No. 21-789

IN THE

Supreme Court of the United States

CASEY BENTON,

Petitioner,

v.

MARY JO BRADLEY, AS ADMINISTRATOR OF THE ESTATE OF TROY ROBINSON, ET AL.,

Respondents.

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

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 16.6, Petitioner Casey Benton submits this Reply to Respondents' Opposition to Petition for Writ of Certiorari.

Respondents assert that the petition "claims nothing more than that the Eleventh Circuit incorrectly applied an undisputed general rule of law to the facts of the case." Opp. 2. Not so. The petition has nothing to do with whether the Eleventh Circuit correctly applied clearly established law to the facts before it. Rather, the petition demonstrates that the Eleventh Circuit used the wrong analytical framework to decide the qualified immunity issue and, as a result, reached a wrong decision on an important and recurring issue. In particular, the Eleventh Circuit violated this Court's repeated instructions that whether law is well established for purposes of qualified immunity must be determined in a particularized sense, not as a broad general proposition.

ARGUMENT

1. As the petition explains, the Eleventh Circuit's decision conflicts with this Court's repeated instruction that, in assessing whether an official is entitled to qualified immunity, courts must determine whether a right is clearly established in a particularized sense—not at a high level of generality. Pet. 9–11. Under that principle, the Eleventh Circuit should have asked whether there is established law closely tied to the facts of this case—namely, an officer deploying a taser on a fleeing person on an eight-foot wall who the officer had reason to believe might be armed. Respondents' arguments against review

misapprehend the nature and basis of the Eleventh Circuit's decision.[1]

a. Respondents contend that the Eleventh Circuit properly denied immunity by applying the "factually specific rule" established by *Tennessee v. Garner*, 471 U.S. 1 (1985) "that an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." Opp. 16. But Respondents' characterization of *Garner* and the Eleventh Circuit's application of it is inaccurate.

Whether force is unreasonably excessive under the Fourth Amendment depends on the type of force used and the reason for using it. *Scott v. Harris*, 550 U.S. 372, 382–84 (2007). An officer must balance both considerations in determining whether to use force against a person and what force to use. *Id.* *Garner* sets forth a particularized rule regarding only the latter consideration about the reasons for using force. It establishes that an officer cannot use deadly force where an unarmed person who poses no threat is fleeing. *Garner*, 471 U.S. at 21. It does not set forth a specific rule regarding the former consideration about *what* constitutes deadly force.

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[1] Respondents assert that Officer Benton's Rule 14(B) statement erroneously omits five of the plaintiffs in this action. Opp. 11. That is not so. Rule 14(B) requires the petition to contain "A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties)." The five plaintiffs identified by Respondents were not listed as parties in the Eleventh Circuit's proceedings. *See Bradley v. Benton*, 10 F.4th 1232 (11th Cir. 2021) (No. 20-11509).

As this Court recognized in *Scott*, whether force constitutes deadly force is a fact-specific inquiry. 550 U.S. at 384. It depends on the type of force used and the circumstances under which that force is used. There was no doubt that the officer in *Garner* used deadly force; he shot the suspect in the head. Accordingly, *Garner* had no reason to and did not provide any guidance regarding how to determine whether the use of a specific type of force is deadly. In particular, *Garner* says nothing at all about whether tasing a person on an eight-foot wall constitutes deadly force. Instead of relying on *Garner*'s broad general rule regarding when deadly force may be used, the Eleventh Circuit should have asked whether prior decisions clearly established that deploying a taser on a person on an eight-foot wall constitutes deadly force.

As noted above, the specific facts of *Garner* do not speak to whether tasing a person on an eight-foot wall constitutes deadly force. As this Court noted in *Scott*, shooting a person in the head poses a "near *certainty* of death." 550 U.S. at 384. Tasing a person on an eight-foot wall is not at all comparable. Certainly, one cannot realistically say that *Garner*'s holding that shooting a person in the head constitutes deadly force clearly *establishes* that tasing a person on an eight-foot wall constitutes deadly force. The former says nothing at all about the latter.

b. Respondents also argue that, even absent a prior case on point, Officer Benton is not entitled to qualified immunity because he subjectively knew from his training and from DeKalb County's policy that using a taser on a person at an elevated height

could result in death. Opp. 18. But this Court has made clear that the subjective views of the officer are not relevant to the qualified immunity analysis. Rather, the analysis turns on the "objective reasonableness" of the officer's conduct. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that qualified immunity turns on "the objective reasonableness of an official's conduct"); *see also Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021) (clarifying that "judicial decisions are the only valid interpretive source of the content of clearly established law" and that any training received by an officer "was irrelevant to the clearly-established-law inquiry"). Officer Benton's subjective beliefs simply do not matter.

Contrary to Respondents' contention, Opp. 19, neither *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), nor *Devenpeck v. Alford*, 543 U.S. 146 (2004), supports a different position. In *Devenpeck*, this Court held that "whether probable cause" supporting an arrest under the Fourth Amendment "exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." 543 U.S. at 152. *Devenpeck* thus stands for the proposition that, when evaluating whether an officer had probable cause, a court should consider only facts known to the officer.

Nothing in *Devenpeck* suggests that probable cause depends on the officer's subjective belief about whether the facts known to him constitute probable cause. To the contrary, probable cause is an objective determination of law, made by the court, based on the facts known to the officer. *Ornelas v. United States*,

517 U.S. 690, 696 (1996). By the same logic, the determination of whether the law is clearly established that a certain level of force is deadly or otherwise excessive for purposes of the Fourth Amendment is an objective question of law for the court. It does not turn on the officer's subjective views about the nature of the force deployed.

Respondents' reliance on *Hernandez* is likewise misplaced. In *Hernandez*, this Court stated that, in determining whether officers are entitled to qualified immunity, a court should consider only "the facts that were knowable to the defendant officers" at the time they engaged in the conduct in question. 137 S. Ct. at 2007 (quoting *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam)). Accordingly, an officer cannot claim immunity based on facts unknown to him or "learn[ed] after the incident ends." *Id.* That holding—that facts unknown to an officer cannot be deemed to be known by him—provides no support for Respondents' assertion that one officer's views about whether a particular type of force can be deadly can control whether it is clearly established that the force is in fact deadly.

Accepting Respondents' argument would result in different officers having differing degrees of qualified immunity based on their own personal views about the types of force they deployed. For example, an officer who attended trainings warning against tasing a person on an eight-foot wall where deadly force is not appropriate would not be entitled to qualified immunity for deploying a taser in that way, but an officer who did not attend similar training would be entitled to qualified immunity for deploying a taser in

identical circumstances. That is not and cannot be the law. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 814–15 (1996) (rejecting that an officer's search was unreasonable because "the officer's conduct deviated materially from usual police practices" and reasoning that law enforcement practices "vary from place to place and from time to time"); *Scott*, 550 U.S. at 375 n.1 (finding "whether [the officer] had permission to take the precise actions he took" irrelevant to the qualified immunity analysis); *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 616 (2015) (holding that local policies are irrelevant to the qualified immunity analysis because an officer may act reasonably "[e]ven if an officer acts contrary to her training").

c. Respondents also point to decisions from other courts involving tasing, but they do not and cannot argue that those decisions clearly establish that tasing a person on an eight-foot wall constitutes use of deadly force. Opp. 19. Rather, Respondents cite these cases only for the unremarkable proposition that a "taser causes temporary paralysis and is likely to send the subject into an uncontrolled fall." Opp. 19. No one disputes this point, but it does not clearly establish that using a taser as Officer Benton did here constitutes use of deadly force. Respondents cite no case from the Eleventh Circuit (or any other court) establishing that use of a taser under circumstances comparable to those here constitutes use of deadly force.

Respondents suggest that the Eleventh Circuit's decision in *Harper v. Perkins*, 459 F. App'x 822 (11th Cir. 2012) clearly established that deploying a taser

as Officer Benton did here constitutes deadly force. Opp. 23. That contention cannot withstand analysis.

As an initial matter, *Harper v. Perkins* is an unpublished decision. As such, under Eleventh Circuit rules, it is "not considered binding precedent." 11th Cir. R. 36-2. Consequently, in the Eleventh Circuit, "[u]npublished cases . . . cannot be relied upon to define clearly established law." *JW ex rel. Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1260 n.1 (11th Cir. 2018); *see also City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (noting that a decision was "unpublished" in concluding that it did not clearly establish law). Consistent with this rule, the Eleventh Circuit in this case did not even cite the *Harper v. Perkins* decision it in its opinion.

Moreover, in *Harper v. Perkins* the Eleventh Circuit affirmed denial of a motion to dismiss. In a later published decision in the same litigation, *Harper v. Davis*, 571 F. App'x 906 (11th Cir. 2014), the Eleventh Circuit upheld summary judgment for the officers on their qualified immunity defense. As explained in the petition, *Harper v. Davis* does not hold that deploying a taser on a person at an eight-foot elevation constitutes deadly force. Pet. 21–22. To the contrary, in that case the Eleventh Circuit questioned whether the officers in fact used deadly force when they tased a person eight feet above the ground in a tree. *Harper v. Davis* thus negates any contention that the law was well established that deploying a taser on a person at an eight-foot height constitutes use of deadly force.

d. As the petition explains, even if it were clearly established that force Officer Benton deployed was deadly, he is entitled to qualified immunity because he had reason to believe that Robinson might be armed and was headed into a residential community. Pet. 26. Respondents attempt to counter this point by arguing that this possibility that Robinson had a weapon falls short of constituting probable cause. Opp. 21. That argument misses the mark. Whether Officer Benton is entitled to qualified immunity does not depend on whether he had probable cause to believe Robinson was armed. Rather, the relevant inquiry is whether the law was so clearly established that all reasonable officers would understand that Officer Benton did not have probable cause to believe Robinson was armed. That threshold is significantly lower. Immunity is unavailable only if then-existing precedent clearly establishes that the possibility that Robinson had a weapon does *not* constitute probable cause. *City of Tahlequah*, 142 S. Ct. at 12. Respondents point to no cases establishing that point.

2. As explained in the petition, the facts of this case do not come close to meriting application of the "obvious clarity" exception to the general rule that an officer is entitled to qualified immunity absent a prior case with substantially similar facts clearly establishing that the officer's conduct was unconstitutional. Pet. 28–30. This Court has made clear that only in the "rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances" will the exception apply. *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)

(quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

Respondents incorrectly analogize this case to *Hope v. Pelzer*, 536 U.S. 730 (2002), arguing that Officer Benton possessed information regarding use of tasers similar to the Eleventh Circuit precedents, Alabama Department of Corrections regulations, and a DOJ report regarding the use of hitching posts available to the defendants in *Hope*. Opp. 23. Respondents' argument is misplaced. In finding the obvious clarity exception applied, the *Hope* Court focused on the clear egregiousness of the conduct at hand—conduct the Court found "amount[ed] to gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." 536 U.S. at 738.

While the materials cited by Respondents surely bolstered the Court's holding, at its core, *Hope* involved misconduct akin to torture that this Court found obviously "violated the 'basic concept underlying the Eighth Amendment.'" *Id.* Officer Benton's conduct here does not come close to falling into the same category.

Nothing suggests that Officer Benton made a deliberate decision to inflict gratuitous pain. To the contrary, it is uncontested that he made a split-second decision during a legitimate active pursuit to use what is typically nonlethal force. While tasing a person under some circumstances (say, where person is on the edge of a twenty-foot roof) poses such a risk of death that it obviously constitutes deadly force, this case surely does not fall in that category. An eight-

foot wall is not so high that tasing a person on it obviously constitutes deadly force.

Furthermore, even if it were obviously deadly force, it is not obvious that such force was unwarranted given that Officer Benton had reason to believe Robinson could be armed and headed toward a residential area.

CONCLUSION

Officer Benton respectfully requests that this Court summarily reverse the Eleventh Circuit's judgment denying qualified immunity or, alternatively, grant the petition to review that judgment.

Respectfully submitted,

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