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**U.S. Supreme Court Revisits the
Basics of Probable Cause
and Qualified Immunity**

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❖ **Introduction**

Overtaking a decision of the U.S. Court of Appeals for the D.C. Circuit and a judgment of damages and attorneys' fees totaling almost \$1 million awarded to multiple partygoers arrested in a vacant house, the U.S. Supreme Court, in [District of Columbia v. Wesby](#), #15-1485, 199 L. Ed. 2d 453, 2018 U.S. Lexis 760 revisited the topics of probable cause for arrest and the defense of qualified immunity. In these days when the Court is often sharply divided on many important issues, there was unanimity among the nine Justices on the need to overturn the award, with 7 members of the Court joining in the opinion authored by Justice Thomas, and the other two Justices concurring in the result, but writing separately on their reasoning and emphasis.

This article examines the facts of the case and the Court’s reasoning in reaching the conclusions that it did. The case can serve as a useful primer on the current state of the law on these two very important topics for law enforcement.

We suggest a prior article in this journal, [When is Law “Clearly Established” for Purposes of Qualified Immunity in Civil Rights Litigation?](#), 2017 (3) AELE Mo. L. J. 101 as beneficial companion background reading to this one, as well as the section entitled “Some Suggestions to Consider” in [An Introduction to Qualified Immunity as a Defense in Prisoner Civil Rights Litigation – Part 2](#), 2018 (1) AELE Mo. L. J. 301.

At the conclusion of this article, there is a brief listing of other useful and relevant resources and references.

❖ **Facts of the Case**

About 1 a.m. on March 16, 2008, D.C. police got a complaint about an unruly party with loud music and suspected illegal activity taking place in a vacant house.

When officers knocked at the front door, they observed a man glance out the window and then scurry upstairs. Then officers were admitted by a partygoer, and right away saw that the house looked like a vacant dwelling, was in “disarray,” and was littered with beer bottles and cups of liquor on a floor so filthy that one of the partygoers flatly refused to sit on it while officers asked them questions.

While there was working electricity and plumbing, there was almost no furniture, other than a few metal padded chairs. Blinds on the windows were the only observable signs of habitation besides some food items in the refrigerator and toiletries in the bathroom, both of which might have been brought in by the partygoers.

There was a makeshift strip club in the living room in which several women clad only in bras and thongs, with money tucked into their garter belts were giving lap dances. Other partygoers watched, with most holding cash and cups of alcohol. The presence of the officers caused many of those present to quickly go elsewhere in the house.

Upstairs, in what the Court characterized as a scene of debauchery, there was a single woman and several men in a room with a bare mattress on the floor, which was littered with opened condom wrappers as well as a used condom on the windowsill and lit candles on the floor. There were no other mattresses or beds anywhere in the house. A partygoer hid in an upstairs closet, while another stayed in a shut bathroom, refusing to exit.

The officers found a total of 21 people in the house. Questioning them all resulted in an unclear and inconsistent picture of the origin of the party. Some said that the event was a “bachelor party,” but nobody could tell the officers who the supposed “bachelor” was, and no one identified themselves as that person.

Everyone stated that they had been invited to the party, but at first couldn’t say by whom. Two of the women who appeared to be “working” the party, finally claimed that a woman named either “Peaches” or “Tasty” was the home’s renter and granted permission for everyone’s presence. She had allegedly just rented the house when the previous owner died, but officers found no evidence of anyone moving in, such as moving supplies.

Peaches was not at the party, and no one knew her real name. An officer prevailed on one of the women to phone Peaches, who when contacted refused to come to the home, expressing fear of being arrested. Over a number of phone conversations, she furnished conflicting information about her relationship to the house and party, first claiming to be a renter who had given permission for everyone to be there, then hanging up after yelling, and finally admitting that she had no permission of any kind to use the house.

Officers managed to identify the owner of the building and contact him, finding out that he had entered into negotiations with Peaches to rent her the house, but had not reached a deal. He also made it clear that he had not given anyone consent to go into the house or have a party there. The officers then arrested all 21 people present for unlawful entry, charges that were altered to disorderly conduct at the police station. Everyone was released, with the charges later dropped.

16 of the arrestees sued the District of Columbia and five of the officers for false arrest in violation of the Fourth Amendment, as well as false arrest and negligent supervision under D.C. law. They claimed that they were arrested without probable cause.

The trial court granted the plaintiffs partial summary judgment, finding a lack of probable cause to arrest for unlawful entry, as nothing the officers learned showed that the partygoers “knew or should have known” that they were entering the building without the owner’s consent. The judge ruled further that the officers were not to be granted qualified immunity because D.C. law required that they have evidence that an alleged intruder knew or should have known, upon entry that such entry was against the will of the owner.

A jury trial ensued, solely on damages, and a total of \$680,000 in compensatory damages was awarded. A trial court award of attorneys’ fees to the partygoers as prevailing plaintiffs raised the total awarded to close to \$1 million.

The U.S. Court of Appeals for the D.C. Circuit upheld this result. A 2-1 divided panel of the D. C. Circuit made Peaches’ supposed invitation “central” to its determination that the officers lacked probable cause to arrest the partygoers for unlawful entry, **stating that**, “in the absence of any conflicting information, Peaches’ invitation vitiates the necessary element of [the partygoers’] intent to enter against the will of the lawful owner.” The panel majority asserted that “there is simply no evidence in the record that [the partygoers] had any reason to think the invitation was invalid.” The officers must, the court stated, “have known that uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry.

The U.S. Supreme Court granted review on the issues of whether the officers had probable cause to arrest the partygoers, and whether the officers were entitled to qualified immunity. It answered in the affirmative on both questions, overturning the judgment and the award of damages and attorneys’ fees.

❖ U.S. Supreme Court Decision

--Probable Cause to Arrest

To determine whether an officer had probable cause for an arrest, the Court noted, “we examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause.” Because probable cause “deals with probabilities and depends on the totality of the circumstances,” it is “a fluid concept”

that is “not readily, or even usefully, reduced to a neat set of legal rules,” It “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”

In this case, the Court found, there was absolutely no dispute that the partygoers entered the house against the will of the owner. Despite this, the plaintiffs claimed that there was no probable cause because the officers had no reason to believe that they “knew or should have known” their “entry was unwanted.”

The Court disagreed. Based on the totality of the circumstances, the officers made an “entirely reasonable inference” that the partygoers were knowingly taking advantage of a vacant house as a setting for their late-night party. The Court based this on the condition of the house, its vacant appearance, lack of furnishings, filthy floors, and few signs of inhabitance.

The fact that there were blinds, electricity, food in the refrigerator and toiletries in the bathroom were found not to be inconsistent. “The owner could have paid the utilities and kept the blinds while he looked for a new tenant, and the partygoers could have brought the food and toiletries.”

The fantastic story of Peaches renting the house and inviting the partygoers for a bachelor party for an apparently non-existing “bachelor” altered little or nothing in the Court’s view, given the apparent total lack of evidence of any move-in such as boxes, moving supplies, or clothes in closets.

Besides the condition of the house, the Court pointed to the partygoers’ conduct, including music “so loud that it could be heard from outside,” the floor littered with beer bottles and liquor cups, the makeshift strip club, and the open sexual activity upstairs.

Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several “common-sense conclusions about human behavior.” Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized.

The Court further found the partygoers' reaction to the officers' presence, such as hiding or fleeing to other parts of house, as additional reasons for the officers to believe that the plaintiffs knew they lacked permission to be in the house.

Unprovoked flight at seeing police can be suggestive of wrongdoing and can be treated as suspicious behavior that factors into the totality of the circumstances to be evaluated when determining whether there is probable cause to arrest.

The plaintiffs' evasive and vague answers to questioning also suggested their guilty state of mind, the Court stated, and their knowledge that they were not supposed to be there and had no real permission to enter.

Add to that the phone conversations with Peaches which led to her admission that she had no right to invite anyone to enter the house. "Peaches' lying and evasive behavior gave the officers reason to discredit everything she had told them. For example, the officers could have inferred that Peaches lied to them when she said she had invited the others to the house, which was consistent with the fact that hardly anyone at the party knew her name. Or the officers could have inferred that Peaches told the partygoers (like she eventually told the police) that she was not actually renting the house, which was consistent with how the partygoers were treating it."

Looking at these facts as a whole, the Court reasoned, reasonable officers could conclude that there was probable cause to believe the partygoers knew they did not have permission to be in the house.

Problems with the appeals courts' approach

The Supreme Court found the approach of the appeals court's panel majority troubling. They appeared to view each fact in isolation rather than as just one factor in the totality of circumstances to be used in determining the presence of probable cause.

Our precedents recognize that the whole is often greater than the sum of its parts--especially when the parts are viewed in isolation. Instead of considering the facts as a whole, the panel majority took them one by one. For example, it dismissed the fact that the partygoers "scattered or hid when the police entered the house" because that fact was "not sufficient *standing alone* to create probable cause." (emphasis added). Similarly, it found "nothing in the record suggesting that the condition of the house, *on its own*, should have alerted the [partygoers]

that they were unwelcome.” (emphasis added). The totality-of-the-circumstances test “precludes this sort of divide-and-conquer analysis.”

Further, the panel majority “mistakenly believed” that it could dismiss outright any circumstances that were “susceptible of innocent explanation,” leading to brushing aside the drinking and the lap dances as “consistent with” the partygoers’ explanation that they were having a bachelor party. It similarly dismissed the unruly condition of the house as consistent with Peaches being a new tenant.

The determination of probable cause does not require that police officers “rule out the suspect’s offered innocent explanation,” but in this case, the relevant question was “whether a reasonable officer could conclude--considering all of the surrounding circumstances, including the plausibility of the explanation itself--that there was a ‘substantial chance of criminal activity.’”

In this case, the Court concluded, the circumstances suggested criminal activity. A factor viewed in isolation is often more “readily susceptible to an innocent explanation” than one viewed as part of a totality. The officers had plenty of reasons to doubt the partygoers’ claims of innocence. The Court concluded that the officers had probable cause, which was enough, by itself, to overturn the award.

--Qualified Immunity Defense

The determination that the officers had probable cause to make arrests was enough to resolve the case. But the Court did not stop there, as it could have. Instead, it went on to discuss the question of whether the officers would have been entitled to the defense of qualified immunity even if it were determined that they did not actually have probable cause. Why?

Last year, in [White v. Pauly](#), #16-67, 137 S. Ct. 548, 196 L. Ed. 2d 463, 2017 U.S. Lexis 5, the Court noted that it had found it necessary in multiple cases in recent years to overturn denials of qualified immunity by lower courts that appeared to misunderstand what it meant to determine that the law on a subject was clearly established, giving officers notice that a particular course of conduct was proscribed. As a result, in that case involving use of deadly force, it further refined and clarified what it means for the law on a subject to be “clearly established” for purposes of

overcoming qualified immunity as a defense. That case is discussed in more detail in [When is Law "Clearly Established" for Purposes of Qualified Immunity in Civil Rights Litigation?](#), 2017 (3) AELE Mo. L. J. 101.

Plainly, that is still a concern for the Court. Troubled by the approach the D.C. panel took on the qualified immunity issue, the Court exercised its discretion to analyze what the correct approach was, in order to admonish lower courts on how broad and expansive the defense of qualified immunity is intended to be.

“We exercise that discretion here because the D. C. Circuit’s analysis, if followed elsewhere, would ‘undermine the values qualified immunity seeks to promote.’”

Officers are entitled to qualified immunity under 42 U.S.C. §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was “clearly established at the time.” Clearly established means that, at the time of the officer’s conduct, the law was “‘sufficiently clear’ that every ‘reasonable official would understand that what he is doing’” is unlawful. In other words, existing law must have placed the constitutionality of the officer’s conduct “beyond debate.”

This is a demanding standard that protects “all but the plainly incompetent or those who knowingly violate the law.”

A legal principle is only clearly established when it has “a sufficiently clear foundation in then-existing precedent,” in other words, it must be “settled law” dictated by “controlling authority” or “a robust ‘consensus of cases of persuasive authority.’” If the rule is not one that “every reasonable officer” would know, but rather one that is subject to reasonable debate, it is not clearly established.

As an aside, the Court also went out of its way, in footnote 8 to the opinion, to state that it was not yet decided whether decisions by lower federal courts, such as the various courts of appeals, are sufficient to make a legal principle clearly established law:

“We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity. See, e.g., [Reichle v. Howards](#), 566 U. S. 658, 665–666 (2012) (reserving the question whether court of appeals decisions can be ‘a dispositive source of clearly established law’). We express no view on that question here. Relatedly, our citation to and discussion of

various lower court precedents should not be construed as agreeing or disagreeing with them, or endorsing a particular reading of them.”

What about the level of generality of the legal principle established? The Court cautioned that the “clearly established” standard requires that the legal principle clearly prohibit the officer’s conduct in the particular circumstances before him. With a warrantless arrest, the rule must obviously resolve “whether ‘the circumstances with which [the particular officer] was confronted . . . constitute[d] probable cause.’”

Applying these principles, the Court readily concluded that the officers in this case were entitled to qualified immunity. Even assuming that the officers lacked actual probable cause to arrest the partygoers, the officers were entitled to qualified immunity because they “reasonably but mistakenly conclude[d] that probable cause [wa]s present.”

Tellingly, neither the panel majority nor the partygoers have identified a single precedent--much less a controlling case or robust consensus of cases--finding a Fourth Amendment violation “under similar circumstances.”

The Court analyzed the panel majority’s approach to the question as improperly reasoning that, under clearly established District law, a suspect’s “good purpose and bona fide belief of her right to enter” vitiated probable cause to arrest him or her for unlawful entry. In a two-sentence paragraph without any explanation, the Court noted, the panel majority stated that the officers must have known that “uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry.” *But that supposed “invitation” by Peaches was hardly “uncontroverted evidence.”*

In treating it as such, the panel majority assumed that the officers could not infer the partygoers’ intent from other circumstances. “And by treating the invitation as if it automatically vitiated probable cause, the panel majority assumed that the officers could not disbelieve the partygoers’ story.”

It would not have been clear to every reasonable officer in these circumstances that the partygoers’ supposed bona fide belief that they were invited to the house was “uncontroverted.” Instead, District law suggested that they could infer the partygoers’ guilty state of mind based solely on their conduct. Further, there was

existing precedent that would have given the officers reason to doubt that they had to accept the partygoers' assertion of a bona fide belief.

Accordingly, a reasonable officer, based on the law at the time, could have interpreted the law as permitting the arrests here. "There was no controlling case holding that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value. Indeed, several precedents suggested the opposite. The officers were thus entitled to summary judgment based on qualified immunity."

❖ Resources

The following are some useful resources related to the subject of this article.

- [Defenses: Qualified Immunity](#). AELE Civil Case Summaries.
- [Qualified Immunity](#). Wikipedia article.
- [Qualified Immunity](#). AELE Jail Case Summaries.
- [Qualified Immunity](#). Definition. West Legal Dictionary. Legal Information Institute, Cornell University Law School.

❖ Relevant Monthly Law Journal Articles

- [Civil Liability for Use of Deadly Force-- Part Two. Qualified Immunity and Inadequate Training](#), 2007 (12) AELE Mo. L.J. 101.
- [The Scope of Federal Qualified Immunity in Civil Rights Cases](#), 2009 (2) AELE Mo. L. J. 501.
- [Trickery and Memory Lapse: Officer who testified based on a faked lab report was not entitled to qualified immunity](#), 2012 (1) AELE Mo. L. J. 501.
- [Fourth Amendment Search and Seizure, Qualified Immunity and the Technological Age](#), 2012 (6) AELE Mo. L. J. 501.
- [When is Law "Clearly Established" for Purposes of Qualified Immunity in Civil Rights Litigation?](#), 2017 (3) AELE Mo. L. J. 101.

- [An Introduction to Qualified Immunity as a Defense in Prisoner Civil Rights Litigation – Part 1](#). 2017 (12) AELE Mo. L. J. 301.
- [An Introduction to Qualified Immunity as a Defense in Prisoner Civil Rights Litigation – Part 2](#), 2018 (1) AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. [United States Supreme Court Clarifies “Clearly Established Law” for Qualified Immunity in Deadly Force](#), by Jack Ryan, Legal & Liability Risk Management Institute (January 2017).
2. [The Supreme Court’s Quiet Expansion of Qualified Immunity](#), by Kit Kinports, 100 Minn. L. Rev. 62 (2016).
3. [The Qualified Immunity Defense: What’s “Clearly Established” and What’s Not](#), by Karen M. Blum, Touro Law Review: Vol. 24:No. 3, Article 4 (2014)
4. [Qualified Immunity: How It Protects Law Enforcement Officers](#), by Richard G. Schott, FBI Law Enforcement Bulletin (September 2012).

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