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UNIVERSITY of PENNSYLVANIA LAW SCHOOL

BENCH MEMORANDUM

To: Keedy Cup Justices:

The Honorable James B. Loken

The Honorable Ketanji Brown Jackson

The Honorable Richard Lance Gabriel

From: The Moot Court Board Bench Memo Committee

Anthony Paladino (Chair)

Brian Kearney

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Date: December 18, 2017

Re: University of Pennsylvania Law School Edwin R. Keedy Cup; *District of Columbia v. Wesby*, No. 15-1485

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I. EXECUTIVE SUMMARY

This case began when twenty-one revelers held a wild party at a vacant house in the District of Columbia. Police arrived at the house and arrested the partygoers for trespassing despite the partygoers' assertions that they were invited or had permission to be in the house. The partygoers sued the officers and the District of Columbia for violating their Fourth Amendment rights. Now, before the Supreme Court of the United States, the case asks whether: (1) the officers lacked probable cause for the arrests, and thus violated the partygoers' Fourth Amendment rights; and (2) the officers are immune from suit regardless of whether their actions violated the partygoers' constitutional rights.

The background principles are well settled. As to the probable cause question: warrantless arrests are lawful under the Fourth Amendment as long as they are supported by probable cause. *Beck v. Ohio*, 379 U.S. 89 (1964). To find probable cause, courts ask whether a "reasonably prudent man" would find that a suspect is committing or has committed a crime under the totality of the circumstances surrounding the arrest. *Brinegar v. United States*, 383 U.S. 160, 175–76 (1949); *Beck*, 379 U.S. at 91. As to the qualified immunity question, the partygoers' suit arises under 42 U.S.C. § 1983, which provides, "[e]very person who, under color of any statute . . . of . . . the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or

immunities secured by the Constitution . . . , shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Despite this broad language, police officers are immune from personal liability under section 1983, unless they violate "clearly established" constitutional or statutory rights. *Zigler v. Abbasi*, 137 S. Ct. 1843, 1866 (2017).

The United States District Court for the District of Columbia held the officers lacked probable cause to arrest the partygoers for unlawful entry because "nothing about what the police learned at the scene" suggested the partygoers "'knew or should have known that they were entering against the owner's will.'" The District Court also dismissed the officers' and District of Columbia's qualified immunity defense, asserting that "District of Columbia law has consistently provided that probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner or authorized agent."

The Court of Appeals for the District of Columbia Circuit affirmed, holding that the officers failed to establish probable cause because "it was undisputed that the arresting officers knew the partygoers had been invited to the house by a woman that they reasonably believed to be its lawful occupant." On the question of qualified immunity, the Court of Appeals held the officers were "simply incorrect to suggest

that [they] could not have known that uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry."

The Supreme Court granted certiorari as to two issues:

1. Whether the officers had probable cause to arrest the partygoers under the Fourth Amendment, and, in particular, whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state; and

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

Issue 1: Did the Officers Have Probable Cause to Arrest the Partygoers?

The first issue in this case asks whether the officers had probable cause to arrest the partygoers without warrants. Although the parties agree on the background probable cause principles stated above, they disagree as to the proper standard that should be applied to determine whether the officers established probable cause in this case.

The officers and the District of Columbia favor a "flexible" standard that considers all of the relevant "facts and circumstances" at the time of arrest to support a probable cause finding. Pet'rs' Br. 14, 17. This flexibility must be afforded to the

officers, who should not be expected to make precise legal determinations to meet the standard for probable cause. Specifically, the officers and the District of Columbia emphasize that probable cause does not "require the same type of specific evidence of each element of the offense as would be needed to support a conviction." Pet'rs' Br. 10 (quoting *Adams v. Williams*, 407 U.S. 143 (1972)). As a result, they argue that even if there was no direct evidence that the partygoers possessed the necessary mental state for unlawful entry, the totality of the facts and circumstances at the time of the arrest, including the partygoers' suspicious behavior, support a probable cause finding.

Conversely, the partygoers contend the absence of direct evidence that they knew they did not have permission to be in the home is exculpatory of the unlawful entry offense and, thus, vitiates probable cause. Specifically, the partygoers assert that, under *Pringle v. Maryland*, 540 U.S. 366 (2003), the officers were not allowed "to ignore uncontroverted exculpatory evidence if the evidence negates the *mens rea* of an offense." Resp'ts' Br. 6. Therefore, because probable cause was not established for each element of the offense, based on the uncontroverted exculpatory evidence, the officers were required to investigate further or not arrest the partygoers.

Issue 2: Does the Qualified Immunity Doctrine Apply to the Officers?

The second issue in this case concerns whether the officers are shielded from section 1983 liability under the doctrine of qualified immunity on the theory that the law the Court of Appeals applied to conclude they lacked probable cause was not well established.

The officers and the District of Columbia contend that they are entitled to qualified immunity because the law was not clearly established as to: (1) the requisite *mens rea* for the offense of unlawful entry; (2) whether officers were required to show "some evidence for each element" of a crime to establish probable cause for an arrest; and (3) how conflicting statements and inconsistent or contradictory circumstantial evidence affect probable cause. The partygoers contend the relevant inquiry here is whether it would have been clear to a reasonable officer that his conduct was illegal under the circumstances he confronted and that, under that standard and prevailing District of Columbia caselaw, the officers are not entitled to qualified immunity.

II. QUESTIONS PRESENTED

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

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

III. BACKGROUND

A. Factual Allegations

In the late evening of Saturday, March 15, 2008, a party was in full swing at 115 Anacostia Avenue in Washington, D.C. A woman named "Peaches" had invited several friends to the party telling them that she had just moved to the house. Those friends invited several others, and twenty-one people ultimately attended. Sixteen of those partygoers were the plaintiffs below and are the respondents in this 42 U.S.C. § 1983 action.

Very early in the morning of March 16, 2008, the District of Columbia Metropolitan Police Department received a complaint of loud music and possible illegal activity at that same address. This was not the first time that officers had been called to this location, and neighbors had repeatedly voiced concerns about an "ongoing problem" at the house, which appeared to be abandoned and had been officially listed as vacant for several months.

Responding to the complaint, Officers Andre Parker and Anthony Campanale arrived at the scene at 1:30 a.m. They observed one of the partygoers run upstairs as they approached the house. When the officers were allowed inside to investigate the party, they noted other furtive behavior by the partygoers, including one hiding in a closet and others who were generally trying to avoid the officers. The officers smelled marijuana, tested a substance that may have been determined to be

marijuana,[1] and noted the house was very sparsely furnished—though it had electricity and contained a bare mattress, it was littered with alcohol containers and condoms. The officers found several women upstairs who were engaging in behavior "consistent with activity being conducted in strip clubs." Although they viewed these circumstances as suspicious, "the officers acknowledged that, other than the ostensible unlawful entry, they did not see anyone engaging in illegal conduct."

The officers gathered the partygoers to collect statements to determine why the partygoers were there, who owned the house, and where the owner was. The partygoers claimed to be there for either a bachelor or birthday party, but none of the partygoers knew who the guest of honor was supposed to be. Many of the partygoers did not know who owned the home: one thought it was a woman named "Tasty" (which was determined at trial to be another name used by Peaches), and another identified Peaches as the renter of the house. All partygoers "stated that they were there at the invitation of somebody else."

Peaches was not at the house. When the officers eventually reached her by phone, she said she had just left the party. She refused to return out of fear of being arrested. None of the partygoers could place Peaches at the house that night, but Peaches did admit that she told the partygoers they could party there. The officers

[1] The record is inconsistent on this matter.

asked Peaches who gave her permission to be inside the house. Over the course of multiple phone calls with the officers and a third officer, she first said that no one gave her permission to be there, then said she had permission because she was planning to the house from the owner. She eventually gave the officers the owner's phone number. He confirmed that he knew Peaches, but said they had never reached a rental agreement for the unit. The owner told the officers Peaches did not have permission to be there. Peaches later confirmed that she had not reached a formal agreement with the owner. She mistakenly thought that "she had permission to be inside the residence because she was going to rent the place out."

After establishing the partygoers were on private property without the owner's authorization, the officer in charge of the scene at the time, Sergeant Suber, who is not a party to this suit, made the decision to arrest all twenty-one of the partygoers for unlawful entry. The partygoers were escorted to the police station and placed in a cell. At 5:00 a.m., another officer, Lieutenant Netter, arrived. On advice from a representative of the District Attorney's Office, Lieutenant Netter had all of the partygoers released but then arrested them again for disorderly conduct. Neither Lieutenant Netter nor the District Attorney's Office is a party to this suit. The partygoers were taken back to the cell, processed for disorderly conduct, and allowed to pay for their release.

B. Procedural History

Sixteen of the twenty-one arrested partygoers sued the five officers involved in the arrest, including Officers Parker and Campanale, and the District of Columbia in the federal District Court for the District of Columbia. *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 24 (D.D.C. 2012). The partygoers brought suit under 42 U.S.C. § 1983 and the corresponding D.C. common law, claiming false arrest for unlawful entry and disorderly conduct. *Id.* The partygoers also alleged negligent supervision against the District of Columbia. *Id.*

The officers and the partygoers cross-moved for summary judgment in the district court. *Id.* The District Court granted partial summary judgment to some of the defendants, *id.* at 49, but granted summary judgment on the partygoers' claims against Officers Parker and Campanale, in their personal capacities, under 42 U.S.C. § 1983 and the related state law claims. *Id.* The District Court also granted summary judgment on the partygoers' claims against the District of Columbia for the state law false arrest and negligent supervision claims. *Id.*

The District Court held that Officers Parker and Campanale had lacked probable cause to arrest the partygoers for unlawful entry because "nothing about what the police learned at the scene" suggested that the partygoers "'knew or should have known that they were entering against the owner's will.'" *Id.* at 32. The District Court also dismissed the officers' qualified immunity defense, asserting that

"District of Columbia law has consistently provided that probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner or authorized agent." *Id.* at 37. After a trial on damages, the jury awarded each partygoer between $35,000 and $50,000. *Wesby v. District of Columbia*, 765 F.3d 13, 17 (D.C. Cir. 2014).

The officers and the District of Columbia appealed. *Id.* at 17. The United States Court of Appeals for the District of Columbia Circuit affirmed. The Court of Appeals first observed that the probable cause inquiry in this case turned on the "culpable mental state for unlawful entry," which, under D.C. law, required proof that the defendant entered the property against the express will of the lawful occupant or owner and possessed general intent to enter the property. *Id.* at 20. "Specifically, the question is whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that [the partygoers] knew or should have known they had entered the house 'against the will of the lawful occupant or of the person lawfully in charge thereof,' and intended to act in the face of that knowledge." *Id.* (citing D.C. Code § 22-3302). The Court of Appeals held that the officers had failed to establish probable cause because "it was undisputed that the arresting officers knew the [partygoers] had been invited to the house by a woman that they reasonably believed to be its lawful occupant." *Id.* at 16.

The Court of Appeals acknowledged that probable cause does not require the same amount or type of evidence of each element of the offense as would be required for conviction, but held that the police had to point to *some* evidence supporting each element, including the "requisite mental state." *Id.* at 20. Because the officers had heard from both Peaches and the partygoers that the partygoers were invited to the house and there was no evidence to indicate the partygoers knew Peaches was not authorized to invite them, the Court of Appeals held there was no evidence tending to establish the partygoers knew or should have known they had entered the house knowing that their entry contravened the will of its lawful occupant. *Id.*

The Court of Appeals also affirmed the District Court's holding that the officers were not entitled to qualified immunity. It characterized the question for qualified immunity purposes as "whether, in light of clearly established law and the information that Officers Parker and Campanale had at the time, it was objectively reasonable for them to conclude there was probable cause to believe [the partygoers] were engaging in . . . unlawful entry." *Id.* at 26. According to the Court of Appeals, well-established District of Columbia law provided: (1) "probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest, including any state-of-mind element"; and (2) "[a] person who has a good purpose and bona fide belief of her right to enter 'lacks the element of criminal intent required' to

violate the unlawful-entry statute." *Id.* at 26–27 (citations omitted). Taken together, these principles "made perfectly clear at the time of the events in this case that probable cause required some evidence that the [partygoers] knew or should have known that they were entering against the will of the lawful owner," and the officers and District of Columbia were "simply incorrect" to suggest otherwise. *Id.* at 27.

In dissent, Judge Brown criticized the Court of Appeals' "broad new rule" that "[o]fficers must prove individuals occupying private property know their entry is unauthorized," while "any plausible explanation resolves the issue of culpability in the suspects' favor." *Id.* at 31.

The Court of Appeals denied the officers and the District of Columbia's motion for rehearing *en banc* over a dissent joined by four judges, noting that "an officer could not conclude—not even reasonably, though mistakenly—that the partygoers had a culpable state of mind." *Wesby v. District of Columbia*, 816 F.3d 96, 100 (D.C. Cir. 2016).

The officers and the District of Columbia sought a writ of certiorari on June 8, 2016, and the Supreme Court of the United States granted certiorari on June 28, 2016. *District of Columbia v. Wesby*, 137 S. Ct. 826 (2017).

IV. DISCUSSION

A. Did the Officers Have Probable Cause to Arrest the Partygoers?

The first issue in this case asks whether the officers had probable cause to arrest the partygoers without warrants. The parties agree on two fundamental legal principles. First, warrantless arrests are lawful under the Fourth Amendment as long as they are supported by probable cause. *Beck v. Ohio*, 379 U.S. 89 (1964). The test for probable cause is whether a "reasonably prudent man" would find a suspect is committing or has committed a crime under the totality of the circumstances. *Brinegar v. United States*, 383 U.S. 160, 175–76 (1949); *Beck*, 379 U.S. at 91.

The officers and the District of Columbia, Petitioners in this case, favor a "flexible" standard that considers all of the "facts and circumstances" at the time of arrest to support a probable cause finding. Pet'rs' Br. 14, 17. They assert that officers should not be expected to make precise legal determinations to meet the standard for probable cause. Specifically, the officers and District of Columbia argue that probable cause does not "require the same type of specific evidence of each element of the offense as would be needed to support a conviction." Pet'rs' Br. 10 (quoting *Adams v. Williams*, 407 U.S. 143 (1972)). As a result, they argue that even if there was no direct evidence of the necessary *mens rea* for unlawful entry, the facts and circumstances at the time of the arrest, supporting other elements of unlawful entry, established a probable cause finding.

Conversely, the partygoers, Respondents in this case, contend that the totality-of-the-circumstances test means that all evidence must be considered, and the lack of direct evidence as to a culpable mental state, in the presence of a possible lawful explanation, undermines any probable cause finding. Specifically, under *Pringle v. Maryland*, 540 U.S. 366 (2003), the partygoers assert the officers were not allowed "to ignore uncontroverted exculpatory evidence if the evidence negates the *mens rea* of an offense." Resp'ts' Br. 6. Therefore, because probable cause was not established for each element of the offense, based on the uncontroverted exculpatory evidence, the officers were required to investigate further or not arrest the partygoers.

This section proceeds by: (1) discussing the parties' competing probable cause standards, (2) considering whether direct evidence for each element of an offense is required, and (3) assessing the factual circumstances at the time of an arrest.

1. The Probable Cause Standard

The officers and the District of Columbia argue that probable cause is a flexible and objective standard. For this proposition, they cite Supreme Court precedent labeling the inquiry as: "nontechnical" or "fluid," *Illinois v. Gates*, 462 U.S. 213, 238 (1983), "incapable of precise definition," *Pringle*, 540 U.S. at 371, and a "flexible, all-things-considered approach," *Florida v. Harris*, 568 U.S. 237, 244 (2013). This flexible standard, they argue, allows courts to avoid "unduly

hamper[ing] law enforcement," while protecting citizens from the "whim and caprice" of police officers. *Brinegar*, 338 U.S. at 176. Moreover, they assert, probable cause "is not a high bar" for the government to surmount. *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014).

The officers and the District of Columbia argue that the probable cause standard is meant to be flexible with a lack of bright-line rules as to not hamper officers and their duty to promote the public safety. Specifically, police officers are not required to determine whether every technical element of an offense is met to make a lawful arrest. In this case, they argue that the officers had discovered evidence establishing other elements of the offense for unlawful entry and that should be enough to establish probable cause. Raising the standard to require law enforcement to establish evidence of *mens rea* would hamper law enforcement.

The partygoers acknowledge that the probable cause standard is "nontechnical" and fluid because officers must make decisions in real time. They argue, however, that this fluidity does not permit police officers to rely on "unparticularized suspicion or hunch." *United States v. Sokolow*, 490 US. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Instead, in considering the "totality of the circumstances," police officers must obtain evidence and reach a sensible conclusion based on the evidence. Resp'ts' Br. 8 (quoting *Brinegar*, 338 U.S. at 177)). Specifically, the partygoers argue that all uncontroverted evidence—

inculpatory and exculpatory—must be considered in determining probable cause. Therefore, if police officers ignore uncontroverted exculpatory evidence, they have failed to considered the totality of the circumstances and have not established probable cause.

Here, the partygoers argue that once the officers were faced with uncontroverted exculpatory evidence (i.e., the evidence that the partygoers had been invited to the house), the officers were required to: "(1) find, as a reasonably prudent person would, that probable cause [did] not exist; or (2) investigate further to verify the credibility of the evidence presented." Resp'ts' Br. 10. Having done neither, the officers ignored the partygoers' innocent mental state and arrested them without probable case.

2. Whether Probable Cause Requires Direct Evidence for Each Element of an Offense

In addition to the overall determination that they lacked probable cause, the officers and the District of Columbia question the Court of Appeals' holding that probable cause must be supported by some evidence of each element of the offense giving rise to the arrest. On this point, they raise four arguments in particular:

- First, police officers need not make a prima facie showing of an offense to establish probable cause for an arrest. *Spinelli v. United States*, 393 U.S. 410, 419 (1969), *overruled on other grounds by Gates*, 462 U.S. at 238.

- Second, police officers frequently encounter ambiguous situations and must have room for error. *Brinegar*, 338 U.S. at 176.
- Third, police officers' arrests must be weighed according to the "reasonableness" standard of the Fourth Amendment, not state criminal law. *Cooper v. California*, 386 U.S. 58, 61 (1967).
- Finally, police officers do not need to know the offense for which a suspect will be charged before making an arrest, and officers' subjective state of mind is irrelevant. *Devenpeck v. Alford*, 543 U.S. 146, 153, 155 (2004).

The officers and the District of Columbia argue that, in cases such as this, where the *actus reus* of an offense has been established, officers do not need direct evidence of *mens rea* to establish probable cause, citing language from several courts of appeals emphasizing that leeway must be afforded to arresting officers. *See, e.g.*, *Cox v. Hainey*, 391 F.3d 25, 33–34 (1st Cir. 2004) (noting that "practical restraints on police in the field are greater with respect to ascertaining intent," requiring "correspondingly great" latitude for officers dealing with probable cause for *mens rea*); *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir. 1989) (noting that evaluation of the veracity of a defendant's story is the role of the factfinder, not the arresting officer); *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000) (noting that "absent a confession," an arresting officer considering probable cause for a *mens rea* element will have "to rely on circumstantial evidence regarding the state of his or her mind").

Further, the officers and the District of Columbia seem to argue *Maryland v. Pringle*, 540 U.S. 366 (2003), supports the conclusion that direct evidence of *mens rea* is unnecessary to establish probable cause where the evidence supports an inference that defendants have committed the *actus reus*. In *Pringle*, as in this case, officers arrested suspects who claimed innocence. There, police officers pulled a vehicle over for speeding and, after searching the vehicle, found "$763 of rolled-up cash in the glove compartment directly in front of Pringle [and] [f]ive plastic glassine baggies of cocaine [] behind the backseat." *Pringle*, 540 U.S. at 371–72. Even though Pringle and the other two occupants insisted that they did not know the true owner of the drugs, the police officers arrested the three occupants for unlawful possession of the bags of cocaine. *Id.* at 368.

The Maryland Court of Appeals declined to find probable cause based on the "mere finding of cocaine in the back armrest." *Id.* at 372. In reversing the Maryland court, the U.S. Supreme Court declared it was an "entirely reasonable inference from the facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine[,]" and the pleas of "we didn't do it" were insufficient to vitiate probable cause. *Id.*

The partygoers respond that these arguments are inapposite, but they do not advocate for a standard that would require officers to "find probable cause for each element of the offense." Resp'ts' Br. 10. Instead, they argue that police officers

must consider all of the facts and circumstances in determining whether a crime was or is being committed. *Harte v. Bd. of Comm'rs*, 864 F.3d 1154, 1182 (10th Cir. 2017) (explaining that officers "may not disregard facts tending to dissipate probable cause"); *United States v. Lopez*, 482 F.3d 1067, 1073 (9th Cir. 2007) (holding that new information can eliminate an initial finding of probable cause); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) ("The continuation of even a lawful arrest violates the Fourth Amendment when the police discover additional facts dissipating their earlier probable cause."). The partygoers insist that a consideration of all facts and circumstances must include evidence related to the defendants' intent. They argue that the officers' and the District of Columbia's proposition—that direct evidence of *mens rea* is unnecessary where the *actus reus* is established—directs courts to ignore other evidence of intent, and thus makes the "totality of circumstances" analysis a selective one, rather than requiring reasonable inferences to be based on all available evidence.

Specifically, the partygoers argue the officers and the District of Columbia have incorrectly interpreted *Pringle*. Resp'ts' Br. 11. There, the partygoers argue, probable cause was based on the presence of and the reasonable inference that the defendant, either solely or jointly, possessed the cocaine. According to the partygoers, "[t]here is a critical difference between a reasonable inference of intent when no lawful explanation exists (as in *Pringle*) and an unreasonable inference that

ignores a lawful explanation corroborated by uncontroverted evidence." Resp'ts' Br. 12; *see also Adams v. Williams*, 407 U.S. 143, 148–49 (1972) (upholding an arrest for unlawful possession of a firearm because the "surrounding circumstances . . . certainly suggested no lawful explanation for possession of the gun"); *United States v. Christian*, 187 F.3d 663, 667 (D.C. Cir. 1999) (interpreting *Williams* to hold that the possibility of a lawful purpose, when combined with an absence of evidence for an unlawful purpose, would result in a lack of probable cause for arrest).

Moreover, the partygoers contend that the officers' and the District of Columbia's interpretation of *Pringle* is incorrect in light of *Pringle*'s reference to *United States v. Di Re*, 332 U.S. 581 (1948). In *Di Re*, the Court considered whether an officer had probable cause to arrest a suspect for a felony that required knowing possession of false coupons. *Di Re*, 332 U.S. at 592. There was clear evidence of the *actus reus* of the crime (i.e., Di Re had such coupons on his person), but this evidence was only found after the police searched Di Re. *Id.* Besides his presence in a car involved in a false coupon transaction, police had no evidence of Di Re's knowledge that the coupons were counterfeit. *Id.* In fact, the police had uncontroverted evidence from an informant implicating a different suspect in the crime, which made no mention of Di Re. *Id.* at 593. The Court considered this gap in the informant's testimony uncontroverted evidence that Di Re did not meet the

required knowledge element; and held, therefore, that no probable cause for arrest existed. *Id.*

The partygoers close by arguing that it would run counter to the totality of the circumstances to allow the officers to rebut uncontroverted evidence without any direct evidence to the contrary, and they assert that the combination of *Di Re*, *Pringle*, and *Williams* results in the following probable cause doctrine: (1) police officers are permitted to make reasonable inferences of mental state in situations where no lawful explanation exists; (2) police officers are required to provide more evidence where a lawful explanation exists; and (3) police officers cannot establish probable cause in the face of uncontroverted evidence of an innocent mental state. Resp'ts' Br. 13.

Under the proposed standard of the partygoers, then, the evidence suggesting the partygoers believed they were invited to the residence is not dispositive, rather, it is one of many facts a court must consider in determining whether the officers had probable cause. Because the officers failed to rebut the unconverted exculpatory evidence with direct evidence, the Court of Appeals was correct to conclude that they lacked probable cause.

3. Consideration of the Factual Circumstances at the Time of Arrest

The officers and the District of Columbia argue two points: (1) the evidence supports a finding of probable cause under their proposed standard, which does not

require direct evidence of *mens rea* when the *actus reus* of the crime is established; and (2) the facts and circumstances known at the time of the arrest support a probable cause finding even assuming some evidence of a culpable mental state is required.

First, the officers and the District of Columbia rely on the D.C. statute itself. The D.C. unlawful entry statute requires four elements for *conviction*: (1) entry (or attempt to enter); (2) without lawful authority; (3) against the express will of the lawful occupant or owner; and (4) with the general intent to enter. D.C. Code § 22-3302 (2008); *accord Culp v. United States*, 486 A.2d 1174, 1176 (D.C. 1985). They claim that the D.C. statute is a general intent statute, so violation of the statute did not require specific intent. Further, the officers observed evidence of three of the four elements for conviction. Namely, the officers witnessed the partygoers enter the property, the officers were told the entry was unauthorized, and the officers knew there was a general intent to enter the home.

Second, the officers and the District of Columbia argue that, even if *mens rea* is necessary, the officers "observed facts and circumstances supporting an inference of the requisite mental state." Pet'rs' Br. 20. They cite the Court's holdings in *Sibron v. New York*, 392 U.S. 40, 66 (1968), which stated that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*," and *Illinois v. Wardlow*, 528 U.S. 119 (2000), holding that a suspect's flight from officers in a high-crime area supported a reasonable suspicion of

involvement in criminal activity. They argue that, in this case, the officers observed enough information to support an inference that the partygoers possessed the requisite mental state to support their unlawful entry arrests and that those observations, combined with the direct evidence of their unlawful presence in the abandoned home, provided sufficient probable cause for the arrest. Such circumstantial evidence of requisite mental state included the furtive behavior of several of the partygoers (e.g., flight, scattering, and hiding).

Also, the officers and the District of Columbia point to the inconsistent and incomplete explanations offered by partygoers to the officers (e.g., conflicting descriptions of the event as a birthday or bachelor part, and failure to identify the guest of honor) as the type of circumstantial evidence of suspects' state of mind courts of appeals often rely on to find probable cause. *See, e.g.*, *United States v. Galvan-Castro*, 225 F.3d 664 (9th Cir. 2000) ("[A] defendant's inconsistent stories may strengthen an inference of knowledge."); *United States v. Armstead*, 112 F.3d 320 (8th Cir. 1997) (holding that inconsistent answers to officers are one factor supporting a finding of probable cause). Further, they cite *Gates* for the proposition that suspicious circumstances observed by officers, even if not constituting illegal activities, can support a finding of probable cause. *Gates*, 462 U.S. at 243 n.13. The officers and the District of Columbia argue that the officers' observation of the seemingly vacant state of the house and the odor and presence of drugs were, *inter*

alia, among the totality of the circumstances that support the officers' finding of probable cause.

In response, the partygoers argue that the officers and the District of Columbia failed to establish probable cause for an unlawful entry arrest in light of the uncontroverted, exculpatory evidence that the partygoers believed they had been invited to the party. Also, the partygoers refute the officers' and the District of Columbia's assertion of "suspicious activity," contending their behavior at the time the officers entered the home does not suggest they knew or should have known that they did not have lawful authorization to be there.

Specifically, the partygoers contend that the facts the officers observed did not establish knowledge that the partygoers knew that they were in the house against the will of its lawful owner or occupant. The partygoers cite *Ortberg v. United States*, 81 A.2d 303 (D.C. 2013), contending that a person lacks the requisite mental state for unlawful entry if he enters the home with the good faith belief in his right to enter and if there is insufficient evidence to make the person aware of the owner's intent. *Ortberg*, 81 A.2d at 309 ("[T]he existence of a reasonable, good faith belief is a valid defense precisely because it precludes the government from proving what it must—the defendant knew or should have known that his entry was against the will of the lawful occupant."). Thus, the partygoers urge, the facts surrounding their

arrest suggested a lack of the required mental intent because, as far as the officers could tell, the partygoers believed they had permission to enter the house.

The partygoers entered the home on the good faith belief that they had the right to be there and, thus, did not satisfy the requisite *mens rea* for unlawful entry. The partygoers were invited to the house by Peaches for a party—an innocent motive—and did not have reason to doubt the validity of that invitation. Although the officers learned from the property owner that Peaches did not have permission to be in the home, the partygoers contend that no evidence suggests that they were aware that they actually lacked such permission. Resp'ts' Br. 15–16.

Also, the partygoers dispute the significance of the specific evidence the officers argue creates an inference that the partygoers knew they were behaving unlawfully. Resp'ts' Br. 16. Although an individual went upstairs when the officers entered the home—and even if this behavior constituted flight—flight must be coupled with additional facts to be considered probable cause. *See Sibron*, 392 U.S. at 66–67 (stating that flight, standing alone, does not amount to probable cause). The partygoers explain that the inconsistencies in their statements regarding the host or occasion for the party are not surprising because it was a diverse gathering of acquaintances and friends. Finally, the presence of marijuana at the party, which is disputed, and the seemingly vacant state of the house are not linked to whether the

partygoers should have doubted the validity of the invitation. Therefore, without further investigation, the officers lacked probable cause to arrest the partygoers.

B. Does Qualified Immunity Shield the Officers?

The second issue in this case asks whether, even if the arrests violated the partygoers' Fourth Amendment rights, the officers nevertheless are shielded from section 1983 liability under the doctrine of qualified immunity. Police officers are immune from personal liability under section 1983 unless they violate "clearly established" law. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). In this case, the officers contend they are entitled to qualified immunity because three aspects of the law were not clearly established: (1) the requisite mental state for the offense of unlawful entry; (2) whether officers were required to adduce "some evidence for each element" of a crime to support probable cause for the arrests; and (3) how conflicting statements and inconsistent or contradictory circumstantial evidence affect probable cause. Pet'rs' Br. 25. The partygoers respond that the qualified immunity question is whether it would have been clear to a reasonable officer that the conduct was illegal under the circumstances he confronted. Applying that standard, the partygoers argue that the officers are not entitled to qualified immunity.

1. The Qualified Immunity Standard

The officers and the District of Columbia assert that qualified immunity protects the officers because they were not "plainly incompetent" and did not

"knowingly violate" clearly established law. *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014). As with probable cause, qualified immunity is designed to give public officials breathing room to make reasonable mistakes, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), ensure that police officers are on notice that their conduct is unlawful before being subjected to suit, *Hope v. Pelzer*, 536 U.S. 730, 731 (2002), and balance the public interest in encouraging the exercise of official authority with citizens' liberty interests. *Butz v. Economou*, 438 U.S. 478, 506 (1978).

The partygoers agree qualified immunity shields police officers unless they were plainly incompetent or knowingly violated clearly established law. But they counter that the more precise inquiry is whether "it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted,'" *Ziglar*, 137 S. Ct. at 1867 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)), and assert that reasonable officers should be aware of well-established law governing their conduct.

2. Was the Mens Rea for Unlawful Entry Clearly Established?

The officers and the District of Columbia rely on *Culp* to argue that, at the time of the arrests, it was clearly established that the crime of unlawful entry required only a mental state corresponding to a "general intent to enter." According to the officers and District of Columbia, the Court of Appeals improperly relied on *Ortberg* to find a more specific requirement that the suspect "'knew or should have known'

they had entered the house 'against the will of the lawful occupant . . . and intended to act in the face of that knowledge.'" They argue that *Ortberg* should not apply to this case because it was decided in 2013, five years after the arrests in this case, and the *Ortberg* court noted that the law surrounding the requisite *mens rea* was confusing and imprecise. For further evidence that the law clearly established only a general intent requirement, they stress that the Criminal Jury Instructions were modified to clarify the intent required for the crime of unlawful entry a year after the officers arrested the partygoers. Pet'rs' Br. 28 (stating new instruction defines the mental state as "entered, or attempted to enter the property voluntarily, on purpose, and not by mistake or accident" and "knew or should have known that [he or she] was entering against that person's will").

Further, the officers and the District of Columbia argue that, at the time of the arrests, it was not clearly established that a suspect's bona fide belief in his or her right to enter another's property negated liability, as opposed to serving as an affirmative defense. They cite several cases predating the arrests that categorize a bona fide belief as an affirmative defense. *See Wittlesey v. United States*, 221 A.2d 86, 92 (D.C. 1966) ("[B]ona fide belief of a right to enter . . . may be shown in defense."); *Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971) (describing bona fide belief as a "valid defense"); *Gaetano v. United States*, 406 A.2d 1291, 1293 (D.C. 1979) (same).

Conversely, the partygoers claim that D.C. law has long held that unlawful entry requires proof that the defendant knew or reasonably should have been aware that the owner did not want him on the property. Because of the "jurisdiction's strong history of requiring probable cause of a required mental state," the partygoers contend that no reasonable officer would have believed their arrests were lawful. Resp'ts' Br. 23.

The partygoers cite a number of federal and D.C. court cases for the proposition that unlawful entry requires the knowing violation of the property owner's wishes. *See United States v. Thomas*, 444 F.2d 919, 926 (D.C. Cir. 1971); *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1992) (citing *Smith v. United States*, 281 A.2d 438, 439 (D.C. Cir. 1971)) (holding that a person with reasonable and bona fide belief in right to enter lacks requisite *mens rea*); *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967) (finding unlawful entry where suspect should have known he was not permitted on an apartment building roof).

To conclude, the partygoers discuss *Ortberg*, which surveys D.C.'s district and federal decisions and says that the cases "make clear that the mental state with respect to acting against the will of the owner [requires] the government to establish that the defendant knew or should have known that his entry was unwanted." *Ortberg*, 81 A.3d at 308. The partygoers argue that, while the officers have tried to distinguish this line of cases by classifying them as affirmative defense cases, rather

than examples of "negation of a required element," a bona fide belief in one's right to enter a property is both an affirmative defense *and* a negation of an element of the underlying crime. *Id.* at 309. *Cf. Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999) (holding that officers' knowledge of an exculpatory purpose for carrying a weapon negated an element of the crime and dissipated probable cause).

3. The "Some Evidence" Standard

The officers and the District of Columbia argue that the officers were entitled to qualified immunity, further, because the Court of Appeals' decision turned on an interpretation of the probable cause standard—that police offers must be able to point to "some evidence for each element" of the crime of arrest to satisfy probable cause—that was not well settled when the arrests occurred in 2008.[2]

To support this argument, the officers and the District of Columbia argue that the two cases on which the Court of Appeals relied—*Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009), and *United States v. Christian*, 187 F.3d 663 (D.C. Cir. 1999)—are both distinguishable from the facts of this case. *Christian*, which required "some evidence" regarding the requisite mental state, dealt with a specific intent crime—possession of a dagger, D.C. Code § 22-3214(b)—not a general intent

[2] Because the partygoers claim that they are not advocating for this type of "some evidence" standard, they do not offer any specific rejoinders on this point.

crime as in this case.[3] *Christian*, 187 F.3d at 667; *see also Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) ("[A]n officer need not have probable cause for every element of an offense[,] . . . however, when specific intent is a required element of the offense, the arresting officer must have probable cause for that element."). Additionally, while the court in *Christian* applied a "some evidence" standard, it did not require direct evidence of intent, recognizing that circumstantial evidence may support the necessary inference. Here, as previously discussed, the officers assert that certain pieces of information (e.g., flight or inconsistent stories) established at least some evidence of intent, leading them to doubt the partygoers' claims of innocent entry, and complain that the District Court and Court of Appeals failed to accord that evidence sufficient weight.

The second case, *Carr*, was decided after the arrests in this case and, the officers and the District of Columba contend, also "arguably" involves a specific intent crime. The offense in *Carr*, which was rioting, D.C. Code § 22-1322(a), required that suspects take part in a parade "*knowing* no permit was granted." According to the officers and the District of Columbia, that requirement is equivalent

[3] The Supreme Court has distinguished crimes requiring general intent versus specific intent through reference to the Model Penal Code's "purpose" and "knowledge" requirements: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *United States v. Bailey*, 444 U.S. 394, 405 (1980).

to specific intent since marching with the knowledge that the parade was unpermitted amounts to intent to disregard the law. *Carr*, 587 F.3d at 410; *see also United States v. Moore*, 435 F.2d 113, 115 (D.C. Cir. 1970) (holding that a person knowingly engaging in a forbidden act, "intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent"). Additionally, they point out that, in *Carr*, the bar for the admissibility of evidence usable for an inference of intent was much lower than the standard the Court of Appeals imposed on the police officers in this case for unlawful entry: in *Carr*, the court suggested that, absent conflicting evidence, an inference drawn from the apparent nature of an activity could establish probable cause for arrest. *Carr*, 587 F.3d at 411.

Further, the officers and the District of Columbia emphasize that, outside of the District of Columbia Circuit, courts of appeals are split as to whether police officers must establish probable cause for each element of the crime of arrest. *See, e.g.*, *United States v. Argueta-Mejia*, 615 F. App'x 485, 489–90 (10th Cir. 2015) (discussing the circuit split on this issue). The Courts of Appeals for the Eighth and Third Circuits have held that they must, *Williams v. Alexander, Ark.*, 772 F.3d 1307, 1312 (8th Cir. 2014) ("For probable cause to exist, there must be probable cause for all elements of the crime."); *United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013) ("To make an arrest based on probable cause, the arresting officer must have probable cause for each element of the offense."); whereas, the Seventh and Ninth

Circuits have held that they need not do so. *Spiegel v. Cortese*, 196 F.3d 717, 724 n. 1 (7th Cir. 2000); *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994). In *Jordan v. Mosley*, 487 F.3d 1350 (11th Cir. 2007), the Eleventh Circuit—using the same language as the Court of Appeals in this case—said this standard applies only with regard to crimes of specific intent and that, for general intent crimes, an officer "needs no specific evidence of suspect's intent. All that is required is probable cause to believe the suspect did the prohibited acts." 487 F.3d at 1356. In sum, the officers and the District of Columbia argue that the appropriate standard for crimes of general intent was not clearly established in the D.C. Circuit at the time of the arrests and remains unresolved nationally.

4. The Exculpatory Evidence Standard

The partygoers argue that the officers were not entitled to qualified immunity, in part because, at the time of the arrests, settled D.C. law established that lack of knowledge that one's presence on a property contravenes the lawful occupant or owner's will precluded liability for unlawful entry. *Christian*, 187 F.3d at 667; *Carr*, 587 F.3d at 410–11. The partygoers assert this principle was "well established because the presiding D.C. courts have long declared it binding . . . ." Resp'ts' Br. 23.

Further, the partygoers argue that, at the time of the 2008 arrest, it was well established in D.C. law more generally that an innocent mental state was exculpatory

for crimes requiring a particular *mens rea*. The partygoers point to *Christian*, where the Court of Appeals found that because of the uncontroverted evidence of the suspect's innocent mental state—specifically a "lawful explanation" for the possession of a dagger offense—there was no probable cause for arrest. *Christian*, 187 F.3d at 667. They also cite *Carr* for the proposition that D.C. requires a probable cause analysis of mental state for crimes general intent crimes. *Carr*, 587 F.3d at 410–11. Finally, the partygoers cite *United States v. Vinton*, No. 06-298(GK), 2007 WL 495799, at *2 (D.D.C. Feb. 12, 2007), for its statement that evidence of the requisite mental state is required to establish probable cause for specific intent crimes. *Id.*

The partygoers contend that probable cause cannot exist if the known facts do not support a conclusion of guilt. They emphasize that police officers are afforded discretion in their probable cause determinations but are still held to a standard of reasonableness, meaning an officer cannot reasonably find probable cause in the face of uncontroverted exculpatory evidence. Resp'ts' Br. 29. Officers must consider "all facts leading sensibly to their conclusions." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). According to the partygoers, a finding of probable cause is supported only if reasonably trustworthy information would lead a prudent man to believe a crime is being committed. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

5. Was the Officers' Arrest Reasonable?

The officers and the District of Columbia assert that the officers could "reasonably have believed that District law supported a finding of probable cause under these facts . . . ." Pet'rs' Br. 35. Essentially, they argue that "existing precedent must have placed the statutory or constitutional question beyond debate," *Ashcroft v. al-Kidd*, 564 U.S. 731, 741 (2011), which did not occur here.

The officers and the District of Columbia argue that the law is unclear within the D.C. District and Circuit Courts, and in fact, that D.C. law supports a finding of probable cause in spite of claims of innocent entry. *See, e.g.*, *Culp*, 486 A.2d at 1147 ("[W] here . . . an officer observes a person inside a vacant building, the officer has reason to believe that person does not belong there, and the property itself reveals indications of a continued claim of possession by the owner or manager, there is probable cause to arrest for unlawful entry."); *McGloin*, 232 A.2d at 90–91 (affirming the conviction for unlawful entry in a residential building even though defendant claimed to be looking for his cat or friend). Next, the officers and the District of Columbia point to the range of sister circuit court decisions supporting a finding of probable cause in the face of suspects' inconsistent statements, including:

- *United States v. Pack*, 612 F.3d 341, 360–61 (5th Cir. 2010) (finding probable cause where the defendant's inconsistent statements created a "reasonable suspicion of criminal activity");

- *United States v. Galvan-Castro*, 225 F.3d 664 (9th Cir. 2000) ("Moreover, a defendant's inconsistent stories may strengthen an inference of knowledge."); and
- *United States v. Armstead*, 112 F.3d 320, 322 (8th Cir. 1997) (supporting a finding of probable cause when considering the suspect's inconsistent statements coupled with other extrinsic evidence).

At the very least, given unsettled or unclear D.C. law, the officers and District of Columbia assert the officers cannot be held to have violated constitutional rights that meet the *Ashcroft* "beyond debate" standard.

Further, the officers and the District of Columbia propose that the Court follow the Third Circuit Court of Appeals' rule from *Wright v. City of Phila.*, 409 F.3d 595 (3d Cir. 2005), which was also acknowledged by the Court of Appeals' decision below. In *Wright*, the court held that officers were "entitled to discredit" a suspect's "innocent explanation for entry into a house in the face of conflicting evidence." 409 F.3d at 603. The Third Circuit found that the officers had probable cause to arrest a woman for unlawful entry despite her innocent explanation that she entered the home to retrieve clothes and evidence that she had been assaulted. *Id.* at 602.

Ultimately, the officers and the District of Columbia contend that, in the absence of a clear rule, the totality of the circumstances, including the flight of some

of the partygoers, the presence of marijuana, and the partygoers' inconsistent and conflicting statements regarding their claims of innocent entry, would lead a reasonable officer to conclude that probable cause for the requisite mental state for unlawful entry existed.

Rather than focusing on the reasonableness of the officers' arrests, the partygoers focus on the presence of uncontroverted exculpatory evidence and a standard of reasonableness—which they claim was not met here—to refute any claim of qualified immunity.

The partygoers argue that, applying the standard laid out above, their bona fide belief that they had a right to be in the house exculpated them from liability—and therefore probable cause—for unlawful entry. Further, in the face of uncontroverted exculpatory evidence, any arrest violates their rights and does not afford the officers qualified immunity. Without the shield of qualified immunity, the officers are liable for damages for the arrest of the partygoers without probable cause.

V. CASE SUMMARIES

A. *Florida v. Harris*, 568 U.S. 237 (2013)

Holding

The Supreme Court rejected a bright-line rule requiring the prosecution to prove that a particular dog drug-detection method was reliable to establish probable cause and reinforced a more flexible, totality-of-the circumstances approach allowing both sides to introduce evidence as to the reliability of evidence.

Summary

Police stopped the defendant's car for an expired registration. After a drug detection dog alerted the officer, police searched the car and discovered pseudoephedrine and other supplies for making methamphetamine. The dog was trained to detect several types of illegal substances, but not pseudoephedrine.

The State of Florida charged the defendant with possession of pseudoephedrine with intent to manufacture methamphetamine. At trial, the defendant moved to suppress evidence obtained during the warrantless search of his car, arguing that the fact that the dog's alert was false undermined probable cause for the search. The Florida trial court denied the motion to suppress, holding that the totality of the circumstances provided probable cause to conduct the search. The First District Court of Appeal affirmed, but the Florida Supreme Court reversed,

holding that the State had not sufficiently proved the dog's reliability in drug detection to establish probable cause.

The U.S. Supreme Court reversed in a unanimous opinion. It rejected the Florida court's rigid requirement that police officers show evidence of a dog's reliability in the field to prove probable cause and reaffirmed that probable cause is a flexible, common-sense test that takes the totality of the circumstances into account.

A probable cause hearing for a dog alert should proceed as any other, allowing each side to make its best case with all available evidence. The Court expressly noted that a defendant should be allowed to challenge, "whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses," the adequacy of training, lack of rigorous standards, or particular circumstances of a dog alert. The record in this case supported the trial court's determination that police had probable cause to search the defendant's car.

B. *Maryland v. Pringle*, 540 U.S. 366 (2003)

Holding

Probable cause may arise absent evidence of specific evidence showing that a defendant actually knew about or possessed drugs where surrounding circumstances provide enough information to raise a reasonable suspicion that the defendant was involved in criminal activity.

Summary

After stopping a car for speeding, a police officer searched the car and seized money from the glove compartment and cocaine from behind the backseat armrest. The officer arrested the three occupants in the car even though they denied ownership of the drugs and money. The state court convicted Pringle, the front-seat passenger, for possession of and intent to distribute cocaine. The state appellate court reversed the conviction, holding that, in the absence of specific facts showing that the front-seat passenger knew about or specifically possessed the drugs and money, the mere fact that the defendant was seated in the car where the evidence was found was insufficient to establish probable cause.

The U.S. Supreme Court disagreed. In a unanimous opinion, the Court ruled that the facts of the search and arrest adequately supported the trial court's probable cause determination. The three men were riding together in a small car that carried a quantity of drugs and cash that suggested drug-dealing activity, and none of the

three men provided any information that would have exonerated any of the others. Under these circumstances, it was reasonable for the officer to infer that any or all three of the passengers knew about and exercised control over the contraband.

C. *Hope v. Pelzer*, 536 U.S. 730 (2002)

Holding

For qualified immunity purposes, officials can be on notice that their conduct violates clearly established law even in novel factual circumstances and absent cases with materially similar facts.

Summary

This is an Eighth Amendment civil rights violation case arising from prison guards' actions in twice handcuffing Alabama prison inmate to a hitching post for disruptive conduct, once for seven hours without a shirt in the hot sun with few water breaks and no bathroom breaks. The Court of Appeals for the Eleventh Circuit held that the officers' conduct violated the Eighth Amendment, but that they were nevertheless entitled to qualified immunity because its determination on the merits was not supported by cases with "materially similar" facts.

The Supreme Court reversed, holding that, under *United States v. Lanier*, 520 U.S. 259 (1997), defendants can be on notice that their conduct violates established law even in novel factual circumstances. The relevant question is not whether previous cases were "fundamentally" or "materially similar" to the facts; instead, it is the more general question whether the state of the law at the time of the offense gave officers "fair warning" that their conduct was unconstitutional.

In Hope's case, the obvious cruelty inherent in the practice of handcuffing an inmate to a hitching post should have put the officers on notice that their conduct was unconstitutional. Moreover, binding Court of Appeals cases, Alabama Department of Corrections regulations, and an existing Department of Justice report all suggested that using a hitching post for punishment was constitutionally problematic.

D. *Illinois v. Gates*, 462 U.S. 213 (1983)

Hoding

The standard for probable cause is "totality of the circumstances," not the more rigid, two-pronged "credibility/reliability" and "basis of knowledge" test established in *Spinelli v. United States*, 393 U.S. 410 (1969). An independent magistrate's finding that there is a "substantial basis" that a search will uncover evidence of wrongdoing satisfies the Fourth Amendment's probable cause standard for issuance of a warrant.

Summary

The police received an anonymous letter identifying the defendants as drug traffickers. The letter included details as to the methods the defendants used to purchase drugs in bulk and asserted that the defendants had over $100,000 in drugs in their basement. Following up on the tip, the police observed a drug smuggling operation in action and obtained a search warrant based on the tip and the defendants' corroborating activities. While executing the warrant, the police discovered drugs, weapons, and other contraband in the defendants' automobile and home. The Supreme Court considered whether a magistrate judge could issue a valid warrant based on an anonymous tip corroborated by independent police observation, when the police lacked any indicia of the informant's "basis of knowledge."

The Court held that, where an anonymous tip is corroborated with actual police findings, probable cause may be determined by a "totality of the circumstances" approach, rather than the two-pronged test of "credibility/reliability" and "basis of knowledge" from *Spinelli v. United States*, 393 U.S. 410 (1969). The elements of the informant's "credibility/reliability" and "basis of knowledge" were to be used as guides when considering the "totality of the circumstances," but they were not the exclusive requirements in every case. The Fourth Amendment requires no more than a finding by an issuing magistrate that there was a "substantial basis" that a search would uncover evidence of wrongdoing.

The concurrence opined that, even if the factual findings by police were only corroborated by innocuous behavior, a valid warrant could still have been issued because the defendants' actions were suspicious. The concurring opinion argued that the main focus of the inquiry should be whether the suspects' actions supported an inference that the informant was credible and the information was obtained in a reliable manner.

The dissent would have held that the warrant was improperly granted. Since some of the anonymous tips were not corroborated and actually proved false, the informant's "credibility/reliability" was undermined, and, therefore, the warrant should not have been issued. Police cannot use findings of an illegal search to substantiate a previously issued warrant.

E. *Adams v. Williams*, 407 U.S. 143 (1972)

Holding

Where officers' initial stop of a suspect is lawful under *Terry*, information discovered during the stop may be considered in addition to the information that led to the stop to establish probable cause for a subsequent arrest.

Summary

A Connecticut police officer received a tip that the defendant, who was sitting in a vehicle early in the morning, was carrying narcotics and a firearm. In responding to the tip, the officer tapped on the defendant's vehicle window and asked him to open the door. The defendant refused and rolled down the window instead. The officer then reached inside the car and removed a fully loaded firearm from the defendant's waist. The weapon was not visible from outside the car but was exactly where the informant stated it would be. The officer then arrested the defendant for unlawful possession of a firearm and conducted a full search of the defendant and his car pursuant to the arrest, during which the officer discovered heroin and additional weapons.

The Supreme Court held that the initial stop was lawful under *Terry v. Ohio*, 392 U.S. 1 (1968), and that the discovery of the gun established probable cause to arrest the defendant for unlawful possession of a weapon. The initial stop and search for the gun was lawful because the tip was not anonymous, the officer knew the

informant and had previously received information from him, the officer and defendant were located in a high-crime area early in the morning, and the defendant chose to roll down his window rather than getting out of his car. The presence of the gun in the defendant's waistband served to corroborate the informant's report that the defendant was also carrying drugs; given all of these facts, the officer had probable cause to arrest the defendant and to search his person and car.

Notably for purposes of this case, the Court said, "Probable cause does not require the same type of specific evidence for each element of the offense as would be needed to support a conviction. . . . Rather, the court will evaluate generally the circumstances at the time of the arrest to decide if the officer had probable cause for his action."

F. *Brinegar v. United States*, 338 U.S. 160 (1949)

Holding

Probable cause requires only a reasonable ground for belief of guilt, not evidence of guilt beyond a reasonable doubt.

Summary

In this pre-*Terry* case, the defendant had a reputation for illegally transporting liquor across state lines, in violation of 27 U.S.C. § 223. A police officer parked on the edge of a highway, recognized the defendant, and noted that the defendant's vehicle looked "heavily loaded." The officer claimed he could see one case of alcohol in the front seat of the car when he stopped the vehicle, but the defendant denied that any liquor was visible. The officer arrested the defendant and seized the alcohol in the car as well as alcohol he found in the trunk after the arrest. The defendant challenged the constitutionality of his arrest on the grounds that the original stop was invalid for lack of probable cause.

The Supreme Court held that the officer had probable cause to stop the defendant's car, and the arrest was constitutional. The Court emphasized "probable cause" was the standard for conducting an arrest, not "guilt beyond a reasonable doubt," as required for criminal convictions. The Court stressed that if the "beyond a reasonable doubt" standard was used in ordinary arrests, officers would rarely take "effective" action in protecting the public good because the standard would be too

high a burden. The Court noted that to require more than probable cause would harm police officers, while to allow less than probable cause would "leave law-abiding citizens at the mercy of the officers' whim or caprice." Nonetheless, the Court cautioned probable cause still requires "a reasonable ground for belief of guilt." Thus, the Court announced it would consider the reasonableness of an officer's belief when it evaluates a warrantless search.

G. *Ortberg v. United States*, 81 A.3d 303 (D.C. 2013)

Holding

To establish unlawful entry under D.C. law, the government needs only to prove that the defendant entered property against the lawful occupant's will; it does not need to show that the defendant intended to defy the lawful occupant's will or violate the law.

Summary

After entering a private function room in a hotel where an invitation-only fundraiser for a member of the United States House of Representatives was being held with intent to stage a protest, the defendant was charged with unlawful entry. The defendant asserted at trial that his entry was at most "opportunistic" and was not "clearly unlawful" because the room was not closed off to members of the public who might be in the hotel lobby. Therefore, he argued, the government had failed to prove that he had the requisite mental state to commit unlawful entry and to disprove his bona fide belief in the lawfulness of his actions.

The defendant was convicted, and the D.C. Court of Appeals affirmed, holding that the government needed to prove only that the defendant knew or should have known his entry was unwanted to establish that his entry was against the lawful occupant's will. The government did not need to prove the defendant purposefully sought to defy the lawful occupant's will or to violate the law. Applying this

standard, the Court of Appeals held that there was ample evidence to support the defendant's conviction.

H. *Culp v. United States*, 486 A.2d 1174 (D.C. 1985)

Holding

The defendant's presence in vacant building, combined with apparent indications of a continued claim of possession by a property owner, such as boarding up the house, and suspicious behavior by the suspect together established probable cause to support arrest for unlawful entry under D.C. law.

Summary

The defendant was arrested and searched when he was found inside a vacant house. The defendant contended that his arrest was not supported by probable cause and that the subsequent search of his person, during which the arresting officers found several packets of heroin, was constitutionally invalid. The defendant argued that, because the house was obviously vacant and in a state of disrepair, he could not have known he was entering the house against the will of the lawful occupant.

The defendant was convicted, and the D.C. Court of Appeals affirmed, holding that the defendant's inability to answer the officer's questions about what he was doing in the house, the fact that the house had been boarded up, and the officer's preexisting knowledge of the landlords' efforts to prevent damage or trespass to the property together gave the officer reasonable grounds to believe the defendant did not belong in the vacant house and, therefore, probable cause to support an unlawful entry arrest.