (2018) (citation and internal quotation marks omitted).

The second and third methods, known as "obvious clarity" cases, exist when "case law is not needed" to demonstrate the unlawfulness of the conduct or where the existing case law is so obvious that "every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." *Vineyard,* 311 F.3d at 1351. Such cases are rare. *See, e.g., Santamorena v. Ga. Military Coll.,* 147 F.3d 1337, 1340 n.6 (11th Cir. 1998) (noting that "these exceptional cases rarely arise").

Plaintiffs rely upon *Tennessee v. Garner, Lundgren v. McDaniel,* 814 F.2d 600 (11th Cir. 1987), and *Perez v. Suszczynski,* 809 F.3d 1220 (11th Cir. 2016), to support their contention that the constitutional right was clearly established so as to deny Snook a defense of qualified immunity. However, those cases do not apply to Snook's conduct because Mr. Powell was holding a gun and raising his aim at the time of the shooting.

Garner is not analogous to this case. As the Supreme Court explained,

> *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, by shooting him "in the back of the head" while he was running away on foot, and when the officer "could not reasonably have believed that the suspect . . . posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape."

Scott v. Harris, 550 U.S. 372, 382-83, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (alterations accepted) (quoting *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *Garner*, 471 U.S. at 4, 21). "*Garner* says something about deadly force but not everything, especially when facts vastly different from *Garner* are presented. "The Supreme Court has cautioned that '*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Long v. Slaton*, 508 F.3d 576, 580 (11th Cir. 2007) (quoting *Scott*, 550 U.S. at 382); *see also Young v. Borders*, 850 F.3d 1274, 1281 (11th Cir. 2017) (quoting *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017)) ("The Supreme Court explained that federal courts that relied on *Graham*, *Garner*, and their circuit court progeny, instead of identifying a prior

case with similar circumstances, have 'misunderstood' the 'clearly established' analysis because those excessive force cases do not create clearly established law outside of an 'obvious case' . . . .") (en banc). The facts of this case are vastly different from *Garner:* Snook shot Mr. Powell while Mr. Powell was facing Snook and in the process of raising a handgun, and Snook justified his actions on the basis of his belief that Mr. Powell was about to shoot him.

In *Lundgren,* the Eleventh Circuit held that "shooting a suspected felon who was apparently neither fleeing nor threatening the officers or others was—even in July, 1983—an unreasonable seizure and clearly violated fourth amendment law." *Lundgren,* 814 F.2d at 603. In that case, at around 2:00 a.m., officers noticed the front window of a video store was broken, suspected that a burglary was in progress, and entered the video store faintly illuminated by a television. *Id.* at 602. In fact, the window had been broken the previous day, and the video store owners were sleeping in the store behind a desk. *Id.* The store owner wife woke up her husband when she heard someone walking on the broken glass outside the store. *Id.* The jury believed the wife's testimony that as her husband was raising up, he was shot, and that neither she nor her husband reached for a gun or fired a shot. *See id.* at 602, 603 n.1. The Court affirmed the jury's finding that the officers violated the Fourth Amendment because "[t]he jury could have reasonably believed that the officers were neither threatened by a weapon, nor appeared to be threatened by a weapon, nor were fired upon, but rather that the officers without provocation shot at a nondangerous suspect." *Id.* at 603.

Once again, *Lundgren* is inapposite because the undisputed evidence here is that Mr. Powell was carrying a gun in his right hand and had begun to raise that gun. Furthermore, "[i]n *Lundgren* . . . there was no advance report that a burglary suspect in the store might have a gun," *Young,* 850 F.3d at 1283, and in this case the officers were responding to a 911 call about potential domestic violence where shots had been fired. *Lundgren* is not "a case where an officer acting under similar circumstances as Officer [Snook] was held to have violated the Fourth Amendment." *Id.* (quoting *White,* 137 S. Ct. at 552); *see also Ayers v. Harrison,* 650 F. App'x 709, 714-15 (11th Cir. 2016) (emphasis added) (finding that *Gilmere v. City of Atlanta,* 774 F.2d 1495 (11th Cir. 1985) (en banc), and *Lundgren* provided sufficient notice that "using deadly force against an *unarmed,* nondangerous suspect is unconstitutional") (unpublished).

In *Perez,* the Eleventh Circuit held that "no reasonable officer would have shot [a suspect] while he was lying prone, unarmed, and compliant." *Perez,* 809 F.3d at 1218. In that case, sheriff's deputies responded to an altercation at a sports bar in the pre-dawn hours. *Id.* at 1217. The deputies told everyone to get down and put their hands in the air. *Id.*

> Arango then got on the ground or was thrown to the ground by [a deputy]. After going to the ground, Arango made no attempt to get up or resist police restraint; instead, he remained compliant and prostrate on his stomach, with his hands behind his back. A deputy remarked

> that Arango had a gun. One of the deputies removed a handgun from Arango's waistband and threw it "pretty far," about ten feet. [Deputy] Suszczynski then shot Arango twice in the back, in a manner one witness described as "execution-style," from approximately twelve to eighteen inches away.

Id. The facts of this case are not remotely similar to the facts described above. In *Perez,* "witnesses for the Estate testified in their depositions that Arango was subdued, *unarmed,* and not resisting arrest when Suszczynski fatally shot him." *Id.* at 1222 (emphasis added). In the instant case, Mr. Powell held a gun in his right hand and began raising it prior to being shot by Snook.

In the absence of relevant case law on point, we ask whether the officer's conduct was "so obviously at the very core of what the Fourth Amendment prohibits" that any officer would know the conduct was illegal. *See Lee,* 284 F.3d at 1199 *(quoting Smith v. Mattox,* 127 F.3d 1416, 1419 (11th Cir. 1997)) (concluding "the peculiar facts of this case are 'so far beyond the hazy border between excessive and acceptable force that [the officer] had to know he was violating the Constitution even without caselaw on point"). "This standard is met when every reasonable officer would conclude that the excessive force used was plainly unlawful." *Lewis v. City of W. Palm Beach,* 561 F.3d 1288, 1292 (11th Cir. 2009) (citing *Priester v. City of Riviera Beach,* 208 F.3d 919, 926-27 (11th Cir. 2000)).

This standard is not met in this case. The decisive factor is that Mr. Powell carried a gun in his right hand and began raising that gun in front of a police officer.[10] *Compare Garner,* 471 U.S. at 11 ("A police officer may not seize an unarmed and non-dangerous suspect by shooting him dead."); *Bryant v. Mascara,* 723 F. App'x 793, 797 (11th Cir. 2018) (denying summary judgment where there were genuine issues of material fact as to whether the suspect was holding a gun at the time he was shot by police officers); *Lundgren,* 814 F.2d at 603 (concluding the police officers violated the Fourth Amendment when they "were neither threatened by a weapon, nor appeared to be threatened by a weapon"). Accordingly, Ms. Powell has not met her burden to prove that Snook violated a clearly established constitutional right by shooting Mr. Powell.

The events of the night of June 7, 2016, were a tragedy. Mr. Powell was shot outside his home while investigating what he reasonably believed was an armed intruder approaching his residence in the middle of the night. Ms. Powell witnessed her husband's shooting from just feet away. Ms. Powell lost her spouse and her family lost a loved one. Snook took the life of an innocent citizen. In addition, because the officers responded to the Powells's residence, they did not respond to the location where shots may have been fired and where someone was potentially the victim of domestic violence. The Court sympathizes with Ms. Powell for her terrible loss. However, binding Supreme

10. Although "the mere presence of a gun or weapon is not enough to warrant the exercise of deadly force and shield an officer from suit," *Perez,* 809 F.3d at 1220, in this case, Mr. Powell held the gun and raised it in the direction of the police officer.

Court and Eleventh Circuit precedent make clear that even if Snook violated Mr. Powell's Fourth Amendment rights that night, Plaintiffs' claim fails because they have not shown that the constitutional right at issue was clearly established at the time of the incident. "[T]ragedy does not equate with unreasonableness." *Shaw v. City of Selma,* 884 F.3d 1093, 1101 (11th Cir. 2018). Because any violation of a constitutional right in this case was not clearly established at the time of the shooting, Snook is entitled to qualified immunity.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant Patrick Snook's Motion for Summary Judgment [Doc. 53] is **GRANTED**.

It is further. **ORDERED** that Defendants Annie Davis, Andrew Talbert, and Henry County, Georgia's Motion for Summary Judgment [Doc. 52] and Defendants Ashley Ramsey (f/k/a Janicak) and Matthew Davis's Motion for Summary Judgment [Doc. 54] are **DENIED AS MOOT**.

The Clerk is **DIRECTED** to close this file.

IT IS SO ORDERED this 30th day of July, 2019.

/s/ Mark H. Cohen
MARK H. COHEN
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED APRIL 1, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13340-JJ

SHARON POWELL, AS EXECUTRIX
OF THE ESTATE OF WILLIAM DAVID POWELL,
SHARON POWELL,

Plaintiffs-Appellants,

v.

JENNIFER SNOOK, AS EXECUTRIX FOR THE
ESTATE OF PATRICK SNOOK,

Defendant-Appellee,

ANNIE DAVIS, *et al.*,

Defendants.

April 1, 2022, Filed

Appeal from the United States District Court
for the Northern District of Georgia.

Appendix C

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, NEWSOM, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)