No. 21-1559

IN THE

Supreme Court of the United States

SHARON POWELL, AS EXECUTRIX OF THE ESTATE OF WILLIAM DAVID POWELL, *et al.*,

Petitioners,

v.

JENNIFER SNOOK, AS EXECUTRIX FOR THE ESTATE OF PATRICK SNOOK,

Respondent.

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

REPLY BRIEF

JOHN C. JONES
JOHN C. JONES,
ATTORNEY AT LAW
248 Roswell Rd.
Marietta, GA 30060
(404) 317-3697

BRUCE M. EDENFIELD
Counsel of Record
BRUCE M. EDENFIELD, P.C.
324 Three Sisters Rd.
Dahlonega, GA 30533
(706) 864-2123
bedenfieldlaw@windstream.net

Attorneys for Petitioners

314880

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

The facts of this case ask this question—is an officer entitled to qualified immunity when he simply lies in wait watching a suspect who is unaware of the officer's presence, who is not presenting an imminent threat toward the officer or others, and during a time when it is beyond debate that the officer had ample opportunity to either identify himself or give a warning but, choosing to remain silent, the officer waits until the suspect unknowingly and innocently makes a movement causing the officer to use deadly force?

If the answer to this question is yes, then an officer can simply wait and ambush a suspect with impunity from liability for his unconstitutional conduct. Even though *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Conner*, 490 U.S. 386 (1989) are cast at a high level of generality, this Court's prior precedent makes it clear that in an obvious case they can still give fair warning to the officer that his conduct is unconstitutional.

But if the Court leaves unchecked the Circuit Court's opinion and the Respondent's overly restrictive view of *Graham*, it will have opened the door for officers, acting under guise of "police tactics,"[1] to neuter the application

1. It cannot be overlooked when taking into account the "totality of the circumstances," that Officer Snook admitted in his deposition he had ample opportunity to give a warning "over and over again" from the time the garage door began to open until shots were fired and further testified in his sworn Declaration, based on his experience, that he had encountered dozens of homeowners in similar cases where the suspect came through a garage in the middle of the night which gave him an

of both *Garner* and *Graham's* ability to give fair notice even in an obvious case.

When viewed through the lens of the "totality of the circumstances" which takes into account the entire encounter leading up to the use of force, there can be no debate but that the Respondent had ample opportunity to give a warning during a time when Mr. Powell was not posing an imminent threat to the officers.

Under the Circuit Court's and Respondent's view, Snook did not have to give a warning because of his claim of "police tactics." The Constitutional protections guaranteed by the Fourth Amendment cannot be subverted to the guise of an officer's claim of "police tactics," especially when Supreme Court precedent gave fair notice that such conduct was unconstitutional.

A. In assessing the reasonableness of an officer's use of force under the Fourth Amendment, this Court's prior precedent "commands" that the assessment be undertaken considering the totality of the circumstances and is not limited to the moment when shots were fired.

When taking into account the totality of the circumstances, including Officer Snook's conduct leading up to the use of deadly force, this Court's decisions in

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opportunity to give a warning before using force in the encounter. Snook actually claims he gave a warning by "loudly announcing 'Henry County Police'" before Mr. Powell began to raise his right arm. Mrs. Powell denies any such warning was given. Petitioner's Statement of Case at pp. 8-9.

Garner and *Graham*, although cast at a high level of generality, apply with obvious clarity to the Petitioners' claims.

At the core of this Court's Fourth Amendment jurisprudence is whether a particular search or seizure is reasonable, and therefore constitutional. The central inquiry under the Fourth Amendment is "the reasonableness of *all the circumstances* of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio*, 392 U.S. 1 (1968). Indeed, it has been this Court's view since its holding in *Terry* that "the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, *in light of all the exigencies of the case*, a central element in the analysis of reasonableness." *Id.* at 17, fn 15.

The assessment of the reasonableness of an officer's conduct depends upon the "totality of the circumstances." *Graham*, 490 U.S. at 396. This rule extends to all searches and seizures, whether an investigatory stop (*Terry*) or the use of deadly force under *Graham*. In considering the "totality of the circumstances," this Court has consistently refused to rule out any relevant facts or circumstances and has insisted that reasonableness "is not capable of precise definition or mechanical application," and therefore the analysis "requires careful attention to the facts and circumstances of each particular case." *Id.*

In addressing the "totality of the circumstances" standard, this Court has held that it is "in the nature of a test which must accommodate limitless factual circumstances." *Saucier v. Katz,* 533 U.S. 194 205 (2001).

The operative question in any excessive force case is "whether the totality of the circumstances justifie[s] a particular sort of search or seizure." *Garner*, 471 U.S. at 8-9.

This Court first applied the "totality of circumstances" standard in the context of an officer's use of force under the Fourth Amendment in *Garner*. The Court examined "the nature and quality of the intrusion" and the "importance of governmental interests alleged" in asking "whether the totality of the circumstances justified a particular sort of search or seizure." *Id.* at 8-9. Four years later, this Court reaffirmed that standard in *Graham v. Conner*, 490 U.S. 386 (1989), holding that the Fourth Amendment inquiry set out in *Garner* provided the exclusive framework for assessing the constitutionality of an officer's use of force. The Court emphasized that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," and restated emphatically that the "question is 'whether the totality of the circumstances justifie[s] a particular sort of … seizure.'" *Graham*, 490 U.S. at 396.

In *Scott v. Harris*, 550 U.S. 372 (2007), the Court left no doubt that the Fourth Amendment analysis of any use of force must remain flexible considering all the circumstances. The Court rejected the argument that *Garner* had created a bright-line rule embracing a factual inquiry based on all relevant circumstances. As stated by the Court, "[A]lthough Respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Id.* at 387.

More importantly, neither *Garner* nor *Graham* imposes a temporal bar against considering the conduct of officers leading up to a use of force.[2] Rather, *Graham* requires any court assessing the reasonableness of an officer's conduct to "put themselves in the shoes of the officer" on the scene without the benefit of hindsight. *Id,* 490 U.S. at 396-397. In this regard, "[e]xcessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon all the information the officers had when the conduct occurred." *Saucier,* 533 U.S. at 206-207. *Garner* never suggested a limited timeframe for the circumstances relevant to the "reasonableness" analysis and framed the inquiry as "whether the totality of the circumstances justified a particular sort of search or seizure." *Garner* at 471 U.S. at 8-9. Indeed, all courts assess the reasonableness and constitutionality of an officer's conduct based upon all the information available to the officer at the time, allowing for split-second decisions, without ignoring the officer's own conduct before the officer pulls the trigger.

As this Court stated in *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546-1547 (2017),

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2. Respondent's argument that *Graham's* reasonableness inquiry is limited to the "moment" shots were fired is misplaced and taken entirely out of context. Read in context, *Graham's* use of the word "moment" merely requires the courts to put themselves in the shoes of the officer on the scene rather than evaluating the officer's actions with 20/20 hindsight. *Graham*, 490 U.S. 396-7. Nothing in *Graham* suggests that the officer's own conduct should be excluded from the reasonableness inquiry and this Court's own analysis in its review of Fourth Amendment cases reject Respondent's interpretation.

> Excessive force claims…are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred" (citing to *Saucier*, 533 U.S. at 207). That inquiry is dispositive: when an officer carries out a seizure that is reasonable, ***taking into account all relevant circumstances***, there is no valid excessive force claim. *Id,* at 1546-47 [Emphasis added].

This, of course, should come as no surprise because the Court in *Garner* took upon itself to consider the officer's conduct ***preceding*** the use of deadly force as one of the factors relevant to the Court's Fourth Amendment reasonableness analysis by requiring a "warning, where feasible" under the circumstances confronted by the officer on the scene before using deadly force. In this respect, this Court has repeatedly and consistently analyzed the reasonableness of an officer's conduct on the scene, taking into account the "totality of the circumstances" leading up to the time of the officer's use of force in assessing the reasonableness of the force actually employed. See *Bower v. County of Inyo*, 489 U.S. 593 (1989) (taking into account the "unreasonableness…of setting up a roadblock in such a manner as to be likely to kill him"); *Scott v. Harris*, 550 U.S. 372 (2007) (finding in the course of a high speed chase one of the involved officer's conduct to be reasonable where that officer had issued warnings for the Plaintiff to stop "with blue lights flashing and sirens blaring…for nearly ten miles" before the officer used a pit maneuver to stop the vehicle killing the driver); similarly, *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-22 (2014) (analyzing several minutes before the officer fired shots to determine reasonableness of the force used); *Mullenix v. Luna*, 136

S. Ct. 305 (2015) (considering events of an eighteen minute chase before officers shooting the car to determine if qualified immunity was appropriate).

More recently, the Court in *White v. Pauley*, 137 S. Ct. 548 (2017) examined the conduct of several officers leading up to the shooting of an *armed* individual who was engaged in a shootout with the officers on the scene. The Court granted qualified immunity to Officer White who arrived late on the scene because Officer White could assume that the other officers had already given such a warning before his arrival. As noted in Justice Ginsburg's concurrence, she understood the Court's opinion not to foreclose excessive force claims against the other officers, who may have precipitated a violent confrontation by threatening to enter the house without adequately identifying themselves as police, and even against Officer White, if there were factual disputes over "when [he] arrived on the scene, what he may have witnessed, and ***whether he had adequate time to identify himself and order [the suspect] to drop his weapon***." *Id.* at 553. [Emphasis added].

Just four months later in *Mendez*, the Court reaffirmed what it has cautioned in every Fourth Amendment excessive use of force case since *Graham* that "*Graham* ***commands*** that the officer's use of force be assessed for reasonableness under the totality of the circumstances." 137 S. Ct. at 1547, fn.

B. No prior precedent provided Officer Snook the discretion to ignore Garner's directive that a warning is required before the use of deadly force where it was feasible to do so under the circumstances of this case.

Citing to *City of San Francisco v. Sheehan*, 575 U.S. 600 (2015) and *Mendez*, Respondent argues that these cases foreclose any argument that pre-shooting tactics can ground liability for excessive force. Respondent's Op. Brief at 18. This is not a fair reading of those cases. To the contrary, the Court in *Sheehan* was careful to point out that there was no "prior precedent" clearly establishing "an objective need" for the alleged unauthorized conduct. Here, the Court's precedent in *Graham* clearly required a warning where it was "feasible to do so" under the objective circumstances confronting the officer on the scene. Regardless, it goes without saying that "police tactics" cannot sweep away a Fourth Amendment protection previously recognized in precedent by this Court, especially where the precedent applies with obvious clarity to the case.

As for *Mendez*, the Court only addressed the Tenth Circuit's "Provocation Rule." It did not grant certiorari on the reasonableness of the officer's conduct under *Graham's* Fourth Amendment analysis and the issue had not been addressed in the court below. *Mendez,* 137 S. Ct. at 1547, fn.

Finally, there is not a single Eleventh Circuit case cited by the Respondent where no warning was given before the use of deadly force that was not either a split-second decision where no prior warning was feasible under the circumstances or where the officer had already

given commands to the suspect to cease his threatening conduct. As to the cases relied upon by the Circuit Court on this very point. See Petitioners' Cert. Petition for a detailed discussion which drives Petitioners' point home at pp. 20-23.

C. On their quest for factual similarity, the Circuit Court's opinion and Respondent's arguments would have this Court limit its decisions in *Garner* and *Graham* in their ability to give "fair notice" of unconstitutional conduct proscribed by the Fourth Amendment in an obvious case.

Ignoring the totality of the circumstances in this case and this Court's caution in *Hope v. Pelzer,* 536 U.S. 730 (2002) that the search for materially similar decisions may take on a life of its own and override the principle that an officer's conduct can be both novel and unconstitutional, the Circuit Court's opinion and Respondent's arguments demonstrate their overriding quest and requirement of factual similarity in a prior case to establish a violation of clearly established law.

As stated by the Circuit Court panel,

> While it is clear that in some circumstances an officer must warn before using deadly force where it's *feasible* to do so, *Garner*, 471 U.S. at 11-12, decisions addressing how soon an officer is required to give a warning to an *unarmed* suspect do not clearly establish anything about whether or when a warning is required for *armed* suspects raising a firearm in the direction of an officer. Pet. App. 19a-20a.

Respondent's arguments regarding *Garner's* ability to give fair notice of unconstitutional conduct echo that of the Circuit Court but tighten the noose even tighter.

> By its own terms *Garner's* holding is limited to the circumstances under which police lawfully may use deadly force to *prevent escape*. Res. Opposition Brief at 12.
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> As for scope, *Garner's* "fair warning" provision was designed for escape situations. *Id.* at 14-15.
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> On the other hand, *Garner* says nothing about a situation where an armed suspect intentionally confronts an officer with imminent deadly force.[3] *Id.* at 15.
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> ***
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> *Garner* says absolutely nothing about whether or when the Fourth Amendment requires police officers to reveal their presence and announce their police officer status. *Id.* at 16.

If the Circuit Court's and Respondent's reading of *Garner* are correct, there would have been no reason for

3. Of course, Mr. Powell did not know of Officer Snook's or any officer's presence because no warning was given even though it was feasible to do so.

this Court to even address *Garner's* "warning, if feasible" directive in the Court's qualified immunity analysis in *White v. Pauley*, unless, the Court agrees that *Garner* cannot give "fair notice" except in a case with identical or similar facts. The Court in *White* analyzed *Garner's* warning requirement, "where feasible," in that case which involved each one of the above noted dissimilar facts that the Circuit Court and Respondent applied to Petitioners' case in order to neuter *Garner's* clear application.[4] In doing so, such a restrictive view of *Garner's* ability to give "fair notice" in an obvious case involving an armed suspect moves *Garner's* decision to a footnote for the idly curious while discretely ignoring this Court's precedent of its applicability to such a case.

More to the point, this overly restrictive view of *Garner's* application to an obvious case is contrary to this Court's precedent which has repeatedly held that *Garner* and *Graham* can "clearly establish" the answer and give "fair notice" of unconstitutional conduct even without a body of relevant caselaw. *Anderson v. Creighton,* 483 U.S. 635 (1987); *United States v. Lanier*, 520 U.S. 259 (1997); *Hope v. Pelzer,* 536 U.S. 730 (2002); *Brosseau v. Haugen,* 543 U.S. 194 (2004); *White v. Pauley,* 580 U.S. __, 137 S. Ct. 548 (2017).

4. After a detailed review of the facts in that case, including the conduct of the officers before Officer White arrived on the scene, the Court properly concluded as to Officer White, he arrived late on the scene and could have assumed that a prior warning was given by the other officers before his arrival.

D. Petitioner has never argued that a warning is required "at the earliest possible moment" but rather "where it was feasible to do so."

The Circuit Court and Respondent try to couch Petitioners' argument as requiring Officer Snook to give a warning "at the earliest possible moment." Succinctly stated, Petitioners have ***never*** made such an argument but have vigorously argued when taking into account the totality of the circumstances, if a warning was feasible prior to the use of deadly force (that is to say at any time during the seventeen-plus seconds preceding Snook's firing the shots), then *Garner* applies with obvious clarity to this case and requires that such a warning to be given "where feasible to do so."

The Circuit Court's and Respondent's disingenuous attempt to alter Petitioners' argument led the Circuit Court to its newly created but clearly erroneous holding that a Plaintiff, in order to give fair notice of unconstitutional conduct, must have prior precedent that establishes that a warning "must be given at the earliest possible moment" to defeat qualified immunity in this case. As noted, this was never the Petitioners' argument and the Circuit Court's holding creates a burden of proof for the Petitioners that is indefensible and plainly contrary to this Court's holding in *Garner*.

CONCLUSION

Certiorari and full merits briefing should be granted on these important issues.

Respectfully submitted,

JOHN C. JONES
JOHN C. JONES,
ATTORNEY AT LAW
248 Roswell Rd.
Marietta, GA 30060
(404) 317-3697

BRUCE M. EDENFIELD
Counsel of Record
BRUCE M. EDENFIELD, P.C.
324 Three Sisters Rd.
Dahlonega, GA 30533
(706) 864-2123
bedenfieldlaw@windstream.net

Attorneys for Petitioners