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Pearson v. Callahan

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Authorship: Scott Street, an associate in LA's Akin Gump office, and Amanda Kane, a 3L at Georgetown University Law Center

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Briefs and Documents

Docket: 07-751 (<http://www.supremecourtus.gov/docket/07-751.htm>)

Issue: Whether, for qualified immunity purposes, police officers may enter a home without a warrant on the theory that the owner consented to the entry by previously permitting an undercover informant into the home. (Note: in addition to the questions presented, the Court directed the parties to brief and argue the following question: “Whether the Court’s decision in *Saucier v. Katz*, 533 U.S. 194 (2001) should be overruled?”)

- Opinion below (<http://www.ck10.uscourts.gov/opinions/06/06-4135.pdf>) (10th Circuit)
- Petition for certiorari (http://www.scotusblog.com/wp/wp-content/uploads/2008/02/07-751_pet.pdf)
- Brief in opposition (http://www.scotusblog.com/wp/wp-content/uploads/2008/02/07-751_bio.pdf)
- Petitioner’s reply (http://www.scotusblog.com/wp/wp-content/uploads/2008/02/07-751_cert_rep.pdf)

Merit briefs

- Brief for Petitioners Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, and Jeffrey Whatcott (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_Petitioner.pdf)
- Brief for Respondent Afton Callahan (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_Respondent.pdf)
- Reply Brief for Petitioners Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, and Jeffrey Whatcott (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_PetitionerReply.pdf)

Amicus briefs

- Brief for States of Illinois, Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, and The Commonwealth of Puerto Rico of in Support of Petitioner (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_PetitionerAmCu33States.pdf)

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- Brief for the United States of America in Support of Petitioner (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_PetitionerAmCuUSA.pdf)
- Brief for the National Association of Counties, Council of State Governments, the International City/ County Management Association, the U.S. Conference of Mayors, and the International Municipal Lawyers Association in Support of Petitioner (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_PetitionerAmCu5StateLegisOrgs.pdf)
- Brief for the National Association of Criminal Defense Lawyers in Support of Respondent (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_RespondentAmCuNACDL.pdf)
- Brief for the Liberty Legal Institute in Support of Respondent (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_RespondentAmCuLibertyLegalInst.pdf)
- Brief for the ACLU in Support of Respondent (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_RespondentAmCuACLU.pdf)
- Brief for the National Police Accountability Project and the Association of American Justice in Support of Respondent (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_RespondentAmCuNPAPAAJ.pdf)
- Brief for the National Campaign to Restore Civil Rights in Support of Respondent (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_RespondentAmCuNatlCpgrntoRestoreCvIRgts.pdf)
- Brief for the Texas Association of School Boards in Support of Neither Party (http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-751_NeutralAmCuTASB.pdf)

Oral Argument: Transcript (http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-751.pdf)

Pre-Argument Articles

Argument Preview

In *Saucier v. Katz*, the Supreme Court held that when a federal court considers whether an official is entitled to qualified immunity, it must decide the merits of the plaintiffs' constitutional claim before turning to whether a qualified immunity defense is available. The question before the Court in this case is whether police officers may enter a home without a warrant when a civilian confidential informant signals that there is probable cause, and if not, whether such officers are entitled to qualified immunity under the "consent once removed" doctrine.

Background

This case stems from an undercover drug buy in, and subsequent raid on, Afton Callahan's home in central Utah. On March 19, 2002, a confidential informant working with the Central Utah Narcotics Task Force discussed a potential sale of methamphetamine with Callahan. Later that day, the informant went to Callahan's home and – after establishing that he could purchase a gram of methamphetamine for \$100 – reported the future buy to the task force. The task force provided the informant with a marked \$100 bill, a hidden microphone, and a transmitter. The informant returned to Callahan's home and was invited inside by Callahan's daughter. After purchasing methamphetamine with the marked bill, the informant gave a pre-arranged signal to the task force officers, who then entered the home and personally observed Callahan holding a plastic bag containing methamphetamines. Callahan consented to a protective sweep of the home, which unearthed evidence that he had engaged in drug possession and sales. Additionally, the police found the marked bill in Callahan's possession. At no time during these events did the members of the task force have an arrest or search warrant.

Based on this evidence, Callahan was charged in Utah state court with possession and distribution of methamphetamines. The trial court held that the evidence found in Callahan's home was admissible despite the lack of a warrant because exigent circumstances rendered the search reasonable. Callahan entered a conditional guilty plea but challenged the admissibility of the evidence on appeal. On appeal, the state conceded that exigent circumstances did not justify the warrantless entry but argued in the alternative that the evidence should be admitted under the inevitable discovery doctrine. The Utah Court of Appeals rejected that argument and reversed.

Callahan then filed a civil suit in federal district court against, inter alia, the five task force officers who participated in the raid,

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alleging a violation of his constitutional rights under the Fourth and Fourteenth Amendments and seeking damages under 42 U.S.C. § 1983. The district court held that qualified immunity shielded the officers because, even if the search had violated Callahan's constitutional rights, those rights were not clearly established at the time of the search. In so doing, the district court relied upon the "consent once -removed" doctrine, which allows officers to enter a home without a warrant when an agent or informant who has already been admitted to the home either calls for back-up or makes clear that there is probable cause. The court noted that although the Supreme Court's 2006 decision in *Georgia v. Randolph* created the assumption of a violation of constitutional rights, the rights could not have been "clearly established" at the time of the search because three other circuits had recognized the "consent-once removed" exception.

On appeal, the Tenth Circuit reversed, holding that the search had violated clearly established rights against warrantless entry into the home and that under Tenth Circuit precedent, warrantless entry is per se unreasonable unless it fell in one of the few carefully defined exceptions based on the presence of exigent circumstances or consent. The Tenth Circuit distinguished this case – in which the informant was a civilian – from other circuits' decisions allowing officers to enter a house without a warrant to assist an undercover officer previously admitted by express invitation. In the court's view, extending the "consent-once-removed" exception to civilian informants would be a great expansion of power, as the person with the authority to consent to the entrance had never consented to allowing law enforcement into the house. Additionally, the Tenth Circuit noted that the Supreme Court and its own precedent had clearly established the constitutional right against warrantless searches, and officers wishing to create a new exception such as this one could not have relied upon an expectation that the Court would do so.

Petition for Certiorari

The officers advance three arguments for granting certiorari. First, they explain that although several lower courts (but not the Supreme Court) have recognized the "consent once removed" exception in some form, there is a split among the circuits over whether the exception should apply when the undercover individual is a civilian informant rather than a law enforcement officer. They emphasize that, in contrast with the decisions of the Sixth and Seventh Circuits, in this case the Tenth Circuit regarded the distinction between an invitation to an undercover officer into the home and an invitation to a civilian informant as "critical." However, the officers explain, because it is easier for civilians to portray undercover buyers (often because of their already established reputation in the community as past purchasers of narcotics), there is a great incentive to use civilians in this fashion. They warn that the Tenth Circuit decision would have a substantial chilling effect on such uses by police departments in other circuits.

Second, the officers contend that Supreme Court should correct the Tenth Circuit's denial of qualified immunity, and in the process resolve disagreement in the lower courts regarding what constitutes "clearly established" law for purposes of qualified immunity. They argue that the Tenth Circuit improperly defined the "clearly established" constitutional right in the most abstract way possible by merely restating the right violated here as a general Fourth Amendment right to be free from unreasonable searches and arrests. Instead, they counter, the court of appeals should have considered the specific facts of this case and whether the "consent once removed" doctrine was clearly established. And although the Tenth Circuit had held that the "consent once removed" doctrine was not "clearly established" because it had not been recognized by either the Tenth Circuit or the Supreme Court, other circuits' recognition of the doctrine at the time of the entry created "clearly established" law in the officers' favor.

Third, the officers contend that certiorari is warranted to resolve the disagreement in the circuits regarding the extent to which decisions other than those of the Supreme Court and the home circuit can constitute "clearly established" rights. The Tenth Circuit (using an approach similar to that of the Seventh and Ninth Circuits) held that the deciding court could use the "clearly established weight of authority" from other circuit, district, or state courts. A second approach, taken by the Eleventh Circuit, limits the relevant authorities to the home circuit, Supreme Court, and the court of last resort in the state where the event occurred. The Second Circuit employs a third approach that looks only to Supreme Court and Second Circuit precedent. As a result of this conflict, the officers explain, the strength of any qualified immunity defense may depend upon the jurisdiction in which the lawsuit is filed.

Opposing certiorari, Callahan makes four basic arguments. First, he contends that the alleged circuit split does not merit Supreme

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Court review because only three circuits have addressed the specific question at issue here: the propriety of a warrantless entry into a private home upon the signal of a confidential informant. Moreover, only one of those circuits had addressed the question before the entry in this case.

Second, Callahan argues, the Tenth Circuit's decision denying qualified immunity was correct: the Supreme Court has already held, in *Groh v. Ramirez*, that officers cannot rely upon an expectation that courts will craft a new exception to satisfy the requirement that they have a good faith belief that their conduct was lawful. Rather, an officer is entitled to qualified immunity only if a reasonable person would believe that his conduct was not unlawful. Because a warrantless search of a home is presumptively unconstitutional, in the absence of any significant support for a "consent once removed" exception, Callahan argues, the officers could not have reasonably relied upon the expectation that the courts would carve out such an exception, as no Supreme Court, Tenth Circuit, or Utah state court cases had done so.

Third, Callahan argues, the Tenth Circuit correctly held that the Fourth Amendment does not permit police to enter a home without a warrant upon the signal from a confidential informant indicating probable cause. The law has only a few, well-established exceptions to the presumption that a warrantless physical search of a home is unconstitutional. The "exigent circumstances" exception does not apply here because an undercover officer, who has the power to arrest without a warrant upon probable cause, is different from a confidential informant, who does not. Nor can the "consent" exception justify the entry: although an undercover officer's call for assistance once invited into a suspect's home has been deemed constitutional, the same cannot be said for a confidential informant, for whom an invitation does not constitute consent to the entry of law enforcement into a home.

Fourth, Callahan emphasizes that any differences among the circuits regarding the sources of law that a court can use to determine whether a right is "clearly established" are minor, and in any event petitioners could not prevail under any of the three standards. Only the Second and Eleventh Circuits decline to consider authorities from outside their jurisdictions, and the only difference between those two courts is that the Second Circuit looks only to federal law, while the Eleventh Circuit considers authority from the highest state court as well. Moreover, what constitutes "clearly established law" is no different than any other question of law.

The Court granted certiorari on March 24, 2008. In so doing, it also asked the parties to brief an additional question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001)" – which held that, in qualified immunity cases brought under Section 1983, a court must decide the merits of the plaintiff's constitutional claim before ruling on the defendant's qualified immunity argument – "should be overruled?"

Merits Briefing

In their brief on the merits, the officers reiterate the arguments made in their petition. First, they contend that the entry of additional agents did not violate the Fourth Amendment, because Callahan had already lost his expectation of privacy when he allowed the informant into his home. When Callahan admitted the informant into his home and displayed evidence of a crime, he assumed the risk that the informant would share that information with law enforcement.

Second, the officers assert that even if their entry did constitute a Fourth Amendment search, that search was reasonable because it was incident to Callahan's arrest and necessary to protect both the safety of the informant and the integrity of the arrest. Moreover, the Tenth Circuit's distinction between police officers and informants for purposes of consent has no basis because a suspect will always be unaware of the difference. Thus, distinguishing between the "power and obligations" of police and informants has no basis in history, current Fourth Amendment doctrine, or common sense.

Third, the officers argue that they are entitled to qualified immunity because the entry did not violate clearly established law. When the entry occurred, several circuits and state supreme courts had embraced the "consent once removed" exception, and no court had rejected it. Thus, the officers could have reasonably believed that their conduct complied with the law.

Fourth, the officers urge the Court to either limit or overrule *Saucier v. Katz*. They offer two alternative rules for the Court to adopt instead: either *Saucier* should not apply in Fourth Amendment civil suits or, at a minimum, its application should be limited

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to Fourth Amendment claims that do not involve the exclusion of the fruit of the poisonous tree. Either of these rules, they explain, would more properly balance the two competing interests of achieving clarity in the law and avoiding unnecessary constitutional decisions that may place additional burdens on the court and create precedents of an uneven quality.

In his response, Callahan rebuts each argument in the officers' merits brief. Callahan contends that the officers' warrantless entry violated the Fourth Amendment for four reasons. First, consent to allow a civilian informant into the home does not equal consent to warrantless entry by the police, because it violates "widely shared social expectations" about the nature of invitations into one's home. Second, Callahan's consent for the civilian informant to enter his home did not waive his reasonable expectation of privacy against warrantless entry by law enforcement. Third, "consent once removed" is not legitimized by being part of the search incident to arrest, because none of the exigencies inherent in arrest procedure occurred here. Fourth, the "consent once removed" doctrine does not serve any legitimate law enforcement need, because police can readily obtain a warrant or anticipatory warrant before or after they send a "wired" informant into a home.

Additionally, Callahan argues that the officers are not entitled to qualified immunity because the rights at issue were clearly established at the time of the violation. Both the Tenth Circuit and the Supreme Court have held that warrantless entry into the home is per se unreasonable in the absence of consent or exigent circumstances, and a decision from a single out-of-circuit court could not provide an exemption from liability under Sec. 1983.

Finally, Callahan disagrees with the officers that *Saucier v. Katz* should be overruled, explaining that *Saucier's* two-step analysis discourages the search for post hoc justifications for otherwise illegal searches.

In their reply brief, the officers address the perceived flaws in Callahan's rebuttals. First, regarding the constitutionality of the search, the officers argue that there is no logical way to distinguish between the consent to entry of an undercover officer and the entry of police following an invited informant. Moreover, the availability of an anticipatory warrant, they explain, should have no bearing in situations – such as this one – in which such a warrant would be unavailable. Additionally, the search incident to arrest exception is much broader than described in Callahan's brief. Second, the officers are entitled to qualified immunity for the reasons articulated in the original brief. Third, this is an appropriate case to overrule *Saucier v. Katz*, because the *Saucier* two-step analysis is most flawed when, as here, the initial constitutional question is unclear but the case for immunity is uncomplicated.

Oral Argument Recap

The following is adapted from LA Akin Gump associate Scott Street's write-up for SCOTUSblog.

A Brief Background

To recap, Pearson arose out of a drug buy/bust that was organized by a narcotics task force in central Utah. A confidential informant identified Afton Callahan as a drug dealer in the area and arranged to purchase \$100 worth of methamphetamine from him. The task force gave the informant a marked bill, wired him, and followed him to Callahan's neighborhood. The police directed the informant to complete the transaction and then give a signal to officers that the purchase had been completed. Once they received the signal, the officers raided the home and found Callahan with the marked bill and methamphetamines. The officers arrested Callahan and two of his friends.

Callahan was charged in Utah state court with possession and distribution of methamphetamines. Based on the officers' warrantless entry into his house, he challenged the evidence as inadmissible, but the trial court admitted the evidence, reasoning that the officers' entry was justified under the exigent circumstances exception to the warrant requirement. The Utah Court of Appeals reversed that decision and also rejected the state's argument that the evidence was admissible under the "inevitable discovery" doctrine. Callahan then filed a civil claim against the officers under 42 U.S.C. § 1983. Unlike the state, the officers argued that their warrantless entry into the home was justified under the "consent-once-removed" doctrine. Under that doctrine, the consent that a homeowner gives to one individual when he invites the person inside his home is transferred to police officers whom the invitee summons into the home based on probable cause.

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The federal district court in Utah questioned whether the Supreme Court would adopt such a rule, which had previously been recognized in only three circuits. However, it dismissed the claim against the officers on qualified immunity grounds, finding that the officers could reasonably have believed that the consent-once-removed doctrine justified their actions. The U.S. Court of Appeals for the Tenth Circuit reversed. It adopted a variation of the consent-once-removed doctrine, which it applied “when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause, and then immediately summons other officers for assistance.” However, the Tenth Circuit refused to extend that principle to confidential informants. In addition, the Tenth Circuit held that qualified immunity did not protect the officers because they could not have reasonably believed that their entry satisfied one of the two recognized exceptions to the warrant requirement—consent and exigent circumstances.

The Fourth Amendment Merits

Like the Tenth Circuit, the Supreme Court at oral argument did not seem troubled by the consent-once-removed doctrine as it applies to undercover officers. Indeed, Justice Alito ridiculed Callahan’s attorney for even suggesting otherwise, saying that he was “advocating a rule that is going to get police officers killed.” Justice Kennedy said that a rule prohibiting police officers from making a warrantless entry if they “create the exigency” (as they almost always would in sending an undercover officer into a drug buy) would be “a dangerous rule.” Even Justices Souter and Ginsburg, who both criticized expanding the consent-once-removed doctrine to cover informants, suggested that a rule covering undercover police officers would be justified based on an analogous probable cause theory that views the “knowledge of one police officer as the knowledge for all [police officers].”

Expanding the rule to cover confidential informants clearly bothered some of the Court’s more liberal justices, who imagined a slippery slope whereby police officers could enter a home without a warrant anytime they get a signal from an individual on the inside of the home that gives them probable cause to believe a crime is being committed inside, even if that signal is simply a phone call from a visitor in the home. As the Tenth Circuit suggested below, that scenario would seem to run afoul of cases like *Georgia v. Randolph*, which hold that police may not enter a home based on the consent of one person with apparent authority to do so if another person with authority to consent refuses the entry. But if the Court is willing to adopt the consent-once-removed doctrine for police officers, it makes little sense not to extend it to confidential informants who are acting under the express direction of the police and whom the Court would treat as government actors under other Fourth Amendment doctrines.

Ultimately, the debate over consent-once-removed reflected a larger concern among some justices about the direction the Court has taken in its Fourth Amendment decisions. As Justice Ginsburg noted at one point, the warrant requirement is the “main rule” of the Fourth Amendment. Here, the confidential informant identified Callahan as a possible target. The task force sent the informant in on a dry run to ensure that drugs were present at the home and to arrange a sale. They then waited two hours before sending the informant back in to make the purchase. At that point, they had probable cause to search the home and to arrest Callahan, but instead of getting a warrant to do so, they arranged the buy/bust and entered Callahan’s home without a warrant.

Thus, however the Court chooses to support its decision doctrinally, the merits of the Fourth Amendment claim in *Pearson* will turn on this difficult question: Is the touchstone of the Fourth Amendment the warrant requirement or is it “reasonableness”?

The Saucier Two-Step

The difficulty of that question prompted the Court to ask the parties whether it should modify its standard for evaluating qualified immunity defenses. In *Saucier v. Katz*, the Court developed a two-step test that all lower federal courts must conduct in measuring a qualified immunity claim. First, the court must determine whether a constitutional violation has occurred. Second, if a violation did occur, the court must determine whether that right was “clearly established.”

Not surprisingly, many judges hate the *Saucier* test. At one point, the Chief Justice recalled, “I had a few of these cases in courts of appeals [and] I thought it was very odd that I had to go and decide a difficult constitutional issue and then not worry about it because in one sentence you say well, but the issue is not clearly established and so it’s qualified immunity.” The Chief Justice also suggested that the test was “unworkable, or at least frustrating.” Justice Stevens stated that, “[r]ather than having the judges answer each [constitutional question] and getting everything mixed up, why not just have them take whatever is the easier path?”

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As a judge, I like to take what is the easier path.”

On another point, the justices struggled to imagine the contours of “clearly established” law. Under *Saucier*, *Harlow v. Fitzgerald*, and the Court’s other qualified immunity cases, the law must be so clearly established that no reasonable state actor could believe that his conduct was lawful under the circumstances. The Court seemed hostile to Callahan’s suggestion that only Supreme Court cases and cases from the official’s home circuit could constitute “clearly established” law, even if the home circuit’s law conflicted with the law from every other circuit.

Part of the problem with *Saucier*, of course, stems from the fact that there are hundreds of federal judges deciding thousands of constitutional questions every year. That creates a number of conflicts that make it nearly impossible to say that an official has violated “clearly established” law.

Ironically, the Court built *Saucier*’s two-step test to encourage the development of constitutional law, so that public officials did not repeatedly avoid liability simply because a court had not declared the conduct unlawful. Ultimately, this Court will have to determine whether that goal is worth the burden it places on federal judges. Neither of the parties in *Pearson* argued that *Saucier* should be overruled and only two of the amici that filed briefs in the case argued for such a draconian result. Most suggested tweaking *Saucier* in a way that makes it less rigid. A less rigid rule would appeal to this Court, although it could also give it an excuse to avoid the difficult constitutional questions that we expect it to answer.

Opinion Analysis

Links and further information

- Cornell Law School Overview and Analysis (<http://www.law.cornell.edu/supct/cert/07-751.html>)

Press

- NYT: Justices to Weigh Search and Consent (http://www.nytimes.com/2008/03/25/washington/25scotus.html?_r=1&ref=us&oref=slogin) (March 25, 2008)
- Former Blogger Makes High Court Debut (<http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202425437216>)
- Educational Week: Court Mulls Process for Deciding 'Qualified Immunity' of Officials" (<http://www.edweek.org/login.html?source=http%3A%2F%2Fnews.google.com%2Fnews%3Fhl%3Den%26q%3Dpearson%2520v.%2520callahan%26um%3D1%26ie%3DUTF-8%26sa%3DN%26tab%3Dwn&destination=http%3A%2F%2Fwww.edweek.org%2Ffew%2Farticles%2F2008%2F10%2F15%2F09scotus.h28.html&levelId=2100&baddebt=false>)

Blogosphere

- Findlaw: The Fourth Amendment, Once Removed (<http://writ.news.findlaw.com/colb/20081013.html>)
- Concurring Opinions: More on *Pearson v. Callahan* (http://www.concurringopinions.com/archives/2008/04/more_on_pearson.html) (April 4, 2008)
- Concurring Opinions: Qualified Immunity and *Saucier v. Katz* (http://www.concurringopinions.com/archives/2008/03/qualified_immunity_and_saucier_v_katz.html) (March 31, 2008)

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- This page was last modified 17:05, 24 October 2008.