No. 10-712

DEC 23 2010

In The
Supreme Court of the United States

WILLIAM MORRIS, JR. and RONALD REMUS,

Petitioners,

v.

ROBERT G. SWOFFORD and SHARON SWOFFORD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE SWOFFORDS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The questions presented by the Deputies are premised on incorrect or disputed facts. For example, they assume that the Deputies entered the Swoffords' property in search of "felony" suspects, but the record reflects that the suspects at most committed a misdemeanor and that the Deputies were not in hot pursuit. The Deputies' questions also presume that the Deputies shot Swofford "in self-defense," but evidence shows that they acted in response to an inquiry from Swofford who – with his gun pointed to the ground and blinded by the Deputies' flashlights – simply said to the Deputies, "Halt!" and "Who are you?" Furthermore, the Deputies' questions omit the undisputed facts that the Deputies knew that they were at the Swoffords' residence and that Swofford was not one of the suspects they were pursuing. And as conceded by the Deputies, their first question addresses an issue never reached by the circuit court. Thus, the only question raised by the Eleventh Circuit's unpublished opinion in this case is this:

> Are deputies entitled to qualified immunity as a matter of law where evidence shows that they entered a residential backyard unannounced late at night and, knowing that the innocent homeowner was not their suspect, gunned him down without warning when he asked – with his pistol pointed to the ground and blinded by their flashlights – who they were?

The courts below correctly answered, "no."

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Respondents, Robert Swofford ("Swofford") and his wife, Sharon Swofford (collectively, the "Swoffords"), submit this opposition to the Petition for a Writ of Certiorari ("Petition") filed by two deputies of the Seminole County Sheriff's Office ("SCSO"), William Morris, Jr. ("Morris") and Ronald Remus ("Remus") (collectively the "Deputies"), to show why the Petition should be denied.

BRIEF OF THE SWOFFORDS IN OPPOSITION

This case is not a good vehicle for addressing the questions presented by the Deputies. The first issue – whether the circumstances surrounding the shooting should be ignored – was not reached by the Eleventh Circuit. The second issue rests on a distorted fact-based description of the record and does not present any new or errant ruling of law. In light of the factual disputes going to the heart of this case, the Deputies' request for qualified immunity as a matter of law does not implicate public policy concerns or otherwise warrant review by writ of certiorari.

COUNTERSTATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15, the Swoffords offer this Counterstatement of the Case to respond to misstatements relating to the following four key aspects of the event in question: (1) the

Deputies' non-exigent search for suspects; (2) the Deputies' knowledge of the residence; (3) the Deputies' encounter with Swofford; and (4) the Deputies' failure to warn before shooting.

1. The Deputies' non-exigent search for the suspects

The Deputies assert that they were searching for felony suspects. (Pet. 2, 4). But the Deputies' own police expert testified that, at most, the suspects had committed the crime of trespassing – a misdemeanor in Florida. (Grossi Depo. 171:25-172:15 (Doc. 124)). The suspects were not reported to be armed. (Remus Depo. 117:4-14, 172:12-24 (Doc. 97)). And the search was not exigent. In fact, Morris stated that he was not in a hurry to search for the suspects. (Morris Depo. 120:13-18, 120:25-121:2 (Doc. 96)).

2. The Deputies' knowledge of the residence

The Deputies characterize the Swoffords' property as an "abandoned commercial area" and "open field," but the record shows they knew the property was residential and that they were in the Swoffords' backyard at the time of the shooting. Swofford had previously asked SCSO to patrol his property because of repeated trespasses and attempted burglaries and had informed SCSO that he and his property caretakers routinely checked the property armed. Consequently, SCSO had conducted 45 area patrols of the Swoffords' property in the two months before the

shooting. (Doc. 184-33; Swofford Depo. 178:11-179:18, 182:6-19 (Doc. 95); Area Patrol Reports (Doc. 184-34)). In fact, Remus himself personally checked the property eleven times before the shooting, including a patrol two to three hours before the shooting. (Area Patrol Reports (Doc. 184-34)). Remus's Area Patrol Reports stated "checked residence" or "area patrol completed." Remus testified that he thought the suspects might have fled "through the [Swoffords'] yard." (Remus Depo. 118:14-20; 128:5-13 (Doc. 97)). The Deputies had access to all of the Area Patrol Reports of the Swoffords' property on their portable computers. (Remus Depo. 147:3-6 (Doc. 97)).

The Deputies have also described features of the Swoffords' property out of context to create the impression that they entered a large, overgrown commercial area. (Pet. 8). Yet the property is in a residential neighborhood and was enclosed by a six-foot wooden privacy fence, a chain-link fence, and woods. (Pet. App. 3, 4; Doc. 89-4 at 4; Doc. 89-5 at 50; Remus Depo. 128:5-13 (Doc. 97)). The Swoffords and their caretakers testified that the property was mowed regularly and gardened and the fence around the property was repaired as needed. (Sharon Swofford Aff. ¶ 6 (Doc. 188-9); Buccholz Aff. ¶ 4 (Doc. 188-10); Velez Aff. ¶ 6 (Doc. 188-11); Swofford Depo. 175:5-176:24 (Doc. 95)).

3. The Deputies' encounter with Swofford

The record shows that, awoken by his dog barking at 2:25 a.m., Swofford picked up his gun, locked

the house, and went outside to inspect his property. (Swofford Depo. 198:10-24 (Doc. 95)). It is undisputed that Swofford, a former Army Captain, did not put his gun into battery as necessary for it to shoot. (*Id.* at 32:3-34:3; Swofford Aff. ¶ 5 (Doc. 188-1); Pet. App. 9). He checked his garage, doors, and windows and then knelt down holding his gun in a two-handed grip pointed at the ground to observe the back of his property that abutted the apartment complex. (Swofford Depo. 206:17-208:22 (Doc. 95)). After a few minutes, he heard someone on the other side of his fence say, "This looks like a good place to get through here," and then heard the squealing sound of boards being pulled off the fence. Thereafter, two unknown people – the Deputies – came through his fence. (Swofford Depo. 210:25-211:25, 212:4-13 (Doc. 95)).

What happened next is in dispute. According to Swofford, he did not "suddenly confront" the Deputies. Swofford watched the flashlight beams from two unknown persons wander through his property in the dark. (Swofford Depo. 213:14-215:16 (Doc. 95)). There is evidence that when they neared him, Swofford yelled, "Halt," (*id.* at 231:16-22, 233:1-25 (Doc. 95)), and "Hey, hey you, who are you?" (Doc. 89-5 at 64). There also is evidence that at the moment of the encounter, Swofford was crouching or kneeling and never stood upright or ran towards the Deputies. (Swofford Depo. 231:23-232:25 (Doc. 95); *contra* Pet. 10 n. 1). The Deputies shined their flashlights at Swofford, blinding him, and realized that he was not one of the suspects for whom they were searching.

(Pet. 2, 9; Remus Depo. 174:23-25 (Doc. 97); Morris Depo. 154:25-155:11 (Doc. 96)). Not only did the Deputies have time to realize that Swofford was not their suspect, as they later admitted, but Morris also admitted that before he shot Swofford, he believed that Swofford was the homeowner. (Morris Depo. 154:25-155:11 (Doc. 96)). Additionally, Remus's first statement – taken shortly after the incident – is consistent with Swofford's testimony that before he was shot, Swofford called out to the Deputies. Remus told FDLE investigators that he heard Swofford say something like "'[H]ey,' 'Hey, you,' or 'Who are you?'" (Doc. 89-5 at 64). At the time he was shot, Swofford had committed no crime. In fact, SCSO decided not to charge Swofford with any crime within 24 hours of the shooting. (Doc. 89-3 at 46).

The Deputies' interpretation of the diagrams of Swofford's expert, Richard Ernest, is refuted by the images and by Ernest himself. First, the diagrams do not show Swofford "walking toward the deputies" or "approaching the deputies." (*See* Pet. 2, 3, 6, 10, 22, 29, 30). Instead, they depict Swofford bent forward, with the gun pointed to the ground and the location of the officers' bullets as they entered his body. Indeed, Ernest's diagrams are for illustration purposes and do not represent what Swofford did. Ernest Aff. ¶ 15 (Doc. 184-6). And Ernest's report concluded that "the statements of D/S Remus and D/S Morris asserting that Swofford raised the gun and pointed it in their direction are not supported by the physical evidence." Ernest Aff. Ex. B (Doc. 184-6). The Deputies also fail

to mention that Ernest's affidavit confirmed that Swofford was pointing his gun "down toward the ground" when he was shot:

> As explained above, there is no physical evidence to suggest that Mr. Swofford ever raised his firearm. What the physical evidence does show is that at the time the Deputies fired their gun, Mr. Swofford had a two-handed grip on his firearm, his hands were in front of his waist, and the firearm was pointed down towards the ground and not at the Deputies.

Ernest Aff. ¶ 13 (Doc. 184-6).

Even the Deputies' expert agrees that it would be impossible for Swofford to receive the injuries he did – through his wrists and into his abdomen – if his gun had been raised as claimed by the Deputies. (Hueske Depo. 24:6-27:15 (Doc. 128); *accord* Wright Aff. ¶ 6-9, 13-15 (Doc. 184-7); Ernest Aff. ¶ 5-8, 12-13, (Doc. 184-6); Swofford Aff. ¶ 11 (Doc. 188-1)). Further, although the Deputies repeatedly assert that Swofford was only a second from being able to fire on them, they never have claimed that they thought this at the time they shot Swofford. And as the Eleventh Circuit noted, there were inconsistencies within the Deputies' own testimony as to what happened during the encounter. (Pet. App. 3).

4. The Deputies' failure to warn

It is undisputed that the Deputies did not announce themselves as they broke through Swofford's fence. Additionally, although the Deputies now say that they shouted warnings during the shooting, an audio recording of the shooting supports Swofford's version that no warnings were given. A microphone connected to one of the Deputies' radios was transmitting, thus creating an audio recording of the shooting on the dispatch tape. On the audio, one hears multiple gun shots but no verbal commands to Mr. Swofford to drop his weapon until after the last shot. (Tr. of Dispatch Audio Tape (Doc. 184-2)).

Also, the Deputies misstate the record by claiming that Swofford agrees that warnings were given at least during the shooting. Swofford testified that the Deputies did not identify themselves or give him any commands before shooting him. (Swofford Depo. 231:16-22, 233:1-25, 282:1-20 (Doc. 95)). He testified that immediately after he yelled "halt" and flashlights were shined in his eyes, he felt a sharp pain, causing him to grab his stomach; then he heard "BOOM, BOOM, BOOM." Afterward, he heard someone shouting, "Seminole County Sheriff's Office," and then again he heard "BOOM, BOOM, BOOM." (Swofford Depo. 231:16-22 (Doc. 95)).

Indeed, the Deputies have largely ignored the district court's and Eleventh Circuit's discussion of the factual disputes that required denial of summary judgment on the qualified immunity defense. The

district court found that "[t]he bulk of the disputed facts in this case surround the events that occurred immediately before, during, and just after the shooting of Mr. Swofford." (Doc. 317 at 9). And the Eleventh Circuit held that "[t]he record reveals material issues of fact about whether the deputies identified themselves to Swofford, the position of Swofford's gun, the need for Morris and Remus to shoot Swofford, and whether Remus should have intervened to prevent Morris's use of force," all of which pertain to the circumstances surrounding the shooting. (Pet. App. 2).

REASONS FOR DENYING THE PETITION

There are no compelling reasons under Rule 10 for granting this Petition. With respect to the first question presented, the Eleventh Circuit's ruling is not in conflict with the decision of another United States Court of Appeals on an important matter of federal law. *See* Sup. Ct. R. 10(a). And with respect to the second, the Eleventh Circuit did not decide an important question of federal law that has not been previously settled by or conflicts with this Court. *See* Sup. Ct. R. 10(c). Accordingly, the Petition should be denied.

1. This case is not a good vehicle for deciding the first question – whether the circumstances surrounding the shooting should be ignored – because the Eleventh Circuit's unpublished opinion did not address that issue, which does not warrant review by this Court in any event.

The Deputies argue that the district court's decision in this case conflicts with the "segmenting approach" used by the Fourth, Sixth, Seventh, and Eighth Circuits. The "segmenting approach" is a method of applying the "totality of the circumstances" test that this Court established in *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) and refined in *Graham v. Connor*, 490 U.S. 386, 396 (1989), for determining whether an officer's use of deadly force was objectively reasonable. *See Dickerson v. McClellan*, 101 F.3d 1151, 1161-62 (6th Cir. 1996). The Deputies assert that "the district court in this case rejected segmenting and held that the deputies' entry onto Swofford's property could be viewed as unreasonable, such that the subsequent use of force was caused by the entry onto property, rendering the use of force unreasonable." (Pet. 21). But the Eleventh Circuit did not mention "segmenting," nor did it agree or disagree with the segmenting method. Indeed, the Deputies concede that the Eleventh Circuit did not squarely address this issue. (Pet. 16). The *per curiam* opinion states only:

> The district court did not err when it ruled that Morris and Remus were not entitled to

> qualified immunity. The record reveals material issues of fact about whether the deputies identified themselves to Swofford, the position of Swofford's gun, the need for Morris and Remus to shoot Swofford, and whether Remus should have intervened to prevent Morris's use of force.

(Pet. App. 2).

At no point does the Eleventh Circuit discuss the unreasonableness of the Deputies' entry onto the Swoffords' property, the Deputies' failure to wait for the approaching police helicopter before beginning their search for suspects, or any other pre-force activity. Instead, the Eleventh Circuit only addressed unresolved material issues of fact that pertain to the circumstances immediately preceding and during the shooting of Swofford. And the Eleventh Circuit summarily denied without opinion the Deputies' petition for rehearing and for rehearing *en banc*. (Pet. App. 47). Further, alleged district court errors do not warrant review by this Court. *See* Sup. Ct. R. 10. The first question, therefore, does not merit review because the Eleventh Circuit never addressed it.

In any event, the segmenting issue does not warrant review by this Court. The segmenting approach does use a somewhat narrow interpretation of the "totality of the circumstances" in determining if excessive force was used by analyzing excessive-force claims in segments. *Claybrook v. Birchwell*, 274 F.3d 1098, 1103 (6th Cir. 2001). But there is no dramatic split between the circuits. (*See* Pet. 20). Every circuit

applies the "totality of the circumstances" test that this Court established in *Garner*, 471 U.S. at 8-9, and refined in *Graham,* 490 U.S. at 396, for determining whether an officer's use of deadly force was objectively reasonable. *See, e.g.*, *Nelson v. County of Wright*, 162 F.3d 986, 990 (8th Cir. 1998); *Dickerson*, 101 F.3d at 1161-62; *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992); *Greenidge v. Ruffin*, 927 F.2d 789, 791 (4th Cir. 1991).

The segmenting approach does not mean that an officer's previous conduct plays no role in determining the reasonableness of his use of deadly force. Instead, in determining whether the use of force was reasonable, these circuits "segment" by not considering whether there was a separate constitutional violation leading up to the seizure. Such analysis does not require courts to view an officer's conduct underlying an excessive force claim in a vacuum. In the decisions cited by the Deputies, the appellate courts considered what the officers knew when they used deadly force, demonstrating that an officer's pre-force knowledge and actions impact those courts' analysis of the objective reasonableness of a seizure. *See Chappell v. City of Cleveland*, 585 F.3d 901, 916 (6th Cir. 2009) ("[c]onsidering what the record shows they knew at the moment of McCloud's attack, their use of deadly force . . . cannot be deemed objectively unreasonable"); *Dickerson*, 101 F.3d at 1161 (requiring a court to judge the reasonableness of the use of deadly force in light of all that the officer knew); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (same); *Cole v.*

Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) (examining the information that a trooper possessed at the time he decided to use deadly force and describing what the trooper had seen during a high-speed chase in which he had participated for approximately 30 miles).

Although the Deputies' characterization of "segmenting" and "non-segmenting" circuits creates the impression that the circuits' approaches are vastly dissimilar, their differences are more rhetorical than actual. For example, while these courts state that they analyze what happened in "the moments preceding the shooting," there is no indication by these courts of how long a "moment" is. *See Dickerson*, 101 F.3d at 1162. No "segmenting" court has said that it only analyzes what occurred in the exact instant of the use of force.

Similarly, the circuits that decline to narrowly interpret the "totality of the circumstances" do not go to the extreme and consider everything that an officer did leading up to the use of force. *See, e.g.*, *Billington v. Smith*, 292 F.3d 1177, 1189-90 (9th Cir. 2002) (holding that "[o]ur precedents do not forbid any consideration of events leading up to a shooting[, but] neither do they permit a plaintiff to establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided"). For example, these courts decline to include events that occurred substantial periods of time before the use of force in their analyses. *Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n. 7

(10th Cir. 1994) (cited with approval by *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001)) (refusing to scrutinize events occurring one hour before actual seizure and noting events were not immediately connected with the seizure).

At least one "non-segmenting" court has even cited language from a Seventh Circuit decision – *Plakas*, 19 F.3d at 1150, that "we carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage" – to support the view that actions leading up to the use of force must be considered in determining reasonableness of force. *See St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995). Apparently, the First Circuit found such language supportive of the idea that actions shortly preceding use of force are part of the deadly force segment. *Id.*

Even courts that allegedly "segment" have considered circumstances in which the officers caused the situation that required them to use deadly force. For example, in a factually similar case, *Claybrook*, 274 F.3d at 1100, a firefight broke out when plainclothes undercover officers, who failed to identify themselves, fatally shot a man holding a shotgun in a market parking lot who was acting as a security guard for a woman removing deposits from the market. *Id.* In analyzing the excessive force claim, the Sixth Circuit noted that "Claybrook was fired upon by unidentified, non-uniformed officers whom . . . Claybrook . . . thought to be robbing the market." *Id.* at 1105. In determining the reasonableness of the

deadly force, the court found it relevant that the officers did not identify themselves, thus creating the situation that caused the firefight. *Id.*

In another factually similar case, a homeowner was shot by unidentified police in his backyard at dusk. *Floyd v. City of Detroit*, 518 F.3d 398, 402 (6th Cir. 2008). The officers, who were investigating a call about an argument, did not identify themselves; instead, the homeowner only saw that people were running toward him because he could see their flashlight beams. *Id.* Although the homeowner was unarmed, the officers thought he had a gun in his hand. *Id.* at 403. In denying a motion for qualified immunity as a matter of law, the Sixth Circuit considered that the officers caused the situation leading to deadly force, holding that "the failure of both officers to properly assess the reality of the situation they created before employing deadly force without warning against an unarmed suspect cannot shield them from liability unless that failure was objectively reasonable." *Id.* at 408.

Furthermore, the segmenting approach is not an absolute and inflexible rule. For example, in *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998), the Eighth Circuit disagreed with the plaintiff that a brief struggle with a police officer should be viewed as "distinct and separate segments." *Id.* at 991. Rather, because "[t]he situation was tense and rapidly evolving," the court declined to apply the segmenting approach as it had in *Cole*, 993 F.2d 1328. *Id.* Cases

such as *Claybrook*, *Floyd*, and *Nelson* illustrate that use of the segmenting approach is simply a method or tool for analyzing the reasonableness of deadly force given the totality of the circumstances, rather than an important question of law over which the circuits are irreparably split.

All of the circuit courts state the rule of law to be applied in determining whether excessive force was used – namely, the "totality of the circumstances" test under *Garner* and *Graham*. Thus, there is no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" regarding the question of whether to segment the use of deadly force from previous events. *Powell v. Nevada*, 511 U.S. 79, 86-87 (1994). Rather, because the segmenting issue as presented by the Deputies is not "of importance to the public as distinguished from that of the parties," certiorari should not be granted in this case. *Id.*

Indeed, this Court already has held that an officer's use of deadly force may be reviewed for reasonableness in light of his actions leading up to the force. In *Brower v. County of Inyo*, 489 U.S. 593 (1989), this Court evaluated a case where the police created a roadblock to stop a fleeing suspect. *Id.* at 594. When the suspect collided with the roadblock and was killed, his heirs brought an action under § 1983, alleging that the roadblock constituted the use of excessive force. *Id.* This Court held that the roadblock was a "seizure" under the Fourth Amendment and remanded for a determination of whether

the roadblock was created in an unreasonable manner. In its analysis, this Court determined that it was necessary to consider the officers' actions of creating the roadblock even though the roadblock was created well before the decedent hit it. *See generally id.* Thus, this Court reviewed the actions of the police leading up to the crash, noting that they had:

> (1) caused an 18-wheel tractor-trailer to be placed across both lanes of a two-lane highway in the path of Brower's flight, (2) "effectively concealed" this roadblock by placing it behind a curve and leaving it unilluminated, and (3) positioned a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be "blinded" on his approach.

Id. at 594, 598. As the Third Circuit later pointed out, "if [the police's] preceding conduct could not be considered, remand in *Brower* would have been pointless, for the only basis for saying the seizure was unreasonable was the police's preseizure planning and conduct." *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999); *see also St. Hilaire*, 71 F.3d at 26 (citing *Brower* as support for rejecting the view that an officer's actions need be examined only at the moment of the use of deadly force).

Therefore, this Court has already established that officers' pre-force actions that result in the use of deadly force are part of the "totality of the circumstances" in determining the reasonableness of that force. By granting this Petition, the Court would be

"tak[ing] a case merely to reaffirm (without revisiting) settled law," which would be a "poor use of judicial resources." *Powell*, 511 U.S. at 87. Accordingly, the Petition should be denied.

2. The second question – whether a warning is required before a shooting in "self-defense" – rests on a distorted description of the evidence and does not present an errant ruling of law.

After conducting a *de novo* review of the record, the Eleventh Circuit found that "[t]he record reveals material issues of fact about whether [the Deputies] identified themselves to Swofford, the position of Swofford's gun, the need for Morris and Remus to shoot Swofford, and whether Remus should have intervened to prevent Morris's use of force." (Pet. App. 2). Viewing the facts in the light most favorable to Swofford, the Eleventh Circuit held that "a reasonable jury could find that [the Deputies] violated Swofford's clearly established constitutional rights." (Pet. App. 3).

The Petition is based on what the Deputies believe to be the Eleventh Circuit's erroneous factual findings:

> Although the *Garner* warning requirement is clearly ill-suited to a case like this one involving a split-second decision to use deadly force in self-defense, both the district court and the Eleventh Circuit denied qualified immunity to the deputies in large part based

> on a fact dispute as to whether the deputies gave a *Garner*-type warning to Swofford prior to the use of deadly force.

(Pet. 25). A fact dispute, however, is not a reason to grant this Petition. *See* Sup. Ct. R. 10 (stating that a petition "will be granted only for compelling reasons" and that a petition "is rarely granted when the asserted error consists of erroneous factual findings . . .").

In its opinion, the Eleventh Circuit provided a clear roadmap as to the core issues of material fact upon which a reasonable jury could find that the Deputies violated Swofford's clearly established constitutional rights. (*See* Pet. App. 2-3). The Eleventh Circuit found that disputed issues of fact precluded summary judgment as to the excessive force claim against the Deputies. Those issues of material fact should be decided by a jury, not this Court. By filing the Petition, the Deputies ask nine Supreme Court Justices to do a second *de novo* review of a voluminous pre-trial record consisting of thousands of pages. In effect, the Deputies want "another bite at the apple," even though they have taken three already – one with the district court and the second and third with the Eleventh Circuit.

Thus, the Petition does not warrant review by this Court because it presents only a fact dispute and no errant ruling of law. And its fact-bound result makes it an inappropriate means for reviewing the holding in *Tennessee v. Garner*, which requires a

warning prior to using deadly force if feasible. Therefore, the Court should reject the Deputies' request that the Court use this case to revisit *Garner* to decide whether a law enforcement officer is constitutionally required to give a warning to someone who is not a fleeing felon. (Pet. 7).

Moreover, the Deputies' argument fails on the merits. The Deputies argue that the *Garner* factors are unworkable and do not provide them with "fair notice" of what is constitutionally required prior to the use of deadly force. (Pet. 28). But *Garner* does provide "fair notice" of what was required when the Deputies encountered Swofford. *See Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S.Ct. 596, 599 (2004) (finding that the general tests set forth in *Garner* and *Graham* can provide fair warning). As the district court found, it is clear that a deputy cannot shoot an innocent homeowner under the circumstances presented here. (*See* Pet. App. 40) (holding that "[i]t is simply not normal for law enforcement officers to . . . enter unannounced onto a homeowner's property, and shoot him, unprovoked in his own backyard, knowing full well that he was not one of the suspects. . . . If constitutional protection against that risk is not bedrock, it is hard to envision what is").

Garner provides the Deputies with "fair notice" that they cannot shoot an innocent homeowner – who they know is not a suspect – without first giving a proper warning, if feasible. Viewing the facts in the light most favorable to Swofford, the Deputies entered the Swoffords' property in search of two

Hispanic suspects. During their search, they encountered Swofford, who is not Hispanic and who was lawfully checking his property with a handgun pointed to the ground. The Deputies, knowing that Swofford was not one of the suspects and was probably the homeowner, immediately shot Swofford, severely injuring him. Under these facts, a reasonable jury could find that the Deputies violated Swofford's clearly established constitutional rights.

Moreover, this Court has held that a "clearly established" constitutional violation does not require case law that is "materially similar." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In fact, general statements of law – such as those identified in *Garner* – are capable of providing fair notice and warning to a law enforcement officer that his or her "conduct violates established law[,] even in novel factual circumstances." *Id.*; *see also U.S. v. Lanier*, 520 U.S. 259, 271 (1997) (recognizing that general statements of law are capable of giving fair and clear warning); *Anderson v. Creighton,* 482 U.S. 635, 639 (1987) (rejecting the idea that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful).

The precedent set by *Garner* informs the Deputies that a fleeing felon is entitled to a warning if feasible. Under that precedent, the Deputies cannot argue in good faith that an innocent homeowner – who admittedly does not resemble the suspects – is not entitled to at least the same type of warning as a

fleeing felon. Accordingly, the Petition does not merit review by this Court.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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