No. 23-1285

IN THE

Supreme Court of the United States

SHAWN T. SWINDELL,

Petitioner,

v.

KENNETH BAILEY,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Bailey mischaracterizes the legal issue presented by Swindell's Petition as dependent on where Bailey was when the arrest was initiated, inside or outside the home, and despite the jury's determination that the arrest was initiated outside the home. Instead, the *actual* legal issue is whether it was clearly established, as of September 11, 2014, that Swindell's instantaneous entry into the residence to arrest Bailey for a first-degree misdemeanor, committed in public view and in Swindell's presence on the porch, was unconstitutional.

The first question submitted to the jury in this case was whether Swindell had reasonable suspicion to detain Bailey for a law enforcement investigation. The jury answered "yes" to that question. (Petition, p. 17a). As a matter of law, Bailey was lawfully detained while on the porch and was not free simply to turn around and go inside the home. *Terry v. Ohio*, 392 U.S. 1 (1968). The jury next found that Swindell had probable cause to arrest Bailey for the offense of "knowingly resisting, obstructing, or opposing" Swindell in the lawful execution of his duty to investigate the claims of Bailey's estranged wife. (Petition, p. 18a). This Petition is about the clarity of the law as to Swindell's entry into the residence to arrest Bailey for that offense. Regardless of whether Bailey had crossed the threshold of the door, as this Court held in *United States v. Santana*, 427 U.S. 38, 42 (1976), Bailey could not "thwart" an otherwise lawful arrest simply by "retreating" inside the home.

In addition to finding that the initial detention and questioning of Bailey on the porch was lawful, and that when Bailey broke off the investigation there was probable cause to arrest Bailey, the jury also found that the arrest was initiated outside the home. (Petition, p. 19a). This is the question which in *Bailey v. Swindell*, 940 F.3d 1295, 1303 (11th Cir. 2019) (*Bailey I*) the Eleventh Circuit had ordered be submitted to this second jury. The Eleventh Circuit in *Bailey I* was clear: upon remand, if the jury concluded that Swindell had probable cause to arrest Bailey and that the arrest was initiated outside the home, Swindell's entry into the home was lawful and Swindell would prevail.

Instead, in *Bailey v. Swindell*, 89 F.4th 1324 (11th Cir. 2024) (*Bailey II*), the Eleventh Circuit divined from the jury's additional finding of no exigent circumstances that the jury must have believed Bailey was inside the home when the arrest process was initiated. This interpretation of the verdict puts this case squarely in the *Santana* camp, or at least would result in qualified immunity because the law would not have been clearly established to Swindell that he could not enter to make the arrest.

Bailey's reply urges that Swindell's Petition is founded on fact disputes at trial about whether Bailey was inside the home or outside the home when the arrest actually occurred. (Bailey Response, pp. 10-11; 14-15; 17). This entirely mischaracterizes the legal issue presented by this case. The issue is not, as Bailey argues, where Bailey was when he was actually arrested. Rather, the legal issue presented is whether Swindell is entitled to qualified immunity on a claim that he acted unconstitutionally in immediately pursuing Bailey into the home to arrest

Bailey for an offense which Bailey had just committed in public: to wit, resisting Swindell's effort to investigate.

Bailey begins by contending that the Petition "contains not one reference to Bailey's trial testimony." (Bailey Response, p. 1, n. 1). That is simply not true. The Petition *directly quotes* Bailey's trial testimony, including his location on the porch as Swindell questioned him, that he turned and walked inside, and that Swindell came inside the home to arrest Bailey in an "instant." (See Petition, pp. 4-5, quoting Bailey's trial testimony at Petition, pp. 128a-130a). The Petition repeatedly references the Eleventh Circuit's conclusions of fact in this case, including that the jury in later questions found no exigency. (See, e.g., Petition, pp. 12, 22, 24, 25-26, 28, citing *Bailey II*.)[1]

Bailey argues that the Eleventh Circuit concluded that the jury believed the testimony from the Bailey family that "Swindell was outside the house, while Bailey was already inside, when Swindell formed the intent to arrest Bailey and set it in motion." (Bailey Response, p. 17, quoting *Bailey II*, 89 F.4th at 1330).[2] Bailey contends

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1. Bailey's recitation of facts unfairly characterizes Bailey purely as an innocent who did nothing wrong. However, this conflicts with the jury's findings that: (1) Swindell had reasonable suspicion to detain Bailey for a law enforcement investigation; (2) Swindell had probable cause to arrest Bailey for ***knowingly*** resisting, obstructing or opposing Swindell's execution of a legal duty; and (3) that Swindell initiated the arrest of Bailey outside the home. Furthermore, the first jury trial established that Swindell did not use excessive force when arresting Bailey.

2. Bailey notes that Swindell did not have a specific criminal offense subjectively in mind at the moment he decided to arrest Bailey. (Bailey Response, p. 6). But probable cause is objective and

that the jury's decision on this point, combined with a finding of lack of exigency for entry, shows a constitutional violation in Swindell's entry into the home to arrest him. He urges that Swindell's petition to this Court depends on ignoring or "second-guessing" the jury's verdict as to whether Bailey was inside or outside when the arrest actually began. (Bailey Response, p. 18).

This is classic straw man argument by Bailey in that, as the district court correctly observed, the issue on qualified immunity is not where Bailey was standing when the arrest process began. Rather, the issue is whether Bailey was inside or outside when Bailey committed the first-degree misdemeanor offense of resisting Swindell's investigation. (Petition, p. 28a-29a). The universal, undisputed evidence is that the offense occurred when the two men were on the porch, in public view, and Bailey turned and retreated inside.

Citing *Santana*, this Court observed in *Lange v. California*, 594 U.S. 295 (2021) that the circumstances under which entry into a residence can be made to arrest a person for a misdemeanor committed in public is fact-dependent and that there is no absolute rule on the subject. The indisputable fact is that Bailey's offense was committed in public. Swindell is thus not, as Bailey argues, asking the Court to "undo" the jury's factual findings. Instead, Swindell asks the Court on the strength of cases such as *Santana* and *Lange* to conclude that it was not clearly established in 2014 that Swindell's entry into the home to arrest Bailey was unconstitutional under these

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does not depend on the subjective thought process of the deputy. *Devenpeck v. Arnold*, 543 U.S. 146, 153 (2004).

circumstances, such that Swindell is entitled to qualified immunity.

II. Once the focus is correctly placed on the fact that Bailey's offense was committed outside and that Swindell's entry to make the arrest was immediate, it becomes clear that the district court was correct in awarding judgment as a matter of law to Swindell based on qualified immunity. This is so even under the Eleventh Circuit's interpretation of the verdict, and certainly under the district court's interpretation of the verdict.

The district court in this case cited *Santana* and *Lange* for the proposition that it was not clearly established when this incident occurred that Swindell acted unconstitutionally in entering the home to arrest Bailey when Bailey "retreated into the home in an attempt to depart the encounter" with Swindell. (Petition, pp. 30a-31a). The district court concluded that the question of whether there had been a "hot pursuit" and whether it justified entry into the home to arrest Bailey was not clearly established at the time of the incident such that Swindell is entitled to qualified immunity. *Id.* The jury's finding that the arrest was initiated outside the home buttresses the conclusion that a deputy in Swindell's shoes would not be on clear notice that pursuit of Bailey into the home was unconstitutional.

Bailey argues that the Court should deny certiorari review because there is no inter-circuit split on the question of how this Court's decision in *Lange* affects the §1983 qualified immunity analysis regarding entry into the home to make the misdemeanor arrest. Bailey

argues that the Eleventh Circuit's decision in *Bailey II* is not in conflict with any decision of this Court. (Bailey Response, p. 10).

But there is an obvious conflict between this Court's opinion in *Lange* and the Eleventh Circuit's opinion in *Bailey II* with regard to the clearly established law. This conflict in turn flows from the discord, often observed, between this Court's decisions in *Santana* and *Payton v. New York*, 445 U.S. 573 (1980), regarding warrantless entry into a residence to make an arrest. *Santana* holds that warrantless entry into a home *in hot pursuit* of a suspect to make an arrest, where there is probable cause that the suspect has committed a criminal offense in public view, is constitutional. *Santana*, 427 U.S. at 42-43. *Payton*, on the other hand, holds that warrantless entry into a home to make an arrest founded on probable cause, *but without additional exigency* and *without hot pursuit*, is unconstitutional. *Payton*, 445 U.S. at 576.

The Eleventh Circuit has itself previously recognized the inconsistency that arises when *Santana* and *Payton* are considered in tandem in the qualified immunity context. *McClish v. Nugent*, 483 F.3d 1231, 1249 (11th Cir. 2007) (Given the "apparent tension between *Santana* and *Payton*" defendant officer was entitled to qualified immunity for entry; "if judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.") (quoting *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (internal quotation marks omitted)).

This Court in *Lange* expressly rejected a categorical rule on that very point. Under *Lange*, the constitutionality of entry into a residence to pursue and arrest a

misdemeanant depends on the individual facts of the case. The district court found that qualified immunity must protect Swindell from liability precisely because the law was not clearly established at the time of the incident that Swindell's immediate entry into the home to arrest Bailey was unconstitutional.

As part of its analysis of *Santana* and *Payton*, the Eleventh Circuit in this case cited back to its first opinion in this case, *Bailey I*, for the proposition that a law enforcement officer "can't point to *Santana* as a source of uncertainty in the law." *Bailey I*, 940 F.3d at 1303. But in *Lange* the majority of this Court came to the opposite conclusion, observing that the *Santana* decision *is* a source of part of the ambiguity in the law at issue in this case.

> Assuming *Santana* treated fleeing-felon cases categorically (that is, as *always* presenting exigent circumstances allowing warrantless entry), it still said nothing about fleeing misdemeanants. We said as much in *Stanton*, when we approved qualified immunity for an officer who had pursued a suspected misdemeanant into a home. Describing the same split of authority we took this case to address, we stated that "the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established" (so that the officer could not be held liable for damages). In other words, we found that neither *Santana* nor any other decision had resolved the matter one way or the other.

Lange, 594 U.S. at 304-5 (internal citations omitted) (quoting *Stanton v. Sims*, 571 U.S. 3, 6, 10 (2013)).

The §1983 defendant in *Stanton* made a "split-second decision" to enter a property to make a misdemeanor arrest, and this was important to this Court's reasoning on qualified immunity because the constitutionality of the defendant's entry was not "beyond debate." *Stanton*, 571 U.S. at 10 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). In the instant case, as in *Stanton*, the facts are undisputed but that Bailey committed his misdemeanor offense in public view and that Swindell entered the home from the porch to arrest Bailey in an "instant." Swindell cannot be expected to analyze and weigh all of the factors of all of the possible exigencies, in a split-second, on the porch, as Bailey retreats inside, and to be ordered to pay money damages "for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.

Bailey nevertheless contends that this Court ought to attach constitutional significance to Bailey merely "walking" inside, thereby concluding that there was a non-urgent character to the need to pursue Bailey. (Bailey Response, p. 23, citing *Hardigree v. Lofton*, 992 F.3d 1216 (11th Cir. 2021) for the proposition that plaintiff in that case was "not furtively fleeing" but instead "walked inside at a normal pace" such as to defeat concerns of officer safety.) First, *Hardigree* was decided in 2021 and therefore could not establish the law in 2014. Second, Bailey severely mischaracterizes the facts in *Hardigree* when he says that plaintiff there "walked inside" the residence at issue in that case. In *Hardigree* the plaintiff claimed he was at the threshold of the door, but inside the residence the entire time and that, when confronted, he retreated further back into the home. 992 F.3d at 1222. That is as contrasted here, where Bailey came outside, was lawfully detained for investigation, committed a crime

on the porch, in public, and *then* retreated into the home. Finally, if the pace of retreat from the porch to inside the residence is the measure of constitutionality for entry, Swindell is entitled to qualified immunity as even now there is no clearly established law as to how fast is "fast enough" so as to constitutionally justify entry.

To overcome qualified immunity, it must be shown *both* that there was a constitutional violation *and* that it was of "clearly established" law. *Pearson v. Callahan*, 555 U.S. 223 (2009). In the Fourth Amendment context, specificity of the prior caselaw and similarity of circumstances is imperative. *City of Escondido, Cal. v. Emmons*, 586 U.S. 38 (2019), pp. 42-43 (citing *Kisela v. Hughes*, 584 U.S. 100 (2018) and *District of Columbia v. Wesby*, 583 U.S. 48 (2018)).

The district court in this case determined that it was still very much debatable in 2014 whether Swindell's entry into the home to arrest Bailey was a Fourth Amendment violation, *at all*. The district court correctly concluded that even if entry was a constitutional violation, it was not of clearly established law given that the Court in *Lange* expressly held that there was no clear rule as to when and under what circumstances a law enforcement officer pursuing a fleeing misdemeanant from outside a home to inside that home must have exigency on top of the pursuit, itself, to satisfy the Fourth Amendment. (Petition, pp. 30a-31a; *Lange*, 594 U.S. at 308-309).

Bailey's observation that no other circuit has addressed the effect of *Lange* on a §1983 qualified immunity analysis is correct. But *Lange* was decided just three years ago

and Bailey does not take issue with Swindell's point that at least three other federal district courts have since then agreed with Swindell—and the district court in this case—that *Lange* recognized that the state of the law as to entry of a residence to pursue a fleeing misdemeanant has been decidedly *unclear* for some time, and certainly prior to the 2021 decision in *Lange*. (Petition, pp. 17-18). [3]

The circuit courts of appeal have struggled with applying *Santana* and *Payton* in the qualified immunity context for an entry into a home to make an arrest. See, e.g., *McClish*; *Joyce v. Town of Tewksbury, Mass.*, 112 F.3d 19 (1st Cir. 1997) (en banc) (given *Santana*, contours of right of officers to enter home to make arrest in hot pursuit not clearly established such that officers were entitled to immunity); *Soza v. Demsich*, 13 F.4th 1094 (10th Cir. 2021) (*Santana* could lead officers to reasonably believe that entry was proper).

If one adheres to the view of Chief Justice Roberts in his concurring opinion in *Lange*, there was no underlying constitutional violation here at all because the Fourth Amendment is not implicated by immediate pursuit of a fleeing misdemeanant into a residence where that

3. Similarly, officers have been granted qualified immunity based on the lack of clarity in the law given *Santana*. *Zavec v. Collins*, No. 3:16-cv-00347, 2017 WL 3189284 (M.D. Pa. July 27, 2017) (officers entitled to immunity when they could reasonably believe based on *Santana* that they could enter a home to arrest for an offense occurring just outside the front door); *Nance v. Kilpatrick*, No. 1:18-cv-11, 2019 WL 1409847 * 7 (E.D. Tenn. March 28, 2019) (officers received immunity because *Santana* provides that a suspect cannot "necessarily reacquire Fourth Amendment protection simply by retreating back into the home.").

misdemeanant has just committed an offense in public view. *Lange*, 594 U.S. at 319-20. (Roberts, C.J., concurring). A pursuit in this context does not require an "extended hue and cry in the streets," just "some sort of chase." *Santana*, 427 U.S. at 42-43. Here, Swindell entered the home in an instant, from the porch, immediately after Bailey retreated inside. This was "some sort of chase," just as surely as in *Santana*, despite the fact that it "ended almost as soon as it began." *Id*. at 43. Even under the majority opinion by Justice Kagan in *Lange*, the conclusion is simply inevitable that the law was not clearly established in 2014 that Swindell acted unconstitutionally in the moment and Swindell is therefore entitled to qualified immunity.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari and reverse the decision of the Eleventh Circuit in this case, restoring judgment in favor of Swindell.

Respectfully submitted,

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