No. 15-816

IN THE

Supreme Court of the United States

SHANNON SMITH, individually,
Petitioner,

v.

NICOLE ATTOCKNIE, personal representative of the estate of Aaron Scott Palmer, as mother and next friend of M.P., a minor child, and individually, and KENNETH CHERRY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Respondent Nicole Attocknie's Brief in Opposition

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QUESTION PRESENTED

Sheriff Shannon Smith appointed Kenneth Cherry as a deputy sheriff but did not provide him with any training or supervision. Cherry proceeded to unlawfully enter Aaron Palmer's home and shoot him. The district court determined that Smith was Cherry's employer and denied Smith's motion for summary judgment based on qualified immunity.

The question presented is whether the Tenth Circuit correctly affirmed the district court's denial of Smith's motion.

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INTRODUCTION

Aaron Palmer was killed when deputy sheriff Kenneth Cherry stormed into his home without knocking and immediately shot him in the chest. Cherry had come to Aaron's house to serve a year-old bench warrant on Aaron's father, who did not live with Aaron and was not in the house when Aaron was killed.

Aaron's widow, Nicole Attocknie, brought this case against Cherry and petitioner Sheriff Shannon Smith, who had appointed Cherry deputy but did not provide him with any training or supervision. Cherry and Smith moved for summary judgment, contending that they were entitled to qualified immunity. The district court denied the motions, and the Tenth Circuit affirmed.

Sheriff Smith now seeks review, asking five questions about qualified immunity, none of which are presented here. The first three questions are not presented because they presume that Smith was not Cherry's employer, but the district court found otherwise. As Smith concedes, that fact is settled for purposes of this appeal.

As to the last two questions, both are also counterfactual. Ms. Attocknie demonstrated in the district court that Smith violated Aaron's clearly-established rights, and the district court did not ignore qualified immunity.

Moreover, regardless of what happened in the district court, the court of appeals had authority to decide qualified immunity de novo. And both the district court and court of appeals reached the correct result: Smith is not entitled to summary judgment based on qualified immunity. The Tenth Circuit's decision is unexceptional and correct, and the petition should be denied.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner Shannon Smith is the sheriff of Seminole County, Oklahoma. On July 23, 2012, Sheriff Smith appointed Kenneth Cherry as a deputy, giving him arrest powers needed to serve as a drug-court compliance officer. Pet. App. 18. Deputy Cherry had no formal law-enforcement training, such as in how to make arrests, use force, enter private dwellings, or serve warrants. *Id.* at 13. Nonetheless, and although Oklahoma law provides that the sheriff is responsible for the acts of deputy sheriffs, *see* Okla. Stat. tit. 19, § 547(A), Smith did not provide Cherry with any training or supervision after appointing him deputy. Pet. App. 18. Smith did not even give Cherry a copy of the sheriff's office's policies and procedures. *Id.* at 18-19.

On August 25, 2012, Cherry went to the home where Aaron Palmer and his wife Nicole Attocknie lived with their three-year-old daughter and foster son to attempt to execute a year-old bench warrant for Aaron's father, Randall Palmer. *Id.* at 3, 8. In 2011, Randall had pleaded guilty to selling methamphetamine, and, when he failed to abide by terms of the county drug-court program's performance contract, a bench warrant had been issued for his arrest. The September 2011 warrant did not list an address, and Randall did not live with Aaron and his family. *Id.* at 8.

Cherry testified that when he went to Aaron Palmer's and Nicole Attocknie's home on August 25, 2012, he saw someone he presumed to be Randall in their garage. *Id.* He contacted the Seminole Police Department and arranged to meet officers at a local convenience store to come up with a plan for arresting Randall. *Id.* at 9.

According to Cherry, when they arrived back at the home, he saw someone who seemed to be Randall run through the garage into the house. *Id.* at 4. Cherry ran—gun drawn—from his police cruiser to the front door of the house. *Id.* At the time, Aaron was home with his three-year-old daughter preparing hamburgers. *Id.* at 9 n.2. Without knocking or pausing, Cherry pushed open the front door and immediately shot Aaron in the chest in his front hall. *Id.* at 4. Aaron died at the hospital later that night. *Id.* at 21.

Randall was not found at the home. *Id.* at 9.

B. The District Court Proceedings

Ms. Attocknie filed suit against Cherry, Smith, and Tammy Wall, the drug court administrator, on behalf of Aaron's estate, their daughter, and herself. As relevant here, the complaint claimed that Cherry violated Aaron's rights under the Fourth Amendment by unlawfully entering the house and using excessive force, and that Smith was liable for failing to train or supervise his deputy. Pet. App. 4.

Smith, Wall, and Cherry all moved for summary judgment. Smith's motion argued that Attocknie could not show that Cherry violated any constitutional rights, and that, even if Cherry did violate the Constitution, Smith could not be held liable because Cherry was not his employee. D. Ct. Doc. 108, at 21. Smith further argued that because he "clearly . . . did not violate Plaintiff's constitutional rights," he was entitled to qualified immunity. *Id.* at 22. According to Smith, because he "did not personally violate Plaintiff's constitutional rights in any way whatsoever," the "second stage of qualified immunity analysis, whether a right was 'clearly established' need not even be performed." *Id.* at 22-23.

Noting that Smith claimed "that qualified immunity absolves him of liability," D. Ct. Doc. 126, at 16, Ms. Attocknie's response set forth the standard for qualified immunity, *id.* at 16-18, and argued and sought to demonstrate that "Defendant Smith, in his individual capacity, violated Aaron Palmer's clearly established constitutional rights," *id.* at 27. Ms. Attocknie demonstrated that Cherry's entry of the home violated Aaron's clearly established constitutional rights. *See* D. Ct. Doc. 124, at 20-34 (incorporated in Doc. 126, at 28 n.9, 31). She directed the court to evidence that Smith employed Cherry, including evidence that Smith:

- Interviewed Cherry;
- Ran a criminal background check on him;
- Personally checked his references;
- Signed a "Notice of Employment" about Cherry for submission to a state law enforcement agency;
- Signed and submitted a "Notice of Termination" about Cherry; and
- Retained the power to direct and control Cherry's duties for non-drug court purposes.

See Doc. 126, at 11, 19. In addition, Ms. Attocknie's response cited established case law demonstrating that Smith could be held liable for the constitutional violation based on his failure to train Cherry. *Id.* at 27-29. The response concluded that "Defendant is not entitled to qualified immunity." *Id.* at 31.

The district court denied Smith's motion. The court first set forth the standards for qualified immunity and supervisory liability, Pet. App. 26-28, and determined that Tammy Wall, the drug-court administrator, was entitled to qualified immunity because she "could reasonably have relied on the Sheriff's judgment that Cherry

was appropriately trained on how to execute court process." *Id.* at 28-29.

The court then rejected Smith's contention that Cherry was not his employee. The court stated that "both the documentation surrounding Cherry's appointment and termination as a deputy, as well as[] the Oklahoma statutes establish this is a frivolous argument." *Id.* at 29 (citing Okla. Stat. tit. 19, §§ 547(A), 548(A), & 545).

The court explained that, "[t]o establish individual liability of a supervisor for failure to train or supervise, 'a plaintiff must show that (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference.'" *Id.* at 34-35 (quoting *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381-82 (5th Cir. 2005) (internal quotation marks omitted)); *see also*, *e.g.*, *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010). The court determined that Smith personally decided not to supervise and/or train his deputy and that there was clearly a causal link between Smith's failure to train Cherry and the violation of Aaron's constitutional rights. The only remaining question was whether Smith's failure to train amounted to deliberate indifference to Aaron's constitutional right to be secure in his own house against unreasonable searches and seizures, which the court held to be a jury question. Pet. App. 35-36.

Finally, the district court denied Cherry's motion for summary judgment based on qualified immunity, explaining that, absent exigent circumstances, "an arrest warrant does not give police the authority to enter any dwelling in search of the object of the warrant." *Id.* at 37.

C. The Tenth Circuit Decision

Smith appealed. Despite the discussion of qualified immunity in Ms. Attocknie's response to his motion for summary judgment, Smith contended that the response "completely failed to address [his] contention that he was entitled to qualified immunity." 10th Cir. Opening Br. at 5-6. He also argued that the district court had "fail[ed] to consider [his] entitlement to qualified immunity," and that even if the district court had "implicitly deni[ed] qualified immunity, the facts [were] insufficient to withstand either prong of the qualified immunity test." *Id.* at 4.

The Tenth Circuit unanimously affirmed. The court first held that Cherry's entry of Aaron's home violated Aaron's clearly-established constitutional rights. Pet. App. 12. The court then rejected Smith's argument that it should reverse based on the district court's failure to specifically address qualified immunity or any failure by Ms. Attocknie to respond to his argument in the district court. "The district court denied the motion," the court explained. *Id.* at 14. "That is the only prerequisite for us to review a legal challenge to the denial. If the district court failed to address an issue, we can still reverse on that ground if the issue was preserved and is meritorious." *Id.* at 14-15. Moreover, it continued, "as appellee, Plaintiff can raise arguments for affirmance supported by the record." *Id.* at 15.

The court of appeals then explained that "the important procedural failure in this case is not Plaintiff's or the district court's but Smith's." *Id.* It noted that Smith's only arguments in support of qualified immunity had been that Cherry did not violate the Constitution and that Cherry was not Smith's employee. *Id.* at 15-16. In particular, it pointed out, "Smith raised no argument be-

low that he would be entitled to qualified immunity even if Cherry was his employee." *Id.* at 16.

Accordingly, the Tenth Circuit concluded, Smith's "only path to reversal" was to argue that he was not Cherry's employer. *Id.* The Tenth Circuit explained, however, that the district court had determined that Smith was Cherry's employer, and that Smith acknowledged that this status was settled for purposes of the appeal. *Id.* at 13. Noting that Smith did "not argue on appeal that the district court committed plain error" in determining that he was Cherry's employer, *id.* at 16, the court of appeals did "not address that possibility" and affirmed the denial of qualified immunity. *Id.*

Smith filed a petition for rehearing en banc, which was denied without any judge requesting that the court be polled. *Id.* at 43.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Raise Any of the Petition's Five Questions Presented.

A. Because It Is Settled for Purposes of This Appeal That Smith Was Cherry's Employer, the Petition's First Three Questions Are Not Presented.

Smith's first three questions presented are based on the presumption that he was not Cherry's employer. His first question, for example, asks whether the district court erred in denying him qualified immunity when he "neither employed, supervised, nor trained" Cherry. Pet. i. Likewise, his second question asks whether it is a constitutional violation for a sheriff to fail to train or supervise an individual "where all relevant parties agree that the Sheriff neither employed, nor trained or supervised that individual." *Id.*

In fact, the issue whether Smith employed Cherry was hotly disputed in the district court. *See* D. Ct. Doc. 126, at 4-5, 11, 18-20; Pet. App. 13. The district court resolved the issue and determined that Smith *was* Cherry's employer. *See* Pet. App. 29. Indeed, the court described Smith's arguments to the contrary as "frivolous." *Id.*

Smith concedes that "for the purposes of this interlocutory appeal" on qualified immunity, he must "accept the District Court's . . . declaration that Cherry was [his] employee." Pet. 18; *see Johnson v. Jones*, 515 U.S. 304 (1995) (limiting interlocutory review of denials of qualified immunity at the summary judgment stage to questions of law). Accordingly, the petition's first three questions, which are based on the premise that Cherry was not employed by Smith, are not presented here.

B. Because Plaintiff Met Her Burden and the District Court Did Not Ignore Qualified Immunity, the Last Two Questions Are Not Presented.

Smith's fourth and fifth questions presented—asking whether the district court can deny qualified immunity where the plaintiff did not meet her burden and whether the district court can completely ignore the concept of qualified immunity—are likewise not presented here.

The fourth question is not presented because Ms. Attocknie met her burden to establish that Smith violated clearly-established rights. *See* D. Ct. Doc. 126, at 27. She demonstrated that the federal rights at issue—such as Aaron's right to have Cherry knock and announce himself before entering Aaron's home and Aaron's right not to be seized in his home without probable cause—were clearly established. *See* D. Ct. Doc. 124 (discussing the violated rights); D. Ct. Doc. 126, at 28 n.9, 31 (incorporat-

ing arguments in document 124). Moreover, she demonstrated that it was clearly established that a sheriff could be held liable for failing to train or supervise his deputy—that is, that someone like Smith could be held liable for failing to train or supervise someone like Cherry. *See* D. Ct. Doc. 126, at 29 (explaining that "[t]he Tenth Circuit has recognized individual liability for a failure to train for more than a quarter century," and citing *Meade v. Grubb*s, 841 F.2d 1512, 1528 (10th Cir. 1988), which held that a sheriff could held liable "for improperly hiring, training, supervising and disciplining his deputies").

Smith accuses Ms. Attocknie of failing to show that it was clearly established that he had to train someone "who all relevant parties agree was not his employee," Pet. 17, and over whom he "had authority at most solely pursuant to Oklahoma statutes," *id.* at 18. As discussed above, however, the district court found that Cherry was Smith's employee, a fact settled at this stage of the case. Accordingly, here again, Smith's argument rests on a false premise.

The petition's fifth question is not presented because the district court addressed qualified immunity. It set forth the standards for qualified immunity, quoting at length from this Court's decision in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014). *See* Pet. App. 27-28. It also cited this Court's case law on failure to train, quoting the statement in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Pet. App. 28. Although the court's articulation of the qualified immunity standard was in its discussion of Wall's motion for summary judgment and it did not repeat that same

discussion in addressing Smith's motion, the court relied on clearly-established precedent and determined that there were questions of fact as to whether Smith had been "deliberately indifferent." *Id.* at 36. Moreover, the court specifically addressed the only argument Smith made in support of his claim that he was entitled to qualified immunity—that he had no personal involvement in any violation of Aaron's constitutional rights and supervisory liability could not attach because "Cherry was not an employee or officer of Sheriff Smith." D. Ct. Doc. 108, at 21, 22; *see* Pet. App. 29. Given the district court's attention to these issues, the notion that the district court "completely ignore[d]" qualified immunity is unsustainable.

II. Nothing in the Course of the District Court Proceedings Deprived the Court of Appeals of the Authority To Address Qualified Immunity De Novo.

As explained above, Ms. Attocknie met her burden and the district court did not ignore qualified immunity. Even if Smith's counter-factual arguments had any basis in the record, however, the Tenth Circuit would not have "departed from the accepted and usual course of judicial proceedings" in denying Smith's motion because the court of appeals had authority to address qualified immunity de novo. Pet. 12.

First, this Court has already rejected the argument that the court of appeals cannot deny qualified immunity if the plaintiff does not meet the burden of demonstrating to the district court that the defendant violated clearly-established rights. *See Elder v. Holloway*, 510 U.S. 510 (1994). In *Elder*, the district court granted qualified immunity to the defendant. On appeal, the Ninth Circuit noticed clearly-established precedent missed in the district court by both the plaintiff and the court. However,

relying on the same quote from *Davis v. Scherer*, 468 U.S. 183, 197 (1984), on which Smith relies here, *see* Pet. 11, the Ninth Circuit held that "cases unmentioned in the District Court could not control on appeal." *Elder*, 510 U.S. at 514.

This Court reversed. Explaining that the Ninth Circuit had misconstrued *Davis*, the Court held that "appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by, the district court." *Id.* at 512. Because "[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law," the Court stated, it "must be resolved *de novo* on appeal." *Id.* at 516. Thus, the Ninth Circuit was allowed to deny qualified immunity even though the plaintiff and district court had missed the precedent demonstrating that the official's actions violated clearly-established rights. Likewise, here, the Tenth Circuit had the authority to deny qualified immunity regardless of whether the plaintiff or district court made the argument in the way Smith believes was required.

Similarly, it would not matter if the district court had not addressed qualified immunity. The district court denied the motion for summary judgment, and, as the court of appeals stated, that ruling "is the only prerequisite for [the court] to review a legal challenge to the denial. If the district court failed to address an issue, [the court] can still reverse on that ground if the issue was preserved and is meritorious." Pet. App. 14-15. The Tenth Circuit's statement follows *Mitchell v. Forsyth*, in which this Court explained that, when qualified immunity presents a purely legal question, that question "is appropriate for

[the Court's] immediate resolution notwithstanding that it was not addressed by" the lower court. 472 U.S. 511, 530 (1985) (internal quotation marks and citation omitted).

Finally, Smith appears to take issue with the court of appeals' determination that he failed to preserve arguments. *See* Pet. App. 5 (explaining that Smith "cannot obtain relief on the only grounds he preserved in district court because they are based on a view of the evidence rejected by the district court," that is, that Cherry was not his employee); *see also* Pet. 17 (accusing court of appeals of "yet again not considering qualified immunity"). Smith argues that the case the Tenth Circuit cited concerning waiver of arguments is inapplicable because it did not concern an affirmative defense. But rules about waiver apply both to principal arguments and affirmative defenses, and it is certainly not a "far depart[ure] from the accepted and usual course of judicial proceedings," Pet. 17, for courts to hold that an appellant failed to preserve arguments. Indeed, rather than being a reason to grant the petition, the court of appeals' determination that Smith failed to preserve the argument "that he would be entitled to qualified immunity even if Cherry was his employee," Pet. App. 16, makes this case a particularly poor vehicle for answering any questions about qualified immunity because, as Smith himself concedes, Pet. 18, it is settled for the purposes of this appeal that Cherry was, in fact, Smith's employee.

III. The District Court and Court of Appeals Correctly Held That Smith Is Not Entitled to Qualified Immunity.

In addition to being within the court's authority, the Tenth Circuit's conclusion was correct. Because Smith's actions violated "clearly established . . . constitutional

rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), Smith is not entitled to qualified immunity.

To begin with, as the court of appeals held (and the petition does not contest), "Cherry's entry of Aaron's home was clearly contrary to well-established law." Pet. App. 12. An "arrest warrant by itself does not authorize entry into the home of a third party." *Valdez v. McPheters*, 172 F.3d 1220, 1224 (10th Cir. 1999) (citing *Steagald v. United States*, 451 U.S. 204, 215 (1981)). And even if the bench warrant for Randall had allowed Cherry to enter Aaron's home, under clearly-established law, Deputy Cherry should have knocked and announced himself as a law enforcement officer before entering. *See, e.g.*, *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997); *Wilson v. Arkansas*, 514 U.S. 927 (1995).

In addition, it would have been clear to a reasonable officer in Smith's position that he could be held liable for failing to train Cherry. It has been clearly established for decades that sheriffs can be held liable if their failure to train their deputies causes constitutional violations. *See Meade*, 841 F.2d at 1528 (holding that complaint against sheriff stated a claim and explaining that a defendant "may be held liable where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable"); *see also Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1241 (10th Cir. 1999) ("[T]he Tenth Circuit has clearly established that a supervisor may be individually liable for failing to adopt or implement policy or training of subordinates to prevent deprivations of constitutional rights.").

Smith contends that no authorities would have made clear to him that he had to train someone over whom he

"had authority at most solely pursuant to Oklahoma statutes." Pet. 18. Again, Smith ignores that he hired Cherry as his deputy. *See* Pet. App. 29 (describing Smith's argument that Cherry was not his employee as "frivolous"). In any event, Smith is wrong: at the time of the events in question, it was clearly established that defendants could be held liable for "breach[ing] a duty imposed by state or local law which caused the constitutional violation." *Meade*, 841 F.2d at 1528 (holding that sheriff could be liable for improperly hiring, training, supervising, and disciplining deputies who used excessive force because, "[u]nder Oklahoma law, a sheriff is responsible for the proper management of the jail in his county and the conduct of his deputies"); *see also Dodds*, 614 F.3d at 1203 (holding that sheriff could be liable for violation of arrestee's right to post bail where jail policy led to the violation and "Oklahoma law charged Defendant as sheriff with the responsibilities of running the county jail and accepting bail from all arrestees not charged with death-penalty eligible crimes").

In *City of Canton*, 489 U.S. at 388, this Court held that failure to train can serve as a basis for liability under 42 U.S.C. § 1983 "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." The Court explained that because "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons" and the "city has armed its officers with firearms, in part to allow them to accomplish this task," "the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be so obvious, that failure to do so could properly be characterized as deliberate indifference to constitutional rights." *Id.* at 390 n.10 (internal quotation marks omitted).

Here, Smith, the chief law enforcement officer of Seminole County, deputized Cherry knowing he would be required to serve warrants and apprehend felons. Indeed, he appointed Cherry deputy precisely so he could undertake those tasks. In this situation, it would have been obvious to a reasonable officer in Smith's position that he was required to provide his deputy with training in topics such as how to serve warrants, approach private homes, and make arrests. Smith did not, with tragic consequences, and is not entitled to qualified immunity for that failure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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