No. 10-712

In The
Supreme Court of the United States

WILLIAM MORRIS, JR., and
RONALD REMUS,

Petitioners,

v.

ROBERT G. SWOFFORD,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Pursuant to Supreme Court Rules 15.6 and 17.5, Petitioners William Morris, Jr., and Ronald Remus submit the following Reply Brief in support of their Petition for Writ of Certiorari.

I. EVALUATION OF SWOFFORD'S § 1983 USE OF FORCE CLAIM SHOULD BE FOCUSED ON THE SUDDEN DEADLY THREAT THE DEPUTIES OBJECTIVELY PERCEIVED FROM SWOFFORD, AND NOT ON EXTRANEOUS MATTERS WHICH HAVE NO BEARING ON THE DEPUTIES' NEED FOR USE OF FORCE IN SELF-DEFENSE.

In his Brief in Opposition to the Petition for Writ of Certiorari, Swofford emphasizes factual disputes as to how his confrontation with Deputies Morris and Remus evolved. He argues that the facts leading up to that confrontation are relevant to determining whether the deputies' subsequent use of deadly force in self-defense against him was constitutionally reasonable. He also downplays the threat that an objectively reasonable deputy sheriff would have perceived from him based on the expert diagrams at the heart of this Petition. (Petition for Writ of Certiorari, Appendix at 48-50).

The deputies advocate segmenting the incident into its discrete components such that their use of force in self-defense is evaluated based only on the circumstances immediately preceding the need for

use of deadly force. To the deputies, the constitutional reasonableness of their use of force begins and ends with the fact that as they searched for two car burglars Swofford suddenly confronted them with his own firearm poised to shoot at the deputies in one second or less. And, that is based on Swofford's version of events, not the deputies'.

On the other hand, Swofford and the district court view the case as one long series of missteps by the deputies culminating in, and ultimately causing, the need for use of deadly force. Swofford questions whether the deputies really needed to enter his property in search of the burglars, whether their manner of entry was negligent, and whether the deputies had reason to suspect he was the owner of the property involved. He also emphasizes that, regardless of whatever threat he might have represented in the moment, he had done nothing wrong and had a right to be where he was.

According to his own expert, at the moment the deputies had to decide whether to fire in self-defense Swofford was approaching the deputies, had reached a point just 20-25 feet away from them, and was holding a gun in a position that any reasonable law enforcement officer would view as a deadly threat.

Swofford characterizes his gun as non-threatening and "pointed down towards the ground" based on the awkward angle of the gun in his hands (Brief in Opp. at p. 6). But, Swofford does not challenge the testimony of his own expert that the gun

was out and above Swofford's waist, that Swofford was facing Morris, that the gun was in the ready or low ready to fire position, and that from that position Swofford would appear able to fire on the deputies **in a split-second**. Petitioners once again urge the Court to review the diagrams, attached to the Petition for Writ of Certiorari, Appendix at 48-50.

The deputies should have received qualified immunity for their use of force in the face of that threat. Factual disputes about whether one of the deputies knew he was on private property, or whether the deputies properly pursued the felony car burglar suspects[1] in the first place, are all irrelevant to the fact that the deputies had at most one second to defend themselves from Swofford.

In a § 1983 use of force case, there are two principles of law that allow the Court to focus on the purely legal issues presented by qualified immunity. First, almost all § 1983 cases involve fact disputes and the immunity would ring hollow if a plaintiff could overcome it simply by generating a multitude of factual questions. The Court is thus not dismissive of a Petition based on denial of qualified immunity

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[1] Swofford inaccurately cites the deposition of a defense expert for the proposition that the suspects had committed only a misdemeanor. (Brief in Opp., p. 2). This expert testified that the suspects were believed to have committed car burglary, which the expert further testified is a felony. (Grossi depo. at p. 172). Car burglary in Florida is indeed a felony, § 810.02, Fla. Stat., as is theft of a car. § 812.014, Fla. Stat.

simply because there are fact disputes. *Scott v. Harris*, 550 U.S. 372, 380-81, 127 S. Ct. 1769 (2007). Instead, the Court resolves all fact questions reasonably supported by the record in favor of the non-moving party. *Id.* The pending Petition is therefore based solely on Swofford's version of events, as illustrated by his expert and to the extent supported by the record.

Second, the Court is not dismissive of a Petition just because there is a substantial or complicated record. Once the Court has constructed the non-movant's best case based on resolving all disputes in favor of that party, the Court must still "slosh our way through the factbound morass of reasonableness" to determine whether there has been a violation of the Fourth Amendment and of clearly established law. *Id.* at 383.

Even if one assumes that Deputy Remus personally knew that the entirety of the six acre property involved belonged to Swofford, and even if both he and Morris knew that Swofford was not a suspect, that does not change the fact that they had but one second to react to Swofford. Likewise, hindsight examination of the tactical steps taken by the deputies in their effort to find the car burglars is not, in the moment the deputies had to react to Swofford, relevant to the reasonableness of their use of deadly force against the deadly threat suddenly facing them.

Swofford contends that when Morris fired he "believed that Swofford was the homeowner." (Brief in

Opp., p. 5). In context, Morris testified that he believed that the person approaching *could* be the home or business owner. In any event, Morris testified, understandably, that at the moment Swofford appeared prepared to fire on him and Remus it did not matter who Swofford was because, "he was still armed; therefore he was a threat." (Depo. of Morris at p. 105).

The question presented by the Petition is whether the way that this situation developed is relevant to the constitutionality of the deputies' use of force once the acute confrontation with Swofford occurred. Consequently, Swofford's emphasis on the presence of fact disputes about how the incident developed is misplaced in that it assumes those disputes to be relevant to the use of force given the manner in which Swofford approached the deputies.

The fact that Swofford turned out to be the owner of the property may make him more sympathetic after the fact, but to the deputies standing in that field at 2:30 in the morning with a man 20 feet away and poised to fire on them in one second or less, that is simply not a factor in the constitutional reasonableness of their use of deadly force in self-defense. The deputies are not required to stand there and be shot by Swofford even if they think it possible he is an innocent passerby or property owner.

Swofford criticizes the deputies' version of events as incorrect. The deputies state that Swofford has his gun "raised" and Swofford disagrees with that

characterization. But, that has nothing to do with the central issue in the Petition. The issue is not whether the deputies' account and characterization is correct. The issue is whether, assuming Swoffords' version is correct, the deputies would be entitled to qualified immunity.

For Swofford and the district court below, that issue turned in large part on what happened well in advance of the moment Swofford emerged from the darkness, gun in hand. That approach impermissibly links the deputies' tactical law enforcement decisions as they searched for the car burglars to the split-second decision to use force to defend themselves from the threat suddenly posed by Swofford. That, in turn, is what the segmenting debate is all about.

II. THE INTER-CIRCUIT SPLIT ON SEGMENTING IS MEANINGFUL AND THIS CASE IS A GOOD VEHICLE FOR DECIDING THE ISSUE.

Swofford minimizes the segmenting issue, arguing that, even if there is a disagreement amongst the circuit courts about segmenting, it is not an important disagreement. Swofford also argues that in any event this case is a poor vehicle for deciding the issue because the Eleventh Circuit did not directly address segmenting in its opinion.

Swofford urges that the inter-circuit split on segmenting is "more rhetorical than actual." (Brief in Opp., p. 12). That is simply not the case. The split is

pronounced. Even Swofford's discussion of the myriad approaches to segmenting leaves one questioning what is, and is not, included in the "totality of the circumstances" when evaluating the constitutionality of the use of force. *Tennessee v. Garner*, 471 U.S. 1, 8-9, 105 S. Ct. 1694 (1985). Put more squarely, the issue is whether the "totality of the circumstances" for purposes of Fourth Amendment reasonableness includes the deputies' pre-use of force conduct, or just the circumstances immediately surrounding their use of force in self-defense.

For example, Swofford cites the Ninth Circuit's decision in *Billington v. Smith*, 292 F.3d 1177, 1189-90 (9th Cir. 2002) for the proposition that the courts there will consider *some* of the facts leading up to the need for use of force, but at the same time the court will not allow a plaintiff to establish a Fourth Amendment violation "based merely on bad tactics that result in a deadly confrontation that could have been avoided."

Some circuit courts expressly *do* include the pre-use of force actions of officers leading up to the officers' use of force in deciding whether that force is reasonable under the Fourth Amendment. See e.g. *Billington*, supra; *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26-7 (1st Cir. 1995) (expressly disagreeing with circuit courts that segment cases like this one, holding that "once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure.")

Some circuit courts expressly *do not* include pre-use of force conduct in deciding whether the use of force is reasonable under the Fourth Amendment. See e.g. *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994) (holding that *only* the facts immediately surrounding the use of force are relevant to its constitutional reasonableness; pre-use of force actions of officers are irrelevant to Fourth Amendment analysis of the use of force); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (the focus in a Fourth Amendment use of force case is "on the very moment when the officer makes the split-second judgment" to use force, and not on events leading up to the use of force.)

Swofford's claims that the segmenting dispute is not real, or that the issue is insignificant, are belied by the cases cited by both parties. This case crystallizes the point: if a deputy's tactical approach to a given situation that causes a confrontation is irrelevant to the constitutionality of the use of force during the confrontation, then contrary to the conclusion of the lower courts the deputies' *manner* of searching for the car burglars and their entry onto Swofford's land are irrelevant to the reasonableness of the use of deadly force in the confrontation.

The district court order is replete with references to the deputies' pre-use of force conduct and the role it played in causing the confrontation. The district court in this case wrote, "[i]t is simply not normal for law enforcement officers to tear down privacy fencing in a non-exigent search for suspects, 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." *Swofford v. Eslinger*, 671 F.Supp. 2d 1289, (M.D. Fla. 2009) (included in the Appendix to the Petition at 40).

Such language is utterly at odds with the circuit court decisions endorsing segmenting, but in accord with those that have broader definitions of "the totality of the circumstances." This issue is important and deserves the Court's consideration because law enforcement officers often find themselves in places that make it possible, if not likely, that they will encounter non-suspects, be they property owners or passersby.

Swofford argues that because the Eleventh Circuit did not remark about the segmenting issue then this case is ill-suited for the Court's consideration of that issue. Swofford inaccurately cites Sup. Ct. Rule 10 as standing for the proposition that errors of the district court are not relevant in such circumstances. (Brief in Opp., p. 10). It would also be incorrect, as Swofford suggests at various points, to cast this as a mere disagreement of fact. The issue presented is a legal one: whether the factual disputes relied upon by the district court and affirmed by the Eleventh Circuit matter to the Fourth Amendment analysis of the deputies' use of deadly force in self-defense.

Under ordinary circumstances, and if the Court deemed the issue as substantial as Petitioners believe

it to be, then this might seem reason to grant the Petition and to order the Eleventh Circuit to review the case in light of the segmenting issue. Indeed, there might be some merit to the notion of ordering the Eleventh Circuit to review the case more thoroughly and with reference to segmenting and the other legal issues raised in the appeal. But, it is still the case that there is no direction from this Court as to whether the manner of the deputies' entry onto Swofford's property is part of the calculus of "reasonableness" of the use of force. And, it is the absence of direction on that issue that is the source of the segmenting disagreement amongst the circuit courts.

Last, this particular case does present a good vehicle for deciding the segmenting issue because of the clear division between the segment of the incident involving the search for the car burglars and the entry onto Swofford's property, and then the subsequent confrontation with Swofford and the deputies' use of deadly force in self-defense. The Court should grant the Petition to resolve this important point of disagreement amongst the circuit courts.

III. THE FOURTH AMENDMENT DOES NOT REQUIRE THAT A DEPUTY PROVIDE A WARNING PRIOR TO USE OF DEADLY FORCE IN SELF-DEFENSE WHERE THERE IS ONLY A SPLIT-SECOND TO MAKE THE DECISION TO USE SUCH FORCE; EVEN IF THERE IS SUCH A REQUIREMENT, IT WAS NOT CLEARLY ESTABLISHED FOR PURPOSES OF QUALIFIED IMMUNITY UNDER THE FACTS OF THIS CASE.

Swofford characterizes the deputies' second question presented, concerning whether a *Garner*-type warning would be constitutionally required in this case, as merely questioning the factual conclusions of the district and appellate courts. This is incorrect.

Swofford emphasizes the parties' disagreement over the timing of warnings and submits that the question turns on that dispute. But, the deputies' question is whether, even if warnings in this case were not given before the deputies fired, are warnings constitutionally required *at all* when Swofford is one second from firing on the deputies? This issue cannot be passed off as simply questioning the lower courts' conclusion that warnings were feasible under *some* scenario. The deputies' contention is that, if Swofford emerged from the darkness in the manner illustrated by his own expert diagrams, then by definition a warning is not feasible or required under *Garner*.

It bears repeating: "For all [the officer] knew, the hesitation involved in giving a warning could easily

cause such a warning to be his last." *McClenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994).

The issue raised here is central to qualified immunity for use of deadly force in self-defense. Morris and Remus, according to Swofford, literally have a split-second to decide whether to protect themselves. A split-second. The law should not be that they must warn Swofford so as to give him some sort of romanticized fighting chance to surrender. Under Swofford's version of events, there is simply no time for that.

From a qualified immunity point of view, the question is even narrower: Is the pronouncement about warnings in *Garner* enough to charge the deputies with knowledge that, under the facts of this case, it would clearly be unconstitutional for them to use deadly force without a warning? *Garner* involved a fleeing felon and represents a far different scenario than someone approaching the deputies, one second from firing on them. It is not fair, reasonable, or consistent with principles of qualified immunity to hold the deputies *personally* liable based on the circumstances of *Garner*, even if the deputies did not give warnings to someone a split-second from firing on them.

This is a legal issue. It is built around Swofford's own expert's re-creation and testimony as to how Swofford would have appeared to the deputies. And, it is a central component of the reasonableness of the deputies' use of force in this case. This Court should

grant the Petition and hold, either that *Garner* is not the rule of law for use of force in self-defense or that, even if it is, the use of the phrase "where feasible" affords the deputies some level of qualified immunity leeway when they have one second or less to choose to fire in self-defense.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

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