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

PETITION FOR WRIT OF CERTIORARI

D. ANDREW DEBEVOISE, ESQUIRE
Counsel of Record
Florida Bar No.: 0281972
Email: debevoise@debevoisepoulton.com

THOMAS W. POULTON, ESQUIRE
Florida Bar No.: 0083798
Email: poulton@debevoisepoulton.com
DEBEVOISE & POULTON, P.A.
Lakeview Office Park, Suite 1010
1035 S. Semoran Boulevard
Winter Park, Florida 32792
Telephone: 407/673-5000
Facsimile: 407/673-5059

Attorneys for Petitioners
William Morris, Jr., and Ronald Remus

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTIONS PRESENTED

1. Where two deputy sheriffs enter a property searching for felony suspects, and the deputies are forced to fire on the armed property owner in self-defense, are the circumstances of the deputies' initial entry onto the property relevant to the constitutionality of their subsequent use of force against the property owner?

2. Where two deputy sheriffs enter a property searching for felony suspects, and the owner of the property suddenly confronts the deputies with a gun poised to shoot the deputies in a second or less, is it "clearly established" that the Fourth Amendment requires the deputies give a warning prior to shooting the property owner in self-defense?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rules 12.6 and 14.1(b), the parties to the action below are Robert G. Swofford and Sharon Swofford, Plaintiffs; and, Donald Eslinger, in his official capacity as Sheriff of Seminole County, Florida, and William Morris, Jr., and Ronald Remus, in their individual capacities, Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioners William Morris, Jr., and Ronald Remus, at all material times deputy sheriffs in Seminole County, Florida, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eleventh Circuit and of the district court below.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the Appendix at 1-3. It can also be found at *Swofford v. Eslinger*, No. 09-16162, 2010 WL 3422565, at *1 (11th Cir. Sept. 1, 2010) (unpublished decision). The decision of the district court is reported as *Swofford v. Eslinger*, 671 F. Supp. 2d 1289 (M.D. Fla. 2009), and is reproduced in the Appendix at 4-45.

JURISDICTION

On September 1, 2010, the Eleventh Circuit entered judgment. Appendix at 1. Deputies Morris and Remus timely filed a petition for rehearing *en banc* on September 17, 2010. The Eleventh Circuit entered an order denying the petition on October 25, 2010. Appendix at 46. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent Robert G. Swofford seeks damages for an alleged violation of his Fourth Amendment rights pursuant to 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides in relevant part 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. . . ."

Section 1983, Title 42, United States Code, provides in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

Seminole County Sheriff's Deputies William Morris, Jr., and Ronald Remus were searching for two felony car burglars in a large open field at approximately 3 a.m. when they were confronted by Plaintiff Robert Swofford. Swofford was walking toward the deputies and was holding a gun in both hands, in the

center of his body, above his waist. The gun was in what is termed the "ready," or "low ready" to fire position. The deputies shot Swofford believing that, if they did not, he would fire at them.

Swofford was the owner of the property onto which the deputies had followed the car burglars from an adjacent apartment complex. Swofford says that he did not realize who the deputies were and that they shined a flashlight in his eyes. While the deputies have testified that they identified themselves and warned Swofford to drop his gun before they fired, Swofford claims that he heard those commands only as the shots were being fired.

He complains that the deputies conducted their operation to find the car burglars in a negligent manner. Swofford ultimately contends that the deputies are personally liable for their use of deadly force against him because the deputies should not have been on his property to begin with.

At the moment he was shot by the deputies, Swofford was walking toward the deputies and had reached a point just 20-25 feet away from them. Swofford's gun was, according to Swofford's trajectory and ballistics expert, just **one second or less** from being in position to fire on the deputies. Several of Swofford's relevant expert diagrams showing how Swofford would have appeared to the deputies are included in the Appendix at 48-50, and the Petitioners urge the Court to view them so as to understand the

immediacy of the threat Swofford posed to the deputies.

This case squarely raises two important legal questions, both of **first impression** for this Court.

First, are criticisms of the deputies' entry onto Swofford's property relevant to the issue of whether the deputies' use of deadly force was constitutional? The deputies were led onto Swofford's property in pursuit of two felony car burglars. Swofford, who was armed, suddenly confronted the deputies, forcing them to fire on him in self-defense.

In the course of the litigation, Swofford has found fault with various aspects of the deputies' entry onto his property. For example, he complains that the deputies entered his property without announcing themselves and that the deputies should have waited for an approaching Sheriff's Office helicopter to join the chase for the burglars because that would have alerted Swofford to the possible presence of law enforcement. The case raises the question as to whether the deputies' use of deadly force, even if reasonable at the very moment they decided to shoot Swofford in self-defense, might nonetheless be unreasonable because their entry onto Swofford's property caused or contributed to the confrontation.

This issue is the subject of sharp disagreement among the lower courts. The Fourth, Sixth, Seventh, and Eighth Circuits all hold that a law enforcement officer's use of deadly force in self-defense is judged based only on the facts at the precise moment the

officer has to make the decision to use deadly force to protect himself, and without regard to whether the officer's pre-use of force conduct, even if unreasonable in some way, caused the need for the use of force. Those courts limit evaluation of the constitutionality of deadly force to consideration of the circumstances immediately preceding the use of deadly force.

Other courts, including the First, Third, and Ninth Circuits, take the opposite position, holding that in certain circumstances an officer's use of deadly force, even if genuinely necessary to save his own life, may be unconstitutional if the officer's preceding actions were unreasonable and caused the need for use of force. The Tenth Circuit has its own approach, holding that, while the focus is on the moment of decision, if a law enforcement officer engages in reckless behavior that leads to the need for use of deadly force, then the officer's culpability in causing that need for deadly force should be considered in deciding whether the force was unconstitutional.

This issue involves the balancing of significant societal interests, law enforcement interests, and constitutional rights that are much broader than the interests of the parties to this case. The constitutional relationship between the deputies' entry onto property and their subsequent use of deadly force in self-defense is the subject of substantial disagreement among the circuit courts. This Court should grant this Petition for Writ of Certiorari and address this important issue.

Second, the case raises the question of whether a pre-use of force warning, one of the factors announced by the Court in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985) for evaluating the constitutionality of use of deadly force, applies to a self-defense case where there is no time to give a warning. One of the key reasons that the district and the circuit courts denied qualified immunity to the deputies was the dispute as to whether warnings were given before, or as, the shots were fired.

As this case arises on denial of a motion for summary judgment based on qualified immunity, one will necessarily credit Swofford's claim that he heard warnings as the shots were fired, as opposed to before the shots were fired. But, that begs the purely legal question as to whether the Fourth Amendment would require that the deputies provide a warning prior to use of deadly force in self-defense against someone at most one second from firing on them.

Garner involved the use of deadly force to stop a fleeing felon whereas the instant case involved a person approaching deputies in a threatening manner such that the deputies had a split-second to react to him. Nonetheless, the lower courts in this case held that the deputies were required to identify themselves and warn Swofford before firing on him. *Swofford v. Eslinger*, 671 F. Supp. 2d 1289, 1304-05, 1309 (M.D. Fla. 2009). This case questions the feasibility of a warning when Swofford was a second or less from firing on the deputies, and it therefore raises the question as to whether a *Garner*-type warning was constitutionally required.

This is a significant issue for the law enforcement community and highlights the fact that there is no guidance from this Court on the use of deadly force by law enforcement purely for self-defense, as opposed to seizure of a fleeing felon as in *Garner*. The Court should grant this Petition for Writ of Certiorari so as to articulate the factors for the constitutional analysis of use of deadly force in self-defense, or at a minimum to limit or modify the warning requirement in *Garner* where a law enforcement officer has no choice but to use deadly force in immediate need of self-defense.

1. The deputies' entry onto Swofford's property.

In the early morning hours of April 20, 2006, Seminole County Sheriff's Deputy Ronald Remus was on bicycle patrol in an apartment complex located in Altamonte Springs, Florida. The apartment complex, Barrington at Mirror Lake Apartments ("Barrington"), had seen a recent spike in automobile burglaries, causing the Sheriff's Office to increase patrols there. (Doc. 97-1, p. 31).

At approximately 2:30 a.m., Remus spotted a Honda, backed into a parking spot with its engine running. Remus saw that next to that car, was another Honda, with two males appearing to be in the process of "punch starting" and stealing the car. As Remus rode by, the two males looked up, panicked, and ran. (Doc. 97-1 pp. 30-35; Doc. 97-2, p. 1).

Remus called out for assistance by radio. He then rode alongside the two suspects as they ran north

along a wooden fence. The suspects appeared to Remus to jump the fence. (Doc. 97-1, pp. 34, 35-37).

Remus rode back to the spot where he had seen the original Honda vehicle, and that car drove out of Barrington, with its lights out. Remus rode a short distance behind it and another deputy, in a patrol vehicle who had responded to Remus' call, pulled that vehicle over. Remus returned to searching for the two car burglars who had fled on foot. (Doc. 97-1; pp. 43-44, 73-74).

Deputy Sheriff William Morris, Jr., a K-9 deputy, arrived at Barrington as Remus renewed his search for the car burglars. Morris used his canine "Strike" to begin a track of the burglars. Strike led Deputies Morris and Remus to a spot along the fence that matched where Remus believed the burglars had jumped over the fence. Morris found a point a few yards away where there appeared to be rotted or loose boards. Morris pulled away a couple of boards so that he and Remus could fit through. (Doc. 96, pp. 74-80, 96-100; Doc. 97-1, p. 47).

The large field on the other side of the fence belonged to Swofford. Swofford's property spans six acres. He bought old cars and kept them on the property to repair and restore. At the point at which the deputies went through the fence in pursuit of the car burglars, Swofford's property appeared commercial in nature. It included an abandoned semi-trailer with high weeds around it, an area formerly used as a commercial nursery, a large warehouse, storage buildings, and several other non-residential buildings. (Doc. 82-1;

Doc. 95-1, pp. 31-38; Doc. 90; Doc. 96, p. 99; Doc. 96-1, pp. 7-8; Doc. 92-1, pp. 5-9).

2. The use of force.

Swofford's home is on the far northeast corner of the six acre property, on the opposite side from where the deputies entered the property. He was awakened by the sound of his dog barking. He got up and went outside to check on what might have caused his dog to bark. Before leaving his house, Swofford armed himself with his own 9 mm pistol. (Doc. 92-1).

Swofford traveled from the east side of the property, where his house was, to the far west side, near the fence abutting Barrington. He checked on several buildings along the way to make sure that they were secure. He reached an area in the field near the fence, knelt in some bushes, and listened. (Doc. 95-1, p. 100; Doc. 95-2, pp. 4-8; Doc. 92-1, p. 14).

Swofford then saw two people come through the fence. One had on a uniform, which Swofford has since described as looking like a UPS uniform. He watched as the two figures, flashlights in hand, moved along the fence between his property and Barrington. These were the deputies, although Swofford states he did not realize that and did not see the dog, Strike. (Doc. 92-1, pp. 19, 40).

The deputies testified that they heard and saw Swofford as he was almost upon them and with his firearm pointed at them. They fired, fearing that Swofford would shoot them if they did not. Swofford's expert on ballistics and trajectory established that

Swofford was walking towards the deputies and was 20-25 feet from the deputies when the deputies fired. Swofford's expert developed diagrams, based on the physical evidence and Swofford's wounds, as to how Swofford would have appeared to the deputies at the moment they fired on him. Again, the relevant diagrams composed by Swofford's expert are attached to this petition in the Appendix at 48-50. (Doc. 96-1, pp. 44-47; Doc. 97-2, pp. 16-19; Doc. 99; Doc. 99-1).[1]

This expert was deposed and testified that, at the moment the deputies fired on him, Swofford's firearm was in the "ready" or "low ready" position. The expert further testified that, from this position, Swofford was one second or less from being able to fire on the deputies. (Doc. 99, pp. 28-36).

The deputies testified that as Swofford approached they did not believe that he was one of the original suspects, but that he was coming at them with a gun and appeared ready to fire on them. The parties agree that warnings were given, but disagree on the timing. The deputies testified that they gave warnings *before* firing, identifying themselves and

---

[1] After the shooting incident, and before the litigation, Swofford was interviewed and stated that he was still kneeling in the bushes when shot. However, in the litigation, Swofford later receded from that version of events noting that the combination of medications he was on at the time and the trauma of being shot initially caused some memory confusion for him. Swofford testified that he was in fact standing up and walking toward the deputies and that the physical evidence supported his expert's rendition of events, as reflected in the Appendix. (Doc. 92-1, pp. 23-25; Doc. 102-3; Doc. 102, pp. 12-13, 39).

telling Swofford to drop his firearm. Swofford testified that he heard warnings, but only *as* the shots were being fired. All testimony and evidence established that the confrontation and use of force lasted mere seconds. (Doc. 96-1, pp. 44-46; Doc. 97-2, pp. 23-24; Doc. 92-1, pp. 19-22).

3. District Court Proceedings.

Swofford sued the deputies, in their individual capacities, and Seminole County Sheriff Donald Eslinger, in his official capacity, under both § 1983 and state law tort theories. The § 1983 claims were divided into two groups, with Swofford claiming first that the deputies' warrantless entry onto his land violated the Fourth Amendment, and second that their use of force against him also violated the Fourth Amendment.

The case was originally filed in state court but the Defendants timely removed it to the United States District Court for the Middle District of Florida. Jurisdiction in the lower court was founded on the presence of a federal question, 28 U.S.C. § 1331.

At the close of discovery, the defendants moved for summary judgment on all claims. The district court granted the deputies qualified immunity as to the § 1983 entry onto land claims. The district court held that, regardless of whether Swofford's property would properly be characterized as curtilage, it was not clearly established that it was curtilage subject to

Fourth Amendment protection. *Swofford*, 671 F. Supp. 2d at 1303; Appendix at 25-26.

The district court, citing the *Garner* factors for evaluation of use of deadly force, denied summary judgment to the deputies on three main theories: first, that there was a dispute as to when warnings were given – that is, whether they were given before or as the deputies began firing on Swofford; second, that it was unclear whether Swofford was actually in a threatening position to the deputies so as to warrant the use of deadly force; and, third, that even though the deputies were entitled to qualified immunity for the § 1983 entry onto property claims, their entry onto the property could be viewed by a jury as generally unreasonable or negligent, that their unreasonable or negligent entry is what led to the need to use force, and that a jury could therefore find that the use of force was constitutionally unreasonable based on the entry onto Swofford's property. The district court also found that Remus could be liable for failing to prevent Morris from firing on Swofford, a failure to intervene claim that had not previously been pled by Swofford. *Swofford*, 671 F. Supp. 2d 1289; Appendix at 4-45.

4. Decisions of the Eleventh Circuit.

The deputies appealed the district court's denial of qualified immunity. Briefing at the Eleventh Circuit was completed on June 17, 2010. On September 1, 2010, the Eleventh Circuit issued a brief judgment

affirming, finding that factual disputes as to whether the deputies would reasonably have perceived Swofford as a threat, whether the deputies knew that Swofford was the property owner, and whether the deputies identified themselves prior to use of force, precluded summary judgment on the use of force claims. The Eleventh Circuit also held that there was sufficient evidence for Swofford to move forward on the failure to intervene claim against Remus. Appendix at 1-3.

The deputies timely filed a petition for rehearing en banc on September 17, 2010. The petition was denied on October 25, 2010. Appendix at 46-47.

REASONS FOR GRANTING THE PETITION

This case presents two important issues that the Court should review by grant of this Petition for Writ of Certiorari. First, the Court should address the question of whether the circumstances surrounding the deputies' entry onto Swofford's property has any bearing on the reasonableness of, and therefore the constitutionality of, their use of deadly force against Swofford when he confronted them. Second, the Court should determine whether the warning factor in *Garner* applies in this self-defense case where the deputies literally had a split-second to decide to use deadly force to defend themselves.

The Court should grant the petition to consider whether a law enforcement officer's conduct prior to the use of deadly force is relevant to the reasonableness of that use of deadly force under the Fourth Amendment. Swofford contends that the deputies' entry onto his property was unreasonable or negligent, and that their entry onto his property set in motion the chain of events leading to the confrontation. The lower courts, particularly the district court, agreed with this argument, holding that a jury might find the force unreasonable, not because it was unjustified in the moment, but because the deputies' entry onto Swofford's property caused the moment to occur.

There is a remarkably sharp conflict among the circuit courts on this issue. Some circuit courts hold that the focus in a use of force case is solely on the moment of decision, and that an officer's conduct prior to that moment, even if it caused or contributed to a confrontation as urged in this case, is completely irrelevant to evaluating the reasonableness of the use of force. Other circuits reject this approach. At least three circuits hold that, even if an officer's use of deadly force in self-defense is completely justified under the circumstances of the confrontation, the force may still be deemed unreasonable if the officer's actions caused or contributed to the confrontation. The inter-circuit conflict on that weighty issue is ripe for resolution in the context of this case.

There is a factual dispute as to whether warnings were given before the deputies fired on Swofford or as they fired. Accepting as one must for qualified

immunity purposes Swofford's best case version of events, the question is whether a warning would be required before use of deadly force in self-defense based on the diagrams in the Appendix at 48-50. The Court should clarify that a warning in such a circumstance is, in the language of *Garner*, not "feasible," and therefore not constitutionally required. At a minimum, the Court should grant the petition to decide that for qualified immunity purposes it was not clearly established by *Garner*, a fleeing felon case, that a warning would be required for the deputies' use of deadly force in self-defense.

I. THE COURT SHOULD GRANT THE PETITION SO AS TO DECIDE WHETHER THE INCIDENT SHOULD BE SEGMENTED INTO ITS DISCRETE CLAIMS, SUCH THAT THE DEPUTIES' USE OF DEADLY FORCE IS EVALUATED WITHOUT REGARD TO THEIR ENTRY ONTO SWOFFORD'S PROPERTY.

Swofford complains that if a reasonable jury concluded that the deputies should not have been on his property then the jury might also find that the use of deadly force was unconstitutional because it was the deputies, not he, who created the need for the use of deadly force. Swofford and the district court are critical of the deputies for the manner in which they generally searched for the suspects and entered the property. Those criticisms include the deputies' failure to announce themselves as they entered the property, failure to wait on a Sheriff's

Office helicopter that was four minutes from the scene, and other similar criticisms. *Swofford*, 671 F. Supp. 2d at 1309; Appendix at 11-12.

The deputies did receive qualified immunity from the district court for their entry onto Swofford's property because it was not clear that the area of the property where events unfolded might be curtilage protected by the Fourth Amendment. *Id.* at 1303; Appendix at 25-26. But, the district court held that Swofford's broad claim that the entry onto his property was unnecessary, or was done in negligent fashion, was nonetheless a factor in evaluating the constitutionality of the deputies' subsequent use of force. Had the deputies not entered Swofford's property in the first place, the district court reasoned, then the confrontation would not have occurred. *Id.* at 1307-08; Appendix at 34. The Eleventh Circuit did not squarely address this issue in its brief judgment.

Some lower federal courts have held that an incident like the one at bar, involving a distinct claim of entry onto property, followed by use of force, is to be analyzed in a strictly "segmented" approach. Under this approach, endorsed primarily by the Fourth, Sixth, Seventh, and Eighth Circuits, the timeline of events is segmented such that each constitutional claim is analyzed without regard to the circumstances surrounding the other.

Cases using the segmenting approach, and rejecting the type of approach used by the district court here of mingling these issues, include *Chappell*

v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009) (court must separate out and consider separately a claim for unreasonable entry onto property from a use of force during an ensuing confrontation in the property; rejecting plaintiff's claim that officers' failure to knock and announce before entering property was a material fact as to reasonableness of subsequent use of force); *Dickerson v. McClellan*, 101 F.3d 1151, 1160-62 (6th Cir. 1996) (holding that officers' entry into property, even if it was unreasonable and created the confrontation that led to the shooting of an occupant, had no role in determining the constitutionality of the use of force); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (officer's actions leading up to use of deadly force, even if unreasonable and causing need for deadly force, irrelevant to reasonableness of use of deadly force); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (endorsing segmenting to focus solely on facts immediately surrounding need for use of force); and, *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (in a deadly force case, the focus is solely on the seizure itself, excluding the officers' actions leading up to it).

The lower courts in this case, particularly the district court, view the events at issue as one seamless incident. However, in a segmented analysis, even if the deputies' entry onto Swofford's property in a but-for sense causes or contributes to the confrontation with Swofford, and even if the entry is in some measure unreasonable, the court evaluates the entry onto property first, and **then separately** judges the constitutionality of the use of force by considering only the facts immediately surrounding the use of

force. That is, the entry onto property, right or wrong, reasonable or unreasonable, has no bearing on the constitutionality of a subsequent use of deadly force.

As the Seventh Circuit has explained:

> We do not return to prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer.

Plakas, 19 F.3d at 1150.

Similarly, and of particular note to the instant case, the Fourth Circuit has held that an officer's failure to identify himself or show his badge, and which the plaintiff alleges contributed to the need for force, is irrelevant to the constitutionality of the use of force if it is in self-defense. *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993). The Fourth Circuit has also held that the focus in a use of force case is "on the very moment when the officer makes the split-second judgment" and that events before that moment are not to be considered in evaluating the constitutionality of the use of force. *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

Other circuit courts, including the First, Third, and Ninth Circuits, have reached the opposite conclusion, holding that pre-use of force actions by a law enforcement officer are properly considered in analyzing whether a subsequent use of force is constitutional.

A number of those cases have explicitly rejected the holdings to the contrary in the cases cited above. The Ninth Circuit in *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002) held that, even where officers' use of deadly force was reasonable, the officers could still be held liable if they acted recklessly in creating the need for use of force. *Id.* at 1189-90 (citing *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) for the proposition that "even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force.")

The First Circuit squarely holds that events preceding use of deadly force are relevant to the reasonableness of the force. *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26-7 (1st Cir. 1995) (expressly disagreeing with *Drewitt* and *Carter* on segmenting). The Third Circuit in *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999) also expressly disagreed with a number of the cases cited above in the Seventh and Eighth Circuits on the issue, holding that pre-seizure conduct is part of the totality of the circumstances to be considered in deciding whether the use of force is constitutional. *Id.* at 291.

The Eleventh Circuit has favorably cited the Seventh Circuit's segmenting decision in *Plakas*, holding that only the circumstances immediately surrounding the use of deadly force are relevant in evaluating whether the force is constitutional. *Menuel v. City of Atlanta*, 25 F.3d 990, 996-97 (11th Cir. 1994) (citing *Plakas*, 19 F.3d at 1148-50). On the other

hand, in *Jackson v. Sauls*, 206 F.3d 1156 (11th Cir. 2000), the Eleventh Circuit held that the plaintiffs could sue for injuries caused by use of deadly force during a confrontation that was "caused" by the unreasonable manner of the officers' conduct, even though the defendant officers were entitled to qualified immunity for use of deadly force in self-defense.

The Tenth Circuit takes a middle ground approach, holding that although the focus is on the moment of decision, the acts of an officer leading up to the use of force can render otherwise reasonable force unreasonable if the officer's actions "rise to the level of recklessness, rather than mere negligence" and are "immediately connected" to the use of force. *Medina v. Cram*, 252 F.3d 1124, 1132-33 (10th Cir. 2001).

It is apparent that the circuit courts are in significant disagreement as to whether the actions of an officer, before the moment when he must decide to use deadly force, are relevant to the reasonableness of that use of deadly force. Within that debate is further disagreement about the degree of culpability required to incorporate the officer's pre-use of force actions into the Fourth Amendment analysis of the use of deadly force. Of those circuits that consider pre-use of force conduct relevant to analysis of use of deadly force, some courts include all conduct in that evaluation, even if it is merely negligent. Others will consider the pre-use of force conduct relevant to the reasonableness of the use of force only if that conduct can itself be characterized as reckless or unconstitutional.

In the instant case, the district court below considered the most general of criticisms of the entry onto property, sounding purely in negligence, as relevant to the constitutionality of the deputies' use of force. It is perplexing that the deputies would receive qualified immunity for their entry onto Swofford's property because it did not appear to be curtilage, but that the same entry onto property would serve as the main vehicle by which the district court might characterize the subsequent use of force as unconstitutional.

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. *Swofford*, 671 F. Supp. 2d at 1307-08; Appendix at 34. With regard to Deputy Morris, the district court held that the fact and manner of his entry onto Swofford's property are relevant to the reasonableness of his later use of force against Swofford because Morris' actions might be viewed as having "caused" the confrontation. The district court order stated that "[b]y entering the property without announcing or otherwise informing the property owner of their entry, a reasonable jury could find that Defendant's (Morris') own actions created this precarious position." *Swofford*, 671 F. Supp. 2d at 1307; Appendix at 34.

With regard to Deputy Remus, the district court stated that "a reasonable jury could infer that Defendant Remus's actions created or contributed to

the risk that ultimately resulted in the use of deadly force against Mr. Swofford." *Id.* at 1308; Appendix at 37-38. The district court, in traditional negligence language, went on to hold that "a reasonable jury could conclude that Remus's entry onto Swofford's property under such circumstances was objectively unreasonable and created a foreseeable risk of injury to the property owner." *Id.*; Appendix at 38-39.

These conclusions of law by the district court cannot be squared with the segmenting decisions represented by *Chappel* and *Dickerson*. As the Sixth Circuit put it in *Dickerson*:

> The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

Dickerson, 101 F.3d at 1161 (quoting *Plakas*, 19 F.3d at 1150).

That Swofford was uncertain as to the identity of the deputies does not change the fact that he approached them as illustrated in his expert's diagrams. Appendix at 48-50. The deputies had but a second to react to Swofford. They cannot turn back the clock

and wait for a helicopter. They cannot in that instant go back and take some other action to identify themselves as they enter the property; nor would it necessarily be advisable for them to do so as they searched for felony car burglars on the other side of a fence. They simply have to decide in that split-second whether to defend themselves from a man with a gun poised to shoot them in a second or less.

Declaring the deputies' use of deadly force unreasonable under the Fourth Amendment because the deputies entered Swofford's property without announcing themselves, or because the deputies did not wait for a helicopter, effectively constitutionalizes police operational negligence. None of those items, by themselves, would be unconstitutional. It is only by importing them into the analysis of the eventual use of force in the confrontation with Swofford that they take on constitutional dimension.

This case crystallizes the express conflict among the circuit courts as to whether an officer's own actions in creating or contributing to a confrontation are relevant to the reasonableness of the force he must use to end it. The case involves the weighing of competing and compelling interests: Swofford's right to defend his property against intruders he does not recognize versus the deputies' duty to pursue the car burglars and their right to defend themselves when it certainly appears that they are about to be fired upon. This Court should review this important issue to resolve the conflict among the circuits.

II. THE COURT SHOULD GRANT THE PETITION SO AS TO DECIDE WHETHER A WARNING IS CONSTITUTIONALLY REQUIRED PRIOR TO A DEPUTY'S USE OF DEADLY FORCE IN SELF-DEFENSE.

In *Garner*, this Court held that the factors to be considered for evaluating the constitutionality of use of deadly force by a law enforcement officer to prevent escape are: (1) whether the officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or to others, or that he has committed a crime involving the infliction, or threatened infliction, of serious physical harm; (2) whether the law enforcement officer reasonably believes that the use of deadly force is necessary to prevent escape; and (3) whether the officer has given some warning about the possible use of deadly force, "if feasible." *Garner*, 471 U.S. at 11-12.

This Court has since cautioned that the decision in *Garner* was fact-specific and that the *Garner* factors will not translate well to every case involving the use of deadly force. *Scott v. Harris*, 550 U.S. 372, 382-83, 127 S. Ct. 1769 (2007) ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force.").

In large measure, this is because the use of deadly force often involves split-second decision-making by a law enforcement officer under very dangerous, quick, and tense circumstances. *Graham*

v. Connor, 490 U.S. 386, 109 S. Ct. 1865 (1989). Despite this Court's admonition that the lower courts must temper application of the *Garner* factors to the unique facts of each case, the lower courts here applied the warning requirement without regard to the split-second pressure facing the deputies.

Since *Garner* was issued in 1985, this Court has had occasion to discuss the application of the *Garner* factors in three § 1983 cases where the issue was the propriety of use of deadly force – in *Scott*; in *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378 (1989); and in *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596 (2004). Like *Garner*, however, all three of these other cases involved the use of force on suspects who were running away from law enforcement. The question in each was the reasonableness of use of force employed at least in part to prevent escape.

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.

The deputies say they did provide warnings prior to firing on Swofford and Swofford says they gave warnings to him, but only as he was being shot. Neither the district court nor the Eleventh Circuit addressed the deputies' threshold argument that,

when faced with an armed Swofford one second from firing on them, it was not feasible to issue a warning before using deadly force to eliminate that threat.

Thus, this case squarely presents the question as to whether a *Garner*-type warning is constitutionally required under the circumstances illustrated by the diagrams in the Appendix, and where the deputies have only a second to react to the threat presented by Swofford.[2] The case naturally presents the subsidiary question of whether, even if a *Garner*-type warning was required, was that requirement "clearly established" at the time of this incident so as to overcome the deputies' entitlement to qualified immunity?

Qualified immunity protects law enforcement officers so that they may make decisions and take necessary action without the fear of a lawsuit. *Mitchell v. Forsyth*, 472 U.S. 511, 525-26, 105 S. Ct. 2806 (1985). Use of force is judged objectively, and from the perspective of the deputies, not Swofford. *Graham*, 490 U.S. at 396-97. "The 'reasonableness' of a particular use of force must be judged from the perspective of

---

[2] In the course of the litigation, Swofford has occasionally urged that his position as reflected in the expert diagrams is not threatening because his gun is not completely leveled at the deputies. However, as noted, his expert has testified that this position is the "ready" or "low ready" position for firing, and Swofford would have appeared prepared to fire on the deputies within one second. The Fourth Amendment does not require that the deputies wait until Swofford fully levels his gun at them before defending themselves. *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001).

a reasonable officer on scene, rather than with the 20/20 vision of hindsight." *Id.*

Regardless of the fact that Swofford might not have realized that the deputies were law enforcement officers, it remains true that under Swofford's version of events, he was armed and would have objectively appeared able to fire on the deputies in one second, thus giving the deputies less than a second to make a life or death decision to defend themselves. Certainly, the deputies ought to at least receive qualified immunity given that objective threat. As the Fourth Circuit put it in *McClenagan v. Karnes*, 27 F.3d 1002 (4th Cir.1994), "For all [the officer] knew, the hesitation involved in giving a warning could easily cause such a warning to be his last." *Id.* at 1007.

The Court should be aware of the similarity of issues raised in this petition with issues raised in another pending petition, *City of Santa Rosa v. DeSantis*, 377 F. App'x 690 (9th Cir. 2010), petition for cert. filed, 79 U.S.L.W. 3228 (U.S. Sept. 27, 2010) (No. 10-434). In *DeSantis*, a Ninth Circuit case, police were called to the home of a man who was firing a gun into his ceiling and acting strangely. *Id.* at 692 (O'Scannlain, J., dissenting). The officers arrived on scene and, after the man was coaxed from the home, he lunged at them. *Id.* at 691. The officers, believing based on earlier reports that he was still armed, shot and killed him. The family sued the officers and the city for which they worked, arguing among other things that the officers could have tried alternatives

to their use of deadly force or issued a warning before firing. *Id.*

The petition currently pending in that case asks whether the defendant officers should be entitled to qualified immunity notwithstanding the second-guessing on alternatives because they, like the deputies in this case, were faced with an immediate and objectively deadly threat. As here, the fundamental argument is that there is no time under such circumstances to give warnings, or to ponder alternatives, and so at least from a constitutional perspective the use of deadly force to seize and stop the threat is reasonable.

Arguably, part of the problem in *DeSantis*, as here, is that there is no clear direction from this Court as to the factors to be considered in evaluating the constitutionality of deadly force in self-defense where the city police officer, or the deputy sheriff, has but a moment to react to the threat against him. *Garner*, a fleeing felon case, does not represent a meaningful rule of decision for self-defense cases.

Of note, shortly after *Garner* was decided, the Court denied a petition for writ of certiorari from the Eleventh Circuit's decision in *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985), abrogation on other grounds recognized in *Nolin v. Isbell*, 207 F.3d 1253, 1255-56 (11th Cir. 2000), a case raising similar issues to the case at bar. (Denial of Petition for Writ of Certiorari reported at *Sampson v. Gilmere*, 476 U.S. 1124, 106 S. Ct. 1993 (Mem.) (1986).

Gilmere involved the shooting of a suspect who was struggling with officers, and who then lunged at them. An officer shot him. Chief Justice Burger, joined by Justice O'Connor, dissented from the denial of *certiorari* review, explaining that in his view *Garner* holds that an officer's use of deadly force in self-defense is constitutional where the officer simply has probable cause to believe that the suspect "poses a threat to the officer." *Id.* The warning requirement was not mentioned in this discussion, despite invocation of the decision in *Garner*.

In sum on this issue, this Court in *Garner* identified factors for use of deadly force when seizing a fleeing felon, including issuance of a warning, where feasible. This Court has emphasized that the *Garner* factors are not a "one size fits all" template for evaluating all use of force situations. Nonetheless, it is clear that the lower courts here imposed a *Garner*-type warning requirement even when under Swofford's version of events a warning was not feasible.

To date, this Court has not articulated the standard for evaluating use of force when an armed person is approaching, as opposed to fleeing, and is a direct, immediate, and objective threat to the life of the officer. This case presents an opportunity to either decide the relevant factors for such cases, or at a minimum to clarify that the *Garner* factors are not applicable to use of deadly force purely in self-defense.

III. THERE ARE IMPORTANT PUBLIC POLICY ISSUES AT STAKE IN THIS CASE.

Swofford would characterize the case as one in which he was an innocent property owner, rightfully protecting his property when he approached Morris and Remus, not recognizing them as law enforcement officers. Balanced against Swofford's interest in protecting his property, however, are Morris' and Remus' duty to pursue the felony car burglars and their own interest in protecting themselves when suddenly threatened by Swofford.

The deputies went onto Swofford's six acre property adjoining Barrington in the middle of the night and at a point far removed from any residence. There were weeds, an abandoned semi-tractor trailer, and storage and warehouse buildings. As they tracked the burglars, Swofford suddenly appeared before them, 20-25 feet away, gun in hand. He appeared ready to fire on them in a split-second. A *Garner*-type warning was not "feasible," and the fleeing felon scenario in *Garner* is a poor source of criteria for judging the deputies' actions in these circumstances.

The reasonableness of the deputies' use of force, and hence its constitutionality, is judged from the perspective of the deputies, not from the perspective of Swofford. In the instant they had to decide to defend themselves, it did not matter that Swofford was the property owner. It did not matter whether Swofford knew who they were. The use of deadly force violates the Fourth Amendment only if it represents

an unreasonable seizure, and it was not unreasonable for the deputies to shoot someone who, by Swofford's own account, appeared ready to shoot them in an instant.

The general circumstances giving rise to the issues in this case are bound to be repeated. There is considerable and earnest disagreement among the circuit courts as to how to approach the analysis of a case that involves criticism both of events leading up to a confrontation requiring use of deadly force and the circumstances immediately preceding the use of deadly force. William Morris, Jr., and Ronald Remus therefore respectfully request that the Court grant *certiorari* review of these important issues.

CONCLUSION

Because of the significance of the case beyond the interests of the parties to this lawsuit, and particularly because of the conflict in the circuit courts on segmenting, the Court should grant *certiorari* review of this case.

Respectfully submitted,

D. ANDREW DEBEVOISE, ESQUIRE
Counsel of Record
Florida Bar No.: 0281972
Email: debevoise@debevoisepoulton.com

THOMAS W. POULTON, ESQUIRE
Florida Bar No.: 0083798
Email: poulton@debevoisepoulton.com
DEBEVOISE & POULTON, P.A.
Lakeview Office Park, Suite 1010
1035 S. Semoran Boulevard
Winter Park, Florida 32792
Telephone: 407/673-5000
Facsimile: 407/673-5059

Attorneys for Petitioners
William Morris, Jr., and Ronald Remus