No. 07-___

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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Several lower courts have recognized a "consent once removed" exception to the Fourth Amendment warrant requirement. Does this exception authorize police officers to enter a home without a warrant immediately after an undercover informant buys drugs inside (as the Sixth and Seventh Circuits have held), or does the warrantless entry in such circumstances violate the Fourth Amendment (as the Tenth Circuit held below)?

(2) Did the Tenth Circuit properly deny qualified immunity when the only decisions directly on point had all upheld similar warrantless entries?

PARTIES TO THE PROCEEDING

Petitioners are five individual law enforcement officers: Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, and Jeffrey Whatcott. Respondent is Afton Callahan, an individual.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 494 F.3d 891. It is reprinted in the Appendix at Pet. App. 1.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on July 16, 2007. The Tenth Circuit denied a petition for rehearing on September 6, 2007. Pet. App. 60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT

This is a Fourth Amendment case involving an undercover drug buy. On March 19, 2002, confidential informant Brian Bartholomew contacted agents of the Central Utah Narcotics Task Force to inform them that he had arranged to purchase narcotics from respondent Afton Callahan later that day at Callahan's trailer home. Members of the Task Force provided Bartholomew with a hidden microphone and transmitter and drove him to Callahan's home. The agents instructed Bartholomew to purchase the narcotics from Callahan and then to give the agents a prearranged signal when the purchase was complete.

Bartholomew knocked on the door and was invited inside by Callahan's daughter. After Bartholomew stepped inside, Callahan sold Bartholomew

a bag of methamphetamine for $100. When Bartholomew gave the prearranged signal, members of the Task Force entered Callahan's home. Upon entering, the officers personally observed Callahan holding a plastic bag later confirmed to contain methamphetamine. A search of the home pursuant to Callahan's consent revealed evidence that Callahan had been possessing and distributing methamphetamine from his home. At no time did the police obtain a warrant.

Callahan was charged in Utah state court with possession and distribution of methamphetamine. The state trial court ruled that the evidence of narcotics was admissible because exigent circumstances permitted the warrantless entry into Callahan's home. Callahan entered a conditional guilty plea allowing him to challenge the trial court's Fourth Amendment ruling. On appeal, the State agreed that exigent circumstances did not exist and instead argued that the evidence should be admitted under the inevitable discovery doctrine. The Utah Court of Appeals ruled that the inevitable discovery doctrine was inapplicable and remanded with instructions to grant Callahan's motion to suppress. *State v. Callahan*, 93 P.3d 103, 107 (Ut. App. 2004).

Callahan then filed a civil suit in the United States District Court for the District of Utah against the five individual officers who participated in the search of his home, the Central Utah Narcotics Task Force, and the several Counties that participate in the Task Force. Callahan alleged a violation of his Fourth Amendment rights and asserted a claim

under 42 U.S.C. § 1983. District Judge Paul G. Cassell granted the defendants-petitioners' motion for summary judgment and found that the defendants were entitled to qualified immunity. Pet. App. 31.

According to Judge Cassell, the constitutionality of the warrantless entry depended on whether the Supreme Court would eventually accept the "consent once removed" exception to the warrant requirement already adopted by the Sixth, Seventh, and Ninth Circuits. Pet. App. 52-53. "Ultimately the Supreme Court will have to finally resolve the question of whether the doctrine is consistent with the Fourth Amendment[,]" Judge Cassell explained. Pet. App. 53. "[I]f confronted with a case squarely presenting the 'consent-once-removed' doctrine, the Supreme Court might well" disagree with those circuits and find that no such exception exists. Pet. App. 52.

Instead of resolving the constitutionality of the entry, Judge Cassell assumed that the Supreme Court would eventually reject the "consent once removed" doctrine and instead focused on whether the search had violated Callahan's "clearly established" rights. Pet. App. 53. Judge Cassell reasoned that the caselaw from the Sixth, Seventh, and Ninth Circuits recognizing a "consent once removed" exception prevented the warrantless entry from violating a clearly established right:

> [O]n the specifics of this case, the officers had a reasonable argument that the "consent-once-removed" doctrine justified their actions. Indeed, it is clear that in [the] Sixth,

> Seventh and Ninth Circuits their actions would have been fully consistent with the Constitution. Put another way, unless and until the Tenth Circuit or the Supreme Court rejects the "consent-once-removed" doctrine, a police officer in Utah relying on the doctrine (in a case where the doctrine factually applies) has not violated a clearly established right.

Pet. App. 55-56. Judge Cassell then granted summary judgment in favor of the entity defendants under the principles of *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 680, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Pet. App. 57-58.

A divided Tenth Circuit reversed in a decision by Judge Murguia, sitting by designation. Pet. App. 2.[1] Judge Murguia ruled that the "consent once removed" doctrine did not apply because the initial entry was made by a confidential informant instead of an undercover police officer. Pet. App. 14. The entry would have been constitutional if the initial entry had been made by a police officer because "the consent granted to the hypothetical police officer would have covered additional backup officers." Pet. App. 12. However, the "distinct obligations and powers" of confidential informants made the exception

[1] Callahan's appeal before the Tenth Circuit did not address the liability of the entity defendants, and those issues are therefore not before the Court. The only remaining defendants are the petitioners, the five individual law enforcement officers involved in the search of Callahan's home.

inapplicable when an informant had made the initial entry into the home instead of a police officer. Pet. App. 13.

The panel next concluded that the warrantless entry had violated Callahan's clearly established constitutional rights so that no qualified immunity defense applied. The panel defined the relevant constitutional right as "the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15. According to Judge Murguia, it was clearly established in the Tenth Circuit that "the only two exceptions to the warrant requirement are consent and exigent circumstances." Pet. App. 17. Thus, a reasonable officer in the Tenth Circuit would realize it was improper to rely on the "consent once removed" exception recognized in other circuits. Pet. App. 17.

Judge Kelly dissented. Pet. App. 18. Judge Kelly agreed with the Sixth and Seventh Circuit cases expressly recognizing the "consent once removed" exception when the initial entry was made by an informant. According to Judge Kelly, distinguishing entry by an informant from entry by an undercover officer was unprincipled and "create[d] odd results." Pet. App. 25. Judge Kelly also concluded that the officers should be entitled to qualified immunity:

> [B]ecause neither the Supreme Court nor the Tenth Circuit has heretofore addressed the propriety of the consent once removed doctrine as applied to confidential informants, and the clear weight of authority from other circuits strongly suggested that the Task

> Force's actions in this case were legal, I would hold that the right at issue was not clearly established and would affirm the grant of qualified immunity.

Pet. App. 29.

The Tenth Circuit denied a Petition for Rehearing on September 6, 2007. Pet. App. 60.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS OVER THE "CONSENT ONCE REMOVED" DOCTRINE OF FOURTH AMENDMENT LAW.

Over the last twenty-five years, lower courts have recognized a "consent once removed" exception to the Fourth Amendment warrant requirement.[2] The exception allows narcotics investigators to make a warrantless entry into a home after an undercover agent personally observes narcotics inside the home. The doctrine applies when "the agent (or informant)

[2] The Sixth, Seventh, Ninth, and Tenth Circuits have recognized the doctrine in some form, as have the Supreme Courts of New Jersey and Wisconsin. *See, e.g., United States v. Romero*, 452 F.3d 610 (6th Cir. 2006); *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007); *State v. Henry*, 627 A.2d 125 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994).

entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers." *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987). Four federal circuits and two state supreme courts have expressly recognized the "consent once removed" doctrine at least in some form. The Supreme Court has never recognized or even addressed this exception.

The Court should grant certiorari in this case to resolve the split among the circuits over use of this exception when the undercover individual is an informant instead of a law enforcement officer. The Sixth Circuit and Seventh Circuit both have expressly held that the "consent once removed" doctrine permits a warrantless entry into the home when the undercover individual is an informant. In *United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986), Judge Posner concluded that the doctrine "extends to the case where the initial, consensual entry is by a confidential informant." An undercover agent could enter with consent and then summon other officers, and it made "no difference" that the person was an informant instead of a law enforcement officer. *Id*. The Seventh Circuit reaffirmed the principle in *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1994) and *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995).

The Sixth Circuit adopted the Seventh Circuit's approach in *United States v. Yoon*, 398 F.3d 802 (6th

Cir. 2005). *Yoon* noted that in a prior case, the Sixth Circuit had recognized the "consent once removed" doctrine in a case involving undercover agents and informants together. *See id.* at 807-08 (citing *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000)). The *Yoon* Court decided to "extend that concept to cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest." *Id*. at 807. The Sixth Circuit thus embraced the rule of the Seventh Circuit: "This Court agrees with and adopts the sound reasoning of the Seventh Circuit in *Paul, Jachimko,* and *Akinsanya.*" *Id*. at 807.

The Tenth Circuit decision below expressly disagreed with these rulings. Judge Murguia's majority opinion concluded that the distinction between government agents and informants was critical and that the "consent once removed" doctrine could not apply when the undercover entry was made by an informant. Judge Murguia characterized the Seventh Circuit and Sixth Circuit decisions applying the doctrine to undercover informants as "unconvincing." Pet. App. 12. According to Judge Murguia, the distinctions between the "obligations and powers" of private persons and the police "must also be reflected in a distinction between inviting a citizen who may be an informant into one's house and inviting the police into one's house." Pet. App. 13. Thus in the Tenth Circuit the "consent once removed" doctrine can be

used when the undercover individual is a police officer but not when he is a confidential informant.

This Court should grant certiorari to resolve the clear split in the circuits. The division between the Sixth and Seventh Circuits on one hand and the Tenth Circuit on the other leaves the "consent once removed" doctrine in a state of considerable uncertainty. There are obvious reasons for police to use informants to set up and execute undercover drug buys. Undercover individuals must trick sellers of narcotics into believing that they are legitimate buyers rather than police officers or their agents. This is often easier for informants than police officers because informants can be members of the community already widely known as past purchasers of narcotics. *See generally* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 651-54 (2004) (describing common uses of informants). The lower court disagreement on the use of the "consent once removed" exception in this setting creates great uncertainty as to the legality of this important law enforcement technique.

The circuit split is particularly important because the "consent once removed" doctrine has long been plagued by legal confusion and uncertainty. Judges have disagreed about its conceptual basis and whether it should exist at all. Some courts have justified the doctrine on the ground that a person's privacy interest is "fatally compromised when the owner admits a confidential informant and proudly

displays contraband to him." *Paul*, 808 F.2d at 648 (Posner, J.). Other courts have grounded the rule in general reasonableness. *State v. Henry*, 627 A.2d 125, 132 (N.J. 1993) (concluding that a consent-once-removed entry was "reasonable" in light of all of the circumstances). Judge Cornelia Kennedy has argued that the exception is best understood as "a combination of a sort of 'quasi exigent circumstances and consent.'" *Yoon*, 398 F.3d at 809, n.2 (Kennedy, J., concurring). On the other hand, Judge Nathaniel Jones has reasoned that the "consent once removed" exception should not exist at all and has no place in Fourth Amendment law. *See United States v. Pollard*, 215 F.3d 643, 649 (6th Cir. 2000) (Jones, J., dissenting) (contending that the doctrine "represents an unjustified extension of our traditional exigent circumstances jurisprudence.")

Lower court confusion is understandable because the Supreme Court has never addressed the constitutionality of "consent once removed" searches. The doctrine has developed in the lower courts for over two decades without this Court's review. As then-Judge (now Professor) Paul Cassell stated when this case was before the district court, "[u]ltimately the Supreme Court will have to finally resolve the question of whether the doctrine is consistent with the Fourth Amendment." Pet. App. 53. That time should be now. Supreme Court review is needed to address the confusion and to provide the police with clear legal guidance.

Further percolation of this issue is unnecessary for two reasons. First, lower courts have debated the merits of the exception extensively for more than two decades. The resulting opinions explore the doctrine from many different perspectives at considerable length, taking different views on whether the doctrine should exist and how broadly it should extend. *See United States v. Romero*, 452 F.3d 610 (6th Cir. 2006); *United States v. Yoon*, 398 F.3d 802 (6th Cir. 2005); *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000); *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995); *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1993); *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987); *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986); *United States v. Janik*, 723 F.2d 537 (7th Cir. 1983); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007); *United States v. Samet*, 794 F.Supp. 178 (E.D.Va. 1992); *United States v. Herrera-Corral*, 2002 WL 69491 (N.D.Ill. 2002); *United States v. McCalla*, 1996 WL 699629 (N.D.Ill. 1996); *United States v. Anhalt*, 814 F.Supp. 750 (N.D.Ill. 1993) (rev'd by *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1993)); *United States v. Santiago*, 1993 WL 75140 (N.D.Ill. 1993); *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006); *State v. Henry*, 627 A.2d 125 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994); *Brown v. United States*, 932 A.2d 521, n.8 (D.C. App. 2007); *Smith v. State*, 857 A.2d 1224 (Md. App. 2004); *State v. Penalber*, 898 A.2d 538 (N.J. Super. 2006); *Commonwealth v. Moye*, 586 A.2d 406 (Pa. Super. 1990); *State v. Heriot*, 2005 WL 1131731 (Ohio

App. 2005) (unpublished); *People v. Finley*, 687 N.E.2d 1154 (Ill. App. 1997); *People v. Galdine*, 571 N.E.2d 182 (Ill. App. 1991); *Williams v. State*, 937 S.W.2d 23 (Tex. App. 1st Dist. 1996); *People v. Cespedes*, 191 Cal.App. 3d 768 (Cal. App. 4th Dist. 1987).

Further percolation is also unnecessary because the Tenth Circuit's decision may have a substantial chilling effect. Undercover drug buys are necessarily planned out ahead of time; officers choose when and how they occur. Such techniques are unusually sensitive to adverse legal rulings. A court decision from one circuit expressly rejecting a particular technique is unusually likely to be noted by those in other circuits who are in charge of planning investigations. That possibility is particularly significant when the adverse ruling not only rejects the legality of the technique but also denies qualified immunity to the officers involved. In such circumstances, an adverse ruling may overdeter police; one decision may strongly discourage police departments in other circuits from relying on the technique (thus avoiding legal challenges to it) in future investigations. The potential chilling effect of the Tenth Circuit's decision makes this case the best vehicle for settling the legality of the "consent once removed" doctrine.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE TENTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY AND THEREBY RESOLVE THE THREE-WAY DISAGREEMENT IN THE LOWER COURTS AS TO PROPER SOURCES OF CLEARLY ESTABLISHED LAW.

An improper denial of qualified immunity provides an independent basis for certiorari because a misapplication of qualified immunity standards creates the functional equivalent of a circuit split. An improper denial of qualified immunity in the Fourth Amendment context overdeters the police from going close to the line of legality; the threat of liability forces the police to change their practices much like a decision altering substantive Fourth Amendment law. The Court has recognized this principle by repeatedly granting certiorari to review denials of qualified immunity absent any claim of disagreement among the circuits. *See, e.g.*, *Scott v. Harris*, 127 S.Ct. 468, 166 L.Ed.2d 333 (2006) (granting certiorari to review denial of qualified immunity in a Fourth Amendment case); *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (granting certiorari and summarily reversing Fourth Amendment decision that had denied qualified immunity); *Groh v. Ramirez*, 537 U.S. 1231, 123 S.Ct. 1354, 155 L.Ed.2d 195 (2003) (granting certiorari in Fourth Amendment qualified immunity decision to review Ninth Circuit decision denying qualified immunity).

The Tenth Circuit's denial of qualified immunity calls out for this Court's review exactly as did the circuit court decisions in *Scott*, *Brosseau*, and *Groh*. The Tenth Circuit below made precisely the same conceptual error as did the lower courts in those cases: It defined the "clearly established" constitutional right in the most abstract way possible. As this Court explained in *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), allowing plaintiffs to allege violations of "extremely abstract rights" would effectively "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability[.]" In clear disregard of this guidance, the Tenth Circuit chose the most abstract level of generality possible by merely restating the language of the Fourth Amendment. According to the panel majority below, "the relevant right is the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15.

Remarkably, the Tenth Circuit's qualified immunity analysis included no specific application to the facts of the case. The panel ruled that qualified immunity was improper simply because "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions." *Id*. Because the "consent once removed" doctrine had not been "established" by either the Supreme Court or the Tenth Circuit, it was necessarily "clearly established" that it had no application to the facts of this case.

This was clearly incorrect, as Judge Kelly explained in his dissent:

> Properly characterized, the right at issue in this case is not simply the right to be free from unreasonable searches and seizures. Instead, it is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause. As the district court observed, no Supreme Court or Tenth Circuit decision has ever granted or even discussed that right.

Pet. App. 27 (Kelly, J., dissenting).

Given the precedents that existed in March 2002, when the entry occurred, a reasonable officer would have concluded that the petitioners' conduct was constitutional. Although the Supreme Court and the Tenth Circuit had never addressed the "consent once removed" doctrine, every court to have addressed the issue had recognized the exception. Three federal circuits already had embraced it, and Judge Posner had held that it explicitly covered cases when the initial entry was made by a confidential informant. *See United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986). No case had rejected the doctrine in a case with similar facts. Indeed, not long after the warrantless entry in this case, a journal article expressly instructed officers that the doctrine *permitted* searches when the initial consent was obtained by an informant.

Hendrie, *Consent Once Removed*, FEDERAL BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN, February 2003, at 24-25 ("There is no requirement that the person obtaining the original consent be an officer of the law. The person obtaining consent could be an informant.")

As Judge Cassell and Judge Kelly both recognized, the petitioners were properly entitled to qualified immunity in these circumstances. The panel's error is sufficiently plain that it stands alone as a basis for granting the petition. *See* Krumholz, *Divided Tenth Circuit Panel Gets One Wrong, Horribly Wrong*, ROCKY MOUNTAIN APPELLATE BLOG, July 2007, available at http://rockymtnappellateblog.typepad.com/rocky_mountain_appellate_/2007/07/index.html (describing the panel's qualified immunity analysis as a "stunningly bad" and "utterly indefensible" decision that "completely guts qualified immunity").

Granting certiorari would also permit the Court to address the three-way division among the Courts of Appeals on whether and how decisions outside the home circuit create "clearly established" law. The problem is an important one: When applying the qualified immunity test, to what extent should the state of the law be informed by decisions other than those of the Supreme Court and the home circuit? Should the law of other circuits, state supreme courts, federal district courts, and lower state courts factor into whether the law is "clearly established?" Or are these decisions irrelevant? The question has obvious importance in this case because qualified

immunity relies in part on the caselaw outside the Tenth Circuit that expressly upheld the constitutionality of the technique used by the Task Force.

Although the Supreme Court has provided occasional guidance on how to determine clearly established law,[3] the circuits have divided on the meaning of that guidance and have adopted a wide range of different legal tests in response to it. For example, the Tenth Circuit below recognized the Circuit's usual rule that "for a right to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007) (cited in *Callahan*, 494 F.3d at 899).[4]

The Seventh Circuit and the Ninth Circuit take a roughly similar approach. In those circuits, courts can consider all relevant caselaw whether from another circuit, a state court, or a district court. *See, e.g.*, *Tekle ex rel. Tekle v. United States*, 457 F.3d 1088, 1096 (9th Cir. 2006) ("In the absence of binding precedent, we look to whatever decisional law is

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[3] *See Grayden v. Rhodes*, 345 F.3d 1225, 1251 n.4 (11th Cir. 2003) (summarizing the Supreme Court's guidance).

[4] The proper test in the Tenth Circuit is somewhat unclear because different panels have expressed the test differently. For a thorough discussion of Tenth Circuit caselaw, *see Prison Legal News, Inc. v. Simmons*, 401 F.Supp.2d 1181, 1189-92 (D. Kan. 2005).

available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts."); *Jacobs v. City of Chicago*, 215 F.3d 758, 767 (7th Cir. 2000) (Courts "broaden our survey to include all relevant caselaw in order to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.")

In the Eleventh Circuit, by contrast, the only source of law that is relevant beyond the Supreme Court and the home circuit is the state Supreme Court in the state where the event occurred. Courts looking for "clearly established" law do not consider the law of other circuits or other state courts. *See Marsh v. Butler County*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc) ("When case law is needed to 'clearly establish' the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state. . . . Each jurisdiction has its own body of law, and splits between jurisdictions on matters of law are not uncommon. We do not expect public officials to sort out the law of every jurisdiction in the country.") *See also Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003).

The Second Circuit takes yet another approach. In the Second Circuit, the only sources that can create "clearly established" law are the U.S. Supreme

Court and the Second Circuit. Decisions by other circuits, state courts, and federal district courts are irrelevant to whether the law is "clearly established." *See Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit."). *See also Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003); *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998).

This disagreement among the circuits has real and important consequences. Fourth Amendment caselaw develops in a case-by-case fashion, and the relevance of the first lower court decisions to the outcomes of later qualified immunity defenses is a very important question in practice. When a lower court approves a new investigative technique, police officers in other circuits may reasonably attempt to rely on that precedent. On the other hand, when a lower court rules that a practice is illegal, plaintiffs around the country may reasonably attempt to rely on it in civil cases against the police.

Given the current lower court disagreement, however, the strength of any qualified immunity defense may hinge on where the lawsuit is filed. The initial decision may be relevant to a qualified immunity defense in the Seventh, Ninth, and Tenth Circuits; irrelevant in the Second Circuit; and relevant in the Eleventh Circuit only if it is a decision of the state Supreme Court in that state. This area

demands uniformity, and a grant of certiorari in this case could provide the Court with an excellent vehicle to address this issue.

In sum, the Court should grant the petition to resolve the circuit split on the "consent once removed" exception; to correct the Tenth Circuit's improper denial of qualified immunity; and to address the disagreement in the circuits as to how courts determine clearly established law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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494 F.3d 891

United States Court of Appeals, Tenth Circuit.

Afton CALLAHAN, Plaintiff-Appellant,

v.

MILLARD COUNTY; The Central Utah Narcotics Task Force; Sevier County; Piute County; Mt. Pleasant City; Wayne County; Richfield City; Salina City; Gunnison City; Ephraim City; Cordell Pearson, in his official and individual capacity; Marty Gleave, in his official and individual capacity; Clark Thomas in his official and individual capacity; Dwight Jenkins, in his official and individual capacity; Jeffrey Whatcott, in his official and individual capacity; and John Does I-IX in their official and individual capacities, Defendants-Appellees.

No. 06-4135.

July 16, 2007.

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Peter Stirba (Barbara L. Townsend and Meb W. Anderson with him on the brief), Stirba & Associates, Salt Lake City, UT, for Defendants-Appellees.

Before KELLY and EBEL, Circuit Judges, and MURGUIA,* District Judge.

MURGUIA, District Judge.

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* The Honorable Carlos Murguia, District Judge, United States District Court for the District of Kansas, sitting by designation.

In this civil rights action, Plaintiff-Appellant Afton Callahan appeals from the district court's grant of summary judgment in favor of the numerous Defendant-Appellees. The district court held that the individual officers were entitled to qualified immunity because Mr. Callahan did not establish that the officers violated a clearly established right. Holding that the district court was correct in its determination that Mr. Callahan's constitutional rights were violated, but incorrect in its determination that these rights were not clearly established, we reverse in part and remand.

Background

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

According to the findings of the district court, the confidential informant began that evening by drinking "between six to eight beers in three hours." He then went to Mr. Callahan's home, where he "ingested or tasted a sample of the methamphetamine." After establishing that he could purchase methamphetamine that evening, the confidential informant left Mr.

Callahan's home to report the plan of purchasing a gram of methamphetamine for $100 to the task force.

During their conversations with the informant, the officers learned that he was intoxicated. Concerned about his competency, the officers supplied the confidential informant with coffee and monitored him. They were unaware that he also had ingested methamphetamine.

Despite the confidential informant's condition, the officers continued with the planned drug transaction. They wired the confidential informant, gave him a marked $100 bill, and worked out a signal for him to give the officers once the exchange was completed. The officers then drove the confidential informant to Mr. Callahan's home.

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

Hearing the signal, the officers entered Mr. Callahan's home through a porch door. Once inside, they ordered the confidential informant, Mr. Callahan, and two other individuals to the floor. During their entry, the officers saw Mr. Callahan drop a plastic bag, which they later confirmed contained methamphetamine. After the four persons were on

the floor, the officers conducted a protective sweep of the home. The Utah Court of Appeals later determined that Mr. Callahan consented to the protective sweep.

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

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

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

Amendments. Additionally, Mr. Callahan brought claims against municipalities for failure to supervise the task force and several state law claims.

On matters not on appeal, the district court dismissed Mr. Callahan's claims against the municipalities because Mr. Callahan did not show any official policy or custom related to the actions of the task force. Combined with the dismissal of the claims against the task force under qualified immunity – as later discussed – the district court declined to exercise jurisdiction over Mr. Callahan's state law claims. This closed Mr. Callahan's case.

Regarding the claims against the task force, the district court dismissed the claims because it found that qualified immunity shielded the officers. In so doing, it found that despite an assumption that the task force violated Mr. Callahan's constitutional rights, those constitutional rights were not clearly established. Specifically, the district court examined the application of the "consent-once-removed" doctrine, finding that although three circuit courts have upheld the doctrine, the recent Supreme Court decision in *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), allowed the district court to assume Mr. Callahan's constitutional rights were violated. On the other hand, the approval of the doctrine by three circuit courts prevented the district court from finding that those rights were clearly established.

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

Discussion

When reviewing summary judgment orders based on qualified immunity, the approach differs from other summary judgment decisions. *Cortez v. McCauley,* 478 F.3d 1108, 1114 (10th Cir.2007). Once a qualified immunity defense is asserted, the burden shifts to the plaintiff. First, the plaintiff must "establish that the defendant violated a constitutional right." *Id.* (citing *Reynolds v. Powell,* 370 F.3d 1028, 1030 (10th Cir.2004)). If the plaintiff fails to satisfy this initial requirement, the court's inquiry ends. *Cortez,* 478 F.3d at 1114 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.") (quoting *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). If the plaintiff establishes that a constitutional right was violated, then the plaintiff must

also show that the violated right was clearly established. *Cortez,* 478 F.3d at 1114. Whether the right was clearly established is examined under the "specific context of the case, not as a broad general proposition." *Id.* (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation." *Id.* If reasonable officers would not have been aware of the clearly unlawful nature of their actions, qualified immunity applies and summary judgment would be appropriate. *Id.* (citing *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

Even under this framework for analyzing qualified immunity, it remains that a district court's determination of qualified immunity is a question of law that we review de novo. *Cortez,* 478 F.3d at 1115 (citing *Bisbee v. Bey,* 39 F.3d 1096, 1099 (10th Cir.1994)). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "We review the evidence in the light most favorable to the nonmoving party." *Cortez,* 478 F.3d at 1115.

I. The actions of the Task Force violated Mr. Callahan's constitutional rights.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. When examining a search or seizure, the central question is whether the actions were reasonable. *United States v. McCullough,* 457 F.3d 1150, 1163 (10th Cir.2006) (citing *Illinois v. McArthur,* 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001); *Texas v. Brown,* 460 U.S. 730, 739, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)). Courts continually have viewed the warrantless entry into a house as presumptively unreasonable. *Brigham City v. Stuart,* ___ U.S. ___, 126 S.Ct. 1943, 1947, 164 L.Ed.2d 650 (2006); *United States v. Walker,* 474 F.3d 1249, 1252 (10th Cir.2007) ("It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.") (noting that the sentence is a quotation from *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)); *Galindo v. Town of Silver City,* 127 Fed.Appx. 459, 465 (10th Cir.2005) (applying this in the context of qualified immunity). This presumption results from the understanding that "the home is entitled to the greatest Fourth Amendment protection." *United States v. Najar,* 451 F.3d 710, 712-13 (10th Cir.2006) (citing *Payton,* 445 U.S. at 585, 100 S.Ct. 1371 ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *Kyllo v. United*

States, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.")).

This presumption that a warrantless search of a house is unreasonable can be overcome in certain circumstances. *Walker,* 474 F.3d at 1252 (citing *Coolidge v. New Hampshire,* 403 U.S. 443, 474-75, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). These circumstances require the government actors to demonstrate that the search "falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" *Id.* (quoting *Coolidge,* 403 U.S. at 474-75, 91 S.Ct. 2022); *United States v. Sawyer,* 441 F.3d 890, 893-94 (10th Cir.2006) ("It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is *per se* unreasonable subject to only a few specifically established and well-delineated exceptions."); *Fuerschbach v. Sw. Airlines Co.,* 439 F.3d 1197, 1203 (10th Cir.2006) (discussing these exceptions in the context of qualified immunity). The exceptions based on exigent circumstances adopted by the Supreme Court include the hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to police officers or other people inside or outside the home. *United States v. Thomas,* 372 F.3d

1173, 1177 (10th Cir.2004) (citing *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990)). Additional factors in analyzing the exceptions based on exigent circumstances are that the circumstance may not be "subject to police manipulation or abuse," or "motivated by an intent to arrest and seize evidence." *United States v. Zogmaister,* 90 Fed.Appx. 325, 330-31 (10th Cir.2004) (citing *United States v. Aquino,* 836 F.2d 1268, 1272 (10th Cir.1988); *United States v. Smith,* 797 F.2d 836, 840 (10th Cir.1986)).

Even with these additional factors, the central question remains whether the search was reasonable. The focus simply shifts to whether "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City,* 126 S.Ct. at 1947 (quoting *Mincey v. Arizona,* 437 U.S. 385, 393-94, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)). Thus, to find that a new exception is warranted requires a balancing of private interests and unique public safety concerns. *Fuerschbach,* 439 F.3d at 1203.

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

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

We find the distinctions between an officer and an informant summoning additional officers to be significant. Had the person inside Mr. Callahan's home been an undercover officer, no extension of our case law would be necessary. Mr. Callahan would have consented to opening his home to the police. Consent is a well-established method of conducting a reasonable search, despite lacking a warrant. *United States v. Ringold,* 335 F.3d 1168, 1174 (10th Cir.2003) ("It has long been established that an officer may conduct a warrantless search consistent with the Fourth Amendment if the challenging party has previously given his or her voluntary consent to that search."). Tenth Circuit precedent permits the police to use deception to gain such consent. *See Pleasant v. Lovell,* 876 F.2d 787, 802 (10th Cir.1989). *But see Butler v. Compton,* 158 Fed.Appx. 108, 111 (10th

Cir.2005) (citing Sixth Circuit case law for the statement "[t]o be valid, however, the consent must be 'unequivocally, specifically, and intelligently given . . . ' [m]oreover, the consent must be 'uncontaminated by duress, coercion, or trickery.' "). Once lawfully inside the home, an officer may effect a warrantless arrest that is supported by probable cause. *United States v. Cruz-Mendez,* 467 F.3d 1260, 1269 (10th Cir.2006). We have never drawn a constitutional distinction between an entry or search by an individual police officer and an entry or search by several police officers. Thus, the consent granted to the hypothetical undercover officer would have covered additional backup officers without any need for additional exceptions to the warrant requirement.

On the other hand, the invitation of an informant into a house who then in turn invites the police, which are the present facts, would require an expansion of the consent exception. In this context, the person with authority to consent never consented to the entry of police into the house. Other courts have overcome this distinction by noting that a state may grant the power to arrest to the police as well as its citizens, and if the informant has the power to arrest, then an informant must be capable of summoning the police. *Yoon,* 398 F.3d at 810-11. This logic is unconvincing. That a citizen has the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state. *Cf. Arnsberg v. United States,* 757 F.2d 971, 979 (9th Cir.1985) (law enforcement officers have "obligations, such as the

duty to execute warrants, which private citizens lack; those obligations make the law of the citizen arrests an inappropriate instrument for determining FTCA liability"); *Caban v. United States,* 728 F.2d 68, 73-74 (2d Cir.1984) (immigration officers have different privileges and duties than private individuals, and therefore citizen's arrest statute does not apply to such officers); *United States v. Hillsman,* 522 F.2d 454, 461 (7th Cir.1975) (discussing the differences between a private citizen's right to make an arrest and that of a police officer). These distinct obligations and powers must also be reflected in a distinction between inviting a citizen who may be an informant into one's house and inviting the police into one's house.

The officers also ask this court to adopt the "consent-once-removed" doctrine based on policy considerations. They argue that without this doctrine law enforcement will be severely hampered in its pursuit of drug traffickers because the use of informants is vital, and requiring officers to obtain a warrant whenever an informant was in a home would jeopardize personal safety and cause delays. This argument fails for two reasons. First, this contradicts the nature of the exceptions based on exigent circumstances requiring that the police may not manipulate or abuse the circumstances creating the exigency. *Zogmaister,* 90 Fed.Appx. at 330 (citing *Aquino,* 836 F.2d at 1272). Second, as recently restated by the Supreme Court in *Georgia v. Randolph,* "[a] generalized interest in expedient law enforcement cannot,

without more, justify a warrantless search." 547 U.S. 103, 126 S.Ct. 1515, 1524 n. 5, 164 L.Ed.2d 208 (2006); *Coolidge,* 403 U.S. at 481, 91 S.Ct. 2022 ("The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.")

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

II. Mr. Callahan's rights were clearly established

Having established that Mr. Callahan's rights were violated, we now turn to whether these rights were clearly established. For a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains." *Cortez,* 478 F.3d at 1114-15 (citing *Medina v. City of Denver,* 960 F.2d 1493, 1498 (10th Cir.1992)). This does not require a plaintiff to cite a case holding that

the specific conduct at issue is unlawful, but rather plaintiff must show that the unlawfulness of the action was apparent. *Jones v. Hunt,* 410 F.3d 1221, 1229 (10th Cir.2005).

In this case, the relevant right is the right to be free in one's home from unreasonable searches and arrests. The Supreme Court has repeatedly emphasized the importance of this right, stating "[o]ver and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes . . . and that searches conducted outside of the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (citations omitted). Thirty years after *Katz,* but before the raid on Mr. Callahan's home, the Supreme Court again emphasized the long history of this right. *Wilson v. Layne,* 526 U.S. 603, 610-11, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) ("[T]he 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic' meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest.") (citations omitted). Although the Supreme Court decided *Groh v. Ramirez* after the present events occurred, the Court's analysis in rejecting another exception to the warrant requirement is appropriate, stating "[n]o reasonable officer could claim to be unaware of the basic rule,

well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. . . . Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so." 540 U.S. 551, 564, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

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

The district court held that the right was not clearly established because other circuits have approved of the "consent-once-removed" doctrine. From the district court's perspective, this gave the officers a "reasonable argument" that their actions were justified until this Circuit or the Supreme Court rejected the "consent-once-removed" doctrine. This approach

misreads a plaintiff's burden in showing that a right is clearly established. While case law from other circuits is relevant in the analysis, it relates to whether "the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains." *Cortez,* 478 F.3d at 1114-15. Here, the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances. The creation of an additional exception by another circuit would not make the right defined by our holdings any less clear. Moreover, at the time of these events only the Seventh Circuit had applied the "consent-once-removed" doctrine to a civilian informant. *See United States v. Paul,* 808 F.2d 645, 648 (7th Cir.1986). The precedent of one circuit cannot rebut that the "clearly established weight of authority" is as the Tenth Circuit and the Supreme Court have addressed it.

Here, the officers knew (1) they had no warrant; (2) Mr. Callahan had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them. They do not argue on appeal that exigent circumstances justified their entry. Thus, "reasonable officers could [not] have believed that" their warrantless entry into Mr. Callahan's home "was lawful, in light of clearly established law and the information the officers possessed." *Wilson,* 526 U.S. at 615, 119 S.Ct. 1692 (utilizing this phrasing in defining the "appropriate

level of specificity" for a qualified immunity analysis). Although other circuits might disagree, Tenth Circuit law governed the reasonableness of the officers' beliefs in this case. The officers are not protected by qualified immunity.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

PAUL KELLY, JR., Circuit Judge, dissenting.

Afton Callahan was arrested by the Central Utah Narcotics Task Force (the "Task Force") for distribution and possession of methamphetamine following a warrantless entry into his residence. The warrantless entry occurred after a confidential informant consensually entered Mr. Callahan's residence, purchased methamphetamine using funds provided by the Task Force, and gave what appeared to the officers to be a pre-arranged signal indicating that the drug deal had come to fruition. After successfully challenging the legality of the warrantless entry in Utah courts, *see State v. Callahan,* 93 P.3d 103 (Utah Ct.App.2004), Mr. Callahan brought a civil rights action under 42 U.S.C. § 1983 against individual members of the Task Force, the Task Force itself, and several counties in Utah (collectively "Defendants").

On summary judgment, the district court granted Defendants qualified immunity. Today, the court reverses, holding that (1) the "consent once removed" doctrine does not justify officers' warrantless entry into a residence, at least where the individual gaining initial, consensual entry is a confidential informant,

and (2) the law was clearly established that law enforcement may not enter a residence without a warrant in order to assist a confidential informant – present in the home consensually and possessing probable cause – in effectuating an arrest. Because these holdings unnecessarily part company with at least two (and arguably three) of our sister circuits and are contrary to longstanding Fourth Amendment and qualified immunity principles, I respectfully dissent.

In order to overcome a qualified immunity defense, a plaintiff asserting a cause of action under § 1983 must demonstrate that (1) the defendant's actions violated a federal constitutional or statutory right, and (2) the right alleged to have been violated was clearly established at the time of the conduct at issue.[1] *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

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[1] Despite heated debate among the Justices on the matter, the Supreme Court has explained that the lower federal courts are obliged to consider the qualified immunity questions in turn and may not skip the first step – whether a constitutional or statutory right was violated – simply because the case can be disposed of on the second. *See Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. The district court below clearly violated this command when it assumed a constitutional violation and nonetheless held in Defendants' favor on the second *Saucier* step. Disregarding the district court's failure, the majority faithfully fulfills its obligation "to set forth principles which will become the basis for a holding that a right is clearly established," *id.*; unfortunately, it arrives at an erroneous conclusion.

At the highest level of abstraction, the right at issue is the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. The Supreme Court has interpreted the Fourth Amendment to require government agents to obtain a warrant before entering a residence for purposes of search or arrest. *See Welsh v. Wisconsin,* 466 U.S. 740, 748, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). The warrant requirement, however, is nowhere near absolute; there are exceptions, though they are "few in number and carefully delineated." *United States v. United States Dist. Court,* 407 U.S. 297, 318, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). "[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent" freely and voluntarily given. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). This exception results from the recognition that the primary purpose of the Fourth Amendment – "protection of the privacy of the individual, his right to be let alone," *Davis v. United States,* 328 U.S. 582, 587, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946) – is forfeited when a homeowner freely allows government agents inside.

Thus, it is abundantly clear that had one or more members of the Task Force gained consent to enter Mr. Callahan's home, there would be no Fourth Amendment violation. *See United States v. Cruz-Mendez,* 467 F.3d 1260, 1265-66 (10th Cir.2006). As

the court notes, the same would be true had the Task Force members gained consent under the guise of being plain-clothed citizens looking to purchase methamphetamine. *See Lewis v. United States,* 385 U.S. 206, 211, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). Analogously, the confidential informant's consensual entry was not a violation of the Fourth Amendment, despite the fact that Mr. Callahan had no idea he was acting as a government agent at the time. *See United States v. Lowe,* 999 F.2d 448, 450-51 (10th Cir.1993).

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

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

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

United States v. Pollard, 215 F.3d 643, 648 (6th Cir.2000) (quoting *United States v. Akinsanya,* 53 F.3d 852, 856 (7th Cir.1995)). The name "consent once removed" is somewhat of a misnomer, however, because the doctrine depends on more than consent alone. *See United States v. Yoon,* 398 F.3d 802, 809-10 (6th Cir.2005) (concurring op.). Rather, the doctrine requires both a valid consensual entry – which alleviates the warrant requirement – and a concomitant destruction of the homeowner's legitimate expectation of privacy – which allows officers to enter. *Id.*; *see also United States v. Paul,* 808 F.2d 645, 648 (7th Cir.1986) ("[T]he interest in the privacy of the home . . . has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him."). When one gives consent for another individual to enter his home in order to buy or sell narcotics, he not only assumes the risk that the person is an undercover government agent, but also that the individual will later testify to his observations, that he will attempt to effectuate an arrest on-the-spot, or that he will take some of the contraband and hand it over to the police. *Paul,* 808 F.2d at 648. Given the assumption of these risks, the marginal risk that an individual will instead invite law enforcement officials to assist in an on-the-spot arrest "is too slight to bring the requirement of obtaining a

warrant into play."[2] *Id.*; *see also United States v. Rubio,* 727 F.2d 786, 797 (9th Cir.1983).

The crucial question, then, is whether a homeowner's legitimate expectation of privacy is any greater when he allows a confidential informant into his home rather than a full-fledged officer. The court answers that question with a resounding "yes," but I fail to see the difference in the two situations. The court draws the line at police officers because "the person with authority to consent never consented to the entry of police into the house" when only a confidential informant is admitted and "the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state." Ct. Op. at 897.

While it is technically correct that Mr. Callahan never consented to the entry of police, no one ever consents to the entry of police in these undercover situations; they instead consent to the entry of someone who *might* be the police (an undercover officer), or as in this case, someone who *might* be a government agent (a confidential informant). So long as an

[2] The court misconceives the conceptual underpinnings of the consent once removed doctrine, suggesting the doctrine is premised upon the existence of two consents – one from the homeowner to the confidential informant and one from the confidential informant to the police. Viewed in that light, however, the doctrine could not operate as to either confidential informants or police officers. Police officers have just as little authority to subsequently admit other officers into a home as confidential informants do.

invitation to enter is extended to a government agent (even unknowingly), the pertinent issue is not the type of government agent allowed in, but the consequence of that invitation, combined with the subsequent sale of narcotics, on a resident's reasonable expectation of privacy. And the only principled resolution of that issue is to hold that, no matter what type of government agent is allowed in, any previously existent legitimate expectation of privacy is abandoned.

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

There is also no denying that citizens (including confidential informants) in Utah, and nearly every other state, possess the power to arrest another

individual who commits a felony in their presence. *See* Utah Code Ann. § 77-7-3 (2003). To be sure, the ordinary citizen does not possess *all* the powers and obligations attendant to being a police officer. But once that citizen becomes a government agent and embarks on a joint venture with the police, as the confidential informant in this case did, both he and the officers for whom he works face civil liability for any of his actions later deemed unconstitutional. *See Pleasant,* 876 F.2d at 798-99. Police have no greater obligation than to respect citizens' constitutional rights, but that obligation carries over to the confidential informant once he agrees to work closely with the government and is imbued with state action. This fact distinguishes confidential informants from other citizens and, combined with the citizens' arrest power, renders application of the consent once removed doctrine to them abundantly reasonable.

Finally, the line the court draws creates odd results. Although police officers themselves may enter a residence to assist a fellow officer in effectuating an arrest, other government agents – such as agents of the Internal Revenue Service – might not have the same capacity. I fear future cases will turn on how closely the "powers and obligations" of the government agent in question resemble those of the classic police officer, rather than on Fourth Amendment

reasonableness, *see Illinois v. Rodriguez,* 497 U.S. 177, 183-85, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).[3]

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

Although the extension of the consent once removed doctrine to confidential informants is an issue on which reasonable minds might differ, there is no doubt that the right at issue was not clearly established at the time the Task Force acted. "[T]he affirmative defense of qualified immunity . . . protects

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[3] Despite the district court's suggestion to the contrary, the Supreme Court's recent decision in *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), does not affect the viability of the consent once removed doctrine. In that case, the Court held that police may not reasonably enter premises under dual control when one occupant is physically present and refuses admittance. *Id.* at 1519. Beyond the fact that *Randolph* may have slightly altered the circumstances under which a confidential informant or undercover officer may enter and remain in a residence under the first prong of the consent once removed doctrine, it is inapposite because it does not address whether, once valid consent is granted to a government agent and probable cause of criminal activity is established, a search is rendered unreasonable if additional officers enter a residence to help effectuate an arrest.

all but the plainly incompetent or those who knowingly violate the law." *Medina v. Cram,* 252 F.3d 1124, 1127 (10th Cir.2001) (internal quotation marks omitted). To be clearly established, the contours of a right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Moreover, the clearly established law inquiry is an objective one, *see Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), and "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. A right is "clearly established" if Supreme Court or Tenth Circuit case law exists on point or if the "clearly established weight of authority from other circuits" found a constitutional violation from similar actions. *Murrell v. Sch. Dist. No. 1,* 186 F.3d 1238, 1251 (10th Cir.1999).

Properly characterized, the right at issue in this case is not simply the right to be free from unreasonable searches and seizures. Instead, it is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause. As the district court observed, no Supreme Court or Tenth Circuit decision has ever granted or even discussed that right. The court is no more successful in identifying such a decision. Instead, it relies upon cases holding that a warrantless

search of a home is per se unreasonable unless officers gain consent or exigent circumstances exist.[4] *See* Ct. Op. at 897-99 (citing *Katz, Wilson, Groh, Franz*, and *Falcon*). The court's approach is flawed, however, because it characterizes the right in overly broad terms and begs the question – what is the effect on a resident's legitimate expectation of privacy where the consent exception to the warrant requirement applies? Because neither the Supreme Court nor the Tenth Circuit has previously addressed this issue in the context of a warrantless entry of officers where a confidential informant is involved, we must look to other circuits for guidance.

Prior to the events giving rise to this litigation, three circuits had issued opinions which could have led a reasonable officer to believe that a warrantless entry was legal in this case. First, the Seventh Circuit, in 1986, clearly held that the consent once removed doctrine applies equally where confidential informants are involved, relying on a reduced expectation of privacy. *See Paul,* 808 F.2d at 648. Second, the Sixth Circuit, in 2000, applied the consent once removed doctrine in a situation in which both an officer and a confidential informant were granted consent to enter and "*the informant* accompanying

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[4] *United States v. Falcon,* 766 F.2d 1469 (10th Cir.1985), relied upon by the court, discusses what is required for one to possess the power to grant consent, not the consequences of a proper grant of consent on a homeowner's legitimate expectation of privacy. *See id.* at 1474.

the officer immediately summoned the other officers for assistance." *Pollard,* 215 F.3d at 648-49 (emphasis added). Importantly, the Sixth Circuit stated that the consent once removed doctrine applies where "[t]he undercover agent *or informant* "consensually enters a residence, establishes probable cause, and immediately summons help. *See id.* at 648 (emphasis added). Finally, the Ninth Circuit, in 1996, explained that the consent once removed doctrine applies where "undercover agent[s]" are involved, *see United States v. Bramble,* 103 F.3d 1475, 1478 (9th Cir.1996); and a reasonable officer could have believed the term "undercover agent[s]" includes confidential informants acting as government agents.

In sum, because neither the Supreme Court nor the Tenth Circuit has heretofore addressed the propriety of the consent once removed doctrine as applied to confidential informants, and the clear weight of authority from other circuits strongly suggested that the Task Force's actions in this case were legal, I would hold that the right at issue was not clearly established and would affirm the grant of qualified immunity.

2006 WL 1409130

United States District Court,
D. Utah,Central Division.

Afton Dale CALLAHAN, Plaintiff,

v.

MILLARD COUNTY; The Central Utah Narcotics Task Force; Sevier County; Sanpete County; Piute County; Mt. Pleasant City; Wayne County; Richfield City; Salina City; Gunnison City; Ephraim City; Cordell Pearson in his official and individual capacity; Marty Gleave, in his official and individual capacity; Clark Thomas, in his official and individual capacity; Dwight Jenkins, in his official and individual capacity; and John Doe I-IX in their official and individual capacities, Defendants.

No. 2:04-CV-00952.

May 18, 2006.

James K. Slavens, Fillmore, UT, for Plaintiff.

Peter Stirba, Harold H. Armstrong, Meb W. Anderson, Stirba & Associates, Gary R. Guelker, Jenson Stavros & Guelker, Salt Lake City, UT, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PAUL G. CASSELL, District Judge.

This is a § 1983 action in which plaintiff Afton Callahan alleges the named defendants violated his Fourth Amendment rights by a warrantless entry into his home. Both sides have moved for summary judgment. The court finds it possible that the entry into the home was justified under the consent-once-removed doctrine, as a confidential information [sic] who had been given access to the home had authority to invite law enforcement officers into the home as well. Because this legal doctrine possibly justified the officers' actions, they did not violate clearly-established Fourth Amendment rights. Accordingly, they are entitled to qualified immunity. The legal entities who supervised the law enforcement officers are also entitled to judgment in their favors. Accordingly, the court GRANTS the defendants' motion for summary judgment [# 61] with respect to Mr. Callahan's federal claims and dismisses his state claims without prejudice. The court DENIES Mr. Callahan's motion for partial summary judgment [# 52].

BACKGROUND

For the purposes of these competing motions for summary judgment, the court finds the following facts. The Central Utah Narcotics Task Force is charged with investigating illegal drug use and sales in Central Utah. The Task Force regularly relies on confidential informants to achieve its goal of eradicating the sale and use of illicit drugs. Brian Bartholomew

agreed to assist the Task Force as one of those confidential informants after being charged with possession of methamphetamine. On March 19, 2002, Mr. Bartholomew encountered plaintiff Afton Callahan at a gas station in Fillmore where the two had a casual conversation. Mr. Bartholomew then contacted Officer Jeffrey Whatcott of the Task Force and informed him that Mr. Callahan would have methamphetamine to sell later that day. Officer Whatcott instructed him to call back later if he had any more information, and Mr. Bartholomew promised to do so. Mr. Bartholomew left work around 5:00 p.m. without further talking to Mr. Callahan or any subsequent discussions with Officer Whatcott.

Mr. Bartholomew then proceeded to buy some beer and drink between six to eight beers in three hours. Around 8:00 p.m., he visited Mr. Callahan's home, determining that methamphetamine was in fact available. Mr. Bartholomew also ingested or tasted a sample of the methamphetamine. He then made further arrangements to make a purchase that night at Mr. Callahan's house. Mr. Bartholomew left the house under the auspices of procuring funds and contacted Officer Whatcott. He reported that he set up a deal between him and Mr. Callahan, and the Task Force arranged to meet further with Mr. Bartholomew.

At 9:00 p.m., Mr. Bartholomew met with members of the Task Force and briefed them on his conversations with Mr. Callahan. He indicated that he could likely purchase a gram of methamphetamine

for $100 from Mr. Callahan at his house. The Task Force members also discovered that Mr. Bartholomew had been drinking heavily. Officer Whatcott consequently monitored Mr. Bartholomew for several hours, urging him to drink numerous cups of coffee until the Task Force could ensure his competency to complete the job. Mr. Bartholomew did not inform the Task Force, however, of his indiscretions with methamphetamine during his visit to Mr. Callahan's house. Once the Task Force determined Mr. Bartholomew's readiness for the task, they searched him for drugs and equipped him with a wire and a transmitter. They also gave him a marked $100 bill, and xeroxed that bill as well. The Task Force then discussed the procedures of the arranged buy with Mr. Bartholomew, indicating that he should proceed with the buy at 11:00 p.m. The Task Force determined that Mr. Bartholomew would give the Task Force officers a pre-determined signal once he completed the buy. This signal "was to act like he was going to play the drums that were on the porch of the residence."[1]

The Task Force then transported Mr. Bartholomew to Mr. Callahan's trailer and he gained entrance to the house through the attached porch door after being let in by Mr. Callahan's daughter. The house entrance included an enclosed wooden porch attached to the front of Mr. Callahan's house. The porch had a separate door to the outside, and contained items

[1] S*tate v. Callahan,* Jury Trial Transcript I, at 72 (Aug. 5, 2002).

such as a drum set, washer and dryer, a garbage bag, and shelves. There was also a two-inch crack between the floor of the porch and the interior door of the trailer house. Once Mr. Bartholomew entered the house, the Task Force monitored the conversation through the wire on his person.

Once inside, Mr. Bartholomew asked Mr. Callahan for some methamphetamine, and they completed the deal. Mr. Callahan removed a large baggie from his kitchen freezer, unrolled it, and provided a number of smaller baggies of methamphetamine for Mr. Bartholomew to purchase. They then exchanged the marked $100 bill for one bag of methamphetamine. Mr. Bartholomew then left the house and entered the porch area together with Mr. Callahan and a third person. As the three men entered the porch area, Mr. Bartholomew "mentioned that [all three of them] should play the drums."[2] The reference to the drums (even though Mr. Bartholomew did not actually play the drums) signaled to the Task Force that the deal had been completed. "When [Officer Whatcott] heard [Mr. Bartholomew] say something about playing on the drums . . . [saying something about how Mr. Bartholomew] wanted to play drums on the porch . . . is when [Officer Whatcott] advised the other officers the [methamphetamine] deal had been made."[3] While the Task Force defendants concede lack of clarity of

[2] *State v. Callahan,* Jury Trial Transcript II, at 19-21 (Aug. 6, 2002).

[3] Jury Trial Transcript I, at 81.

some of the transmissions over the wire, Officer Whatcott testified that he recognized the prearranged signal. He then signaled the other Task Force members that the deal had been completed and gave the "okay" to enter the trailer house.

The Task Force officers entered through the porch door and ordered Mr. Bartholomew and another individual to lay on the ground. Mr. Callahan observed the police from inside the house portion, just outside of the porch enclosure, and proceeded to step outside onto the porch at that moment. Additionally, at that moment, the other person with Mr. Bartholomew reached for one of the officer's flashlight that happened to be attached to the end of the officer's weapon. Officers from the Task Force observed Mr. Callahan drop a plastic bag into the porch area which they later confirmed contained methamphetamine. The Task Force officers ordered Mr. Callahan to the ground as well, and also ordered a fourth person to the ground when he opened the interior door and stepped onto the porch enclosure. After overcoming resistance to the order, two officers then placed that fourth person on the ground.

Several Task Force officers then conducted a protective sweep of the house trailer looking for any other suspects in the vicinity. The Task Force conducted this sweep "to see if there were any other subjects, make sure that no one was in there with weapons, [so the Task Force officers] couldn't get

hurt."[4] The four suspects were brought into the house trailer and read their *Miranda* warnings, but had not yet been arrested. According to three Task Force officers and the Utah Court of Appeals, Mr. Callahan then consented to a search of the trailer. A search of Mr. Bartholomew's person led to a baggie of methamphetamine in his pocket. The Task Force also found in Mr. Callahan's possession the marked $100 bill issued to Mr. Bartholomew for the methamphetamine purchase. The Task Force subsequently found drug syringes in Mr. Callahan's house as well.

The Task Force members did not obtain a search or arrest warrant prior to entering Mr. Callahan's enclosed porch or house. The Task Force argues that no warrants were required because of the rapidly unfolding situation, the time of night, Mr. Callahan's parole status, and the exigent circumstances surrounding the drug transaction. One of the Task Force officers testified that the legal basis for entering the house was "to secure the persons in the residence . . . [and because] we knew that there was a large quantity of methamphetamine, and we can secure that residence with those people, and either obtain a search warrant from that point or from permission to search."[5] Because Mr. Bartholomew had "seen so much methamphetamine, [the Task Force officer in charge, Commander Cordell Pearson] didn't want any

[4] Jury Trial Transcript II, at 82.

[5] Jury Trial Transcript II, at 101.

of it to walk out of there or any of it disposed of prior to [the Task Force] getting into the house after [Mr. Bartholomew] had been there."[6] And the Task Force officers note that they knew that persons selling drugs in smaller, more rural counties generally disposed of those drugs to their buyers in a quick manner, almost never more than 4-5 hours from the time they first secured the drugs. The defendants argue that the Task Force reasonably believed that obtaining a search warrant in the short time between the arranged buy and when Mr. Bartholomew first confirmed the availability of drugs would not be timely to ensure the continued existence of the methamphetamine at Mr. Callahan's house.

After the arrest and search, the State of Utah charged Mr. Callahan with possession and distribution of methamphetamine. Mr. Callahan moved to suppress the evidence of methamphetamine and drug paraphernalia. The trial court, however, found that exigent circumstances existed warranting the warrantless search. Mr. Callahan then entered into a conditional plea of guilty reserving the right to appeal his unfruitful motion to suppress.

The Utah Court of Appeals reversed the trial court's decision on the motion to suppress in *State v. Callahan*[7] and reversed Mr. Callahan's conviction. On appeal, the Utah Attorney General's Office conceded

[6] *Id.* at 103.

[7] 93 P.3d 103 (Ut.Ct.App.2004).

that no exigent circumstances existed to justify the warrantless search. Rather, the Utah Attorney General's Office argued an alternative theory that the Task Force officers "inevitably would have discovered the evidence found in [Mr. Bartholomew's] pocket based on their routine and standard police practices."[8] Citing *State v. Topanotes,*[9] the Attorney General's Office contended that even if the Task Force had not illegally entered and searched Mr. Callahan's home, Mr. Bartholomew "would have left the home and presented the Task Force with the methamphetamine."[10]

The Utah Court of Appeals held that under the circumstances described it was "not possible to conclude that the evidence would have been discovered through independent, legal avenues."[11] It therefore concluded that "the evidence from [Mr. Bartholomew's] pocket [was] not admissible pursuant to the inevitable discovery doctrine."[12] Because of the Attorney General's Office's concession, the Court of Appeals also held that the trial court "erred in justifying the Task Force officers' warrantless entry into [Mr.] Callahan's home under the doctrine of exigent circumstances."[13] It stated that the "Task Force's adoption of

[8] *Id.* at 106.

[9] 76 P.3d 1159 (Utah 2003).

[10] *Callahan,* 93 P.3d at 107.

[11] *Id.* (quotations omitted).

[12] *Id.*

[13] *Id.*

tactics that involve planned illegal entry should not be countenanced, and permitting the use of any evidence found during this situation would provide no deterrent at all to future unlawful detentions, entries, or searches."[14]

Mr. Callahan now brings his claims through a 42 U.S.C. § 1983 action in this court, arguing that the Utah Court of Appeals' decision is the "law of the case." Because the Utah Court of Appeals found the Task Force violated Mr. Callahan's Fourth Amendment rights, he argues he is entitled to judgment in his favor. He also seeks remedies for the Task Force's violations of his right to privacy under the Fourteenth Amendment and his "right to personal security as guaranteed by the United States Constitution and protected under 42 U.S.C. § 1983."[15] He further argues that the alleged violations of his constitutional rights resulted from the municipal entities' policies or customs and their failure to supervise the Task Force members. Finally, Mr. Callahan brings various state law claims, including wrongful arrest, assault and battery, defamation, intentional infliction of emotional distress, and mislabels "punitive damages" as a cause of action. Mr. Callahan seeks partial summary judgment on the Task Force defendants' liability as a matter of law [# 51].

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[14] *Id.* (quotations omitted).

[15] Amended Complaint, at ¶¶ 57-61.

The Task Force defendants respond by contending they are entitled to summary judgment on Mr. Callahan's claims. The Task Force defendants argue that (1) the consent-once-removed doctrine justified the Task Force's warrantless search; (2) Mr. Callahan's parole status gave the Task Force the ability to conduct a warrantless search based solely on reasonable suspicion of criminal activity; (3) Mr. Callahan did not have a reasonable expectation of privacy on his enclosed porch; and (4) exigent circumstances were present, along with probable cause of criminal activity to permit a valid warrantless search. They also argue that even if the court finds their conduct constitutionally deficient, the Task Force defendants are entitled to qualified immunity. And the Task Force defendants seek summary judgment on Mr. Callahan's state law claims, including wrongful arrest, battery, assault, and intentional infliction of emotional distress, through immunity provided by the Utah Governmental Immunity Act.[16]

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to

[16] UTAH CODE ANN. §§ 63-30-1 *et seq.*

judgment as a matter of law."[17] The court must view the evidence, and draw reasonable inferences from that evidence, in the light most favorable to the nonmoving party.[18] The nonmoving party may not, however, "rest on mere allegations or denials of [its] pleading, but must set forth specific facts showing there is a genuine issue for trial."[19] "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient [to overcome summary judgment]; there must be evidence on which the jury could reasonably find for [the nonmoving party]."[20]

DISCUSSION

Turning first to Mr. Callahan's motion, it is clear that the "law of the case" doctrine does not preclude this court from examining the issues despite the Utah Court of Appeals' decision. Mr. Callahan's overarching argument primarily consists of the assertion that because the Utah Court of Appeals reversed his conviction and held the search of his residence unconstitutional,[21] his § 1983 suit must prevail. According

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[17] Fed.R.Civ.P. Rule 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Cummings v. Norton,* 393 F.3d 1186, 1189 (10th Cir.2005).

[18] *Cummings*, 393 F.3d at 1189; *Spaulding v. United States*, 279 F.3d 901, 904 (10th Cir.2002).

[19] *Anderson v. Liberty Lobby,* 477 U.S. 242, 256 (1986).

[20] *Id.* at 252.

[21] *Callahan,* 93 P.3d 103.

to the Tenth Circuit, "[t]he law of the case doctrine obligates every court to honor the decisions of courts higher in the judicial hierarchy."[22] Given that the respected Utah Court of Appeals is an appellate *state* court, it is not "higher in the judicial hierarchy" for this federal court. Accordingly, the Court of Appeals' decision does not constitute "law of the case."

At the same time, however, it would be foolish to ignore the Utah Court of Appeals' decision if it considered the same issues between the same parties. In this vein, the Supreme Court in *Migra v. Warren City School District Board of Education* noted that "issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered."[23] Under 28 U.S.C. § 1738, it is true that state court judgments "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the court of such State . . . from which they are taken." "This statute has long been understood to encompass the doctrines of res judicata, or "claim preclusion," and collateral estoppel, or "issue

[22] *Stifel, Nicolaus & Co. v. Woolsey & Co.,* 81 F.3d 1540, 1543 (10th Cir.1996) (citing *Mason v. Texaco, Inc.,* 948 F.2d 1546, 1553 (10th Cir.1991)).

[23] 465 U.S. 75, 83 (1984).

preclusion."[24] The Supreme Court succinctly defines these two terms:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.[25]

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit *between the same parties or their privies.*' "[26] As the Supreme Court noted in *Montana v. United States,* to "preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility

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[24] *San Remo Hotel, L.P. v. City & County of San Francisco,* 545 U.S. 323, 332 (2005).

[25] *Id.* at 332 n. 16 (quotations omitted).

[26] *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)) (emphasis added).

of inconsistent decisions."[27] Preclusion of non-parties to the previous litigation might "fall[ ] under the rubric of collateral estoppel" as long as "interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issue previously resolved."[28] But collateral estoppel is specifically reserved for the "persons for whose benefit and at whose direction a cause of action is litigated" who "cannot be said to be strangers to the cause."[29]

Although Mr. Callahan was a party in *State v. Callahan*, the defendant officers and entity defendants were not. Rather, the State of Utah pursued that case. Mr. Callahan has not alleged, nor could he reasonably allege, that the Task Force or entity defendants were persons for whose benefit and at whose direction the previous cause of action was litigated. Indeed, through their counsel here, the individual officers vigorously assert arguments that the Utah Attorney General's Office chose not to pursue. Because the current defendants were not parties or privies to the previous litigation, collateral estoppel principles cannot apply to the case before this court. The court will, of course, look to the Utah

[27] *Montana,* 440 U.S. at 153-54.

[28] *Id.*

[29] *Id.* (quotations omitted).

Court of Appeals' decision for persuasive guidance. But that decision lacks preclusive weight in this case.

Turning then to Mr. Callahan's alleged Fourth Amendment violation, the Task Force and municipal defendants argue that no Fourth Amendment constitutional violations occurred, and that if they occurred, they are entitled to qualified immunity. The court notes that "even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard."[30] After the U.S. Supreme Court's holding in *Brosseau v. Hagen*,[31] the court must first ask on a qualified immunity issue whether the facts show the Task Force officers' conduct violated a constitutional right.[32] If the court concludes that a constitutional violation did occur, then the court must undertake an inquiry "in the light of the specific context of the case, not as a broad general proposition" as to whether the right was clearly established.[33] Under this clearly-established prong, the Task Force officers are immune unless "the

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[30] *Davis v. Scherer,* 468 U.S. 183, 190 (1984); *see also Malley v. Briggs,* 475 U.S. 335, 341 (1986) ("[T]he qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

[31] 543 U.S. 194 (2004).

[32] *Id.* at 197 (quoting *Saucier v. Katz,* 533 U.S. 194, 201 (2001)); *Simkins v. Bruce,* 406 F.3d 1239, 1241 (2005).

[33] *Saucier,* 533 U.S. at 201.

law clearly proscribed the actions" taken.[34] For this court, in "making this determination, the relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[35] Now that the Task Force defendants have raised the defense of qualified immunity, the burden shifts to Mr. Callahan to show that (a) the Task Force defendants violated a constitutional right, and, (b) that the right was clearly established at the time of the Task Force defendant's conduct.[36]

A. The Court Will Assume Mr. Callahan Has Established a Violation of His Constitutional Rights.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[37] Mr. Callahan argues that the Utah Court of Appeals reversed his conviction and established that the Task Force defendants violated his Fourth Amendment rights. As noted above, this decision by the Utah Court of Appeals is not the "law of the case" doctrine, nor do collateral estoppel principles apply. Accordingly, the court must consider the

[34] *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985); *see also Meyers v. Redwood City,* 400 F.3d 765, 770 (9th Cir.2005).

[35] *Saucier,* 533 U.S. at 202.

[36] *Batiste v. J.C. Penney Co.,* 147 F.3d 1252, 1255 (10th Cir.1998).

[37] U.S. CONST., amend. IV.

arguments by the Task Force and entity defendants, who argue that (1) the doctrine of "consent-once-removed" entitled the Task Force to enter Mr. Callahan's residence; (2) Mr. Callahan was a parolee and therefore his home could be searched to establish evidence of a parole violation; (3) Mr. Callahan possessed no Fourth Amendment rights on his screen porch; and (4) exigent circumstances existed to justify the Task Force defendants' warrantless entry.

The defendants' strongest argument appears to be the doctrine of "consent-once-removed." Under this doctrine, if an undercover agent or informant is given consent to enter a home, in certain circumstances that consent to enter without a warrant can be extended to other law enforcement officers who can provide assistance to that agent or informant.[38] The consent given to the first person, generally a law enforcement officer but sometimes an informant, is then transferred to the entering police officers once the first person requests assistance from the police based on probable cause. As described by the Sixth Circuit in *United States v. Pollard*, police officers that have been called to assist a person already in a house may perform a warrantless entry and search if an

[38] *See* WALTER R. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1(c) at 290 & n. 114 (4th ed. 2004) ("[I]t has frequently been held that no warrant is needed where the arrest is made within premises to which an undercover police officer gained admittance by indicating his interest in participating therein in criminal activity.").

"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."[39] Therefore, the "consent-once-removed" doctrine applies to the warrantless entry and search by police that are summoned at the behest of the undercover agent or informant.

Besides the Sixth Circuit, the Seventh and Ninth Circuits have embraced this doctrine.[40] The Seventh Circuit applied the doctrine of "consent-once-removed" to a case in which a government informant received consent to enter an apartment, viewed heroin in the apartment and "immediately summoned the agents, who entered the apartment just as [the informant] was leaving."[41] That circuit held in *United States v. Akinsanya* that "when [the suspect] gave consent to [the informant] to enter his apartment, he effectively gave consent to the agent with whom [the informant] was working. . . . That consent was not withdrawn simply because [the informant] stepped out of the apartment moments before, or at the same

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[39] *Pollard,* 215 F.3d 643, 648 (6th Cir.2000).

[40] *See id.* at 643; *United States v. Bramble,* 103 F.3d 1475 (9th Cir.1996); *United States v. Akinsanya,* 53 F.3d 852 (7th Cir.1995); *United States v. Diaz,* 814 F.2d 454 (7th Cir.1987); *United States v. Paul,* 808 F.2d 645 (7th Cir.1986).

[41] *Akinsanya,* 53 F.3d at 856; *see also United States v. Jachimko,* 19 F.3d 296, 299 (7th Cir.1994); *Paul,* 808 F.2d at 648.

time, the agents entered."[42] Since at least 1986, the Seventh Circuit has applied the "consent once removed" doctrine to "a confidential informant wearing . . . an alert button."[43] And the Ninth Circuit in *United States v. Bramble* "join[ed] the Seventh Circuit in holding that where an undercover agent is invited into a home, established the existence of probable cause to arrest or search, and immediately summons help from other officers, the warrantless entry of the other officers does not violate the Fourth Amendment."[44] The Tenth Circuit has not, however, spoken on the issue.

The Sixth Circuit adopted the broadened reasoning of the Seventh Circuit recently in *United States v. Yoon.*[45] In that case, the circuit applied the "consent-once-removed" doctrine to "cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest."[46] In that case, a confidential informant engaged in monitored conversations with Mr. Yoon, finally agreeing to purchase 20 pounds of marijuana at Mr. Yoon's apartment.[47] Upon invitation into the apartment, Mr.

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[42] *Akinsanya,* 53 F.3d at 856.

[43] *Jachimko,* 19 F.3d at 299 (citing *Paul,* 808 F.2d at 648).

[44] 103 F.3d 1475, 1478 (9th Cir.1996) (citing *Akinsanya,* 53 F .3d at 856 and *Jachimko,* 19 F.3d at 298-99).

[45] 398 F.3d 802, 807 (6th Cir.2005)

[46] *Id.* at 808.

[47] *Id.* at 807.

Yoon and the informant viewed the marijuana, and the informant then gave a prearranged signal over his radio transmitter to the police officers waiting outside.[48] The Sixth Circuit held that Mr. Yoon possessed the authority to invite the informant into his residence, also holding that viewing the marijuana "established the necessary probable cause to effectuate an arrest."[49] The analysis partly rested on the fact that the transaction took place in Tennessee, and that Tennessee is one of the states that grants citizens actual arrest powers.[50] According to the Sixth Circuit, the warrantless search did not violate Mr. Yoon's constitutional rights because the civilian informant "could have made the arrest himself had he chosen to do so. Instead, he called officers to assist him, a permissible choice."[51] As noted above, the Seventh Circuit has reached similar conclusions.[52]

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Pollard*, 215 F.3d 643, 648.

[52] *See Akinsanya,* 53 F.3d 852; *Jachimko,* 19 F.3d 296; *Paul,* 808 F.2d 645; *see also United States v. Diaz,* 814 F.2d 454, 459 (7th Cir.1987), *cert. denied,* 484 U.S. 857 (1987) (limiting the use of this doctrine to instances in which "the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the probable cause to effectuate an arrest or search, and immediately summoned help from other officers.").

The case before this court is essentially identical to *Yoon*,[53] *Akinsanya*,[54] *United States v. Jachimko*,[55] *and United States v. Paul.*[56] Mr. Callahan invited the confidential informant, Mr. Bartholomew, into his home to purchase methamphetamine. Mr. Bartholomew, wired by the Task Force officers, entered the home and purchased drugs. When Mr. Bartholomew viewed and purchased the methamphetamine, the requisite probable cause for an arrest by the Task Force was established. And, like the Tennessee state law discussed in *Yoon,* Utah law "recognizes the right of a private person to make a citizen's arrest in narrowly defined circumstances."[57]

Mr. Callahan responds that *Yoon* was decided in 2005, while the search in this case occurred in 2002. But it is clear that the Seventh Circuit's cases in *Akinsanya, Jachimko* and *Paul* were all decided prior to 1996, over eight years before the actions took place in this case. More important, however, this argument misses the main point: if *Yoon*, *Akinsanya*, *Jachimko* and *Paul* were correctly decided, then no Fourth Amendment violation ever took place here.

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[53] 398 F.3d 802.

[54] 53 F.3d at 856.

[55] 19 F.3d at 299.

[56] 808 F.2d at 648.

[57] *State v. Quada*, 918 P.2d 883, 886-887 (Utah Ct.App.1996) (citing Utah Code Ann. § 77-7-3).

Mr. Callahan also makes the more fundamental argument, however, that *Yoon* and its predecessors are simply incorrect. He also notes that the Tenth Circuit has not explicitly or implicitly adopted this doctrine.

The court, too, wonders about the grounding of this doctrine. It seems a bit of a stretch to call the kind of police entry that occurred here "consensual." To be sure, Mr. Callahan invited one person – Mr. Bartholomew – into his home. But he did not give Mr. Bartholomew any authority to invite others into his home. The Supreme Court's very recent decision in *Georgia v. Randolph*[58] suggests that the Supreme Court may not be receptive to the doctrine. *Randolph* held that police could not enter a home over Mr. Randolph's objections even though his wife simultaneously gave consent to enter. The Court explained that "[t]his case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of the fellow occupant."[59] Thus, if confronted with a case squarely presenting the "consent-once-removed" doctrine, the Supreme Court might well conclude that the objections of an occupant might trump the further warrantless police entry that occurs from an undercover operative

[58] 126 S.Ct. 1515 (2006).

[59] *Id.* at 1528.

or confidential informant originally receiving consent to enter from that occupant.

This is just a prediction about the future, however. Today, the "consent-once-removed" doctrine has been upheld and applied in the Sixth, Seventh, and Ninth Circuits. It has been explicitly applied not only to undercover police agents, but also to government and confidential informants in the Sixth and Seventh Circuits. Ultimately the Supreme Court will have to finally resolve the question of whether the doctrine is consistent with the Fourth Amendment. For purposes of resolving this case, the simplest approach is to assume that the Supreme Court will ultimately reject the doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment.

B. Any Violation By Individual Officers Was Not of Clearly-Established Rights.

Even proceeding on the basis of an assumed violation of constitutional rights, however, the court finds that the individual defendants are all entitled to qualified immunity. Mr. Callahan still bears the burden to demonstrate the "clearly established nature" of any constitutional right that is violated.[60] "A right is 'clearly established' if Supreme Court or Tenth Circuit case law exists on point or if the 'clearly

[60] *Baptiste v. J.C. Penny Co.,* 147 F.3d 1252, 1255 (10th Cir.1998).

established weight of authority from other circuits' found a constitutional violation from similar actions." [61]In *Saucier v. Katz,* the Supreme Court stressed that "[t]his inquiry must be undertaken in light of the case's specific context, not as a broad general proposition."[62]

The Tenth Circuit in *Holland v. Harrington* extended this inquiry by explaining that an officer is entitled to qualified immunity because of a reasonable police officer's mistake.[63] In evaluating such a reasonableness standard, the circuit stated that "[a] mistake of law may be 'reasonable' where the circumstances 'disclose substantial grounds for the officer to have concluded he had legitimate justification under the law for acting as he did.'"[64] Therefore, this court must look to fundamentally similar case law, but it may also examine the reasonableness of the officer's mistake, to determine the "clearly established" nature of the alleged constitutional violations.

Mr. Callahan counters that he has pointed out clearly established law that (1) warrantless searches

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[61] *Murrell v. School Dist. No. 1,* 186 F.3d 1238, 1251 (10th Cir.1999).

[62] *Saucier,* 533 U.S. at 201.

[63] *Holland ex rel. Overdorff v. Harrington,* 268 F.3d 1179, 1196 (10th Cir.2001).

[64] *Id.* (quoting *Saucier v. Katz*, 533 U.S. at 208).

of a person's home are presumptively unreasonable,[65] (2) there is a heavy burden if entry into a home is involved,[66] (3) that police officers cannot create their own exigent circumstances,[67] and (4) that the State must establish both probable cause and exigent circumstances.[68] At a general level, this is all true. But on the specifics of this case, the officers had a reasonable argument that the "consent-once-removed" doctrine justified their actions. Indeed, it is clear that in Sixth, Seventh and Ninth Circuits their actions would have been fully consistent with the Constitution. Put another way, unless and until the Tenth Circuit or the Supreme Court rejects the "consent-once-removed" doctrine, a police officer in Utah

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[65] *See Roska v. Peterson,* 328 F.3d 1230, 1240 (10th Cir.2001) ("It is well-established that a warrantless search is presumptively unreasonable under the Fourth Amendment. . . .").

[66] *See Anderson v. Creighton,* 483 U.S. 635, 668 n. 24 (1987) ("It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (quotations omitted).

[67] *See United States v. Mikulski,* 317 F.3d 1228, 1233 (10th Cir.2003) (counseling against the "manufacture of exigencies"); *United States v. Acquino,* 836 F.2d 1268, 1272 (10th Cir.1988) ("[W]ell-meaning officers may exploit such opportunities without sufficient regard for the privacy interests of the individuals involved.").

[68] *See Cortez v. McCauley,* 438 F.3d 980, 993 (10th Cir.2006); *Marshall v. Columbia Lea Reg'l Hosp.,* 345 F.3d 1157, 1171-72 (10th Cir.2003) ("It is a basic principle of Fourth Amendment law that searches and seizures inside the home without a warrant are presumptively unreasonable unless the police can show both probable cause and the presence of exigent circumstances.").

relying on the doctrine (in a case where the doctrine factually applies) has not violated a clearly established right.[69]

Finally, it is also worth noting that the Utah trial court and the Utah Court of Appeals differed on the legality of the search in this case. The trial court considered all the facts and circumstances of the case and concluded that the officers faced sufficient exigent circumstances to justify warrantless entry into the home. The trial court cited the presence of a very dangerous drug – methamphetamine – and the possibility of quick disposal of the drugs as creating exigent circumstances. To be sure, the Utah Court of Appeals differed with the trial court after the Utah Attorney General's Office declined to defend that position. Without agreeing with the final legal conclusion of the trial court,[70] it certainly provides considerable evidence that the actions of the officers in this case were not in violation of clearly-established rights.

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[69] In light of this conclusion, the court need not reach the arguments raised by the defendants as to the justifications for their actions.

[70] *Cf. Brigham City v. Stuart,* 126 S.Ct 979 (2006), *granting certiorari to review Brigham City v. Stuart,* 122 P.3d 506 (Utah 2005) (finding no exigent circumstances to justify warrantless entry).

C. The Entity Defendants Are Entitled to Summary Judgment.

Mr. Callahan's suit against the entity defendants relies on claims that these defendants implemented unconstitutional official polices or customs as the catalyst to Mr. Callahan's injuries. Additionally, Mr. Callahan claims that the entity defendants failed to properly train the Task Force defendants, thereby causing his constitutional injuries.

The court recognizes no respondeat superior liability under § 1983 for municipal entities.[71] To survive summary judgment, Mr. Callahan must show that the entity took its municipal action "with the requisite degree of culpability and must demonstrate a causal link between that action and the deprivation of federal rights."[72] In order to impose supervisor liability under § 1983, it is not enough for [Mr. Callahan] merely to show [the entity defendants were] in charge of other state actors who actually committed the violation. Rather, [Mr. Callahan] must establish a deliberate, intentional act by the supervisor to violate constitutional rights. [Mr. Callahan] may satisfy this standard by showing the defendant-supervisor personally

[71] *See Cannon v. City and County of Denver,* 998 F.2d 867, 877 (10th Cir.1993); *see also Monell v. Dep't of Social Servs.,* 436 U.S. 658, 680 (1978).

[72] *Bd of County Commr's v. Brown,* 520 U.S. 397, 404 (1997).

directed the violation or had actual knowledge of the violation and acquiesced in its continuance."[73]

> Mr. Callahan has failed to point to any official policy or custom implemented, or not implemented, by the entity defendants which led to the violation of Mr. Callahan's rights. Mr. Callahan has also pointed to no arguable facts in the record which demonstrate the entity defendants' failure to train. In fact, the entity defendants demonstrate that each of the Task Force defendants have been properly certified to perform police work in the state, and also demonstrate that the entity defendants held bi-annual meetings to discuss the supervision of the Task Force. Therefore, Mr. Callahan's § 1983 claims against the municipal entities for their implementation of policies or customs, or their lack of policies or customs, fails. And, particularly given the recognition of the "consent-once-removed" doctrine in several circuits, the court cannot find any municipal entity liability either under Mr. Callahan's failure to supervise and train § 1983 claims. Accordingly, the court finds this claim ripe for summary judgment as well.

D. Mr. Callahan's State Law Claims

Having granted summary judgment to the Task Force and entity defendants on Mr. Callahan's federal

[73] *Beedle v. Wilson,* 422 F.3d 1059, 1074 (10th Cir.2005).

claims, the court declines to exercise supplemental jurisdiction on any of Mr. Callahan's state law claims. Although both sides make arguments regarding the Utah Governmental Immunity Act and its application to this case, the court declines to consider these arguments, as they are best resolved in Utah courts. Accordingly, the court dismisses these claims without prejudice.

CONCLUSION

Given the foregoing discussion, the court GRANTS the defendants' motion for summary judgment [# 61] and DENIES Mr. Callahan's motion for partial summary judgment [# 52]. The federal law claims are dismissed with prejudice. The state law claims are dismissed without prejudice. The Clerk's Office is directed to close this case.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AFTON CALLAHAN, Plaintiff-Appellant, v. MILLARD COUNTY, et al., Defendants-Appellees.	No. 06-4135

ORDER

Filed September 6, 2007

Before **KELLY**, and **EBEL**, Circuit Judges and **MURGUIA**,* District Judge.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

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* The Honorable Carlos Murguia, District Judge, United States District Court for the District of Kansas, sitting by designation.

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk