Equal Protect of Self Defense

By Paul Engel

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- The Fourth Amendment protects us from unreasonable searches and seizures.
- This includes the unreasonable use of force by law enforcement.
- Shouldn’t law enforcement be as responsible for their actions as any other citizen?

Most of us are aware of the Fourth Amendment’s Unreasonable Search and Seizure Clause. While definitions of what is “reasonable” have been argued since the Bill of Rights was ratified, it is pretty much agreed that the Fourth Amendment’s prohibition against unreasonable searches and seizures includes the use of unreasonable force during an encounter with law enforcement. What responsibility does law enforcement have in the initiation and escalation of a dangerous, possibly life threatening situation? That was the question in the case Barnes v. Felix.

Background

In the case before the Supreme Court of Barnes v. Felix, the question is not so much what is reasonable, but what evidence can the court consider when determining reasonableness.

The Fourth Amendment prohibits a police officer from using “unreasonable” force. …, this Court held that reasonableness depends on “the totality of the circumstances.” … But four circuits—the Second, Fourth, Fifth, and Eighth—cabin Graham. Those circuits evaluate whether a Fourth Amendment violation

occurred under the "moment of the threat doctrine," which evaluates the reasonableness of an officer's actions only in the narrow window when the officer's safety was threatened, and not based on events that precede the moment of the threat. In contrast, eight circuits—the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits—reject the moment of the threat doctrine and follow the totality of the circumstances approach, including evaluating the officer's actions leading up to the use of force.

Barnes v. Felix – Petition for Certiorari

What standard should be used to evaluate law enforcements contribution to a situation where force may be warranted? The question of use of force has been of particular interest to me for many years. In every state in the union, a person has the right to use lethal force when there is an imminent threat of death or serious bodily injury to themselves or another innocent party. The one exception to this general rule is the person using lethal force cannot have initiated or escalated the situation that led to the threat.

On an April afternoon in 2016, Ashtian Barnes was driving his girlfriend's rental car on the Sam Houston Tollway outside of Houston, Texas. That same afternoon, Officer Roberto Felix, Jr. was patrolling for toll violations. Through no fault of Barnes, there were toll violations associated with the rental car's license plate, and Felix initiated a traffic stop. Felix asked Barnes for his license and the rental car's insurance paperwork. Barnes indicated that the paperwork may be in the trunk, and Felix instructed Barnes to get out of the vehicle. A dash camera recorded what happens next: The car starts moving slowly forward, and Officer Felix jumps onto the door sill of the vehicle. In the same instant, Officer Felix begins shooting inside the vehicle, striking Barnes twice. Officer Felix then holds Barnes at gunpoint until he bleeds to death in the rental car.

Barnes v. Felix – Petition for Certiorari

The question before the court is not was the stop reasonable, or even was the officer's shooting reasonable, but what evidence should the courts look at to establish said reasonableness?

Nathaniel A.G. Zelinsky – Attorney for the Petitioner

Oral arguments started with Mr. Zelinsky, attorney for Ms. Janice Hughes Barnes and the estate of her late son Ashtian.

1. ZELINSKY: Mr. Chief Justice, and may it please the Court: We are here today because Ashtian Barnes was shot and killed on the side of a Texas highway after being pulled over for unpaid tolls. The question before this Court is how to determine whether Ashtian's Fourth Amendment rights were violated.

The Fourth Amendment prohibits unreasonable seizures. Justice Scalia was no fan of a totality-of-the-circumstances test, but, in Scott, Justice Scalia made clear that courts must "slosh through the fact-bound morass of reasonableness."

In this case, the district court and the Fifth Circuit didn't do that. Instead, they applied the "moment of the threat" doctrine.

According to the Fifth Circuit decision below, "we may only ask whether Officer Felix was in danger at the moment of the threat," and "any of the officer's actions leading up to the shooting are not relevant."

This kind of legal amnesia is incompatible with precedent, conflicts with common law, and defies common sense.

Barnes v. Felix – Oral Arguments

How do we determine if Officer Felix's actions were reasonable? Was it simply that at the instant he started

shooting, his life was in danger? Or should the courts consider the officer's actions, including jumping onto the sill of the vehicle, when it considers the reasonableness of his actions? The two doctrines the court talks about are "moment of the threat" and "totality of the circumstances." The Fifth Circuit applied the "moment of threat" doctrine, meaning they gave no consideration to how Officer Felix's actions may have contributed to the threat he felt at the time he used lethal force. While both the District and Circuit courts found the actions of Officer Felix reasonable, at least one of the judges wrote in his concurrence that the officer acted unreasonably.

Finally, as Judge Higginbotham underscored in his concurrence, the facts show that Officer Felix acted unreasonably. But this is a court of review, not of first view. The Court should rule for Petitioner on the sole question presented and remand for the lower courts to apply the correct constitutional standard.

I welcome this Court's questions.

Barnes v. Felix — Oral Arguments

After his opening statement, Mr. Zelinsky answered questions from the justices.

JUSTICE THOMAS: Under your approach, what would that correct standard look like and how would it be applied here?

1. ZELINSKY: Justice Thomas, we think the standard is the "totality of the circumstances" standard that this Court articulated in Graham and Garner, Scott, and Plumhoff. In this particular case, it would require looking at more than just the two seconds in which Officer Felix was on the moving vehicle. It would require asking was there a reason for Officer Felix —

Barnes v. Felix — Oral Arguments

You will find this “two seconds” rule referred to often in this case. It’s related to the timeframe in which Officer Felix jumped on the moving vehicle and him discharging his weapon. Do we only consider the situation when Officer Felix is standing on the vehicle or the situation that put him there?

JUSTICE THOMAS: How much more than the — than the last two seconds?

1. ZELINSKY: Justice Thomas, if you include an extra three seconds, then you would look at the seizure in its totality.

I think that this Court shouldn’t be drawing bright-line rules on exactly how much of the seizure should or shouldn’t come in. That’s what Justice Scalia underscored in Scott. There are no rigid rules.

And courts can apply ordinary principles of relevancy and proximate cause to determine the — the reasonableness of a seizure.

Barnes v. Felix — Oral Arguments

So the plaintiff’s weren’t looking for a bright-line rule, meaning you can look back 2 seconds, or 5, 10, 30, etc. Rather they wanted courts to look both at the relevancy and proximity to the cause to determine if the actions of law enforcement were relevant.

JUSTICE KAVANAUGH: Was it reasonable to — for the officer to jump on the side of the car?

1. ZELINSKY: So, Just — Justice Kavanaugh, we don’t think it was in this particular case, but that’s precisely the issue that the lower courts couldn’t evaluate because they applied this legal amnesia and only look at the fact that the officer was on the moving vehicle. Judge

Higginbotham, in his concurrence, looked to the totality of the circumstances and said: I think it was unreasonable in this case.

We want the opportunity for a court to be able to look at that and for us to be able to litigate that core claim.

Barnes v. Felix – Oral Arguments

I noticed during the oral argument that the justices frequently detoured from the question at hand: Should the court have used the "moment of threat" or "totality of circumstances" standard to evaluate the reasonableness of the officer's actions? It seems the justices were very interested in whether or not Officer Felix's actions were reasonable. Mr. Zelinsky was not the only person to attempt to bring a justice back to the question at hand. This really isn't a surprise, since the topic of what is reasonable is so often argued in court.

JUSTICE ALITO: The – the reason for the question is to probe whether you are using the term "unreasonable" in a sense that's different from the sense in which the Fourth Amendment prohibits unreasonable searches and seizures. So "unreasonable" has a particular meaning when the Court has to decide whether there was a Fourth Amendment violation. But, in lay speech, "unreasonable" could go to whether the action was prudent, whether it was a violation of best police practices or the practices of a particular police department.

Those are not necessarily the same thing. In fact, it seems that they're probably different. So you are eliding these two different meanings of "reasonable." Now maybe that's – maybe that's sound. Maybe that's unsound.

1. ZELINSKY: Justice Alito, what we're asking for is the standard that this Court has applied in Garner, Graham, and Scott and Plumhoff, which is you have to look at the – the balance here. There's, on the one side, the state

interest in seizing someone in a particular manner. On the other side, there is the harm to the suspect, here, the ultimate harm, the loss of his life.

The problem in this case is that the Fifth Circuit couldn't engage in that core balancing because it couldn't ask was there a really pressing reason for an officer to jump onto a car and give himself no other opportunity but to shoot the driver.

Barnes v. Felix – Oral Arguments

Was it reasonable for the officer to jump onto the sill of the car or not? Did Officer Felix take an otherwise simple traffic stop and escalate it by putting himself in a situation where deadly force was the only option? While that is a very interesting question, the argument Mr. Zelinsky is making is that the Fifth Circuit could not ask this question because they felt bound to the "moment of threat" doctrine.

JUSTICE ALITO: Well, would you be satisfied with a narrow holding that it is wrong to – it is wrong for a court to look just at the moment of the threat, that the court has to judge the reasonableness of the alleged unreasonable seizure based on – taking into account to whatever extent they are relevant the events that occurred before that? Would you be satisfied if we just did that –

1. ZELINSKY: I think we would, Justice –

JUSTICE ALITO: – and not get into these other, more difficult questions?

1. ZELINSKY: One hundred percent. I think it would be helpful if the Court makes clear that that means that you can look at the jump in addition to the shoot, right? That's the core issue that we want to be able to litigate. But, yes, Justice Alito, we'd be happy with a very narrow holding.

Barnes v. Felix – Oral Arguments

All Mr. Zelinsky and his clients were asking for was an instruction from the Supreme Court that only looking at the moment of threat was not sufficient for determining reasonableness. Other attorneys would make grander claims, but they just wanted to Circuit Court's decision vacated and remanded to be decided on more than just the moment of threat.

JUSTICE SOTOMAYOR: You've given up in your reply brief, I understood, that you're not asking us to – the – the – to address the question of what an officer-created danger rule is like?

1. ZELINSKY: We're not asking for an officer-created danger test at all.

JUSTICE SOTOMAYOR: And – and that wasn't even addressed below, correct?

1. ZELINSKY: That's correct.

JUSTICE SOTOMAYOR: Okay. Thank you.

Barnes v. Felix – Oral Arguments

One of the oft repeated points was a question of "officer-created danger." Meaning that if the officer created the danger, it was not reasonable for him to use said danger as justification for the use of force. But isn't that the exact same standard used in every state law regarding the use of lethal force in self-defense? If I cannot create a dangerous situation, then claim self-defense, why should law enforcement?

As I said, the justices spent a lot of time on the question of reasonableness rather than the standard for determining reasonableness, which led to this interchange between Justice Kavanaugh and Mr. Zelinsky.

JUSTICE KAVANAUGH: And when an officer jumps on the car, the deadly force can be avoided by – by the driver too.

1. ZELINSKY: Well, in this particular case, Officer Felix's own expert testifies that Officer Felix shot so quickly, Ashtian Barnes didn't have time to stop.

And – and if I could, let me sketch out, Justice Kavanaugh, why it's so dangerous for you to shoot a driver. In fact, there is – I'm not aware of any police department that recommends that its officers shoot drivers.

The high likelihood – in this particular case, Ashtian Barnes didn't immediately die. He was able to brake the car and put it into park. If he had been immediately killed, that car could have careened and crashed into the highway. Officer Felix put other people on that highway in grave, very serious danger that particular day.

So I don't think it's just a he's jumping on to stop Ashtian from getting away. He's also jumping on in a manner that is going to put a lot of other people at risk.

Barnes v. Felix – Oral Arguments

Again, not germane to the topic before the court, but an interesting question. Is it reasonable to shoot the driver of a moving motor vehicle? I'm sure there are times when it is, but this seems to not only be an escalation against Mr. Barnes, but a threat to the public at large. Based on research that Mr. Zelinsky brought, jumping on a moving vehicle isn't the only dangerous actions repeatedly taken by law enforcement.

The other reoccurring fact pattern is a pattern where officers fail to identify themselves, and the suspect, exercising his or her own Second Amendment rights to self-defense, pulls out a firearm.

The Fifth Circuit alone has two cases in which they apply the "moment of the threat" doctrine. The cases are Cass and Royal, and they say: We can't look at the fact that the officer failed to identify himself. We can only look at the fact that the officer faced a loaded gun.

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Imagine someone comes to your door, or your vehicle, or just stops you on the street. Maybe they're armed, maybe they're just demanding information or that you take action. This could easily be seen as a threat, leading you to defend yourself by showing or possibly drawing your firearm. Since it appears most law enforcement is trained to draw and prepare to fire at the word "GUN!" this could easily end up badly for you. Now imagine the court only looks at the fact that the unidentified officer saw a firearm, and not the fact that the officer initiated, even escalated the situation to one of deadly impact? That's what we're talking about here.

JUSTICE SOTOMAYOR: What do you do with the cases cited by the other side where the Fifth Circuit does appear not to apply the "moment of threat" docket – doc – doctrine and does take into account more of the totality of circumstances?

1. ZELINSKY: So, Justice Sotomayor, let me give you three responses.

First, there's never a Fifth Circuit case where they actually look at the officer's prior conduct and say that's part of the calculus and it goes against the officer. So it's always it – it – whenever they might do it, it's only in the officer's benefit.

The second, the best case –

JUSTICE SOTOMAYOR: Some of my colleagues might agree with that. Why should we not?

1. ZELINSKY: Because you have to look – reasonableness. The framers gave us a test of reasonableness, and that is a – it's a two-way street, not a one-way ratchet.

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In the Fifth Circuit, there has NEVER been a case determined by "totality of circumstances" that did not benefit the officer, and Justice Sotomayor asks why her colleagues shouldn't agree with that? Are you telling me that law enforcement has never escalated a situation into the use of force? Or does Justice Sotomayor believe her colleagues agree with her that law enforcement is never responsible for the use of force, even if they've initiated the situation that led to it?

Zoe A. Jacoby, Assistant to the Solicitor General

Next to offer arguments was Ms. Zoe Jacoby, Assistant to the Solicitor General. She was representing the Department of Justice, who agree with the Petitioner's position.

1. JACOBY: Mr. Chief Justice, and may it please the Court:

The Fifth Circuit analyzed this case by examining only the so-called moment of the threat and categorically ignoring all prior events. None of the parties defends that approach. That is because reasonableness is assessed under the totality of the circumstances and pre-force events can be critical to that assessment.

Prior events often show that the force was reasonable. For example, police may have issued warnings or attempted deescalation, all of which a split-second "moment of the threat" doctrine misses. Of course, when officers face a moment of danger, that is by far the most important factor under Graham. But, in rare cases, a moment of danger doesn't tell the whole story. If the danger was manufactured entirely by police conduct outside the bounds of reasonable behavior

and not by the suspect's intervening apparent misconduct, it is unreasonable to use force in the moment.

The panel's approach fails to provide a constitutional backstop in those cases, and it disregards context that may show that force was reasonable in others.

I welcome the Court's questions.

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I think Ms. Jacoby's argument is both succinct and convincing. Yes, what happens before the moment of threat puts the threat in context. Did the officer escalate or deescalate the situation? Was it the actions of the accused or the officer who initiated the moment of danger? Were the actions of law enforcement reasonable or not? This is what needs to be considered when determining the reasonableness of the actions of law enforcement.

Charles L. McCloud on behalf of Respondents

Next to argue was Charles McCloud on behalf of the respondents Roberto Felix, Jr. and County of Harris, Texas.

1. McCLOUD: Thank you, Mr. Chief Justice, and may it please the Court:

When an officer doing his duty confronts a threat to his safety or the safety of others, it is reasonable for that officer to use force to end that threat. That's the conclusion this Court has consistently reached, and that's what the Fifth Circuit correctly held below.

At the moment Sergeant Felix used force, he was clinging to the side of a fleeing suspect's car, and Felix reasonably believed that his life was in imminent danger. That conclusion should end this case.

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Yes, in general an officer has the reasonable authority to use force in response to a threat to his safety, but does that include when it is that officer who put himself in danger?

Petitioner's contrary argument attacks a strawman. Let me be very clear. We are defending the decision below and the "moment of threat" doctrine as it actually exists. The core premise of that doctrine is that an officer doesn't lose his right to defend himself just because he made a mistake at an earlier point in time.

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In this case, the straw man is not being presented by the petitioners, but by the respondents. It was never a question of whether or not Officer Felix made a mistake, but whether or not he put himself in danger and used that as an excuse to execute a suspect he was investigating. Yes, execute, but of the facts I've found so far, no one has been able to determine if Mr. Barnes actions were malicious or merely accidental. Was Mr. Barnes attempting to evade paying tolls that had accrued to the rental car before he rented it, or was it a simple mishap when he attempted to get out of the car at the officers request, but failed to put the vehicle in park? We will probably never know.

But applying that rule does not require courts to ignore everything that occurred prior to the use of force. Like other circuits, the Fifth Circuit has repeatedly held that preceding events are relevant to the extent they inform the officer's perception of the danger that he faced. The panel decision below repeatedly cited to and quoted from those very precedents. The panel did not and could not overrule them sub silentio.

Petitioner asked the Court to create a new breed of constitutional tort under which an officer facing the barrel of a gun loses his right to defend himself if he previously

used bad tactics or poor planning.

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Again, this straw man of "bad tactics or poor planning" is used. We're not talking about a situation where the officer parked his vehicle in the wrong place or whether or not he forgot to bring a pen with him. Officer Felix is accused of jumping onto a moving vehicle and using that as an excuse to take another man's life.

That's contrary to precedent and common sense. Graham asks only whether an officer's use of force was reasonable in the particular circumstances he faced. It requires courts to put themselves in the shoes of the officer who used force, not to second-guess every decision the officer made in some of the most stressful circumstances imaginable.

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I'm not sure about precedent, but what is contrary to common sense is to believe that a law enforcement officer holds absolutely no responsibility when he or she contributes to a dangerous situation. This seems to be at the heart of Mr. McCloud's argument.

And Plumhoff and Mendez rejected similar officer-created danger theories as illogical, unwarranted, and inconsistent with precedent. The Court should reject the theory again in this case and affirm the judgment of the court of appeals.

I welcome the Court's questions.

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Under Mr. McCloud's theory, officers can create all forms of danger, without any reasonable cause to do so, yet cannot be held accountable. Does that sound reasonable to you? Should an officer be able to stop you and ask you questions at gun-point? After all, that is an "officer-created danger" without

reason. Since the officer in that circumstance was in imminent threat of death or serious bodily harm, and the accused had not initiated or escalated the situation, wouldn't they have the right to use deadly force to protect themselves from the officer that created this dangerous situation?

JUSTICE THOMAS: How would you assess the difference between the Fifth Circuit's approach, what you – as you see it, and the "totality of the circumstances" approach, as we heard it this morning?

1. McCLOUD: So I don't think that there is any difference between what the Fifth Circuit does and what Graham directs. Both –

JUSTICE THOMAS: No, I mean, as – what the Solicitor General and Petitioner, as they see the totality of the circumstances, not so much Graham.

1. McCLOUD: So the difference, I think, between our position and – and somewhat the government's position is they want to include within the totality of the circumstances arguments that the officer escalated the danger or created the danger.

And we think that that is not a relevant consideration under Graham and under the Fourth Amendment. In those cases, the question is: Was there a legitimate threat that the officer is responding to?

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In other words, Mr. McCloud seems to believe law enforcement officers should have absolute immunity for any danger to the public they create. I wonder if Mr. McCloud would still hold to that argument if law enforcement broke down his door and entered his home in the middle of the night with weapons drawn? Would he still find the officer created danger "not relevant"?

Much of the interactions between Mr. McCloud and the justices seemed to me to be him trying to skirt around this basic fact. Mr. McCloud's position is to insure that police do not have the same burden of reasonableness as the average citizen. After all, any citizen on the street that uses deadly force in self-defense must also show that they did not initiate or escalate the situation which lead to the threat against them. Although Mr. McCloud likes to refer to "the officer making a mistake," "bad tactics," or "poor planning," what he repeatedly pointed out in his responses to the justices' questions was he did not want to consider if the officer had contributed or initiated the danger that he was in. Just look at this interchange between Mr. McCloud and Justice Sotomayor.

If your answer had been – if he had walked up in an unmarked car, in plain clothes, with a gun drawn, and this person – and he walked up to the car and this person took off and/or accelerated slightly, and he jumped on and shot blindly, do you think that's reasonable?

1. McCLOUD: I think that would not be reasonable for a number of reasons.

JUSTICE SOTOMAYOR: All right. So you've given the game away because, at that point, you have to look at what the officer did.

1. McCLOUD: And, Your Honor, we agree that you can look at what the officer did. And the Fifth Circuit does look at what the officer did. The best example I can give you –

JUSTICE SOTOMAYOR: It didn't in this case.

1. McCLOUD: In this case, that's because the only argument that Petitioner made below, the only action she said you should look at, was an action based on officer-created danger.

JUSTICE SOTOMAYOR: And we have three judges who said we

shouldn't be limited in this way in the mine-run of cases, and we – and so we're stuck with this. We think the – the judgment is right, but it wasn't addressed at all. Officer-created danger wasn't addressed.

And the other side says clearly it's not raising it here.

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Did Mr. McCloud actually say that courts can look at the officer's actions, but not if the action was based on officer-created danger? Yes, he did. I guess Justice Sotomayor was correct: Mr. McCloud did give away the game.

So you can still look to things that the officer did prior to using force, but you cannot blame the officer for creating a bad situation and – and second-guess all of the decisions he made.

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I don't believe anyone was trying to second-guess all of the decisions the officer made, only the actions of him jumping onto a moving vehicle and shooting blindly inside.

Lanora Pettit, Principal Deputy Solicitor General,
Austin, Texas

The last to argue was Lenora Pettit on behalf of Harris County Texas.

1. PETTIT: Thank you, Mr. Chief Justice, and may it please the Court:

In the last 15 years, this Court has rejected at least three times that an officer's otherwise liable conduct violates the Fourth Amendment because an earlier split-second decision made a confrontation more likely.

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What was at question in the District Court was not a question of making a confrontation more likely, it was the reasonableness of jumping onto a moving vehicle and using lethal force. After all, expert testimony on behalf of Officer Felix showed that he "shot so quickly, Ashtian Barnes didn't have time to stop."

Properly understood, what Judge Higginbotham dubbed the "moment of threat" doctrine merely applies that rule. As this Court recognized in cases like Mendez and Sheehan, it is necessary because the Fourth Amendment must be applied by thousands of real cops in the real world without, in the words of Kentucky against King, an unacceptable degree of unpredictability.

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So thousands of real cops cannot understand that escalating a situation may bring the reasonableness of their actions into question, but millions of gun owners are required to? It seems the entire argument of the respondents is to place law enforcement above the laws they enforce on the American people.

The moment – the officer-created risk theory which Petitioners have continuously pressed at least until the reply brief in this Court is antithetical to that proposition because it invites an open-ended subjective inquiry into the officer's intent that cannot be conducted without the benefit of hindsight. It also, as Mendez recognized, involves tricky questions and fuzzy standards of causation that cannot be easily be applied.

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Nowhere has anyone asked to look into an officer's intent. In fact, Mr. Zelinsky specifically stated that such subjective analysis was not their intent, but the objective analysis of the reasonableness of the officer's actions.

Because the Fifth Circuit has properly rejected that proposition, its judgment should be affirmed.

And I welcome the Court's questions.

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Because the Fifth Circuit gave them the answer they wanted, Officer Felix and Harris County, Texas want the court to stop there. But would that be justice? Would that be due process, a judicial process designed to protect the legal rights of the individual? I don't think so.

Conclusion

There are two aspects of this case I want to comment on. First, the actual question before the court, when determining the reasonableness of a law enforcement use of force. Should the court only look at the moment of threat or at the preceding actions of all parties, including the officer-created danger? I think the answer is obvious that the totality of the circumstances, including any escalations and dangers created by the officer, need to be considered. If not, then we do not live in a constitutional republic, but a police state where law enforcement can commit crimes with impunity.

Second is the question of the reasonableness of Officer Felix's actions. While there are a lot of facts that need to come out in court, based on what I've read from the Supreme Court case, I've come to the following conclusions. The reasonableness of jumping on the sill of a moving vehicle is questionable. Seeing as it appears the vehicle had just started moving, and was therefore going very slowly, I would not automatically find that unreasonable. However, discharging a firearm into the occupied cabin of a vehicle in that situation was most definitely not reasonable. The greatest risk to the officer in that situation was the vehicle running over his foot, not a life-threatening injury, and one easily mitigated by jumping back down. With no evidence or probable

cause that Mr. Barnes was a danger to others, there was no justification for the use of deadly force.

This “Dirty Harry” mentality of escalating relatively minor situations into an excuse for deadly force not only makes these dangerous officers a threat to our communities, but gives reasonable excuses for people to not trust law enforcement in general. All in all, I would say that both the District and Circuit Courts made a bad situation worse. We’ll have to wait and see how the Supreme Court handles this case.

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