No. 18-99

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY BARNES,

Petitioner,

v.

JOSEPH GERHART, *et al.,*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

On June 7, 2010, the Gerharts' Fourth Amendment right to be secure in their own home was suddenly and violently shattered by Johnny Barnes, City of Pearl Police Officer; Brett McAlpin, Rankin County Sheriff's Deputy; and Brad McLendon, Mississippi Bureau of Narcotics Agent. On that day, Petitioner Barnes, along with McAlpin and McLendon, were part of a multi-task force on a drug buy-bust mission **gone wrong**. They were responsible for leading the task force to the target home and were the designated "breaching team." However, prior to the operation, none of them made a reasonable effort to ascertain and identify the correct address of the target home. As a result, they unlawfully entered the Gerharts' home, causing the Gerharts to suffer physical and severe, irreparable mental harm.

(1) Did the Fifth Circuit correctly hold that Barnes' conduct was "not 'consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment' "? Pet'r App. 19, *Gerhart v. Barnes*, No. 17-60287, 724 F. App'x 316, 325 (5th Cir. Apr. 26, 2018) (quoting *Maryland v. Garrison*, 480 U.S. 79, 88 (1987)).

(2) Did the Fifth Circuit correctly hold that Barnes was ***not*** entitled to qualified immunity?

QUESTIONS PRESENTED – Continued

(3) Do the holdings by this Court in *Sause v. Bauer*, 138 S. Ct. 2561 (June 28, 2018), *Kisela v. Hughes*, 138 S. Ct. 1148 (Apr. 2, 2018), and *District of Columbia v. Wesby*, 138 S. Ct. 577 (Jan. 22, 2018) require that the Fifth Circuit reconsider its holding that Barnes was ***not*** entitled to qualified immunity?

PARTIES TO THE PROCEEDING

The Respondents are Joseph Gerhart, Amanda Jo Gerhart, Brett Gerhart, Ian Gerhart, and Sarah Robillard. Petitioner is Johnny Barnes, a police officer in Pearl, Mississippi. Brett McAlpin and Brad McLendon are law enforcement officers who are co-defendants in this case.

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STATEMENT OF THE CASE

A. Facts

1. The Unlawful Entry

On June 7, 2010, during the daylight hours, Brett Gerhart ("Brett") was in his front yard washing his motorcycle, preparing to go for a ride when he heard the sound of screeching tires. ROA.2909, 2912-13, 3083. He looked up and saw an unmarked, black Cadillac Escalade with tinted windows speed into his front yard. ROA.2912-13. He did not see any blue lights on the vehicle. ROA.2913. As the vehicle door opened, the only thing Brett saw was a gun barrel, causing him to run in fear for his life. ROA.2914. Barnes and his cohorts, McAlpin and McLendon, exited the unmarked vehicle with guns drawn. ROA.2947. Brett never heard the word "police." ROA.2913. The only words he heard were "[g]et the f--- down." ROA.2913.

Not knowing the armed intruders were law officers, Brett frantically ran into his home and locked the door behind him, screaming and warning his family, "Run, they have guns." ROA.3070, 2914. Brett's mom, Ms. Gerhart, was sitting at the kitchen table. ROA.3070-71. Upon hearing her son's warning, she screamed to Mr. Gerhart that someone was trying to shoot Brett and rushed to get her then three-year-old daughter, Sarah. ROA.3071. Ms. Gerhart took Sarah in her arms and started down the hall to the bedroom of her youngest son, Ian. ROA.3071-72.

Meanwhile, McAlpin chased after Brett, broke through the Gerharts' door with one kick and, followed by McLendon and Barnes, illegally entered the Gerharts' home with weapons drawn, without a warrant and without identifying themselves as police officers. ROA.2999, 3080, 3111. McAlpin ran through the living room past Mr. Gerhart, chasing after Brett. ROA.3111. McLendon approached Mr. Gerhart, stuck a gun in Mr. Gerhart's face and said, "Get the f---- down." ROA.3111.Brett ran to the front door "[t]o try and stop any intruder coming in through the front door." ROA.2915. He stepped out his front door, saw that nobody was outside, turned around to reenter his home, and met McAlpin. ROA.2916, 3116. Brett did not notice anything identifying McAlpin as a sheriff's deputy. ROA.2917. McAlpin grabbed Brett, threw him face down onto the concrete porch, and said, "You don't run from me, mother f-----." ROA.2917, 3115-16. McAlpin then kicked Brett repeatedly in the back and side of his head. ROA.2918, 3117.

Mr. Gerhart screamed and tried to get up to protect his son, but McLendon pushed him back down. ROA.3111, 3115. Mr. Gerhart screamed helplessly as he watched McAlpin kick his son repeatedly in the head while his son was saying, "I'm down, I'm down." ROA.3111, 3115-17. McAlpin kicked Brett with enough force to push Brett's face into the concrete, resulting in abrasions to his face, lip and cheek. ROA.2919, 3170-74. Afterwards, McAlpin picked Brett up, brought him to the living room, and placed him on his stomach on the floor. ROA.2921, 3111. Rather than handcuffing Brett, McAlpin pinned Brett to the floor by putting his knee into

Brett's back, held a gun to Brett's head, and told him not to move or it would be his last. ROA.2922-23, 3008, 3111-12.

Meanwhile, Barnes confronted Ms. Gerhart in the hallway with a rifle.[1] ROA.3072. Barnes pointed his rifle at Ms. Gerhart and three-year old Sarah and yelled, "Get down, get down." ROA.3072. With Sarah still in her arms, Ms. Gerhart dropped to her knees, closed her eyes, and pled for her life and her family's. ROA.3072, 3325. When she opened her eyes, Barnes lowered his gun. ROA.3325. She got up, proceeded to Ian's room, and frantically told him to get in the closet and call 911 because there were men in the house with guns.[2] ROA.3072-73, 3325. Barnes never identified himself as a police officer and was dressed in regular street clothes. ROA.2957, 3080. Ms. Gerhart never heard any of the intruders identify themselves as police officers and did not recall seeing any of them wearing a vest with "police" or "sheriff" on it. ROA.2957, 3080.

Thereafter, another officer approached McAlpin and told him that they were in the wrong house. ROA.2923, 3112, 3316. The officer had to tell McAlpin two or three times that they were in the wrong house and shake him before he would get off Brett. ROA.2921, 2923, 3112.

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[1]Barnes testified that he exited the vehicle brandishing a mini-14 rifle and entered the Gerharts' home. ROA.3349, 3351-52.

[2]A 911 call was made, and the caller stated that there were "***guys* in the house with guns**." ROA.3192 (emphasis added).

As a result of Barnes and his cohort's sudden and violent unlawful entry into the Gerharts' home, the Gerharts suffered physical and severe mental injuries and continue to suffer mental injuries. ROA.2918-19, 2955, 2959-61, 3170-74, 3251, 3255-56.

2. Information Available to Barnes and His Cohorts at the Time of the Unlawful Entry

Barnes, McAlpin, and McLendon were responsible for leading the task force to the target home and were the designated "breaching team." ROA. 3630-31. Prior to the operation, Detective Jamie Scouten, the lead officer, fully briefed Barnes, McAlpin, and McLendon on the correct address and location of the target home. ROA.3313; 3185-86; 3269; 3344. Scouten used Google Earth images to familiarize the officers with the location and appearance of the target home. ROA.3196. He described an unusual van that would be parked in the driveway of the target home and discussed the fact that the target home had burglar bars. ROA.3199-200; 3204-05. (The Gerharts' home did not have burglar bars, and the unusual van was not parked in their driveway. ROA.3200.) He introduced the confidential informant at the briefing, so the officers would be able to identify and distinguish her from the suspects. ROA.3185-86. The informant also described and drew a diagram of the exterior and interior layout of the target home. ROA.3185-86.

3. Barnes and His Cohorts' Failure to Ascertain and Identify the Target Home

However, McLendon testified that he did not attend the briefing; that no one ever told him the correct address; and that the confidential informant never gave him a description of the house. ROA.3966-68. McAlpin likewise testified that no one ever told him the exact address of the target home; that the confidential informant never gave him a description of the house; and that he never spoke to the confidential informant. ROA.2988-89. Although Barnes admitted that he attended the briefing and was the only officer familiar with the area, he testified that **he "didn't know the exact house."** ROA.3346 (emphasis added).

Barnes and his cohorts were assigned the task of following the confidential informant to the target home, maintaining visual contact with that home, and responding first in case of an emergency. ROA.3200-01. However, McLendon, the breaching team's driver, and McAlpin claimed that they did not follow the confidential informant to the target home. ROA.2988-89; 3967. Barnes, McAlpin, and McLendon also failed to hear Scouten's radio command to converge on the target home to render aid to the confidential informant. ROA.3316. Scouten had to directly radio Barnes and repeat the command before Defendants acknowledged that they were en route to the residence. ROA.3316.

4. Internal Affairs Investigation

An internal affairs investigation conducted by the Pearl Police Department determined that "the reason for going to the wrong residence was because of inattention by Officers: Det. Johnny Barnes, Det. Brett McAlpin, and Agent Brad McLendon . . . ." ROA.3553. Barnes was given a written corrective discipline. ROA.3554. He was advised "to pay closer attention to what is going on. It is very important that every officer is dialed into what is taking place in every case. This is imperative for officer safety and public safety." ROA.3554.

B. Procedural History

The Gerharts filed their Complaint on September 20, 2011. ROA.32, 55. Nearly five years later, on August 23, 2016, Defendants filed their qualified immunity motions. ROA.1513, 1692, 1953. By bench ruling on October 24, 2016, the district court dismissed the Gerharts' claims against the City of Pearl and Rankin County under *Monell*. ROA.4626. By bench ruling on January 9, 2017, the court denied qualified immunity to Barnes and McAlpin on the Gerharts' unlawful entry claim and denied qualified immunity to McAlpin on Brett Gerhart's excessive force claim. On March 31, 2017, the district court entered its written Order to that effect. Pet'r App. 50-53; ROA4489-90. At counsel's request, the court entered a separate Order with findings of facts and conclusions of law regarding McLendon, which likewise denied McLendon qualified immunity as to the

Gerharts' unlawful entry claim.[3] ROA.4491-4515; *see Gerhart v. Rankin County*, No. 3:11-CV-586-HTW-LRA, 2017 WL 1238028 (S.D. Miss. March 31, 2017).

Thereafter, Barnes, McAlpin, and McLendon filed notices of appeal. ROA.4516, 4521, 4524. McLendon's appeal was docketed as a separate appeal, and the Fifth Circuit affirmed the trial court's ruling. *Gerhart v. McLendon*, 714 F. App'x 327, 333 (5th Cir. Oct. 25, 2017). Six months later, the Fifth Circuit likewise affirmed the trial court's ruling that Barnes and McAlpin were *not* entitled to qualified immunity for the unlawful entry into the Gerharts' home. *Gerhart v. Barnes*, 724 F. App'x 316, 325 (5th Cir. Apr. 26, 2018). Barnes filed a petition for rehearing, which was denied on June 25, 2018. Pet'r App. 90-91. Neither McAlpin nor McLendon filed a petition for writ of certiorari, and the Fifth Circuit's decision is now final and non-appealable as to them.

SUMMARY OF THE ARGUMENT

Petitioner Barnes presented no compelling reason why this Court should grant his Petition for Writ of Certiorari. The Fifth Circuit considered the totality of the circumstances and correctly concluded that Barnes is *not* entitled to qualified immunity for the warrantless entry into the Gerharts' home because he failed to make a *reasonable* effort to ascertain and identify the place to be searched.

Barnes also failed to demonstrate that the Fifth Circuit's opinion is in conflict with a decision of this

[3]The court ruled that it was "convinced that McClendon's [sic] actions cannot be classified as an 'honest mistake' which would afford him qualified immunity." ROA.4514.

Court or any other circuit. The courts in the decisions relied upon by Barnes applied well-settled qualified immunity principles to the particular facts before them and came to conclusions based on the facts presented. In this case, the Fifth Circuit likewise applied those same principles to the particular facts at hand and came to a conclusion based on those facts. Different conclusions do not create *any* conflict, much less create the type of conflict that warrants this Court's review. Rather, the differing outcomes are merely indicative of the fact that the analysis of a qualified immunity defense is fact driven.

Finally, the precedent set by this Court in *Maryland v. Garrison*, 480 U.S. 79 (1987) provided notice to Barnes that he was required to make a reasonable effort to ascertain and identify the place to be searched. The evidence shows that Barnes failed to do so. It was not exigent circumstances that caused the warrantless entry into the Gerharts' home, but Barnes' failure to make a reasonable effort to ascertain and identify the place to be searched. Therefore, the Gerharts respectfully request that the Court deny Barnes' Petition.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit considered the totality of the circumstances and correctly concluded that Barnes is *not* entitled to qualified immunity because his actions were objectively *unreasonable* in light of clearly established law.

An officer is *not* entitled to qualified immunity if a plaintiff shows "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *McLendon*, 714 F. App'x at 333 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Whether an officer is entitled to qualified immunity depends on whether it would be clear to a reasonable officer that his conduct violated a constitutional right:

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by **a test that focuses on the objective legal reasonableness of an official's acts**. **Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers**

> **injury caused by such conduct may have a cause of action.**

Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (emphasis added); *see, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (denying qualified immunity to officer finding that no reasonable officer could believe that a warrant not complying with the particularity requirement was valid); *Guerra v. Sutton*, 783 F.2d 1371, 1375 (9th Cir. 1986) (denying qualified immunity to officers finding that officers executing a search warrant have a duty to inquire as to the nature and scope of the warrant).

A. At the time of the warrantless entry, it was well established that searches and seizures inside a home without a warrant are presumptively unreasonable.

At the time of the warrantless entry in this case, it was well established as "a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980). Physical entry into a home "'is the chief evil against which the wording of the Fourth Amendment is directed.'" *Id.* at 585-86 (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against *unreasonable* searches and seizures, **shall not be violated** . . . ." U.S. Const. amend. IV. (emphasis added). It clearly establishes "'the right of a man to retreat into his own home and there be free from

unreasonable governmental intrusion.'" *Payton*, 445 U.S. at 590 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

"[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590.

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

McDonald v. United States, 335 U.S. 451, 455–56 (1948). Our courts cannot be true to the constitutional requirement of a warrant and excuse a warrantless entry without a showing "that the exigencies of the situation made that course imperative." *Id.* at 456.

The text of the Fourth Amendment expressly imposes the requirement that all searches and seizures be "reasonable." *Kentucky v. King*, 563 U.S. 452, 459 (2011). "'[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Id.* (quoting *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006) (citing *Michigan v. Fisher,* 558 U.S. 45 (2009). "'A warrantless search of a home is presumptively unreasonable, absent probable cause, consent or exigent circumstances.'" Pet'r App. 13, *Barnes*, 724 F. App'x

at 322 (quoting *McLendon*, 714 F. App'x at 333) (citing *United States v. Jones*, 239 F.3d 716, 719 (5th Cir. 2001)).

B. At the time of the warrantless entry, it was also clearly established that an officer must make a *reasonable* effort to ascertain and identify the place to be searched.

At the time of the warrantless entry in this case, it was also clearly established that, *even in exigent circumstances*, entry into the wrong home is unreasonable *unless there is undisputed evidence of an honest mistake by the officer. Garrison,* 480 U.S. at 87. The seminal case is this Court's decision in *Garrison*. There, the Court recognized "the need to allow some latitude for ***honest mistakes*** that are made by officers **in the dangerous . . . process of . . . executing search warrants.**" *Id.* (emphasis added). But such "mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions.

. . ." *Id.* at 87 n.11 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).[4]

1. *Maryland v. Garrison*, 480 U.S. 79 (1987)

In affirming the denial of qualified immunity to Barnes, the Fifth Circuit relied upon the following precedent established by this Court: "Officials do not violate the Fourth Amendment by entering the incorrect residence when their conduct is 'consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment.'" Pet'r App. 13, *Gerhart*, 724 F. App'x at 322 (5th Cir. Apr. 26, 2018) (quoting *Garrison*, 480 U.S. at 88)). In *Garrison*, police officers obtained a warrant to search a person and his third-floor apartment for contraband. *Garrison*, 480 U.S. at 80. The warrant was obtained after a reasonable investigation that included verification of

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[4]Similarly, this Court held that **the exigent circumstances rule justifies a warrantless search only when the conduct of the police *"preceding"* the exigency is reasonable**:

> "[W]arrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, . . . **the exigent circumstances rule justifies a warrantless search when the conduct of the police *preceding* the exigency is reasonable** in the same sense."

King, 563 U.S. at 462 (emphasis added).

information obtained from a reliable informant, an exterior examination of the apartment building, and an inquiry of the utility company. *Id.* at 81. Unbeknownst to the officers, the third floor contained two separate living quarters, one belonging to the target suspect and another belonging to Garrison. *Id.* at 80. The officers unknowingly seized contraband from Garrison's living quarters, resulting in Garrison's conviction. *Id.* at 80. Garrison subsequently filed a motion to suppress the evidence seized from his apartment. *Id.* at 80. The trial court denied his motion, and the Maryland Court of Special Appeals affirmed the denial. *Id.* at 80-81. However, the Court of Appeals of Maryland reversed and remanded for a new trial. *Id.* at 80.

The issue before this Court was whether the seizure of the contraband was prohibited by the Fourth Amendment. *Id.* The Court held that the constitutionality of the officers' conduct depended on whether their conduct was ***understandable and reasonable*** in light of the information available to them at the time they acted. *Id.* at 85, 88 n.12. If the officers had known ***or even should have known*** that there were two separate apartments on the third floor, it would have been unconstitutional for them to search Garrison's quarters. *Id.* at 86. The Court further held that an officer's conduct in executing a search warrant must be **"consistent with a reasonable effort to ascertain and identify the place intended to be searched."** *Id.* at 88 (emphasis added). The Court concluded that the officers' mistake in searching Garrison's apartment was understandable and reasonable because, prior to the search, there was nothing to indicate that the third

floor contained two separate apartments. *Id.* at 88 n.12. "[T]he officer's conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Id.* at 89.

a. The Information Available to Barnes and His Cohorts

Barnes and his cohorts' conduct were *not understandable and reasonable* in light of the information available to them at the time they acted. They *should have known* the correct address of the target home. According to Scouten's case report, he fully briefed Barnes, McAlpin, and McLendon on the correct address and location of the target home. ROA.3313. Another report also states that Barnes, McAlpin, and McLendon were present at the briefing and met the confidential informant. [5] ROA.3269. Barnes likewise testified that they were all present at the briefing. ROA.3344.

Scouten testified that he introduced the confidential informant at the briefing and had her describe and draw a diagram of the exterior and interior layout of the target home. ROA.3185-86. At the top of the diagram, he wrote the address of target home. ROA.3313, 3185-86. He also used Google Earth images to familiarize the officers with the location and appearance of the target home.

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[5]Scouten, Case Report Pearl P.D. Narcotics Unit re Sale of Methamphetamine ¶ 1 (June 7, 2010) (stating that Barnes, McAlpin, and McLendon met with confidential informant and were briefed on plans to execute search warrant). ROA.3269.

ROA.3196. He discussed an emergency plan to enter the target home through the carport door because burglar bars were on all the other doors and windows. ROA.3199-200. (The Gerharts' home did not have burglar bars. ROA.3200.) Scouten informed the team that an unusual van with an installed dual axle and dual wheels would be parked in the driveway of the target home. ROA.3204-05. (No such vehicle was parked in the Gerharts' driveway.)

b. Barnes and His Cohorts' Unreasonable Conduct in Light of the Information Available to Them

However, McLendon testified that he did not attend the briefing; that no one ever told him the correct address; that the confidential informant never gave him a description of the house; and that he did not follow the confidential informant to the target home. ROA.3966-69. McLendon did not know crucial information about the operation, such as "what color the target residence was; what color the CI's vehicle was; where the residence was located; or what the target residence's address was" and "who the CI was." *Gerhart*, 2017 WL 1238028, at *3; ROA.3967-69, 71, 75; 4496.

McAlpin likewise testified that no one ever told him the "exact address" of the target home; that he did not follow the confidential informant to the target home; that the confidential informant never gave him a description of the house; and that he never spoke to the confidential informant. ROA.2988-89. He testified that he trusted his colleagues to identify the correct residence. ROA.2976-77. Although

Barnes admitted that he attended the briefing and was the only officer familiar with the area, he testified that **he "didn't know the exact house."** ROA.3346 (emphasis added).

The evidence further shows that Barnes and his cohorts were inattentive during the task force operation. According to Scouten, after receiving a text message from the confidential informant indicating that she was in distress, he announced over the narcotics radio channel that the confidential informant was in distress signal and to converge on 473 Robert Michael Drive to render aid. ROA.3316. However, Barnes, McAlpin, and McLendon failed to hear the announcement. ROA.3316. Scouten had to directly radio Barnes and repeat the announcement before Defendants acknowledged that they were en route to the residence. ROA.3316. As Scouten arrived at the correct address and exited his car, he observed McLendon and McAlpin "running towards the wrong house with their weapons drawn and shouting." ROA.3316.

c. Cause of Unlawful Entry: Officer Inattention

An internal affairs investigation was conducted by the Pearl Police Department immediately following the warrantless entry into Plaintiffs' home. ROA.3553. It was determined that the reason for this mistake was the inattention of Barnes, McAlpin, McLendon:

> Det. Scouten advised he briefed Officers on the warrant that was about to be

> served.[6] He advised all parties on the location of the residence that officers were going to be going to. Det. Scouten had a drawn out floor plan of the residence **with the address clearly located at the very top of the map**. . . .
>
> Sgt. Bennett determined that **the reason for going to the wrong residence was because of inattention by Officers: Det. Johnny Barnes, Det. Brett McAlpin, and Agent Brad McLendon** . . . .

ROA.3553 (emphasis added).

On June 15, 2010, Barnes was given a written corrective discipline, which states that he was advised "to pay closer attention to what is going on. It is very important that every officer is dialed into what is taking place in every case. This is imperative for officer safety and public safety." ROA.3554.

Clearly, the outcome in this case was different from the outcome in *Garrison* because of the particular facts. In *Garrison*, the officers conducted a reasonable investigation prior to the mistaken entry and there was nothing to indicate that they were

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[6]Scouten testified that the procedure in a "drug buy-bust" is to first prepare a search warrant and affidavits; have an informant buy the illegal drug; thereafter fill-in the blanks on the warrant / affidavit regarding the time, date, drugs purchased, and the amount; and then go to the judge for approval and signature. ROA.3178. In this case, the warrant had been prepared without the "[t]ime, date and the drugs and the amount of drugs that were purchased from the residence." ROA.3178.

entering the wrong residence. In this case, Barnes failed to make a reasonable investigation and was inattentive during the briefing and operation. Barnes ***should have known the correct address***. According to him, they had to stop for the confidential informant to turn into the driveway of the target home. Therefore, Barnes ***should have known*** the correct home. ROA.3203. There were also indications that he was entering the wrong residence, such as the absence of burglar bars and the unusual van. Barnes ***should have known*** that he was entering the wrong home.

2. *Hunt v. Tomplait*, 301 F. App'x 355 (5th Cir. 2008)

Following the precedent set by this Court in *Garrison*, the Fifth Circuit held that law officers are granted immunity in cases of warrantless searches of the wrong home *based on undisputed evidence of an* **honest mistake**, and **"[a]n honest mistake can only be clearly established if the officers' conduct is 'consistent with a reasonable effort to ascertain and identify the place to be searched.'"** *Hunt v. Tomplait*, 301 F. App'x 355, 359 (5th Cir. 2008) (quoting *Garrison*, 480 U.S. at 79–101) (emphasis added).

In *Hunt*, the plaintiffs brought suit under 42 U.S.C. § 1983 based on the warrantless search of their home. *Id.* The case likewise involved the **warrantless entry into the wrong home *and exigent circumstances***—a search for a fleeing suspect who had allegedly exchanged gunfire with an officer and attempted to run over a uniformed officer. *Id.* at 356.

Law enforcement had information that the suspect was traveling to his father's home located at "126 Circle Drive," and a warrant was issued for that residence. *Id.* The sheriff asked his deputy to lead a team in the search of that residence. *Id.* at 357. However, the deputy, without checking the warrant, briefed the team regarding a planned search on "940 Church Street" instead because he mistakenly believed *that* address was the only "Hunt" residence in the area. *Id.* As a result, the officers searched the wrong home. *Id.* at 357-58.

The district court denied the sheriff and his deputy's motions for summary judgment based on qualified immunity. *Id.* at 363. On appeal, the Fifth Circuit determined that the defendants' actions were not "objectively reasonable." *Id.* at 363. The court found the deputy's conduct to be egregious because he never even read the search warrant, which would have likely prevented the unlawful because the address and the description of the home on the warrant clearly did not match the home entered. *Id.* at 362. The court determined that, although some feeble efforts (surveillance measures) were taken to identify the correct home, such efforts were insufficient, "especially since none of the surveillance efforts supported a search of the plaintiffs' home." *Id.* at 361–62. The court concluded that the sheriff and his deputy's actions did not constitute "an honest mistake consistent with a reasonable effort to ascertain and identify the placed to be searched." *Id.* at 363. Therefore, the court affirmed the district court's denial of qualified immunity to the sheriff and his deputy. *Id.*

Likewise, Barnes' feeble efforts are insufficient to constitute an honest mistake. Barnes claims that

the Fifth Circuit failed to give him credit for his efforts to save the confidential informant and to identify the correct house. Pet. at 11. However, it was not exigent circumstances that caused the warrantless entry into the Gerharts' home, but Barnes' failure to make a reasonable effort to ascertain and identify the place to be searched. Essentially, Barnes is asking this Court to grant him immunity merely because he showed up at the briefing. However, as the Fifth Circuit properly held "an officer must make ***reasonable*, non-feeble efforts** to correctly identify the target of a search . . . ." *Barnes*, 724 F. App'x at 325 (quoting *McLendon*, 714 F. App'x. at 334) (emphasis added).

3. *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995)

The Fifth Circuit also relied upon the Eleventh Circuit's ruling in *Hartsfield v. Lemacks*, 50 F.3d 950, 954-55 (11th Cir. 1995), a case it considered to be factually similar to the one at bar. Pet'r App. 15, *Barnes*, 724 F. App'x at 323. There, homeowners brought a § 1983 suit against police officers for unlawfully entering their home while attempting to execute a search warrant on another home. *Id.* at 951-52. The plaintiffs appealed the district court's decision granting qualified immunity to the officer who led the search. *Id.* at 952.

On appeal, the Eleventh Circuit held that the officer's conduct was "not 'consistent with a reasonable effort to ascertain and identify the place intended to be searched' as dictated by *Garrison*." *Id.* at 955 (quoting *Garrison*, 480 U.S. at 488-89). In so holding,

the court relied upon the following: (1) the officer had gone to the correct home the day before the search; (2) the officer had the warrant in his possession but failed to check it to ensure that he was leading the other officers to the correct address; (3) the search occurred during the day; (4) the addresses of both houses were clearly visible; (5) there were distinctions in the appearance of the houses; and (6) the houses were separated by another house. *Id.*

The warrantless entry into the Gerharts' home likewise occurred during the day; the distinctions in the appearance of the homes were apparent; and the Gerharts' home was two houses down from the target home. ROA.1545. Scouten testified that, at the time of the unlawful entry, it was daylight and not raining, and the terrain between the target home and the Gerhart home was level. ROA.3216. Clearly, the Fifth Circuit's ruling is not only in line with the precedent set by this Court in *Garrison*, but is also in line with the rulings of other circuits faced with similar fact patterns.

4. *Dawkins v. Graham*, 50 F.3d 532 (8th Cir.1995)

The Fifth Circuit further relied upon an Eight Circuit case with facts similar to the one at bar. In *Dawkins v. Graham*, 50 F.3d 532 (8th Cir. 1995), the homeowners brought a § 1983 action based on unlawful entry and excessive force against two officers who had entered their home located at "611 Adam Street" while attempting to execute a search warrant on a crack home located at "611 Byrd Street." *Id.* at 533-34. The plan was for the two officers to search a

suspect's car and house when informed by other search team members that the suspect and his car were at 611 Byrd. *Id.* at 534. Upon signal, the two officers drove to execute the warrant but turned a block too soon onto Adam Street. *Id.* The district court denied the officers' motion for summary judgment based on qualified immunity, and the officers appealed. *Id.* at 534.

The Eight Circuit in *Dawkins* held that the officers were not entitled to qualified immunity, finding that "the law prohibiting the officers' conduct was clearly established at the time of the raid" and "the more specific right not to be subjected to the unreasonable mistaken execution of a valid search warrant was also clearly established . . . ." *Id.* at 535 (citing 535 *Garrison,* 480 U.S. at 86–89). The court relied upon the following facts available to the officers at the time of the raid: (1) the raid at the target home involved a large search team and the officers were extensively briefed; (2) street signs clearly marked both Adam and Byrd Streets; (3) the vehicle at the plaintiffs' home did not match the description of the vehicle that was supposed to have been present at the target home; (4) the houses were different colors; and (5) the rest of the search team was not present at the plaintiff's house. *Id.* at 534.

Likewise, Barnes and his cohorts were extensively briefed and the Gerharts' home did not have burglar bars and none of the vehicles in the driveway matched the description of the unusual van discussed at the briefing. In fact, the unusual van was parked in the driveway of the target home just as Scouten described it would be. ROA.3204-05.

5. *Rogers v. Hooper*, 271 F. App'x 431 (5th Cir. 2008)

Finally, the Fifth Circuit also distinguished the facts in the case at bar from another mistaken entry case in which it found that the officers had made reasonable efforts to identify the house. *See* Pet'r App. 15-16, *Barnes*, 724 F. App'x at 323 n.3. In *Rogers v. Hooper*, 271 F. App'x 431, 435 (5th Cir. 2008), the court again held that **law officers are entitled to qualified immunity *if* their conduct is "'consistent with a reasonable effort to ascertain and identify the place intended to be searched**.'" *Id.* at 435 (citing *Hartsfield*, 50 F.3d 955) (*quoting Maryland,* 480 U.S. at 87) (emphasis added)). The court first determined that the plaintiffs had unquestionably demonstrated the violation of a constitutional right. *Id.* at 433. However, the court ultimately held that the officers were entitled to qualified immunity because their conduct was consistent with a reasonable effort to identify the place to be searched based on the following: (1) the defendant officers had conducted a surveillance of the target house prior to the search; (2) the search warrant was executed at night when the differences between the two houses, which were next door to each other, were less noticeable; and (3) the car that had been in front of the target home earlier was in front of the plaintiffs' home when the search began. *Id.* at 435.

Barnes and his cohorts did not make an initial surveillance of the target home. Barnes misleadingly represented to the Fifth Circuit that he "was an occupant in the car that circled the area surrounding

Reed's house before the stake out began." Barnes 5th Cir. Appellant Br. at 17. However, this statement does not comport with the evidence, including Barnes' own deposition testimony that, he "didn't know the exact house." ROA.3346. McAlpin and McLendon likewise testified that they had never driven by the target residence.[7] ROA.2976-77, 3969. Further, McLendon and McAlpin testified that they did not follow the confidential informant to the target residence.[8] ROA.2988, 3967. At the very least, it is a disputed fact that Barnes and his cohorts *never* made an initial surveillance of the target house, which must be accepted as true on appeal. *See Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004) ("Where factual disputes exist in an interlocutory appeal asserting qualified immunity, we accept the plaintiffs' version of the facts as true.").

Additionally, unlike in *Rogers*, the unlawful entry took place during the daylight hours as previously discussed. McAlpin also testified that at the time he was chasing Brett into his house it was daylight and that "[y]ou could still see well." ROA.2999. Ms. Gerhart likewise testified that it was daylight when the officers unlawfully entered her home. ROA.3084.

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[7]McAlpin testified that "if it's an operation conducted by our agency, well – we'll do several drive-bys of the residence, photograph the residence, verify the address with our Board of Supervisors." ROA.2976.

[8]At the hearing on McAlpin's Motion for Summary Judgment, his counsel indicated that it is disputed as to whether Defendants were ever told to follow the confidential informant and claimed that the video footage taken by the camera given to the confidential informant does not show anybody following her. ROA.4657-58. (With the camera hidden in her purse?)

Clearly, the case at bar is distinguishable from *Rogers*.

C. The Fifth Circuit's conclusion that Barnes was *not* entitled to qualified immunity fits squarely with and is in accord with the Fourth Amendment's "reasonable-mistake rule" as well as other circuits' application of the rule.

The Fifth Circuit's conclusion that Barnes was not entitled to qualified immunity fits squarely with and is in accord with the Fourth Amendment's "reasonable-mistake rule" as well as other circuits' application of the rule. *See* Pet. at 11-13. While some mistakes on the part of officials are allowed, "[t]he limit is that 'the mistakes must be those of reasonable men.'" *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (quoting *Brinegar*, 338 U.S. at 176). In the cases cited by Barnes, the mistakes were reasonable. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (finding warrantless entry valid because officers *reasonably,* though mistakenly, believed that the person who gave consent to their entry was a resident of the premises); *Hill v. California*, 401 U.S. 797, 802-804 (1971) (finding arrest and search valid where officers arrested individual matching suspect's description because they *reasonably* believed him to be the suspect).

As noted by Barnes, "Underlying the Fourth Amendment's reasonable-mistake principle is the question of *why* the mistake occurred." *Id.* at 13. Barnes and his cohorts' inattention and their *feeble* efforts, if any, to ascertain and identify the correct

address is *why* the unlawful entry occurred. The Fifth Circuit properly affirmed the trial court's denial of qualified immunity to Barnes because of *the lack of evidence* that he made a *reasonable* effort to ascertain and identify the place to be searched, *as required by clearly established law*.

II. This Court's holding in *Garrison* gave Barnes fair and clear warning that he had to make a reasonable effort to ascertain and identify the correct home to be searched.

Incredibly, Barnes argues that this Court's holding in *Garrison* that an officer must make a reasonable effort to ascertain the place to be searched was "too general" to provide him with notice that his conduct was unlawful. Barnes claims that, "in the panel's view, this 'reasonable-efforts' phrase was sufficient to put every police officer in Louisiana, Mississippi, and Texas on notice about when a factual mistake would be deemed permissible." Pet. at 18. The problem with Barnes' logic is that he did *not* make a "factual mistake" concerning the address of the home to be searched. He failed to get the facts in the first place. He never knew what the correct address was.

Barnes relies on two recent decisions of this Court, *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) and *White v. Pauly*, 137 S. Ct. 548, 551 (2017). However, these decisions are materially distinct from the case at bar and are highly fact driven. Moreover, this Court clarified in *White* that "'general statements of the law are not inherently incapable of

giving fair and clear warning' to officers . . . ." *White*, 137 S. Ct. at 552 (citing *United Sates v. Lanier*, 520 U.S. 259 (1997)). In this case, unlike in *Wesby* and *White*, the precedent set by this Court in *Garrison* gave Barnes fair and clear warning that he had to make a reasonable effort to ascertain and identify the correct home to be searched.

A. *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018)

Wesby involved the issues of whether there was probable cause for the arrest of partygoers for unlawful entry and whether the arresting officers were entitled to qualified immunity. *Wesby*, 138 S. Ct. at 585. The Court held that the crucial question is whether the official acted reasonably in light of the particular circumstances faced. *Id.* at 590. The plaintiffs/partygoers were arrested for unlawful entry into a vacant house and sued the District of Columbia and several officers for false arrest. *Id.* at 584. The officers had found the partygoers in a near empty house, identified by neighbors as vacant, with strippers in the living room and a naked woman and several men in a bedroom, and the partygoers fled at the first sign of police. *Id.* at 583, 589. Only two of the twenty-one partygoers could identify the person who they claimed had invited them, and that person, "Peaches," eventually admitted to the officers that she did not have permission to use the house. *Id.* at 583-84.

The district court and District of Columbia Court of Appeals determined that the officers lacked probable cause for the arrests because there was no

evidence that the alleged intruders, two of whom claimed to have been invited, **knew or should have known** that their entry was against the will of the owner. *Id.* at 584-85. Regarding qualified immunity, the court of appeals determined that "it was 'perfectly clear' that a person with 'a good purpose and bona fide belief of her right to enter' lacks the necessary intent for unlawful entry" and the officers "must 'have known that uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry.'" *Id.* at 585 (quoting *Wesby*, 765 F.3d at 27).

However, this Court concluded that the totality of the circumstances gave the officers probable cause to believe that "the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party." *Id.* at 586. Regarding qualified immunity, this Court concluded that "[t]here was no controlling case that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value." *Id.* at 593. Therefore, the Court held that the officers were entitled to qualified immunity. *Id.* at 593.

Again, the precedent set by this Court in *Garrison* provided notice to Barnes that he was required to make a reasonable effort to ascertain and identify the place to be searched. The evidence shows that Barnes failed to do so. The Fifth Circuit considered the particular facts and circumstances with which Barnes was faced and correctly determined that he was not entitled to qualified immunity.

B. *White v. Pauly*, 137 S. Ct. 548 (2017)

Barnes also relies on *White* for the proposition that this Court's ruling in *Garrison* was too general to provide him with notice that he had to make a reasonable effort to ascertain and identify the place to be searched. Pet. at 19. The *White* case is an excessive force case, which especially requires a fact-intensive inquiry.[9] In that case, the Tenth Circuit improperly applied general statements of law regarding excessive force. *White*, 137 S. Ct. at 551. The court concluded that that the officer was not entitled to qualified immunity because he failed to give a warning before using deadly force. However, this Court concluded that the officer, who had arrived late to an ongoing police action, did not violate a clearly established right when he shot a suspect after hearing one of the suspects state, "we have guns," and seconds later being faced with a suspect pointing a pistol in his direction. *Id.* at 549-50, 552.

The Court determined that the Tenth Circuit's recognition of the "*unique set of facts and circumstances*" alone "should have been an important indication" that the officer did not violate a "'clearly established' right." *Id.* at 552. (emphasis added). The Court held that the officer's conduct did not violate clearly established law, despite the officer's failure to shout a warning before using deadly force because of the "unique" circumstances surrounding the officer's

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[9]"[T]he resolution of the issue of qualified immunity often involves a fact-intensive inquiry by the court, especially in cases involving claims regarding the use of excessive force." *May v. Andres*, 2017 WL 495832, at *9–10 (N.D. Tex. 2017).

late arrival on the scene. *Id.* at 552. The Court reasoned that, in those particular circumstances, clearly established law does not prohibit a reasonable officer who arrives late to an ongoing police action from assuming that the warning had already been given. *Id.*

The case at bar does not present any such unique set of circumstances and facts. The law was clear that Barnes had to make a reasonable effort to ascertain and identify the correct home to be searched, and he failed to do so.

C. *Thomas v. Williams*, 719 F. App'x. 346 (5th Cir. Feb. 1, 2018)

Finally, Barnes cites *Thomas v. Williams*, 719 F. App'x. 346 (5th Cir. Feb. 1, 2018), claiming an "intra-Circuit conflict" between the Fifth Circuit's decision in that case and the case at bar. *See* Pet. at 18-19, 23. Contrary to Barnes' claim, the result was different in *Thomas* because the facts and circumstances were different. There, the plaintiffs brought suit against an officer and others alleging that the defendants had violated their Fourth Amendment right to remain free from unreasonable searches and seizures. *Id.* at 349. The officer had been surveilling an apartment complex based on a complaint of drug dealers living there who were selling drugs to school kids, threatening neighbors and damaging property. *Id.* at 347. Based on investigation and surveillance, it was determined that the suspect usually sold drugs from the common areas, a practice that made it difficult for police to recover evidence and arrest dealers while in possession. *Id.* at 348.

After several failed attempts, the confidential informant purchased drugs and finally saw the suspect come out of apartment number "5818." *Id.* The officer could not see the apartment because he had maintained a distant surveillance so as not to blow their cover, which had happened during a previous attempt there. *Id.* at 347. The officer had the confidential informant describe and draw a diagram of the apartment complex and indicate exactly where the suspect entered the apartment. *Id.* at 348. Based on this information, his experience and prior dealing with the same confidential informant, he obtained a search warrant. *Id.* When executing the warrant, he approached the apartment described by the confidential informant and noticed that the address was "5816," not "5818." *Id.* However, he decided that the confidential informant must have misread the number, and he entered the wrong apartment. *Id.* It was later determined that the mistaken entry had occurred because the confidential informant had not seen and described the plaintiffs' apartment ("5816") as being there because a brick wall had blocked his view. *Id.*

The district court granted summary judgment to the officer based on qualified immunity, and the plaintiffs appealed. *Id.* The Fifth Circuit applied the same law and analysis as this Court did in *Garrison* and as it did in the case at bar: **whether the officer's conduct was objectively understandable and reasonable in light of the information available to him at the time of search**. *Id.* at 351-52. The court concluded that the officer "did not violate any clearly established law by executing a search warrant at a residence that he thought was

the location described in the search warrant." *Id.* at 352.

The officer in *Thomas* had made reasonable efforts to identify the place to be searched but simply made an honest mistake. Barnes made no such efforts. The fact that different results were ultimately reached in *Thomas* does not create any conflict, much less the type of conflict that warrants this Court's review. Rather, the differing outcomes are merely indicative of the fact that analysis of a qualified immunity defense depends on the particular facts and circumstances of each case.

III. There was no need for the Fifth Circuit to mention inapposite cases decided this term.

In addition to *Wesby*, Barnes cites two other cases decided by the Court this term, *Sause v. Bauer*, 138 S. Ct. 2561 (June 28, 2018) and *Kisela v. Hughes*, 138 S. Ct. 1148 (Apr. 2, 2018). Barnes asserts that the failure of the Fifth Circuit to discuss or cite these cases shows that the panel did not adhere to this Court's mandate to "think hard, and then think hard again" about the issue of qualified immunity. However, those cases are inapposite, and there was no need for the court to cite or discuss them.

A. *Sause v. Bauer*, 138 S. Ct. 2561 (June 28, 2018)

Most perplexing, Barnes relies on *Sause*. In that case, this Court *reversed* a grant of qualified immunity. *Sause*, 138 S. Ct. at 2563. In a unanimous decision, the Court remanded the case back to the lower court to reconsider its decision granting qualified immunity to police officers. *Id.* There, the plaintiff filed a complaint *pro se* against two officers based on violation of her First Amendment right to free exercise of religion and Fourth Amendment right to be from unreasonable search and seizure. *Id.* at 2562. The plaintiff alleged that the officers visited and gained entrance to her apartment after receiving a noise complaint and cited her for disorderly conduct and interference with law enforcement. *Id.* She also alleged that, during the incident, she knelt to pray, but an officer ordered her to stop. *Id.*

The district court granted the defendant officers' motion to dismiss for failure to state a claim based on qualified immunity. *Id.* On appeal, the plaintiff was represented by counsel and raised only a First Amendment argument. The Tenth Circuit concluded that the officers were entitled to qualified immunity. *Id.* This Court determined that the *pro se* complaint should have been interpreted liberally and, when done so, could state a Fourth Amendment claim that could *not* be properly dismissed for failure to state a claim. *Id.* at 2563. The Court found that the First Amendment claim required consideration of the plaintiff's Fourth Amendment rights and the basis for the officers' presence in her apartment and the nature of any legitimate law enforcement interests

that might have justified the order to stop praying at the time in question. *Id.* Therefore, the Court reversed the judgment of the Tenth Circuit and remanded the case. *Id.*

B. *Kisela v. Hughes*, 138 S. Ct. 1148 (Apr. 2, 2018)

Kisela is another excessive force case relied on by Barnes, which again *especially* requires a fact-intensive inquiry. Kisela, the police officer, shot Hughes a few minutes after he and two other officers arrived at the scene where a woman had been reported to 911 as hacking a tree with a knife and acting erratically. *Kisela*, 138 S. Ct. at 1150-51. When Kisela fired, Hughes was holding a large knife, had taken steps toward a woman (later identified as Hughes' roommate), and had refused to drop the knife after at least two commands to do so. *Id.* at 1151. All of the officers later said that they perceived Hughes as a threat to her roommate. *Id.* Hughes had a history of mental illness, which was not known to the officers at the time of the shooting. *Id.* Her roommate said that she did not feel endangered. *Id.* Hughes sued Kisela, alleging excessive force in violation of the Fourth Amendment. *Id.* The district court granted summary judgment to Kisela, but the Ninth Circuit reversed. *Id.*

This Court held that the officer was entitled to qualified immunity because this case was "far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick [her roommate] would violate the Fourth Amendment." *Id.* at 1153. Kisela believed Hughes

was a threat to her roommate. *Id.* Kisela had mere seconds to assess the potential danger and was separated from the women by a chain-link fence. *Id.* Moreover, the Court found that the most analogous Ninth Circuit precedent favored granting qualified immunity to Kisela. *Id.* (citing *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005)).

The officer's conduct was reasonable based on the facts available to him at the time of the shooting. In the case at bar, prior to the unlawful entry, Barnes should have made a *reasonable* effort to ascertain and identify the target home. However, he failed to do so. Based on the facts available to Barnes at the time of the unlawful entry, he *should have known* the correct address and the distinctions between the two properties. Therefore, Barnes should not be granted qualified immunity.

IV. The Fifth Circuit decided this case through the precedent established by this Court, and its decision is in accord with the decisions of other circuits.

Finally, Barnes misrepresents that this case "grows out of an unpublished opinion" and "involves not only intra-Circuit conflict between the panel opinion and *Thomas*, but it also conflicts with other Circuits' application of the reasonable-mistake rule and qualified immunity." Pet. at 23-24. Again, the Fifth Circuit relied upon the precedent established by this Court in *Garrison*. The courts in the decisions cited by Barnes applied well-settled qualified immunity principles to the particular facts before them and came to a particular conclusion. Likewise, the

Fifth Circuit applied well-settled qualified immunity principles to the particular set of facts at hand and came to a particular conclusion. The fact that different results were ultimately reached does not create any conflict, much less the type of conflict that warrants this Court's review. Rather, the differing outcomes are merely indicative of the fact that the analysis of a qualified immunity defense is fact driven.

CONCLUSION

Barnes and his cohorts' inattention and their *feeble* efforts, if any, to ascertain and identify the correct address is what caused the unlawful entry into the Gerharts' home. The law should not protect such reckless disregard for the rights, safety and welfare of others. The law should not protect Barnes from liability for his reckless invasion into the Gerharts' home and reckless violation of the Gerharts' Fourth Amendment right. The doctrine of qualified immunity should not be a shield for such *unreasonable* conduct. To find otherwise flies in the face of our Fourth Amendment right to be secure in our own homes and free from government intrusion.

For the forgoing reasons, the Gerharts respectfully request that the Court deny Barnes' Petition for Writ of Certiorari.

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Respectfully submitted,

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