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Civil Rights Update

By: Bradford B. Ingram and John P. Heil, Jr.
Heyl, Royster, Voelker & Allen

The Supreme Court Abandons an Inflexible Application of the *Saucier* Two-Step

The Supreme Court in January finally addressed the bane of district courts throughout the nation: the inflexible *Saucier v. Katz* test for resolving governmental entities' claims of qualified immunity in federal civil rights actions. With its unanimous decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Court has likely made life easier for lower courts and litigants by allowing them to "cut to the chase" in cases in which no clearly established constitutional right is at issue.

In 2001, *Saucier* mandated that, in cases brought pursuant to 42 U.S.C. §1983, courts must analyze the propriety of the qualified immunity defense through a two-step analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, courts were required to determine whether the complaint (when considering a Fed. R. Civ. P. 12(b)(6) or 12(c) motion) or the evidence (when considering a Fed. R. Civ. P. 50 or 56 motion) suggested a violation of a federal constitutional or statutory right. *Pearson*, 129 S. Ct. at 815-16. If plaintiffs satisfied this first step, courts were then required to determine whether that constitutional or statutory right was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 816.

Since the Court announced the *Saucier* "two-step" in 2001, courts around the country have encountered cases in which initial attention to the second prong would quickly dispose of the matter, without the need for an underlying constitutional analysis. In *Pearson*, the Supreme Court found a factual scenario in which to end the much-maligned *Saucier* experiment.

Facts and the Courts Below

Pearson's underlying facts are simple and straightforward: in 2002 a confidential informant working with the Central Utah Narcotics Task Force made a controlled purchase of methamphetamine from the respondent Afton Callahan. *Pearson*, 129 S. Ct. at 813. The confidential informant, who was equipped with a pre-marked $100 dollar bill and a concealed microphone, entered the respondent's house at the respondent's invitation. *Id.* The informant watched the respondent retrieve a large bag of methamphetamine from his freezer and, in exchange for the $100 dollar bill, hand the respondent a small bag of the substance. *Id.* The informant gave a prearranged signal to the Task Force agents, who immediately entered the respondent's home, retrieved the drugs and assorted paraphernalia, and arrested him for unlawful possession and distribution of a controlled substance. *Id.* at 813-14.

The trial court ruled that the agents' warrantless entry into the respondent's home was justified by exigent circumstances. *Id.* at 814. Before the Utah appellate court, the state's attorney general conceded that exigent circumstances did not exist, but argued that the inevitable discovery doctrine nevertheless justified the agents' actions. *Id.* The appellate court disagreed and vacated the respondent's conviction. *Id.*

The respondent subsequently filed suit pursuant to 42 U.S.C. §1983, claiming that the agents' warrantless entry into his home violated his Fourth Amendment rights. *Id.* at 814. The United States District Court for the

District of Utah granted summary judgment on behalf of the agents. The court found applicable the "consent-once-removed" doctrine, which allows for the warrantless entry into a home by law enforcement officers after consent is provided to an undercover officer or confidential informant who witnesses contraband in plain view prior to the recovering officers' entry. *Id.* Although it believed the Supreme Court's holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), likely signaled the future invalidity of the "consent-once-removed" doctrine, the court ruled that the agents could have reasonably believed that it authorized their entry. *Pearson*, at 814.

The Tenth Circuit Court of Appeals reversed, holding that a constitutional violation occurred because the "consent-once-removed" doctrine did not apply to confidential informants. *Id.* at 814-15. As to *Saucier*'s second prong, the Tenth Circuit held that the constitutional interest in question was clearly established at the time of this incident because that interest generally consisted of one's right to be free at home from unreasonable searches and seizures. *Id.* at 814.

In granting the agents' petition for *certiorari*, the Supreme Court directed the parties to address whether the *Saucier* two-step should be overruled. *Id.* at 815.

A Less Rigid "Order of Battle"

Initially, the U.S. Supreme Court admitted that the original goals behind the *Saucier* mandate – to "support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation" – were not realized as planned. *Id.* at 816, quoting *Saucier*, 533 U.S. at 201. Indeed, the Court continued, "application of the rule has not always been enthusiastic," *Id.* at 817, (citing *Higazy v. Templeton*, 505 F.3d 161, 179, n.19 (2d Cir. 2007), and lower court judges "have not been reticent in their criticism of *Saucier*'s 'rigid order of battle.'" *Id.* at 817, quoting *Purtell v. Mason*, 527 F.3d 615, 622 (7th Cir. 2008). The Court further acknowledged that its own faith in the approach wavered years ago, as evidenced by criticism in at least three of its opinions since 2004. *Id.*, citing *Morse v. Frederick*, 551 U.S. 393 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 201-202 (2004); and *Bunting v. Mellen*, 541 U.S. 1019 (2004).

The Court continued its analysis by addressing possible *stare decisis* concerns, finding that, although *stare decisis* is important "to the actual and perceived integrity of the judicial process," it "is not an inexorable command." *Id.* at 816 (citations omitted). In this case, the Court was free to reconsider its prior ruling because a change of course "would not upset expectations," *Saucier*'s procedure was judge-made and adopted purely "to improve the operation of the courts," and "experience has pointed up the precedent's shortcomings." *Id.* at 816.

With its path clear of *stare decisis* concerns, the Court held that, although *Saucier*'s two-step analysis "is often beneficial," it is no longer mandatory. *Id.* at 818. Deciding the question of constitutionality in many cases will still be necessary, since it "may be difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be." *Id.*, quoting *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring). Conversely, the Court reasoned, there exist plenty of cases in which the facts fail to demonstrate a violation of a clearly established federal right. *Id.* at 818. From this point forward, lower courts will be free to use – or not use – *Saucier*'s approach as they see fit, given the particular facts before them.

Elimination of the requirement to do the *Saucier* two-step does more than merely streamline matters, however. The Supreme Court also pointed to some inherent dangers in *Saucier*'s rigid mandate. Among them is the very real danger of bad decision-making. *Id.* at 820. In cases in which the "clearly established" prong is obviously lacking, courts (and litigants) may naturally make short shrift of the initial constitutional question. Precedent based upon poorly analyzed constitutional issues, including those "resting on an uncertain interpretation of state law," is not the healthy constitutional development *Saucier* intended. *Id.* at 819-20. The Court further noted that adherence to *Saucier*'s rigid approach can place litigants in an untenable position. A defendant found to have violated someone's constitutional rights may find little solace in the district court's ruling that the right was not "clearly established" at the time. *Id.* at 820. Because such a defendant will have prevailed on the claim through the application of qualified immunity, he will normally be unable to appeal the

label of "violator of constitutional rights." These conundrums are now easily avoided when it is clear that the right involved was not clearly established at the time of the alleged misconduct.

On the facts before it, the Court avoided addressing *Saucier*'s first prong and found that the Task Force agents' entry into the respondent's home did not violate a clearly established constitutional right. In light of the "consent-once-removed" doctrine's general acceptance in 2002, it was objectively reasonable for the agents to rely on the doctrine and perform the actions they did. *Id.* at 822-23. The Court, therefore, found qualified immunity applicable and reversed the judgment of the Court of Appeals. *Id.* at 823.

Practice Implications

On a practical level, *Pearson* may not affect the day-to-day practice of defending §1983 claims. Although defense attorneys moving for dismissal or summary judgment on qualified immunity grounds are now permitted to forgo presenting an underlying constitutional argument and instead focus exclusively on the "clearly established" requirement, it is doubtful that many will want to do so unless the facts mandate it. After all, an argument not made is an argument waived. Whether judges decide to "cut to the chase" is a much different question than whether good practice dictates you do so. That being said, in cases in which there is really no dispute that a federal constitutional or statutory right was in some way trampled, it is nice to know one need not waste time and resources presenting a constitutional argument for no real purpose. Even if defendants continue to do the *Saucier* two-step, the judicial system as a whole will likely benefit from the courts' freedom to decline the invitation.

About the Authors

Bradford B. Ingram is a partner with *Heyl, Royster, Voelker & Allen.* His practice concentrates on the defense of civil rights and municipal entities and the defense of employers in all types of discrimination claims. He is a frequent speaker before local and national bar associations and industry groups.

John P. Heil Jr. is an of-counsel attorney with *Heyl, Royster, Voelker & Allen*. He joined the firm in November 2007 after serving eleven years an Assistant State's Attorney in Cook County, Illinois. He received his J.D. from Chicago-Kent College of Law in 1996 and his B.S. from Bradley University in 1993. His practice includes the defense of civil rights actions, municipal liability, and general negligence matters.

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Illinois Association of Defense Trial Counsel, PO Box 3144, Springfield, IL 62708-3144, 217-585-0991, idc@iadtc.org