ORIGINAL

21-6016

No. 20-

In the United States Supreme Court

ZELDA WARE,

Petitioner,

v.

CITY OF ATLANTA and CHRISTOPHER FALL

Respondents.

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

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Questions Presented

1. Whether, consistent with the Fourth Amendment to the United States Constitution, a court order directing a state agency to pick up a child is the functional equivalent of a search warrant, such that a law enforcement officer, acting on behalf of an employee of the agency may barge into a home and search without permission.

2. Whether a law enforcement officer and his employer may assert qualified immunity against a Fourth Amendment violation, where the facts which must be accepted as true on a motion for summary judgment, show that the law enforcement officer "barged" into Petitioner's home and began searching her home, purportedly for her grandson, without her permission; that when Petitioner told the officer that the child was not there and was with her daughter, the officer threatened to arrest her unless she "g[ot] her daughter on the telephone"; that Petitioner complied with his request, but he nevertheless "aggressively grabbed [her], twisted her arm and shoulder and placed her in handcuffs," which caused an injury to her shoulder; and that the officer subsequently removed the handcuffs and left.

List of Parties

All parties are listed in the caption above.

List of All Proceedings

Action was originally filed in the State Court of Fulton County, Georgia on August 17, 2018, under docket number 18-EV-0003984.

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In the Supreme Court of the United States
Petition for a Writ of Certiorari

Petitioner requests that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the United States Court of Appeals for the Eleventh Circuit may be found at___F' Appx___, 2021 WL 2588745 and in the Appendix at A1. The Opinion of the District Court is not reported and may be found in the Appendix at A22.

Jurisdiction

The Eleventh Circuit's decision was filed on June 24, 2021. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Constitutional and Statutory Provisions Involved

U.S. Const., Amdt. IV:

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.

O.C.G.A. § 16-5-45(b)(1):

A person commits the offense of interference with custody when without lawful authority to do so, the person: (A) [k]nowingly or recklessly takes or entices any child ... away from the individual who has lawful custody of such child ...; [or] (B) [k]nowingly harbors any child ... who has absconded.

O.C.G.A.§ 17-4-1

An actual touching of a person with a hand is not essential to constitute a valid arrest. If the person voluntarily submits to being considered under arrest or yields on condition of being allowed his freedom of locomotion, under the discretion of the officer, the arrest is complete.

O.C.G.A. § 17-4-3

In order to arrest under a warrant charging a crime, the officer may break open the door of any house where the offender is concealed.

O.C.G.A. § 17-4-40

(a) Any judge of a superior, city, state, or magistrate court or any municipal officer clothed by law with the powers of a magistrate may issue a warrant for the arrest of any offender against the penal laws, based on probable cause either on the judge's or officer's own knowledge or on the information of others given to the judge or officer under oath. Any retired judge or judge emeritus of a state court may likewise issue arrest warrants if authorized in writing to do so by an active judge of the state court of the county wherein the warrants are to be issued.

O.C.G.A. § 17-5-20

(a) A search warrant may be issued only upon the application of an officer of this state or its political subdivisions charged with the duty of enforcing the criminal laws or a currently certified peace officer engaged in the course of official duty, whether said officer is employed by a law enforcement unit of:

(1) The state or a political subdivision of the state; or

(2) A university, college, or school.

(b) A search warrant shall not be issued upon the application of a private citizen or for his aid in the enforcement of personal, civil, or

property rights.

O.C.G.A. 19-9-41(17)– UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT PART 1 - GENERAL PROVISIONS Definitions

In this article:

"Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

Statement of the Case

Petitioner filed a pro se civil complaint in the state court of Fulton County against Respondents, the City of Atlanta and Officer Fall, in his individual and official capacity, related to Officer Fall's violations of her civil rights at her home in August 2016. Respondents removed the action to federal court.

At the time of the incident at issue, Petitioner's grandson, "DJ," was living with her pursuant to a safety plan put in place by the Georgia Department of Family and Children Services ("DFACS"). On August 18, 2016, a woman by the name of Ms. Maupin, who identified herself as an employee of Fulton County DFACS, placed a call to Atlanta 9-1-1, advising that DFACS had a court order to remove DJ

from the home, and Ms. Maupin sought police assistance in executing the order. Officer Fall, in his capacity as an officer with the Atlanta Police Department, was dispatched to Petitioner's home in response to the call.

According to Petitioner, whose version of the facts must be accepted on a motion for summary judgment, her encounter with Officer Fall began when she heard a "really, really loud and aggressive[]," banging on the door of her home. Petitioner came from the back of the home and opened the door and Officer Fall "pushed his way in" and began to search her home without announcing himself as a law enforcement officer, without identifying himself by name, and without explaining that the DFACS call was the reason for his presence.

In addition, Officer Fall said nothing regarding the court order (or a warrant of any kind) authorizing his entry. Petitioner did not give Officer Fall consent to enter her home. Ms. Maupin, the DFACS worker, had not yet arrived at this point.

After his entry, Petitioner repeatedly asked Officer Fall why he

was at her home. Eventually, she realized that Officer Fall was looking for her grandson DJ and informed Officer Fall that DJ was with her daughter, Ms. Evans, in South Carolina, and then proceeded to call her daughter.

When she attempted to give the phone to Officer Fall, however, it hung up. Petitioner tried to show Officer Fall paperwork indicating that she had custody over DJ, but he refused to view it.

Officer Fall got angry about the ended phone call and believed she was "playing with the phone." Officer Fall then grabbed Petitioner by her arm, twisted her arm up behind her back, placed a handcuff on her, and told her to "get the child here now." Petitioner was in pain and when her school-age niece, who was also present, saw that she was in distress, the niece grabbed Officer Fall's arm, refusing to let go until he released Petitioner. At that point, Officer Fall released Petitioner, but told her to get Ms. Evans on the phone or she was going to jail. Subsequently, Petitioner reached her daughter, who returned to the home with DJ.

Respondents made a motion for summary judgment, which was

granted. The district court concluded that the court order was a warrant, citing O.C.G.A. 19-9-41(17), which concerned a definition under the Uniform Child Custody Jurisdiction and Enforcement Act and by its terms limited to the Act, and had no application to the case. Under that reasoning there was no Fourth Amendment violation.

As to the arrest, the district court found that Officer Fall was entitled to qualified immunity. The state law claims were dismissed on the grounds that the City of Atlanta had sovereign immunity and that Officer Fall did not act with malice.

The Court of Appeals affirmed. It held that the court order was the functional equivalent of an arrest warrant and thus justified the entry and search. It agreed that Officer Fall had qualified immunity for the arrest and, in any event, had probable cause for the arrest. Due to what it found was inadequate briefing, the Court held that Petitioner waived any argument with respect to the sufficiency of the state law claim.

Reasons for Granting the Writ

A. The Court Should Resolve the Conflict that Entry into a Home Requires a Traditional Search or Arrest Warrant Not Simply a "Court Order" that Authorizes Neither

Abraham Lincoln once posed the question: "If you call a dog's tail a leg, how many legs does it have?" and then answered his own query: "Four, because calling a tail a leg doesn't make it one."

That aphorism explains the problem with the analysis of the district court and the court of appeals. They looked to a statute defining the term "warrant" for "[i]n this article," only and then proceeded as if the document were, in fact, a search warrant or arrest warrant. Such warrants, under Georgia law, and, elsewhere, operate under a far different standard. See O.C.G.A. § 17-4-3 ("In order to arrest under a warrant charging a crime, the officer may break open the door of any house where the offender is concealed.") And, of course, consistent with the Fourth Amendment to the Constitution, Georgia requires the standard of probable cause. O.C.G.A. § 17-4-40

O.C.G.A. § 19-9-41(17) is part of the Uniform Child Custody Jurisdiction and Enforcement Act and has nothing to do with the

circumstances at hand. There is no indication that the underlying order was issued pursuant to that section, which concerns child abduction.

Even if the order was issued pursuant to the Uniform Act, the entry without consent was unauthorized. An order under the Uniform Act is simply a "pickup order." (See Patricia M. Hoff, The Uniform Child-Custody Jurisdiction and Enforcement Act, Juvenile Justice Bulletin, U.S. Department of Justice Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, p. 8 (December, 2001), available at https://www.ojp.gov/pdffiles1/ojjdp/189181.pdf; *H.T. v. Cleburne Cty. Dep't of Human Res.*, 163 So.3d 1054, 1058 n. 3 (Ala.Civ.App.2014) (so describing Georgia order); Comment to Unif. Child Custody Jurisdiction and Enforcement Act § 311. It does not authorize the entry and search of a premises without consent and neither the district court nor the court of appeals cited any authority otherwise.

This case thus presents this Court with the opportunity to hold that a search warrant and arrest warrant have fixed meanings and the

Fourth Amendment does not tolerate some other mechanism for entry into a home absent probable cause as understood under this Court's precedents. The term "warrant" is used in a variety of contexts; it is simply an order "from a competent authority in pursuance of law, directing the doing of an act, and addressed to an officer or person competent to do the act, and affording him protection from damage, if he does it." Black's Law Dictionary ("warrant").

In short, the entry here cannot be justified simply upon recitation of the term "warrant." The analysis below simply begged the question and should be disapproved.

B. The Eleventh Circuit Misconstrued this Court's Precedents on Qualified Immunity. The Case Presents an Ideal Fact Pattern to Resolve Its Contours and Resolve the Conflict in Excessive Force Cases Between the Eleventh Circuit and Other Circuits

The Eleventh Circuit concluded that Officer Fall was entitled to qualified immunity because there was no direct precedent supporting a constitutional violation under the facts presented and he had probable cause to arrest Petitioner for custodial interference.

The doctrine of qualified immunity shields from liability public

officials who perform discretionary duties and it thus protects police officers who act in ways they reasonably believe to be lawful. It protects those officers who make a *reasonable* error in determining whether there is probable cause to arrest an individual. *Carmichael v. Village of Palatine, Ill.*, 605 F.3d 451, 459 (7th Cir.2010) (internal citations omitted).

Qualified immunity in the context of probable cause has been aptly summarized as follows:

> Whether police officers had probable cause to arrest a suspect and whether they are entitled to qualified immunity for the arrest are closely related questions, although qualified immunity provides the officers with an "additional layer of protection against civil liability" if a reviewing court finds that they did not have probable cause. In an unlawful arrest case in which the defendants raise qualified immunity as a defense, this court will "determine if the officer actually had probable cause or, if there was no probable cause, whether a reasonable officer could have mistakenly believed that probable cause existed." If the officers can establish that they had "arguable probable cause" to arrest the plaintiff, then the officers are entitled to qualified immunity, even if a court later determines that they did not actually have probable cause.

Ibid.

Under OCGA § 16-5-45 (b) (1) (A), "[a] person commits the offense

of interference with custody when without lawful authority to do so, the person ... [k]nowingly or recklessly takes or entices any child ... away from the individual who has lawful custody of such child[.]" (emphasis supplied). As defined by statute, "lawful custody" includes "that custody inherent in the natural parents, ... or that custody awarded to a parent, guardian, or other person by a court of competent jurisdiction." OCGA § 16-5-45 (a) (3).

As the Georgia Court of Appeals has held in reversing a conviction, "Under the plain language of the statute, the defendant must entice the child away from an *individual* having custody." *Owens v. State*, 353 Ga.App. 848, 850, 840 S.E.2d 70, 73 (2020) (emphasis in original). Since that is certainly not the case here, as Petitioner had custody pursuant to an agreement approved by DFACS, there is simply no probable cause for the arrest. See also *Thompson v. State* , 245 Ga. App. 396, 397 (1), 537 S.E.2d 807 (2000) (reversing conviction for interference with custody of a minor where the defendant picked up the victim while she was skipping school).

Given the "plain language of the statute," the 2000 decision in

Thompson, and the undisputed possession by Petitioner of a custody agreement with DFACS there can be no claim of arguable probable cause. No reasonable police officer could have so concluded.

In any event, again contrary to the Eleventh Circuit's holding, there is no question that Officer Fell used excessive force against Petitioner and qualified immunity "do[es] not require a case directly on point," it does require that "existing precedent must have placed the statutory or constitutional question beyond debate." See *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); see also *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("Officials can still be on notice that their conduct violates established law even in novel factual circumstances."); *Hamby v. Hammond*, 821 F.3d 1085, 1095 (9th Cir. 2016) ("[A] plaintiff need not find a case with identical facts in order to survive a defense of qualified immunity.")

"In an obvious case, general standards can clearly establish the answer, even without a body of relevant case law." *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir.2005) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). "[T]here need not be a case with the exact same fact

pattern or even 'fundamentally similar' or 'materially similar' facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional." *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir.2005) (quoting *Hope v. Pelzer*, 536 U.S. at 741, (2002)). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

As the Sixth Circuit has held, under this Court's precedents, "Among the most important factors to consider in determining the objective reasonableness of the force used are: 1) the severity of the crime at issue; 2) whether the suspect posed an immediate threat to the safety of the police officer or others; and 3) whether the suspect actively resisted arrest or attempted to evade arrest by flight." *Grawey v. Drury*, 567 F.3d 302, 310 (6th Cir. 2009)(citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

These factors point to the denial of summary judgment on Petitioner's claim of excessive force. See, e.g., *Meredith v. Erath*, 342

F.3d 1057, 1061 (9th Cir. 2003) (affirming denial of qualified immunity on summary judgment concluding that grabbing plaintiff by the arm, forcibly throwing her down, and twisting her arm to handcuff her where she was only passively resisting violated a clearly established right); *DelPriore v. McClure*, 424 F. Supp. 3d 580, 597 (D. Alaska 2020) (same).

It is noted that the Eleventh Circuit follows a contrary rule. In the Eleventh Circuit, police may use what it calls, de minimis force, such as forcing the suspect to the ground,, when making a custodial arrest "regardless of the severity of the alleged offense" and even if the force applied was "unnecessary." *Durruthy v. Pastor*, 351 F.3d 1080, 1094 (11th Cir. 2003); *cf. Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 739–40 (11th Cir. 2010) (dicta) ("the lawpermits some use of force in any arrest for even minor offenses," but gratuitous use of pepper spray and other force in minor offense context violated the Constitution).

Indeed, contrary to other Circuits, the Eleventh Circuit has held that even more aggressive takedown measures are permissible and the

fact that the arrestee suffers a physical injury as a result of being slammed to the ground or thrown about does not deprive the officer of qualified immunity. See, e.g., *Rubio v. Lopez*, 445 F. App'x 170, 173 (11th Cir.2011) (qualified immunity shielded officer who pushed civil rights plaintiff onto hot pavement, even though plaintiff screamed out that he was being burned and suffered second degree burns to his face and chest); *Rodriguez v. Farrell*, 280 F.3d 1341, 1351–53 (11th Cir.2002) (officer entitled to qualified immunity despite fact that injuries caused by twisting and jerking plaintiff's arm when applying handcuffs necessitated 25 surgeries and the eventual amputation of plaintiff's arm below the elbow); *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir.2000) (officer enjoyed qualified immunity despite plaintiff's multiple bruises from being thrown into van, kneed in the back, and having his head pushed against van); *Jones v. City of Dothan*, 121 F.3d 1456, 1460 (11th Cir.1997) (affording officer qualified immunity from claim that he slammed suspect against wall and kicked his legs apart, even though plaintiff required treatment for resulting pain to his arthritic knee); see also *Gold v. City of Miami*, 121 F.3d 1442, 1446–47

(11th Cir.1997) (affording officer qualified immunity on claim that he applied handcuffs too tightly for 20 minutes, causing pain and skin abrasions); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559–60 (11th Cir.1993) (officer arresting restaurant manager for violating ordinance enjoyed qualified immunity from claim that he needlessly placed plaintiff in chokehold and pushed him against wall).

Conclusion

Petitioner respectfully requests that certiorari be granted.

Respectfully submitted

/s/ ZELDA WARE