2017

Section 5: Criminal Law Panel

Institute of Bill of Rights Law at the William & Mary Law School

V. Criminal Law Panel

In This Section:

Carpenter v. United States

16-402

Ruling Below: *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016).

Carpenter and three other accomplices were charged with robbery and violating the Hobbs Act. As evidence, the state presented cell-site data gathered without a warrant. Carpenter moved to suppress the evidence on the ground that it violated his Fourth Amendment rights on the basis that the FBI should have acquired a warrant with probable cause prior to collecting said data. The Court denied his motion. Carpenter appealed. The Court of Appeals affirmed.

Question Presented: Whether the warrantless seizure and search of historical cellphone records revealing the location and movements of a cellphone user over the course of 127 days is permitted by the Fourth Amendment.

United States of America,
v.
Timothy Carpenter.

United States Court of Appeal for the Sixth Circuit

Decided on April 13, 2016

[Excerpt; some citations and footnotes omitted]

KETHLEDGE, Circuit Judge. In Fourth Amendment cases the Supreme Court has long recognized a distinction between the content of a communication and the information necessary to convey it. Content, per this distinction, is protected under the Fourth Amendment, but routing information is not. Here, Timothy Carpenter and Timothy Sanders were convicted of nine armed robberies in violation of the Hobbs Act. The government's evidence at trial included business records from the defendants' wireless carriers, showing that each man used his cellphone within a half-mile to two miles of several robberies during the times the robberies occurred. The defendants argue that the government's collection of those records constituted a warrantless search in violation of the Fourth Amendment. In making that argument, however, the defendants elide both the distinction described above and the difference between GPS tracking and the far less precise locational information that the government obtained here. We reject the defendants' Fourth Amendment argument along with numerous others, and affirm the district court's judgment.

I.

In April 2011, police arrested four men suspected of committing a string of armed robberies at Radio Shacks and T-Mobile stores in and around Detroit. One of the men confessed that the group had robbed nine different stores in Michigan and Ohio between December 2010 and March 2011, supported by a shifting ensemble of 15 other men who served as getaway drivers and lookouts. The robber who confessed to the crimes gave the FBI his own cellphone number and the numbers of other participants; the FBI then reviewed his call records to identify still more numbers that he had called around the time of the robberies.

In May and June 2011, the FBI applied for three orders from magistrate judges to obtain "transactional records" from various wireless carriers for 16 different phone numbers. As part of those applications, the FBI recited that these records included "[a]ll subscriber information, toll records and call detail records including listed and unlisted numbers dialed or otherwise transmitted to and from [the] target telephones from December 1, 2010 to present[,]" as well as "cell site information for the target telephones at call origination and at call termination for incoming and outgoing calls[.]" The FBI also stated that these records would "provide evidence that Timothy Sanders, Timothy Carpenter and other known and unknown individuals" had violated the Hobbs Act, 18 U.S.C. § 1951. The magistrates granted the applications pursuant to the Stored Communications Act, under which the government may require the disclosure of certain telecommunications records when "specific and articulable facts show[] that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

The government later charged Carpenter with six counts, and Sanders with two, of aiding and abetting robbery that affected interstate commerce, in violation of the Hobbs Act, and aiding and abetting the use or carriage of a firearm during a federal crime of violence. *See* 18 U.S.C. §§ 924(c), 1951(a). Before trial, Carpenter and Sanders moved to suppress the government's cell-site evidence on Fourth Amendment grounds, arguing that the records could be seized only with a warrant supported by probable cause. The district court denied the motion.

At trial, seven accomplices testified that Carpenter organized most of the robberies and often supplied the guns. They also testified that Carpenter and his half-brother Sanders had served as lookouts during the robberies. According to these witnesses, Carpenter typically waited in a stolen car across the street from the targeted store. At his signal, the robbers entered the store, brandished their guns, herded customers and employees to the back, and ordered the employees to fill the robbers' bags with new smartphones. After each robbery, the team met nearby to dispose of the guns and getaway vehicle and to sell the stolen phones.

FBI agent Christopher Hess offered expert testimony regarding the cell-site data provided by Carpenter's and Sanders's wireless carriers, MetroPCS and T-Mobile. Hess explained that cellphones work by establishing a radio connection with nearby cell towers (or "cell sites"); that phones are constantly searching for the strongest signal from those towers; and that individual towers project different signals in each direction or "sector," so that a cellphone located on the north side of a cell tower will use a different signal than a cellphone located on the south side of the same tower. Hess said that cell towers are typically spaced widely in rural areas, where a tower's coverage might reach as far as 20 miles. In an urban area like Detroit, however, each cell site covers "typically anywhere from a half-mile to two miles." He testified that wireless carriers typically log and store certain call-detail records of their customers' calls, including the date, time, and length of each call; the phone numbers engaged on the call; and the cell sites where the call began and ended.

With the cell-site data provided by Carpenter's and Sanders's wireless carriers, Hess created maps showing that Carpenter's and Sanders's phones were within a half-mile

to two miles of the location of each of the robberies around the time the robberies happened. Hess used MetroPCS call-detail records, for example, to show that Carpenter was within that proximity of a Detroit Radio Shack that was robbed around 10:35 a.m. on December 13, 2010. Specifically, MetroPCS records showed that at 10:24 a.m. Carpenter's phone received a call that lasted about four minutes. At the start and end of the call, Carpenter's phone drew its signal from MetroPCS tower 173, sectors 1 and 2, located southwest of the store and whose signals point northnortheast. After the robbery, Carpenter placed an eight-minute call originating at tower 145, sector 3, located northeast of the store, its signal pointing southwest; when the call ended, Carpenter's phone was receiving its signal from tower 164, sector 1, alongside Interstate 94, north of the Radio Shack. *See* Carpenter App'x at 11. Hess provided similar analysis concerning the locations of Carpenter's and Sanders's phones at the time of a December 18, 2010 robbery in Detroit; a March 4, 2011 robbery in Warren, Ohio; and an April 5, 2011 robbery in Detroit. *See* Carpenter App'x at 12-15.

The jury convicted Carpenter and Sanders on all of the Hobbs Act counts and convicted Carpenter on all but one of the § 924(c) gun counts. Carpenter's convictions on the § 924(c) counts subjected him to four mandatory-minimum prison sentences of 25 years, each to be served consecutively, leaving him with a Sentencing Guidelines range of 1,395 to 1,428 months' imprisonment. The district court sentenced Carpenter to 1,395 months' imprisonment and Sanders to 170 months' imprisonment. Carpenter and Sanders now appeal their convictions and sentences.

II.

A.

Carpenter and Sanders challenge the district court's denial of their motion to exclude their cell-site data from the evidence at trial. Those data themselves took the form of business records created and maintained by the defendants' wireless carriers: when the defendants made or received calls with their cellphones, the phones sent a signal to the nearest cell-tower for the duration of the call; the providers then made records, for billing and other business purposes, showing which towers each defendant's phone had signaled during each call. The government thereafter collected those records, and hence these cell-site data, for a range of dates (127 days of records for Carpenter, 88 days for Sanders) encompassing the robberies at issue here. The government did so pursuant to a court order issued under the Stored Communications Act, which required the government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). Carpenter and Sanders argue that the Fourth Amendment instead required the government to obtain a search warrant, pursuant to a showing of probable cause, before collecting the data. The district court rejected that argument, holding that the government's collection of cell-site records created and maintained by defendants' wireless carriers was not a search under the Fourth Amendment. We review the district court's decision de novo. *See United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government

trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *United States v. Jones*, 132 S.Ct 945, 950 (2012). Government trespasses upon those areas normally count as a search. *Id*. In *Katz v. United States*, 389 U.S. 347 (1967), however, the Supreme Court moved beyond a property-based understanding of the Fourth Amendment, to protect certain expectations of privacy as well. To fall within these protections, an expectation of privacy must satisfy "a twofold requirement": first, the person asserting it must "have exhibited an actual (subjective) expectation of privacy"; and second, that expectation must "be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). When an expectation of privacy meets both of these requirements, government action that "invade[s]" the expectation normally counts as a search. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

This case involves an asserted privacy interest in information related to personal communications. As to that kind of information, the federal courts have long recognized a core distinction: although the content of personal communications is private, the information necessary to get those communications from point A to point B is not. For example, in *Ex parte Jackson*, 96 U.S. 727, 733 (1878), the Court held that postal inspectors needed a search warrant to open letters and packages, but that the "outward form and weight" of those mailings— including, of course, the recipient's name and physical address—was not constitutionally protected. *Id*. That was true even though that information could sometimes bring embarrassment: "In a small village, for instance, a young gentleman may not altogether desire that all the loungers around the store which contains the Post-office shall be joking about the fair object of his affections." Our Letters, N.Y. Times, Dec. 12, 1872, at 4.

In the twentieth century, the telephone call joined the letter as a standard form of communication. The law eventually followed, recognizing that police cannot eavesdrop on a phone call—even a phone call placed from a public phone booth—without a warrant. *See Katz*, 389 U.S. at 352-55. But again the Supreme Court distinguished between a communication's content and the information necessary to send it. In *Katz*, the Court held that "[t]he Government's activities in electronically listening to and recording the petitioner's words" was a search under the Fourth Amendment. *Id*. at 353 (emphasis added). But in *Smith*, the Court held that the police's installation of a pen register—a device that tracked the phone numbers a person dialed from his home phone—was not a search because the caller could not reasonably expect those numbers to remain private. "Although [the caller's] conduct may have been calculated to keep the *contents* of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed." *Smith*, 442 U.S. at 743 (emphasis in original). Today, the same distinction applies to internet communications. The Fourth Amendment protects the content of the modern-day letter, the email. *See United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010). But courts have not (yet, at least) extended those protections to the internet analogue to envelope markings, namely the metadata used to route internet communications, like sender and recipient addresses on an email, or IP addresses. *See, e.g.*, *United States v. Christie*, 624 F.3d 558, 574 (3d Cir. 2010); *United States v. Perrine*, 518 F.3d 1196, 1204-05 (10th Cir. 2008); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2007).

The business records here fall on the unprotected side of this line. Those records say nothing about the content of any calls. Instead the records include routing information, which the wireless providers gathered in the ordinary course of business. Carriers necessarily track their customers' phones across different cell-site sectors to connect and maintain their customers' calls. And carriers keep records of these data to find weak spots in their network and to determine whether roaming charges apply, among other purposes. Thus, the cell-site data—like mailing addresses, phone numbers, and IP addresses—are information that facilitate personal communications, rather than part of the content of those communications themselves. The government's collection of business records containing these data therefore is not a search. The Supreme Court's decision in *Smith* confirms the point. At the outset, the Court observed that Smith could not claim that "his 'property' was invaded" by the State's actions, which meant he could not claim any property-based protection under the Fourth Amendment. And as to privacy, the Court hewed precisely to the content-focused distinction that we make here. 442 U.S. at 741. The Court emphasized (literally) that the State's pen register did "not acquire the *contents* of communications." *Id*. (emphasis in original). Instead, the Court observed, the phone numbers acquired by the State had been dialed "as a means of establishing communication." *Id*. Moreover, the Court pointedly refused to adopt anything like a "least sophisticated phone user" (to paraphrase the Fair Debt Collection Practices Act) standard in determining whether phone users know that they convey that information to the phone company: "All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id*. at 742. The Court likewise charged "telephone users" with knowledge that "the phone company has facilities for recording" numerical information and that "the phone company does in fact record this information for a variety of legitimate business purposes." *Id*. at 743. Thus, the Court held, Smith "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business." 442 U.S. at 744. Hence the numerical information was not protected under the Fourth Amendment.

The same things are true as to the locational information here. The defendants of course lack any property interest in cell-site records created and maintained by their wireless carriers. More to the point, when the government obtained those records, it did "not acquire the contents of communications." *Id*. at 741. Instead, the defendants' cellphones signaled the nearest cell towers—thereby giving rise to the data obtained by the government here—solely "as a means of establishing communication." *Id*. Moreover, any cellphone user who has seen her phone's signal strength fluctuate must know that, when she places or receives a call, her phone "exposes" its location to the nearest cell tower and thus to the company that operates the tower. *Accord United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (en banc); *In re Application for Historical Cell Site Data*, 724, F.3d 600, 614 (5th Cir. 2013). And any cellphone user who has paid "roaming" (i.e., out-of-network) charges—or even cellphone users who have not— should know that wireless carriers have "facilities for recording" locational information and that "the phone company does in fact record this information for a variety of legitimate business purposes." *Id*. at 743. Thus, for the same reasons that Smith had no expectation of privacy in the numerical information at

issue there, the defendants have no such expectation in the locational information here. On this point, Smith is binding precedent.

The defendants and their amicus, the American Civil Liberties Union, argue that *Jones* liberates us to hold otherwise. In *Jones*, five Justices (though not the Court in its majority opinion) agreed that "longer term GPS monitoring in government investigations of most offenses impinges on expectations of privacy." 132 S. Ct. at 964 (Alito, J., concurring in the judgment); *id*. at 955 (Sotomayor, J., concurring) (same). But there are at least two problems with the defendants' argument as made here. The first is that the government action in this case is very different from the government action in *Jones*. That distinction matters: in applying *Katz*, "it is important to begin by specifying *precisely the nature of the state activity that is challenged*." *Smith*, 442 U.S. at 741 (emphasis added). Whether a defendant had a legitimate expectation of privacy in certain information depends in part on what the government did to get it. A phone conversation is private when overheard by means of a wiretap; but that same conversation is unprotected if an agent is forced to overhear it while seated on a Delta flight. Similarly, information that is not particularly sensitive—say, the color of a suspect's vehicle—might be protected if government agents broke into the suspect's garage to get it. Yet information that is highly sensitive—say, all of a suspect's credit-charges over a three-month period—is not protected if the government gets that information through business records obtained per a subpoena. *See United States v. Phibbs*, 999 F.2d 1053, 1077-78 (6th Cir. 1993).

This case involves business records obtained from a third party, which can only diminish the defendants' expectation of privacy in the information those records contain. *See United States v. Miller*, 425 U.S. 435, 443 (1976); *Phibbs*, 999 F.2d at 1077-78. *Jones*, in contrast, lands near the other end of the spectrum: there, government agents secretly attached a GPS device to the underside of Jones's vehicle and then monitored his movements continuously for four weeks. That sort of government intrusion presents one set of Fourth Amendment questions; government collection of business records presents another. And the question presented here, as shown above, is answered by *Smith*.

The second problem with the defendants' reliance on Jones is that—unlike Jones—this is not a GPS-tracking case. GPS devices are accurate within about 50 feet, which is accurate enough to show that the target is located within an individual building. Data with that kind of accuracy might tell a story of trips to "the strip club, the criminal defense attorney, the by-the hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on[.]" *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (internal quotation marks omitted). But here the cell-site data cannot tell that story. Instead, per the undisputed testimony at trial, the data could do no better than locate the defendants' cellphones within a 120- (or sometimes 60-) degree radial wedge extending between one-half mile and two miles in length. Which is to say the locational data here are accurate within a 3.5 million square-foot to 100 million square-foot area—as much as 12,500 times less accurate than the GPS data in Jones. And cell phone locational data are even less precise in suburban and rural settings. Areas of this scale might encompass bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque. The ACLU responds that so-called "femtocells"

can provide service (and thus identify a phone's location) within areas as small as ten meters. But our task is to decide this case, not hypothetical ones; and in this case there are no femtocells to be found. The defendants' argument is without merit.

The defendants similarly rely on *Riley v. California*, 134 S.Ct 2473, 2485 (2014), where the Court held the government may not access a smartphone's internal data—or, one might say, its contents—without a warrant. But the Court's rationale was that smartphones typically store vast amounts of information about their users—vastly more, of course, than whether the user happens to be located within a two-mile radial wedge. *Riley* only illustrates the core distinction we make here.

Some other points bear mention. One is that Congress has specifically legislated on the question before us today, and in doing so has struck the balance reflected in the Stored Communications Act. The Act stakes out a middle ground between full Fourth Amendment protection and no protection at all, requiring that the government show "reasonable grounds" but not "probable cause" to obtain the cell-site data at issue here. See 18 U.S.C. § 2703(d). The defendants and the ACLU effectively ask us to declare that balance unconstitutional. There is considerable irony in that request. The *Katz* standard asks whether the defendants' asserted expectation of privacy "is 'one that society is prepared to recognize as reasonable[.]'" *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361). Here, one might say that society itself—in the form of its elected representatives in Congress—has already struck a balance that it thinks reasonable. That is not to say that courts should defer to Congress's judgment on constitutional questions. But when the question itself turns on society's views, and society has in a meaningful way already expressed them, judges should bring a certain humility to the task of deciding whether those views are reasonable—lest judges "confuse their own expectations of privacy," *Jones*, 132 S. Ct. at 962 (Alito, J., concurring), with those that every reasonable person must hold.

A second point is related. Constitutional judgments typically rest in part on a set of empirical assumptions. When those assumptions concern subjects that judges know well—say, traffic stops—courts are well-equipped to make judgments that strike a reasonable balance among the competing interests at stake. See *Kerr*, The Fourth Amendment and New Technologies: Constitutional Myths and the Case For Caution, 102 Mich. L. Rev. 801, 863 (2004). But sometimes new technologies—say, the latest iterations of smartphones or social media—evolve at rates more common to superbugs than to large mammals. In those situations judges are less good at evaluating the empirical assumptions that underlie their constitutional judgments. Indeed the answers to those empirical questions might change as quickly as the technology itself does. With regard to the *Katz* test in particular, for example, "[d]ramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes." *Jones*, 132 S. Ct. at 962 (Alito, J., concurring). Congress is usually better equipped than courts are to answer the empirical questions that such technologies present. Thus, "[w]hen technologies are new and their impact remains uncertain, statutory rules governing law enforcement powers will tend to be more sophisticated, comprehensive, forward-thinking, and flexible than rules created by the judicial branch." *Kerr*, 102 Mich. L. Rev. at 859-60.

These concerns favor leaving undisturbed the Congressional judgment here.

In sum, we hold that the government's collection of business records containing cell-site data was not a search under the Fourth Amendment.

B.

Sanders argues that the district court should have suppressed the government's cell-site evidence for another reason, namely that (in his view) the government's applications to obtain the cell-site records failed to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). There are several problems with that argument, but the simplest is that suppression of evidence is not among the remedies available under the Stored Communications Act. Quite the contrary: the statute identifies a handful of civil remedies, including "damages" and "equitable or declaratory relief," 18 U.S.C. § 2707(b), and provides that those "are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708; *see United States v. Guerrero*, 768 F.3d 351, 358 (5th Cir. 2014). The relief that Sanders seeks is therefore unavailable under the Act. *See United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006).

III.

A.

Carpenter argues that the district court erred when it denied Carpenter's motion for acquittal for lack of venue over counts seven and eight. Those counts charged Carpenter with aiding and abetting a Hobbs Act robbery in Warren, Ohio, and with aiding and abetting the use of a firearm in connection with that robbery. *See* 18 U.S.C. §§ 924(c), 1951(a). We review the district court's decision de novo. *See United States v. Kuehne*, 547 F.3d 667, 677 (6th Cir. 2008).

Carpenter was prosecuted in the Eastern District of Michigan. Venue was proper there so long as a rational trier of fact, viewing the evidence in the light most favorable to the government, could find by a preponderance of the evidence that any of Carpenter's accessorial acts, or the underlying crime itself, occurred in the Eastern District of Michigan. Relatedly, "[w]here venue is appropriate for the underlying crime of violence, so too it is for the § 924(c)(1) offense." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 282 (1999).

Here, Carpenter's accomplices testified that, while in the Eastern District of Michigan, Carpenter recruited the robbers for the Warren robbery, described for them the robbery's general scheme, and from there drove them to Ohio. Two of these witnesses also testified that, while in Michigan, Carpenter made arrangements to have another accomplice supply the robbers with a gun when they got to Warren. A reasonable trier of fact could credit this testimony, and conclude that much of Carpenter's conduct in abetting both the Warren robbery and the use of a firearm during it took place in the Eastern District of Michigan. The district court correctly denied Carpenter's motion for acquittal on counts seven and eight.

B.

Carpenter argues that the district court should have allowed him to use a report prepared by FBI Special Agent Vicente Ruiz to refresh the memory of government witness Adriane Foster on cross-examination. We review that evidentiary ruling for an abuse of

discretion. *See United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012).

At trial, Carpenter's counsel cross-examined Foster—an accomplice of Carpenter—about Foster's past statements to Agent Ruiz. Foster testified that he told Ruiz that Carpenter had provided Foster with advance information about the robbery in Warren. According to Ruiz's written summary of the interview, however, Foster told Ruiz that Sanders, not Carpenter, had provided Foster with advance information about the robbery. Carpenter's counsel sought to introduce Ruiz's report to "refresh [Foster's] memory" of the interview.

A document may be used to refresh a witness's memory only after his memory has been "exhausted." *Rush v. Ill. Cent. R.R. Co.*, 399 F.3d 705, 716 (6th Cir. 2005). Here, Foster seemed to have no trouble remembering his conversation with Agent Ruiz. Foster repeatedly testified that he did remember telling Ruiz that Timothy Carpenter—not Timothy Sanders—had told him about the plans for the Warren robbery. Carpenter's counsel then asked Foster whether he remembered "saying something different" to Ruiz. Foster said that he did not. That answer did not show that Foster's memory needed refreshing; it showed that Foster disagreed with Carpenter about what Foster had told Ruiz. What Carpenter actually sought to do with the report was not refresh Ruiz's memory, but impeach his testimony. The district court did not abuse its discretion in ruling that Carpenter could not use the report for that purpose.

To the same end, Carpenter argues that the district court should have allowed him to introduce Ruiz's report as extrinsic evidence of a prior inconsistent statement under Federal Rule of Evidence 613(b). But an FBI agent's written summary of an interview with a declarant cannot be used to impeach the declarant's later testimony unless the declarant has attested to the report's accuracy. *See United States v. Barile*, 286 F.3d 749, 757 (4th Cir. 2002); *United States v. Schoenborn*, 4 F.3d 1424, 1429 & n.3 (7th Cir. 1993). Foster has not done that here; to the contrary, Foster testified that Ruiz's report would have been wrong if it said that Sanders rather than Carpenter had told him about the plans for the Warren robbery. The district court thus correctly barred the report's introduction at trial.

C.

1.

Carpenter's remaining argument is that his 1,395-month sentence is so disproportionate to his crimes as to violate the Eighth Amendment's prohibition on cruel and unusual punishment. He also argues that his mandatory-minimum sentences for his § 924(c) convictions violate the constitutional separation of powers. We consider both issues de novo. *See United States v. Kelsor*, 665 F.3d 684, 701 (6th Cir. 2011).

"[O]nly an extreme disparity between crime and sentence offends the Eighth Amendment." *United States v. Odeneal*, 517 F.3d 406, 414 (6th Cir. 2008). In *Solem v. Helm*, 463 U.S. 277 (1983), the Supreme Court held that the Eighth Amendment prohibited a state court from sentencing to life imprisonment without parole a recidivist criminal who wrote a bad check for $100. But in *Ewing v. California*, 538 U.S. 11 (2003), the Supreme Court rejected the Eighth Amendment claim of a defendant who was sentenced to 25 years to life for stealing several golf clubs. 538 U.S. at 28-30.

Carpenter has a long criminal history. In this case, as the district court observed, Carpenter organized and led several "very violent" robberies that put his victims "in extreme

danger[.]" Meanwhile, in other armed-robbery cases, we have already held that sentences even longer than Carpenter's were constitutionally permissible. *See United States v. Clark*, 634 F.3d 874, 877-78 (6th Cir. 2011) (2,269 months); *United States v. Watkins*, 509 F.3d 277, 282 (6th Cir. 2007) (1,772 months). Carpenter's sentence does not violate the Eighth Amendment.

Nor do his mandatory-minimum sentences violate the constitutional separation of powers. "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467 (1991). Carpenter acknowledges that we have "flatly rejected" his argument in other cases. Carpenter Br. at 54; *see, e.g.*, *United States v. Cecil*, 615 F.3d 678, 696 (6th Cir. 2010). This case is no different.

2.

Sanders challenges his sentence on non-constitutional grounds, arguing that the district court misapplied the Sentencing Guidelines and that his sentence is "greater than necessary" to accomplish the remedial objectives of incarceration. *See* 18 U.S.C. § 3553. We review for clear error the district court's factual findings in support of Sanders's sentence, and review the sentence itself for an abuse of discretion. *See United States v. Randolph*, 794 F.3d 602, 614 (6th Cir. 2015).

Sanders argues first that the district court incorrectly applied sentencing enhancements for brandishing or possessing a firearm in furtherance of robbery, and for physically restraining a person in furtherance of a robbery. *See* U.S.S.G. §§ 2B3.1(b)(2)(C), (b)(4)(B). Sanders himself need not have committed those acts in order for the enhancements to apply; rather, he need only have known it was "reasonably probable" that a co-participant would commit them. *See United States v. Woods*, 604 F.3d 286, 291 (6th Cir. 2010).

That standard is met here. During the January 7, 2011 robbery, Sanders's accomplice Juston Young returned to the getaway car with gun in hand. Thus, when Sanders teamed up with Young and others for another robbery on March 4, Sanders could have easily foreseen that Young would brandish a firearm in the course of the crime—as in fact Young did. The district court did not clearly err in finding that the firearm enhancement applied to Sanders.

Nor did the court err in finding that Sanders could foresee that Young would physically restrain someone during the March 4 robbery. As a general matter, an accomplice to robbery should foresee that robbery likely entails physical restraint or worse. *See* U.S. Sentencing Guidelines Manual § 1B1.3 cmt. n.2 (2012). And Sanders knew specifically that the plan for that robbery was for the robbers to move customers and employees to the back of the store. The physical-restraint enhancement was therefore proper. That leaves an enhancement for brandishing a firearm during the January 7 robbery. But that enhancement had no effect on Sanders's Guidelines range: the offense level for the March 4 robbery was higher than the offense level for the January 7 robbery, even with the brandishing enhancement; and the offense level for the March 4 robbery, not the January 7 one, thus determined his total offense level under the Guidelines. Any error as to the brandishing enhancement for the January 7 robbery was therefore harmless. *See United States v. Jeross*, 521 F.3d 562, 574-76 (6th Cir. 2008).

Finally, the district court acted within its discretion in sentencing Sanders to 170 months' imprisonment, which fell squarely within his Guidelines range of 151 to 188

months. Within Guidelines sentences are presumptively reasonable in this circuit. *See United States v. Kamper*, 748 F.3d 728, 739-40 (6th Cir. 2014). Moreover, the district court considered and rejected the arguments that Sanders raised at his sentencing hearing, and otherwise properly determined that the sentence was appropriate in light of 18 U.S.C. § 3553(a). The court did not abuse its discretion.

The judgments in both cases are affirmed.

CONCURRENCE

STRANCH, Circuit Judge, concurring. I join Parts II.B and III of the majority opinion, which resolve Carpenter's and Sanders's statutory, evidentiary, and sentencing claims. I concur only in the judgment with respect to Part II.A because I believe that the sheer quantity of sensitive information procured without a warrant in this case raises Fourth Amendment concerns of the type the Supreme Court and our circuit acknowledged in *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring), and in *United States v. Skinner*, 690 F.3d 772, 780 (6th Cir. 2012). Though I write to address those concerns, particularly the nature of the tests we apply in this rapidly changing area of technology, I find it unnecessary to reach a definitive conclusion on the Fourth Amendment issue. I concur with the majority on the basis that were there a Fourth Amendment violation, I would hold that the district court's denial of Carpenter and Sanders's motion to suppress was nevertheless proper because some extension of the good faith exception to the exclusionary rule would be appropriate.

A. Fourth Amendment Concerns

At issue here is not whether the cell-site location information (CSLI) for Carpenter and Sanders could have been obtained under the Stored Communications Act (SCA). The question is whether it should have been sought through provisions of the SCA directing the government to obtain a warrant with a probable cause showing, 18 U.S.C. § 2703(c)(1)(A), or a court order based on the specified "reasonable grounds[,]" *id*. §§ 2703(c)(1)(B), (d). This leads us to the requirements of the Fourth Amendment.

Fourth Amendment law was complicated in the time of paper correspondence and land phone lines. The addition of cellular (not to mention internet) communication has left courts struggling to determine if (and how) existing tests apply or whether new tests should be framed. I am inclined to favor the latter approach for several reasons, particularly one suggested by Justice Sotomayor: "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) (citations omitted).

It is easier to see why the existing tests present problems than it is to articulate a test that will not. This difficulty is exemplified by the two conceptual categories under the Fourth Amendment found in this case and the law that governs each. The majority accurately describes two different strains of law, one addressing the distinction between GPS tracking and the less accurate CSLI obtained and used in this case and the other "between the content of a communication and the information necessary to convey it." (Majority Op. at 2.) To understand whether and how the tests established in these two

different strains of Fourth Amendment law might apply requires a brief review of each.

First, the distinction between GPS tracking and CSLI acquisition. CSLI does appear to provide significantly less precise information about a person's whereabouts than GPS and, consequently, I agree that a person's privacy interest in the CSLI his or her cell phone generates may indeed be lesser. *See, e.g.*, *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."); *id.* at 963 (Alito, J., concurring) ("For older phones, the accuracy of the location information depends on the density of the tower network, but new 'smart phones,' which are equipped with a GPS device, permit more precise tracking.").

But precision is not the only variable with legal significance. In *United States v. Skinner*, we addressed the government's use of GPS data emitted by a suspect's cell phone to track the suspect's whereabouts over the course of three days. *Skinner*, 690 F.3d at 774–76. The tracking took place pursuant to a court order authorizing the suspect's phone company to provide the government access to the GPS data emitted by the suspect's pay-as-you-go cell phone. See id. at 776. The majority opinion there acknowledged "the concern raised by Justice Alito's concurrence in *Jones*" that long-term location monitoring in government investigations impinges on expectations of privacy, but held that the concern was not implicated in Skinner's case because of the relatively short tracking period. *Id.* at 780. It distinguished *Jones*, explaining that "[w]hile Jones involved intensive monitoring over a 28-day period, here the DEA agents only tracked Skinner's cell phone for three days. Such 'relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable.'" *Id.* (quoting *Jones*, 132 S. Ct. at 964 (Alito, J., concurring)). But Skinner framed this conclusion with a key caveat: "There may be situations where police, using otherwise legal methods, so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable for Fourth Amendment purposes." *Id.*

Primarily analyzing this case under the tests established for the assertion of a privacy interest in business records, the majority here determines that the CSLI is unprotected because it deals with routing or conveying information, not the content of the related communications. (Majority Op. at 6–8.) This analysis reflects a valid distinction in that arena of the law. It is here, however, that my concern arises with the existing tests. It seems to me that our case resides at the intersection of the law governing tracking of personal location and the law governing privacy interests in business records. This case involves tracking physical location through cell towers and a personal phone, a device routinely carried on the individual's person; it also involves the compelled provision of records that reflect such tracking. In light of the personal tracking concerns articulated in our precedent, I am not convinced that the situation before us can be addressed appropriately with a test primarily used to obtain business records such as credit card purchases—records that do not necessarily reflect personal location. And it seems to me that the business records test is ill suited to address the issues regarding personal location that are before us. I therefore return to the law governing location.

I begin by acknowledging that this case involves CSLI that does not reach the specificity of GPS. Nonetheless, Skinner recognizes "situations where police, using otherwise legal methods, so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable for Fourth Amendment purposes." *Skinner*, 690 F.3d at 780. The tracking of cell-phone data in this case went far beyond 3 or even 28 days—the government procured approximately 127 days of CSLI records for Carpenter and 88 days for Sanders. That is close to four and three months, respectively. Even taking into account the less precise nature of CSLI as compared to GPS, such extensive monitoring far exceeds the threshold we identified in *Skinner* and the warrantless acquisition of such substantial quantities of CSLI implicates the *Skinner*/*Jones* concerns. I do not think that treating the CSLI obtained as a "business record" and applying that test addresses our circuit's stated concern regarding long-term, comprehensive tracking of an individual's location without a warrant. At issue here is neither relatively innocuous routing information nor precise GPS locator information: it is personal location information that partakes of both. I am also concerned about the applicability of a test that appears to admit to no limitation on the quantity of records or the length of time for which such records may be compelled. I conclude that our precedent suggests the need to develop a new test to determine when a warrant may be necessary under these or comparable circumstances.

B. The Exclusionary Rule & Good-Faith Exception

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). The exclusionary rule is not intended "to redress the injury to the privacy of the search victim[.] . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures[.]" *United States v. Calandra*, 414 U.S. 338, 347 (1974). "As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." *Krull*, 480 U.S. at 347.

This restriction has led the Supreme Court to articulate certain "exceptions" to the exclusionary rule. For example, in *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held that courts generally should not apply the exclusionary rule to evidence obtained by police officers whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even if the warrant was ultimately found to be defective. *See Leon*, 468 U.S. at 905– 26; *see also id*. at 926 ("In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."). The Court explained that "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope[,]" "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id*. at 920–21 (footnote omitted). In *Illinois v. Krull*, the Supreme Court extended the good-faith exception articulated in Leon to

evidence obtained in reasonable reliance on a statute that is subsequently declared unconstitutional, reasoning "that the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes." *Krull*, 480 U.S. at 352; *see also id*. at 349–350.

In the instant case, there is nothing to suggest that the FBI agents who obtained the CSLI of Carpenter and Sanders pursuant to the SCA engaged in any intentional misconduct. Suppressing the CSLI at trial would not have the requisite deterrent effect on future unlawful conduct and application of the exclusionary rule is therefore inappropriate. *See*, *e.g.*, *United States v. Warshak*, 631 F.3d 266, 333–34 (6th Cir. 2010) (Keith, J., concurring). Assuming without deciding that this situation states a Fourth Amendment violation, I would still affirm the district court's denial of Carpenter and Sanders's motion to suppress on this ground.

C. **Judicial Review**

One further issue of importance bears mentioning. The majority may be correct that Congress is well positioned to gauge changing public attitudes toward new and evolving technology. This institutional advantage may even weigh in favor of approaching challenges to statutes that balance privacy and public safety interests with some caution. But I do not see this case primarily as a challenge to the constitutionality of the SCA's provisions that authorize the government to seek secured communications through either an order or a warrant. The question before us is one that courts routinely answer: did the search at issue require a warrant? That the government sought and obtained an order under the SCA does not immunize that order from challenge on Fourth Amendment grounds. As relevant here, our circuit has already had occasion to weigh the propriety of an order under the SCA and to have found that order wanting. *Warshak* explained that "to the extent that the SCA purports to permit the government to obtain [a subscriber's] emails [from an internet service provider] warrantlessly, the SCA is unconstitutional." *Id*. at 288. I do not read that holding as declaring the balance struck by the SCA unconstitutional. (See Majority Op. at 10–11.) *Warshak* simply found that one proposed interpretation or use of the SCA as applied did not comply with the Fourth Amendment's requirement for a warrant based on probable cause. Determining the parameters of the Fourth Amendment is the task of the judiciary. *See United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (quoting *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012)). The runaway pace of technological development makes this task more difficult. But the job is ours nonetheless and the circumstances before us lead me to believe that we have more work to do to determine the best methods for assessing the application of the Fourth Amendment in the context of new technology.

“U.S. Supreme Court to settle major cellphone privacy case”

Reuters

Lawrence Hurley

June 5, 2017

Police officers for the first time could be required to obtain warrants to get data on the past locations of criminal suspects based on cellphone use under a major case on privacy rights in the digital age taken up by the U.S. Supreme Court on Monday.

The justices agreed to hear an appeal by a man convicted in a series of armed robberies in Ohio and Michigan with the help of past cellphone location data who contends that without a warrant from a court such data amounts to an unreasonable search and seizure under the U.S. Constitution's Fourth Amendment.

Cellphone location records are becoming increasingly important to police in criminal investigations, with authorities routinely requesting and receiving this information from wireless providers.

Police helped establish that the man at the center of the case, Timothy Carpenter, was near the scene of the robberies at Radio Shack and T-Mobile stores by securing past "cell site location information" from his cellphone carrier that tracked which local cellphone towers relayed his calls.

The case reaches the high court amid growing scrutiny of the surveillance practices of U.S. law enforcement and intelligence agencies amid concern among lawmakers across the political spectrum about civil liberties and police evading warrant requirements.

The legal fight has raised questions about how much companies protect the privacy rights of their customers. The big four wireless carriers, Verizon Communications Inc(VZ.N), AT&T Inc(T.N), T-Mobile US Inc(TMUS.O) and Sprint Corp(S.N), receive tens of thousands of requests a year from law enforcement for what is known as "cell site location information," or CSLI. The requests are routinely granted.

The Supreme Court has twice in recent years ruled on major cases concerning how criminal law applies to new technology, on each occasion ruling against law enforcement. In 2012, the court held that a warrant is required to place a GPS tracking device on a vehicle. Two years later, the court said police need a warrant to search a cellphone that is seized during an arrest.

The information that law enforcement agencies can obtain from wireless carriers shows which local cellphone towers users connect to at the time they make calls. Police can use historical data to determine if a suspect was in the vicinity of a crime scene or real-time data to track a suspect.

Carpenter's bid to suppress the evidence failed and he was convicted of six robbery

counts. On appeal, the Cincinnati, Ohio-based 6th U.S. Circuit Court of Appeals upheld his convictions, finding that no warrant was required for the cellphone information.

Civil liberties lawyers have said that police need "probable cause," and therefore a warrant, in order to avoid constitutionally unreasonable searches.

'LONGSTANDING PROTECTIONS'

A general view of the U.S. Supreme Court building in Washington, U.S., November 15, 2016.Carlos Barria

"Because cellphone location records can reveal countless private details of our lives, police should only be able to access them by getting a warrant based on probable cause," said Nathan Freed Wessler, a staff attorney with the American Civil Liberty Union's Speech, Privacy and Technology Project who represents Carpenter.

"The time has come for the Supreme Court to make clear that the longstanding protections of the Fourth Amendment apply with undiminished force to these kinds of sensitive digital records," Wessler added.

But, based on a provision of a 1986 federal law called the Stored Communications Act, the government said it does not need probable cause to obtain customer records. Instead, the government said, prosecutors must show only that there are "reasonable grounds" for the records and that they are "relevant and material" to an investigation.

The case will be heard and decided in the court's next term, which starts in October and ends in June 2018.

The Trump administration said in court papers the government has a "compelling interest" for acquiring the records without a warrant because the information is particularly useful at the early stage of a criminal investigation.

"Society has a strong interest in both promptly apprehending criminals and exonerating innocent suspects as early as possible during an investigation," the administration said in a brief.

David LaBahn, president of the Association of Prosecuting Attorneys, said warrants can be obtained quickly from judges but police may have problems getting the evidence needed to show probable cause.

"They may not be able to get over that legal hurdle, so the court couldn't issue the warrant," LaBahn said.

Civil liberties groups assert that the 1986 law did not anticipate the way mobile devices now contain a wealth of data on each user.

Steve Vladeck, a national security and constitutional law professor at the University of Texas, said the case will have "enormous implications" over how much data the government can obtain from phone companies and other technology firms about their customers without a warrant.

"Courts and commentators have tried to figure out exactly when individuals will have a continuing expectation of privacy even in data they've voluntarily shared with a third party," Vladeck said. "This case squarely raises that question."

“Digital Privacy to Come Under Supreme Court’s Scrutiny”

The New York Times

Peter J. Henning

July 10, 2017

In October 1986, the top-rated television program was “The Cosby Show,” Janet Jackson’s “When I Think of You” headed the pop music charts and “Crocodile Dundee” dominated the box office.

Congress, meanwhile, passed an obscure statute that month called the Stored Communications Act that has become much more relevant 30 years later as the Supreme Court will have two opportunities to help define the scope of digital privacy under a law enacted when cellphones and email hardly existed.

To obtain electronic communications, the government must obtain a warrant for any that are held for 180 days or fewer by a computer service provider. This means establishing probable cause that the evidence sought is related to a crime.

But for anything older than that, investigators need only a grand jury or administrative subpoena, as long as the person whose communications are sought is informed. That notification can be delayed by as much as 90 days if disclosure might have an adverse effect, such as destroying or tampering with evidence.

Back in 1986, Congress viewed communications over six months old to be abandoned and therefore subject to reduced protection, a notion that looks quaint today when emails and texts may be held for years.

Another provision of the statute allows investigators to obtain information from the provider about a subscriber to any electronic service, like cellphones, by seeking a court order based on “reasonable grounds to believe” that the records are relevant to a criminal investigation. This is a lower standard than probable cause, the usual requirement for a search warrant.

It is this lower threshold for getting information that is at issue in Carpenter v. United States, which the Supreme Court will hear in its next term starting in October.

The defendants were convicted of organizing a string of robberies in the Detroit area where they served as lookouts by parking near the stores. The government obtained orders directing wireless carriers to provide cell site location information showing where different numbers linked to the crew conducting the robberies were at the time of the crimes. Armed with data from various cell towers, prosecutors showed at trial that the defendants’ phones were a half-mile to two miles from the robberies, helping to link them to the actual perpetrators.

The defendants sought to suppress that information, arguing that it constituted a

search of their phones so that the reasonable grounds standard in the Stored Communications Act for the order did not meet the probable cause requirement of the Fourth Amendment.

The United States Court of Appeals for the Sixth Circuit in Cincinnati rejected that claim, finding that "although the content of personal communications is private, the information necessary to get those communications from point A to point B is not." Therefore, the defendants had no privacy interest in the information held by the carriers about their location and the constitutional probable cause requirement did not apply.

The Carpenter case raises a fundamental question about how far the privacy protection in the Fourth Amendment, which by its terms applies to "persons, houses, papers and effects," should reach in protecting data generated by a person's electronic devices. Chief Justice John G. Roberts Jr. wrote in Riley v. California, a 2014 decision, that cellphones are now "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."

In Riley, the court found that a warrantless search of an arrestee's cellphone was unconstitutional, explaining that what distinguishes the device from other items that might be found on a person that the police could look at "is their immense storage capacity." But rummaging through the contents of a phone or computer is not necessarily the same as getting site information that is broadcast to the carrier, especially when a person may enable it by using an app like Find My Phone.

In a 2012 case, United States v. Jones, the Supreme Court found that the use of a GPS tracker attached to a car was a search governed by the Fourth Amendment. Justice Sonia Sotomayor explained in a concurring opinion that the privacy interests in a person's specific location required investigators to get a warrant because gathering that information "enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on."

In the Carpenter case, the justices will have to weigh whether cell site data is different from a GPS tracker because learning where a person is within about a one-mile radius may not be a sufficient invasion of privacy to come within the Fourth Amendment. Nor does obtaining the location of a cellphone reveal the content of any communication, only that a call was made, so the protection afforded by the Riley decision may not apply.

Another case involving the Stored Communications Act that may come before the justices concerns the territorial reach of a warrant authorizing investigators to obtain emails held by Microsoft. The United States Court of Appeals for the Second Circuit in Manhattan, in Microsoft v. United States, found that the warrant did not apply to emails stored on a server in Dublin because there was no indication in the statute that Congress intended to authorize a search outside the United States.

The Justice Department filed a petition with the Supreme Court on June 22 asking for a

review of that decision, arguing that it was "wrong, inconsistent with this court's framework for analysis of extraterritoriality issues, and highly detrimental to criminal law enforcement." Those requests are often granted because the justices rely on the solicitor general's office to identify cases that have significant law enforcement implications.

Another factor in favor of granting review is that the Second Circuit's decision has not been followed by federal district courts in Philadelphia, San Francisco, Washington and Wisconsin, which have enforced warrants to produce email records that may have been stored abroad. A note in the Harvard Law Review criticized the decision because it "did not acknowledge the 'un-territorial' nature of data."

Microsoft is fighting the effort to apply the Stored Communications Act to electronic records held outside the United States, pointing out in a company blog post that the European Union's new General Data Protection Regulation scheduled to go into effect next year will make it illegal to transfer customer data from Europe to the United States. That could put global technology organizations like Google and Microsoft in the difficult position of balancing demands for greater privacy with efforts to investigate crime that could result in large fines for failure to comply.

Determining how digital information fits under a constitutional protection adopted when there were only "persons, homes, papers and effects" that could be searched requires the Supreme Court to figure out the scope of privacy expectations in a very different world from the 18th century. The problem is that legal challenges take a piecemeal approach to a statute adopted over 30 years ago, and the courts cannot rewrite provisions that may be hopelessly out of date.

The House of Representatives adopted the Email Privacy Act in February to modernize the protections afforded electronic communications that would require obtaining a search warrant in almost every case. That proposal met resistance in the Senate last year when Attorney General Jeff Sessions, then a senator from Alabama, sought to add a provision allowing law enforcement to skip the warrant requirement in emergency situations.

Whether the legislation can get through the Senate is an open question, and it is not clear whether President Trump would sign off if the Justice Department opposes the bill. That may mean the Supreme Court will have to establish the broad parameters of digital privacy while Congress tries to deal with the intricacies of a world of electronic communication that evolves rapidly.

Devices connected to the internet, from cellphones to watches to personal training trackers that facilitate our personal habits and communications, are a fact of daily life, and the Supreme Court will have to start drawing clear lines around what types of electronic information are — and are not — protected by the Fourth Amendment. Simply asserting that there is a right to privacy does not provide much help in determining how far that protection should extend in a digital world.

“Cell phone privacy case of Michigan criminal goes to U.S. Supreme Court”

FOX 2- Detroit Local News

Taryn Asher

June 5, 2017

A metro Detroit area man is convicted in a series of armed robberies in Michigan and Ohio - but his right to cell phone privacy could wipe that out.

He is appealing because of how police got ahold of cell phone records used to make the case against him - now the US Supreme Court will weigh in.

Timothy Carpenter will spend the next 116 years in federal prison - but this case could reverse that decision.

"Cell phones were probably the size of a brick at that time, things have changed a great deal," said attorney Harold Gurewitz.

Well-known defense attorney Harold Gurewitz along with the ACLU says that it is time the law changes too.

On Monday the U.S. Supreme Court decided to hear a landmark case that could change how law enforcement obtains cell phone location records.

Gurewitz says technology has evolved and advanced since the 1986 Stored Communication Act - which says the government does not to show probable cause to get customer cell phone records.

"People have cell phones with them all the time, use them for all the details of their lives without knowing the records of how or when they use their phones could become available by the government," Gurewitz said.

All of this stems from a 2011 federal case Gurewitz defended when his client, 32 -year-old Timothy Carpenter, was convicted for robbing several cell phone stores in Michigan and one in Ohio, sent to prison for the rest of his life.

Coincidentally, federal investigators obtained months’ worth of cell phone location records which helped show where Carpenter was when he made and received calls in the general area of the robberies.

That evidence helped lead to his conviction - evidence Gurewitz says was obtained without a search warrant.

"It is our position the evidence shouldn't have been used at trial and if it had an impact on the trial," he said. "If it was material and harmful then it should result in reversal of his conviction."

At trial, prosecutors said Carpenter organized many of the robberies supplied the firearms and acted as the look out, but Gurewitz says

that's not what this supreme court case is about.

"What this case is really about is whether people have a right to privacy in records that are created with cell phones," he said.

“This Very Common Cellphone Surveillance Still Doesn't Require a Warrant”

The Atlantic

Robinson Meyer

April 14, 2016

The government does not need a warrant to access the location data created on an ordinary, often minute-to-minute basis by cellphones and logged with cell providers, the Sixth Circuit for the U.S. Court of Appeals ruled Wednesday.

The ruling adds to a growing consensus among federal appeals courts that law enforcement can request this type of data—called “cell-site location information,” or CSLI—without violating the Fourth Amendment’s protection against unreasonable search or seizure. But it only complicates the legal situation of their use, which is now so complex that driving across the border from Illinois to Kentucky changes how federal authorities can use the technology.

Every time a cellphone checks in with its provider—to send a text message, to start or end a voice call, or just to get a push notification—it lodges a time-stamped piece of location information with the nearest cell tower. This data, CSLI, isn’t as precise as a GPS coordinate, but in urban or suburban areas it can narrow someone’s location down to less than two miles and give their angular relationship to the nearest cell tower. String a set of these time-stamped points together and you can disprove an alibi or reconstruct an escape route.

Right now, CSLI comes in three flavors. The first is “real-time,” where police work with a cell provider to access location data immediately after it’s created. This usually does require a warrant. The second is a “tower dump,” when authorities ask for all the phones that have communicated with a certain tower during a period of time. There’s not a lot of law about how tower dumps work, but as of September of last year cops rarely sought a warrant for them.

The third is historical CSLI, where law enforcement requests a backlog of location data created by a certain phone. This does not require a warrant, and hundreds of these requests happen per day. In 2015, AT&T alone handled more than 58,000 requests for historic CSLI. (By contrast, it received about 17,000 real-time CSLI warrants and fewer than 1,500 tower-dump requests.) Warrantless CSLI may be the most common kind of cellphone surveillance that Americans are subject to.

The just-decided Sixth Circuit case, U.S. v. Carpenter and Sanders, is a good example of how this looks in practice. Between December 2010 and March 2011, there were

a string of robberies of T-Mobile and Radioshack stores in and around Detroit. The robber, not named in the suit, confessed soon after the crimes and shared his cellphone number with the FBI. The agency requested his call records, then made a second request: the call records and cell-site location information for 16 additional phone numbers.

With this data, it identified the defendants in the suit—Timothy Sanders and Timothy Carpenter—as the alleged organizers, getaway car drivers, and lookout men for the robberies.

In making this critical second request, it asked for more than just a couple of days of location data. In fact, it asked for more than 215 days of combined CSLI, almost seven months of information total. The defendants and the American Civil Liberties Union contended that all this geographical data, when taken together, constituted a warrantless search.

"When police obtain months' worth of cellphone data comprising thousands of individual locations, like they did in this case, they should have to get a search warrant from a judge," said Nathan Freed Wessler, the ACLU attorney who argued the case in front of the Sixth Circuit, in a statement.

The ACLU turned to two recent Supreme Court rulings for support. In the first, Riley v. California in 2014, the justices held that authorities couldn't search a smartphone's data without a warrant. In the second, U.S. v. Jones in 2012, they ruled that attaching a GPS tracker to a car without seeking a warrant first violated the Fourth Amendment.

The Sixth Circuit rejected the ACLU's reasoning. Riley covered the wealth of internal data that a phone can store, including emails, notes, photos, and text messages; and not the limited kind of location data logged on corporate servers, wrote Judge Raymond Kethledge in the majority opinion. And the precise GPS tracking at issue in Jones, he said, doesn't approach the general locational awareness permitted by CSLI.

Historical CSLI is "as much as 12,500 times less accurate than the GPS data in Jones," wrote Kethledge. "And cellphone locational data are even less precise in suburban and rural settings [than urban ones]. Areas of this scale might encompass bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque."

Instead, Kethledge vindicates the federal privacy test that has been in effect since the late 1970s: the third-party doctrine, which holds Americans do not have a reasonable expectation of privacy to data created and logged by an outside corporation. This law differentiates between the private content of a communication and the information needed to convey it, and it's why police need a warrant to wiretap a phone call but not to request call records.

But the Sixth Circuit's ruling was not unanimous. While Judge Jane Stranch concurred with Kethledge's decision, she disagreed that long-term historical CSLI was straightforwardly Constitutional. Fourth Amendment protection isn't just a matter of precision, she said, approvingly citing a line from the Supreme Court's 1942 decision in Skinner v. Oklahoma:

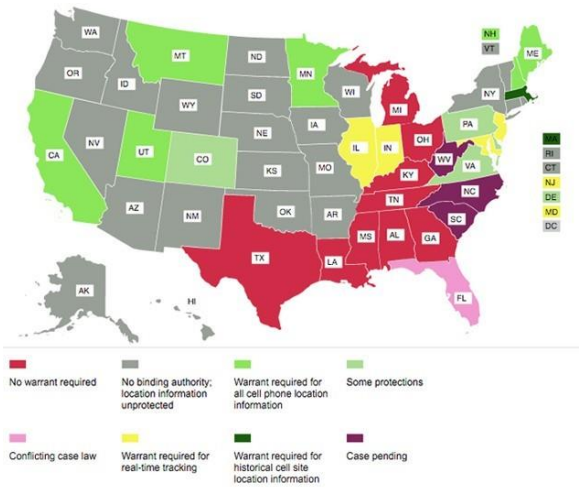
> There may be situations where police, using otherwise legal methods, so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable for Fourth Amendment purposes.

Stranch writes that CSLI sits uncomfortably between the law governing location information and the law governing business records. "I do not think that treating the CSLI obtained as a 'business record' and applying that test addresses our circuit's stated concern regarding long-term, comprehensive tracking of an individual's location without a warrant," she writes. Ultimately, she writes, the Sixth Circuit or a higher court may need to develop a new legal test to determine exactly what kinds of search require a warrant.

The day when the Supreme Court formulates that test, however, may now not come for years. In upholding the constitutionality of warrantless CSLI requests, the Sixth Circuit joins two other federal appeals courts, the Fifth and the Eleventh Circuit. All three courts have now ruled that seeking months of historical cell-site data without a warrant is perfectly legal.

As recently as last year, that looked like it might change. Last summer, the Fourth Circuit ruled that this kind of warrantless CSLI request was illegal. The ACLU also asked the Supreme Court to take up a case on the same question. But the high court declined the petition, and, in October, the Fourth Circuit decided to rehear the CSLI case again as a full court. This vacates its earlier ruling and removes the brief circuit split.

So the legal status of warrantless cellphone tracking remains messy: a drive up Interstate 95 would take you through states where a warrant is required for all CSLI, for just historical CSLI, for some historical CSLI—and where no warrant is required at all. The ACLU has created a map of what protections exist in each state. I've embedded it below. There's a good chance that it will get even more complicated before it starts to improve:



Class v. United States

16-424

Ruling Below: *United States v. Class*, No. 13-253 -RWR- 1 (D.D.C. Nov. 21, 2014).

Class sought a reversal of the judgement of the District Court where he had plead guilty, seemingly knowingly waiving his right to appeal.

The Court states that unconditional guilty pleas traditionally waive the defendant's right to appeal, even on constitutional grounds.
Class appealed, claiming three counts of constitutional error and one count of statutory error. The Court stated that none of the four counts were proper exceptions to the waiver.
The Court of Appeals affirmed.

Question Presented: Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.

Rodney Class,
v.
United States.

D.C. Circuit Court

Decided on July 5, 2016

[Excerpt some citations and footnotes removed].

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties and oral arguments of counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is ORDERED and ADJUDGED that the judgment of the district court be affirmed.

Appellant Rodney Class pleaded guilty in the district court to possession of a firearm on Capitol grounds in violation of 40 U.S.C. § 5104(e). Although the defendant appeared pro se at the time of the plea, he had previously been represented by appointed counsel and counsel had been discharged at his request, although the Federal Public Defender served as stand-by or advisory counsel. Despite his sometime lack of counsel, the plea followed extended motions practice and was memorialized in a plea agreement.

The district court conducted a full inquiry pursuant to Federal Rule of Criminal Procedure 11. That inquiry included the following exchange:

> THE COURT: If you went to trial and you were convicted, you would have a right to appeal your conviction to the Court of Appeals and to have a lawyer help you prepare your appeal. Do you understand that?
>
> [APPELLANT]: Yes.

> THE COURT: Do you know what I mean by your right to appeal?
>
> [APPELLANT]: Yeah. Take it to the next court up.
>
> THE COURT: All right. Now, by pleading guilty, you would be generally giving up your rights to appeal. Do you understand that?
>
> [APPELLANT]: Yes.
>
> THE COURT: Now, there are exceptions to that. You can appeal a conviction after a guilty plea if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in these guilty-plea proceedings. You may also have a right to appeal your sentence if you think the sentence is illegal. Do you understand those things?
>
> [APPELLANT]: Yeah. Pretty much.
>
> THE COURT: Now, if you plead guilty in this case and I accept your guilty plea, you'll give up all of the rights I just explained to you, aside from the exceptions that I mentioned, because there will not be any trial, and there will probably be no appeal. Do you understand that?
>
> [APPELLANT]: Yes.

Tr. of Plea Hearing at 16:2—17:4, *United States v. Class*, No. 13-253 -RWR- 1 (D.D.C. Nov. 21, 2014).

On appeal, Class attempts to assert three grounds of constitutional error and a further claim of statutory error. None of them are properly before us.

It is well-established law that "[u]nconditional guilty pleas that are knowing and intelligent. . . waive the pleading defendant{'sJ claims of error on appeal, even constitutional claims." United States *v. Delgado*-Garcia, 374 F.3d 1337, 1341 (D.C. Cir. 2004). Although the Federal Rules of Criminal Procedure provide for conditional pleas wherein a pleading defendant may "reserv[e] in writing the right to have an appellate court review an adverse determination of a specified pretrial motion," Fed. R. Crim. P. 1 1(a)(2), the defendant's plea in the present case contains no such reservation.

The plea agreement included an explicit waiver of appeal rights as to sentencing errors and collateral attacks on the conviction, but not as to alleged errors in the indictment or in proceedings before the sentencing. Appellant apparently believes that the lack of an explicit waiver permits him to proceed in the present appeal. He is in error. The holding from *Delgado Garcia* quoted above reflects the universally-recognized law of the United States. *See*, e.g., Tollettv. *Henderson*, 411 U.S. 258, 266-68 (1973).

There are two recognized exceptions to this rule: "the defendant's claimed right not to be hauled into court at all," and a claim "that the court below lacked subject-matter jurisdiction over the case. . . ." *Delgado-Garcia*, 374 F.3d at 1341 (citations and internal quotation marks omitted). Neither claimed exception applies here. We therefore affirm the judgment of the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the

mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 4 1(b); D.C. Cir. R. 41(a)(l).

“Justices To Decide If Guilty Plea Ends Constitutional Claims”

Law360

Jody Godoy

February 21, 2017

The U.S. Supreme Court agreed on Tuesday to decide whether a defendant who pled guilty to violating federal law still has the right to challenge the law's constitutionality on appeal, an issue the petitioner claims could affect the majority of criminal cases.

Rodney Class pled guilty to unlawfully bringing a gun into a parking lot near the U.S. Capitol but argued in both D.C. federal court and appeals court that the law was unconstitutional. The D.C. Circuit denied the appeal, pointing to an earlier holding that defendants give up the right a constitutional challenge when they plead guilty.

The vast majority of criminal cases end in guilty pleas, making it important for the Supreme Court to get the appeals courts on the same page, Class argued in his September petition.

“The criminal justice system is essentially a series of plea negotiations — and yet the parties to those negotiations are operating without a clear understanding of the necessary consequences of the plea itself,” Class said.

The D.C. Circuit is on one side of a split over how to apply two Supreme Court decisions from the mid-1970s, Blackledge v. Perry and Menna v. New York. In those cases, the high court found that guilty pleas do not preclude appeals claiming vindictive prosecution or double jeopardy, respectively.

Five appeals courts have applied those holdings to find a guilty plea is not an automatic waiver of a constitutional challenge, a position Class has urged the Supreme Court to adopt.

On the other side, the government contends that Blackledge and Menna actually carve out a narrow exception for constitutional claims involving the “power of the state to bring the defendant into court,” not the laws themselves.

The government argued in a brief replying to Class' petition that his guilty plea only preserved his right to appeal legal problems with the plea itself. Aside from challenges to the court's jurisdiction, the government claims Class implicitly waived the right to bring other appeals.

According to Class, a third group of appeals courts have allowed challenges to a law's constitutionality, like Class' claim that the law itself is unconstitutionally vague about where the Capitol grounds end, but blocked claims relating to the law's application, like Class' complaint that there was no sign telling him he was on the Capitol grounds. The Fourth, Seventh and Eighth Circuits are in this camp.

Stephanos Bibas, director of the Supreme Court Clinic at the University of Pennsylvania Law School, says the justices could issue a finding that gives white collar defendants more leeway to challenge criminal statutes and how they are applied.

"The leverage to get white collar defendants to plead is enormous, so the government can kind of insulate some of these issues from judicial review," Bibas said.

If the court finds that an otherwise unconditional guilty plea does not preempt constitutional challenges, more defendants will likely raise those issues in white collar cases, Bibas said.

Counsel for Class did not immediately reply to a request for comment. The government does not comment on pending litigation.

Class is represented by Jessica Ring Amunson of Jenner & Block LLP.

The government is represented by Finnuala K. Tessier.

The case is Rodney Class v. U.S., case number 15-3015, in the Supreme Court of the United States.

“Guilty Plea's Constitutional Consequence Heads To High Court”

Law360

Daniel Wenner and Danielle Corcione

May 12, 2017

Federal criminal prosecutions almost always result in guilty pleas.[1] When faced with the likelihood of an expensive and lengthy trial and, perhaps, a longer sentence for exercising the trial right, see Missouri v. Frye, 566 U.S. 133, 144 (2012), defendants often make what is the sensible choice: they plead guilty. The U.S. Supreme Court recognizes this reality and has emphasized the importance of prudent and sage counsel in the plea-bargaining process. Id. at 143.

In contemplating whether to plead guilty, a defendant must be cognizant of Federal Rule of Criminal Procedure 11’s requirement that “[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.” Fed. R. Crim. P. 11(b)(3). In layman’s terms, that means that one can’t plead guilty unless he or she is, in fact, guilty. And what determines guilt? Whether the person did the things that violate the elements of the statute the defendant is charged with having violated.

But what happens when the person did the things proscribed, but doesn’t think the proscription is proper? What if he thinks the statute is unconstitutional? Must he go to trial? May he raise that issue in the district court, plead guilty if he loses his motion, and appeal? Well, as of now, that depends where he lives. Whether a constitutional challenge survives after a client pleads guilty varies by circuit. But, the Supreme Court will consider in Class v. United States “[w]hether a guilty plea inherently waives a defendant’s right to challenge the constitutionality of his statute of conviction.” And hopefully, it will settle the matter.

What Is the Legal Background?

In Blackledge v. Perry, 417 U.S. 21 (1974), the Supreme Court allowed a defendant who had pleaded guilty to raise a double jeopardy claim on appeal, even though he had not explicitly preserved that claim. In Menna v. New York, 423 U.S. 61 (1975), the Supreme Court endorsed that view regarding a claim of vindictive prosecution. In each of those cases, the court reasoned that those types of claims are not necessarily resolved by the guilty plea because such a plea determines only whether the government could prove the crime charged beyond a reasonable doubt as to the facts. But it does not inform whether the prosecution was properly brought. Are these the only situations in which an unpreserved claim might be pressed on appeal from a guilty plea? That question lays at the heart of the dispute in Class.

What Are the Facts?

Rodney Class is a retired veteran who lived in North Carolina. Class traveled to Washington, D.C., in May 2013 and brought his lawfully owned firearms, which he left in closed bags in his locked vehicle. He parked in a public lot about 1,000 feet from the U.S. Capitol building. Class didn't know the public lot was part of the "Capitol grounds," which is defined by statute and is an area where all weapons are prohibited. See 40 U.S.C. §5104(e). When Class was away from his vehicle, a police officer saw in the cab of the vehicle what she mistakenly believed to be a gun holster.

When Class returned, he spoke with the officer and admitted that he had weapons in the car. Law enforcement obtained a search warrant to search the vehicle. That search resulted in the recovery of a number of firearms and ammunition. Class was arrested, and the grand jury indicted him in a two-count indictment. Class was charged with one count of unlawfully carrying or having readily accessible a firearm on Capital grounds, in violation of 40 U.S.C. §5104(e)(1), and one count of carrying a pistol in public, in violation of D.C. Code §22-4504(a) (2012). (Ironically, the second count was dismissed because the statute was ultimately deemed to be unconstitutional. See Palmer v. District of Columbia, 59 F. Supp. 3d 173 (D.D.C. 2014).)

Class waived his right to counsel. Acting pro se, Class raised several challenges to §5104(e)(1), including that it unconstitutionally infringed on his rights under the Second Amendment and violated the Due Process Clause. The district court asked the parties to brief these arguments, held a hearing, and ultimately denied Class' claims.

The district court set the case down for trial, but Class ultimately agreed to plead guilty pursuant to a written plea agreement. The plea agreement did not contain a waiver of his right to appeal his conviction. It also did not concede that §5104 was constitutional. During the guilty plea colloquy, the district judge advised Class that he could "'appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful.'" Petition for Writ of Certiorari at 8, Class v. United States, No. 16-424 (Sept. 30, 2016). He received a sentence of 24 days of imprisonment to be followed by a 12-month term of supervised release. Brief for the United States in Opposition at 4–5, Class v. United States, No. 16-424 (Dec. 2016).

After his conviction was final, Class appealed to the U.S. Court of Appeals for the District of Columbia Circuit. He argued, in a pro se merits brief, that §5104(e) was unconstitutional because it unlawfully infringed on his right to "keep and bear arms" under the Second Amendment. The government did not move to dismiss the appeal. Instead, it argued in its merits brief "that even though [Class'] plea did not contain any express waiver of the right to appeal his conviction, the plea inherently waived his right to raise any constitutional claims that accrued before he pleaded guilty, including his constitutional challenges to the statute." Petition at 10. In his reply brief, Class disputed this contention, arguing that his constitutional challenges survived his plea because he was not challenging his

"factual guilt" on appeal; rather, he was challenging the constitutionality of the statute to which he pleaded guilty.

The D.C. Circuit affirmed his conviction. It reasoned that by pleading guilty, he inherently waived his claims of error on appeal, including his constitutional claims. It also cited circuit precedent holding that by pleading guilty, Class's constitutional claims could only survive if they were so flagrant that he could not be haled into court to defend himself.

What Were the Arguments Regarding a Writ of Certiorari?

Class petitioned for a writ of certiorari, arguing that there is a circuit split on this issue. He noted that some circuits, including the D.C. Circuit have "held that a plea inherently waives every underlying constitutional claim except the double jeopardy and vindictive prosecution claims." Petition at 12. Other circuits — the Third, Fifth, Sixth, Ninth and Eleventh Circuits — have held "that a guilty plea concedes factual guilt—but does not necessarily concede or waive the constitutionality of the statute of conviction itself." Id. Finally, the Fourth, Seventh, and Eighth Circuits strike "a middle ground, allowing facial—but not as-applied—challenges to survive a guilty plea." Id.

The government opposed Class' petition. It argued that the Supreme Court should deny the petition for three reasons: "The court of appeals' unpublished disposition is correct; this case would be a poor vehicle for reviewing the question presented; and no further review is warranted." Opposition at 6. The government endorsed the view of the court of appeals that by pleading guilty without explicitly preserving his right to appeal the constitutionality of the statute, Class forfeited that argument. Id. at 6–7. It distinguished Blackledge and Menna by arguing that in those cases, "'the very act of haling the defendants into court completed the constitutional violation.'" Id. at 8 (quoting United States v. Miranda, 780 F.3d 1185, 1190 (D.C. Cir. 2015)). It contended the case was a poor vehicle for this issue because of certain factual stumbling blocks as well as because there is no merit to Class' Second Amendment argument. Id. at 7, 15. It also argued that the proper place to raise a constitutional challenge after a guilty plea is on collateral review in a habeas corpus petition. Id. at 18.

Notwithstanding the government's opposition to Class' petition, the Supreme Court granted the writ. Complete briefing is due in July 2017.

What's at Stake?

The Supreme Court will decide if a criminal defendant's constitutional challenge to the statute of conviction survives after a guilty plea is entered. On balance, voluntary agreements memorialized in a plea agreement and accepted by the district court are binding. See Fed. R. Crim. P. 11(d)(2) (laying out the narrow grounds upon which a defendant may withdraw a guilty plea). At the plea hearing, the court engages in a colloquy to determine if a defendant is competent, understands the gravity of pleading guilty, is doing so willingly, and that there is a factual basis to accept the guilty plea. See Fed. R. Crim. P. 11(b)(1). Further,

a guilty "plea may be set aside only on direct appeal or collateral attack." Fed. R. Crim. P. 11(f).

Seemingly following the proper procedures, Class raised the constitutional issues in the district court and lost. He then pleaded guilty and appealed, not claiming he didn't commit the crime, but contending that the crime was unconstitutional. He pleaded guilty, without explicitly waving his right to appeal his conviction, and then contested the constitutionality of the statute on appeal. Whether the Supreme Court endorses that approach is anyone's guess, but regardless of the result in this case, the impact for defendants general might be minor because of conditional guilty pleas.

Certainly, Class would be in a different position had he bargained in his plea agreement for the right to appeal the specific constitutional question. This happens all the time when defendants move to suppress evidence, such as the drugs seized in a drug-possession case. And it is explicitly authorized by Rule 11, which allows a defendant with the government's consent to "enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2). And it is the better course to ensure that any pretrial issues that a defendant wants to preserve should be spelled out and explicitly carved from the plea agreement.

Where Does That Leave Us?

Counsel should recognize the importance of negotiating a plea agreement that incorporates the conditional language of Rule 11(a)(2). While it might end up that such conditional language is unnecessary should Class prevail, it would remain an important belt-and-suspenders approach to ensure that any defendant is not caught in Class' position: thinking he could appeal something raised below, even when the something is as fundamental as the constitutionality of the statute. After all, the government already considered Blackledge and Menna to be properly limited to their particular facts, and might do the same even if Class prevails. Foreclosing all doubt in what may and may not be appealed might just be the preferred tack when it comes to guilty pleas.

District of Columbia v. Wesby

15-1485

Ruling Below: *Wesby v. District of Columbia*, 765 F. 3d (D.C. Cir. 2016).

Wesby and his co-plaintiffs sought relief for false arrests and violations of their Fourth Amendment rights. They claimed that the arresting officers did not have probable cause to arrest them for unlawful entry because there was uncontroverted evidence that they were invited to the property in question. The District Court granted summary judgement for the Plaintiffs and held the District liable. The District appealed. The Court of Appeals affirmed the ruling of the summary judgement and upheld the District's liability.

Question Presented: Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest the partiers for trespassing under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state?

Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard?

Theodore Wesby,
v.
District of Columbia.

United States Court of Appeals for the District of Columbia Circuit

Decided on September 2, 2014

[Excerpt; some citations and footnotes omitted]

PILLARD, *Circuit Judge*: A group of late-night partygoers responded to a friend's invitation to gather at a home in the District of Columbia. The host had told some friends she was moving into a new place and they should come by for a party. Some of them informally extended the invitation to their own friends, resulting in a group of twenty-one people convening at the house. With the festivities well underway, Metropolitan Police Department ("MPD") officers responded to a neighbor's complaint of illegal activity. When the police arrived, the host was not there. The officers reached her by phone, and then called the person she identified as the property owner, only to discover that the putative host had not finalized any rental agreement and so lacked the right to authorize the soiree. The officers arrested everyone present for unlawful entry. But because it was undisputed that the arresting officers knew the Plaintiffs had been invited to the house by a woman that they reasonably believed to be its lawful occupant, the officers lacked probable cause for the arrest. Nor was there probable cause to arrest for disorderly conduct because the evidence failed to show any disturbance of sufficient magnitude to violate local law. We accordingly affirm the district court's grant of summary judgment to Plaintiffs on the ground that the arrests violated their clearly

established Fourth Amendment rights and District of Columbia law against false arrest. Because the supervising police sergeant at the scene also overstepped clear law in directing the arrests, the district court also correctly held the District of Columbia liable for negligent supervision.

I.

The District of Columbia and two police officers in their individual capacities appeal the district court's liability determinations resulting from the grant of partial summary judgment against them. The court granted partial summary judgment in Plaintiffs' favor because, given the uncontroverted evidence of record regarding the information known to the sergeant and two of the officers at the time of the arrests, no reasonable officer in their shoes could have found probable cause to arrest any of the Plaintiffs. The court's grant of summary judgment was only partial, however, in several ways: First, the court denied Plaintiffs' motion for summary judgment against several other officers in the face of factual disputes about what they knew at the scene; the Plaintiffs then abandoned those claims and the court dismissed them with prejudice. Second, the court granted the Defendants' cross-motion for summary judgment on claims against all of the officers in their official capacities, dismissing those claims, too, with prejudice. Finally, the Plaintiffs' summary judgment motion was limited to liability, leaving remedial determinations to the jury. At a trial on damages, the jury awarded each Plaintiff between $35,000 and $50,000 in compensatory damages. The only questions on this appeal address the validity of the partial summary judgment liability holding.

For purposes of appeal of a grant of a plaintiff's motion for summary judgment, we view the facts in the light most favorable to defendants. In the early morning hours of March 16, 2008, the MPD dispatched officers to investigate a complaint of illegal activities taking place at a house in Washington, D.C. The officers heard loud music as they approached the house and, upon entering, saw people acting in a way they viewed as consistent "with activity being conducted in strip clubs for profit"—several scantily clad women with money tucked into garter belts, in addition to "spectators . . . drinking alcoholic beverages and holding [U.S.] currency in their hands." Some of the guests scattered into other rooms when the police arrived. The parties dispute how fully the house was "furnished," but the police observed at least some folding chairs, a mattress, and working electricity and plumbing.

One of the Defendants-Appellants, Officer Anthony Campanale, took photographs of the scene and, along with other officers, interviewed everyone present to find out what they were doing at the house. The partygoers gave conflicting responses, with some saying they were there for a birthday party and others that the occasion was a bachelor party. Someone told Officer Campanale that a woman referred to as "Peaches" had given them permission to be in the house; others said that they had been invited to the party by another guest. Peaches was not at the house. Nobody who was present claimed to live there or could identify who owned the house.

Another Defendant-Appellant, Officer Andre Parker, spoke to a woman who told him that Peaches "was renting the house from the grandson of the owner who had recently passed away and that [the grandson] had given permission for all individuals to be in the house." The woman then used her cell phone to call Peaches. Officer Parker spoke to Peaches, who refused to return to the house because she said she would be arrested if she

did. When Officer Parker asked who gave her permission to be at the house, Peaches told Officer Parker that he could "confirm it with the grandson." Officer Parker then used the same phone to call the apparent owner, identified in the record only as Mr. Hughes, who told Officer Parker that he was trying to work out a lease arrangement with Peaches but had yet to do so. Hughes also told Officer Parker that the people in the house did not have his permission to be there that evening.

Sergeant Andre Suber, an MPD supervisor who was acting as the watch commander that night, arrived on the scene after the officers had begun their investigation. The officers briefed Sergeant Suber, including telling him about Parker's conversations with Peaches and Hughes. Sergeant Suber also spoke to Peaches directly by phone. According to Sergeant Suber, Peaches told him that "she was possibly renting the house from the owner who was fixing the house up for her" and that she "gave the people who were inside the place, told them they could have the bachelor party." As the police continued to talk to Peaches, she acknowledged that she did not have permission to use the house. On that basis— and notwithstanding the undisputed statements of both the guests and Peaches that she had given them permission to be at the house—Sergeant Suber ordered the officers to arrest everyone for unlawful entry.

After the police arrested and transported the partygoers to the police station, Sergeant Suber and the lieutenant taking over as watch commander discussed the appropriate charges for the Plaintiffs. According to Sergeant Suber, the lieutenant decided to change the charge to disorderly conduct after speaking with a representative from the District of Columbia Attorney General's office. Sergeant Suber disagreed, but the lieutenant overruled him. The officers who had been at the house, including Sergeant Suber, each testified that they had neither seen nor heard anything to justify a disorderly conduct charge.

Sixteen of the arrestees sued five officers for false arrest under 42 U.S.C. § 1983, the officers and the District for false arrest under common law, and the District for negligent supervision. On cross-motions for partial summary judgment as to liability, the district court granted the parties' motions in part and denied both motions on some issues. The court ruled in favor of the Plaintiffs on their claims of false arrest against Officers Parker and Campanale in their individual capacities, and on the common law false arrest and negligent supervision claims against the District. Defendants appeal these liability determinations.

II.

We review de novo a district court's summary judgment ruling, "apply[ing] the same standard of review applicable to the underlying claims in the district court." Defenders of *Wildlife v. Gutierrez*, 532 F.3d 913, 918 (D.C. Cir. 2008). A party is entitled to summary judgment where, "viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in the nonmoving party's favor," *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 4 (D.C. Cir. 2011), this Court determines that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

We begin with Plaintiffs' entitlement to summary judgment on their Section 1983 and common-law false arrest claims. Because "[t]he elements of a constitutional claim for false arrest are substantially identical to the elements of a common-law false arrest

claim," we address the merits of those claims together. See Scott v. District of Columbia, 101 F.3d 748, 753-54 (D.C. Cir. 1996) (citing *Dellums v. Powell*, 566 F.2d 167, 175 (D.C. Cir. 1977)). As with most false arrest claims, Plaintiffs' claims "turn on the issue of whether the arresting officer[s] had probable cause to believe that [Plaintiffs] committed a crime." *Id*. at 754. Defendants argue that the district court erred in finding the arrests unsupported by probable cause because, in their view, the officers had objectively valid bases to arrest the Plaintiffs both for unlawful entry and disorderly conduct. In the alternative, Defendants contend that, even if probable cause were lacking, the officers are shielded from liability by qualified immunity and a common-law privilege. We address these contentions in turn.

A.

The assessment of probable cause is an objective one. An arrest is supported by probable cause if, "at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that the suspect has committed or is committing a crime. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

Based on the undisputed facts relevant to the knowledge the police had at the time of the arrests, and "giv[ing] due weight to inferences drawn" by the officers, we consider de novo whether those facts support a determination of probable cause to arrest. *Ornelas v. United States*, 517 U.S. 690, 697, 699 (1996). Defendants contend that they were justified in arresting Plaintiffs for unlawful entry and disorderly conduct. To determine whether they had probable cause to believe that Plaintiffs were violating District of Columbia law, we look to District law to identify the elements of each of those offenses. See *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). Upon examination of the relevant statutes and case law, we conclude that no reasonable officer could have concluded that there was probable cause to arrest Plaintiffs for either crime.

Unlawful Entry. At the time of Plaintiffs' arrests, District of Columbia law made it a misdemeanor for a person to, "without lawful authority, . . . enter, or attempt to enter, any public or private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof." D.C. Code § 22-3302 (2008). To sustain a conviction for unlawful entry, the government must prove that "(1) the accused entered or attempted to enter public or private premises or property; (2) he did so without lawful authority; (3) he did so against the express will of the lawful occupant or owner; and (4) general intent to enter." *Culp v. United States*, 486 A.2d 1174, 1176 (D.C. 1985).

The probable-cause inquiry in this case centers on the third and fourth elements, which together identify the culpable mental state for unlawful entry. See *Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013). Specifically, the question is whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that Plaintiffs knew or should have known they had entered the house "against the will of the lawful occupant or of the person lawfully in charge thereof," and intended to act in the face of that knowledge. D.C. Code § 22-3302; see *Ortberg*, 81 A.3d at 305; *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989).

Probable cause "does not require the same type of specific evidence of each element of

the offense as would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972). But the police cannot establish probable cause without at least some evidence supporting the elements of a particular offense, including the requisite mental state. *United States v. Christian*, 187 F.3d 663, 667 (D.C. Cir. 1999). Because the offense of parading without a permit, for example, requires knowledge that no permit issued, "officers who make such an arrest must have reasonable grounds to believe" that the suspects knew no permit had been granted. *Carr v. District of Columbia*, 587 F.3d 401, 410-11 (D.C. Cir. 2009).

In this case, the officers on the scene had three pieces of information that could bear on whether the Plaintiffs knew or should have known that they had entered a house against the owner's express will. First, the officers had Plaintiffs' statements that they had been invited to some kind of party at the house, with inconsistent and conflicting statements about the type of party. Second, the officers had explicit, uncontroverted statements from Peaches and a guest at the scene that Peaches had told the people inside the house that they could be there. Finally, the officers had a statement by the claimed owner of the house that he had been trying unsuccessfully to arrange a lease with Peaches and that he had not given the people in the house permission to be there.

As a preliminary matter, Defendants argue that Peaches' invitation is irrelevant to the determination of probable cause, because whether the Plaintiffs had a bona fide belief in their right to enter the house "simply raises a defense for the criminal trial." That argument misses the mark. The District of Columbia Court of Appeals recently reiterated that "the existence of a reasonable, good faith belief [in permission to enter] is a valid defense precisely because it precludes the government from proving what it must—that a defendant knew or should have known that his entry was against the will of the lawful occupant." *Ortberg*, 81 A.3d at 309 (emphasis added).

It is true that, if prosecuted for unlawful entry, a defendant may raise as a defense that he entered the building "with a good purpose and with a bona fide belief of his right to enter." *Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971); see *United States v. Thomas*, 444 F.2d 919, 926 (D.C. Cir. 1971); *Ortberg*, 81 A.3d at 308-09. But the cases interpreting the unlawful-entry statute are clear and consistent that such a defense is available precisely because a person with a good purpose and bona fide belief of her right to enter "lacks the element of criminal intent required" by the statute. Smith, 281 A.2d at 439; see also *McGloin* v. United States, 232 A.2d 90, 91 (D.C. 1967) (dismissing concern about unintentional violations of the statute, because "one who enters for a good purpose and with a bona fide belief of his right to enter is not guilty of unlawful entry"); *Bowman*, 212 A.2d 610, 611-12 (D.C. 1965) ("[O]ne who enters . . . for a good purpose and with bona fide belief of his right to enter . . . would not be guilty of an unlawful entry . . . .").

Thus, contrary to Defendants' argument, Peaches' invitation is central to our consideration of whether a reasonable officer could have believed that the Plaintiffs had entered the house unlawfully. That is because, in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of Plaintiffs' intent to enter against the will of the lawful owner. A reasonably prudent officer aware that the Plaintiffs gathered pursuant to an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully.

Ignoring the significance of Peaches' invitation, Defendants argue that Hughes's statement that he had not given the Plaintiffs permission to be in the house is dispositive because a homeowner's denial that he has given permission to enter his property is sufficient to establish probable cause to arrest for unlawful entry. We disagree. Importantly, Hughes never said *that he or anyone else had told the Plaintiffs* that they were not welcome in the house. Peaches eventually admitted that she did not have permission to be in the house or to invite others, but there is no evidence that *she* had told the Plaintiffs as much. Indeed, the evidence is uniform that the arrestees all were invited, and there is simply no evidence in the record that they had any reason to think the invitation was invalid. All of the information that the police had gathered by the time of the arrest made clear that Plaintiffs had every reason to think that they had entered the house with the express consent of someone they believed to be the lawful occupant. Accordingly, there was no probable cause for the officers to believe that the Plaintiffs entered the house knowing that they did so against the will of the owner or occupant.

The cases on which Defendants rely do not compel a different conclusion. Citing to *McGloin*, 232 A.2d 90, and Culp, 486 A.2d 1174, Defendants argue that Hughes's statement was sufficient because "[t]he offense of unlawful entry does not require any kind of prior warning in the case of a private dwelling." Br. for Appellants 22. *Culp* and *McGloin* establish that an owner of a private dwelling need not post any sign or warning in order to express an intent to exclude the general public. See *Culp*, 486 A.2d at 1177 (probable cause for unlawful entry where the building is vacant and "the property itself reveals indications of a continued claim of possession by the owner or manager"); *McGloin*, 232 A.2d at 91 ("[S]urely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry."). But those cases do not apply here, because the Plaintiffs did not simply find a house that appealed to them and walk in off the street; they entered the specified home at the invitation of someone they reasonably believed was an authorized inhabitant.

Defendants' reading of *Culp* and *McGloin* would provide probable cause to arrest for unlawful entry any individual in a private dwelling without the express permission of the owner. Such a rule would transform the unlawful-entry statute from one barring entry "against the will of the owner" into one criminalizing entry "without the express invitation of the owner." A brunch host who overstays her lease does not thereby expose her invited guests to arrest for unlawful entry, nor does a person summoned onto property by a stranger who appears to be the lawful inhabitant commit the crime of unlawful entry if she reasonably fails to recognize that the stranger is not the owner at all, but a traveling salesman. What the unlawful-entry law requires is some showing that the individual entered a place that she knew or should have known she was not entitled to be.

The cases Defendants cite merely recognize that certain factual circumstances not present here make it reasonable to infer an interloper's intent to enter against the will of the owner. *McGloin*, for example, upheld an unlawful-entry conviction where the defendant entered an apartment building, ran up the fire escape and then onto the roof, and said first that he was looking for his cat and then "for a friend named DeWitt who lived in the building," when no one by that name lived there. 232 A.2d at 90. In his

defense, McGloin relied on *Bowman*, where the court held that an entry into a semi-public space was not unlawful unless the owner had given an express "warning to keep off," which could be expressed verbally or "by sign." *See McGloin*, 232 A.2d at 91 (quoting *Bowman*, 212 A.2d at 611). Distinguishing *Bowman*, the court emphasized that McGloin entered "not a public or semi-public building," but an apartment building containing four private family dwellings. *Id*. Under such circumstances, it was "more than plain that wandering through the building, climbing on the roof or perching on the fire escape would be against the will of the owner." *Id*.

Culp addressed what inferences the police may reasonably draw when a person enters a property that appears to be vacant. In that case, the police saw three men, including the defendant, inside a "dilapidated" public housing property. See *Culp*, 486 A.2d at 1175. The men tried to leave through the back door when they saw the police approaching, and the defendant "could not explain his presence" when the officers asked what he was doing there. Id. Culp challenged his arrest for unlawful entry on the basis that the police lacked probable cause to believe that he knew he was entering the house against the will of the occupant. See id. The court found that the officers had probable cause to arrest Culp because "there were sufficient indications of efforts by [the housing authority] to protect the property against intruders that the officers could reasonably conclude that [Culp] knowingly entered against the will of the person lawfully in charge." *Id*. at 1177 (quotation marks and ellipsis omitted). The housing authority had made "continuous and diligent efforts to board up the house" and at least some of the windows remained boarded up when Culp entered. *Id*.

The arresting officers in this case, unlike those in *McGloin* and *Culp*, observed nothing inconsistent with the reason the Plaintiffs gave for being there—a reason that was corroborated, rather than undermined, by the information that Peaches gave to the officers: Peaches had invited them to her new apartment. Defendants point to the "highly suspicious and incriminating" activities the officers observed in the house to bolster the argument that the officers had no reason to credit the Plaintiffs' explanation for their presence. But the officers acknowledged that, other than the ostensible unlawful entry, they did not see anyone engaging in illegal conduct. Moreover, the activities they did observe—scantily clad women dancing, bills slipped into their garter belts, and people drinking—were consistent with Plaintiffs' explanations that they were there for a bachelor or birthday party. To the extent that people scattered or hid when the police entered the house, such behavior may be "suggestive" of wrongdoing, but is not sufficient standing alone to create probable cause. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (noting that unprovoked flight "is not necessarily indicative of wrongdoing," but is suggestive enough that, given other circumstances, may justify further investigation). To the extent that the party involved semi-nude dancing or stripping, it is hardly surprising that participants would retreat as officers entered off the street.

As the district court explained, this is not a case in which "the property was boarded up, door latches were broken, no trespassing signs were posted or the manner of securing the property indicated that the owner wanted others to keep out." *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 33 (D.D.C. 2012). Notwithstanding the parties' dueling characterizations of how furnished and inhabited the house appeared, there is nothing in the record suggesting that the condition of

the house, on its own, should have alerted the Plaintiffs that they were unwelcome. To the contrary, that the house had sparse furnishings and functioning utilities was entirely consistent with one individual's statement to Officer Parker that Peaches was the new tenant in a house previously occupied by the owner's recently deceased grandfather.

It bears emphasizing that Defendants are incorrect to suggest that our conclusion could render the unlawful-entry statute "unenforceable in most circumstances" or leave the police "powerless to make arrests for unlawful entry" in analogous situations. Br. for Appellants 24. The police were by no means powerless in this case. At a minimum, after speaking with Hughes and determining that he had not given Peaches permission to use the house, the officers could have told the Plaintiffs that they lacked permission to be there and so must leave. Had the officers "personally asked [the Plaintiffs] to leave and [the Plaintiffs] had refused," such a refusal would have supplied the probable cause the officers needed to make an arrest for unlawful entry. *District of Columbia v. Murphy*, 631 A.2d 34, 38 (D.C. 1993); see *id.* at 37 ("The offense of unlawful entry includes . . . cases where a person who has entered the premises with permission subsequently refuses to leave after being asked to do so by someone lawfully in charge.").

In sum, when faced with the facts and circumstances presented in this case—and, in particular, without any evidence that the Plaintiffs knew or should have known they were in the house against the will of the owner or lawful occupant—a reasonable officer could not have believed there was probable cause to arrest the Plaintiffs for unlawful entry.

Disorderly Conduct. Defendants argue in the alternative that the officers had probable cause to arrest the Plaintiffs for disorderly conduct. At the time of the Plaintiffs' arrests, the relevant statute made it a crime to "shout[] or make[] a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons," either with the intent "to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby." D.C. Code § 22-1321(3) (2008). The "breach of the peace" clause qualifies the remainder of the statute "and sets forth an essential element of the offense." *In re T.L.*, 996 A.2d 805, 810 (D.C. 2010).

Plaintiffs point to the evidence in the record that the arresting officers themselves did not believe there was evidence to support a disorderly conduct charge. As long as the arresting officers "had an objectively valid ground upon which" to make an arrest, however, the subjective knowledge and intent of the officers is irrelevant. *United States v. Bookhardt*, 277 F.3d 558, 566 (D.C. Cir. 2002); *see Whren v. United States*, 517 U.S. 806, 813 (1996). Thus, even where police do not believe evidence suffices, or are unsure which of several offenses the suspect may have committed, an arrest is valid so long as, on the facts of which the officers were aware, an objective observer can discern probable cause. *See*, e.g., *United States v. Broadie*, 452 F.3d 875, 881 (D.C. Cir. 2006) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)); *Bookhardt*, 277 F.3d at 566; *United States v. Prandy-Binett*, 995 F.2d 1069, 1073-74 (D.C. Cir. 1993); see also *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006) (Sotomayor, J.) ("[W]hen faced with a claim for false arrest, we focus on the validity of the arrest, and not on the validity of each charge."). Defendants are thus correct that the arresting officers' subjective

belief that they lacked probable cause to arrest the Plaintiffs for disorderly conduct is not dispositive. What matters is whether, on the facts the officers knew at the time, a reasonably prudent officer could have found that the Plaintiffs were engaging in disorderly conduct. See *Whren*, 517 U.S. at 813; *Bookhardt*, 277 F.3d at 566.

The officers here, however, accurately estimated the evidence as inadequate to support probable cause to believe that the Plaintiffs' conduct was disorderly. As the district court recognized, some evidence suggested "the police were told of reports of a loud party or loud music and some officers heard loud music upon arrival." *Wesby*, 841 F. Supp. 2d at 34. But Defendants exaggerate the nature and quantum of that evidence as showing that Plaintiffs had "disturbed the tranquility and nighttime slumber of the community residents." Br. for Appellants 32. The evidence on which Defendants rely shows nothing more than that one neighbor had called to complain about noise that evening. A disorderly conduct violation under District of Columbia law requires that an arrestee disturbed a "considerable number of persons" and acted "under circumstances such that a breach of the peace may" have been occasioned by that arrestee's 19 conduct. D.C. Code § 22-1321 (2008); *In re T.L.*, 996 A.2d at 808-09 (concluding that defendant did not create "breach of the peace" within the meaning of the statute despite the fact that "some ten to fifteen people left their town houses" in order to observe the "clamor" that defendant caused by yelling loudly on the street). Even viewing it, as we must, in the light most favorable to the Defendants, the evidence here simply does not rise to that level.

For all of these reasons, we conclude that the officers lacked probable cause to arrest the Plaintiffs for unlawful entry or disorderly conduct.

B.

Having concluded that Plaintiffs' arrests were unsupported by probable cause, we must consider whether qualified immunity shields the officers from liability. "An officer is entitled to qualified immunity, despite having engaged in constitutionally deficient conduct, if, in doing so, she did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Brosseau v. Haugen*, 543 U.S. 194, 205 (2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). If Officers Parker and Campanale had "an objectively reasonable basis for believing that the facts and circumstances surrounding [Plaintiffs'] arrest were sufficient to establish probable cause," *Wardlaw v. Pickett*, 1 F.3d 1297, 1304 (D.C. Cir. 1993) (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)), they would be immune from Plaintiffs' suit for damages.

As with all cases examining whether a particular right was sufficiently clear, "[w]e begin by establishing the appropriate level of generality at which to analyze the right at issue." *Johnson v. District of Columbia*, 528 F.3d 969, 975 (D.C. Cir. 2008); see, e.g., *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Here, the question is whether, in light of clearly established law and the information that Officers Parker and Campanale had at the time, it was objectively reasonable for them to conclude that there was probable cause to believe Plaintiffs were engaging in either unlawful entry or disorderly conduct. *See Wilson*, 526 U.S. at 615. This inquiry into the "objective legal reasonableness" of the officers' actions

parallels but does not duplicate the reasonableness aspect of the Fourth Amendment probable cause analysis. *See Johnson*, 528 F.3d at 976 (describing the two Saucier steps as "distinct but overlapping").

To determine whether the officers "strayed beyond clearly established bounds of lawfulness," id., we look first to "cases of controlling authority," *Youngbey v. March*, 676 F.3d 1114, 1117 (D.C. Cir. 2012) (quoting *Wilson*, 526 U.S. at 617). It is not enough to reiterate that the Fourth Amendment's restrictions against arrest without probable cause are clearly established; the inquiry must be made more contextually, at a finer level of specificity. At the same time, "[w]e need not identify cases with materially similar facts, but have only to show that the state of the law at the time of the incident gave the officer[s] fair warning" that their particular conduct was unconstitutional. Johnson, 528 F.3d at 976 (brackets, ellipsis, and quotation marks omitted).

Turning first to the claim of false arrest for unlawful entry, we conclude that no reasonable officer could have believed there was probable cause to arrest Plaintiffs for entering unlawfully where, as here, there was uncontroverted evidence that Plaintiffs believed they had entered at the invitation of a lawful occupant. Defendants argue that, because no case identified by Plaintiffs had "invalidated an arrest for unlawful entry under similar circumstances," it was not clearly established that arresting Plaintiffs for unlawful entry was unconstitutional. But that is not the applicable standard. Qualified immunity need not be granted every time police act unlawfully in a way that courts have yet to specifically address. *See*, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("To be established clearly, . . . there is no need that the very action in question have previously been held unlawful." (brackets and internal quotation marks omitted)); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

The law in this jurisdiction has been well established for decades that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest, including any state-of-mind element. *See*, e.g., *Carr*, 587 F.3d at 410-11; *Christian*, 187 F.3d at 667. Under District of Columbia law, criminal intent is a necessary element of the offense of unlawful entry. A person who has a good purpose and bona fide belief of her right to enter "lacks the element of criminal intent required" to violate the unlawful-entry statute. *Smith*, 281 A.2d at 439. Notwithstanding Defendants' suggestion to the contrary, see Oral Arg. Rec. at 5:40-5:52, District of Columbia unlawful entry law predating the conduct in this case plainly required that a suspect "knew or should have known that his entry was unwanted." *Ortberg*, 81 A.3d at 308 (collecting cases); *see also id*. at 307-08 (explaining that, although "lack[ing] some precision," prior discussions of "the mental states for entry and for doing so 'against the will' of the lawful occupant are both clearly discernible and distinct").

The controlling case law in this jurisdiction therefore made perfectly clear at the time of the events in this case that probable cause required some evidence that the Plaintiffs knew or should have known that they were entering against the will of the lawful owner. Defendants are simply incorrect to suggest that the officers could not have known that

uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry. *See Harlow*, 457 U.S. at 819 ("[A] reasonably competent public official should know the law governing his conduct.").

The same analysis holds true with respect to the clarity of the Fourth Amendment right against false arrest for disorderly conduct. Defendants contend that the law was not clearly established at the time of Plaintiffs' arrests because there was no case law interpreting the specific provision of the statute on which Defendants rely. They correctly point out that the first case from the District of Columbia Court of Appeals interpreting subsection (3) of D.C. Code § 22-1321 was decided after the arrests in this case. *See In re T.L.*, 996 A.2d at 810 ("This is the first prosecution under subsection (3) of the statute that has come to our attention."). But the plain text of that provision requires the disturbance of a "considerable number of persons." D.C. Code § 22-1321(3). Whatever a "considerable number of persons" means, surely it must mean something more than a single individual. And yet there is no evidence in this case that the loud music the officers heard when approaching the house disturbed anyone other than one neighbor who had complained.

Put differently, we believe that the language of the disorderly conduct statute, standing alone, was sufficient to give fair notice that there was no probable cause to make an arrest under these circumstances. We do not doubt, as the *In re T.L.* court acknowledged, that some parts of that provision may "pose their own interpretive issues." 996 A.2d at 810. That does not mean, however, that distinct elements of the offense were unclear in the absence of case law interpreting the statute. See *United States v. Lanier*, 520 U.S. 259, 266-67 (1997) (analogizing clearly established standard to fair warning principles in the context of criminal prosecutions, and noting that "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal" (emphasis added)); cf. *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (noting that "the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the total absence of case law").

Finally, we reject Defendants' arguments that Officers Parker and Campanale cannot be held liable under Section 1983 because (1) they followed Sergeant Suber's order to arrest the Plaintiffs, and (2) they were not each individually responsible for each of the Plaintiffs' arrests.

An officer is not necessarily entitled to qualified immunity simply because he relies on a supervisor's decision to arrest. In evaluating the objective legal reasonableness of an officer's position for purposes of qualified immunity, approval by a superior officer is "pertinent" but not "dispositive." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1249 (2012); cf. *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986) (rejecting the notion that approval of a warrant by a neutral magistrate automatically establishes qualified immunity, and requiring instead that the officer exercise his own "reasonable professional judgment"). Defendants argue to the contrary primarily in reliance on *Elkins v. District of Columbia*, 690 F.3d 554 (D.C. Cir. 2012), in which we held that an inspector from the Historic Preservation Office, a government agency "charged with protecting the city's historic structures," was entitled to qualified

immunity for her unlawful seizure of the plaintiff's notebooks. *Id*. at 559, 567- 68. Elkins held that, although the inspector had been personally involved in the unconstitutional seizure, it was reasonable for her not to know that her actions were unlawful. See *id*. at 568 ("The appropriate question for us to ask is whether it would have been clear to a reasonable official in [the inspector's] situation that seizing [the plaintiff's] notebook was unlawful."). Significantly, the inspector in that case was not a law enforcement officer at all, but "a junior member of the search team present to take pictures in an inspection led by police and her superiors." *Id*. Moreover, the *Elkins* court emphasized in granting qualified immunity that, although the inspector ultimately "relied upon the judgment of her supervisor and the police officer in charge," she did not blindly follow their orders. *Id*. Rather, she first "asked [them] about the permissible scope of the search." *Id*. Based on those and other factors, the court concluded that her actions, "though mistaken, were not unreasonable." *Id*. (citing *Pearson v. Callahan*, 555 U.S. 223, 244 (2009)).

The circumstances here, unlike in *Elkins*, do not show the officers' unquestioning reliance on Sergeant Suber's arrest order to be reasonable. See *id*. at 569 ("Whether an official's reliance [on her supervisor] is reasonable will always turn on several factors . . . ."). In contrast to the historic preservation investigator in Elkins, Officers Parker and Campanale are police officers with the independent authority to make arrests while on patrol. Indeed, had Sergeant Suber not come out to the scene, they would have had to make the arrest determinations on their own. Police officers charged with enforcing the criminal statutes are expected to know the limitations on their authority, see *Harlow*, 457 U.S. at 819, and, as discussed above, a reasonably competent officer faced with the information the officers had gathered in this case should have known that he lacked probable cause to make an arrest.

This is also not a case, like *Elkins* and the decisions cited therein, in which the defendant officers played little or no role in the investigation. See *Elkins*, 690 F.3d at 569 (citing, by way of example, a case in which officers did not play a "key role in the overall investigation"). Here, Officers Parker and Campanale were actively involved in surveying the scene and gathering information regarding the Plaintiffs' knowledge and reason for being in the house, and Officer Parker spoke to both Peaches and Hughes by phone. Both officers, moreover, were aware of the key uncontroverted facts in this case: that Peaches had invited the Plaintiffs to the house, and that the Plaintiffs had no reason to doubt that Peaches had the right to extend such an invitation. Under these circumstances, it was not reasonable for the officers to rely on Sergeant Suber's unlawful decision to arrest the Plaintiffs. Yet another factor present in Elkins but missing in this case is that neither Officer Parker nor Officer Campanale raised the question—to Sergeant Suber or anyone else—whether there was evidence that the Plaintiffs knew or should have known that their presence in the house was unauthorized. Indeed, there is no evidence in the record suggesting that Officer Parker or Officer Campanale in fact disagreed with Sergeant Suber's determination that there was probable cause for an arrest but carried out the arrests because they were under orders to do so.

That the officers were apparently as confused or uninformed about the law as their supervisor does not make it reasonable for them to have arrested the Plaintiffs in reliance on his flawed assessment. Cf. *Malley*, 475 U.S. at 346 n.9 ("The officer . . . cannot

excuse his own default by pointing to the greater incompetence of the magistrate."); *Messerschmidt*, 132 S. Ct. at 1252 (Kagan, J., concurring in part and dissenting in part) (2012) ("[W]hat we said in Malley about a magistrate's authorization applies still more strongly to the approval of other police officers . . . ."). This Court has never held that qualified immunity permits an officer to escape liability for his unconstitutional conduct simply by invoking the defense that he was "just following orders." See generally *Hobson v. Wilson*, 737 F.2d 1, 67 (D.C. Cir. 1984) (statement denying petition for rehearing) (per curiam) (rejecting with "no hesitation" the defendants' argument, raised for the first time in petition for rehearing, that the existence of an illegal policy excused low-level government officials from liability). Indeed, "[i]n its most extreme form, this argument amounts to the contention that obedience to higher authority should excuse disobedience to law, no matter how central the law is to the preservation of citizens' rights." *Id.* For good reason, this Court has never adopted such a rule.

That leaves us with the contention that Officers Parker and Campanale cannot be held liable because they did not personally arrest each of the Plaintiffs. But Defendants' argument misapprehends the applicable legal standard for causation in the Section 1983 context. As this court has recognized, the Plaintiffs were required to "produce evidence 'that each [officer], through [his] own individual actions, has violated the Constitution.'" *Elkins*, 690 F.3d at 564 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). Here, the cause of the group arrest was the investigation and erroneous determination regarding probable cause. Both Officers Parker and Campanale were the hub of that investigation: they gathered evidence, including photographs of the people in the house, and actively participated in questioning the Plaintiffs and other key witnesses such as Hughes and Peaches. See id. at 566-68 (assessing whether the evidence showed that the individual officers caused the unlawful seizure, and noting in one instance that the defendant's actions were "instrumental to the seizure"). In this context, that is sufficient to establish causation. See, e.g., *KRL v. Estate of Moore*, 512 F.3d 1184, 1193 (9th Cir. 2008) (denying qualified immunity to an officer who relied on a facially invalid warrant in conducting a search because he played "an integral role in the overall investigation" that led to the issuance of the defective warrant); *Hall v. Shipley*, 932 F.2d 1147, 1154 (6th Cir. 1991) (recognizing general rule that mere presence is insufficient to create liability, but upholding denial of qualified immunity based on record evidence that the officer had been "the prime mover" in obtaining the search warrant and "participated in the search once inside the dwelling" (internal quotation marks omitted)); *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (officers who did not physically perform pat-down but who "remained armed on the premises throughout the entire search" could be held liable under Section 1983 as "participants rather than bystanders").

Because the common-law privilege Defendants invoke overlaps with but is harder to establish than qualified immunity, the Defendants' argument on that score "fails for essentially the same reasons already set forth." *District of Columbia v. Minor*, 740 A.2d 523, 531 (D.C. 1999) (noting that the standard for common-law privilege "resembles the section 1983 probable cause and qualified immunity standards . . . (with the added clear articulation of the requirement of good faith)"); cf. *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012) (explaining that 28 although the officer

"need not demonstrate probable cause in the constitutional sense" for privilege to attach, the officer must show "(1) he or she believed, in good faith, that his or her conduct was lawful, and (2) this belief was reasonable" (brackets and internal quotation marks omitted)). Accordingly, we affirm the district court's judgment insofar as it relates to Plaintiffs' Section 1983 and common-law false arrest claims.

III.

Finally, we address the District's claim that the district court erred in granting summary judgment to the Plaintiffs on their common-law negligent supervision claim. The District makes two arguments in support of its contention that the district court erred. First, the District contends that the negligent supervision claim must fail because the arrests were supported by probable cause, so either the standard of care was met or there was no underlying tort. That argument, however, is foreclosed by our conclusion that the officers lacked probable cause to arrest the Plaintiffs.

Second, the District argues that it was entitled to summary judgment on this claim because the Plaintiffs failed to present expert testimony regarding the standard of care. We disagree. District of Columbia law requires expert testimony only where "the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." *Godfrey v. Iverson*, 559 F.3d 569, 572 (D.C. Cir. 2009) (quoting *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 433 (D.C. 2000)). Moreover, although the District correctly points out that courts often require expert testimony where the training and supervision of police officers is concerned, see Br. for Appellants 43 (citing cases), the fact that the supervising official was on the scene and directed the officers to make the unlawful arrests distinguishes this case from those in which expert testimony has been required. See *Godfrey*, 559 F.3d at 573 (no expert testimony required where "the individual with supervisory authority (Iverson) was present when his employee (his personal bodyguard Kane) committed the tortious acts"); *District of Columbia v. Tulin*, 994 A.2d 788, 797 (D.C. 2010) (no expert testimony required where police sergeants were on the scene and authorized arrest without inquiring into "critical information" about the incident).

Indeed, the undisputed facts in this case demonstrate that Sergeant Suber, one of the District's supervisory officials, directed his subordinates to make an arrest that he should have known was unsupported by probable cause. That is sufficient to entitle the Plaintiffs to judgment as a matter of law on their negligent supervision claim. See *Phelan v. City of Mount Rainier*, 805 A.2d 930, 937-38 (D.C. 2002) ("To establish a cause of action for negligent supervision, a plaintiff must show: that the employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee." (internal quotation marks omitted)).

* * *

For the foregoing reasons, we affirm the district court's judgment.

So ordered.

BROWN, Circuit Judge, dissenting:

The court today articulates a broad new rule—one that essentially removes most species of unlawful entry from the criminal code. Officers must prove individuals

occupying private property know their entry is unauthorized; otherwise police lack probable cause to make arrests. Moreover, any plausible explanation resolves the question of culpability in the suspects' favor. Thus, unless the property is posted with signs or boarded up and attempts to prevent access have been deliberately breached, i.e., there is direct evidence of unauthorized entry, law enforcement's options are limited to politely asking any putative invitee to leave.

I respectfully dissent.

I

Summary resolution is inappropriate where—as here— the probable cause determination turns on close questions of credibility, as well as the reasonability of inferences regarding culpable states of mind that officers draw from a complicated factual context. See *Media Gen., Inc. v. Tomlin*, 387 F.3d 865, 871 (D.C. Cir. 2004) ("[Where] the material facts are susceptible to divergent inferences . . . the [] Court ha[s] no basis upon which to grant summary judgment.").

The Court concludes that, as a matter of law, no reasonably prudent officer could believe Plaintiffs entered unlawfully because the undisputed evidence shows an individual with (illusory) authority invited their entry, vitiating Plaintiffs' formation of the requisite intent. Maj. Op. at 11. Yet the mere presence of an invitation by one with ostensible authority is not dispositive if, under the totality of the circumstances, the officers could still conclude the suspects knew or reasonably should have known their invitation was against the will of the lawful owner. *See Ortberg v. United States*, 81 A.3d at 308 (D.C. 2013). The absence of direct, affirmative proof of a culpable mental state is not the same thing as undisputed evidence of innocence.

The court relies on two primary precedents to raise the bar, but neither *Ortberg v. United States*, 81 A.3d 303 (D.C. 2013) nor *United States v. Christian*, 187 F.3d 663 (D.C. Cir. 1999) justifies the impossible standard for finding probable cause the court now proposes. Channeling Dr. Frankenstein, the court cobbles together a few recognizable parts to build a grotesque and unnatural whole. In *Ortberg*, the court recognized a bona fide belief in the right to enter as a defense to a charge of unlawful entry. *Ortberg* was not a probable cause case; it confirmed that all elements of unlawful entry, including requisite criminal intent, are necessary to sustain a conviction, while emphasizing that bona fide belief must have some reasonable basis. It is "not sufficient that an accused merely claim a belief of a right to enter." *Id.* at 309, n.12.

United States v. Christian does impose a higher probable cause standard but that case is distinguishable. First, Christian involved a specific intent crime. See generally *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) ("[A]n officer need not have probable cause for every element of an offense[,]. . . however, when specific intent is a required element of the offense, the arresting officer must have probable cause for that element."). Second, Christian did not require direct evidence. The court cited *Adams v. Williams*, 407 U.S. 143, 149 (1972), acknowledging that the circumstances surrounding an arrest may support the necessary inference of unlawful possession. *Christian*, 187 F.3d at 406. The problem with the government's argument in *Christian* was not the absence of direct proof of criminal intent, it was the absence of any evidence whatsoever of unlawful possession. "[T]he officers [therefore] lacked probable cause to believe a crime had been committed." *Id.*

Today's decision undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden that the Court declines to specify. The Court's decision broadly extends *Ortberg* and *Christian* to apply standards designed for materially disparate contexts to the probable cause inquiry for general intent crimes. Cf. *Pierce v. United States*, 402 A.2d 1237, 1246 n.2 (D.C. Cir. 1979) ("Sentences out of context rarely mean what they seem to say."). As a result, the Court finds officers may only lawfully arrest suspects for unlawful entry where the officers have evidence affirmatively proving each element of an offense, including clear proof of what the suspect knew or reasonably should have known. But cf. 1 Corinthians 2:11 ("For who knows a person's thoughts except their own spirit within them?"). This is tantamount to an invitation to abuse vacation rentals or houses being marketed for sale or lease where prospective tenants can gain entry and retain or misappropriate a key or a lockbox combination, or leave a point of entry unsecured. Such a heightened threshold is not called for under our precedents. For general intent crimes, "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149 (1972). The proper inquiry is not whether the element of knowledge was conclusively satisfied; it is instead whether, based on the totality of the circumstances, officers could reasonably believe Plaintiffs committed the offense of unlawful entry.

The Court concludes there was insufficient evidence to support arrest because the evidence that Plaintiffs were invitees was uncontradicted, noting the presence of semi-nude dancing and the semi-furnished state of the home are consistent with Plaintiffs' contentions of their innocent attendance at a party. Maj. Op. at 15–16. A jury might credit Plaintiffs' depiction of events, their claims of innocent reliance upon a credible invitation, and conclude they lacked knowledge of the unlawfulness of their entry. However, for purposes of summary judgment, Plaintiffs' lack of knowledge must not be merely "consistent" with the evidence gathered by the police. Instead, Plaintiffs' lack of knowledge must be the only reasonable inference the officers could draw.

Here the totality of the circumstances could cause reasonable minds to question whether Plaintiffs were as blameless as the attendees of a Sunday brunch whose imprudent host has overstayed her lease. *Contra* Maj. Op. at 13 (finding this case indistinguishable from such a scenario). The officers responded to a call reporting illegal activity in a home at least some residents of the neighborhood knew to be vacant. As the officers entered, the partygoers' first response was to scatter into different rooms or hide. The house's interior was bare and in disarray; beyond fixtures or large appliances, it contained only folding chairs and food, and one room upstairs had a bare mattress and lighted candles—along with "females . . . that had provocative clothing on with money in . . . their garter belt[s]." Parker Dep. 14:12–16.

After rounding up and interviewing the partygoers, the officers found their claim to lawful entry was an invitation from the house's supposed tenant, Peaches, who was "throwing a party." However, Peaches was not actually present when the officers arrived on the scene. The partygoers also gave inconsistent explanations for the party to which they had allegedly been invited. Some claimed to be attending a birthday party while others insisted it was a bachelor's party; in any event, none could identify the guest of honor.

When ultimately reached by telephone, Peaches admitted to inviting various partygoers, and claimed she had permission to enter, an assertion she quickly recanted in a series of conflicting answers she made to investigators before becoming evasive and hanging up. The officers also confirmed from the actual owner that the house had been vacant since its last resident's death, the current owner was attempting to rent the property out, and neither Peaches nor anyone else had the owner's permission to enter or use the premises.

The totality of the evidence does not need to show the officers' beliefs regarding the unlawfulness of Plaintiffs' entry were "correct or more true than false. A practical, nontechnical probability . . . is all that is required." *Texas v. Brown*, 460 U.S. 730, 742 (1983). The surrounding context may not convince a jury to find probable cause. But likewise, taken in the light most favorable to the officers, the facts are not so clear cut that no reasonable officer could believe the partygoers knew or should have known Peaches' invitation was not credible or that their entry into the home was not properly authorized.

This is not a case where officers "turn[ed] a blind eye toward potentially exculpatory evidence in an effort to pin a crime on someone." *Ahlers v. Schebil*, 188 F.3d 365, 372 (6th Cir. 1999). Nor did officers lack "any" evidence Plaintiffs committed the offense of unlawful entry. See Christian, 187 F.3d at 667. The circumstances surrounding the arrest were sufficient to support the inference that the suspects knew or reasonably should have known their entry was unlawful.

"[T]he real key . . . [to probable cause] is how [an] observed transaction fits into the totality of the circumstances." *Jefferson v. United States*, 906 A.2d 885, 888 (D.C. 2006) (noting observation of a one-way transfer of an unidentified object can, in some cases, support probable cause for an unlawful two-way exchange of drugs for money). The officers did not ignore Plaintiffs' potentially exculpatory claims of invitation. See *Fridley v. Horrighs*, 291 F.3d 867, 874–75 (6th Cir. 2002) (officers may not ignore exculpatory facts that tend to negate an element of an offense). Instead, during the course of a fast-moving investigation, officers considered and investigated Plaintiffs' statements, and rendered a determination that their claims of bona fide good faith were insufficiently credible to overcome the surrounding facts and circumstances. *See Minch v. D.C.*, 952 A.2d 929, 937–38 (D.C. 2008) (noting police suspicion was reasonably based on appellant's evasiveness and equivocation, particularly in a fast-moving investigation).

The very purpose of a totality of the circumstances inquiry is to allow law enforcement officers to approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism, and decline to give credence to evidence the officers deem unreliable under the circumstances. Cf. *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983) ("In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts."). The Court's holding to the contrary ensures that all but the most implausible claims of invitation must be credited and radically narrows the capacity of officers to use their experience and prudent judgment to assess the credibility of the self-interested statements of intruders who claim to have been "invited" and have not overtly forced their entry into a home.

In light of the facts known to the officers at the time of the arrests, summary judgment is unwarranted on the question of probable cause for unlawful entry. From their investigation, the officers knew the house was an unoccupied private rental dwelling, which would likely not require a sign or express warning forbidding entry. See *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). They further determined none of the Plaintiffs owned or rented the house; that the property was, in fact, vacant; and the true owner had provided neither the partygoers nor any tenants with permission to enter, see *Culp v. United States*, 486 A.2d 1174, 1177 n.4 (D.C. 1985) ("[T]he arresting officers' knowledge that the property is vacant and closed to the public is material to a determination of probable cause."). Plaintiffs' party was taking place in a home so sparsely furnished as to be consistent with a vacant building; the guests' immediate response to the presence of police was to run and hide, an action suggestive of consciousness of guilt; the partygoers gave conflicting accounts about "why" the party was being held; and they purported to rely on an invitation from a "tenant" who was not actually present. When reached by telephone the "tenant" gave conflicting accounts as to her own permission to access the home, finally admitted she lacked any right to use the house, and—upon further questioning—became evasive and yelled at officers before hanging up.

Based on this evidence, taken in the light most favorable to the officers, a reasonable person could disbelieve Plaintiffs' claim of innocent entry based on a credible invitation. *See Parsons v. U.S.*, 15 A.3d 276, 280 (D.C. 2011) ("[T]he informant's general credibility and the reliability of the information he or she provides are important factors in a probable cause assessment"); see also *United States v. Project on Gov't Oversight*, 454 F.3d 306, 313 (D.C. Cir. 2006) ("Evaluation of the credibility of witnesses must be left to the factfinder, and the need to assess the credibility of witnesses is precisely what places this dispute outside the proper realm of summary judgment."). A rational juror could find the officers reasonably believed Plaintiffs either knew, or should have known, Peaches' invitation was unauthorized and that use of the house was not otherwise permissible.

At its fringes probable cause is a nebulous construct. See *Jefferson v. United States*, 906 A.2d 885, 887 (D.C. 2006). ("The probable-cause standard is incapable of precise definition . . . because it deals with probabilities and depends on the totality of the circumstances."). In factually complex circumstances, like the present one, the probable cause inquiry requires weighing the credibility of statements from multiple parties and witnesses, and consideration of the reasonable inferences officers may draw from idiosyncratic facts. Resolution of such a credibility laden and fact specific inquiry is properly reserved for the jury. The Court errs in concluding such a case is appropriate for preliminary resolution at summary judgment. See *George v. Leavitt*, 407 F.3d 405, 413 (D.C. Cir. 2005) ("[A]t the summary judgment stage, a judge may not make credibility determinations, weigh the evidence, or draw inferences from the facts-these are jury functions, not those of a judge ruling on a motion for summary judgment. . . . Although a jury may ultimately decide to credit the version of the events described by [a defendant] over that offered by [a plaintiff], this is not a basis upon which a court may rest in granting a motion for summary judgment.").

More troubling still, by subverting the appropriate standard for probable cause, the

Court effectively excises unlawful entry from the District's criminal code for cases where intruders claim they were invited and have not obviously and forcibly obtained entrance to a currently unoccupied private dwelling. Such a conclusion is not compelled by either our case law or common sense; officers are simply not required to credit the exonerating statements of suspected wrongdoers where the totality of the circumstances suggests such claims should be treated with skepticism.

II

Even assuming Plaintiffs' arrests were not supported by adequate probable cause for unlawful entry, qualified immunity shields the officers from individual liability for Plaintiffs' section 1983 claims because the officers' "conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added); see also *DeGraff v. D.C.*, 120 F.3d 298, 302 (D.C. Cir. 1997) ("[T]he scope of qualified immunity must be evaluated using the [] 'objective reasonableness' criteria.").

For purposes of qualified immunity, "'[c]learly established' . . . means that "[t]he contours of the right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999). While, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful," id., courts should nonetheless "examine the asserted right at a relatively high level of specificity, and on a fact-specific, case-by-case basis," *O'Malley v. City of Flint*, 652 F.3d 662, 668 (6th Cir. 2011). And in reviewing the pre-existing law, the officers' "unlawfulness must be apparent" to support a finding that qualified immunity does not apply. *Wilson*, 526 U.S. at 615; *Wardlaw v. Pickett*, 1 F.3d 1297, 1301 (D.C. Cir. 1993) (suggesting the "unlawfulness of the defendants [must be] so apparent that no reasonable officer could have believed in the lawfulness of his actions").

Here the pre-existing law of unlawful entry is not so clear that a reasonable officer would have known he lacked probable cause to arrest Plaintiffs. The officers were faced with an unusual factual scenario, not well represented in the controlling case law. The property where Plaintiffs were found was somewhere between an occupied private dwelling and a vacant or abandoned building. The situation the officers encountered rests uneasily between two distinct strands of District law. Compare *McGloin*, 232 A.2d at 91 ("[N]o one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.") with *Culp*, 486 A.2d at 1177 (noting boarded windows gives sufficient warning an abandoned building should not be entered).

Neither line of cases unambiguously controls. The law of unlawful entry for abandoned properties has traditionally dealt with obviously decrepit buildings, e.g., *Culp*, 486 A.2d 11 at 1175 (noting the house was missing a rear door, its windows were shattered, and the interior was in "shambles"), while unlawful entry of private dwellings has generally dealt with traditionally occupied residences, apartments, or semipublic buildings. *See*, e.g., *McGloin*, 232 A.2d at 91; *Bowman v. United States*, 212 A.2d 610, 611-12 (D.C. 1963). Neither line of cases encompasses a scenario where individuals claim to be the social guests of a tenant of a (vacant) property to which the tenant has no actual possessory

interest—much less a scenario where the putative tenant is herself not present on the scene and refuses to otherwise cooperate with officers' ongoing investigation. Moreover, to the extent the pre-existing law is broadly comparable, a reasonable person could find it supports an officer's finding of probable cause where a trespassers claim of invitation is deemed insufficiently credible. *See*, e.g., *McGloin*, 232 A.2d at 90–91 (upholding the conviction of person found in nonpublic areas of a private apartment building, despite his excuse he was looking for a cat or a friend who lived in the building); *Kozlovska v. United States*, 30 A.3d 799, 800–801 (D.C. 2011) (upholding the conviction of a woman who claimed an employee permitted her to use the building).

Thus, in the absence of pre-existing case law clearly establishing the contours of Plaintiffs' rights, the officers were shielded by qualified immunity when, acting under color of state law, they reasonably arrested plaintiffs for unlawful entry. The case law of course requires officers to have some evidence the alleged trespassers committed the offense of unlawful entry. *See* Maj. Op. at 21–22. Yet nothing in the District's law requires officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims. The officers were therefore entitled to the protection of qualified immunity and the "breathing room" it gives them to make reasonable— albeit potentially mistaken—judgments under novel circumstances unexplored by the law when they took the challenged action. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

"Supreme Court to hear case about arrests at party in D.C. house"

Robert Barnes

Washington Post

January 19, 2017

The party in the otherwise quiet Washington neighborhood had gotten loud by the time D.C. police officers Andre Parker and Anthony Campanale arrived.

Several women were dressed only in bras and thongs, with money in their garter belts. The unoccupied residence in Anacostia appeared to have been turned into a strip club, the officers thought. The partygoers said they had been invited by a woman named "Peaches," although some knew her as "Tasty." In the end, Parker and Campanale arrested 21 people.

The legal wrangling that followed those arrests in 2008 resulted in a nearly $1 million award against the officers and the city, and divided the judges of the U.S. Court of Appeals for the D.C. Circuit. On Thursday, the case made it onto the Supreme Court's docket.

The court announced that it will consider whether there was probable cause for the officers to make the arrests — the partygoers said they were invited to the house, and they were never prosecuted — and whether the officers deserve immunity for their actions.

The case appears to have split the Supreme Court justices. They considered nine times whether to accept the case before agreeing to review it.

It is unclear whether it will be considered in the court's current term or held over for the term that begins in October.

D.C. Attorney General Karl A. Racine told the justices in a petition that the court of appeals decision — finding that the officers lacked probable cause for the arrests because the partygoers said they were not trespassing but were guests of Peaches — failed to reflect "the real world in which police officers function."

"The court of appeals' decision undercuts an officer's ability to use his or her experience, judgment, and direct observations to assess the credibility of a suspect's innocent explanation," Racine wrote. "Officers will second-guess themselves and forgo enforcement of the law, fearing that a judge, far removed from the scene and years later, might make a different credibility judgment and then hold them personally liable."

Sixteen of the 21 people arrested sued after no charges were brought. A district judge ruled against the police officers, saying that "nothing about what the police learned at the scene suggests that the [partygoers] knew or should have known that they were entering" against the property owner's will.

After a trial, the partygoers were awarded $680,000 and the police officers were ordered to pay attorney costs, which brought the total to just under $1 million.

A divided panel of the appeals court upheld the award. And two judicial heavyweights on the court, liberal Cornelia T.L. Pillard and conservative Brett M. Kavanaugh, squared off over whether the entire circuit should review the decision.

Kavanaugh said the panel's opinion eroded the protection for police officers who may make an honest mistake when trying to carry out their duties.

"Two D.C. police officers have been held liable for a total of almost $1 million," Kavanaugh said in a statement joined by three other judges who wanted to rehear the case. "That equates to about 20 years of after-tax income for the officers, not to mention the harm to their careers. For what? For arresting for trespassing a group of people who were partying late at night with drugs and strippers in a vacant house that the partiers did not own or rent."

But Pillard replied that the panel's opinion did not change existing protections for police officers at all.

"Our opinion does not ignore or weaken that important protection, which gives officers the necessary 'breathing room' to perform their difficult, dangerous jobs and safeguard the public," she said. "It simply finds that a reasonable officer could not conclude, based on the information before these particular officers, that there was probable cause."

Ted J. Williams, an attorney for Theodore Wesby and the others who were arrested, had told the Supreme Court that it did not warrant the justices' attention.

Under D.C. law, a person is guilty of unlawful entry only if he knew or should have known that he was entering the property "against the will of the lawful occupant or of the person lawfully in charge" of the property, Williams wrote. In this case, the partygoers had been invited by Peaches, "a woman whom they reasonably believed to be its lawful occupant."

The case is District of Columbia v. Wesby.

“Supreme Court to hear case about party in vacant DC house”

Associated Press

Mark Sherman

January 19, 2017

WASHINGTON (AP) — The Supreme Court will hear a case in which people arrested for having a party in a vacant house sued police for violating their constitutional rights and won.

The justices said Thursday they will review lower court rulings in favor of 16 people who gathered in a house in Washington about three miles east of the nation’s Capitol for a party.

Police arrested the group after no one could identify whose house it was, some said it was a birthday party and others said it was a bachelor party. No one could identify the guest of honor. Several women were scantily clad, with money hanging out of their garter belts. The officers said that the scene resembled a strip club, according to court papers.

Several of the partygoers said someone named “Peaches” gave them permission to have the party.

But when an officer later contacted the purported owner of the home, he denied having given anyone permission to have a party.

The group was arrested for trespassing, a charge later changed to disorderly conduct and then dropped altogether. But the 16 people sued for false arrest and were awarded $680,000.

The issue for the court is whether the officers had sufficient reason to arrest the group for trespassing. The court also will determine whether the officers should be shielded from liability even if their actions are found to violate the law.

A panel of the federal appeals court in Washington upheld the judgment, but four other judges on the court said that the officers should have been protected, citing a string of Supreme Court decisions.

The case, District of Columbia v. Wesby, 15-1485, will be argued in April or the fall.

"Chemerinsky: When can government officers be held liable?"

ABA Journal

Erwin Chemerinsky

February 2, 2017

In the last few years, police killings of unarmed African-American men—Michael Brown, Eric Garner, Walter Scott, Laquan McDonald, Freddie Gray and others—have received great publicity. There is an urgent question of how to hold the police accountable to prevent and remedy constitutional violations.

This term, the Supreme Court has several cases addressing when law enforcement officers can be sued for money damages.

In each of the cases, the court has to consider whether the police violated the Fourth Amendment and if so, whether the officers can be held liable or whether they are protected by "qualified immunity." All government officials when sued for money damages can raise immunity as a defense. For some tasks, there is "absolute immunity," which means that the officer cannot be held liable no matter how egregious the constitutional violation. For example, absolute immunity exists for prosecutors for their prosecutorial tasks, legislators for their legislative tasks, judges for their judicial tasks and law enforcement officers for their testimony in court.

If there is not absolute immunity, a government official can assert "qualified immunity." The Supreme Court has said that this means that the officer can be held liable only if he or she violates clearly established law that every reasonable officer should know; it must be a right that is established "beyond dispute." In many recent cases, the Court has found that police sued for excessive force are protected by qualified immunity. For example, on January 9, in White v. Pauley, the Supreme Court, in a per curium opinion, reversed the Denver-based 10th U.S. Circuit Court of Appeals and held that officers were protected by qualified immunity for a shooting that killed a man in his home.

There are several pending cases that will cause the court to examine when law enforcement officers can be held liable.

Ziglar v. Abbasi, Ashcroft v. Abbasi, Hasty v. Abbasi

These three cases, which were consolidated for oral arguments, involve Muslim men who were apprehended and detained after the terrorist attacks on September 11, 2001. They were then held for months in solitary confinement in a super-maximum security wing of a federal prison. They claim that they were subjected to harassment and abuse. They maintain that this was not because of any evidence that they were dangerous, but solely because of their race and ethnicity.

The Manhattan-based 2nd U.S. Circuit Court of Appeals ruled that the plaintiffs' claims survived a motion to dismiss. The Supreme Court granted review and there are several

issues before the court. Do the plaintiffs have a claim under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (1971), which held that federal officers can be sued for money damages for violating the Constitution? Unlike 42 U.S.C. §1983, which allows state and local officers to be sued for violating the Constitution and federal laws, there is no similar statute authorizing suits against federal officials. Bivens held that a cause of action for money damages can be derived from the Constitution, in that case from the Fourth Amendment. But the court repeatedly has narrowed Bivens and there is the question of whether plaintiffs have a claim for money damages in this situation.

Also, there is the question of qualified immunity. Even if there is a cause of action, did the defendants violate clearly established law that every reasonable officer should know? Finally, there is the question of whether the plaintiffs' complaint was sufficient to withstand a motion to dismiss in light of Ashcroft v. Iqbal, a case with similar facts. The plaintiffs in these cases amended their complaint after Ashcroft v. Iqbal and maintain that the additional, detailed facts are sufficient to withstand a motion to dismiss.

The cases were argued on Jan. 18 of this year. Only six justices are participating. Justice Sonia Sotomayor is recused, likely because the cases were before the 2nd Circuit when she was a judge there, and Justice Elena Kagan, is recused, likely because she the Solicitor General of the United States when the cases were considered there.

Hernandez v. Mesa

In 2010, a 15-year-old boy, Sergio Hernandez, was playing with three friends in the concrete culvert separating El Paso, Texas, and Juarez, Mexico. They were playing a game where they would run up the culvert's northern incline, touch the U.S. fence, and then scamper back down to the bottom. They were unarmed. A border agent, Jesus Mesa, fired his gun at Hernandez, who was about 60 feet away. Hernandez was struck by the bullet and killed. Mesa was in the United States; Hernandez was in Mexico. Whether the boys were throwing rocks at Mesa, and whether there was "alien smuggling" occurring, is very much in dispute between the parties.

The federal district court dismissed all claims and the New Orleans-based 5th U.S. Circuit Court of Appeals affirmed. There are a number of issues before the Supreme Court. Does the Fourth Amendment, which prohibits excessive force by law enforcement officials, apply? In United States v. Verdugo-Urquidez (1990), the court held that the Fourth Amendment does not apply to law enforcement officials acting outside of the United States. Does that apply here when Mesa was in the United States when he fired his gun, but the victim was on the other side of the border? Also, like in the Abassi cases, there are questions of whether there is a cause of action under Bivens and, if so, whether the defendants are protected by qualified immunity.

The plaintiff presents this to the court as applying settled law: the Fourth Amendment prohibits excessive force by a law enforcement officer in the United States and Mesa was in the United States when he fired his gun. The defendant argues that this is a case about extraterritoriality and the Fourth Amendment doesn't apply, or at the very least a novel situation where there should not be a Bivens suit available and qualified immunity should be a defense. Hernandez v.

Mesa will be argued on Tuesday, February 21.

District of Columbia v. Wesby

On Jan. 19, the Supreme Court granted review in yet another Fourth Amendment case with a qualified immunity issue: District of Columbia v. Wesby.

Police officers found late-night partiers inside a vacant home. Some of the partiers told the officers that they had been invited to the house by a woman whom they believed to be its lawful occupant. That woman confirmed to the officers by telephone that she had invited them. The officers, however, subsequently learned that she was not in fact a lawful resident of the house. The officers arrested the partiers for trespassing.

Ultimately, all of the charges were dismissed and 16 individuals filed a civil suit against the officers under §1983 for violating the Fourth Amendment. The federal district court and the United States Court of Appeals for the District of Columbia Circuit ruled in favor of the plaintiffs, holding that there was not probable cause for their arrest because the partiers reasonably believed that they had the right to present in the house and also concluding that the officers were not protected by qualified immunity.

The Supreme Court granted review on two questions: whether the officers had probable cause to arrest under these circumstances and whether even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity. No oral argument date has been scheduled.

All of these cases come to the court in the context of great national attention to police misconduct and the demands for action by Black Lives Matter and others. Together these cases will be important in defining the ability to use civil suits to hold the police accountable.