Barnes v. Felix

A Legal Analysis of Excessive Force under the Fourth Amendment

[Adriana Voloshchuk]

On April 28, 2016, Ashtian Barnes, a 24-year-old African American, was fatally shot by Officer Roberto Felix on the side of a tollway in Houston, Texas.[1] At 2:40 pm, Barnes was pulled over for multiple tollway violations attached to his silver Toyota Corolla, which was rented in his girlfriend's name.[2] When asked for the registration of the car, Barnes explained that the vehicle was not his and began searching the passenger seat for the requested paperwork.[3] Officer Felix responded by telling Barnes to "stop digging around" and claimed to smell marijuana, although no illegal substances were discovered following the incident.[4] After failing to find the registration for the leased vehicle, Barnes suggested that they search the trunk instead.[5] At this point, Felix opened the door of the driver's seat and placed one foot onto the car.[6] Instead of exiting the vehicle, Barnes, however, turned on his left blinker, signaling that he was planning to merge back onto the highway.[7] Felix responded by drawing his gun to Barnes' head and shouted, "Don't fucking move!"[8] As Barnes began to drive forward, Officer Felix jumped onto the car with both feet and began shooting into the vehicle with no visibility to where he was aiming.[9] One of the bullets

1 *Barnes v. Felix,* 91 F.4th 393 (U.S. Court of Appeals for the Fifth Circuit, 2024). For the footage of the encounter, (note: content is graphic), see https://www.youtube.com/watch?v=9gbM_22fUbY.

2 *Barnes v. Felix*, 91 F.4th 393, 395.

3 *Barnes v. Felix*, 91 F.4th 393, 395.

4 *Barnes v. Felix*, 91 F.4th 393, 395.

5 *Barnes v. Felix*, 91 F.4th 393, 395.

6 *Barnes v. Felix*, 91 F.4th 393, 395.

7 *Barnes v. Felix*, 91 F.4th 393, 395.

8 *Barnes v. Felix*, 91 F.4th 393, 395.

9 *Barnes v. Felix*, 91 F.4th 393, 395.

hit Barnes in the torso and, at 2:57 pm, he was pronounced dead at the scene.[10]

Janice Hughes Barnes, Individually and as Representative of the Estate of Ashtian Barnes, Deceased (plaintiff) filed a claim against Officer Roberto Felix, County of Harris, Texas (defendant) alleging a constitutional violation.[11] Plaintiff sought to assert that the seizure of Barnes by Felix – the shooting – was "unreasonable" and therefore violated Barnes' Fourth Amendment rights.[12] However, the District Court held that because Felix feared for his life once the vehicle was put in motion, his use of force was justified, and he was granted qualified immunity.[13] It is to be noted that the District Court used a mode of analysis in Fourth Amendment jurisprudence known as the "moment of the threat" doctrine, which means that the events preceding the moment that an officer felt threatened are irrelevant to the conclusion of whether his use of force was reasonable. This contradicts the federal precedent established by *Scott v. Harris,* which introduced the "totality of the circumstances" doctrine. Using the former standard, the Fifth Circuit Court of Appeals affirmed the decision of the lower court.[14] The legal question in both the District Court and the Court of Appeals was whether the use of force by Felix was reasonable, to which they found that it was. However, the appellant, in their appeal to the U.S. Supreme Court (also known as a writ of certiorari) posed a different, very narrow legal question – whether courts should apply the "moment of the threat" doctrine or instead utilize the "totality of the circumstances."[15] Thus, the Supreme Court granted this case on the merits – if the petitioner prevails, the case will be sent back to the district court for retrial.

In this paper, I will argue on behalf of the petitioner, Ashtian Barnes. Despite the claim by the respondent that the Fifth Circuit is bound to abide by the "moment of the threat" doctrine as held by *Harmon v. City of Arlington,* this directly contradicts the mode of analysis required by federal law, which demands the "totality of the circumstances" doctrine as held by *Scott v. Harris.* Moreover, the killing of a nondangerous fleeing suspect defies federal precedent under *Tennessee v. Garner* and further erodes confidence in our law enforcement.

Although *Harmon v. City of Arlington* does not coin the phrase "moment of the threat," it does establish the following precedent for the Fifth Circuit – the "brief interval" in which the officer's life is considered to be at risk is the superseding factor in determining whether an officer met the reasonableness standard when

10 *Barnes v. Felix*, 91 F.4th 393, 395.
11 *Barnes v. Felix*, 91 F.4th 393, 396.
12 *Barnes v. Felix*, 91 F.4th 393, 396.
13 *Barnes v. Felix*, 91 F.4th 393, 396.
14 *Barnes v. Felix*, 91 F.4th 393, 397.
15 Reply Brief for Petitioner, *Barnes v. Felix*, No. 23-1239 (Supreme Court of the United States, filed August 27, 2024), 8, https://www.supremecourt.gov/DocketPDF/23/231239/323566/20240828110005330_Barnes%20Reply%208-27-24%20Final.pdf.

deciding to employ excessive force.[16] The examination of facts which occurred before this window is either irrelevant or merely performative.[17] Indeed, *Harmon,* which is factually quite similar to *Barnes*, concluded that Officer Bau Tran (appellee) did not violate the Fourth Amendment rights of Terrance Harmon (appellant) when he shot him for fleeing a seizure. The court held that the "brief interval—when Tran [was] clinging to the accelerating SUV" is the only moment that the court must consider "to determine whether Tran reasonably believed he was at risk of serious physical harm."[18] Although the Fifth Circuit heavily relies on this precedent, the concurring opinion of *Barnes* expresses significant hesitancy to employ such a limiting mode of analysis. Indeed, the usage of the "moment of the threat" doctrine is only employed by three other federal Circuit Courts – the remaining eight utilize the "totality of the circumstances" doctrine which was established by *Scott v. Harris.*[19] Therefore, the legal question presented to the Supreme Court seeks to address a clear split between the federal Circuit Courts and their methodology in addressing claims of excessive force.

Under *Scott v. Harris,* the Supreme Court established that the framework for assessing the reasonableness of an officer's use of deadly force is a "fact-intensive endeavor" that "depends on the . . . circumstances of every case."[20] The ruling held that the decision made by respondent – Officer Harris – to drive into the petitioner's car – Timothy Scott – during a high-speed chase and thus paralyzing him in the process, did not violate the petitioner's Fourth Amendment rights due to the threat he posed to the public.[21] The court carved out a new mode of analysis known as the "totality of the circumstances" for lower courts to assess whether the use of excessive force is reasonable. For the first time, the Supreme Court accepted video evidence – in this case, dash cam footage – to examine all facts leading up to the alleged use of excessive force. The court examined the following facts which all occurred before the alleged (and denied) constitutional violation: respondent clocked petitioner traveling 73 miles per hour in an area with a speed limit of 55 miles per hour – the officer activated his vehicle lights, initiating the seizure, to which the petitioner responded by accelerating, driving at a speed of which exceeded 85 miles per hour.[22] Respondent dispatched other officers, who together, attempted to corner Scott in a mall parking lot. The petitioner was able to maneuver the vehicle out of the trap (although he did hit Harris' car in the process) and returned once again to the highway.[23] After 6 minutes of a high-speed chase,

16 *Harmon v. City of Arlington*, 16 F.4th 1164 (U.S. Court of Appeals for the Fifth Circuit, 2021).

17 *Barnes v. Felix*, 91 F.4th 393, 401.

18 *Harmon v. City of Arlington*, 16 F.4th 1164.

19 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 400.

20 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 400.

21 *Scott v. Harris*, 550 U.S. 372 (2007).

22 *Scott v. Harris*, 550 U.S. 372, 374-75.

23 *Scott v. Harris*, 550 U.S. 372, 375.

Officer Harris radioed his supervisor to ask permission to employ the "Precision Intervention Technique" (PIT) – a method which causes the driver to spin out by hitting the rear end of their vehicle – which was granted.[24] Upon being hit, Scott subsequently lost control of the wheel, drove off the highway, and, as a result of the crash, was rendered a quadriplegic.[25]

Conclusively, in *Scott,* the Court held that "Fourth Amendment analysis is necessarily a 'fact-bound morass of reasonableness'" as the Justices examined a mountain of evidence which occurred before the excessive force claim.[26] In simple terms, events that occur before the use of deadly intervention are relevant. Both the District Court and the Fifth Circuit were obligated by federal law to abide by the "totality of the circumstances" doctrine. Yet they did not.[27] Indeed, in *Barnes,* the courts implemented the complete opposite standard – under the "moment of the threat" doctrine, "courts are prohibited from looking to what has transpired up until the moment of the shooting itself."[28] Absent from the jury's analysis, was the fact that Officer Felix was suspicious of Barnes from the moment he pulled him over, absent from their analysis was the fact that Officer Felix claimed to smell marijuana, despite the fact that no illegal substances were later found in the vehicle, and finally, absent from the jury's analysis – the decision by respondent to step onto the petitioner's vehicle which drastically escalated the prospect of a deadly encounter.[29] The only relevant facts according to the lower courts were (1) the precise moment when Barnes chose to drive, and (2) the milliseconds before the bullets left the barrel of the gun. Such a narrow interpretation deeply offends *Scott,* and in turn, the Fourth Amendment, which, given its fact-intensive nature, requires a holistic interpretation to conclude whether the use of excessive force was unreasonable.

The respondent's attorney claimed, in the oral arguments, that ordering this case to be sent back to the district court for retrial (a process known as remanding) is "pointless" because the lower court would rule in favor of Felix regardless – the simple fact that Barnes chose to flee is enough to justify the use of excessive force even under the "totality of the circumstances" doctrine.[30] Nevertheless, allowing the killing of a non-felon who bears no significant threat to the officer or the public runs counter to federal precedent held by *Tennessee v. Garner.* The petitioner, Edward Garner, after being chased by police for allegedly breaking and entering a residence, began climbing a chain fence to escape. When

24 *Scott v. Harris*, 550 U.S. 372, 375.

25 *Scott v. Harris*, 550 U.S. 372, 375.

26 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 400.

27 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 399.

28 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 399.

29 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 400.

30 Supreme Court of the United States, *Oral Argument - Audio: Barnes v. Felix, Docket No. 23-1239* (Jan. 22, 2025), at 49:06, https://www.supremecourt.gov/oral_arguments/audio/2024/23-1239.

the petitioner (who was unarmed) refused to stop after being ordered to do so, officers Elton Hymon and Leslie Wright responded by shooting Garner in the back of the head, pronouncing him dead at the scene.[31] Officers claimed to have been operating under a Tennessee statute that demanded that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."[32] However, the Supreme Court overruled this statute, arguing that the killing of a non-dangerous fleeing suspect who poses no harm is a use of excessive force. The legal baseline from *Garner* is that the act of taking a life is only justified if it is done to protect one's own life or the life of another.[33] Officer Felix did not have any prior knowledge of Barnes, other than the fact that his car had outstanding toll violations which are not considered "arrestable offenses under Section 370.177 of the Texas Transportation Code."[34] Although it is obvious per the video footage that Officer Felix was suspicious of something more nefarious, there was no evidence to suggest that at the moment that the petitioner was pulled over, he posed a threat to the respondent or the public. But immediately after sensing that Barnes was attempting to flee, Felix jumped on the car "lest he get away with driving his girlfriend's rental car with an outstanding toll fee."[35] Therefore, under the *Garner* principle, it was in fact, unreasonable for Felix to employ deadly force on Barnes, who was a nondangerous fleeing suspect.[36]

Finally, there is concern that upholding the "totality of the circumstances" doctrine will lead to less aggressive policing and, therefore, result in higher crime. But as *Garner* rightfully pointed out, killing a nondangerous fleeing suspect does nothing to deter crime. On the contrary, unnecessary killings contribute to a further loss of confidence in our police force. Indeed, in the aftermath of the death of George Floyd, trust in officers reached a 27-year low as less than half of Americans are confident in the capabilities of their local law enforcement.[37] The first reason for this lack of faith is the inequity in police tactics, as "[b]lack drivers were five times likelier to be searched by police than white drivers.[38] The second concerns the lack of accountability for officers who use excessive force.[39] Remarkably, the majority of the police force agrees that the institution requires significant reform, as "according to a recent survey of more than 8000 police officers, 72 percent disagreed with the statement that 'officers who consistently do a poor job are held

31 *Tennessee v. Garner*, 471 U.S. 1 (1985).

32 *Tennessee v. Garner*, 471 U.S. 1, 3.

33 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 399.

34 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 399.

35 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 401.

36 *Barnes v. Felix*, concurring opinion by Justice Higginbotham, 399.

37 Brief of the Cato Institute as Amicus Curiae in Support of Petitioner, *Barnes v. Felix*, No. 23-1239 (Supreme Court of the United States, filed June 2024), 13, https://www.cato.org/sites/cato.org/files/2024-06/Barnes_Final.pdf.

38 Brief of the Cato Institute, *Barnes v. Felix*, 13.

39 Brief of the Cato Institute, *Barnes v. Felix*, 13.

accountable.'"[40] The truth is that training officers to anticipate resistance with every civilian encounter makes the country more dangerous – the "moment of the threat" doctrine extends beyond simple traffic stops, as the police are being called upon to answer an increasingly diverse array of public policy issues, specifically those concerning mental health.[41] The "totality of the circumstances" in its administration holds both civilians and law enforcement accountable – *Scott* is one of many cases that prove law enforcement benefits from this holistic approach to evaluating claims of excessive force.

Given the very narrow legal question presented to the Supreme Court, the petitioner is likely to prevail, given that the ruling of the Fifth Circuit court directly challenges federal precedent established in *Scott v. Harris.* Although the Supreme Court will not determine the factual disputes of the case (whether the seizure of Barnes by Felix was reasonable), it is to be noted that the killing of fleeing misdemeanants is considered illegal as held by *Tennessee v. Garner.*

Officer Felix was previously involved in another fatal shooting in 2007, in which he was likewise granted qualified immunity.[42] In an interview with MSN, the mother of Ashtian Barnes, Janice Hughes Barnes, expressed her disappointment with recent social justice movements, such as Black Lives Matter, which have been unsuccessful at implementing substantive law enforcement reform – "no one is policing the police," she states.[43] By replacing the "moment of the threat" doctrine with a more expansive mode of analysis, the "totality of the circumstances," the Supreme Court can minimize the prospect of a deadly police-civilian encounter and ultimately begin the process of restoring faith in a central American institution.

40 Brief of the Cato Institute, *Barnes v. Felix*, 13.

41 Brief of the Texas Civil Rights Project as Amicus Curiae in Support of Petitioner, *Barnes v. Felix*, No. 23-1239 (Supreme Court of the United States, filed June 24, 2024), 4, https://www.supremecourt.gov/DocketPDF/23/23-1239/315543/20240624121554894_23-1239%20TCRP%20Amicus%20Brief%20Final.pdf.

42 David Feith, "Split-Second Decision: Supreme Court Returns to the Question of Police Killings," *MSN*, April 22, 2024, https://www.msn.com/en-us/news/us/split-second-decision-supreme-court-returns-to-the-question-of-police-killings/ar-AA1xsH04.

43 Feith, "Split-Second Decision."