

In the
Supreme Court of the United States

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MICHAEL SCOTT PRICE, Individually and in his Official Capacity as
Lieutenant of Haywood County Sheriff's Department; KEITH ALLEN
BEASLEY, Individually and in his Official Capacity as Deputy
Sheriff of Haywood County Sheriff's Department; WEST AMERICAN
INSURANCE COMPANY, Corporate Surety on the official bond of the
Sheriff of Haywood County; THE OHIO CASUALTY INSURANCE
COMPANY, Corporate Surety on the official bond of the
Sheriff of Haywood County,

Petitioners,

v.

TERESA ANN HENSLEY, as relator on behalf of the State of North
Carolina, and as Administrator of the Estate of David Lee Hensley;
H.H., a minor, by and through her parent and next friend;
RACHELLE FERGUSON, Individually, and as relator on behalf of the
State of North Carolina,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER.....	1
CONCLUSION	6

TABLE OF AUTHORITIES

Page(s):

Cases:

Graham v. Connor,
490 U.S. 386 (1989) 2, 5

Ryburn v. Huff,
565 U.S. 469 (2012) 4

Scott v. Harris,
550 U.S. 372 (2007) 1, 2, 3, 4

Tennessee v. Garner,
471 U.S. 1 (1985)..... 2, 3, 4, 5

Constitutional Provisions:

U.S. Const. amend IV *passim*

REPLY BRIEF FOR PETITIONER

At the outset, in analyzing qualified immunity for a Fourth Amendment excessive force claim, “the reasonableness of [a law enforcement officer’s] actions . . . is a pure question of law.” *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). The motion for summary judgment, the appeal to the Fourth Circuit, and the Petition to this Court all proceed on the premise that taking the undisputed facts in the light most favorable to Respondents, no violation of Hensley’s Fourth Amendment right to be free from unreasonable seizures can be shown. Thus, Respondent’s discussion of disputed facts that may be “hotly contested,” (Br. in Opp. 1), at trial has no bearing on the legal errors in the split panel’s decision in this case. Respondents’ contention that neither prong of qualified immunity can be resolved “[u]ntil such time as the finders of fact establish facts on which the Trial Division can rely through special interrogatories,” (Br. in Opp. 7), is patently incorrect.¹

Respondents apparently concede that the correct analysis of the Fourth Amendment claims is to assess whether on the undisputed facts the use of force was objectively reasonable under the totality of the circumstances. (Br. in Opp. 3). But that is not what the panel majority did. (Pet. 10-12). Rather,

¹ Equally puzzling is Respondents’ extended argument in support of the panel majority’s waiver finding, (Br. in Opp. 4-5), when the Petition did not challenge the majority’s waiver finding, and instead seeks review of the impermissible alteration of the standard analyzing the alleged Fourth Amendment violation, (Pet. i). For the reasons we explain, the waiver finding does not present any vehicle problem for this case, (Pet. 17 n.6), and Respondents do not argue otherwise.

the majority, citing *Garner* alone, held that it is unconstitutional to ever use deadly force in the absence of a feasible verbal warning. (Pet. App. 17a-18a). Respondents do not dispute that the panel majority's decision creates a circuit split on the necessity of verbal warnings in deadly force cases, (Pet. 7). Indeed, Respondents do not dispute that the panel's decision is in conflict with this Court's decisions in *Scott* and *Graham v. Connor*, 490 U.S. 386, 395 (1989), and the decisions of other circuits following the same. Fundamentally, the panel majority's decision incorrectly used one fact from *Garner* as a substitute for the correct test of objective reasonableness under the totality of circumstances. Respondents actually embrace the majority's error, citing *Garner* alone as support for the Fourth Circuit's finding of a constitutional violation here. (Br. in Opp. 5-7). Rigidly adopting *Garner's* language of providing "a warning, if feasible," is precisely how the majority creates an impermissible conflict on this important question of constitutional law.

Respondents protest that the Fourth Circuit's decision does not say it requires a verbal warning in order for deadly force to be found reasonable. (Br. in Opp. 6). As the Petition explains, the sum and substance of the panel majority's ruling makes the absence of a verbal warning dispositive, and the decision has already been interpreted to say exactly that by other courts. (Pet. 6-8). It is an undeniable consequence of the majority's discussion distinguishing this case from prior precedent finding no constitutional violation where unarmed subjects who received verbal warnings were shot. (Pet. App. 19a). Even Respondents are unable to defend the

decision in their favor without hinging on the Petitioners' failure "to issue commands or instructions on what to do with the gun," (Br. in Opp. 6). Respondents appear to concede that the fact that Hensley did not point his revolver at Petitioners was considered only in determining whether it would have been feasible to offer a verbal warning. (Br. in Opp. 6) ("If the gun was not pointed at [Petitioners], they had several seconds to issue commands or instructions . . ."). While the District Court exclusively relied on the fact that Hensley did not point his revolver at Petitioners, (Pet. App. 57a), the panel majority's opinion cannot be read to turn on that fact. The majority clearly reads this Court's decision in *Garner* as requiring "a warning, if feasible" before any use of deadly force. (Pet. App. 17a-19a). Ultimately, the majority ruled that Petitioners could not have had an objectively reasonable belief that Hensley posed a threat of serious harm to them because, although he had a gun, hit his daughter, and advanced on law enforcement officers, Petitioners "had ample time, under [Respondents'] evidence, to warn Hensley to drop his gun or stop before shooting him, but they concede they never gave any such warning." (Pet. App. 14a). It is precisely this analysis that incorrectly embeds a verbal warning into the constitutional baseline of reasonableness.

"*Garner's* warning admonition," (Pet. App. 18a), was never itself part of the test for reasonableness under the totality of the circumstances, and this Court's decision in *Scott* made it abundantly clear that "*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."

Scott, 550 U.S. at 382. Of course, the officer in *Scott* did not even attempt to issue a warning before using deadly force. *Id.* at 396-97 (Stevens, J., dissenting). After this Court’s decision in *Scott*, every other circuit has held that the one and only test for all excessive force claims is objective reasonableness under the totality of the circumstances, and *Garner* does not create a separate test for deadly force claims. (Pet. 9-11). The majority’s opinion is irreconcilable with these decisions.

Moreover, the correct standard would have produced the opposite result. Respondents contend that Hensley had “the right to be on [his] own property with a pistol, not otherwise pointed at an officer, and that such conduct is only a potential for harm,” claiming that the gun in Hensley’s hand could not create an objectively reasonable belief that he presented a risk of serious harm until the gun was pointed at Petitioners. (Br. in Opp. 4). Not so. As this Court has explained, conduct which is lawful may still “portend imminent violence,” (Pet. 14) (quoting *Ryburn v. Huff*, 565 U.S. 469, 477 (2012)). Moreover, the “innocent” act of advancing on Petitioners, in uniform, in marked cars, in broad daylight, with a gun in his hand – is not the only conduct requiring consideration. The panel majority took Hensley’s “assault . . . out of the picture,” (Pet. 4 n.1), refusing to consider an act of violence no more than 13 seconds prior to the use of force. Respondents do not dispute that the Fourth Circuit excluded from its analysis the fact that Petitioners saw Hensley hit his daughter in the back of her head with his long-nose revolver, (Pet. App. 16a), nor do Respondents make any attempt to defend the exclusion of that fact from the totality of the

circumstances. As the dissenting judge noted, (Pet. App. 27a), Petitioners had knowledge of facts suggesting Hensley was unstable *before* they witnessed him hit his own child with a pistol and come marching towards them, none of which merited any discussion in the majority's eyes. Petitioners' use of force was objectively reasonable under the totality of the circumstances; the majority failed to apply that standard, altering it to turn on a single fact – the absence of a verbal warning.

The question of when a state actor is constitutionally permitted to use deadly force is undeniably important. Since *Graham v. Connor*, 490 U.S. 386, 395 (1989), this Court has maintained that there is one –and only one– test for all excessive force claims. This Court has clarified that *Garner* is an example of one application of that test, and is not a separate or additional test for deadly force claims. The panel majority's decision defies these principles and puts the Fourth Circuit in conflict with nearly every other circuit on the appropriate standard for answering this profound question.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

This the 28th day of March 2018.

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