Section 7: Criminal Law

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Arizona v. Gant


The Arizona Supreme Court ruled that evidence seized by police after the defendant was arrested and the scene secure was inadmissible. The United State Supreme Court had accepted the case previously, but did not hear oral arguments. Instead the Court remanded the case back to the Arizona appellate court.

Questions Presented: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to crime of arrest to justify a warrantless vehicular search incident to arrest conducted after the vehicle’s recent occupants have been arrested and secured?

STATE OF ARIZONA, Appellee
v.
Rodney Joseph GANT, Appellant

Supreme Court of Arizona

Filed July 25, 2007

BERCH, Vice Chief Justice

This case requires us to determine whether the search incident to arrest exception to the Fourth Amendment’s warrant requirement permits the warrantless search of an arrestee’s car when the scene is secure and the arrestee is handcuffed, seated in the back of a patrol car, and under the supervision of a police officer. We hold that in such circumstances, a warrantless search is not justified.

I. FACTS AND PROCEDURAL BACKGROUND

On August 25, 1999, two uniformed Tucson police officers went to a house after receiving a tip of narcotics activity there. When Defendant Rodney Gant answered the door, the officers asked to speak with the owner of the residence. Gant informed the officers that the owner was not home, but would return later that afternoon. After leaving the residence, the officers ran a records check and discovered that Gant had a suspended driver’s license and an outstanding warrant for driving with a suspended license.

The officers returned to the house later that evening. While they were there, Gant drove up and parked his car in the driveway. As he got out of his car, an officer summoned him. Gant walked eight to twelve feet toward the officer, who immediately arrested and
handcuffed him. Within minutes, Gant had been locked in the back of a patrol car, where he remained under the supervision of an officer. At least four officers were at the residence by this time and the scene was secure.

After Gant had been locked in the patrol car, two officers searched the passenger compartment of his car and found a weapon and a plastic baggie containing cocaine. Gant was charged with one count of possession of a narcotic drug for sale and one count of possession of drug paraphernalia for the baggie that held the drug.

Gant filed a motion to suppress the evidence seized from his car, which the superior court denied. Gant was convicted of both charges and appealed. The court of appeals held that the evidence should have been suppressed and therefore reversed Gant’s convictions. State v. Gant, 202 Ariz. 240, 246, P 18 (App. 2002). After this Court denied review, the State petitioned the United States Supreme Court for certiorari. The Supreme Court granted the petition, vacated the court of appeals’ opinion, and remanded to that court to reconsider its opinion in light of this Court’s opinion in State v. Dean, 206 Ariz. 158 (2003). Arizona v. Gant, 540 U.S. 963 (2003). In Dean, we held that when an arrestee is not a recent occupant of his vehicle at the time of the arrest, the reasons supporting a “warrantless search of the vehicle—protection of the arresting officers and preservation of evidence”—no longer justify the search and therefore the police must obtain a warrant. 206 Ariz. at 166, PP 32-34.

Following the Supreme Court’s remand, the court of appeals remanded Gant’s case to the trial court to determine whether Gant was a recent occupant of his car when he was arrested. After an evidentiary hearing, the superior court determined that Gant was a recent occupant and concluded that the search of his car was thus justified as incident to his arrest. Gant appealed and the court of appeals again reversed, finding that the search of Gant’s car was not incident to his arrest because it was not contemporaneous with his arrest and did not satisfy the rationales set forth in Chimel v. California, 395 U.S. 752 (1969), for dispensing with the warrant requirement. State v. Gant, 213 Ariz. 446, 452, P 18 (App. 2006).

The State petitioned for review, which we granted because this case presents an important question regarding vehicle searches incident to arrest.

II. DISCUSSION

The Fourth Amendment guarantees the right of citizens to be free from unreasonable governmental searches. U.S. Const. amend. IV. “[S]ubject only to a few specifically established and well-delineated exceptions,” a search is presumed to be unreasonable under the Fourth Amendment if it is not supported by probable cause and conducted pursuant to a valid search warrant. Katz v. United States, 389 U.S. 347, 357 (1967).

The Supreme Court has recognized a “search incident to a lawful arrest” as one of the exceptions to the Fourth Amendment’s warrant requirement. See, e.g., Chimel, 395 U.S. at 755. The Court justified the search incident to arrest exception by the need to protect officers and preserve evidence:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order
to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

_{Id._ at 762-63. Based on the rationales of officer safety and preservation of evidence, the Court limited the permissible scope of a search incident to arrest to the “arrestee’s person and the area ‘within his immediate control’”—that is, “the area from within which he might gain possession of a weapon or destructible evidence.” _Id._ at 763.

Although the rule has worked reasonably well in some contexts, it has proved difficult to apply to automobile searches incident to arrest, prompting the Supreme Court to reconsider and redefine the permissible scope of such a search. See _New York v. Belton_, 453 U.S. 454, 455 (1981). In _Belton_, a police officer stopped a speeding vehicle and made contact with the driver and three passengers while all occupants were seated in the vehicle. Upon smelling marijuana, the officer ordered the occupants out of the car, arrested them, and searched each one. As the driver and passengers stood by, the officer searched the car’s passenger compartment and found a jacket containing cocaine. _Id._

The sole question before the Court in _Belton_ was the “constitutionally permissible scope” of an otherwise lawful search of an automobile incident to arrest, given the exigencies of the arrest situation. _Id._ at 455, 457. Noting the lack of consistency among courts in deciding how much of the automobile the police could search incident to arrest and the desirability of a bright-line rule to guide police officers in the conduct of their duties, the Supreme Court held that the area within an arrestee’s immediate control encompassed not only “the passenger compartment of an automobile” that the arrestee recently occupied, but also containers within the passenger compartment. _Belton_, 453 U.S. at 458-60.

The State and our dissenting colleagues seek to bring Gant’s case within the _Belton_ rule. Unlike _Belton_, however, this case deals not with the permissible scope of the search of an automobile, but with the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure. Because _Belton_ does not purport to address this question, we must determine whether officer safety or the preservation of evidence, the rationales that excuse the warrant requirement for searches incident to arrest, justified the warrantless search of Gant’s car. _Cf. Dean, 206 Ariz._ at 166, PP 32-34 (relying on _Chimel_ rationales in holding that arrestee was not a recent occupant of vehicle).

Neither rationale supports the search here. At the time of the search, Gant was handcuffed, seated in the back of a locked patrol car, and under the supervision of a police officer. The other two arrestees at the scene were also handcuffed and detained in the back of patrol cars, and the record reflects no unsecured civilians in the vicinity. At least four officers were on the scene. At that point, the police had no reason to believe that anyone at the scene could have gained access to Gant’s vehicle or that
the officers' safety was at risk. Indeed, one of the officers who searched Gant’s car acknowledged at the evidentiary hearing that the scene was secure at the time of the search. Therefore neither a concern for officer safety nor the preservation of evidence justified the warrantless search of Gant’s car. Absent either of these Chimel rationales, the search cannot be upheld as a lawful search incident to arrest.

Nor does this case require this Court to “reconsider Belton.” See Dissent P 27. Belton dealt with a markedly different set of circumstances from those present in this case. The four unsecured occupants of the vehicle in Belton presented an immediate risk of loss of evidence and an obvious threat to the lone officer’s safety that are not present in Gant’s case. See Belton, 453 U.S. at 455-56. Thus, in Belton, Chimel’s justifications were satisfied and the search was “‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” Id. at 457 (quoting Terry, 392 U.S. at 19). Here, to the contrary, because Gant and the other two arrestees were all secured at the time of the search and at least four officers were present, no exigencies existed to justify the vehicle search at its inception. Belton therefore does not support a warrantless search on the facts of this case.

It is possible to read Belton, as the State and the Dissent do, as holding that because the interior of a car is generally within the reach of a recent occupant, the Belton bright-line rule eliminates the requirement that the police assess the exigencies of the situation. But, if no exigency must justify the warrantless search, it would seem to follow that a warrantless search incident to an arrest could be conducted hours after the arrest and at a time when the arrestee had already been transported to the police station. Yet the Court was careful in Belton to distinguish United States v. Chadwick, 433 U.S. 1, 15 (1977), in which it had rejected an argument that a search of a footlocker more than an hour after the defendants’ arrests could be justified as incidental to the arrest. In doing so, the Court noted that the search occurred “after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency.” Belton, 453 U.S. at 462 (quoting Chadwick, 433 U.S. at 15). Such a distinction would be wholly unnecessary under the State’s interpretation of Belton.

Relying on language in United States v. Robinson, 414 U.S. 218 (1973), the State next maintains that the Chimel justifications are presumed to exist in all arrest situations simply by “the fact of the lawful arrest,” id. at 235, and so it need not show that either Chimel rationale existed at the time of the search.

But Robinson does not hold that every search following an arrest is excepted from the Fourth Amendment’s warrant requirement; if it did, the Court’s opinions in the cases following Chimel would hardly have been necessary. Rather, Robinson teaches that the police may search incident to an arrest without proving in any particular case that they were concerned about their safety or the destruction of evidence; these concerns are assumed to be present in every arrest situation. Once those concerns are no longer present, however, the “justifications [underlying the exception] are absent” and a warrant is required to search. Preston v. United States, 376 U.S. 364, 367-68 (1964); accord Chambers v. Maroney, 399 U.S. 42, 47 (1970) (“[T]he reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is
Similarly, when, as here, the justifications underlying Chimel no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer, the warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.

The State also argues that the Supreme Court's recent decision in Thornton, 541 U.S. 615, compels a contrary result. In Thornton, an officer in an unmarked patrol car ran a check on the license plate of a suspicious car and discovered that the plate was not registered to that car. Before the officer could pull the car over, Thornton parked and alighted from the car. The officer parked his patrol car behind Thornton's car, exited, and approached him. Thornton agreed to a pat down search, during which the officer felt a bulge in Thornton's pocket. Thornton admitted possessing drugs and produced bags containing marijuana and crack cocaine. The officer arrested and handcuffed Thornton and placed him in the back of the patrol car. The officer then searched Thornton's car and found a gun. Id. at 618.

Although the facts in Thornton resemble those in the case before us, the case is distinguishable. Thornton never claimed that being placed in the patrol car removed the Chimel justifications for the search; rather, he challenged the lawfulness of the search of his car on the ground that he was out of his car before his encounter with the police began. Id. at 619. Thus the Supreme Court's opinion addressed only whether the Belton rule applies when an officer does not initiate contact with a vehicle's occupant until after the occupant has left the vehicle. Id. at 617, 622 n.2. The answer to that question turned on whether, having stepped out of his car, Thornton was a recent occupant for purposes of Belton when he was arrested. See id. at 622-24. The Supreme Court concluded that he was [a recent occupant]. . . .

Thornton's holding was carefully limited to the question presented, the Supreme Court did not address whether, even if an arrestee is a recent occupant, a search of the arrestee's vehicle is nonetheless unlawful if concerns for officer safety or destruction of evidence—the Chimel justifications—no longer exist at the time of the search. See id. at 622 n.2, 624 n.4.

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Amici Arizona Law Enforcement Legal Advisors' Association and Arizona Association of Chiefs of Police assert that, as a result of our holding, police officers will not secure arrestees until after they have searched the passenger compartment of an arrestee's vehicle, thus jeopardizing the officers' safety. We presume that police officers will exercise proper judgment in their contacts with arrestees and will not engage in conduct that creates unnecessary risks to their safety or public safety in order to circumvent the Fourth Amendment's warrant requirement. In this technological age, when warrants can be obtained within minutes, it is not unreasonable to require that police officers obtain search warrants when they have probable cause to do so to protect a citizen's right to be free from unreasonable governmental searches.

We recognize the importance of providing consistent and workable rules to guide police officers in making decisions in the field. Belton sought to address this concern by creating a bright-line rule regarding the scope of automobile searches incident to arrest. The Supreme Court has not, however,
adopted a bright-line rule for determining whether a warrantless search of an automobile is justified to begin with. In the absence of such a rule, we look to the circumstances attending the search to determine whether a warrant was required. See Dean, 206 Ariz. at 166, P 34 (examining “the totality of the facts” in determining the necessity for a warrant). When, based on the totality of the circumstances, an arrestee is secured and thus presents no reasonable risk to officer safety or the preservation of evidence, a search warrant must be obtained unless some other exception to the warrant requirement applies.

The State has advanced no alternative theories justifying the warrantless search of Gant’s car, and we note that no other exception to the warrant requirement appears to apply. The officers did not have probable cause to search Gant’s car for contraband, as is required by the automobile exception. See Chambers, 399 U.S. at 51-52. No evidence or contraband was in plain view. See Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). Moreover, the officers testified that they had no intention of impounding Gant’s car until after they searched the passenger compartment and found the contraband. Thus the search cannot be characterized as an inventory search. See South Dakota v. Opperman, 428 U.S. 364, 372 (1976). There being no other exception to the warrant requirement justifying the search of Gant’s car, the warrantless search was unlawful.

III. CONCLUSION

For the foregoing reasons, we hold that the warrantless search of Gant’s car was not justified by the search incident to arrest exception to the Fourth Amendment’s warrant requirement. The evidence obtained as a result of the unlawful search must therefore be suppressed. We reverse the judgment of the superior court and AFFIRM the judgment of the court of appeals suppressing the evidence, but VACATE the opinion of the court of appeals.

BALES, Justice, dissenting

[Brief restatement of the facts.]

Because I believe that the majority’s reasoning and conclusion are inconsistent with the Supreme Court’s decision in New York v. Belton, 453 U.S. 454 (1981), I respectfully dissent. Although there may be good reasons to reconsider Belton, doing so is the sole prerogative of the Supreme Court, even if later developments have called into question the rationale for its decision. See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

Belton itself was an extension of the Court’s holdings in Chimel v. California, 395 U.S. 752 (1969), and United States v. Robinson, 414 U.S. 218 (1973). In Chimel, the Court held that, incident to a lawful arrest, police may properly search the arrestee and the area within the arrestee’s “immediate control” without a warrant. 395 U.S. at 763. Although “Chimel searches” are justified by general concerns for officer safety and the preservation of evidence, see id., in Robinson the Court held that such searches are permissible regardless of whether, in the circumstances of a particular case, “there was present one of the reasons supporting the” exception to the warrant requirement, 414 U.S. at 235.

The Court in Belton considered the application of Chimel and Robinson when police arrest an occupant or recent occupant of an automobile. There, an officer stopped a car and, having reason to believe the occupants unlawfully possessed marijuana,
ordered the driver and his three companions out of the car and placed them under arrest. 453 U.S. at 455-56. After searching each individual, the officer then searched the car's passenger compartment, where he discovered a jacket on the back seat. Id. at 456. He opened one of the jacket pockets and found cocaine. Id.

Belton upheld the officer's search of the jacket as a valid search incident to arrest even though it occurred after the defendant had been removed from the car and could not reach the jacket. Id. at 462-63. The Court first extended the Chimel exception to the passenger area of a car by adopting the "generalization" that an arrestee might reach within this area to grab a weapon or destroy evidence. Id. at 460. Having defined the area of the suspect's "immediate control" to include the passenger compartment, the Court went on to hold that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment" and "the contents of any containers found within." Id.

The search authorized by Belton does not depend on a case-specific determination that there may be weapons or evidence in the automobile. Indeed, the Court noted that its holding would allow searches of containers that "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." Id. at 461. The Court nonetheless concluded that the lawful arrest itself justified the search. Quoting Robinson, the Court noted that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would . . . be found." Id.

In holding that the search of Gant's automobile violated the Fourth Amendment, the majority's analysis conflicts with Belton in three respects. The majority concludes that the search was not incident to Gant's arrest because the Chimel concerns for officer safety and preservation of evidence were not present. See Op. P 13 ("Absent either of these Chimel rationales, the search cannot be upheld as a lawful search incident to arrest.").

The validity of a Belton search, however, clearly does not depend on the presence of the Chimel rationales in a particular case. Indeed, in Belton, the New York Court of Appeals, much like the majority here, held that the search could "not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article." 453 U.S. at 456. In reversing the state court and upholding the search, the Court in Belton did not question the state court's finding that the jacket was inaccessible. Justice Brennan, dissenting in Belton, pointedly noted that "the Court today substantially expands the permissible scope of searches incident to arrest by permitting police officers to search areas and containers the arrestee could not possibly reach at the time of arrest." Id. at 466.

Justice Brennan explicitly made the argument that the majority adopts here. "When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying Chimel's limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband." Id. at 465-66. While these observations have force, if they did not persuade a majority of the Supreme Court in Belton, I do not think it is appropriate for our Court to effectively rewrite Belton as
embracing them now.

**Belton** is also inconsistent with the majority’s focus on the Chimel rationales at the time of the search. See Op. PP 13-14. In Belton itself the search did not take place until after the officer had already removed the defendant from the car. 453 U.S. at 456. The Court did not consider whether one of the Chimel rationales was present at the time of the search; instead, the Court noted that the search was justified by the arrest itself. *Id.* at 461. That the jacket was within the passenger compartment in which Belton “had been a passenger just before he was arrested,” meant that it was within his “immediate control” for purposes of the search incident to arrest. *Id.* at 462 (emphasis added).

Because a Belton search is justified by circumstances that the Supreme Court thought generally exist upon the arrest of the occupant of a vehicle, the validity of the search does not depend on particularized concerns for officer safety or preservation of evidence at the time of the search. Thus, Belton rejected the argument that the search of the jacket in that case was improper because it did not occur until after the officer had reduced it to his “exclusive control.” *Id.* at 461 n.5. Recognizing the implications of the Court’s reasoning, Justice Brennan noted, “Under the approach taken today, the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car before placing them under arrest . . . .” *Id.* at 468.

The point noted by Justice Brennan in his dissent has been recognized by nearly every appellate court that has since considered the issue: Belton implies that warrantless searches may be conducted even when the arrestee has been handcuffed and locked in a patrol car . . . .

That the Chimel rationales need not be present in a particular case does not, as the majority contends, mean that police may conduct warrantless searches hours after an arrest. See Op. P 15. Belton upheld the warrantless search of a vehicle’s passenger compartment “as a contemporaneous incident” of the occupant’s arrest. 453 U.S. at 460 (emphasis added). In so ruling, the Court distinguished United States v. Chadwick, 433 U.S. 1 (1977), as not involving a search incident to an arrest, see 453 U.S. at 461-62. The post-arrest search in Belton was justified because it was incidental to the arrest, not because other exigencies were present that were absent in Chadwick. Thus, although Belton does not require a warrantless search to occur simultaneously with the arrest, it must occur within some temporal proximity.

The majority also departs from Belton’s determination that searches in this context should be guided by a “straightforward rule” that does not depend on case-by-case adjudication. See 453 U.S. at 458-59. The majority concludes that a Belton search is not justified unless, “based on the totality of the circumstances,” there is a “reasonable risk to officer safety or the preservation of evidence.” Op. P 23. Such an inquiry can only be made on a case-specific basis, initially by officers in the field and, if a search is later challenged, post-hoc by reviewing courts. This approach is at odds with the core premise of Belton. See Thornton v. United States, 541 U.S. 615, 622-23 (2004) (“The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies
the sort of generalization which Belton enunciated.

The bright-line rule embraced in Belton has long been criticized and probably merits reconsideration. Belton created a significant exception to the Fourth Amendment’s warrant requirement by making a generalization about the exigencies of arrests involving automobiles and then allowing searches whether or not the concerns justifying the exception were present in any particular case. Belton thus rests on a “shaky foundation,” id. at 624 (O’Connor, J., concurring in part), that has become even more tenuous over time. Police officers routinely secure suspects by handcuffing them before conducting Belton searches. Id. at 628 (Scalia, J., joined by Ginsburg, J., concurring in the judgment).

But even if Belton were to be reconsidered, the approach adopted by the majority is only one of several possible alternatives. Although the majority revives a case-by-case approach focusing on the presence of the Chimel rationales at the time of the search, it would also be possible to imagine a bright-line limitation to Belton’s bright-line exception. For example, one could argue that a Belton search is never justified as “incident to arrest” if it occurs after a suspect is handcuffed outside the vehicle. Or perhaps Belton should be limited so it continues to allow searches of the passenger compartment but not containers found therein, see Thornton, 541 U.S. at 634 (Stevens, J., joined by Souter, J., dissenting), or even replaced by a rule “built on firmer ground,” id. at 625 (O’Connor, J., concurring in part), that would allow warrantless searches when “it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle,” id. at 632 (Scalia, J., joined by Ginsburg, J., concurring in the judgment).

If Gant had developed an argument under Article 2, Section 8, of the Arizona Constitution, we might properly have considered whether, as a matter of state law, to reject or modify the Belton rule. Several other state courts have done so. . . . Here, however, we are faced only with arguments based on the Fourth Amendment.

We can add our voice to the others that have urged the Supreme Court to revisit Belton. We cannot, however, take it upon ourselves to re-examine Belton’s interpretation of the Fourth Amendment. Because Belton allows the search of Gant’s vehicle, I respectfully dissent.
The Supreme Court agreed Monday to rule on whether police officers are free to search a parked vehicle whenever they arrest a driver or a passenger [in Arizona v. Gant].

Prosecutors, including Los Angeles County Dist. Atty. Steve Cooley, asked the high court to set “a clear, bright-line rule” that permits officers to search a vehicle whenever an arrest is made, even if the handcuffed person has been taken away.

In the past, the court has focused on the danger faced by officers when they stop a vehicle and make an arrest. In a 1981 decision, the court said officers may search a vehicle when they arrest an occupant so as to check for weapons. These searches were reasonable, the justices said, because the officers may be in danger if weapons are hidden in the vehicle. Most prosecutors and judges interpreted that decision as giving police ample authority to search vehicles after an arrest.

But the Arizona Supreme Court took a different view in a case in which Tucson police had arrested a man who was standing near his parked car.

Rodney Gant lived at a suspected drug house that had been under observation. Police knew he had an outstanding warrant for driving with a suspended license, and arrested him when he pulled up in his car. He was handcuffed outside his car and put in the back of a patrol car. Officers then searched his vehicle and found a gun and a bag of cocaine.

In a 3-2 decision, the Arizona high court threw out the evidence against Gant and said the search of his car was a violation of the 4th Amendment and its ban on “unreasonable searches and seizures.”

The majority said that since Gant was handcuffed in a patrol car, the officers faced no danger from weapons hidden in his car.

Officers could have obtained a search warrant, but only if they could show a magistrate that they had probable cause to believe drugs were in the car.

Arizona Atty. Gen. Terry Goddard appealed to the U.S. Supreme Court last fall. He argued that the state high court’s opinion—if allowed to stand—sets “an unworkable and dangerous test” that would confuse police, prosecutors and judges.

Officers would be uncertain whether they could search a vehicle when the arrested occupant was outside the vehicle and handcuffed, he said.

The Los Angeles County district attorney and the National Assn. of Police Organizations also urged the court to take up Arizona v. Gant and to clarify the law on vehicle searches.

The court was not expected to hear the case until the fall.
The Arizona Supreme Court ruled Wednesday that police officers aren’t allowed to search a vehicle without a warrant, if a suspect has been arrested and the scene has been secured.

The decision comes in the case of a Tucson man, Rodney Joseph Gant, whom police arrested in 1999 on suspicion of a license violation. Gant was in the back of a police car when officers searched his vehicle and found cocaine. He was later charged with drug possession.

Gant claimed under the Fourth Amendment of the Constitution that when officers searched his vehicle without a warrant, it violated his protection against unreasonable search and seizure.

Law enforcement officers are allowed to search a person or a vehicle without a warrant if it’s necessary to secure a weapon or preserve evidence that could be destroyed by a suspect.

But if no danger to the officer or the evidence exists, then an officer must get a warrant before searching a vehicle and its contents, the court decided.

During the case, two law enforcement associations argued that the ruling could tempt officers to search vehicles before securing arrestees, thus jeopardizing their safety.

The court replied, “We presume that police officers will exercise proper judgment in their contacts with arrestees and will not engage in conduct that creates unnecessary risks to their safety or public safety in order to circumvent the Fourth Amendment’s warrant requirement.”

The court noted that warrants can be obtained within minutes over the telephone.

“It is not unreasonable to require that police officers obtain search warrants when they have probable cause to do so to protect a citizen’s right to be free from unreasonable governmental searches,” wrote Vice Chief Justice Rebecca White Berch.
"Warrant Ruling Not a Concern to Pima Officers"

*Tucson Citizen*
July 28, 2007
David L. Teibel

A state Supreme Court ruling this week limiting the ability of law officers in Arizona to conduct warrantless searches of a vehicle is not of great concern to Pima County sheriff’s commanders who have been complying with similar state Court of Appeals rulings since late last year.

“I don’t think it’s a major problem,” said Bureau Chief George Heaney, head of the sheriff’s Operations Bureau.

“We put out some training bulletins to make sure our deputies were in compliance with appellate court decisions,” Heaney said.

The state Supreme Court ruled Wednesday that it violates Fourth Amendment rights for police to search an arrested person’s car without a warrant when the scene is secure and the person is handcuffed, seated in a patrol car and under an officer’s supervision.

The state high court’s 3-2 ruling in a Tucson case represents a dramatic departure in how such everyday circumstances involving traffic stops and other common situations have been handled by law enforcement, The Associated Press reported.

A lawyer who argued the case on behalf of the state said the ruling may be appealed to the U.S. Supreme Court but that Arizona police must comply with it unless and until it is overturned.

Relying on interpretations on past rulings by federal and state appellate courts, some police agencies have felt free to conduct post-arrest searches of vehicles’ passenger compartments to check for weapons that could pose a threat to officers and for criminal evidence that could be destroyed.

“Courts in the past gave officers lots of leeway in warrantless searches” of vehicles incident to an arrest, Heaney explained.

There still are ways to look into a car without a warrant that law officers can use, Heaney said.

When a car is impounded, the officer must inventory the contents, and a weapon or criminal evidence can be spotted then, seized and used in trial, he said.

Also, any evidence of a crime or a weapon still can be seized if it is in plain view, Heaney said.

He said law officers still can do a cursory search of a car if there are other people in it who may have a weapon or contraband, and in the case of some crime investigations, such as a kidnapping, officers still can search a potential suspect vehicle—the back of a van or in the trunk of a car—for victims. And, he said, the officer can seize criminal evidence and weapons found during such searches.

“In this technological age, when warrants can be obtained within minutes, it is not unreasonable to require that police officers obtain search warrants when they have probable cause to do so to protect a citizen’s right to be free from unreasonable governmental searches,” Vice Chief Justice Rebecca White Berch wrote for the majority, AP reported.
Heaney agreed that when there is probable cause an officer can always telephone a judge and ask for a “telephonic warrant.”

But, he said, “In some cases it takes several hours to find a judge; other cases, one to several hours.

“It’s going to cost us more time, and that’s the cost of doing business today,” Heaney said.

Tucson police for the most part would not comment on the state Supreme Court ruling.

“It is on our agenda for senior staff to discuss early next week as to effect,” said Sgt. Mark Robinson, a police spokesman.

“Any legal ruling that affects police procedure is of concern to us,” Robinson said.

In the case that produced the ruling, police on Aug. 25, 1999, seized cocaine and drug paraphernalia after Rodney Gant got out of his parked car and was arrested about 10 feet away by officers who had earlier learned that Gant was named on an arrest warrant for driving with a suspended license.

Gant had been handcuffed and placed in a locked patrol car under police supervision by the time police searched his car.
The U.S. Supreme Court this fall will hear appeals in an Arizona case and two others pitting the freedoms and privacy of motorists against law enforcement efforts to search cars.

"Will the court have terrorism and post-September 11 in mind? Certainly," said Tracey Maclin, a professor at the Boston University School of Law. "The court, like the executive branch, can't help but think of September 11."

The Arizona case addresses whether police can automatically search a vehicle without a warrant if its recent occupant was arrested outside of the car.

The two others, Maryland vs. Pringle and Illinois vs. Lidster, will address whether all occupants of a car can be arrested when drugs are found in a passenger compartment, and the validity of arrests made at police roadblocks where all motorists are stopped.

Traffic-related incidents are the most common police-citizen encounters. As a result, they represent some of the best opportunities for police to stop criminal activity before it happens.

But experts differ on how increased homeland security pressures might affect the court's decisions in these three cases that will revisit the Fourth Amendment's ban against unreasonable search and seizure.

Some say the court's eventual ruling in Arizona vs. Gant, in particular, could pave new legal ground, either by giving police greater latitude in conducting warrantless searches of empty cars after arrests or spelling out stricter limits on what police can do.

Arguments in the case have been set for Nov. 5.

At issue is the 1999 arrest and conviction of Rodney Gant, 30, on drug charges.

According to court papers, Tucson officers knew there was an outstanding arrest warrant for Gant when they saw him park his car in a driveway.

Gant already had left his car and started walking toward police when they arrested him and placed him in the back of a patrol car. The officers then searched Gant's car, where they found a handgun and a plastic bag filled with cocaine.

The Fourth Amendment generally prohibits warrantless searches without probable cause. But the Supreme Court in a 1981 case, New York vs. Belton, held that police may search the entire passenger area of a stopped vehicle as a "contemporaneous incident" to a lawful arrest for any weapons or any evidence. The reasoning was that is a way to guard the officer's safety and to preserve any evidence.

At trial, Gant claimed no such exception to the warrant requirement existed.

But the trial court denied the motion, and
Gant was convicted of drug charges.

However, the Arizona Court of Appeals later ordered that evidence suppressed, finding that the Belton case did not apply because police did not initiate the contact with Gant before he left his car and that Gant was not even aware of the police presence.

Thus, that court reasoned, the search of the car was not “incident” to the arrest and was unconstitutional.

In its appeal, Arizona says this subjective inquiry about a suspect’s awareness of the police presence before leaving their car places too much uncertainty into the issue of whether later car searches should proceed.

Maclin, who is helping represent the American Civil Liberties Union and the National Association of Criminal Defense Lawyers in support of Gant, says a clearer, bright-line rule needs to be handed down by the court.

“We propose a different rule: Belton only applies when the police seize an individual while inside the car,” he said.

But Joel Bertocchi, a Chicago lawyer who has submitted legal arguments on behalf of the National Association of Police Organizations, said that a suspect in these situations often might be accompanied by “confederates or friends at the scene.” While the suspect might not be in the area of the car, he said his friends could still be, “and might have an advantage over the officer.”

The police proposal, he said, would permit the warrantless searches of cars even if their recent occupants were not aware of the police presence when they got out.

Robert Krauss, a Florida chief assistant attorney general who has filed arguments on behalf of 13 states, emphasized that “none of this happens unless someone is arrested.”

In Arizona, state Assistant Attorney General Eric Olsson said he believes the state Court of Appeals focused too much on a suspect’s supposed state of mind, which he said “is unworkable and wrong.”

However, he declined to speculate how the Supreme Court might rule.

On the other side, Olsson said some might argue that justices on the high court might not like “all the pressure on the Constitution” that their previous decisions in car-search cases has produced.
WASHINGTON—Disappointing both sides, the U.S. Supreme Court on Monday canceled arguments in an Arizona drug case involving rules for searching cars, sending it back to the state’s Court of Appeals.

Arguments had been set here for Nov. 5 in *Arizona vs. Gant*, billed as an important case nationally to clarify whether police can search a suspect’s car without a warrant if the suspect is no longer in the car when arrested.

Instead, the Supreme Court vacated an Arizona Court of Appeals ruling that threw out the car search evidence leading to the 1999 arrest in Tucson of Rodney Gant, 30.

The nation’s high court ordered the state appeals court to reconsider that decision in light of a more-recent Arizona Supreme Court decision in another car search case, *State vs. Dean*.

Lawyers for Gant, the state and more than a dozen other states said Monday that they were disappointed.

“This issue will have to be decided someday,” said Robert Krauss, a Florida chief assistant attorney general who filed arguments on behalf of 14 other states supporting Arizona’s claim that the search of Gant’s car was constitutional.

The Fourth Amendment generally prohibits warrantless car searches without probable cause. But the Supreme Court in a 1981 case held that police may search the passenger compartment of a stopped vehicle as a "contemporaneous incident" to a lawful arrest for any weapons or other evidence. The reasoning is that this is a way to guard the officer’s safety and to preserve any evidence.

But in the Gant case, the Arizona Court of Appeals found that Gant already had left his car and was not even aware of the police presence when they arrested him.

Thus, officer safety and evidence protection were not found to be reasons to uphold the warrantless car search, which had resulted in the discovery of a plastic bag filled with cocaine.

Lawyers for the state, in their appeal, said the Arizona Appeals Court placed too much emphasis on the suspect’s supposed unawareness of police in the area. Arizona and other states, joined by the federal solicitor general, said a clearer legal rule is needed as to when such warrantless car searches may occur.

Florida’s Krauss noted that other cases with similar questions have been popping up across the nation.

Gant’s lawyer, Thomas Jacobs of Tucson, said the U.S. Supreme Court’s decision represented a significant blow to his client’s case.

Arizona Assistant Attorney General Eric Olsson said he has “mixed feelings” about Monday’s decision.

But, he said, the Supreme Court’s
instruction that the case be reconsidered in
light of the state’s own recent *Dean* case
likely means evidence against Gant will be
reinstated. In the *Dean* case, the state
Supreme Court focused on how much time
and distance had elapsed between when the
occupant left the car and when the police
search began.

“He (Gant) was a very recent occupant of
that automobile,” Olsson noted.
Van De Kamp v. Goldstein

07-854


Goldstein was convicted of murder in 1980 based partially on testimony from a jailhouse informant named Fink. Fink testified that he was not receiving any benefit in exchange for his testimony and never had received any benefits in the past. Unbeknownst to the prosecutors and the defense attorneys, Fink had received several reduced sentences in exchange for testimony; information that other deputy district attorneys in the office knew. After serving 24 years in prison, Goldstein was released and has now filed a suit for wrongful conviction. The appellants, Van De Kamp and Livesay, were the District Attorney and the chief deputy at the time of Goldstein’s conviction. Goldstein claims Van De Kamp and Livesay are liable for not establishing a system of information sharing and proper training within the District Attorney’s office. Van De Kamp and Livesay moved to have the claim dismissed, claiming absolute prosecutorial immunity. The District court denied the motion to dismiss, ruling that the actions were administrative rather than prosecutorial, and thus were not entitled to the protections of prosecutorial immunity. The Ninth Circuit affirmed.

Questions Presented: (1) Where absolute immunity shields an individual prosecutor’s decisions regarding the disclosure of informant information in compliance with Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency? (2) Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors’ compliance with Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are “intimately associated with the judicial phase of the criminal process” and hence shielded from liability under Imbler v. Pachtman, 424 U.S. 409, 430 (1976)?

Thomas Lee GOLDSTEIN, Plaintiff-Appellee,

v.

City of Long Beach; County of Los Angeles; John Henry Miller;
William Collete; Logan Wren; and William Maelyman, Defendants, and
John VAN DE KAMP and Curt LIVESAY, Defendants-Appellants.

United States Court of Appeals for the Ninth Circuit

Decided March 28, 2007
HENDERSON, District Judge:

In this case, we are asked to determine whether an elected district attorney and his chief deputy are entitled to absolute immunity from suit based on allegations that they failed to develop policies and procedures, and failed to adequately train and supervise their subordinates, to fulfill their constitutional obligation of ensuring that information regarding jailhouse informants was shared among prosecutors in their office. See Giglio v. United States, 405 U.S. 150, 154 (1972). For the reasons discussed in this opinion, we hold that they are not, and we therefore affirm the opinion of the district court.

I. Background

After serving twenty-four years in prison, Plaintiff-Appellee Thomas Lee Goldstein was released on April 2, 2004, following this Court’s affirmance of the district court’s order granting Goldstein’s petition for habeas relief. Goldstein has now filed a complaint seeking damages under 42 U.S.C. § 1983 based on his wrongful conviction for murder. Although he has sued several individuals and entities, including the City of Long Beach, the County of Los Angeles, and four officers of the Long Beach Police Department, only his claims against Defendants-Appellants John Van De Kamp and Curt Livesay are at issue in this appeal. Van De Kamp was the Los Angeles County District Attorney at the time Goldstein was prosecuted and convicted, and Livesay was his chief deputy.

The claims relevant to this appeal stem from the testimony at Goldstein’s 1980 criminal trial of Edward Floyd Fink, a jailhouse informant. Fink testified that Goldstein confessed the murder to him while both were being detained in the Long Beach City Jail. Goldstein alleges that this testimony was false, as was Fink’s testimony that he was not receiving any benefits for testifying against Goldstein and had never received any benefits for assisting law enforcement in the past. Fink had, in fact, been acting as an informant for the Long Beach Police Department for several years and had received multiple reduced sentences in return. Although other deputy district attorneys in the Los Angeles County District Attorney’s Office were aware of the benefits provided to Fink in exchange for his testimony against Goldstein, this critical impeachment evidence was never shared with the deputy district attorneys prosecuting Goldstein’s case, allegedly because no system of sharing such information existed in the District Attorney’s Office at the time and because deputy district attorneys were not adequately trained or supervised to share such information. As a result, evidence that could have been used to impeach Fink was not shared with Goldstein’s defense counsel, in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963).

Several years prior to Goldstein’s arrest and conviction, the Supreme Court explained that prosecutors’ offices have a constitutional obligation to establish “procedures and regulations . . . to insure communication of all relevant information on each case [including promises made to informants in exchange for testimony in that case] to every lawyer who deals with it.” Giglio, 405 U.S. at 154. Thus, Goldstein alleges that Van De Kamp and Livesay are liable under § 1983 because, as administrators of the Los Angeles County District Attorney’s Office, they violated his
constitutional rights by purposefully or with deliberate indifference failing to create a system that would satisfy this obligation. Goldstein further alleges that Van De Kamp and Livesay violated his constitutional rights by failing to adequately train and supervise deputy district attorneys to ensure that they shared information regarding jailhouse informants with their colleagues.

Van De Kamp and Livesay sought dismissal of the claims against them, under Federal Rule of Civil Procedure 12(b)(6), based on an assertion of absolute prosecutorial immunity. The district court denied their motion on March 8, 2006, finding that Van De Kamp and Livesay's alleged conduct was administrative rather than prosecutorial and, therefore, not entitled to the protections of absolute immunity. Van De Kamp and Livesay filed a timely notice of interlocutory appeal on April 5, 2006.

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III. Discussion

Courts have recognized two types of immunity from suit under 42 U.S.C. § 1983: qualified immunity and absolute immunity. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993). Only absolute immunity is at issue in this appeal, as Van De Kamp and Livesay failed to make an alternative argument in the district court that the claims against them should be dismissed based on qualified immunity.

As its name implies, absolute immunity is an absolute bar to liability. Qualified immunity, on the other hand, shields officials from suits for damages only when their alleged conduct either does not violate a constitutional right or violates a constitutional right that was not “clearly established,” meaning that a reasonable person in the official’s position would not have known “his conduct was unlawful in the situation he confronted.” Saucier v. Katz, 533 U.S. 194, 201-02 (2001).

“The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.” Burns v. Reed, 500 U.S. 478, 486-87 (1991). The official seeking absolute immunity therefore bears the burden of demonstrating that it is warranted, and the Supreme Court has been “quite sparing in its recognition of claims to absolute official immunity.” Forrester v. White, 484 U.S. 219, 224 (1988).

A prosecutor is entitled to absolute immunity under § 1983 for conduct that is “intimately associated with the judicial phase of the criminal process,” Imbler v. Pachtman, 424 U.S. 409, 430 (1976), and “occur[s] in the course of his [or her] role as an advocate for the State,” Buckley, 509 U.S. at 273. However, conduct is not shielded by absolute immunity simply because it is performed by a prosecutor. Id. To the contrary, a prosecutor is entitled only to qualified immunity “if he or she is performing investigatory or administrative functions, or is essentially functioning as a police officer or detective.” Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003) (citing Buckley, 509 U.S. at 273). Thus, when determining whether absolute immunity applies, courts must examine “the nature of the function performed, not the identity of the actor who performed it.” Forrester, 484 U.S. at 229.

Applying this functional analysis, the Supreme Court has held that prosecutors are absolutely immune from § 1983 liability for decisions to initiate a particular prosecution, to present knowingly false testimony at trial, and to suppress exculpatory evidence.
Prosecutors also enjoy absolute immunity for decisions not to prosecute particular cases, Roe v. City & County of San Francisco, 109 F.3d 578, 583-84 (9th Cir. 1997), and for gathering evidence to present to the trier of fact, as opposed to gathering evidence to determine whether probable cause exists to arrest, Broam, 320 F.3d at 1033.

On the other hand, prosecutors do not have absolute immunity “for advising police officers during the investigative phase of a criminal case, performing acts which are generally considered functions of the police, acting prior to having probable cause to arrest, or making statements to the public concerning criminal proceedings.” Botello, 413 F.3d at 976-77 (citing Burns, 500 U.S. at 493, and Buckley, 509 U.S. at 274-78). Nor do government officials have absolute immunity “for conduct involving termination, demotion and treatment of employees.” Id. at 976 (citing Forrester, 484 U.S. at 228-30, and Meek v. County of Riverside, 183 F.3d 962, 967 (9th Cir. 1999)). For example, we have held that absolute immunity does not apply to a District Attorney’s decisions to demote or fail to promote a deputy attorney, to reassign the deputy to a different department, or to bar the deputy from prosecuting any future murder cases. Ceballos v. Garcetti, 361 F.3d 1168, 1184 (9th Cir. 2004). Unlike the removal of a deputy attorney from a particular case, which falls “within the District Attorney’s prosecutorial function” because it is “intimately associated with the judicial phase of the criminal process,” we determined that these challenged actions were “personnel decisions” falling “squarely within the District Attorney’s administrative function. Even the decision not to reassign Ceballos to future murder cases was a personnel decision, and was unrelated to any particular prosecution or ongoing judicial proceeding.” Id. (citing Broam, 320 F.3d at 1028).

Neither the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation, like the one set forth in Giglio, are subject to absolute immunity. The closest we have come was in Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984), a case involving allegations that a supervising district attorney was “liable under § 1983 for failure to train his subordinate . . . to preserve exculpatory evidence, or in the alternative, for permitting a policy of not preserving exculpatory evidence to exist in the District Attorney’s Office.” Id. at 680. We held that the district attorney would enjoy absolute prosecutorial immunity for any allegations based on his direct involvement in the plaintiff’s case. Id. However, we did not reach the question of whether absolute immunity would similarly protect the district attorney on the supervisory claim or on the claim that he failed to develop an appropriate policy because we concluded that the evidence “fail[ed] to give rise to any inference” that the district attorney did not adequately train or supervise his subordinates, or that he failed to develop an appropriate policy of preserving evidence. Id. at 680-81.

We also considered supervisory liability of a district attorney in Genzler, 410 F.3d 630. In that case, we held that, like prosecuting attorneys with direct responsibility for a case, supervisory defendants are entitled to absolute immunity for “conduct closely related to prosecutorial decisions in the trial phase of [the plaintiff’s] case,” such as a claim “that the supervisory defendants knew that [the prosecuting attorney] had granted [a witness] immunity in exchange for
perjured testimony favorable to the prosecution,” or a claim “that the supervisory defendants were aware of and condoned a ploy to use [a witness’s] perjured testimony to force the recusal of [the plaintiff’s] counsel of choice.” Id. at 644.

However, unlike the plaintiff in Genzler, Goldstein does not contend that Van De Kamp and Livesay are liable because they knew about, condoned, or directed any specific trial decisions made by the deputy district attorneys prosecuting Goldstein’s criminal case. Goldstein does not, for instance, assert that Van De Kamp and Livesay knew that Fink had been granted immunity for perjured testimony in Goldstein’s particular case, or that they condoned withholding such information from Goldstein’s criminal defense attorney. Instead, Goldstein rests his theory of liability on Van De Kamp and Livesay’s alleged failure to develop a policy of sharing information regarding jailhouse informants within the District Attorney’s Office and on their alleged failure to provide adequate training and supervision on this issue.

Van De Kamp and Livesay are correct that our holding in Roe, 109 F.3d 578, establishes that absolute immunity protects not only decisions made during an individual prosecution but may also apply to a policy decision. However, they reach too broadly in urging us to apply Roe to this case. Roe concerned challenges to a policy not to prosecute cases without corroborating evidence where a particular police officer was the sole witness to the alleged offense. Id. at 582. We held that a decision not to prosecute was intimately associated with the judicial phase of the criminal process and, therefore, entitled to absolute immunity, and we agreed with the Court of Appeals for the District of Columbia Circuit that “there is ‘no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application.’” Id. at 583 (quoting Haynesworth v. Miller, 820 F.2d 1245, 1269 (D.C. Cir. 1987)).

The determinative factor in Roe was that the challenged policy involved the discretionary decision of whether Roe was a credible enough witness so that prosecutors could “prosecute his cases without corroborating evidence in good conscience or with a reasonable expectation of winning a conviction. . . . This kind of witness evaluation falls entirely within a prosecutor’s judicial function regardless of whether one case or a line of cases is at issue.” Id. at 584. Similarly, the challenged policy in Haynesworth also related to an alleged policy regarding which cases to prosecute: “Appellants aver that they were victimized by a policy of retaliatory prosecution—a practice of pursuing criminal charges against individuals who have endured wrongful arrests, solely because they refuse to waive civil suits against the arresting officers.” Haynesworth, 820 F.2d at 1247. Thus, while Roe and Haynesworth demonstrate that a policy decision may be protected by absolute immunity, the critical factor remains the nature of the challenged policy and whether it falls “within a prosecutor’s judicial function” or, instead, is part of a prosecutor’s exercise of administrative or investigative functions. Roe, 109 F.3d at 584.

In this case, Van De Kamp and Livesay contend that the challenged conduct was prosecutorial in function even if it may have been administrative in form. We disagree. In the context of determining whether absolute immunity applies, “prosecutorial” refers only to conduct that is “intimately associated with the judicial phase of the criminal
process.” *Imbler*, 424 U.S. at 430. Thus, an act is not “prosecutorial” simply because it has some connection with the judicial process or may have some impact at the trial level. Were that the rule, then prosecutors would be absolutely immune from any suit because all actions taken by prosecutors arguably have some connection to the judicial process—even those, such as personnel decisions, that we have explicitly held fall outside the protections of absolute immunity. *E.g.*, *Ceballos*, 361 F.3d at 1184. As the Supreme Court has cautioned, “[a]lmost any action by a prosecutor, including his or her direct participation in a purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive.” *Burns*, 500 U.S. at 495.

While it may be possible for an act to be prosecutorial in function but administrative in form, we need not decide whether such conduct would be entitled to absolute immunity because we conclude that Goldstein’s allegations are administrative and not prosecutorial in function. Van De Kamp and Livesay correctly argue that the specific duty to share information regarding jailhouse informants arose only because of their roles as prosecutors. However, although the challenged conduct may thus be “to some degree related to trial preparation,” Van De Kamp and Livesay have failed to demonstrate the required “close association . . . [with] the judicial phase of [Goldstein’s] criminal trial.” *Genzler*, 410 F.3d at 643, or to clearly established prosecutorial functions such as deciding whether to prosecute a particular case. Administrative work cannot be “retroactively transform[ed]” into the prosecutorial simply because “the evidence this work produced” might affect whether a prosecutor decides to bring a case or, if a case is brought, how the evidence is presented at trial. *Buckley*, 509 U.S. at 275-76. The allegations against Van De Kamp and Livesay, which involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney’s Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases. Consequently, the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity.

**IV. Conclusion**

For the above reasons, we hold that the district court correctly determined that Goldstein’s allegations against Van De Kamp and Livesay describe conduct in furtherance of an administrative rather than prosecutorial function. Van De Kamp and Livesay have therefore failed to meet their burden of demonstrating that the allegations against them are so “intimately associated with the judicial phase of the criminal process” that absolute immunity is warranted. *Imbler*, 424 U.S. at 430. Accordingly, the decision of the district court is AFFIRMED.
WASHINGTON—The Supreme Court accepted an appeal on Monday that could help define the boundaries of prosecutorial immunity in an era when the officials who head big prosecutors’ offices function as managers as much as they act as hands-on lawyers.

Under longstanding legal doctrine, prosecutors are absolutely immune for their judgments in handling cases, even if a faulty judgment results in a wrongful conviction.

In this instance, a man wrongfully convicted of murder on the basis of false testimony by a jailhouse informant sued the top two officials of the Los Angeles County district attorney’s office on the ground that they had failed to set up a proper management system that could have flagged the problematic nature of the informant’s testimony.

In rejecting the officials’ claim of absolute prosecutorial immunity, the federal appeals court in San Francisco held that the suit was related not to the men’s role as prosecutors, but as office managers.

The officials’ Supreme Court appeal argues that this decision circumvented a rule that has shielded prosecutors from second guessing by the courts and warns that it would “encourage a flood of lawsuits” that would make it difficult for prosecutors to do their work.

The plaintiff, Thomas L. Goldstein, served 24 years in prison before the Federal District Court in Los Angeles granted his petition for a writ of habeas corpus. In 2005 he filed a civil rights suit seeking damages from John K. Van de Kamp, who at the time of his trial in 1980 was the Los Angeles district attorney, and Curt Livesay, who was Mr. Van de Kamp’s chief deputy.

The suit said that because of inadequate record keeping, the deputy prosecutors who handled the case were unaware that their star witness, a jailhouse informant, Edward Floyd Fink, not only falsely testified that Mr. Goldstein confessed to him, but also lied when he said on the stand that he was not receiving, and had never received, any benefits for testifying on behalf of the state.

In fact, Mr. Fink had been an informant for the Long Beach police for years and had in turn received reductions in his prison sentence for testifying in earlier trials, as well as in Mr. Goldstein’s case.

Prosecutors are required to inform the defense of information that could serve to impeach the credibility of prosecution witnesses, and the prosecutors would have had to turn over the information on Mr. Fink to Mr. Goldstein’s lawyers, had they known about it.

Mr. Goldstein’s suit argues that under a 1972 Supreme Court decision, Giglio v. United States, a prosecutor’s office has an affirmative obligation to maintain a record-keeping system ensuring that all lawyers in the office have access to information about promises to witnesses.

Mr. Van de Kamp and Mr. Livesay argued unsuccessfully in the lower federal courts
that the suit should be dismissed on the basis of absolute prosecutorial immunity. In their Supreme Court appeal, *Van de Kamp v. Goldstein*, No. 07-854, they argue that “the dissemination of exculpatory information to the defense” is a “core prosecutorial function,” distinct from administrative functions like “hiring procedures and compensation schedules.” The lower courts were mistaken in viewing their failure to have a proper record-keeping system as administrative rather than prosecutorial, they maintain.

Mr. Goldstein’s lawyer argues that “entering information into and retrieving information from a data-indexing system” are “transparently administrative activities” and that no “floodgates” will open, because most prosecutors’ offices, including Los Angeles, now have the systems to avoid future mistakes.
“A Fight 24 Years in the Making”

Los Angeles Times
April 4, 2006
Henry Weinstein

Just a day after celebrating the second anniversary of his freedom, Thomas Goldstein was in court Monday, fighting what may be a long battle to get compensation for the 24 years he spent in prison on a wrongful murder conviction.

At the U.S. 9th Circuit Court of Appeals in Pasadena, Goldstein, now 56, watched his lead lawyer, Ronald O. Kaye, spar with Los Angeles County’s outside counsel, attorney David J. Wilson, over Goldstein’s right to sue the Los Angeles County district attorney’s office for his wrongful imprisonment.

Goldstein was convicted of the 1979 shotgun slaying of John McGinest in Long Beach on the word of a notorious jailhouse informant, Edward R. Fink. A judge later overturned the conviction because of Fink’s credibility problems as well as the prosecutors’ failure to tell Goldstein’s attorney that they had cut a deal to go easy on Fink in a separate criminal case.

Normally, prosecutors have absolute immunity from lawsuits for anything they do in a courtroom. Wilson argued Monday that this “prosecutorial immunity” protects the county from liability.

But Kaye asserted that the two deputy district attorneys who knew about Fink’s deal withheld the information as a matter of district attorney policy, which would make the county liable.

Moreover, Goldstein’s suit asserts that, in the late 1970s before he was prosecuted, “two prosecutorial agencies conducted inquiries into claims by a jailhouse informant that he knew of improper conduct by” individuals in the district attorney’s office regarding confessions allegedly made to a jailhouse informant.

However, the inquiries and any conclusions that the agencies reached were not indexed or widely disseminated in the office, according to the suit.

In addition, the suit contends that the district attorney’s office “considered the creation of a system to track the benefits provided to jailhouse informants . . . but no such system was instituted.”

Three judges heard the arguments Monday but gave no indication how they would rule or when.

Although Long Beach officials contend that their officers did nothing wrong, Goldstein’s right to sue the city of Long Beach has already been clearly established.

Goldstein was freed on April 2, 2004, by a Long Beach Superior Court judge after the district attorney’s office conceded that it had no case against him. In the preceding months, five federal judges had ruled that Goldstein had been wrongfully convicted, largely on the word of Fink, who testified that Goldstein had confessed to the murder while the two were in the same cell in Long Beach in 1979.

In 2002, U.S. Magistrate Judge Robert N. Block said that Fink’s testimony “fits the
profile of the dishonest jailhouse informant.” He cited a lengthy grand jury investigation in 1990 that documented widespread use by prosecutors of false testimony from jailhouse informants in Los Angeles County during the 1970s and ‘80s.

The district attorney’s office at the time “failed to fulfill the ethical responsibilities of a public prosecutor,” the grand jury report states. The scandal led to a dramatic reduction in the use of such informants.

By the time of Goldstein’s trial, Fink already had three felony convictions. Evidence unearthed after Goldstein’s trial revealed that a number of people in law enforcement had doubts about his credibility. The other key witness against Goldstein recanted years later.

Eight months after he won his freedom, Goldstein, represented by Kaye, McLane & Bednar, a small Pasadena law firm, filed a federal civil rights lawsuit, seeking damages from the city of Long Beach, Los Angeles County, four police officers and two former prosecutors.

Last year, U.S. District Judge A. Howard Matz in Los Angeles rejected the county’s contention that the district attorney’s office is absolutely immune from any possible liability. The county appealed, leading to Monday’s hearing.

Goldstein’s lawyers assert in his civil rights suit that the district attorney’s office had a policy that permitted the use of testimony from jailhouse informants that was “false and fabricated.”

But the county, in the brief submitted by lawyer Wilson, said that if Goldstein’s action against the county “is permitted to go forward, it will be the first successful action by a criminal defendant against prosecutors who handled his case for an injury that occurred during the trial of the criminal action.”

Kaye countered that Goldstein’s claim is just the type that was envisioned when the Supreme Court in 1978 ruled that governmental entities can be sued under federal civil rights laws for a policy or custom that violates an individual’s federal rights.

Later this week, Goldstein is scheduled to be one of the featured speakers at a conference at UCLA Law School on wrongful convictions. He already has spoken to members of Congress and testified before the state Legislature. Goldstein first tried to draw attention to the jailhouse informant problem in a letter he sent to government officials from prison in 1985.

After the hearing, Goldstein, who now works as a paralegal in Orange County, said he would continue to speak out on the issue wherever he could. “This is my legacy, something I want to leave behind to make the system better for everyone,” he said.
LONG BEACH—After years of fighting for his freedom, it took only a two-minute hearing on Friday for a local judge to declare Thomas Goldstein a free man.

Of course, it took several hours before Thomas Lee Goldstein was processed out of the Long Beach Superior Court by Los Angeles County Sheriffs deputies, but that wait was nothing compared to the quarter of a century that he languished behind bars.

“I’m nervous and anxious and uncertain about the future, but I’m glad to be out,” a pale Goldstein said as he clutched his meager belongings—an apple, a sandwich and his court files—in a plastic grocery sack.

The next step for the 55-year-old former Marine is to file a federal civil rights lawsuit against the city of Long Beach and its Police Department and the Los Angeles County district attorney for the wrongful conviction, Goldstein and his defense attorneys said.

“They had nothing. No fingerprints. No forensic evidence. No gun,” attorney Dale Rubin declared. “They should be ashamed of themselves.”

It was 1979 when Goldstein, a psychology major at Long Beach City College attending school on the G.I. Bill, was arrested and charged with murder stemming from the shotgun slaying of John McGinest, who was gunned down late on November 3 near Goldstein’s home—a rented garage—in downtown Long Beach.

The short trial that followed relied largely on the testimony of two men, a jailhouse informant named Edward Fink and a Long Beach resident named Loran Campbell, who recanted his testimony shortly before his death in 2002, saying that he was influenced by investigators to identify the former Marine as the culprit. Goldstein was found guilty despite the lack of physical evidence, and was sentenced to 25 years to life in prison, plus two years for committing a murder with a gun.

In December, the U.S. Ninth Circuit Court of Appeals tossed out Goldstein’s conviction, finding the informant—who was rewarded by the district attorney with having one case against him dropped and charges reduced on another—and Campbell’s testimony unreliable.

Following the federal court’s ruling on Goldstein’s release, the district attorney began fighting to re-file the murder case, and Long Beach police picked up Goldstein from the prison where he had been housed and had him booked into the local jail.

For the past four months, Goldstein’s defense attorneys have argued that the prosecution had no case against their client and that there was no reason to keep him incarcerated. On Friday, Long Beach Superior Court Judge James Pierce agreed.

DA Probed

A criminal investigation into the district attorney’s decision not to release Goldstein
despite the appeals court’s ruling is now pending in federal court.

“What the Long Beach Police Department and the district attorney did 25 years ago was not acceptable then, and it’s not acceptable today,” said defense co-counsel Charles Linder. “They should be charged with robbery for stealing this man’s life.”

Because of Campbell’s death, the prosecution turned to his stepson, 38-year-old John Townzen of Cypress, and his widow, Nellie Campbell of Hawaii, to corroborate portions of his original testimony. But both Townzen’s recollections and his mother’s statements conflicted with Campbell’s testimony, as well as each other’s statements, suggesting that Campbell had lied under oath.

Judge Pierce ruled that the district attorney could not ask the court to allow false testimony to be put before a jury, stripping away the prosecution’s ammunition. Pierce also questioned the surviving family members’ ability to identify Goldstein after Townzen picked two photos—one of them Goldstein’s—out of a police photo lineup, and the widow chose another man’s photo.

Deputy District Attorney Patrick Connolly was given until Friday morning to decide whether the people still had a case.

“In light of the previous ruling on the trial testimony of Loran Campbell, the people are unable to proceed,” Connolly conceded.

Goldstein’s defense team immediately called for a dismissal, and Judge Pierce granted the request. After 25 years of his life spent behind bars, Goldstein was a free man. . . .
“Judges Want a Convicted Killer Freed”

Los Angeles Times
January 29, 2004
Henry Weinstein

Over the last 14 months, five federal judges have ruled that Thomas Lee Goldstein, a 54-year-old former Marine imprisoned 24 years for murder, was wrongly convicted, largely on the word of an unreliable jailhouse informant.

Yet even after a Dec. 4 ruling by the U.S. 9th Circuit Court of Appeals that Goldstein should be released without bail, he remains in custody of Los Angeles County officials.

Rather than release the inmate, state officials turned him over to county jailers, who technically are not covered by the court order. County prosecutors say they plan to try Goldstein again. They have not released him despite efforts by Federal Public Defender Sean K. Kennedy—who represented Goldstein before the 9th Circuit—to have the state held in contempt of court.

Goldstein, whose case will be considered again at a hearing today, has maintained all along that he is innocent. The ruling that he did not get a fair trial is a stark reminder of a scandal that long ago faded from the headlines: the widespread misuse of jailhouse informants by Los Angeles County prosecutors in the 1970s and ‘80s.

Goldstein was a student at Long Beach City College with a minor criminal record (two convictions for drunkenness and one for disturbing the peace) when John McGinest was killed on a Long Beach street, hit by four pellets from a shotgun about 10:20 p.m. Nov. 3, 1979. Goldstein, who lived in a rented garage near the murder scene, was arrested two weeks later.

The gun was never found by police. Nor did they discover whether any money was missing, although they suggested that robbery was the motive for the killing. No fingerprints, blood or other physical evidence was found to link the murder or the victim to Goldstein.

Instead, according to the judges who have reviewed the case, the prosecution rested on the statements of two problematic witnesses, both now dead. One was a jailhouse informant who, in 10 cases over more than a decade, including seven murders, testified that people had confessed to crimes while sharing cells with him.

Prosecutors have until Monday to formally state their intention to retry Goldstein, who received a sentence of 27 years to life. Under the 9th Circuit’s ruling, if he isn’t retried, he goes free.

The district attorney’s office has declined to comment on his case in the meantime.

Timothy Browne, the deputy D.A who prosecuted Goldstein in 1980, is retired. He said he had little recollection of the case.

The jailhouse informant was Edward Floyd Fink, a heroin user who in 1980 already had three prior felony convictions. During his lengthy criminal career, Fink was eventually arrested at least 35 times between 1969 and 1991.
He told police—and testified in court—that Goldstein had confessed to the murder when they were held briefly in the same cell in the Long Beach city jail. Fink said that McGinest owed Goldstein money and that Goldstein shot him after they got into an argument about it.

At a preliminary hearing and then at trial, prosecutors listened silently as Fink told his story, said he was not receiving any benefit in return for his testimony, and added that he had never gotten any breaks for his testimony in prior cases.

That testimony was enough to put Goldstein in prison and keep him there for more than two decades. But in 1998, he went to federal court, arguing that prosecutors had violated his constitutional rights.

It was not until 2002 that a judge finished reviewing the case, but when he did, he concluded that Goldstein was correct. There was strong evidence that Fink had struck a deal with prosecutors—that for his testimony, authorities would drop a petty-theft charge and get Fink a lighter sentence on a grand-theft charge.

Prosecutors’ failure to tell the defense about that deal denied Goldstein a fair trial, Chief U.S. Magistrate Judge Robert N. Block said.

In his November 2002 findings on the case, Block added that Fink’s testimony “fits the profile of the dishonest jailhouse informant.” He cited a lengthy grand jury investigation in 1990 that documented the widespread use by prosecutors of false testimony from jailhouse informants in Los Angeles County during the late 1970s and ‘80s.

The D.A.’s office at the time had “failed to fulfill the ethical responsibilities required of a public prosecutor,” the grand jury report said. The scandal led to a dramatic reduction in the use of such informants.

U.S. District Judge Dickran M. Tevrizian later reviewed the case and upheld Block’s findings. When the state appealed, 9th Circuit Judges Betty B. Fletcher, Jerome Farris and Kim M. Wardlaw unanimously agreed with Block. Tevrizian was appointed to the bench by President Reagan, Fletcher and Farris by President Carter and Wardlaw by President Clinton.

Deputy Atty. Gen. William H. Davis Jr., who defended the Goldstein conviction on appeal, contended that “Fink’s testimony was corroborated in essential respects.”

But Block said prosecutors had failed to support that assertion “in any respect.” Block noted that another witness “who had no reason to lie” had testified that he was present during Fink’s conversations with Goldstein “and heard no ‘confession.’”

Evidence presented during the appeals shows that authorities over the years had extensive doubts about Fink’s honesty.

Among the many documents questioning his reliability is a report by a California Department of Corrections counselor named I.B. Benson, who described Fink as a “con man who tends to handle the facts as if they were elastic.”

A record from the Orange County district attorney’s office called Fink an “unreliable operator.” In a 1982 case in which Fink was trying to get lenient treatment in return for testimony that another man, while in his cell, confessed to murder, a Los Angeles deputy district attorney said: “Fink is a Fink.”

Although many of those statements came in the years after Goldstein’s trial, they could be used to discredit Fink’s testimony if
prosecutors were to try Goldstein again. Goldstein’s current lawyer, Dale M. Rubin, said it “would not satisfy the interests of justice or the law” for Fink’s “perjured testimony” to be used again to keep his client in custody.

The second problematic witness in the case, the federal judges concluded, was Loran B. Campbell, who told police he had seen a man carrying a shotgun run past his apartment the night of the murder.

Police investigators were “impermissibly suggestive” when they handed Goldstein’s photo to Campbell and asked the witness if Goldstein was the killer, the judges ruled.

Campbell, the only eyewitness against Goldstein at the 1980 trial, first told the police he was “not sure” that Goldstein was the man he had seen carrying a gun the night of the murder. Then, at the preliminary hearing and the trial, he testified that he was positive of his identification.

Twenty years later, Terry L. Rearick, chief investigator for the federal public defender’s office, tracked down Campbell in Downey. Campbell signed a sworn declaration saying that “the photo of Mr. Goldstein differed from the person I saw.”

“Nonetheless, believing that the police had arrested the right person based on the information told to me about the suspect and believing that the police wanted me to identify the photograph they had selected, I put my doubts aside and tentatively identified the photograph of Mr. Goldstein,” he wrote.

Campbell said that before he testified at trial the police “reassured me they had the right person.” He said Long Beach officers told him that Goldstein “had failed a polygraph test”—a statement that was untrue—and that Goldstein had confessed to another person.

“Because the police had convinced me that they had arrested the right person, I put my doubts aside and identified Mr. Goldstein at trial,” Campbell said.

He said he “would have come forward on my own except that I assumed” Goldstein “had been released a long time ago.”

At a federal court hearing in 2002, about 18 months before he died, Campbell said he had been too “embarrassed” to tell the jury about his doubts and “a little overanxious” to help police.

Davis, the deputy district attorney, said Campbell had concocted his statement in an act of “buyer’s remorse” after learning that Goldstein was still in prison.

But Block said Campbell had “no motivation to falsely recant his testimony.” The judge wrote, “If Campbell testified truthfully when he identified [Goldstein] as the murderer, he would not now feel remorse upon learning that the murderer was still serving his sentence.”

The only reason for Campbell to feel guilty would be “if he knew that he falsely inflated the strength of his identification” when he testified, Block wrote.

Six eyewitnesses to the murder testified—five introduced by the prosecution—but Campbell was the only one who identified Goldstein. In fact, four of the witnesses “described the man as black or Mexican. [Goldstein] is Caucasian,” Block wrote. The sixth witness, who did say the killer was Caucasian, was an elderly woman who saw the murderer from above while looking out her window and admitted that she could not
see the features of his face, the judge noted.

One prosecution witness, Kate Meighan, testified that she saw the murderer’s face from about 60 feet away while he was running past her window for seven to eight seconds. Meighan said she had known Goldstein for some time because she managed the building where he was renting a garage and that he was not the man she had seen.

“Considered collectively,” Block wrote, information that prosecutors withheld from the defense about Fink’s deal and Campbell’s doubts “unquestionably undermines confidence in the verdict.”

In the summary of the case before the preliminary hearing, the deputy D.A. who handled it at the time had written a note that “This case was filed in great haste. Filing officers assure me that it will get stronger.”

Wrote Block, in his review of the case: “It did not.”
The Los Angeles County district attorney’s office for many years tolerated suspected perjury by jailhouse informants as a way to win murder cases, the county grand jury has concluded in a report to be made public today.

The grand jury said that, by doing so, the district attorney’s office “failed to fulfill the ethical responsibilities required of a public prosecutor.”

The grand jury also criticized the Sheriff’s Department, which runs the county jails, for improperly placing defendants awaiting trial in cellblocks with longtime informants, when it should have known the resulting “confessions” would be phony.

However, the grand jury concluded its yearlong investigation into the misuse of jailhouse informant testimony without answering the question of whether law enforcement officials actively solicited informants to lie, as some informants told the grand jury.

On this issue, the grand jury threw up its hands, declaring it did not know whether to believe the informants.

“Whether or not the informants’ testimony (before the grand jury) is believed, the conclusion must necessarily be disturbing,” the panel said in a 153-page report obtained by The Times. “Either egregious perjurers have been used as prosecution witnesses or law enforcement officials committed shocking malfeasance.”

The grand jury returned no indictments. It did not call for a bar on the use of testimony by jailhouse informants. Nor did it take a position on whether they should be given rewards, which in the past have ranged from extra food to freedom. However, the report did criticize the release of violent criminals in return for their testimony.

“In the interest of proper law enforcement and prosecutions, the prosecutor must have the discretion to determine what consideration is appropriate for assistance,” the report said. “Prosecutors rightfully point to serious cases in which informants’ testimony was of major significance in successful prosecutions.”

The only such case the grand jury cited was the “notorious Manson family case,” declaring that the “first breakthrough in (the) case was credited to (a) jailhouse informant.”

The grand jury, however, urged full disclosure of informants’ rewards to judges and jurors who have to evaluate their credibility.

It said it found that full disclosures were not made in an unspecified number of the 150 to 250 cases in Los Angeles County from 1979 to 1988 in which jailhouse informants testified.

Informants were often given rewards after the trials at which they testified concluded. That meant jurors did not learn of the rewards during the trials and, therefore, were not given a full picture of the informants’
motives to lie, the report said.

The grand jury described its inquiry as “the most comprehensive . . . into this topic that has ever been conducted.”

The report covered much of the same ground as a series of investigative articles on the jailhouse informant system that appeared in The Times starting in late 1988 and continuing until early this year.

This common ground included assertions by informants that they used a variety of ploys to gather confidential information about a crime so they could persuasively claim that a cellmate confessed, chiefly in murder cases; admissions by jailers and detectives that the Sheriff’s Department sometimes placed known informants next to defendants; and disclosures that the district attorney’s office repeatedly relied on informants whom top administrators and some other prosecutors knew to be unreliable.

Although the grand jury did not bring criminal charges of its own against anyone, it said that it was referring “several matters that suggest provable criminal cases to the district attorney for consideration.”

The grand jury did not say what type of cases these were, but the context in which they were mentioned suggested that they involve possible perjury by informants, rather than possible criminal misconduct by law enforcement officials.

There was no suggestion that the grand jury sought to determine whether wrongful convictions had resulted from perjured testimony.

“The purpose of this grand jury investigation has not been to make judgments in particular cases,” the report said. “Rather, the focus has been to conduct an overall inquiry as to how and why the system went wrong, and to recommend policies and procedures that will prevent or curtail the emergence of such practices in the future.”

The grand jury made two formal “findings.” They were that:

“The Los Angeles County district attorney’s office failed to fulfill the ethical responsibilities required of a public prosecutor by its deliberate and informed declination (refusal) to take the action necessary to curtail the misuse of jailhouse informant testimony.”

“The Los Angeles County Sheriff’s Department failed to establish adequate procedures to control improper placement of inmates, with the foreseeable result that false claims of confessions or admissions would be made.”

The grand jury also criticized the office of the California attorney general for inaction on numerous occasions since 1979 when confronted with evidence of “apparent abuses concerning jailhouse informants,” including claims of perjury.

It also criticized “certain judges” who “exhibited an unusual willingness to rely on the reputation of a member of the district attorney’s office, rather than on factual evidence before the court” in acceding to prosecutors’ requests for “apparently improper temporary releases from incarceration.”

The report covered the period 1979 to 1988, when John K. Van de Kamp, Robert H. Philibosian and Ira Reiner served as the district attorney; Peter J. Pitchess and Sherman Block served as sheriff, and
George Deukmejian and Van de Kamp served as attorney general.

However, no individuals—neither elected officials nor lesser functionaries—were criticized by name in the report, which was prepared by the grand jury’s special counsel, Douglas Dalton, a longtime Los Angeles criminal defense lawyer.

Dalton succeeded retired California Supreme Court Justice Otto Kaus as special counsel. Kaus started the $500,000 investigation but was dropped by the grand jury late last year.

All told, 120 witnesses testified before the grand jury. They included prosecutors, police and sheriff’s detectives, jailers and defense attorneys. Hundreds of others provided information informally, the report said.

The grand jury investigation began at the request of two defense lawyer groups, California Attorneys for Criminal Justice and the Los Angeles Criminal Courts Bar Assn.

The defense lawyer requests were an outgrowth of a scandal that broke in October, 1988, when a longtime informant, Leslie Vernon White, demonstrated for sheriff’s officials that he could fabricate a convincing confession from a murder suspect he had never met. During the demonstration, White used a jail telephone and posed as a law enforcement officer to get inside information on the case. White later told The Times that he committed perjury 12 times.

The grand jury noted that the district attorney’s office has never prosecuted an informant for perjury and stated, “In the face of the extraordinary number of such apparent instances of perjury and false information . . . surely some cases would have warranted successful prosecution. Such prosecution could have provided a substantial deterrent (to further perjury).”

The grand jury said it took testimony from six informants—five of whom admitted perjuring themselves or providing false information to law enforcement. Specially hired grand jury investigators interviewed 19 other informants.

The grand jury noted that courts have “sometimes lacked adequate factual information to fully realize the potential for untrustworthiness which is inherent in (jailhouse informant) testimony because of the strong inducements to lie or shape testimony in favor of the prosecution.”

As an example of court credulity, the report cited a 1984 California Supreme Court decision that declared that prosecutors are not legally required to corroborate the word of a jailhouse informant because informants have no “direct, compelling motive” to lie.

Among informants, the grand jury found, there is a “widespread belief that law enforcement officials solicit fabricated testimony,” sometimes directly and sometimes through a variety of more subtle means, such as leaving an informant in a room with investigative reports concerning another inmate so he can gather inside information about the other inmate’s case.

While there is no evidence in the report that the grand jury questioned law enforcement officers about specific allegations of this sort, the grand jury did attempt to investigate informants’ accounts of being placed next to
targeted defendants by sheriff’s deputies in charge of inmate housing.

“The Sheriff’s Department denies such a practice has ever existed,” the report said. “However, the grand jury received evidence which indicated the placing of inmates for the gathering of information has occurred.”

[...] In the district attorneys’ office, the grand jury found, senior management had repeatedly refused to establish a central index on informants to keep track of their offers to testify and their reliability, despite requests to do so from subordinates beginning in 1986.

“Neither a defendant’s rights to know about information affecting the credibility of an informant, nor a prosecutor’s obligation to disclose such information to a defendant was ever mentioned during the (district attorney management) discussion of the pros and cons of (maintaining) an informant index,” the grand jury said.

Instead, senior management was concerned that, if it established an index, it might have to disclose it to the defense.

In addition, one management official testified that an informant index was regarded as a bad idea because it might lead to discovery by defense attorneys of what he believed was a “fairly common practice” of the Sheriff’s Department in planting informants next to suspects when “the amount of available evidence that we can present in court is a little on the thin side and a statement would certainly be helpful.”

Instead of establishing an index, the grand jury reported, top district attorney officials decided to hold a Saturday seminar for prosecutors on how to deal with informants.

“The seminar did not appear to address ethical issues relating to . . . the defendant’s entitlement to know the number of times the informant testified as a prosecution witness and the benefits he received,” the grand jury said. “. . . Rather, the seminar appeared to focus on the use of jailhouse informants as it relates to winning cases.”

To illustrate the district attorney’s use of informants known to be unreliable, the grand jury told the story of White, who in 1979 flunked a polygraph test as a would-be informant for the Long Beach police and told the district attorney’s office that some of its prosecutors were setting up suspects and paying off witnesses.

White then filed two lawsuits alleging that his complaints weren’t being taken seriously. The attorney general’s office tried to investigate but got nowhere when White changed his story just before he was to have taken a polygraph. The Department of Corrections weighed in with its assessment that White was “a real flake.”

But, the grand jury said, White’s “career as an informant was just beginning to blossom.”
The Washington Post
June 25, 1993
Joan Biskupic

The Supreme Court ruled yesterday that prosecutors may be liable for overzealous actions taken while investigating crimes and in making statements about cases to news reporters.

Neither kinds of actions, the court said, are part of prosecutors’ courtroom advocacy, which traditionally has been entitled to immunity from liability.

The split ruling, which dissenting justices said could have a chilling effect on law enforcement, arose from the investigation of the rape-murder of an 11-year-old Naperville, Ill., girl.

Prosecutors in Du Page County, just west of Chicago, had targeted Stephen Buckley as a suspect; Buckley claimed he was innocent and that prosecutors had fabricated evidence against him. After spending three years in jail on charges that were never proven, Buckley filed a civil rights suit against county officials.

The Supreme Court was unanimous in finding that Buckley could sue the prosecuting attorneys for damages arising from statements made at a news conference when an indictment against him was announced.

And, by 5 to 4, the court said Buckley could have a claim arising from the prosecutors’ search for clues and corroboration that might have given them probable cause to make an arrest. Specifically, Buckley had alleged that when laboratory results failed to connect his boots to a bootprint at the girl’s home, county prosecutors induced a North Carolina forensic anthropologist to make a positive identification.

The court’s decision reinstates a case brought by Buckley against former Du Page County attorney Michael Fitzsimmons and other prosecutors, which had been dismissed by a lower court. Buckley’s lawyer, Flint Taylor, said yesterday he is seeking $10 million in damages for violations of Buckley’s civil rights, loss of freedom, mental anguish and humiliation.

In a larger sense, the ruling in Buckley v. Fitzsimmons further clarifies when prosecutors may be forced to pay money damages for their wrongful actions.

The concept that an official is immune from liability for injuries caused while on duty derives from English common law. Through the years, U.S. courts have allowed some exceptions to provide redress for individuals who claim they have been injured as the result of wrongful government actions.

But it is still rare for an individual to prevail in an injury suit against prosecutors. Two years ago, in Burns v. Reed, the court held that a state prosecutor is absolutely immune from liability for withholding information critical to a defendant’s rights in a warrant hearing. But the prosecutor was not immune for legal advice he gave police in the case.

The justices said then that the test is whether the prosecutor’s conduct is “intimately
associated with the judicial phase of the criminal process."

Further distinguishing among prosecutorial functions, the court yesterday said prosecutors’ immunity from civil rights law largely depends on the law officers’ activities when the alleged injury occurs.

Justice John Paul Stevens, who wrote the opinion, said that actions taken by a prosecutor who is preparing for a trial or that occur during his advocacy for the state are entitled to absolute immunity.

Out-of-court statements to the press, Stevens said in a portion of the opinion joined by all the justices, are not part of the judicial process, and therefore not protected from liability.

Buckley alleged that Fitzsimmons, who was seeking reelection at the time, made false statements at a news conference announcing Buckley’s arrest and indictment. That, Buckley claimed, undermined the fairness of the proceedings against him. (His trial ended in a hung jury, but because prosecutors planned to retry him Buckley was not freed until the forensic anthropologist who was supposed to be a key witness against him died of cancer.)

Regarding the claim that prosecutors “shopped” for an expert to link his boot to a footprint on the door of the girl’s house, a five-justice majority said it was an investigatory function not entitled to absolute immunity.

“There is a difference between the advocate’s role in evaluating evidence and interviewing witnesses as he prepares for trial . . . and the detective’s role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested,” Stevens wrote.

“A prosecutor neither is, nor should consider himself to be, an advocate before he had probable cause to have anyone arrested,” he said, joined by Justices Harry A. Blackmun, Sandra Day O’Connor, Antonin Scalia and Clarence Thomas.

The four justices who dissented from that portion of the ruling said it could cause prosecutors to act too cautiously or otherwise skew decisions when deciding whether to bring charges against a suspect. The ruling could spawn unjustified complaints when “the claimant is clever enough to include some actions taken by the prosecutor prior to the initiation of prosecution,” said Justice Anthony M. Kennedy, joined by Chief Justice William H. Rehnquist and Justices Byron R. White and David H. Souter.

The ruling reversed a decision by the 7th U.S. Circuit Court of Appeals that the prosecutors had absolute immunity on both of Buckley’s claims. The high court did not decide how Buckley would succeed on the merits of his claim or whether the prosecutors might be entitled to qualified immunity; that is, if they could show they were acting in good faith that their conduct was not wrong.
A police informant working for the Central Utah Narcotics Task Force went to Afton Callahan's home to complete a drug deal. When the sale was finished, the informant signaled the police, who entered Callahan's home and arrested Callahan. Callahan claims the police violated his Fourth Amendment rights by not first obtaining a search warrant. The Utah Court of Appeals agreed that the evidence against Callahan had been illegally obtained, and thus overturned Callahan's conviction. Callahan then filed a lawsuit against the task force for violating his constitutional rights. The police claim that they are immune from suit because the rights violated were not clearly established because of the doctrine of consent once removed. The Tenth Circuit disagreed with the police, ruling that the doctrine of consent once removed has not been adopted in the Tenth Circuit.

Questions Presented: (1) Several lower courts have recognized a “consent once removed” exception to the Fourth Amendment warrant requirement. Does this exception authorize police officers to enter a home without a warrant immediately after an undercover informant buys drugs inside (as the Sixth and Seventh Circuits have held), or does the warrantless entry in such circumstances violate the Fourth Amendment (as the Tenth Circuit held below)? (2) Did the Tenth Circuit properly deny qualified immunity when the only decisions directly on point had all upheld similar warrantless entries? (3) Should the Court’s decision in Saucier v. Katz, 533 U.S. 194 (2001) be overruled?
Mr. Callahan did not establish that the officers violated a clearly established right. Holding that the district court was correct in its determination that Mr. Callahan’s constitutional rights were violated, but incorrect in its determination that these rights were not clearly established, we reverse in part and remand.

Background

This appeal evolves from a police raid of Mr. Callahan’s home on March 19, 2002. Earlier in the day, a confidential informant—who assisted the Central Utah Narcotics Task Force after being charged with possession of methamphetamine—saw Mr. Callahan and discussed a potential sale of methamphetamine later that day. The confidential informant then informed an officer of the task force of the conversation.

[The police officers] wired the confidential informant, gave him a marked $100 bill, and worked out a signal for him to give the officers once the exchange was completed. The officers then drove the confidential informant to Mr. Callahan’s home.

Inside the home, the confidential informant asked Mr. Callahan for methamphetamine. Mr. Callahan retrieved a quantity of drugs. In exchange for a portion of the quantity, the confidential informant gave Mr. Callahan the marked bill. After the deal was completed, the confidential informant gave a variation of the pre-arranged signal to the task force officers.

Hearing the signal, the officers entered Mr. Callahan’s home through a porch door. Once inside, they ordered the confidential informant, Mr. Callahan, and two other individuals to the floor. During their entry, the officers saw Mr. Callahan drop a plastic bag, which they later confirmed contained methamphetamine. After the four persons were on the floor, the officers conducted a protective sweep of the home. The Utah Court of Appeals later determined that Mr. Callahan consented to the protective sweep.

As a result of the search of Mr. Callahan and his home, the officers found evidence of a drug sale and possession. On the confidential informant, they found a small bag of methamphetamine. On Mr. Callahan, they found the marked bill. In Mr. Callahan’s home, they found drug syringes. The officers did not have an arrest or search warrant at any time during these events.

Based on this evidence, Mr. Callahan was charged with possession and distribution of methamphetamine. The trial court found that the evidence was admissible because the existence of exigent circumstances made the search reasonable despite the absence of a warrant. The Utah Court of Appeals reversed this decision and Mr. Callahan’s subsequent conviction. Notably, the Utah Attorney General’s office conceded on appeal that no exigent circumstances existed, instead arguing that the evidence would have been discovered inevitably. The court of appeals disagreed and applied the Attorney General’s concession that there were no exigent circumstances.

Applying the ruling of the Utah Court of Appeals, Mr. Callahan filed claims in the United States Court for the District of Utah. Mr. Callahan alleged that the actions of the task force violated his constitutional rights under the Fourth and Fourteenth Amendments.

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Regarding the claims against the task force, the district court dismissed the claims because it found that qualified immunity
shielded the officers. In so doing, it found that despite an assumption that the task force violated Mr. Callahan’s constitutional rights, those constitutional rights were not clearly established. Specifically, the district court examined the application of the “consent-once-removed” doctrine, finding that although three circuit courts have upheld the doctrine, the recent Supreme Court decision in Georgia v. Randolph, 547 U.S. 103 (2006), allowed the district court to assume Mr. Callahan’s constitutional rights were violated. On the other hand, the approval of the doctrine by three circuit courts prevented the district court from finding that those rights were clearly established.

On appeal, Mr. Callahan contends that summary judgment should not have been granted based on qualified immunity derived from the “consent once removed” doctrine. This argument consists of two components. First, from Mr. Callahan’s perspective, it is clear that the actions of the task force violated his constitutional rights under the Fourth Amendment. Second, Mr. Callahan contends that because Tenth Circuit law requires exceptions to the warrant requirement of the Fourth Amendment be well delineated and carefully drawn, the adoption of the doctrine by other circuits is irrelevant.

Discussion

When reviewing summary judgment orders based on qualified immunity, the approach differs from other summary judgment decisions. Cortez v. McCauley, 478 F.3d 1108, 1114 (10th Cir. 2007). Once a qualified immunity defense is asserted, the burden shifts to the plaintiff. First, the plaintiff must “establish that the defendant violated a constitutional right.” Id. If the plaintiff fails to satisfy this initial requirement, the court’s inquiry ends. Cortez, 478 F.3d at 1114 (“If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.”). If the plaintiff establishes that a constitutional right was violated, then the plaintiff must also show that the violated right was clearly established. Cortez, 478 F.3d at 1114. Whether the right was clearly established is examined under the “specific context of the case, not as a broad general proposition.” Id. “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation.” Id. If reasonable officers would not have been aware of the clearly unlawful nature of their actions, qualified immunity applies and summary judgment would be appropriate. Id.

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I. The Actions of the Task Force Violated Mr. Callahan’s Constitutional Rights.

The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. When examining a search or seizure, the central question is whether the actions were reasonable. United States v. McCullough, 457 F.3d 1150, 1163 (10th Cir. 2006). Courts continually have viewed the warrantless entry into a house as presumptively unreasonable. Brigham City v. Stuart, 547 U.S. 398 (2006); United States v. Walker, 474 F.3d 1249, 1252 (10th Cir. 2007) (“It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.”). This presumption results from the understanding that “the home is entitled to the greatest
Fourth Amendment protection.” United States v. Najar, 451 F.3d 710, 712-13 (10th Cir. 2006).

This presumption that a warrantless search of a house is unreasonable can be overcome in certain circumstances. Walker, 474 F.3d at 1252. These circumstances require the government actors to demonstrate that the search “falls within one of a carefully defined set of exceptions based on the presence of ‘exigent circumstances.’” Id. The exceptions based on exigent circumstances adopted by the Supreme Court include the hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect’s escape, or the risk of danger to police officers or other people inside or outside the home. United States v. Thomas, 372 F.3d 1173, 1177 (10th Cir. 2004). Additional factors in analyzing the exceptions based on exigent circumstances are that the circumstance may not be “subject to police manipulation or abuse,” or “motivated by an intent to arrest and seize evidence.” United States v. Zogmaister, 90 Fed. Appx. 325, 330-31 (10th Cir. 2004).

Even with these additional factors, the central question remains whether the search was reasonable. The focus simply shifts to whether “the exigencies of the situation” make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” Brigham City, 126 S. Ct. at 1947. Thus, to find that a new exception is warranted requires a balancing of private interests and unique public safety concerns. Fuerschbach, 439 F.3d at 1203.

It is undisputed that the task force officers entered Mr. Callahan’s house without a warrant. Presently, they do not argue that an established exception based on exigent circumstances made this entry reasonable. Instead, the officers ask this Circuit to join other circuits in their approval of the “consent-once-removed” doctrine.

The “consent-once-removed” doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000); United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987); United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996). The Sixth and Seventh Circuits have broadened this doctrine to grant informants the same capabilities as undercover officers. See United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986); United States v. Yoon, 398 F.3d 802, 807 (6th Cir. 2005).

We find the distinctions between an officer and an informant summoning additional officers to be significant. Had the person inside Mr. Callahan’s home been an undercover officer, no extension of our case law would be necessary. Mr. Callahan would have consented to opening his home to the police. Consent is a well-established method of conducting a reasonable search, despite lacking a warrant. United States v. Ringold, 335 F.3d 1168, 1174 (10th Cir. 2003). Tenth Circuit precedent permits the police to use deception to gain such consent. See Pleasant v. Lovell, 876 F.2d 787, 802 (10th Cir. 1989). Once lawfully inside the home, an officer may effect a warrantless arrest that is supported by probable cause. United States v. Cruz-Mendez, 467 F.3d 1260, 1269 (10th Cir. 2006). We have never drawn a constitutional distinction between an entry or search by an individual police officer and an entry or search by several police officers. Thus, the consent granted to
the hypothetical undercover officer would have covered additional backup officers without any need for additional exceptions to the warrant requirement.

On the other hand, the invitation of an informant into a house who then in turn invites the police, which are the present facts, would require an expansion of the consent exception. In this context, the person with authority to consent never consented to the entry of police into the house. Other courts have overcome this distinction by noting that a state may grant the power to arrest to the police as well as its citizens, and if the informant has the power to arrest, then an informant must be capable of summoning the police. *Yoon*, 398 F.3d at 810-11. This logic is unconvincing. That a citizen has the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state. *Cf. United States v. Hillsman*, 522 F.2d 454, 461 (7th Cir. 1975) (discussing the differences between a private citizen's right to make an arrest and that of a police officer). These distinct obligations and powers must also be reflected in a distinction between inviting a citizen who may be an informant into one's house and inviting the police into one's house.

The officers also ask this court to adopt the "consent-once-removed" doctrine based on policy considerations. They argue that without this doctrine law enforcement will be severely hampered in its pursuit of drug traffickers because the use of informants is vital, and requiring officers to obtain a warrant whenever an informant was in a home would jeopardize personal safety and cause delays. This argument fails for two reasons. First, this contradicts the nature of the exceptions based on exigent circumstances requiring that the police may not manipulate or abuse the circumstances creating the exigency. *Zogmaister*, 90 Fed. Appx. at 330. Second, as recently restated by the Supreme Court in *Georgia v. Randolph*, "[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." 547 U.S. 103 (2006); *Coolidge*, 403 U.S. at 481 ("The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.")

Thus, while our case law would support a holding that the Fourth Amendment allows an undercover officer to summon backup officers within a home after that officer has been invited with consent, neither the case law nor a rational extension of the case law would support including officers summoned by an informant within a home. Based on this, we hold that entering Mr. Callahan's home based on the invitation of an informant and without a warrant, direct consent, or other exigent circumstances, the task force officers violated Mr. Callahan's constitutional rights under the Fourth Amendment.

II. Mr. Callahan's Rights Were Clearly Established

Having established that Mr. Callahan's rights were violated, we now turn to whether these rights were clearly established. For a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains." *Cortez*, 478 F.3d at 1114-15. This does not require a plaintiff to cite a case holding that the specific conduct at issue is unlawful, but rather plaintiff must show that the unlawfulness of the action was apparent. *Jones v. Hunt*, 410 F.3d 1221, 1229 (10th Cir. 2005).

In this case, the relevant right is the right to be free in one's home from unreasonable
searches and arrests. The Supreme Court has repeatedly emphasized the importance of this right, stating "over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes . . . and that searches conducted outside of the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Thirty years after *Katz*, but before the raid on Mr. Callahan’s home, the Supreme Court again emphasized the long history of this right. *Wilson v. Layne*, 526 U.S. 603, 610-11 (1999) ("[T]he 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic' meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest."). Although the Supreme Court decided *Groh v. Ramirez* after the present events occurred, the Court’s analysis in rejecting another exception to the warrant requirement is appropriate, stating "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. . . . Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so." 540 U.S. 551, 564 (2004).

This Circuit has also long adopted the view that warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions. *See e.g., Franz v. Lytle*, 997 F.2d 784, 787 (10th Cir. 1993) (referring to this limitation as a “cardinal principle” of the Fourth Amendment). Although the officers might argue that their entry fell within the “consent” exception to the warrant requirement, Tenth Circuit law provides that a mere transient guest, without a “substantial interest in or common authority over the property,” cannot consent to the entry of others. *United States v. Falcon*, 766 F.2d 1469, 1474 (10th Cir. 1985).

The district court held that the right was not clearly established because other circuits have approved of the “consent-once-removed” doctrine. From the district court’s perspective, this gave the officers a “reasonable argument” that their actions were justified until this Circuit or the Supreme Court rejected the “consent-once-removed” doctrine. This approach misreads a plaintiff’s burden in showing that a right is clearly established. While case law from other circuits is relevant in the analysis, it relates to whether “the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains.” *Cortez*, 478 F.3d at 1114-15. Here, the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances. The creation of an additional exception by another circuit would not make the right defined by our holdings any less clear. Moreover, at the time of these events only the Seventh Circuit had applied the “consent-once-removed” doctrine to a civilian informant. *See United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986). The precedent of one circuit cannot rebut that the “clearly established weight of authority” is as the Tenth Circuit and the Supreme Court have addressed it.
Here, the officers knew (1) they had no warrant; (2) Mr. Callahan had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them. They do not argue on appeal that exigent circumstances justified their entry. Thus, “reasonable officers could [not] have believed that” their warrantless entry into Mr. Callahan’s home “was lawful, in light of clearly established law and the information the officers possessed.” Wilson, 526 U.S. at 615. Although other circuits might disagree, Tenth Circuit law governed the reasonableness of the officers’ beliefs in this case. The officers are not protected by qualified immunity.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KELLY, Circuit Judge, dissenting:

[Restatement of the facts and procedural history.]

On summary judgment, the district court granted Defendants qualified immunity. Today, the court reverses, holding that (1) the “consent once removed” doctrine does not justify officers’ warrantless entry into a residence, at least where the individual gaining initial, consensual entry is a confidential informant, and (2) the law was clearly established that law enforcement may not enter a residence without a warrant in order to assist a confidential informant—present in the home consensually and possessing probable cause—in effectuating an arrest. Because these holdings unnecessarily part company with at least two (and arguably three) of our sister circuits and are contrary to longstanding Fourth Amendment and qualified immunity principles, I respectfully dissent.

In order to overcome a qualified immunity defense, a plaintiff asserting a cause of action under § 1983 must demonstrate that (1) the defendant’s actions violated a federal constitutional or statutory right, and (2) the right alleged to have been violated was clearly established at the time of the conduct at issue. Saucier v. Katz, 533 U.S. 194, 201.

At the highest level of abstraction, the right at issue is the Fourth Amendment “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. Amend. IV. The Supreme Court has interpreted the Fourth Amendment to require government agents to obtain a warrant before entering a residence for purposes of search or arrest. See Welsh v. Wisconsin, 466 U.S. 740, 748 (1984). The warrant requirement, however, is nowhere near absolute; there are exceptions, though they are “few in number and carefully delineated.” United States v. United States Dist. Court, 407 U.S. 297, 318 (1972). “[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent” freely and voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). This exception results from the recognition that the primary purpose of the Fourth Amendment—“protection of the privacy of the individual, his right to be let alone,” Davis v. United States, 328 U.S. 582 (1946)—is forfeited when a homeowner freely allows government agents inside.

Thus, it is abundantly clear that had one or more members of the Task Force gained consent to enter Mr. Callahan’s home, there would be no Fourth Amendment violation. See United States v. Cruz-Mendez, 467 F.3d 1260, 1265-66 (10th Cir. 2006). As the court notes, the same would be true had the Task Force members gained consent under the guise of being plain-clothed citizens looking
to purchase methamphetamine. See Lewis v. United States, 385 U.S. 206, 211 (1966). Analogously, the confidential informant's consensual entry was not a violation of the Fourth Amendment, despite the fact that Mr. Callahan had no idea he was acting as a government agent at the time. See United States v. Lowe, 999 F.2d 448, 450-51 (10th Cir. 1993).

What was unclear in this circuit, at least until today, was whether Mr. Callahan's consent to the confidential informant coupled with the subsequent drug transaction so eroded his legitimate expectation of privacy that officers could enter his residence without a warrant in order to effectuate his arrest. The court answers that question in the negative, invalidating the consent once removed doctrine where confidential informants, rather than full-fledged officers, are involved. I, however, would draw the line elsewhere.

Under the doctrine of consent once removed, law enforcement officials may enter a residence without a warrant if the following conditions are met:

The undercover agent or informant: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers.

United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000). The name “consent once removed” is somewhat of a misnomer, however, because the doctrine depends on more than consent alone. See United States v. Yoon, 398 F.3d 802, 809-10 (6th Cir. 2005). Rather, the doctrine requires both a valid consensual entry—which alleviates the warrant requirement—and a concomitant destruction of the homeowner's legitimate expectation of privacy—which allows officers to enter. Id.; see also United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986) (“[T]he interest in the privacy of the home... has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him.”). When one gives consent for another individual to enter his home in order to buy or sell narcotics, he not only assumes the risk that the person is an undercover government agent, but also that the individual will later testify to his observations, that he will attempt to effectuate an arrest on-the-spot, or that he will take some of the contraband and hand it over to the police. Paul, 808 F.2d at 648. Given the assumption of these risks, the marginal risk that an individual will instead invite law enforcement officials to assist in an on-the-spot arrest “is too slight to bring the requirement of obtaining a warrant into play.” Id.

The crucial question, then, is whether a homeowner's legitimate expectation of privacy is any greater when he allows a confidential informant into his home rather than a full-fledged officer. The court answers that question with a resounding “yes,” but I fail to see the difference in the two situations. The court draws the line at police officers because “the person with authority to consent never consented to the entry of police into the house” when only a confidential informant is admitted and “the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state.” Ct. Op. at 12.

While it is technically correct that Mr. Callahan never consented to the entry of
police, no one ever consents to the entry of police in these undercover situations; they instead consent to the entry of someone who might be the police (an undercover officer), or as in this case, someone who might be a government agent (a confidential informant). So long as an invitation to enter is extended to a government agent (even unknowingly), the pertinent issue is not the type of government agent allowed in, but the consequence of that invitation, combined with the subsequent sale of narcotics, on a resident’s reasonable expectation of privacy. And the only principled resolution of that issue is to hold that, no matter what type of government agent is allowed in, any previously existent legitimate expectation of privacy is abandoned.

I am similarly unconvinced by the court’s reliance on the distinction between those powers possessed by police officers and those possessed by other citizens. The confidential informant in this case was doubtless a government agent for Fourth Amendment purposes. “In deciding whether a private person has become an . . . agent of the government, two important inquiries are: 1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends.” Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989). In this case—as is the same in nearly all cases involving undercover stings utilizing confidential informants—law enforcement knew of the confidential informant’s intrusive actions beforehand, and those actions were undertaken with the purpose of assisting the police.

* * *

Because I see no principled distinction between police officers and other government agents, including confidential informants, in regard to a resident’s legitimate expectation of privacy following consensual entry, I would join the Sixth and Seventh Circuits in clearly extending the consent once removed doctrine to confidential informants. Thus, I would hold that no constitutional violation occurred in this case and that qualified immunity was properly granted.

Although the extension of the consent once removed doctrine to confidential informants is an issue on which reasonable minds might differ, there is no doubt that the right at issue was not clearly established at the time the Task Force acted. “[T]he affirmative defense of qualified immunity . . . protects all but the plainly incompetent or those who knowingly violate the law.” Medina v. Cram, 252 F.3d 1124, 1127 (10th Cir. 2001). To be clearly established, the contours of a right “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Hope v. Pelzer, 536 U.S. 730, 739 (2002). Moreover, the clearly established law inquiry is an objective one, see Anderson v. Creighton, 483 U.S. 635, 641 (1987), and “must be undertaken in light of the specific context of the case, not as a broad general proposition.” Saucier, 533 U.S. at 201. A right is “clearly established” if Supreme Court or Tenth Circuit case law exists on point or if the “clearly established weight of authority from other circuits” found a constitutional violation from similar actions. Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1251 (10th Cir. 1999).

Properly characterized, the right at issue in this case is not simply the right to be free from unreasonable searches and seizures. Instead, it is the right to be free from the warrantless entry of police officers into one’s home to effectuate an arrest after one has granted voluntary, consensual entry to a
confidential informant and undertaken criminal activity giving rise to probable cause. As the district court observed, no Supreme Court or Tenth Circuit decision has ever granted or even discussed that right. The court is no more successful in identifying such a decision. Instead, it relies upon cases holding that a warrantless search of a home is per se unreasonable unless officers gain consent or exigent circumstances exist. See Ct. Op. at 14-16 (citing Katz, Wilson, Groh, Franz, and Falcon). The court’s approach is flawed, however, because it characterizes the right in overly broad terms and begs the question—what is the effect on a resident’s legitimate expectation of privacy where the consent exception to the warrant requirement applies? Because neither the Supreme Court nor the Tenth Circuit has previously addressed this issue in the context of a warrantless entry of officers where a confidential informant is involved, we must look to other circuits for guidance.

Prior to the events giving rise to this litigation, three circuits had issued opinions which could have led a reasonable officer to believe that a warrantless entry was legal in this case. First, the Seventh Circuit, in 1986, clearly held that the consent once removed doctrine applies equally where confidential informants are involved, relying on a reduced expectation of privacy. See Paul, 808 F.2d at 648. Second, the Sixth Circuit, in 2000, applied the consent once removed doctrine in a situation in which both an officer and a confidential informant were granted consent to enter and “the informant accompanying the officer immediately summoned the other officers for assistance.” Pollard, 215 F.3d at 648-49 (emphasis added). Importantly, the Sixth Circuit stated that the consent once removed doctrine applies where “[t]he undercover agent or informant” consensually enters a residence, establishes probable cause, and immediately summons help. See id. at 648 (emphasis added). Finally, the Ninth Circuit, in 1996, explained that the consent once removed doctrine applies where “undercover agent[s]” are involved, see United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996); and a reasonable officer could have believed the term “undercover agent[s]” includes confidential informants acting as government agents.

In sum, because neither the Supreme Court nor the Tenth Circuit has heretofore addressed the propriety of the consent once removed doctrine as applied to confidential informants, and the clear weight of authority from other circuits strongly suggested that the Task Force’s actions in this case were legal, I would hold that the right at issue was not clearly established and would affirm the grant of qualified immunity.
WASHINGTON—When an unsuspecting drug dealer opens the door to a police informant masquerading as a customer, is he also opening the door for the police to come in and conduct a search of his home without a warrant?

The Supreme Court agreed Monday to answer that question, which has divided the lower federal courts.

Several federal circuits have adopted what has come to be called a consent-once-removed exception to the Fourth Amendment’s warrant requirement. The theory is that a suspect who consents to the entry of someone who is really an agent of the police is also, albeit unknowingly, agreeing to let the police enter as well. The police do not need a warrant to enter and search a home if they have the permission of a person authorized to give it.

The new Supreme Court case is an appeal filed by five Utah police officers, members of the Central Utah Narcotics Task Force, who face paying damages to a man in whose home they conducted a search later found to be unconstitutional. The federal appeals court in Denver rejected their claim of immunity. The police do not need a warrant to enter and search a home if they have the permission of a person authorized to give it.

Events in 2002 form the background to the case. A confidential informant working with the officers bought $100 worth of methamphetamine from Afton D. Callahan, inside Mr. Callahan’s trailer home in Fillmore, Utah. By prearrangement, the officers entered the trailer as soon as they received a signal from the informant, who was wearing a wire, that the sale had been completed.

At Mr. Callahan’s trial in state court for possession and distribution of methamphetamine, the judge rejected the defense argument that the evidence should be suppressed because the search without a warrant was unconstitutional. Mr. Callahan then agreed to a conditional guilty plea while appealing the constitutional issue. A Utah appeals court agreed with him, declared the search unconstitutional, and overturned the conviction.

Free of criminal liability, Mr. Callahan then sued the officers for violating his rights under the Fourth Amendment. In response, the officers argued that they were immune from suit under the doctrine of “qualified immunity,” which provides that government officials cannot be held liable for violating a law or constitutional principle that was not clear at the time.

A federal district judge, Paul G. Cassell, who later left the bench, ruled in 2006 that even assuming the search was unconstitutional, the police were entitled to immunity because they could reasonably have believed at the time that the law was on their side. He noted that three federal appellate circuits, although not the one that includes Utah, had accepted the “consent-once-removed” notion.

The United States Court of Appeals for the 10th Circuit, in Denver, disagreed and reinstated Mr. Callahan’s lawsuit. The
appeals court, declining to adopt the consent-once-removed exception, held that the search violated Mr. Callahan’s “clearly established” right “to be free in one’s home from unreasonable searches and arrests.” The Constitution was so clear on this point, the appeals court said, that a reasonable police officer would have known not to proceed without a warrant.

In accepting the officers’ appeal for argument next November, the justices added an issue of their own that substantially increases the prospective importance of the case, Pearson v. Callahan, No. 07-751. The question is how courts are to evaluate officials’ claims of immunity from suit for constitutional violations.

The Supreme Court last considered this issue in a 2001 decision, Saucier v. Katz, which required courts to consider the issue in a precise order, first deciding what the constitutional rule should be and whether the Constitution was violated, and only then deciding whether the issue had been sufficiently unclear at the time so as to make the defendant entitled to immunity.

The rule of Saucier v. Katz has been severely criticized, both inside the court and outside, for making judges do the hard work of deciding disputed constitutional issues that need not have been decided if, at the end of the day, the lawsuit was going to be dismissed on the ground of official immunity.

The court’s purpose in deciding the Saucier case the way it did was to avoid a situation in which the law is never clarified because its very lack of clarity entitles defendant after defendant to official immunity. Only by deciding whether a constitutional right was violated in the first place would “the process for the law’s elaboration from case to case” be preserved, Justice Anthony M. Kennedy wrote in the Saucier majority opinion.

But in the view of the decision’s many critics, it has not turned out that way.

Judge Pierre N. Leval of the United States Court of Appeals for the Second Circuit, in Manhattan, said in a lecture at New York University in 2005 that the Saucier decision was “a puzzling misadventure,” imposing on judges “a new and mischievous rule.” It was “a blueprint for the creation of bad constitutional law,” he said, because often the constitutional holding would not actually matter to the parties in a case that could be resolved more simply through a decision on immunity.

In an opinion last year, Justice Stephen G. Breyer called for the Saucier decision to be overruled as a “failed experiment.” His opinion came in the “Bong Hits for Jesus” case, in which the court struggled to decide whether a high school principal had violated a student’s First Amendment right to free speech by suspending him for displaying a 14-foot banner bearing those words.

The court ruled by a bare majority that the answer was no. Justice Breyer said the entire exercise could have been avoided if the court, acknowledging that the question was close, had simply granted the principal immunity from suit.

Although Justice Breyer spoke only for himself in that case, Morse v. Frederick, he evidently captured his colleagues’ attention. In its order on Monday granting the appeal in the Utah case, the justices instructed the lawyers for both sides to brief and argue a question that neither side had raised: “Whether the court’s decision in Saucier v. Katz should be overruled?”
Police could forcibly enter an apartment where an informant wearing a wire had been invited in the residence by the defendant, the 6th Circuit has ruled in applying the “consent-once-removed” doctrine [in U.S. v. Yoon].

The police equipped the informant with a wire before he entered the defendant’s apartment. Over the wire, officers heard the informant ask about quantities of marijuana and shipping procedures. They then forcibly entered the apartment, where they found large quantities of both marijuana and cocaine.

The defendant was arrested on charges of drug distribution. He claimed that the police search violated his Fourth Amendment rights.

The government relied on the doctrine of “consent-once-removed” to argue that the police could enter the defendant’s apartment to arrest him without a warrant because the informant: (1) entered at the defendant’s express invitation; (2) established probable cause for a search; and (3) immediately summoned help from the officers.

The court agreed.

“[The defendant] has the authority to consent to another being on the premises. Once inside the apartment, [the informant] observed the marijuana and immediately notified awaiting officers as to its presence via an audio transmitter. Notification that marijuana was in the residence established the necessary probable cause to effectuate an arrest. Accordingly, all three criteria of the ‘consent-once-removed’ doctrine were established,” the court said.

It said it was extending the doctrine to cover an informant unaccompanied by an undercover officer who “enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest.”

The court cited similar opinions from the 7th and 9th Circuits.
The Supreme Court on Monday made it easier for police officers accused of using excessive force in arrests to avoid lawsuits.

"An officer might correctly perceive all of the relevant facts," Justice Anthony Kennedy said in the court's opinion, "but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances."

Nevertheless, he declared, as long as "the officer's mistake as to what the law requires is reasonable," he or she is entitled to immunity from trial for civil damages.

The case attracted briefs from law-enforcement organizations; officials from 27 states, including Illinois, Texas, California and New York, supportive of the officers; and a number of civil rights groups, which were critical of the decision.

The case involved the arrest of an animal rights demonstrator during a 1994 speech by then-Vice President Al Gore at the Presidio, an Army base in San Francisco. Gore was there for the celebration of the base's conversion to a national park.

Veterinarian Elliot Katz, 60, president of In Defense of Animals, came to the event with a banner to protest the possible use of the base's hospital for animal experimentation.

During Gore's speech, Katz unfurled the 4-foot-by-3-foot banner and attached it to a fence. It read, "Please Keep Animal Torture Out of Our National Parks." According to the court's opinion, Katz was aware that military regulations forbade protests and the distribution of handbills on military bases.

Two military police officers pulled the banner from the fence, seized Katz by his arms and shoved him into a nearby van, where he caught himself in time to avoid injury.

In his suit Katz charged his constitutional rights had been violated. Specifically, he cited the 4th Amendment's right to be secure against "unreasonable searches and seizures."

Critical to Monday's decision was "the uncontested fact" that Katz, did not suffer "hurt or injury" when military police arrested him and shoved him into a van.

For this reason, Kennedy said, the demonstrator's suit "should have been dismissed at an early stage." The court also noted that the police "did not know the full extent of the threat" posed by Katz as "there were other potential protesters in the crowd."

Furthermore, the opinion said, the police were required "to recognize the necessity to protect the vice president by securing respondent [Katz] and restoring order to the scene."

In Katz's subsequent lawsuit seeking damages, a federal judge held that Pvt. Donald Saucier, one of the arresting military police officers, must stand trial.

The U.S. appeals court affirmed the decision.
The Justice Department last year urged the Supreme Court to reverse the lower court, maintaining that if the ruling were allowed to stand, it would subject law-enforcement officers to frivolous lawsuits.

Gilbert Gallegos, national president of the 294,000-member Grand Lodge of the Fraternal Order of Police, praised the ruling. By granting immunity from being sued for conducting a lawful arrest, Gallegos said, the court was providing police "a zone of protection for making the difficult, on-the-spot decisions in their discharge of their official duties."

But David Rudovsky, a University of Pennsylvania law professor, contended the ruling "gives police two bites on the apple."

If an officer is found to have used excessive force, he can still win as long as he thought it was reasonable to use force, according to Rudovsky, who authored a brief for the American Civil Liberties Union, the National Lawyers Guild, the Center for Constitutional Rights and the Lambda Legal Defense and Education Fund.
“A man’s home is his castle—with certain exceptions,” paraphrasing the Fourth Amendment to the U.S. Constitution and case law commentary.

One of those exceptions is consent. A defendant always can consent to a police search of his home, if such permission is freely given. Courts have expanded consent to include permissions granted by other residents of the home, such as a spouse.

Consent was expanded yet another level under a legal fiction called “consent-once-removed,” where consent can be given on behalf of an unknowing defendant by an undercover government agent or a confidential informant.

The standards for an allowable consent-once-removed were articulated in U.S. v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987):

- The agent or informant enters at the express invitation of someone with authority to consent.
- The agent or informant establishes that probable cause exists to effect an arrest or search.
- The agent or informant immediately summons help from other officers.

The agent/informant’s consent is imputed to the defendant.

The consent-once-removed doctrine was used by the government to gather evidence to indict Walter Jachimko for marijuana dealing. The story began in March 1992 when convicted felon Joseph Hendrickson volunteered his services to the Drug Enforcement Administration to investigate a marijuana-growing operation managed by Robert and William Anhalt. For almost three months, Hendrickson and DEA agents laid the groundwork for the arrest of the Anhalts. Finally, on June 30, 1992, the DEA was ready, and agents equipped Hendrickson with a buzzer to alert agents if he saw more than 100 marijuana plants in Robert Anhalt’s apartment.

Hendrickson entered Anhalt’s residence, but did not press the buzzer. Instead, he and Anhalt left the apartment and drove to 4900 W. Newport Ave. in Chicago. The DEA had no idea who lived there, how many units were in the building, or whether any crimes were being committed at that address. Hendrickson and Anhalt entered the building. Twenty minutes later, the agent-alarm buzzer sounded. The DEA officers burst in and arrested Anhalt and Walter Jachimko, who lived at the address and was present at the time.

Jachimko moved to suppress the fruits of the search, arguing that he had never given the government the right to search his residence. U.S. District Judge Brian Barnett Duff granted Jachimko’s motion in U.S. v. Anhalt, 814 F.Supp. 750 (1993). Duff distinguished this case from other consent-once-removed situations on two grounds: There had been no previous investigation of Jachimko before the search of his home, and this led to an inflated importance to the testimony of Hendrickson, a man Duff held to be a
perjurer as well as a convicted felon.

The government appealed to the 7th U.S. Circuit Court of Appeals, which overturned Duff’s order in *U.S. v. Jachimko*, 19 F.3d 299 (1994). That opinion held that the distinctions Duff made between Jachimko’s case and other consents-once-removed were irrelevant. The case was returned to Duff so he could rule on Jachimko’s motion to suppress under the three-part standard set out in the *Diaz* case.

On remand, Duff noted that *Diaz* requires the existence of probable cause in warrantless searches such as the one here. So the question in this case was, Did the government meet its burden of showing, by a preponderance of the evidence, that Hendrickson had established probable cause inside Jachimko’s apartment prior to sounding the alarm?


First, Duff dismissed the testimony of the DEA agent on the grounds that it was riddled with hearsay, leading questions and lack of foundation, making it totally useless. He strongly criticized the government for questioning the agent in that manner.

Duff, however, saved his most withering remarks for Hendrickson. The judge listed 10 separate aspects of Hendrickson’s testimony and biography that showed him to be an out-and-out liar. The worst offense was Hendrickson’s admission of cocaine use in June 1992, in violation of his probation on an earlier conviction. That violation hearing was prosecuted by the U.S. attorney’s office on the morning of the same day as the hearing on the Jachimko suppression motion—before Duff. Yet, at the suppression hearing later that day, when Hendrickson stated that he had not used drugs since 1987, the government said nothing.

Duff then reviewed the various cases interpreting consent-once-removed. Under *Diaz*, the government has the responsibility to establish the existence of probable cause—”a substantial probability that certain items are the fruits, instrumentalities or evidence of crime and that these items are presently to be found at a certain place.”

In this case, the government failed to establish probable cause because the DEA agent’s testimony was irretrievably defective and Hendrickson’s testimony was filled with lies. Therefore, Duff granted Jachimko’s motion to suppress the evidence the DEA seized from his apartment.

This opinion is important to defense lawyers in not only presenting an excellent summary of the consent-once-removed doctrine but also in showing how that doctrine can be misused, and how such misuse can be fought successfully. While this decision probably will be appealed to the 7th Circuit, Duff was careful to cover all the required legal and factual bases in his 21-page opinion, making appellate affirmation of his ruling much more likely.

[The case was not reviewed by the Seventh Circuit and stands as good law in the jurisdiction.]
"When Should Courts Address Qualified Immunity?"

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Ilann Margalit Maazel

We all know the maxim: "ignorance of the law is no defense." When the perpetrator of an assault comes before a court, it does not matter whether he knew that assault is a crime. When a party breaches a contract, it does not matter whether she understood offer, acceptance, and consideration, much less the intricacies of the statute of frauds or the parol evidence rule.

A crime is a crime, and a breach is a breach. All persons in this country are simply presumed to know the law, whether they do or not. Were it otherwise, cases would turn not only on the facts and the law, but on the understandings and backgrounds of millions of different litigants, a plainly unacceptable result in a nation of laws, not men.

Such is the maxim, but for every legal rule, there is an exception, and there is one glaring exception we discuss here: the doctrine of qualified immunity.

What Is Qualified Immunity?

Qualified immunity is an affirmative defense generally available in damage actions against individual public officers performing discretionary functions. The Supreme Court created the qualified immunity doctrine to serve a noble public policy goal: encouraging citizens to work for their government. Lawsuits against public officers may not always be valid, but they always create certain "social costs": "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." The fear of being sued may also "dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." At the same time, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."

In the overwhelming majority of civil rights cases against public officers, the Court has therefore created the qualified immunity doctrine, itself a balance between absolute immunity and no immunity.

What is qualified immunity? It is the right of government officials performing discretionary functions to be shielded from liability for civil damages, even if they violate the law, as long as they do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." The court determines whether the law was clearly established at the time an action occurred. If it was not, "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." But if the law was clearly established, "the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."

Put another way, a public officer (whether a police officer or a presidential aide) is not liable for damages if his "mistaken understanding" of the law was "reasonable." For regular citizens, ignorance of the law is
not a defense. For public officers (including law enforcement officers), “reasonable” ignorance of the law is a defense, at least in civil rights actions for damages.

**Timetables**

When Should a Court Address Qualified Immunity? If the defendant’s alleged conduct did not violate clearly established law, should a court say whether the conduct violated the law at all? In *County of Sacramento v. Lewis*, the Supreme Court held in 1998 that the “better approach” in qualified immunity cases “is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.” In two subsequent cases, the Supreme Court (citing *Sacramento*) clarified that courts “must” first determine whether the plaintiff has alleged the deprivation of a legal right, “and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.”

The following year, however, the U.S. Court of Appeals for the Second Circuit resisted the Supreme Court, focusing on Sacramento’s “better approach” language, and minimizing the Court’s subsequent mandatory admonitions to address the underlying constitutional question first. The Second Circuit in *Horne v. Coughlin* articulated a multifactor test for determining the order of judicial resolution, including whether the underlying question will “escape federal court review over a lengthy period” if the court only resolves the qualified immunity issue, “the egregiousness of the conduct that is challenged,” and the “ease of the decision” on the underlying constitutional issue. See *Horne v. Coughlin*, 191 F.3d 244, 249 (2d Cir. 1999).

But in 2001, the Supreme Court returned to the issue, holding in no uncertain terms that courts “must” first decide whether “the officer’s conduct violated a constitutional right[.] This must be the initial inquiry.” The Court explained: “This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

One might have thought this settled the issue, but in 2002 the Second Circuit in *African Trade & Information Center Inc. v. Abromaitis* disregarded *Saucier*, holding that while the “better approach” is to resolve the underlying constitutional question first, the court is nevertheless free to consider qualified immunity first. Although *African Trade* cited *Sacramento* (a 1998 case) and *Horne* (a 1999 case), it did not cite *Saucier* (a 2001 case). In 2003, the Second Circuit did cite *Saucier*, stating that it was “bound to implement that decision.” But the court then stated it would only apply *Saucier* in the “vast majority” of qualified immunity cases, and encouraged lower courts to “use their good sense and limit [Saucier] to those cases where it was meant to apply.”

By its own terms, however, *Saucier* is always meant to apply. “Must” means must. In a 2004 dissent from a denial of certiorari, Justice Antonin Scalia—while noting the discomfort a minority of justices have with the *Saucier* rule—reiterated *Saucier’s*
“mandatory order of priority for resolution,” and specifically cited Horne as a case that “mistakenly” concluded “that the constitutional-question-first rule is customary, not mandatory.”

And last term, the Supreme Court once again reaffirmed that courts are “required” to resolve the underlying constitutional question first. “This must be the initial inquiry.” If, “and only if, the court finds a violation of a constitutional right,” the court can turn to qualified immunity. Scott v. Harris, 127 S.Ct. 1769, 1774 (2007) (citing Saucier).

Nevertheless, a number of district courts in this circuit, apparently unaware of the Supreme Court’s mandatory command in Saucier and Harris, are still following the more flexible, but erroneous, Second Circuit approach.

**Qualified Immunity**

Reasons for Considering Qualified Immunity First. It is perhaps ironic that, on the issue of qualified immunity, the Second Circuit has repeatedly failed to follow clearly established Supreme Court precedent. Why the resistance? To be sure, there are valid reasons to consider qualified immunity first, many set forth in a fascinating discussion between Judge Pierre Leval in the (since-overruled) majority opinion in Horne, and Judge Richard J. Cardamone in the Horne dissent. The Horne majority first appealed to judicial restraint, warning “against reaching out to adjudicate constitutional matters unnecessarily.” The majority then stated that “a court’s assertion that a constitutional right exists would be pure dictum” where there is qualified immunity. Judges might be “insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication,” and parties “may do an inadequate job briefing and presenting an issue that predictably will have no effect on the outcome of the case.” Even worse, if a lower court establishes a right but dismisses the case on qualified immunity grounds, the defendant (who won the case) will have no right to appellate review. Finally, “[f]or a judiciary that is already heavily burdened with cases it must decide, offering an unnecessary but simple solution to an easy problem is better justified than undertaking unnecessarily to untangle a difficult, complex issue.”

**Underlying Legal Issue**

Reasons for Considering the Underlying Legal Issue First. In dissent, Judge Cardamone stated that the usual rule of constitutional avoidance is “inapposite, since even a finding of qualified immunity with respect to an alleged constitutional violation requires some determination about the state of constitutional law at the time the officer acted.” As to the right of appeal, Judge Cardamone noted that “there is no indication that a plaintiff whose suit is...dismissed [on qualified immunity grounds] will lack incentive to appeal”; thus the appellate court will usually have the opportunity and the obligation to reconsider the merits. Perhaps the more satisfying answer, however, is Justice Scalia’s: simply give the defendant who loses on the merits but prevails on qualified immunity the right to appeal.

Judge Cardamone’s core point, and the point motivating the Supreme Court’s repeated command to resolve the merits first, is simply this: what is the alternative? Were the court not to resolve the merits first, the “only real alternative is not to declare the right at all, thereby leaving standards of official conduct even more uncertain, to the
detriment of both officials and the public.” The court would fail the fundamental “duty of the judicial department, to say what the law is” and “constitutional standards of official conduct will be frozen in uncertainty, a result at odds with government under the rule of law.”

The Horne majority recognized this possibility, but noted that qualified immunity would not always preclude review of the underlying legal question. Qualified immunity, for example, is no defense in an injunctive case, nor in a case against a municipality, nor in a motion to suppress in a criminal proceeding. But this is cold comfort in the vast majority of federal civil rights cases, certainly the vast majority of police misconduct cases, where plaintiffs cannot sue the municipality (because there is no custom, practice, or policy of violating the law, see Monell v. Department of Social Servs., 436 U.S. 658 (1978)), nor sue for injunctive relief (because of standing requirements set forth in City of Los Angeles v. Lyons, 461 U.S. 95 (1983) and its progeny). And it is the rare case indeed where public officials are criminally prosecuted for civil rights violations.

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**Conclusion**

Reasonable people can disagree whether a court should be able in a special case to consider qualified immunity first. But no one can dispute the current state of the law. The Supreme Court has held repeatedly and in no uncertain terms that courts must first resolve the merits, an order of decision necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.” The Second Circuit is “bound to follow” Supreme Court precedent, as is every district court within the Second Circuit. Courts in this and other circuits should be aware of their obligation to follow Saucier, Harris, Wilson, and Conn, and resolve the merits first.

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Oregon v. Ice
07-901


Thomas Eugene Ice was convicted of two counts of burglary and four counts of sexual abuse for twice entering a tenant’s apartment to abuse the tenant’s 11 year old daughter. In sentencing, the trial judge found additional facts under ORS 137.123 and imposed consecutive sentences instead of concurrent sentences. On appeal, Ice argued that his right to a jury trial was violated because the additional facts were not made by a jury. The Appellate Court upheld the sentence, but the Oregon Supreme Court agreed with the defendant and remanded the case to the lower court.

Question Presented: Whether the Sixth Amendment, as construed in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

State of OREGON, Respondent
v.
Thomas Eugene ICE, Petitioner

Supreme Court of Oregon

Decided October 11, 2007

GILLETTE, J.

The question in this criminal case is whether the state or federal constitution requires that a jury, rather than a judge, find the facts that Oregon law requires be present before a judge can impose consecutive sentences. Over defendant’s objection, the trial court in the present case imposed consecutive sentences based on its own factual findings. The Court of Appeals affirmed the trial court’s judgment without opinion. State v. Ice, 178 Ore. App. 415 (2001). We allowed defendant’s petition for review and now reverse the decision of the Court of Appeals and the judgment of the trial court.

Defendant managed an apartment complex where the 11-year-old victim, her mother, and younger brother lived. On two occasions, defendant entered into the family’s apartment at night. On each occasion, defendant went into the victim’s bedroom and touched her breasts and then her vagina.

Based on those acts, a grand jury indicted defendant for committing six crimes. The indictment alleged that defendant twice committed first-degree burglary by entering the victim’s apartment with the intent to commit sexual abuse. The indictment also alleged that, during each burglary, defendant committed two acts of first-degree sexual abuse; specifically, the indictment alleged that, on each occasion, defendant touched
the victim’s breasts and then her vagina. Defendant pleaded not guilty. The case was tried to a jury. After considering the evidence, the jury convicted defendant of all six charges.

Before the sentencing hearing, the parties submitted sentencing memoranda. Regarding the length of the sentences, the state recommended that the trial court impose enhanced or upward departure sentences on the two burglary convictions and also on the two sexual abuse convictions based on touching the victim’s vagina. It did not argue that the court should impose departure sentences on the two sexual abuse convictions based on touching the victim’s breasts. With respect to the separate question of whether the sentences should run concurrently or consecutively, the state contended that there were two separate criminal episodes based on the two burglaries and that the sentences arising out of each of those criminal episodes should run consecutively to each other. The state also argued that, within each of the two criminal episodes, the sentence for sexual abuse based on touching the victim’s vagina should run consecutively to the sentence for burglary. It recommended, however, that the sentences for sexual abuse based on touching the victim’s breasts should run concurrently with the sentences for sexual abuse based on touching the victim’s vagina.

In his sentencing memorandum, defendant did not address whether the court should impose departure sentences. Regarding consecutive sentences, defendant agreed that there were two criminal episodes and that ORS 137.123(2) would permit the trial court to impose the sentences arising out of the second episode consecutively to the sentences arising out of the first episode. Defendant noted, however (and the state agreed), that the trial court could impose consecutive sentences within each episode only if it made certain factual findings set out in ORS 137.123(5). Defendant did not argue, in his sentencing memorandum, that either the state or federal constitution required a jury to make those findings. Defendant did argue, however, that the two sexual abuse convictions that occurred within each criminal episode should merge and that, to the extent that there might be a factual basis for finding that merger was not appropriate, the state constitution required a jury to make that factual finding.

After defendant filed his sentencing memorandum but before the sentencing hearing, the United States Supreme Court issued its decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Defendant then filed a supplemental memorandum bringing that decision to the trial court’s attention. The memorandum recited the holding in that case and then stated, “Accordingly, it is the province of the jury to determine which facts constitute a crime, and the jury must also consider any factors which may result in a sentence more severe than contemplated by statute.” Defendant’s memorandum did not purport to explain precisely how Apprendi applied to the various sentencing decisions before the trial court. More specifically, defendant did not argue that Apprendi applied to departure sentences; that is, he did not argue that, as the United States Supreme Court held four years later in Blakely v. Washington, 542 U.S. 296 (2004), the rule in Apprendi applied not only to sentences that exceeded the statutory maximum, but also to departure sentences that exceeded guidelines sentences but stayed within the statutory maximum.

At the sentencing hearing, the trial court noted that it had received extensive sentencing memoranda from the parties and asked whether either had anything to add.
Defendant clarified one point. He argued that, contrary to his statement in the sentencing memorandum, the question whether the two convictions for burglary (and the attendant sexual abuse convictions) arose out of separate criminal episodes turned on a factual finding that, under the state constitution, the jury had to make.

Having considered the parties' arguments, the trial court rejected defendant's arguments. The court then followed the state’s recommendations. It imposed upward departure sentences on the two burglary convictions and the two sexual abuse convictions based on touching the victim’s vagina. It did not impose upward departure sentences on the remaining two sexual abuse convictions. It found that the first burglary charge and the two related sexual abuse charges occurred within a single criminal episode, which ordinarily would require that the sentences on those convictions be concurrent unless the court made certain factual findings. See ORS 137.123(5). On that point, the court reasoned:

"[T]he court can impose consecutive sentences [for offenses that occur within a continuous and uninterrupted course of conduct] if the court finds [under ORS 137.123(5)] that the criminal offense for which consecutive sentence was contemplated was not merely an incidental violation of a separate statutory provision. I do make that finding in this case, that it was an indication of your willingness to commit more than one criminal offense.

"In addition, I find that in committing sexual abuse in the first degree that you caused or created a risk of causing greater, qualitatively different loss, injury or harm to the victim than you did in count 1. So, as I said, your sentence on count 2 [sexual abuse for touching the victim's vagina] will be consecutive to the sentence [on] count 1 [burglary]."

The court ordered that the sentence on the remaining sexual abuse conviction run concurrently with the sentence on the sexual abuse conviction for touching the victim’s vagina.

The court then found that the second burglary was a “second separate incident” and ordered that the sentence on that conviction run consecutively to the other sentences. Regarding the sexual abuse convictions for touching the victim’s vagina and breasts during that second burglary, the court, applying the same reasoning that it had used in connection with the first burglary, ordered that the sentence on the conviction for sexual abuse based on touching the victim’s vagina run consecutively to the sentence for the second burglary, but that the conviction for sexual abuse based on touching the victim’s breasts run concurrently with the other sentences.

Defendant appealed. Among other things, he argued that the trial court violated his state and federal constitutional rights both when it imposed departure sentences and when it ordered that the sentences for four of his six convictions run consecutively rather than concurrently. He further contended that, even if he had failed to preserve those issues, the Court of Appeals should reach them under the plain error doctrine. As noted, the Court of Appeals affirmed the trial court’s judgment without opinion, and we allowed defendant’s petition for review to consider whether either the state or federal constitution requires that a jury
rather than a judge find the facts necessary to impose consecutive sentences.

[Concluding that the defendant did not preserve his challenge to the upward departure sentences.]

Defendant also argues that, under both the state and federal constitutions, he had a right to have the jury decide the facts on which the court based its decision to impose consecutive sentences. Before turning to those arguments, we first describe ORS 137.123, which defines when courts may impose consecutive sentences. See ORS 137.123(1). ORS 137.123 permits consecutive sentences in two different situations. First, ORS 137.123(2) provides that, when a court sentences a defendant for offenses that “do not arise from the same continuous and uninterrupted course of conduct” or when a court sentences a defendant who already is serving a previously imposed sentence, “the court may impose a sentence concurrent with or consecutive to the other sentence or sentences.” Second, ORS 137.123(4) provides that, when “a defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court” finds one of two facts. If the court finds either:

“(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant’s willingness to commit more than one criminal offense; or

“(b) [that t]he criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct,”

then the trial court “has discretion to impose consecutive terms of imprisonment.” ORS 137.123(5).

The trial court viewed this as a case involving both statutory bases for imposing consecutive sentences: First, the trial court found that the convictions for the two burglaries (and the attendant sexual abuse convictions) arose out of “separate incident[s]” and, thus, did not “arise from the same continuous and uninterrupted course of conduct.” See ORS 137.123(2) (stating that criterion). Accordingly, the trial court concluded that it had discretion under ORS 137.123(2) to order that the sentences arising out of the second burglary run consecutively to the sentences arising out of the first burglary. Second, the trial court implicitly found that the three offenses (the burglary and the two instances of sexual abuse) that occurred during each burglary arose out of a “continuous and uninterrupted course of conduct.” See ORS 137.123(4) (stating that limitation). As to the latter criterion, and before the trial court could impose consecutive sentences on the burglary and sexual abuse convictions, it had to find either that the convictions for burglary and sexual abuse reflected a “willingness to commit more than one criminal offense” or that the two offenses “caused ... greater or qualitatively different loss, injury or harm to the victim.” See ORS
137.123(5)(a) and (b). As noted, the trial court made both findings consistent with the criteria in both ORS 137.123(5)(a) and (b) before deciding that, within each criminal episode, the sentence for one count of sexual abuse would run consecutively to the sentence for burglary.

[Concluding that the trial court’s actions did not violate the defendant’s right to trial by jury under Article 1, section 11 or the Oregon Constitution.]

We turn to defendant’s arguments under the Sixth Amendment to the United States Constitution. Notably, the Supreme Court of the United States has rejected, for purposes of the Sixth Amendment, the analytical line that this court has taken in the past (and that we have described above) with respect to Article I, section 11. That is, the Court has indicated that it is wrong to allow the scope of the right to a jury trial to depend on the label—"element" or "sentencing factor"—that the legislature chooses to assign to a factual issue. Blakely, 542 U.S. at 306. It also has criticized judicial attempts to look beneath the legislative labels in this area, as this court did in Wedge, on the ground that such analytical efforts are inevitably subjective and manipulable. Id. at 307-08. Ultimately, the court rejected the idea that the Framers of the Sixth Amendment would have thus

"left definition of the scope of jury power up to a judges’ intuitive sense of how far is too far. We think that claim [that the Sixth Amendment should be deemed to permit courts, rather than juries, to decide facts that courts deem to be mere ‘sentencing factors’] not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."

Id. at 308 (emphasis in original).

Thus, in a series of cases, beginning with Jones v. United States, 526 U.S. 227 (1999) and ending, for the moment, with Cunningham v. California, 127 S. Ct. 856 (2007), the United States Supreme Court has opted for a "bright line" rule when confronted with the sort of claims that we now are considering under the Sixth Amendment in this case. That rule is most succinctly stated in Apprendi: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490 (emphasis supplied). In Apprendi, the court applied that rule in concluding that a defendant’s Sixth Amendment rights had been violated when a trial court imposed a prison term that exceeded the statutory maximum for the crime for which the jury had convicted the defendant, based on the trial court’s own determination that defendant had committed the crime for racially motivated reasons. Id. at 491. Similarly, in Blakely, the court employed that rule when it held that the Sixth Amendment was violated when a trial court imposed a sentence that exceeded the statutory maximum for the crime for which the jury had convicted him of, based on the trial court’s own determination that the defendant had acted with “deliberate cruelty.” Blakely, 542 U.S. at 301-14.

In United States v. Booker, 543 U.S. 220, 236 (2005), the Court explained its rationale for adopting the foregoing rule. First, it noted that, with the advent of determinate
sentencing schemes, it had been forced to consider “the significance of facts selected by legislatures that . . . increased the range of sentences possible for the underlying crimes.” Under sentencing schemes that permitted trial judges to impose a sentence that exceeded the statutory maximum for an offense, based on finding certain sentencing factors, “[i]t became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance” of the evidence. Id. The Court then explained that it had issued its holdings in Apprendi and Blakely in response to this “new sentencing practice.” Id. at 237. The Court reasoned:

“As it thus became clear that sentencing was no longer taking place in the tradition [of judicial discretion in sentencing] that Justice Breyer invokes [in his dissenting opinion], the Court was faced with the issue of preserving an ancient guarantee [to trial by jury] under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led [the Court] to the answer first considered in Jones and developed in Apprendi and subsequent cases culminating with this one.”

Id. (emphasis added). We believe that the foregoing statement from Booker makes it inescapably clear that the rule in Apprendi and Blakely is not directed at the traditional discretion of judges to select a sentence within a range that the legislature has selected and the jury’s verdict determines, but at sentencing schemes that permit or require judges to impose sentences that are longer than sentences that a jury’s verdict alone would authorize.

Obviously, in the context of that concern, it does not matter that a factual determination is of a type that traditionally has been made by judges in the exercise of their sentencing discretion. The concern is with facts that increase a defendant’s sentence beyond the prescribed maximum for the crime that the jury determined that the defendant committed. Under Apprendi, Blakely, and their progeny, those facts must themselves be decided by a jury.

Does the Apprendi rule apply to the present circumstance, i.e., to factual findings that do not increase the sentence for any individual count but that authorize imposition of consecutive sentences? The state contends that it does not. The state notes that, as it is stated and applied in Apprendi, Blakely, and Booker, the rule is predicated on an increase beyond the prescribed statutory minimum “for a crime.” It then argues:

“The relevant statutory maximum for Apprendi purposes is the maximum sentence for each separate, individual offense. The consecutive-sentencing determination is a quintessential sentencing determination that transcends each offense and only becomes relevant when a jury has already convicted a defendant beyond a reasonable doubt of two or more offenses. When a trial court imposes consecutive
sentences, it imposes a sentence that is within the statutory maximum for each of the offenses and then orders them to be served consecutively. Accordingly, consecutive sentences do not implicate the rule from *Apprendi*.”

We think, however, that in so arguing, the state ignores many statements in the cases that describe the problem in terms that are not offense specific but that focus, instead, on the quantum of punishment. For example, in *Apprendi*, the court insisted that

> “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict.”

530 U.S. at 494 (emphasis added).

More importantly, consecutive sentencing as it occurred in the present case clearly implicates the principles expressed in *Apprendi*, *Blakely*, and *Booker*, even if it does not mirror the specific circumstances in those cases. It is important to recognize, in that regard, that, under ORS 137.123, consecutive sentencing in this state is not simply a matter of judicial discretion, but can be imposed only after the sentencing judge has made certain legislatively required findings. At least with respect to offenses that arise out of the same continuous and uninterrupted course of conduct, the jury’s issuance of multiple guilty verdicts will only support concurrent sentences, unless the judge makes those required findings.

As we have suggested, that arrangement conflicts with the principles underpinning *Apprendi*, *Blakely*, and *Booker*, if not with the *Apprendi* rule itself. Under the statutes that we just have described, the maximum aggregate sentence that may be imposed, based solely on the jury’s verdicts and without judicial factfinding, when a defendant is convicted of multiple offenses, assumes that all the sentences run concurrently. But, under the same statutes, additional factfinding—judicial factfinding—is required to justify consecutive sentencing. Under that arrangement, a consecutive sentence necessarily “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict,” *Apprendi*, 530 U.S. at 494, based on judicial factfinding—and thereby violates the principles discussed in *Apprendi* and *Blakely*.

We acknowledge that most other courts that have considered this question have reached a different conclusion, usually on the ground that *Apprendi* and its progeny announce a narrow rule that should only be applied in the circumstances in which the United States Supreme Court heretofore has demanded its application. See, e.g., *State v. Cubias*, 155 Wn. 2d 549 (2005); *People v. Black*, 41 Cal. 4th 799 (2007); *People v. Wagener*, 196 Ill. 2d 269 (2001) (all to that effect). The dissent takes the same view. However, we disagree fundamentally with the proposition that the *Apprendi* rule is a narrow one. In fact, we think that the opposite is true—i.e., we think that the rule of *Apprendi* and its progeny establishes the right to a jury trial respecting whatever factors a legislature has identified as permitting the enhancement of an otherwise statutorily limited sentence. The fact that the Court has yet to speak specifically to consecutive sentencing in this respect seems to us to prove only that it has not yet had a case on the subject. The *Apprendi*, *Blakely*, and *Booker* decisions all go to great lengths to discuss the broad principles underpinning their particular holdings. It would be wrong for us to engage
in an adamantine refusal to get the message. We think that the application of the Apprendi cases to the present problem is obvious. In the present case, the trial court, over defendant’s objection, made a number of findings, already identified, to support its decision to order defendant to serve his sentence on Count 4 (the second burglary count) consecutively to Count 1 (the first burglary count) and Count 2 and Count 5 (the two sexual abuse counts) consecutive to their respective burglaries. Those findings satisfied the requirements of ORS 137.123(2), (4) and (5) for imposition of consecutive sentences. However, the findings were not made by a jury, but were used to increase defendant’s punishment beyond the aggregate statutory maximum that the jury’s verdict alone would support. The trial court thus imposed the consecutive sentences based on its own fact-finding and in violation of defendant’s Sixth Amendment rights. That was error under the rule of Apprendi and Blakely, as we understand it. The trial court’s error was then sustained by the Court of Appeals. That, too, was error. The case must be remanded to the trial court for resentencing.

The decision of the Court of Appeals is REVISED. The judgment of the circuit court is REVISED, and the case is REMANDED to the circuit court for further proceedings.

KISTLER, J., dissenting.

The majority holds that the rule in Apprendi v. New Jersey, 530 U.S. 466 (2000), applies to the question whether a trial court should impose multiple sentences concurrently or consecutively. The majority’s decision marks an abrupt departure from years of tradition; it converts what historically has been an issue for trial judges into a federal constitutional question for juries. Neither the holding in Apprendi nor its reasoning supports extending that decision to the question of consecutive sentencing. Almost every court that has considered this question has held that Apprendi does not apply in this context. I agree with those decisions and respectfully dissent from the majority’s contrary holding.

* * *

Apprendi does not sweep as broadly as the majority perceives. Rather, the Court has been careful to explain that not “every fact with a bearing on sentencing must be found by a jury.” Jones v. United States, 526 U.S. 227, 248. And it has not extended the reach of Apprendi beyond the issue that gave rise to it—the problem posed by determinate sentencing schemes that enhance a defendant’s sentence beyond the statutory maximum for a single offense on the basis of facts that a judge (rather than a jury) finds by a preponderance of the evidence (rather than beyond a reasonable doubt). See United States v. Booker, 543 U.S. 220, 236-37 (2005) (explaining that problem posed by determinate sentencing schemes gave rise to the rule in Apprendi). The majority errs in extending the rule in Apprendi farther than either the holding or the reasoning in that case warrants.

The issue before the Court in Apprendi was narrow. In that case, and the cases that have followed it, a trial court had enhanced a defendant’s sentence for a single offense beyond the statutory maximum authorized for that offense based on a fact that the court had found during sentencing by a preponderance of the evidence. See, e.g., Apprendi, 530 U.S. at 468-69 (describing the defendant’s sentence). The constitutional issue before the Court in each of those cases was whether the sentencing factor that the
trial court had relied on to enhance the defendant’s sentence was, in effect, an element of the offense that a jury had to find beyond a reasonable doubt.

Faced with that issue, the Court held in Apprendi: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. By its terms, the holding in Apprendi does not extend to the question of how a trial court should aggregate multiple sentences. Rather, the holding in Apprendi addresses the procedures that a trial court must follow when “the penalty for a crime [exceeds] the prescribed statutory maximum” for that crime. That is, Apprendi answers the question what are the elements of an offense that the state must prove beyond a reasonable doubt. It does not answer the separate question of how a trial court should aggregate multiple sentences when a jury has found a defendant guilty of multiple offenses.

***

Were there any doubt about the scope of the rule from Apprendi, the passage that the majority quotes from Booker removes it. As that passage makes clear, the rule in Apprendi arose in response to “a new trend in the legislative regulation of sentencing” that the Court first recognized in 1986 in McMillan when it “considered the significance of facts selected by legislatures that . . . increased the range of sentences possible for the underlying crime.” 543 U.S. at 236. That is, the Court adopted the rule in Apprendi to address determinate sentencing schemes that defined the maximum sentence for an offense but permitted a trial court to enhance the sentence for that offense if the trial court found certain “sentencing factors” by a preponderance of the evidence.

The rule in Apprendi provides a means for determining whether those “sentencing factors” are elements of the offense that the state has to prove beyond a reasonable doubt. It does not have a broader reach. Indeed, the Court was careful to explain in Booker that the rule it announced in Apprendi was not intended to displace traditional sentencing practices. As the Court explained, “it is the new circumstances [first recognized in 1986], not a tradition or practice that the new circumstances have superseded, that have led [the Court] to the answer first considered in Jones and developed in Apprendi and subsequent cases culminating with this one.” Id. at 237. When the Court has explained, as it did in Booker, that the rule in Apprendi was intended to solve the problem posed by determinate sentencing schemes, we should be hesitant to extend Apprendi’s holding beyond the limits that the Court has identified. That is especially true when, as in this case, extending Apprendi displaces authority that trial courts traditionally have exercised—i.e., the authority to decide how to aggregate multiple sentences.

Not only is the majority’s decision today at odds with the holdings and reasoning of the Supreme Court’s cases, but it is out of line with the clear weight of authority. In states that require factual findings as a predicate to imposing consecutive sentences, almost every court that has considered the issue has held that Apprendi does not apply to the decision to impose consecutive sentences. Specifically, the courts in Colorado, Illinois, Indiana, Iowa, Louisiana, Maine, Minnesota, New Jersey, and Tennessee have held that Apprendi does not apply to the decision
whether to impose consecutive sentences.

To be sure, there is a split among the states that have considered this recurring issue of federal law—a split that the majority’s decision deepens and confirms. One other state has held, as the majority does, that *Apprendi* applies in this context, *State v. Foster*, 109 Ohio St 3d 1 (2006), and another state’s decisions provide mixed support for the majority’s decision. *Compare State v. Cubias*, 155 Wn 2d 549 (2005) (holding that *Apprendi* does not apply to a factual prerequisite to imposing consecutive sentences), with *In re VanDelft*, 158 Wn 2d 731 (2006) (holding that *Apprendi* does apply to a factual prerequisite to imposing consecutive sentences). Although the majority can count at least one and perhaps two states in its corner, the overwhelming number of state courts (and federal courts considering the constitutionality of state sentencing statutes) have held that *Apprendi* does not apply to the decision to impose consecutive sentences. Because I would not extend the rule in *Apprendi* beyond either the issue or the problem that the Court sought to solve in that case, I respectfully dissent.
The case arose in Oregon, where a state judge sentenced landlord Thomas Eugene Ice to 340 months in prison for twice burglarizing a tenant’s apartment and molesting her young daughter. Over Ice’s objections, the trial judge imposed consecutive sentences based on its own factual findings in the case.

In 2001, the state court of appeals affirmed the judge’s decision without opinion. In October 2007, a 5-2 Oregon Supreme Court reversed and remanded for resentencing.

The majority held that the trial court violated Ice’s Sixth Amendment right, as set forth by the Supreme Court in Apprendi v. New Jersey (2000) and Blakely v. Washington (2004), which established that facts (other than prior convictions) necessary to imposing consecutive sentences must be found by the jury or admitted by the defendant.

“The federal constitution requires that a jury, rather than a judge, find the facts that Oregon law requires be present before a judge can impose consecutive sentences,” the majority held.

The state asked the high court to intervene, pointing to a split among the state supreme courts on the issue.

“The majority of state courts that have addressed the issue have concluded that the principles of Apprendi and Blakely do not apply to findings required for imposition of consecutive sentences,” the brief states. “Illinois, Maine, Indiana, Tennessee, Minnesota, Alaska and Colorado provide the clearest examples. . . . Each state’s highest appellate court to have addressed the question concluded, unlike the Oregon Supreme Court, that this Court’s cases were not intended to apply to aggregate sentences, but only to the individual sentence imposed for each separate conviction.”

The justices will hear oral arguments in the fall [in Oregon v. Ice, Docket No. 07-901].
In Vancouver, a man who killed a police dog potentially faces life in prison, while in Portland a man found guilty in the attempted murder of Portland Police Officer Robert Wullbrandt was recently sentenced to just five years behind bars.

If the punishment in the local case seems light, the explanation lies partly in a recent Oregon Supreme Court ruling that has sent rumbles across the state and country—and which has already started slicing years off the sentences of recently convicted felons in Multnomah County cases.

The ruling is called “State of Oregon v. Thomas Eugene Ice,” but everyone just calls it “Ice.”

“It’s the talk of the courthouse,” said Deputy District Attorney Bob Leineweber. “It’s the talk of the state, actually.”

In 2001, a Marion County Circuit Court judge found Ice, a landlord, guilty of six crimes committed while twice burglarizing a tenant’s apartment to molest her 11-year-old daughter. The judge found that several of the sentences should run consecutively to amount to a stiffer sentence.

On Oct. 11, 2007, the Oregon Supreme Court found that only a jury, not a judge, could impose the sentences from multiple crimes consecutively, rather than have them run concurrently, or all at once.

The “Ice” ruling applies a number of recent U.S. Supreme Court rulings, all based on the Sixth Amendment’s mandate that one is entitled to a jury trial.

The Oregon ruling has thrown a wrench into cases across the state. In Multnomah County, Nicholas Onuskanich, found guilty for shooting at Officer Wullbrandt in a Trader Joe’s parking lot in March, suddenly had four years shaved off what his sentence was likely to be.

“We were seeking a 105-month sentence,” said the prosecutor in that case, Senior Deputy District Attorney Don Rees. “And based on the ruling in ‘Ice,’ the court found that it could not impose a consecutive sentence, and it could only impose a 60-month sentence.”

To avoid that outcome, either the jury in the Onuskanich case would have to have been kept around longer for sentencing, or a second jury for sentencing would have needed to be convened. But because of when the ‘Ice’ ruling came out, it was too late for Rees to rescue the longer sentence.

According to Oregon’s Solicitor General, Mary Williams, the “Ice” ruling will throw a wrench into thousands of pending criminal cases across Oregon, including those that have already been adjudicated but which still await a type of appeal called post-conviction relief.

For those cases caught in mid-trial, the ruling may require bringing back a second jury for sentencing—meaning more time and expense. “That means basically putting
on your case again," Williams said.

And the uncertainty over how lower courts should apply the ruling will also likely trigger a flood of appeals. In fact, "There’s no way for that not to happen," Williams said.

Because the case turns the traditional concept of a judge’s powers on its head, on Tuesday, Oregon Attorney General Hardy Myers authorized a petition to the United States Supreme Court to hear an appeal of "Ice."

Already, the case has generated intense interest among “sentencing nerds” across the country, Williams said. Myers’ office has already received inquiries from Alaska and Pennsylvania concerning how it will react. And judging by the reaction to the case around the country on legal blogs, many observers think there’s a good chance the federal Supremes will hear Myers’ appeal.

Pending word on his appeal, Myers has convened a panel of lawyers to try to translate the “Ice” ruling into a trial procedure for individual cases that both works efficiently and can withstand appeal.

Williams said she is optimistic that people on all sides of the case—defense lawyers, judges and prosecutors—will come together to forge a workable solution pending a U.S. Supreme Court decision.
Courts are still reeling from the legal tsunami caused by the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The sea change hit the courts in a series of ground-shaking waves.

First, the court decided in *Apprendi* that New Jersey’s sentencing scheme violated the Sixth Amendment right to a jury trial because it allowed a trial judge to increase a defendant’s sentence beyond the “statutory maximum” without a jury finding on the aggravating factors. Next came *Blakely v. Washington*, 124 S. Ct. 2531 (2004), in which the court held that the “statutory maximum” that triggers the right to a jury trial is not necessarily the maximum penalty stated in the statute for the crime; rather, it is the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely*, 124 S. Ct. at 2537.

Finally, the high court this term decided *U.S. v. Booker*, 125 S. Ct. 738 (2005). Booker called into question determinate sentencing schemes and specifically held that it is unconstitutional to use the Federal Sentencing Guidelines as anything other than advisory in federal sentencing decisions.

**Impact of Three Rulings Ripples Through State Courts**

The impact of these three decisions is still rippling through the state courts. After *Blakely* and *Booker*, state courts have been left to determine what effect the court’s interpretation of the Sixth Amendment has on their sentencing schemes. Although the process is far from complete, it may be helpful to examine how these state courts have been interpreting their own sentencing schemes in the post-*Booker* era.

For example, in *People v. Black*, 2005 Cal. Lexis 6566 (June 20, 2005), the California Supreme Court decided that the California sentencing scheme survives the changes brought on by *Blakely* and *Booker*. California, like many other states, uses a determinate sentencing law. Under that law, the judge has the discretion to select the upper, middle or low term in sentencing a defendant.

In order to select the high term, the court must identify aggravating factors, such as the degree of cruelty displayed by the defendant; the victim’s vulnerability; the defendant’s use of a weapon or attempt to obstruct justice, prior criminal acts and abuse of positions of trust; and other similar factors.

Under California law, the judge, not the jury, makes the finding that there are aggravating factors supporting the high term sentence. In *Black*, the defendant challenged his sentence for sexual abuse of a child. At trial, the prosecution presented evidence that the defendant repeatedly had sexual intercourse with his 8-year-old stepdaughter. The offense of continuous sexual abuse of a child is punishable by a term of six, 12 or 16 years’ imprisonment. Calif. Penal Code § 288.5. The court sentenced the defendant to the upper term of 16 years for that offense, selecting the high term based on the
aggravating circumstances related to the nature and seriousness of the crime. The court also noted that the victim was particularly vulnerable: Black had abused a position of trust and confidence, and had inflicted emotional and physical injuries on the victim.

Under another provision of California law, the court also imposed two indeterminate terms of 15 years to life on separate lewd-conduct counts that had been filed against the defendant. After Black was convicted on these charges, the court ordered that he serve the additional terms consecutively.

Black challenged his sentence under Blakely and Booker. He contended that the state’s sentencing procedure is unconstitutional because it does not provide the defendant with a jury trial on the aggravating factors relied upon by the judge in imposing an upper-term sentence or consecutive sentences.

The California Supreme Court rejected Black’s challenge and upheld the state sentencing scheme. For several reasons, it held that allowing the judge instead of the jury to determine whether there are aggravating factors justifying a high term does not undermine a defendant’s Sixth Amendment right. First, the court noted that California’s move to determinate sentencing in 1977 was designed to reduce, not increase, the length of potential sentences. Importantly, California did not convert elements of a crime into sentencing factors. Jurors must still decide the key elements of an offense.

Second, in structuring the sentencing scheme, the legislature did not restrict the facts that could be used to select a high term at sentencing. The trial judge can look at a wide variety of factors related to the circumstances of the crime. Finally, and most importantly, California’s overall sentencing scheme expressly provides for jury verdicts on “sentencing enhancements” that significantly aggravate a defendant’s sentence.

The court also held that Blakely did not bar the California system of allowing the judge to decide when sentences will run consecutively. The jury’s verdict authorizes the statutory maximum sentence for each offense; permitting a judge to decide between concurrent and consecutive sentences does not undermine the jury’s role in the case.

One justice, Joyce Kennard, dissented. Although she agreed that Blakely and Booker do not limit the power of judges to determine whether a sentence should run consecutively, she took the position that judges should not be able to decide whether there are aggravating facts justifying an upper term. Other than aggravating factors relating to a defendant’s prior convictions, Kennard read Blakely and Booker as requiring a jury verdict on those issues.

California is not the only state that has had to confront the constitutionality of its sentencing scheme in light of the U.S. Supreme Court’s recent decisions. In People v. Lopez, 2005 Colo. Lexis 504 (May 23, 2005), the Colorado Supreme Court rejected a general challenge to Colorado’s entire sentencing scheme. It noted that under Blakely, there are four kinds of acts that can lead to an aggravated sentence: (1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulates to judicial fact-finding for sentencing purposes; and (4) facts regarding prior convictions. To the extent that Lopez’s sentence was based upon facts relating to his
prior conviction that were discussed at his plea, the trial court had free rein to impose the higher sentence.

The Colorado Supreme Court referred to other courts that have been troubled by their sentencing schemes. For example, in Arizona, the court found that a sentence imposed beyond the presumptive range and in the “super-aggravated” range based on facts found by a judge alone violate \textit{Blakely}. \textit{See State v. Brown}, 99 P.3d 15 (Ariz. 2004).

Likewise, in Indiana, the court found that the mandatory aggravation of a sentence by the judge alone is unconstitutional and it therefore excised portions of the sentencing statute. \textit{See Smylie v. State}, 823 N.E.2d 679 (Ind. 2005). It refused, however, to hold that aggravating factors that support consecutive sentences must be found by the jury. \textit{See Sowders v. Indiana}, 2005 Ind. Lexis 538 (June 16, 2005), citing, \textit{Smylie}, 823 N.E.2d at 686.


\textbf{Some States Unwilling to Invalidate Their Statutes}

Although many states have statutes that are vulnerable to constitutional challenge, several of them, such as Oregon, Washington and Arizona, have not been willing to invalidate their statutes, but focus on whether the particular sentence in that case needs to be vacated. So long as the judge used permissible factors to enhance the sentence, the court did not have to strike down the entire sentencing scheme.

Some jurisdictions go one step further. The Maine, Colorado, Indiana and Arizona high courts have held that even when a sentence is unconstitutional, the courts have the power to modify the state’s sentencing procedures to make their sentences constitutionally viable by allowing for jury findings on aggravating sentencing factors. \textit{See, e.g., Maine v. Scholfield}, 2005 Me. 82 *P39 (June 29, 2005). However, the Washington and Ohio supreme courts have rejected the argument that they may impose a system of jury sentencing. \textit{See Hughes, supra; State ex re. Mason v. Griffin}, 819 N.E.2d 644, 647 (Ohio 2004).

States have a wide range of sentencing schemes. Most have withstood systemic attack. Those best situated to weather the storm are states that use their sentencing guidelines as only advisory. As in \textit{Booker}, the voluntary and nonbinding nature of sentencing guidelines exempts the sentences from the \textit{Blakely} requirement that the jury determine the critical facts the judge will use to decide on the proper sentence. Indeterminate sentencing systems are unaffected by the holding in \textit{Blakely}. \textit{See, e.g., State v. Stover}, 104 P.3d 969 (Idaho 2005). \textit{See also Shabazz v. Delaware}, 2005 Del. Lexis 221 (June 14, 2005) (unpublished).

The aftershocks from \textit{Blakely} and \textit{Booker} continue. Even in those states where the sentencing schemes have survived, lawyers keep flooding the courts with challenges to
individual sentences. Just offshore, dissenting judges stand ready to broadly interpret *Blakely* by striking down sentencing schemes that put more power in the hands of judges than those of the legislatures and juries. See, e.g., *People v. Rivera*, 2005 N.Y. Lexis 1214 (June 9, 2005) (unpublished).

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WASHINGTON—Juries, not judges, must decide whether a defendant deserves more prison time because his offense was a hate crime, the Supreme Court ruled Monday.

The 5-4 decision does not affect most “hate crime” laws in California and elsewhere. Those statutes already put the matter in the jury’s hands.

However, the ruling limits the use of so-called “sentence enhancements” imposed by judges. Under these laws, judges can increase the punishment for a convicted criminal if his offense was motivated by race, gender, religious or other biases.

Speaking for the court, Justice John Paul Stevens said that the Constitution gives all defendants facing substantially more prison time the right to have the hate-crime charge “submitted to a jury and proved beyond a reasonable doubt.”

Ruling May Encourage Higher Penalties

Professor Brian Levin, an expert on hate crimes at Cal. State San Bernardino, said the decision is not a major setback.

It will likely encourage state legislatures to set higher maximum penalties for some offenses, he said.

“The overwhelming majority of hate crime sentencing enhancement laws will be unaffected because they already require that these issues be decided by a jury,” Levin said.

But the decision likely will knock at least two years off a 12-year prison sentence given to a white New Jersey man who fired shots into the home of a black neighbor.

Charles Apprendi Jr., a 37-year-old pharmacist from Vineland, N.J., was drinking heavily on the night of Dec. 22, 1994. Well after midnight, he fired eight shots into the home of the one African American family in the area.

No one was injured and Apprendi was immediately arrested. Under questioning, he said that he fired the shots because his neighbors were black.

He was indicted on several weapons charges and pleaded guilty to offenses that could yield a maximum 10-year prison term. At his sentencing hearing, prosecutors cited the state’s Ethnic Intimidation Act and asked for a stiffer sentence.

Taking the witness stand, Apprendi denied that his crime was racially motivated and blamed it on his drinking. But the judge agreed with the prosecutors that, more likely than not, Apprendi’s offense reflected racial bias. The judge imposed the 12-year term.

The Supreme Court in 1993 upheld the constitutionality of hate crimes laws. But it had not made clear who must decide whether the crime was motivated by racial bias.

In recent years, the justices have struggled to clarify the line between so-called “sentencing factors” and the crime itself.

A basic principle of American law is that
defendants have a right to be tried by a jury. Prosecutors must prove beyond a reasonable doubt that a defendant committed the crime.

At the same time, judges traditionally weigh factors about the defendant and his crimes when deciding on a sentence.

Once again in the case (Apprendi vs. New Jersey, 99-478), the justices found themselves closely split. The majority said that, because the 12-year sentence exceeded the maximum for the gun crimes, the “racial bias” offense was like a separate crime that must be weighed by the jury.

Justice Stevens wrote a 32-page opinion, and Justice Clarence Thomas added another 27-page opinion agreeing with him. Justice Antonin Scalia filed a two-page opinion agreeing as well. Justice David H. Souter and Ruth Bader Ginsburg joined the majority.

Dissenters File Voluminous Opinions

The dissenters did not go quietly. Justice Sandra Day O’Connor wrote 33 pages to disagree, and Justice Stephen G. Breyer added 13 pages of his own dissent. Chief Justice William H. Rehnquist joined both dissents and Justice Anthony M. Kennedy joined O’Connor’s.

The issue figures to be a recurring one. Just three weeks ago, the court overturned the 30-year prison terms given to survivors of the Branch Davidian tragedy near Waco, Texas. They were convicted by a jury on gun charges that carried five-year prison terms, but prosecutors had asked a judge to impose the severe 30-year term because their weapons were machine guns.

In the area of hate crimes, California has both types of statutes. It is a separate crime to “willfully injure [or] intimidate” someone or damage their property because of the “person’s race, color, religion, ancestry, national origin, disability, gender or sexual orientation.” Defendants have a right to have a jury decide this charge.

The state’s “sentence enhancement” law allows a judge to add up to four years in prison if a crime was motivated by illegal bias. Monday’s ruling would appear to cast doubt on these extra sentences if they are imposed by a judge alone.
Herring v. United States

07-513


While Herring was at the Coffee County Sheriff’s Department, Investigator Anderson asked the warrant clerk to check if there were any outstanding warrants for Herring’s arrest. Finding no warrants in Coffee County, the clerk then called neighboring Dale County to inquire if any outstanding warrants existed there. The Dale County Sheriff’s warrant clerk found a record in her computer of an outstanding warrant for Herring’s arrest and communicated this information to the Coffee County clerk, who then relayed the information to Investigator Anderson. Anderson and another deputy pursued Herring and arrested him. In their search of the defendant and his vehicle, the officers found methamphetamine and a firearm. Meanwhile, the Dale County Sheriff’s warrant clerk, unable to find the physical warrant, phoned the Dale County Clerk’s Office, at which point she was informed that the warrant had been recalled. A clerical error had prevented this information from being entered into the warrant clerk’s computer. She immediately phoned Coffee County to inform them that the warrant was no longer valid, but the arrest had already taken place. The Defendant’s motions to suppress the evidence of the drugs and the firearm as illegally obtained without a warrant were denied at trial and by the Eleventh Circuit. The defendant appeals.

Question Presented: Whether the Fourth Amendment requires the suppression of evidence seized incident to a warrantless arrest for which there was no probably cause, conducted in sole reliance on an inaccurate report from other law enforcement personnel regarding the existence of an outstanding warrant.

Bennie Dean HERRING, Appellant,

v.

UNITED STATES of America, Appellee.

United States Court of Appeals for the Eleventh Circuit

Decided July 17, 2007

CARNES, Circuit Judge.

The facts of this case present an interesting issue involving whether to apply the exclusionary rule. Officers in one jurisdiction check with employees of a law enforcement agency in another jurisdiction and are told that there is an outstanding warrant for an individual. Acting in good faith on that information the officers arrest the person and find contraband. It turns out the warrant had been recalled. The erroneous information that led to the arrest and search is the result of a good faith mistake by an employee of the agency in the other jurisdiction. Does the exclusionary rule require that evidence of the contraband be suppressed, or does the good faith
exception to the rule permit use of the evidence?

I.

On a July afternoon in 2004, Bennie Dean Herring drove his pickup truck to the Coffee County, Alabama Sheriff’s Department to check on another of his trucks, which was impounded in the Department’s lot. As Herring was preparing to leave the Sheriff’s Department, Coffee County Investigator Mark Anderson arrived at work. Anderson knew Herring and had reason to suspect that there might be an outstanding warrant for his arrest. Anderson asked Sandy Pope, the warrant clerk for the Coffee County Sheriff’s Department, to check the county database. She did and told Anderson that she saw no active warrants for Herring in Coffee County.

Investigator Anderson asked Pope to call the Sheriff’s Department in neighboring Dale County to see if there were any outstanding warrants for Herring there. Pope telephoned Sharon Morgan, the Dale County warrant clerk, who checked her database and told Pope that there was an active warrant in that county charging Herring with failure to appear on a felony charge. Pope relayed that information to Anderson.

Acting quickly on the information, Investigator Anderson and a Coffee County deputy sheriff followed Herring as he drove away from the Sheriff’s Department. They pulled Herring over and arrested him pursuant to the Dale County warrant, and they searched both his person and the truck incident to the arrest. The search turned up some methamphetamine in Herring’s pocket and a pistol under the front seat of his truck. All of that happened in Coffee County.

Meanwhile back in Dale County, Warrant Clerk Morgan was trying in vain to locate a copy of the actual warrant for Herring’s arrest. After she could not find one, she checked with the Dale County Clerk’s Office, which informed her that the warrant had been recalled. Morgan immediately called Pope, her counterpart in Coffee County, to relay this information, and Pope transmitted it to the two Coffee County arresting officers. Only ten to fifteen minutes had elapsed between the time that Morgan in Dale County had told Pope that an active warrant existed and the time that Morgan called her back to correct that statement. In that short interval, however, the Coffee County officers had acted on the initial information by arresting Herring and carrying out the searches incident to that arrest.

As a result of the contraband found during the searches, Herring was indicted on charges of possessing methamphetamine in violation of 21 U.S.C. § 844(a), and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He moved to suppress any evidence of the methamphetamine and firearm on grounds that the searches that turned them up were not incident to a lawful arrest, because the arrest warrant on which the officers acted had been rescinded.

The magistrate judge recommended denying the motion to suppress. He found that the arresting officers conducted their search in a good faith belief that the arrest warrant was still outstanding, and that they had found the drugs and firearm before learning the warrant had been recalled. The magistrate judge concluded that there was “simply no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes.” The district court adopted the magistrate judge’s recommendation and made the additional finding that the erroneous warrant information appeared to be the fault of Dale
County Sheriff’s Department personnel instead of anyone in Coffee County.

A jury convicted Herring of both counts, and he was sentenced to 27 months imprisonment. His sole contention on appeal is that the district court erred in denying his motion to suppress the drugs and firearm that were found during the search of his truck.

II.

The parties agree on the central facts. The Coffee County officers made the arrest and carried out the searches incident to it based on their good faith, reasonable belief that there was an outstanding warrant for Herring in Dade County. They found the drugs and firearm before learning that the warrant had been recalled. The erroneous information about the warrant resulted from the negligence of someone in the Dale County Sheriff’s Department, and no one in Coffee County contributed to the mistake. The only dispute is whether, under these facts, the exclusionary rule requires the suppression of the firearm and drugs.

A.

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” United States Const. Amend. IV. The searches of Herring’s person and truck cannot be justified as incident to a lawful arrest because the arrest was not lawful. There was no probable cause for the arrest and the warrant had been rescinded. That means the searches violated Herring’s Fourth Amendment rights, but it does not mean that the evidence obtained through them must be suppressed. As the Supreme Court has told us on more than one occasion, whether to apply the exclusionary rule is “an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.” United States v. Leon, 468 U.S. 897, 906 (quoting Illinois v. Gates, 462 U.S. 213, 223 (1983)).

The Leon case is the premier example of the distinction between finding a constitutional violation and excluding evidence based on that violation. Leon held that the exclusionary rule does not bar the use of evidence obtained by officers acting in good faith reliance on a warrant which is later found not to be supported by probable cause. Id. at 922. The Court’s analysis of whether the exclusionary rule should be applied to constitutional violations stemming from mistakes by judicial officers carried out by law enforcement officers proceeded in two steps. First, the Court considered whether the rule should be applied because it might improve the performance of judges and magistrate judges, and the Court concluded that was not a good enough reason for applying it. See id. at 916-17 (“[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.”); see also Illinois v. Krull, 480 U.S. 340, 348 (1987). Second, the Court considered whether, and if so how much, application of the exclusionary rule in that circumstance might be expected to improve the behavior of law enforcement officers, and it concluded that any slight deterrent benefit provided by applying the rule would be outweighed by the heavy costs of excluding relevant and material evidence. Leon, 468 U.S. at 920-22 (“We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”); see also
Krull, 480 U.S. at 348; United States v. Accardo, 749 F.2d 1477, 1480 (11th Cir. 1985) (characterizing Leon as establishing that the exclusionary rule “remains viable only as a deterrent to police misconduct”).

A decade later, in Arizona v. Evans, 514 U.S. 1 (1995), the Court extended Leon’s “good faith exception” to the exclusionary rule to circumstances in which officers rely in good faith on a court employee’s representation that a valid warrant existed when, in fact, the warrant has previously been quashed. Id. at 14. The government contends that Evans involved essentially the same situation as this case and that the Evans decision standing alone justifies the admission of the illegally obtained evidence here. We think, however, that this effort by the government to justify its capture of Herring red-handed relies on a red herring. The Supreme Court in Evans expressly declined to address whether the exclusionary rule should be applied when police personnel rather than court employees are the source of the error, id. at 15 n.5, thereby disavowing any decision on the issue the government argues the Court decided.

For guidance on this issue we return to Leon. The opinion in that case instructs us that “[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . must be resolved by weighing the costs and benefits of preventing the use in the prosecution’s case in chief of inherently trustworthy tangible evidence.” 468 U.S. at 906. A rule that denies the jury access to probative evidence “must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.” Gates, 462 U.S. at 257-58. That means the exclusionary rule should only be applied to a category of cases if it will “result in appreciable deterrence.” United States v. Janis, 428 U.S. 433, 454 (1976). Application of the rule is unwarranted where “[a]ny incremental deterrent effect . . . is uncertain at best.” United States v. Calandra, 414 U.S. 338, 351 (1974).

The possibility that application of the exclusionary rule in a situation may deter Fourth Amendment violations to some extent is not enough. Alderman v. United States, 394 U.S. 165 (1969); see Leon, 468 U.S. at 910. Instead, the test for extending the exclusionary rule is whether the costs of doing so are outweighed by the deterrent benefits. Leon, 468 U.S. at 910.

The “substantial social costs exacted by the exclusionary rule” are well known. Id. at 907. The Supreme Court has “consistently recognized that unbending application of the exclusionary sanction . . . would impede unacceptably the truth-finding functions of judge and jury,” United States v. Payner, 447 U.S. 727, 734 (1980), and it has “repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364-65 (1998). For that reason, suppression of evidence has always been a last resort, not a first impulse. Hudson v. Michigan, 547 U.S. 586 (2006).

Unlike the costs of applying the exclusionary rule, the benefits of doing so are hard to gauge because empirical evidence of the rule’s deterrent effect is difficult, if not impossible, to come by. See Janis, 428 U.S. at 449-53. Even if we could measure or approximate any deterrent effect that the exclusionary rule produces, in order to value that effect we must identify the intended target of the deterrence. Id. at 448, (“In evaluating the need for a deterrent sanction, one must first identify those who
are to be deterred."). It is this question that the first part of Leon and nearly all of Evans addresses. See Leon, 468 U.S. at 913-17; Evans, 514 U.S. at 11-17. The answer that both cases give is that the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of others (in those cases, judicial magistrates and court clerks). Leon, 468 U.S. at 916; Evans, 514 U.S. at 11. Our decisions give the same answer. See, e.g., United States v. Martin, 297 F.3d 1308, 1313 (11th Cir. 2002); Accardo, 749 F.2d at 1480. Misconduct by other actors is a proper target of the exclusionary rule only insofar as those others are “adjuncts to the law enforcement team.” Evans, 514 U.S. at 15.

To sum up, our review of Leon identifies three conditions that must occur to warrant application of the exclusionary rule. First, there must be misconduct by the police or by adjuncts to the law enforcement team. Id. at 913-17. Second, application of the rule must result in appreciable deterrence of that misconduct. Id. at 909. Finally, the benefits of the rule’s application must not outweigh its costs. Id. at 910.

B.

As for the first condition, “[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.” Michigan v. Tucker, 417 U.S. 433, 447 (1974). The conduct in question in this case is the failure of someone inside the Dale County Sheriff’s Office to record in that department’s records the fact that the arrest warrant for Herring had been recalled or rescinded by the court or by the clerk’s office. That failure to bring the records up to date is “at the very least negligent.” See id. We will assume for present purposes that the negligent actor, who is unidentified in the record, is an adjunct to law enforcement in Dale County and is to be treated for purposes of the exclusionary rule as a police officer.

As for the second consideration in deciding whether to apply the exclusionary rule to these circumstances, doing so will not deter bad record keeping to any appreciable extent, if at all. There are several reasons for this. For one thing, the conduct in question is a negligent failure to act, not a deliberate or tactical choice to act. There is no reason to believe that anyone in the Dale County Sheriff’s Office weighed the possible ramifications of being negligent and decided to be careless in record keeping. Deterrents work best where the targeted conduct results from conscious decision making, because only if the decision maker considers the possible results of her actions can she be deterred.

Another reason that excluding evidence resulting from the negligent failure to update records is unlikely to reduce to any significant extent that type of negligence is that there are already abundant incentives for keeping records current. First, there is the inherent value of accurate record-keeping to effective police investigation. Inaccurate and outdated information in police files is just as likely, if not more likely, to hinder police investigations as it is to aid them. Second, and related to the first reason, there is the possibility of reprimand or other job discipline for carelessness in record keeping. Third, there is the possibility of civil liability if the failure to keep records updated results in illegal arrests or other injury. Fourth, there is the risk that the department where the records are not kept up to date will have relevant evidence excluded from one of its own cases as a result.
There is also the unique circumstance here that the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of the negligent record keeping, but instead it would scuttle a case brought by officers of a different department in another county, one whose officers and personnel were entirely innocent of any wrongdoing or carelessness. We do not mean to suggest that Dale County law enforcement agencies are not interested in the successful prosecution of crime throughout the state, but their primary responsibility and interest lies in their own cases. Hoping to gain a beneficial deterrent effect on Dale County personnel by excluding evidence in a case brought by Coffee County officers would be like telling a student that if he skips school one of his classmates will be punished. The student may not exactly relish the prospect of causing another to suffer, but human nature being what it is, he is unlikely to fear that prospect as much as he would his own suffering. For all of these reasons, we are convinced that this is one of those situations where “[a]ny incremental deterrent effect which might be achieved by extending the rule . . . is uncertain at best,” Calandra, 414 U.S. at 348, where the benefits of suppression would be “marginal or nonexistent,” Leon, 468 U.S. at 920-22, and where the exclusionary rule would not “pay its way by deterring official lawlessness,” Gates, 462 U.S. at 257-58.

Turning to the third Leon condition, any minimal deterrence that might result from applying the exclusionary rule in these circumstances would not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence. Leon, 468 U.S. at 910.

In closing, we note, as the Supreme Court did in Leon, that the test for reasonable police conduct is objective. 468 U.S. at 919 n.20. The district court found that “there [was] no credible evidence of routine problems with disposing of recalled warrants” and updating records in Dale County, and Herring does not contest that finding. If faulty record-keeping were to become endemic in that county, however, officers in Coffee County might have a difficult time establishing that their reliance on records from their neighboring county was objectively reasonable. The good faith exception to the exclusionary rule does not shelter evidence that was obtained in an unconstitutional arrest or search that was based on objectively unreliable information. See Evans, 514 U.S. at 17 (O’Connor, J., concurring).

AFFIRMED.
The Supreme Court agreed Tuesday to reconsider the reach of the “exclusionary rule,” a doctrine that has been controversial since the 1960s because it requires judges to throw out evidence if it was obtained improperly by the police.

Several of the court’s conservatives, including Chief Justice John G. Roberts Jr. and Justice Antonin Scalia, have signaled they would like to rein in this rule.

Every day, police officers stop cars or make arrests by relying on information in the files or on the computers of a police department. On occasion, the information is outdated or inaccurate. What should be done, then, if the officer finds drugs or guns in a stopped car, only to learn later that he relied on faulty information when he stopped the vehicle?

Judges have been divided on that question. Some have said the evidence is tainted and should be suppressed. Others have said the evidence should be used if the officer was not to blame for the error.

The high court said it would hear next fall a drug case from Alabama, *Herring vs. United States*, to decide the question.

In July 2004, Bennie D. Herring went to a police station to retrieve several items from an impounded car. Investigator Mark Anderson saw him and began calling around to see if there were any outstanding warrants against Herring.

A police employee from a neighboring county said there was such a warrant, and then Anderson and another officer set off in pursuit of Herring. They pulled him over, arrested him and found methamphetamine in his pocket and a gun in his car. Minutes later, the police employee called back to say there was a mistake. The warrant against Herring had been revoked, but the entry in the computer file had not been updated.

When Herring went to trial on federal drug charges, a judge refused to suppress the evidence against him. The U.S. Court of Appeals in Atlanta agreed, saying it made no sense “to scuttle a case” when the arresting officer was “entirely innocent of any wrongdoing or carelessness.”

Two Stanford law professors appealed on Herring’s behalf. They argued that the court should not allow arrests and prosecutions that were triggered by computer errors and faulty record-keeping by the police.

The high court first announced the exclusionary rule in a 1914 case involving a federal prosecution for illegally sending lottery tickets in the mail. The rule was meant to enforce the 4th Amendment’s ban on “unreasonable searches and seizures.”

Its aim was to deter officers from breaking the law to obtain evidence.

It gained wide attention only after 1961 when the court extended the rule to cover state troopers and local police.

The rule has always had its share of skeptics. As Benjamin N. Cardozo, then a New York state judge, famously put it: “The criminal goes free because the constable has blundered.”
In the 1995 case *Arizona v. Evans*, the Supreme Court, by a vote of 7-2, upheld the search of a motorist mistakenly arrested after the local courthouse failed to inform the sheriff’s department that a previous arrest warrant had been quashed.

In a concurring opinion, however, three justices—Sandra Day O’Connor, David Souter and Stephen Breyer—reserved the question of whether the “exclusionary rule” should apply if a mistaken arrest occurs due to the negligence of law enforcement, rather than judicial, personnel.

Nearly 13 years later, the justices have the opportunity to take up that question when they convene for their private conference on Feb. 15. The Court could announce a decision as soon as Feb. 19. (The petition is No. 07-513, *Herring v. United States*. Disclosure: Tom Goldstein is co-counsel to the petitioner.)

The arrest in question occurred in Alabama in July 2004, shortly after Bennie Herring left the Coffee County sheriff’s department, where he had gone to retrieve personal items from an impounded vehicle. As Herring was about to leave, a county investigator named Mark Anderson arrived for work.

On a hunch, Anderson, who had a contentious history with Herring, asked a fellow employee to check whether Herring had any outstanding arrest warrants in the county. He had none. At Anderson’s request, the employee next called to see if Herring had outstanding warrants in neighboring Dale County. By phone, an employee in the Dale County sheriff’s department said computer records showed that Herring was in fact wanted for failing to appear on a felony charge.

Anderson and a deputy sheriff immediately left in pursuit of Herring. They pulled him over and, over Herring’s protest, placed him in custody. Conducting a search incident to the arrest, the officers discovered methamphetamine in Herring’s pocket and a gun under the front seat.

Minutes later, after being unable to find a physical copy of the arrest warrant, the Dale County employee called back to say she had been mistaken. Herring’s warrant had been recalled five months prior, but the sheriff’s department had failed to update its computer records.

At trial in the U.S. District Court for the Middle District of Alabama, the judge denied Herring’s motion to suppress the evidence and, following conviction by a jury, sentenced him to 27 months in prison. A panel of the U.S. Court of Appeals for the 11th Circuit unanimously affirmed.

Noting that the exclusionary rule was created to deter police misconduct, rather than to remedy victims of unlawful searches, the panel found that courts should only suppress illegally obtained evidence when doing so could “result in appreciable deterrence” of future police misconduct.

While conceding that Herring’s arrest violated the Fourth Amendment, the panel concluded that law enforcement already has...
sufficient incentives to keep criminal databases accurate. As examples, the panel listed authorities’ interests in avoiding internal reprimands, civil liability for wrongful arrests, and the potential hindering of one of their own probes. The panel also reasoned that suppressing the evidence against Herring would foil the work of the department that made the arrest, not the one that provided the faulty data.

Herring’s petition for certiorari, filed by Jeffrey Fisher of the Stanford Law School Supreme Court Litigation Clinic, maintains that courts have been divided over the question since even before the Court left it unanswered in *Evans*.

According to Fisher, some courts have found that the “good faith” exception to the exclusionary rule should apply to all inadvertent clerical errors, while others have suppressed evidence from searches made due to law enforcement negligence. Pointing to a factually similar case decided by the Arkansas Supreme Court, Fisher asserts that suppression would further “the need to deter ‘defective recordkeeping’ by law enforcement as a whole.”

Fisher also questions the assumptions underlying the 11th Circuit’s ruling. The petition says that it’s unclear whether the responsible employees were disciplined for Herring’s mistaken arrest, that officers acting on misinformation would likely receive qualified immunity in a civil lawsuit, and that negligent record-keeping is not itself grounds for suit. Also, Fisher contends, the 11th Circuit’s ruling actually gives authorities an incentive not to remove individuals from databases if arrest warrants are recalled. By contrast, the petition says, if prosecutors were “[f]aced with the possibility of exclusion, police departments [could] reasonably be expected to step up their efforts to keep computer records up-to-date and accurate.”

Opposing certiorari, the federal government maintains that the 11th Circuit’s ruling extends not to all negligent errors committed by police personnel, but only to those where law enforcement agencies that normally maintain accurate records inadvertently provide erroneous information to another agency. In such narrow circumstances, Solicitor General Paul Clement contends, courts may justifiably conclude that the costs of excluding illegally obtained evidence outweigh the benefits.

Clement maintains that arrests made under invalid warrants waste resources, and that police departments, like private employers, uniformly insist upon proper record-keeping. As for civil liability, the government contends that police officers are never guaranteed to receive qualified immunity, and municipalities may in fact face suit when errors result from official policies. In any event, punishing one law enforcement agency for the mistake of another would hardly serve as an effective deterrent for future errors, Clement says.
A legal issue involving Coffee and Dale counties has made it all the way to the U.S. 11th Circuit Court of Appeals.

The court was faced with two issues involving a 2004 incident in Coffee County. Can a citizen be pulled over by the police based on simply the belief that a warrant exists for his/her arrest? And, can the evidence gained from a subsequent search be used in court to convict on separate offenses?

The appeals court ruled Tuesday that a Coffee County investigator’s stop of a man he believed had an outstanding warrant, and the resulting search, was valid.

The case stems from a 2004 incident in which Bennie Dean Herring drove to the Coffee County Sheriff’s Department to check on another vehicle that had been impounded there. About that time, Coffee County Investigator Mark Anderson arrived at the department and saw Herring, and thought there may be outstanding warrants for his arrest. After a check of Coffee County records revealed no warrants for Herring’s arrest, Anderson asked the warrant clerk to check with Dale County to see if the sheriff’s department there had warrants for his arrest.

The warrant clerk in Dale County advised Coffee County that there was an outstanding warrant for failure to appear in court on a felony charge. They then searched him and his truck, finding methamphetamine in his pocket and a pistol under the front seat.

But back in Dale County, the warrant clerk was unable to find the paper copy of the warrant for Herring. The clerk made a quick call to the Dale County clerk’s office and learned the warrant had been recalled. The clerk immediately called Coffee County to relay the information and the information was quickly transmitted to Anderson and the other deputy, but Herring had already been stopped, searched and arrested. Only 10 to 15 minutes elapsed between the time the Dale County warrant clerk told Coffee County there was an outstanding warrant, then called back to correct the information.

As a result of the search, Herring was charged with possessing methamphetamine and being a felon in possession of a firearm. He was indicted, convicted and sentenced to 27 months in prison. Herring appealed, citing the “exclusionary rule” a legal principle holding that evidence collected or analyzed in violation of the U.S. Constitution is inadmissible. In this case, Herring argued that Coffee County conducted a warrantless search and that the evidence resulting from the search should have been suppressed.

A federal district court judge ruled that the arresting officers conducted their search in a good faith belief that the arrest warrant was still outstanding, and that they had found the drugs and firearm before learning the
warrant had been recalled.

The appeals court upheld the district court ruling, relying on a U.S. Supreme Court case that states evidence gained during a search does not have to be suppressed when officers are acting in good faith reliance on a warrant which is later found not to be supported by probable cause. In other words, Anderson and the deputy had a good-faith reason to stop Herring because they believed a warrant existed for his arrest.

Also, the appeals court ruled that even though Dale County may have erred by failing to update the recall of Herring’s warrant, Coffee County should not be punished, nor would it effectively deter Dale County from future errors.

“Hoping to gain a beneficial deterrent effect on Dale County personnel by excluding evidence in a case brought by Coffee County officers would be like telling a student that if he skips school one of his classmates will be punished,” the court wrote. “The student may not exactly relish the prospect of causing another to suffer, but human nature being what it is, he is unlikely to fear that prospect as much as he would his own suffering. For all of these reasons, we are convinced that this is one of those situations where any incremental deterrent effect which might be achieved by extending the (exclusionary) rule . . . is uncertain at best.”
The Supreme Court ruled today that evidence seized by police officers who had relied on the erroneous computer report of a valid arrest warrant could be used in court, as long as the computer error was made by a court employee and not by a law-enforcement official.

The 7-to-2 decision overturned a ruling by the Arizona Supreme Court, which held that the rule requiring the exclusion of illegally seized evidence must apply to computer errors to protect against the "potential for Orwellian mischief" in government's increasing use of computers.

But while reversing that decision, the Supreme Court's approach in this early encounter with law enforcement in the computer age was tempered and narrowly confined—surprisingly so, given the Court's sympathy these days for prosecution interests in most criminal cases.

The majority opinion by Chief Justice William H. Rehnquist stopped notably short of endorsing a broad exclusionary rule for any computer error that led the police to make an invalid search or arrest. While a broad ruling might well have been his preference, it was clear from the concurring opinions filed by three Justices who voted with him that the Chief Justice could not have held a majority of the Court for such a sweeping ruling.

In the case today, the police in Phoenix stopped a man who was driving the wrong way on a one-way street. A check by the squad car's computer showed there was a warrant for the driver's arrest; so the man was arrested, and in the process the police found marijuana. But it was later learned that the misdemeanor warrant was quashed 17 days earlier, with the record remaining in the computer system through a clerk's error.

Chief Justice Rehnquist saw the case as fitting comfortably within the Court's 1984 ruling in United States v. Leon, which held that evidence seized by the police in good faith reliance on a warrant that turned out to be faulty could be admitted at trial. But three members of his majority were not so certain.

In a concurring opinion, Justices Sandra Day O'Connor, David H. Souter and Stephen G. Breyer said that while the police could not necessarily be held accountable for clerical errors made elsewhere in the system, they nonetheless had to be held to standards of reasonableness in relying on an error-filled record-keeping system.

"With the benefits of more efficient law-enforcement mechanisms comes the burden of corresponding constitutional responsibilities," the three said in the concurring opinion, which was written by Justice O'Connor. The police are entitled to the benefits of computer technology, the opinion said, but "they may not, however, rely on it blindly."

Justice Stevens said, “The offense to the dignity of the citizen who is arrested, handcuffed and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base” was “outrageous.”

The case did not address the broader exclusionary rule issue raised by the Republican-sponsored crime package that passed the House last month. One provision would go beyond existing Supreme Court precedent and permit the prosecution to use evidence seized by the police without a warrant but in the “objectively reasonable” belief that the search was consistent with the Constitution.
Melendez-Diaz v. Massachusetts

07-591


Melendez-Diaz was charged with distributing and trafficking cocaine. He is appealing on the ground that the state has violated his rights under the Confrontation Clause that was established in Crawford v. Washington.


Commonwealth of MASSACHUSETTS,

v.

Luis E. MELENDEZ-DIAZ.

Appeals Court of Massachusetts

Decided July 31, 2007

[Excerpt: Some footnotes and citations omitted.]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from judgments on guilty verdicts returned by a jury on indictments charging him with distributing and trafficking in cocaine, the defendant argues that: (1) he was entitled to required findings of not guilty; (2) the admission in evidence of the drug analysis certificates was inconsistent with Crawford v. Washington, 541 U.S. 36 (2004), and violated Commonwealth v. Lanigan, 419 Mass. 15 (1994); and (3) his trial counsel was ineffective in failing to file a motion to suppress evidence and to point out to the jury the packaging of the seized cocaine. We affirm the judgments.

1. The evidence. At trial, evidence was presented establishing that on five or six occasions over a three month period in the fall of 2001, the loss prevention manager (manager) of a K-Mart store (store) located in Dorchester observed Thomas Wright, the store’s human resource manager, make and receive external telephone calls, that is, telephone calls neither placed to nor received from persons within the store. Immediately after receiving each of these calls, Wright would walk outside and stand by the front entrance to the store. He would then get into a blue, four-door Mercury Sable sedan driven by a Hispanic male and sometimes carrying a passenger. The car would drive away and return about ten minutes later, with Wright exiting the car and going back into the store.

At about 2:30 P.M., on November 15, 2001, the manager reported his observations of
Wright’s activities to Boston police Detective Robert Pieroway, who immediately went to the store and set up surveillance of the front outside area of the store. It was about 3:00 P.M. when Pieroway saw Wright come out of the store, stand on the sidewalk looking around the parking lot, and after a few minutes, go back into the store. Pieroway next saw a blue Mercury Sable sedan drive past the store, make a U-turn, and drive back to the front of the store, and stop. The driver, codefendant Ellis Montero, was talking on a cell phone and the defendant was in the front passenger seat. Just as Montero arrived at the front of the store, Wright came out and got into the back seat of the car. The manager also saw this activity, which was consistent with what he had seen on prior occasions and had reported to the police.

Once Wright was in the car, Montero drove slowly through the parking lot. A few seconds later, the car was within ten feet of Pieroway, who could see Wright leaning forward between the two individuals in the front seats. When Wright leaned back, Montero stopped, Wright got out of the car and walked back toward the store. Outside the store, Pieroway stopped Wright, who told Pieroway that he had four bags of cocaine on his person. Pieroway then searched Wright and retrieved from his front pant pocket a plastic bag in which there were four clear white plastic bags containing a total quantity of 4.75 grams of cocaine having a value of about $320 to $400.

Pieroway immediately advised Boston police Officers Ryan and Anderson, stationed in a cruiser in the parking lot, to arrest the two men in the blue car that was driving away.

Ryan and Anderson stopped the car, arrested Montero and his passenger, the defendant, and frisked them for weapons. In compliance with police procedure, the officers did not search either of the men or the car for contraband as they were only assisting with the stop. A search of the car for contraband would be conducted by drug unit officers. Ryan and Anderson placed the defendant and Montero in the backseat of their cruiser, positioning the defendant directly behind the front passenger seat and Montero behind the driver. The officers then drove to the front of the store where Wright was also placed in the back of the cruiser.

The three men were seated with their hands cuffed behind their backs. Montero was directly behind the driver, the defendant in the middle, and Wright behind the front passenger. During the less than eight minute trip to the police station, the defendant and Montero were “speaking in Spanish,” “fidgeting,” “making furtive movements in the back,” and leaning various ways to create space between them, while Wright made no unusual movements and did “nothing.” Through the rear-view mirror, Ryan saw Montero and the defendant “jumping around” and felt them kicking the back of the front seats. At one point during the trip, Ryan told them to “knock it off, quit moving around.”

During the booking process at the police station, the police recovered two cellular phones and $301 from Montero and a pager and $157 from the defendant. Meanwhile, Anderson returned to the cruiser in which the three men had been transported. He was motivated to do so because of the actions and movements of the defendant and Montero during the trip to the station. Anderson found a fold of money totaling $320 on the ground next to the door used by Montero and the defendant in getting out of the cruiser. Looking in the back area of the cruiser, Anderson found a plastic bag
containing nineteen plastic bags of cocaine on the floor in a recess in the partition between the front and back seats on the driver's side of the cruiser.

No one was in the parking lot when Ryan and Anderson arrived at the police station with the three men. Nor was anyone in the lot when Anderson returned to the cruiser and found the money and drugs. Soon after his discovery of the money and the bag containing nineteen other bags, Anderson was joined in the parking lot by Pieroway, who took possession of the nineteen bags which were thereafter analyzed and found to contain a total of 22.16 grams of cocaine.

According to Pieroway, the nineteen bags retrieved from the cruiser “appeared to be the same size and same packaging, same look[ ] everything as the four that [he] recovered from . . . Wright.” Pieroway also testified that the $320 found by Anderson was the same amount that Wright had paid for his purchase of the four bags of cocaine retrieved from him.

There was also evidence establishing that prior to leaving the police station on the morning of November 15, 2001, Ryan had inspected the cruiser to make certain that there was no contraband on the front or back seats, and that the cruiser was in the possession of only Ryan and Anderson for the entire day. In addition, on that day no one had been in the backseat of the cruiser other than Montero, the defendant, and Wright.

2. The sufficiency of the evidence. In contending that he was entitled to a required finding of not guilty on each of the indictments against him, the defendant argues that the evidence was insufficient to show that a drug transaction had taken place on the afternoon of November 15, 2001, or that he was a joint venturer in such a transaction.

We begin our analysis of the defendant’s argument with Commonwealth v. Hernandez, 439 Mass. 688, 694 (2003), in which the Supreme Judicial Court stated:

[T]o prove the defendant guilty as a joint venturer, the Commonwealth was required to prove that he was present at the scene of the crime, had knowledge that another intended to commit the crime and shared the intent to commit the crime, and by agreement was willing and available to help the other if necessary. Commonwealth v. Netto, 438 Mass. 686, 700[-701] (2003). . . . [Additionally], to prove the defendant guilty of trafficking on a joint venture theory, the Commonwealth must prove (1) that the underlying crime of trafficking in cocaine was committed and (2) that the elements of joint venture defined above were satisfied.


In considering whether the Commonwealth met its burden of proof, we take the evidence and the reasonable inferences that can be drawn therefrom in the light most favorable to the Commonwealth.

There can be no real question concerning the sufficiency of the Commonwealth’s evidence, i.e., the testimony of the manager, Pieroway, Ryan, and Anderson, the surveillance photos taken at the time of the crime, and the similarity of the packaging of the drugs retrieved from Wright and those
taken by Anderson from the back of the cruiser, to put to the jury the question of whether the defendant was a willing participant in the distribution of cocaine to Wright. The evidence allows for the reasonable inference that the defendant knew Montero intended to sell drugs to Wright, who had purchased drugs on prior occasions while in the car. The defendant’s reliance upon Commonwealth v. Deagle, 10 Mass. App. Ct. 563 (1980), Commonwealth v. Saez, 21 Mass. App. Ct. 408 (1986), and Commonwealth v. McKay, 50 Mass. App. Ct. 604 (2000), is misplaced as those cases are factually inapposite.

Based upon the evidence presented in the instant matter, a juror could reasonably infer that neither Montero nor Wright, especially Wright, would engage in a criminal transaction in the presence of one “unconnected to the business being conducted.” Commonwealth v. Fernandez, 57 Mass. App. Ct. 562, 567 (2003). The defendant also possessed a pager, a “traditional accouterment of the illegal drug trade.” Commonwealth v. Gollman, 436 Mass. 111, 116 (2002). In addition, as earlier related, there was evidence to show that during the ride to the station, Montero and the defendant were seated next to each other conversing in Spanish while “fidgeting,” “jumping around,” leaning towards opposite windows, and “kicking under the seat.” Although, and as the defendant argued before us, such activity could be thought to have been caused by discomfort attributable to their hands being cuffed behind their backs, we think a sinister inference was also reasonably available, that is, the actions of the men were attributable to their attempts to remove contraband and money from their persons. Such an inference is almost inescapable in view of the testimony of Ryan, Anderson, and Pieroway that the money found on the ground next to the door used by Montero in getting out of the cruiser matched the amount paid by Wright for the cocaine found on him, and that the drugs found in the cruiser were packaged in a manner resembling those found on Wright at the time of his arrest.

Based on all the evidence, including the drug analysis certificates concerning the substances taken from Wright and the back of the cruiser . . . we conclude that the judge did not err in denying the defendant’s motion for required findings of not guilty on the indictments charging him with distributing and trafficking in cocaine.

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Judgments affirmed.
When John P. Moss Jr. stood before a Suffolk Superior Court jury in 2004, the last thing on the Cambridge lawyer’s mind was that, one day, his client’s case might be decided by the U.S. Supreme Court.

But that’s exactly where the otherwise garden-variety cocaine-trafficking matter—which didn’t even merit a published decision from the Appeals Court—is currently headed.

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Although Moss has since handed over the reins to a team of law professors and appellate attorneys, the matter made national headlines earlier this month when the high court granted certiorari on a hearsay issue certain to impact thousands of other cases across the country.

In *Melendez-Diaz v. Massachusetts*, the Supreme Court will decide whether a state forensic-lab report prepared for use in a criminal case is testimonial evidence subject to the demands of the Confrontation Clause as set forth in the landmark 2004 *Crawford v. Washington* decision.

If the court rules in the defendant’s favor after oral arguments this fall, prosecutors in Massachusetts who frequently rely on such reports in drunk-driving, fingerprint, DNA, drug and firearm cases will no longer be allowed to present such evidence without first calling live witnesses.

“These reports are offered substantively everyday in courts throughout Massachusetts,” says one state prosecutor who asks not to be identified. “There’s no question that this is a big deal. With the sheer number of cases out there, it’s just not feasible for the court to expect us to bring a live witness in every time. If the court all of a sudden rules that we have to, you’re talking about some major resource problems.”

In his brief, James J. Arguin of the Attorney General’s Office says that only a handful of courts in the country have adopted the bright-line rule urged by the defendant, which would deem all lab reports prepared for use at trial as testimonial.

“This interpretation of the Confrontation Clause would impose enormous burdens in countless criminal cases by needlessly requiring live testimony from laboratory technicians who are unlikely to have any independent recollection of one—out of the thousands—of tests they routinely perform,” Arguin writes.

‘Huge Question’

But Salem lawyer Mary T. Rogers, who represents the defendant in *Melendez-Diaz* along with Jeffrey L. Fisher of Stanford Law School, counters that the Supreme Court has previously shot down such arguments.

“The right to confrontation is a lot more important than a resource problem, which is a point the Supreme Court has already made in *Crawford*,” she says. “The question presented here isn’t just about drug certifications. The issues at play go to
forensic testing in general, and the way in which evidence is introduced in all kinds of cases.”

Although Crawford—a case argued by Fisher—held that a defendant’s right to confrontation was implicated whenever the prosecution introduced testimonial evidence, Rogers says the court never expressly said whether lab reports are included in that definition.

“[Fisher] called me between the time of the Appeals Court decision and the application for further appellate review and said this was the only case pending in the country at the time that was in the right posture to go to the Supreme Court,” Rogers says. “I didn’t expect to see a Rule 1:28 decision end up there, but there is a huge question about what the word testimonial meant in Crawford. The Supreme Court hasn’t gone very far—perhaps until now—in defining exactly what it means.”

Despite the Crawford ruling, which created much uncertainty among judges and lawyers over the admissibility of hearsay evidence, Rogers says that Massachusetts courts have continued to admit such reports by relying on several state statutes and the 2005 Supreme Judicial Court ruling of Commonwealth v. Verde.

In Verde, which the defense is seeking to overturn, the SJC responded to Crawford by holding that drug certificates are “non-testimonial” statements akin to business records.

“Despite what the SJC found in Verde, we’re confident that Crawford clearly says these kinds of reports are hearsay,” says Rogers. “A lot of us understand that a ruling in our favor will mean that whenever the prosecution wants to introduce the information contained in these lab reports substantively, they will have to bring someone in.”

She adds that Massachusetts is one of 44 states that currently permit trial judges to substantively admit forensic reports on drug cases, even when the chemists themselves are not called to testify.

Brownlow M. Speer of the Committee for Public Counsel Services says the disparity is one of the reasons the Supreme Court granted cert.

“Even though it’s an unpublished decision, I wasn’t surprised they took the case because you’ve got that split among the jurisdictions, and you’ve got the factual incompatibility of the practice with the literal language of the Crawford ruling,” Speer comments.

Until the issue is resolved, Speer says he advises lawyers to challenge the admissibility of all gun and drug certificates offered at trial.

“In addition to future cases, anyone who raised an objection at trial stands to benefit from a ruling in the defendant’s favor,” he notes. “This case has wide applicability because it is an example of a common factual occurrence that appears to run afoul of the Crawford rule.”

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Percolation in Lower Courts

In his brief, Arguin writes that the defendant’s case is a poor vehicle to resolve what he refers to as “the important constitutional question presented.”

Where the underlying ruling is an unpublished Rule 1:28 decision with no
precedential value, he says the court should not grant cert.

“Although not all courts agree with Verde’s reasoning, [the defendant] exaggerates the scope and depth of the conflict that exists,” he writes. “The majority of courts, like Verde, have followed a case-by-case approach to determining whether a particular statement is testimonial or nontestimonial.”

Arguin notes that where only two years have passed since the Supreme Court clarified Crawford’s distinction between testimonial and non-testimonial statements in the 2006 Davis v. Washington ruling, more time is needed to properly assess the question.

“The passage of time and opportunity for further percolation in the lower courts will assist the Court in assessing the far-reaching consequences that a decision in this case might have on criminal prosecutions throughout the country,” he writes.

Contrary to the defendant’s argument, Arguin adds that the lab reports were properly admitted by Rouse under the business records exception to hearsay.

He further notes that the Department of Public Health analysts are “state officials simply recording the ‘results of a well-recognized scientific test’ that the law requires them to perform in the ordinary course of the department’s business.”

**Bad Ball Game**

But Jeffrey T. Green of Northwestern University, who authored an amicus brief signed by several organizations, including MACDL and CPCS, argues that Massachusetts law currently deprives defendants of important constitutional rights.

“[The current system] eviscerates the protections of the Confrontation Clause, and makes the prosecutor the only functional ‘gatekeeper’ against the admission of unreliable evidence,” he writes. “By removing the defendant’s opportunity to confront, before the fact-finder, the presentation of forensic evidence to prove an essential element of the crime, the certification system robs the adversarial system of many of the incentives that promote the truth-finding function of a criminal trial.”

Such statutes, Green adds, virtually eliminate judicial inquiry into the reliability of scientific testing.

“In effect, the prosecutor becomes the ‘referee’ in a game that he has an interest in winning, and thus has every incentive to use ‘shortcuts to the process of proof,’” he says.

Unless the defense can cross-examine forensic witnesses on the stand, Green writes, they will continue having difficulty challenging scientific evidence.

“This Court’s constitutional holding in Crawford means little in practice if States can avoid that holding by simply categorizing vital prosecution evidence . . . ‘non-testimonial.’”
Prior to 2004, in municipal court and criminal cases, statements and documents could often be introduced into evidence over defense counsel’s objection. In the landmark decision of *Crawford v. Washington* 541 U.S. 36, 124 S. Ct. 1354 (2004), the U.S. Supreme Court ruled testimonial hearsay may not be admitted against a defendant at trial unless the declarant is unavailable and the defendant has had a prior opportunity for cross examination.

*Crawford*

In *Crawford* the Supreme Court addressed the protections afforded by the Confrontation Clause. The defendant in *Crawford* was charged with assault and attempted murder, and convicted of assault. The trial judge admitted a tape-recorded statement of the defendant’s wife, given to police while she was herself a suspect, after the judge found the statement reliable. The court held that “[admitting] statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.... Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”

The court reversed defendant’s conviction. Note the court’s express holding applied only to “testimonial” evidence:

Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law... as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.

Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.”

**Confrontation Clause**

As accurately summarized by the 2007 Supreme Court Committee on the Rules of Evidence,

the United States Supreme Court sharply departed from its prior view of how hearsay exceptions could be reconciled with the Confrontation Clause of the Sixth Amendment. The Confrontation Clause provides that “[In] all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” Before *Crawford*, the Supreme Court had held that hearsay did not offend the Confrontation Clause if the out-of-court statement fell within a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.”

See *Ohio v. Roberts*, 448 U.S. 56, 66,
Now, under *Crawford*, testimonial statements made by witnesses absent from trial may be “admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” In *Crawford*, the court did not precisely define “testimonial statements,” but it provided this guidance: “Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations.”

In 2006 the U.S. Supreme Court had its next opportunity to look at the hearsay issue, deciding if 911 calls are admissible if the witness will not come to court.

**Testimonial Statements**

In *Davis v. Washington* 126 S. Ct. 2266 (2006) the court held 911 calls sometimes admissible and not hearsay, elaborating on the meaning of “testimonial”:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

On March 6, 2006, the New Jersey appellate courts had previously determined that eyewitness 911 call to report attack was admissible as an excited utterance. *State in the Interest of J.A* 385 NJ Super. 544 (App. Div. 2006).

In this adjudication of delinquency, the non-testifying eyewitness’s description of an assailant—made to the police by phone while he witnessed the attack and pursued the fleeing suspect—was a present sense impression under N.J.R.E. 803(c)(1) and an excited utterance under N.J.R.E. 803(c)(2), and its admission into evidence did not violate the U.S. Supreme Court’s decision in *Crawford*. Certification has been granted by the New Jersey Supreme Court.

In *State v Buda*, 389 NJ Super. 241 (App. Div. 2006) the court found an excited utterance made by a three year old child abuse victim to a DYFS worker at a hospital, although admissible under state evidence law, is inadmissible in this case as a result of evolving federal constitutional jurisprudence under *Crawford* and *Davis*. Certification to the N.J. Supreme Court was also granted on May 21, 2007.

**Caselaw Since 1985**

In *State v. Berezansky* 386 NJ Super. 84 (App. Div. 2006) there was a challenge to chemist testimony required in a DWI blood case.

A lab certificate was admitted in a drug and DWI cases as a business record under N.J.R.E. 803(c)(6) and as a public record under N.J.R.E. 803(c)(8). Based on *Crawford*, the Appellate Division determined a conviction for driving while intoxicated based on a blood test had to be reversed and remanded for a new trial because the defendant’s right of confrontation was violated by admitting into evidence a lab certificate attesting to his blood alcohol content without giving him
the opportunity to cross-examine the chemist who analyzed his blood sample and prepared the certificate. *Crawford* requires the state introduce live testimony by the chemist in blood cases.

The court rejected the state’s reliance on the business record and government record exceptions to the hearsay rule to permit the admission of the lab certificate. The rationale for those exceptions is that such a document is likely to be reliable because it was prepared and preserved in the ordinary course of the operation of a business or governmental entity, not created primarily as evidence for trial. See N.J.R.E. 803(c)(6); Biunno, *Current N.J. Rules of Evidence*, comment 1 to N.J.R.E. 803(c)(6); comment 2 to N.J.R.E. 803(c)(8) (2005). The certificate at issue is not a record prepared or maintained in the ordinary course of government business; it was prepared specifically in order to prove an element of the crime and offered in lieu of producing the qualified individual who actually performed the test. Here, defendant not only was denied his constitutional right to confront the certificate’s preparer, he was not even afforded an adequate opportunity to challenge the certificate’s reliability because the state failed to provide requested documentation regarding the laboratory analysis of the blood.

The court also noted by analogy, N.J.S.A. 2C:35-19c, which requires the prosecutor provide a defendant with all documentation relating to a proffered lab certificate as a condition for admission of that certificate attesting to the identification of a controlled dangerous substance. Certification has been granted in *Berezansky*.

In *State v. Renshaw* 390 NJ Super. 456 (App. Div. 2007), the state introduced a certificate signed by a nurse who drew blood. The court held that the admission in evidence of the Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner, pursuant to N.J.S.A. 2A:62A-11, without the opportunity for cross-examination of the nurse who drew the blood, and over the objection of defendant runs afoul of the right of confrontation protected both by the United States and the New Jersey Constitutions.

Another case where the court ruled a defendant can contest DWI blood lab reports as hearsay was *State v. Kent* 391 NJ Super. 352 (App. Div. 2007).

In *Kent*, defendant was convicted of DWI following a single-car rollover accident, and the Law Division affirmed his conviction. At the municipal trial, the state placed into evidence, among other proofs, (1) a blood sample certificate pursuant to N.J.S.A. 2A:62A-11 from a private hospital employee who had extracted blood from defendant, and (2) reports from a state police laboratory that had tested the blood samples. The authors of those hearsay documents did not appear at trial.

The court reaffirmed the holdings in *Renshaw* and *Berezansky*, concluding that the hearsay documents are “testimonial” under *Crawford* and the defendant thus deprived of his right of confrontation under the Sixth Amendment.

However, the court also noted that unless our Supreme Court determines otherwise, the confrontation clause of Article I, Paragraph 10 of the New Jersey Constitution does not appear to independently require such cross-examination beyond current federal precedents interpreting the Sixth Amendment. Additionally, the court recommended that legislative and/or rule-making initiatives be pursued to avoid
placing undue testimonial burdens on health care workers and law enforcement personnel who may create documents relevant to drunk driving prosecutions.

Defendant’s DWI conviction was affirmed on independent grounds, based upon the arresting officer’s numerous observations indicative of defendant’s intoxication, and defendant’s admission of drinking.

For decades, DWI breathalyzer certificates in DWI cases were admitted as an exception to hearsay rules. And in a breathalyzer appeal case, *State v. Dorman*, 393 NJ Super. 28 (App. Div., 2007), the court held that notwithstanding the Supreme Court’s holding in *Crawford*, a breathalyzer machine certificate of operability offered by the state to meet its burden of proof under *State v. Garthe*, 1 N.J. 1 (1996), remains admissible as a business record under N.J.R.E. 803(c)(6).
In a decision that could prove highly favorable for many criminal defendants, the Supreme Court on Monday made it more difficult for prosecutors to introduce statements at trial from absent witnesses who are not available for cross-examination by the defense.

The court’s 9-to-0 decision addressed a situation that typically arises when a witness who has given a statement to the police later claims a privilege against testifying at trial, or when a co-defendant who has pleaded guilty has made incriminating statements during plea negotiations.

The basis for the court’s decision was the Sixth Amendment’s confrontation clause, which gives a criminal defendant the right “to be confronted with the witnesses against him.” In an opinion by Justice Antonin Scalia, the court overturned a 24-year-old precedent under which a statement from a witness who was not available for cross-examination could nonetheless be used at trial if the judge found it to be reliable.

Justice Scalia said the requirement of reliability was too subjective, amorphous and “malleable” to comport with the intent of the Constitution’s framers, for whom the right to cross-examine adverse witnesses was essential. The right was firmly established in English common law at the time the Constitution was adopted, he noted.

“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation,” Justice Scalia said, adding: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”

The decision, Crawford v. Washington, No. 02-9410, overturned an assault conviction that had been upheld by the Washington Supreme Court. Michael D. Crawford stabbed a man who, he believed, had tried to rape his wife. His defense was self-defense, and the question at trial was whether the victim was reaching for a weapon when he was stabbed. Mr. Crawford’s wife, Sylvia, who was present at the time, had given the police a statement suggesting that there was no weapon. Invoking the marital privilege, she did not testify at her husband’s trial, but the judge permitted the prosecution to introduce her taped statement.

Under the rule the Supreme Court established Monday, the prosecution may introduce statements only from absent witnesses who had previously been cross-examined by the defense, such as at a deposition or at a previous trial. So the rule will not hamper prosecutors in putting on evidence at a new trial following a mistrial, for example.

One criminal law expert, Prof. Richard D. Friedman of the University of Michigan Law School, said the decision was a “wonderful development” that could bring significant changes in the conduct of criminal trials. If prosecutors have any doubt about the ultimate availability of their
witnesses, they will have to give the defense a chance at cross-examination before trial, he said.

"The court is saying that the confrontation clause is not a matter of weighing and judging, but that it means what it says," Professor Friedman said.

While all nine justices voted to overturn Mr. Crawford's conviction, Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor did not sign Justice Scalia's opinion establishing the new rule. They said the statement in the Washington case did not even meet the 1980 rule's test of reliability, so there was no occasion to overrule that decision, *Ohio v. Roberts*.

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The Supreme Court on Monday called for new legal briefs on possible rehearing—and, maybe, revision—of its ruling striking down the death penalty for the crime of child rape. In an order in *Kennedy v. Louisiana*, the Court sought briefs from lawyers for both sides in the case, as well as from the federal government. The new briefing in 07-343 is to be completed by Sept. 24—in advance of the Court’s first Conference of the new Term, on Monday, Sept. 29.

The briefs are to discuss two issues, according to the order: first, whether to grant rehearing of the June 25 decision, and second, what action—if any—the Court should take if it does reopen the case. Here is the way the Court phrased its inquiries: “whether rehearing should be granted” and “the merits of the issue raised in the petition for rehearing” filed by the state of Louisiana on July 21.

That issue, of course, is whether the Court should modify or expand the substance of its ruling in the case because the decision did not take account of a federal law authorizing a death sentence for child rape as part of the military justice system. This embraces several other related issues: Will the Court rethink its conclusion that there is a “national consensus” against the penalty for that crime? Will it clarify whether one basis for its decision (the absence of a “national consensus”) was more important than the second basis (the Court’s independent view that the punishment was excessive for the crime)? Will it make clear whether rulings under the Eighth Amendment apply to the same degree in the military justice system as in civilian courts? Will it comment in any way on the constitutionality of the military justice provision for the death penalty for child rape?

In Monday’s order, the Justices sought a supplemental brief of up to 4,500 words from attorneys for Patrick Kennedy, the death-row inmate at the center of the case, with that brief due on Sept. 17. The U.S. Solicitor General’s office is to file a brief of up to 2,500 words, due at the same time, on the federal government’s views. The state of Louisiana is to file a brief of up to 4,500 words, dealing not only with its plea for rehearing, but also “the merits of the issue raised in the petition for rehearing.” That final brief is due Sept. 24.

Under the Court’s Rules, a decided case will not be reheard unless a majority of the Court votes to do so, and the majority includes at least one Justice who voted for the result in the case. Since the Kennedy case was decided by a 5-4 vote, at least one of those in the majority of five would have to cast a vote for rehearing.

Louisiana, with the support of the Solicitor General’s office, has contended that the Court’s decision was flawed because of the omission of any reference to a provision enacted by Congress in a Pentagon budget bill two years ago. Both Louisiana and the Solicitor General’s office have said it was an error for them not to bring that law to the Court’s attention but that, nevertheless, the
Court should reopen the case and consider now what impact, if any, that might have on the result.

In the Court’s decision, the Court first made a survey of trends in state legislatures, in Congress, and in the courts—a survey leading to the conclusion that there was a national consensus against the penalty for the crime. In that part of the Court opinion, Justice Anthony M. Kennedy wrote that there was no federal law directly on point.

That is the part of the ruling that Louisiana and the federal government have attacked most aggressively.

In the second part of the decision, the Court, exercising what it called its own “independent judgment,” concluded that the death penalty would not be proportional for the crime of raping a child. In its rehearing petition, Louisiana said that the Court did not “quantify which factor, if any, predominated” in reaching its result—national consensus, or the Court’s “independent judgment.”

If the existence of the military provision “calls into question the national consensus found by this Court,” Louisiana added, “the question arises whether the second factor, standing alone, justifies an Eighth Amendment holding that supplants the will of not only the several States, but of the Federal Government as well.”

The “independent judgment” part of the decision, Louisiana added, “was not fully informed” because the Court “was not presented with all of the evidence of recent legislative enactments.”

The Solicitor General’s office, in asking the Court on July 28 to allow it to file a brief supporting rehearing, said that the Kennedy decision “is grounded on a materially erroneous understanding of federal law. Contrary to statements in the opinion, both Congress and the President have recently determined that a maximum sentence of death is appropriate and proportionate for cases involving the extraordinarily grave crime of child rape.”

The Solicitor’s prepared brief suggested that “the categorical nature of the Court’s decision is particularly problematic.” It noted that the Court “has yet to resolve whether the Eighth Amendment’s prohibition” applies differently in military capital cases. But the Kennedy decision rules out “across the board” the death penalty for child rape. That raised “grave doubt” about the validity of the 2006 law, the brief added.

Before Monday, the Court had taken no action on the Solicitor’s motion to allow the government to file a brief on rehearing—a brief that does not appear to be allowed under the Court’s Rules. But Monday’s order extending the invitation to the Solicitor to file a new brief makes the motion irrelevant now.