No. 07-751

In The
# Supreme Court of the United States

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

*Petitioners,*

v.

AFTON CALLAHAN,

*Respondent.*

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

## REPLY BRIEF FOR PETITIONERS

PETER STIRBA
*Counsel of Record*
STIRBA & ASSOCIATES
215 South State Street,
Suite 750
Salt Lake City, Utah 84111
(801) 364-8300

ORIN S. KERR
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-4775

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

## REPLY BRIEF FOR PETITIONERS

Respondent's arguments do not withstand scrutiny. The Tenth Circuit's decision below creates a clear and acknowledged circuit split and misapplies the law of qualified immunity. A grant of certiorari is needed in this case to settle the scope of the "consent once removed" doctrine and to correct the Tenth Circuit's qualified immunity analysis.

### I. Respondent Concedes That A Circuit Split Exists.

Respondent concedes, as he must, that a clear circuit split exists in this case. The Sixth and Seventh Circuits have held that the "consent once removed" doctrine applies when confidential informants permit the search and that such searches are constitutional. In contrast, the Tenth Circuit below held that the doctrine does not apply in those circumstances and that such searches are unconstitutional. *See* Pet. for Cert. at 8-10. The circuit split is clear and unambiguous, and the Brief in Opposition does not question it.

The Respondent asserts two reasons why the Court should not grant certiorari despite the clear circuit split. First, Respondent argues at length that the Tenth Circuit's Fourth Amendment analysis is correct. *See* BIO at 5-8, 10-15. This argument is misplaced because the merits are not yet before the Court. In addition, the Tenth Circuit's view is the minority view among the Courts of Appeals. The alleged correctness of a minority position is not

normally considered a factor counseling against certiorari review.

Second, Respondent asserts that the Court should not resolve the clear circuit split in order to "allow the issue to develop further in the courts of appeals." BIO at 8. This view is unpersuasive for two additional reasons beyond those discussed in the Petition for Certiorari. *See* Pet. for Cert. at 12-13.

*First*, the present uncertainty over the "consent once removed" doctrine comes at a high cost for law enforcement. The circuit split places the police in a serious bind. Investigators cannot know whether future courts will find the Tenth Circuit's view or the Sixth/Seventh Circuit view more persuasive. If the courts end up accepting the Sixth/Seventh Circuit view, then the evidence will be admitted against the suspect and the officers will not be liable. If the courts end up accepting the Tenth Circuit's view, then the evidence will be rejected and the officers may face personal liability in light of the Tenth Circuit's prior holding that the illegality of the technique was "clearly established." This sort of uncertainty is intolerable. The Nation's police need a simple rule, and only this Court can provide it.

*Second*, further percolation is unnecessary because this case is not rocket science. The Court often allows issues to percolate in the lower courts to let more minds ponder difficult questions. This makes sense in complex cases: By the time an issue reaches

the Court, many different judges will have illuminated the issues in written opinions. However, additional percolation makes little sense in a dispute such as this. The facts and the law here are uncomplicated. The question presented asks the Court to resolve whether the entry was constitutionally reasonable, and in particular whether it makes a difference that the initial entry was by an informant instead of an undercover officer. *See* Pet. for. Cert at 8-9. This is a straightforward question, and it seems highly unlikely that additional decisions will bring new pearls of wisdom to help answer it. This area of law demands certainty now, not additional percolation in the lower courts.

## II. Respondent's Approach to Qualified Immunity Was Rejected By This Court in *Mitchell v. Forsyth*.

As explained in the Petition for Certiorari, the Tenth Circuit's error in applying the qualified immunity standard provides an independent basis for certiorari review. *See* Pet. for Cert. at 14-20. The Tenth Circuit committed an elementary error by construing the relevant right at the most general level possible. This led to a paradoxical result: The entry was deemed to have violated a "clearly established" right even though it appears that no court had previously held that an entry in similar circumstances violates the Fourth Amendment.

Respondent counters with a novel argument about the significance of *Groh v. Ramirez*, 540 U.S. 551 (2004). According to the BIO, qualified immunity is unavailable when the government relied on an exception to the warrant requirement not already recognized by the Supreme Court. *See* BIO at 9-10. Under this reasoning, courts have two choices: Either they must adopt the proposed exception or else they must rule that the search violated "clearly established" rights.

*Mitchell v. Forsyth*, 472 U.S. 511 (1985), squarely rejects this approach to qualified immunity. In *Mitchell*, then-Attorney General John Mitchell authorized a warrantless wiretap of a radical domestic group on the untested theory that the Fourth Amendment recognized an exception for domestic security wiretapping. Two years later, in *United States v. United States District Court*, 407 U.S. 297 (1972), the Supreme Court rejected Mitchell's theory and held that such monitoring required a warrant. Forsyth then sued Mitchell, and Mitchell argued that his authorization of the monitoring was protected by either absolute or qualified immunity. This Court held that qualified immunity was the appropriate standard, and it then held that Mitchell was entitled to qualified immunity because existing precedents left unclear whether the Court would accept a domestic security exception to the warrant requirement. *See Mitchell*, 472 U.S. at 530-535. The Court explained:

> We do not intend to suggest that an official is always immune from liability or suit for a

> warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. *But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.*

*Id.* at 535, n.12 (emphasis added). If the "consent once removed" doctrine does not permit the entry in this case, the circumstances of this case become precisely like those of *Mitchell v. Forsyth*. As in *Forsyth*, the Petitioners are entitled to qualified immunity.

Respondent does not cite *Mitchell v. Forsyth*, but appears to read *Groh v. Ramirez* as implicitly overruling it. *See* BIO at 9-10. This interpretation is incorrect. In *Groh*, the police executed a warrant that did not correctly state the property to be seized: The officer who obtained the warrant "entered a description of the place to be searched in the part of the warrant form that called for a description of the property to be seized." *See Groh*, 540 U.S. at 567 (Kennedy, J., dissenting). In defense of a civil action against them, the officers made a clearly unpersuasive claim that the obviously defective warrant was not actually defective. The Court instead adopted the simple proposition that an obviously defective warrant is, well, obviously defective. *See id.* at 563 ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer

could believe that a warrant that plainly did not comply with that requirement was valid.").

Commentators have widely criticized this holding. For example, Professor LaFave describes it as "flat-out wrong." 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.3(f) (4th ed. 2004) (2007 Supp.). But whether *Groh* was persuasive or not, nothing in the opinion suggests that it overruled *Mitchell v. Forsyth*. Indeed, none of the opinions in *Groh* even cite *Mitchell v. Forsyth*.

## III. The Utah Court of Appeals Did Not Decide the Legality of the Search.

Several comments in the Brief in Opposition could be construed generously to suggest that the decision of the Utah Court of Appeals in the prior state court action has preclusive effect on the lawfulness of the officers' entry. *See* BIO at 6 ("The legality of the search was decided in the state courts: it was held to be illegal."). To the extent the BIO is read to make this argument, such a position is without merit.

It is blackletter law that a criminal judgment has no collateral estoppel effect in a subsequent federal civil rights claim brought against individual officers. *See* 18A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4458 (2007) ("[A] judgment against a government does not bind its officials in subsequent litigation that asserts a personal liability against the officials."); *see also Novitsky v. City of Aurora*, 491 F.3d 1244, 1252 n.2 (10th Cir. 2007)

(noting that "a court's conclusion during a criminal prosecution that a law enforcement officer's conduct was unconstitutional is not afforded collateral estoppel effect in a subsequent civil case against the officer because there is no privity between the prosecution in the criminal case and the officer."); *Tierney v. Davidson*, 133 F.3d 189, 195 (2d Cir. 1998) (same) (citing cases).

Judge Cassell's opinion for the District Court discusses this issue in depth, Pet. App. 42-45. Judge Cassell's view that the state court opinion has no preclusive effect was plainly correct. Unsurprisingly, the Tenth Circuit decision below did not challenge it. The lawfulness of the Petitioners' entry into Respondent's home is before the federal courts *de novo*, making this case an ideal vehicle for resolving the scope of the "consent once removed" doctrine.

Indeed, the combination of a clear split on the Fourth Amendment issue and the qualified immunity issue makes this case an unusually strong vehicle for certiorari. By granting certiorari on both Questions Presented, the Court can resolve the split and then, if necessary, resolve the immunity question. If the Court holds that there was no Fourth Amendment violation, the erroneous qualified immunity ruling below will be taken off the books. *See*, *e.g.*, *Scott v. Harris*, 127 S. Ct. 1769 (2007). On the other hand, if the Court finds a Fourth Amendment violation, it can then turn to the qualified immunity question and

therefore address both issues directly. *See generally Saucier v. Katz*, 533 U.S. 194 (2001).

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

PETER STIRBA
*Counsel of Record*
STIRBA & ASSOCIATES
215 South State Street,
Suite 750
Salt Lake City, Utah 84111
(801) 364-8300

ORIN S. KERR
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-4775