No. 07-751

# In The
# Supreme Court of the United States

CORDELL PEARSON; MARTY GLEAVE;
DWIGHT JENKINS; CLARK THOMAS;
and JEFFREY WHATCOTT,

*Petitioners,*

v.

AFTON CALLAHAN,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

In this case, confidential informant Brian Bartholomew purchased methamphetamine from the Respondent Afton Callahan. After the purchase was complete, Bartholomew gave the signal to the Petitioners, police officers waiting outside. The Petitioners entered and arrested Callahan. Callahan then sued the officers under the Fourth Amendment, raising questions as to whether the officers' entry was lawful; whether the officers are entitled to qualified immunity; and whether this Court should overturn the "order of battle" mandated in *Saucier v. Katz*, 533 U.S. 194 (2001).

Callahan's defense of the Court of Appeals is based on three basic propositions. The first is that a significant difference exists between an officer entering a home to make an arrest at the signal of an undercover officer and entering at the signal of a confidential informant. The second proposition is that officers in undercover drug buy investigations can easily get warrants beforehand permitting entry the moment an informant signals a successful purchase. The third proposition is that a police officer in Utah should have known that Judge Posner was obviously wrong when he concluded for the Seventh Circuit that the technique used in this case was lawful.

All three propositions are mistaken. As a result, the judgment of the Court of Appeals should be reversed.

**1) Callahan cannot persuasively distinguish entry following an undercover officer from entry following a confidential informant.**

According to Callahan, the lawfulness of the officers' entry apparently hinges on the employment status of Brian Bartholomew.[1] If Brian Bartholomew had been employed as a police officer, Callahan suggests, the officers' entry would have been lawful. Resp. Br. at 25-31. Callahan argues that because Bartholomew was an informant, however, the entry was not only illegal, but its illegality was *clearly established*. Resp. Br. at 36-48. But Callahan has failed to assert any plausible reasons why Bartholomew's employment status is relevant – much less that it is so crucial that it could distinguish a perfectly lawful entry from one that only a "plainly incompetent" officer would believe was lawful. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Callahan offers four reasons why the constitutionality of the entry should rest on Bartholomew's

[1] We add the caveat "apparently" because Callahan arguably does not take a firm position on the lawfulness of entry following an undercover police officer. *See* Resp. Br. at 29 ("Courts *may* reach a different result when an undercover police officer . . . enters a home with the occupant's consent.") (emphasis added); *see also* Resp. Br. at 19 n.5. However, Callahan's extensive treatment of the differences between entry following an informant and following an officer strongly suggests that Callahan agrees with the Tenth Circuit's position that the difference is dispositive. *See* Resp. Br. at 25-31.

employment status. First, Callahan suggests that an initial entry by an undercover officer creates exigencies that justify the entry when the undercover officer announces the arrest. Resp. Br. at 25-29. Callahan apparently assumes that an undercover officer will pull out his badge, declare "the gig is up!," and only then signal to the officers waiting outside. But officers do not make such announcements. Officers normally will signal just like confidential informants do: They give the signal covertly and then carry on as if they were just buying drugs. Any other approach presents a threat to officer safety. If the additional officers outside had trouble entering, an undercover officer who declared his identity could find himself in considerable danger before the other officers arrived.

Second, Callahan argues that officer safety concerns are absent when an initial entry is made by an informant. Resp. Br. at 26. However, protecting the safety of informants is just as important as protecting the safety of professional officers. Informants are essential to investigating narcotics cases, and serving as a confidential informant in drug cases is already extremely dangerous. "Drug dealers are not known for treating informers with compassion." *United States v. Bender*, 5 F.3d 267, 270 (7th Cir. 1993). If officers cannot protect the safety of their informants, informants will be unavailable to help the police fight the drug trade. This Court has recognized the importance of informant safety and its role in effective law enforcement by creating an informer's privilege: The identity of an informant is normally

withheld from criminal defendants unless the defendants need to know his identity to defend themselves. *See Roviaro v. United States*, 353 U.S. 53, 59 (1957). It makes little sense for the Court to protect informant safety with legal privileges but to let informants fend for themselves in the Fourth Amendment setting.

Third, Callahan argues that the distinction may also rest on possible differences between the statutory powers of officers and statutory powers of informants. Resp. Br. at 30-31. Callahan must overcome the fact that there are no statutory differences in arrest powers in Utah, and that any differences in other states are irrelevant for Fourth Amendment purposes under *Virginia v. Moore*, 128 S.Ct. 1598 (2008). *See* Pet. Br. at 36-38. Callahan responds with a creative argument: He asserts that the fact that there are no differences under Utah law cannot be considered because *Moore* renders state law irrelevant. Resp. Br. at 30-31. But *Moore* simply holds that state regulations of police powers to make arrests cannot create Fourth Amendment rights. *See Moore*, 128 S.Ct. at 1607 ("[W]hile States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."). It does not hold that variations in state law require courts to presume maximum Fourth Amendment rights despite contrary state law.

Fourth, Callahan suggests that when a police officer is inside a home, the officer "is in a place he is legally entitled to be when probable cause is

established." Resp. Br. at 30. The same is true with private informants. The Fourth Amendment regulates informants exactly like professional officers: When a person acts as an agent of law enforcement, his conduct becomes fully "attributable to the Government." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989). What matters is not the agent's employment status, but whether under a totality of the circumstances he acts as an instrument of the government.[2] *See also* 4 Blackstone, Commentaries *289 (noting that "[a]ny private person (and *a fortiori* a peace officer) that is present when any felony is committed is bound by the law to arrest the felon," and that "they may justify breaking open doors upon following such felon.")

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[2] The ACLU argues as *amicus curiae* that informants should trigger a special rule because officers are trustworthy and reliable while informants often are not. *See* Brief of ACLU at 14-21. But it is hard to see how the relative trustworthiness of officers and informants counsels in favor of a rule requiring a warrant in cases involving undercover drug buys. If the officers must obtain a warrant based on the informant's initial contact with a suspect, the effect will be to rely on the testimony of informants *more* rather than less. Notably, the examples of botched searches on page 20-21 of the ACLU's brief all appear to involve searches executed pursuant to search warrants. The reliability of the undercover individual is relevant to identifying whether probable cause exists, not whether a warrant should be required. Notably, in this case the Petitioners monitored Bartholomew over the wire transmission at all times while he was inside Callahan's trailer home. The officers made the decision to enter based in large part on what they heard rather than just relying on Bartholomew's "trustworthiness" or "reliability." *See* J.A. at 185, 187.

Finally, in response to the officers' argument that the line between officers and informants can blur, Callahan asserts without explanation that "it is not difficult to distinguish police officers from informants." Resp. Br. at 30 n.8. Petitioners invite Callahan to identify which of the following cases fall on which side of the line:

> (1) *State v. Gambrel*, 894 P.2d 235 (Kan. App. 1995), where the undercover who purchased narcotics from the defendant was a confidential informant who had been "deputized" and was paid $2,000 a month and reimbursed for college expenses;
>
> (2) *Mander v. Commonwealth*, 2003 WL 1701657 (Va. App. 2003), where the undercover who purchased crack cocaine from the defendant was a retired police officer who worked as a confidential informant and was paid $100 per undercover purchase;
>
> (3) *People v. Kaid*, 629 N.Y.S.2d 617 (N.Y.City Crim. Ct. 1995), where the undercover who purchased alcohol from the defendant was a police academy cadet;
>
> (4) *Schlesinger v. Councilman*, 420 U.S. 738 (1975), where the undercover who purchased marijuana from the defendant was an enlisted soldier in the United States Army working for Army criminal investigators;
>
> (5) *United States v. Berry*, 164 F.3d 844 (3rd Cir. 1999), where the undercover who purchased crack cocaine from the defendant was

> a state police officer who had been deputized to act as a federal officer in another case but was not acting as a federal officer in that case;
>
> (6) *State v. Nelson,* 560 P.2d 897 (Mont. 1977), where the undercover individual that purchased marijuana from the defendants was a confidential informant who was deputized, issued a gun permit, and described in the opinion as "an undercover narcotics agent."

As these cases suggest, clear lines between officers and informants can be elusive. Anyone can serve as an informant. As the Court emphasized in *Illinois v. Gates*, 462 U.S. 213, 232 (1983), the work of informants "come[s] in many shapes and sizes from many different types of persons." As a result, a new legal rule that distinguishes between informants and officers would be difficult to administer in practice.

**2) An anticipatory warrant will be unavailable in a critical type of case, and a warrant requirement in this case would not advance legitimate Fourth Amendment interests.**

Callahan argues that it was unreasonable to enter without a warrant because a warrant could have been easily obtained. According to Callahan, the police do not need to make warrantless entries in undercover buy cases because they can always obtain an anticipatory warrant. Resp. Br. at 32-34. This

theory is wrong because it misunderstands the limits of anticipatory warrants.

Under *United States v. Grubbs*, 547 U.S. 90 (2006), the police cannot obtain an anticipatory warrant unless they can establish ex ante "probable cause to believe the triggering condition *will occur*." *Id.* at 97 (emphasis in original). If the police seek an anticipatory warrant based on the triggering condition of the informant's signal, they must establish probable cause in their affidavit that the informant will be admitted inside the suspect's home and will actually be sold drugs. In other words, the government must not only show that there will be probable cause after the informant gives the signal; the government must also show probable cause that the signal will be given. *Id.*

This limitation of anticipatory warrants will leave the police unable to obtain an anticipatory warrant in an important category of case. Specifically, the officers may have reasonable suspicion that the target will sell drugs to an undercover officer or informant but will be unable to prove that the sale will actually occur. In such cases, the police will be unable to obtain an anticipatory warrant despite the great certainty that probable cause would exist as soon as the signal is given. The officers will have to wait patiently outside until one of them obtains a warrant based on the fresh information of the new undercover buy. Under Callahan's theory, this is true even if the undercover informant decides to make an

arrest: The officers can listen in on the wire to hear what is happening, but they cannot enter to help.

The facts of this case showcase the importance of the point. Bartholomew had told the officers that Callahan had a small amount of drugs in his home earlier that day. But the record shows that the officers did not know if the drugs would still be there by the time they returned. Small time dealers usually only keep drugs for "four or five hours at a time," and several hours had already passed. J.A. 246. As Petitioner Cordell Pearson testified, the officers believed it was "getting to a point to where Mr. Callahan might not have any drugs left at his residence" when the undercover buy occurred. J.A. 246. In these circumstances, it is uncertain whether the police could have shown probable cause that the undercover buy would succeed (and the triggering event would occur) to justify an anticipatory warrant.[3]

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[3] Remarkably, Callahan claims in his brief that "one of the Petitioners admitted that because the informant had seen the methamphetamine, they could have obtained a warrant" before the undercover buy. *See* Resp. Br. at 33 (citing J.A. 217). This is simply false, as a quick reference to the record demonstrates. During the state trial, counsel for Callahan attempted to build the case that the officers could have obtained a warrant *after the buy occurred*. He began by asking Petitioner Jenkins if Bartholomew's seeing the baggies of meth earlier that day "would give . . . some basis to get a search warrant." Jenkins responded, "Yes, very limited." J.A. 217. The question was whether Bartholomew's earlier visit could provide "some basis" for getting a warrant after the undercover buy, not whether it would have provided the sole basis for doing so beforehand.

More broadly, requiring a warrant in undercover buy cases would not advance the usual goals of the Fourth Amendment's warrant requirement. For example, officers executing warrants normally must knock and announce their presence, ensuring that homeowners know it is the police at the door rather than a burglar. *See United States v. Banks*, 540 U.S. 31, 35-37 (2003). But the facts of an undercover buy/bust would almost always justify a no-knock entry. Police can make a no-knock entry when they have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). This will almost always be the case when officers wish to enter a target's home to catch him "in the act" following an undercover buy. A drug dealer who has just made a sale and still has his drugs out in the open will dispose of them if he can.

Requiring a warrant for the entry would not serve the goals of the particularity requirement, either. The particularity warrant is designed to limit how far a search may extend, forbidding the general warrants that animated the passage of the Fourth Amendment. *See Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987). But as explained in the opening brief, a warrantless entry will often lead to a *narrower* search following the entry than one pursuant to a warrant. *See* Pet. Br. at 32-34. The warrant will permit a

wide-ranging search of the home, while a warrantless entry incident to arrest would not. *See id.*

Callahan disputes this position on the theory that a warrantless entry would lead to an extensive search eventually. According to Callahan, a police officer would be "derelict in his duty" if he did not follow up the warrantless entry by obtaining a search warrant to authorize the search of the target's home or else obtaining the target's consent. *See* Resp. Br. at 27-28 n.7. But if this is true, it is unclear why the law should impose a separate warrant requirement for the entry. The search warrant or the target's consent will fully satisfy the purposes of the warrant requirement separate from the entry. And sometimes no additional search will be necessary. Drug dealers in small communities often purchase only small amounts of drugs at a time, J.A. 246, and this means that all of the drugs often will be on or near the person arrested immediately after a buy. If the police recover drugs on the person incident to arrest, no additional search may be necessary.

Finally, a warrant requirement would not substantially advance the probable cause requirement, designed to ensure that a detached magistrate assesses when enough evidence supports the invasion of the home. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The law of arrests has traditionally distinguished the broad powers of warrantless arrest for crimes committed in a person's presence from the narrower powers of arrest when crimes are not committed in a person's presence. *See Atwater v. Lago*

*Vista*, 532 U.S. 318 (2001); 4 Blackstone, Commentaries, *287-290. The distinction reflects the fact that when a crime is committed in a person's presence, probable cause normally is not in doubt.

When an undercover buy is committed in an informant's presence – and in the virtual presence of the officers listening in from outside – probable cause is obvious. The cause to believe that some evidence of crime can be found inside the home will be overwhelming. As a result, an *ex ante* judicial assessment of probable cause in undercover drug purchase investigations ordinarily will not lead to more reliable assessments of probable cause.

**3) Whether the court uses the label "consent once removed" or the individual doctrines from which this label derives, the officers' entry is constitutional if any one rationale permits it.**

The Fourth Amendment issues in this case are complicated because the facts plausibly implicate several different doctrines and principles. Some doctrines relate to others and the lines among them are indistinct, resulting in a tendency for some of the briefs in this case to present arguments in mixed ways. This is particularly significant because, as explained in the Petitioners' opening brief, the "consent once removed" doctrine is a combination of two different Fourth Amendment rules. The Seventh Circuit cases that originated the label "consent once

removed" drew from decisions based on two long-standing theories: waiver of a reasonable expectation of privacy and search incident to arrest. *See* Pet. Br. at 44-45. As a result, Petitioners submit that the label "consent once removed" is best understood as an application of the two different theories that inspired it rather than a freestanding doctrine.

Whatever label the Court uses, it may be helpful to identify the range of Fourth Amendment arguments potentially raised in this case:

1. *Waiver of a reasonable expectation of privacy.* Under this theory, Callahan compromised his Fourth Amendment rights when he admitted Bartholomew into his home for purposes of an illegal transaction, waiving his reasonable expectation of privacy in the area exposed.

2. *Consent by the suspect.* Under this theory, the entry was lawful because Callahan consented to the officers' entry when he admitted Bartholomew inside.

3. *Consent by a third-party.* Under this theory, the entry was lawful because Bartholomew consented to the officers' entry and he had a right to consent to their entry.

4. *Search incident to arrest.* Under this theory, the entry was justified as it effectuated and assisted in the multiple arrests made inside Callahan's home.

5. *Consent once removed.* Under this theory, the entry was justified under the three-part "consent once removed" test articulated by the lower courts.

6. *Exigent circumstances.* Under this theory, the entry was justified by emergency circumstances that made it implausible to obtain a warrant.

It is helpful to review the main briefs with these six categories in mind. The Petitioners' opening brief focuses on arguments #1 and #4; it expressly disavows argument #3; and it explains that argument #5 is simply a combination of arguments #1 and #4. *See* Pet. Br. at 20-34, 44-45. The brief for the United States as *amicus curiae* takes a different approach. It begins with argument #2 and then turns to argument #5. *See* Br. of United States at 10-16. Finally, Callahan's brief begins with arguments #2 and #3, *see* Resp. Br. at 15-20; it then turns to argument #1, *id.* at 20-24; it next covers argument #5, *id*. at 25-26; then argument #6, *id*. at 26-27; then #4, *id*. at 27-29; and then it returns to argument #1, *id*. at 34-36.

The existence of different Fourth Amendment claims in this case has important implications for both the merits and the application of qualified immunity doctrine. On the merits, it means that a rejection of any one of the arguments leaves open the other arguments; the entry is constitutional if any one argument in favor of the entry prevails. On the qualified immunity issue, it means that decisions

applying any one of the above arguments did not clearly establish the law as to the other arguments.

**4) The search incident to arrest exception is much broader – and the officers' waiver argument much narrower – than Callahan describes.**

Callahan's brief presents an exceedingly narrow version of the "search incident to arrest" exception and an overly broad version of the officers' waiver argument. A few corrections are in order. First, Callahan is wrong to suggest that an arrest must begin before a search can be made incident to arrest. *See* Resp. Br. at 28. *Rawlings v. Kentucky*, 448 U.S. 98 (1980), is quite clear on this point. "Where the formal arrest followed quickly on the heels of the challenged search," *Rawlings* holds, it does not matter whether the search or the arrest occurs first. *Id*. at 111.

Callahan tries to distinguish *Rawlings* on the ground that it did not involve the precise facts here. *See* Resp. Br. at 27. But *Rawlings* did not reflect a fact-specific judgment that powers to search incident to arrest existed only in that case. Rather, *Rawlings* adopted the longstanding rule that the imminent prospect of an arrest triggers the powers to search incident to arrest even if no arrest has yet occurred. In the years before *Rawlings*, lower courts had adopted this rule quite widely. *See generally United States v. Riggs*, 474 F.2d 699, 704 (2d Cir. 1973) (Friendly, C.J.) (citing cases permitting searches

incident to arrest prior to arrest, and stating that lower court authorities have established the lawfulness of such searches "as firmly as anything short of a Supreme Court decision can."). Lower courts have interpreted *Rawlings* accordingly; the case stands broadly for the proposition that search incident to arrest powers exist before the formal arrest occurs. *See, e.g., United States v. Powell*, 483 F.3d 836, 839-42 (D.C. Cir. 2007) (search prior to arrest); *United States v. Smith*, 389 F.3d 944, 951-52 (9th Cir. 2004) (per curiam) (same). These cases indicate that the power to search incident to arrest existed when Bartholomew gave the prearranged signal that set the arrest in motion.

Second, Callahan wrongly suggests that the search incident to arrest authority requires exigent circumstances. Every arrest triggers the search incident to arrest doctrine regardless of the facts: "It is the fact of the lawful arrest which establishes the authority to search[.]" *United States v. Robinson*, 414 U.S. 218, 235 (1973). The doctrine is a "bright line rule" that does not depend on whether exigent circumstances exist in a particular case. *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998). The Court established this point with particular clarity in *Robinson*, where the Court considered and rejected a case-by-case approach:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may

> later decide was the probability in a particular arrest situation that weapons or evidence would, in fact, be found upon the person of the suspect. A . . . search incident to the arrest requires no additional justification.

*Robinson*, 414 U.S. at 235. That rationale applies fully in this case.

Finally, Callahan wrongly claims that the Petitioners' theory of the case has sweeping consequences. Callahan suggests that under the Petitioners' theory of the case, the police could enter homes following informants when they lacked probable cause. Resp. Br. at 34-35. This is incorrect. Callahan fails to appreciate the limited scope of Petitioners' argument. It is bounded both temporally and by the scope of the initial consent. *See* Pet. Br. at 23-26; *see also United States v. Bramble*, 103 F.3d 1475, 1478-79 (9th Cir. 1996) (noting that a government agent is limited from going beyond areas covered by the consent absent a separate constitutional basis for so doing); *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987) (emphasizing limits of consent once removed doctrine).[4]

Further, by the time the police can verify that a suspect has admitted an informant inside the home to

[4] In this case, of course, the Task Force entered Callahan's home while Callahan was still inside, they immediately arrested him, and their additional search of Callahan's home was a permissible protective sweep following the arrest. J.A. at 190-95. Further, Callahan consented to the post-arrest search of his home. *See* Resp. Br. at 5 (citing J.A. 196).

sell him drugs, probable cause will necessarily exist. Indeed, most officers will demand far more than probable cause before relying on the rule from *Lewis v. United States*, 385 U.S. 206 (1966), that a drug dealer loses his reasonable expectation of privacy upon admitting a person inside the home to sell them drugs. If the officer happens to be wrong, and the conduct is innocent, the entry may violate the Fourth Amendment if not incident to arrest. This explains why the consent once removed cases in the Seventh Circuit adopted probable cause as a standard: Probable cause both justifies arrest (triggering the search incident to arrest power) and provides considerable certainty that the *Lewis* rule applies.

**5) The officers are entitled to qualified immunity.**

Callahan's approach to qualified immunity is plainly foreclosed by *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Creighton*, Anderson conducted a warrantless search of Creighton's home based on the erroneous belief that a bank robber was inside. Creighton sued Anderson, and the case rested in whether Anderson had exigent circumstances to enter. The Eighth Circuit held that disputed facts blocked a resolution of the merits at the summary judgment stage, but then went on to hold that qualified immunity could not apply to the case. According to the Eighth Circuit, qualified immunity doctrine had no place because the exceptions to the warrant requirement that permitted warrantless home entry

were "clearly established." *Creighton v. St. Paul*, 766 F.2d 1269, 1277 (8th Cir. 1985).

The Supreme Court vacated and remanded, forcefully rejecting the lower court's method. *Creighton*, 483 U.S. at 646. The Court emphasized that the inquiry must look to how clearly established law applies to specific facts, not whether an abstract legal proposition has been clearly established. *See id.* at 638-46. Twenty-one years later, Callahan now tries to revive the Creighton's losing argument. As in *Creighton*, Callahan argues that the law was clearly established because the Court has clearly established only two exceptions to the warrant requirement to enter the home: consent and exigent circumstances. *See* Resp. Br. at 43-45. This position was wrong when Creighton made it in 1987, and it remains wrong today. For qualified immunity to provide any protection, the key question must be whether a reasonable officer should have known that his conduct was illegal based on the facts, not abstract categories of law.

It doesn't help that Callahan simply ignores the decisions showing that this description of Fourth Amendment law isn't even incorrect, much less that its correctness is clearly established. Callahan relies on a 2008 e-newsletter by a private company that sells police training courses for the position that "there are only three legal ways to enter a person's home: with consent, with a warrant, or with exigent circumstances." Resp. Br. at 43 (quoting Brian Batterton, *Consent, Exigent Circumstances, and Warrantless*

*Home Entry, The Public Agency Training Counsel,* http://www.patc.com/weeklyarticles/print/consent,exigent-circumstances,warrantless-home-entry.pdf (2008)). But the e-newsletter is simply wrong. The Court has allowed warrantless home entries in other circumstances, including to search the homes of probationers, *United States v. Knights*, 534 U.S. 112 (2001); to search mobile homes, *California v. Carney*, 471 U.S. 386 (1985); and to search incident to arrest, *Washington v. Chrisman*, 455 U.S. 1 (1982).

Callahan also presents an erroneous picture of lower court caselaw governing follow-up entries. Callahan suggests that Judge Posner's decision in *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986), was an outlier, and that a police officer in 2002 should have realized that it was an obvious aberration and clearly incorrect. But Callahan ignores the fact that *Paul* was accepted by other courts until the Tenth Circuit's 2007 panel decision below. For example, in *People v. Galdine*, 571 N.E.2d 182 (Ill. App. 2d 1991), a confidential informant arranged to purchase cocaine in the defendant's office. The defendant showed the cocaine to the informant, and the informant then exited the building and signaled to the officers waiting outside. The court specifically agreed with *Paul* and held that the officers' subsequent warrantless entry was constitutional: "we conclude, as did the court in *Paul,* that the warrantless entry into defendant's office did not violate the defendant's rights under the fourth amendment." *Id*. at 191.

The Sixth Circuit's decision in *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000), is similar. *Pollard* involved an undercover entry by an informant and an officer together. After the defendant showed drugs to the officer and informant, the informant signaled to the officers waiting outside and they made a warrantless entry. The Sixth Circuit recited the Seventh Circuit's formulation of when follow-up entries were permitted:

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

*Id.* at 648 (quoting *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995)) (emphasis added). The Sixth Circuit then adopted this test and agreed that it applied to permit the warrantless entry.

The *Pollard* court did not suggest that it made any difference whether the undercover individual was an informant or an officer (or both). To the contrary, the opinion agreed with the Seventh Circuit's formulation that was based on *Paul*. In fact, when the Sixth Circuit expressly decided the lawfulness of follow-up entries from informants in *United States v. Yoon*, 398 F.3d 802 (6th Cir. 2005), the *Yoon* court first had to consider whether *Pollard* had already adopted *Paul* back in 2000. *See Yoon*, 398 F.3d at 806-07. Like *Galdine* and *Pollard*, the *Yoon* decision demonstrates the weakness of Callahan's claim that *Paul* was

obviously an outlier. While *Yoon* was not handed down until 2005, after the 2002 entry in this case, *Yoon* specifically agreed with *Paul*. *Id.* at 807 ("This Court agrees with and adopts the sound reasoning of the Seventh Circuit in *Paul* . . . ."). If Judge Posner's opinion in *Paul* was so obviously wrong, someone forgot to tell the Sixth Circuit.

Callahan briefly discusses four cases that he claims clearly establish that the officers' warrantless entry was unconstitutional. *See* Resp. Br. at 40. Callahan does not discuss these cases in detail, and with good reason: on close scrutiny, they shed no light. One of the four cases, *Carranza v. Georgia*, 467 S.E.2d 315 (Ga. 1996), concerns the lawfulness of home arrests. *Carranza* does not address whether the entry to arrest was consensual or whether such entry was justified under any theory other than exigent circumstances. Further, its holding appears to rely on sources beyond the Fourth Amendment. The Georgia Supreme Court explained its holding as the product of "careful consideration" of Georgia statutory arrest law, "the critical safeguard of individual privacy" represented both by the Georgia state constitution and the Fourth Amendment, and "the consequences of this ruling on an important, effective law enforcement procedure." *Id*. at 318. This conclusion did not

and could not clearly establish a Fourth Amendment rule.[5]

The remaining three cases, *United States v. Santa*, 236 F.3d 662 (11th Cir. 2000), *United States v. Templeman,* 938 F.2d 122 (8th Cir. 1991), and *United States v. Beltran*, 917 F.2d 641 (1st Cir. 1991), all reach the unremarkable conclusion that the entries in those cases were not permitted by the exigent circumstances exception. Of course, this is exactly the same conclusion that Judge Posner reached in *United States v. Paul*. In *Paul*, Judge Posner rejected the government's exigent circumstances theory but then reasoned that the entry was permitted by consent. *See Paul*, 808 F.2d at 647-48. Given that *Paul* rejected the exigent circumstances exception, it is unclear how cases echoing *Paul*'s exigency analysis are supposed to "clearly establish" that other parts of *Paul* are incorrect.

The cases cited by Callahan show that some government lawyers were unaware of *Paul* and the "consent once removed" cases, and they therefore failed to make the argument. That was true in the state criminal prosecution of Callahan, of course. The

[5] It is unclear why Professor LaFave relied on *Carranza* starting in his 2003 pocket part update as if it established a clear Fourth Amendment rule. *See* 3 LAFAVE, SEARCH & SEIZURE 2004 Pocket Part 72-73 (2003) (citing *Carrranza*). In any event, Callahan does not explain how a sentence added in a 2003 Pocket Part update was supposed to clearly establish the law on March 19, 2002. *See* Resp. Br. at 42 n.12.

lawyers for the state of Utah apparently didn't think of the claim. But the government's failure to make an argument does not "clearly establish" that it would have failed if it had been tried. *Cf. Brown v. United States*, 932 A.2d 521, n.8 (D.C. 2007) (noting that where the "consent once removed" doctrine was not argued by the government, it became the "proverbial elephant in the room."). Further, the record in this case offers a significant basis for an exigency argument that was absent in cases like *Santa*, *Templeman*, and *Beltran*. The record shows that the officers knew the drugs wouldn't last for more than a few hours, J.A. 246, bringing the facts very close to those decisions that have allowed exigent entries in narcotics cases. *See, e.g., United States v. Samboy*, 433 F.3d 154 (1st Cir. 2005); *United States v. Gonzalez*, 967 F.2d 1032 (5th Cir. 1992); *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990).[6]

Finally, the Court should ignore Callahan's argument that the officers are not entitled to qualified immunity because the officers make no claim that they subjectively relied on the Seventh Circuit's decisions. *See* Resp. Br. at 48. The officers make no claims about their subjective intentions because this

[6] Indeed, the officers advanced the argument that the entry was justified by exigent circumstances in their memorandum to the district court. If the Court affirms the Tenth Circuit, the officers will reassert that exigent circumstances justified their entry.

Court has deemed their subjective intentions irrelevant. *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

**6) This is an appropriate case to overrule *Saucier v. Katz*.**

This case presents an appropriate vehicle in which to overrule *Saucier v. Katz*, 533 U.S. 194 (2001). *Saucier* is most burdensome when the constitutional question proves difficult but the qualified immunity outcome is clear. In the Petitioners' view, this is such a case. The Fourth Amendment issues raised here are complicated, while the qualified immunity analysis is straightforward.

Callahan argues that *Saucier* should be retained because it leads to more civil cases being adjudicated, which Callahan posits would lead to better Fourth Amendment decisionmaking. *See* Resp. Br. at 55-56. Callahan hypothesizes that without *Saucier*, courts overly burdened by 42 U.S.C. § 1983 actions would not reach the merits in civil cases such as this. Instead, the law would develop only in criminal cases where the courts will be more willing to rule for the government. *Id.* But even assuming that there is a difference between how courts resolve Fourth Amendment cases in the civil and criminal context, Callahan's hypothesis is unrealistic in light of *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, civil suits that imply the invalidity of a criminal conviction

"must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487. Put another way, criminal defendants normally can't sue.

Under *Heck*, most civil actions under the Fourth Amendment involve either innocent individuals who were wrongly targeted or excessive force claims that do not imply the invalidity of a criminal conviction. Fourth Amendment law ends up developing on two parallel tracks. Suppression motions develop the law in cases involving the discovery of criminal evidence, and civil cases develop the law in cases that do not. Petitioners submit that this bifurcation justifies a narrow rule limiting the mandatory two-step of *Saucier* to cases that do not involve fruits of the poisonous tree. *See* Pet. Br. at 58-60 (proposing such a rule); *see also* Brief of Liberty Legal Institute as *Amicus Curiae* at 15-16 (endorsing this approach). This approach recognizes that *Heck v. Humphrey* effectively divides the world of Fourth Amendment cases into criminal cases that involve criminal fruits and civil cases that do not. If *Saucier* is needed to develop the law, it is needed in the latter cases and not the former.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 2008.