No. 10 - 704

IN THE
SUPREME COURT OF THE UNITED STATES

CURT MESSERSCHMIDT and
ROBERT J. LAWRENCE,

Petitioners,

vs.

AUGUSTA MILLENDER,
BRENDA MILLENDER, and WILLIAM JOHNSON,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the standard for civil liability should be different than the standard for suppressing evidence in a criminal case?

2. Whether public entities should be responsible, under the doctrine of *respondeat superior*, for the acts of their agents?

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STATEMENT OF THE CASE

Millender v. County of Los Angeles, 820 F.3d 1016 (9th Cir. 2010) (*en banc*) correctly resolved the sometimes arguable questions which arise in deciding whether an affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. No significant conflicts have developed among the federal or state courts in the twenty-five years since *United States v. Leon*, 468 U.S. 897 (1984) and *Malley v. Briggs*, 475 U.S. 335 (1986). In short, the standards of Rule 10 have not been met and this petition should be denied.

Moreover, Petitioners' shotgun-array of arguments were not properly raised in the courts below.

Millender arises out of a qualified immunity appeal after cross motions for summary adjudication. At issue was a November 4, 2003, warrant obtained by Curt Messerschmidt and approved by Robert J. Lawrence regarding a suspect named Jerry Lee Bowen, and the way Defendants executed the warrant. The Millenders contended that the warrant was invalid because the affiant, Messerschmidt, had misled the magistrate by including false representations and omitting material facts, and because, on its face, the affidavit did not establish probable cause. Also in dispute was whether the Defendants' "SWAT" team's terrifying nighttime entry was lawful.

Rejecting the Millenders' primary contentions, the district court on March 15, 2007, ruled that the

affidavit, on it face, established probable cause to believe that Bowen resided at the Millenders' home and that Messerschmidt had not misled the magistrate. App.[1]131-147. In doing so, the court determined that Defendants were not bound by a prior Los Angeles County Superior Court determination that the affidavit, on its face, did not establish probable cause to believe that Bowen would be found at the Millenders' home. App.129.

The district court did accept some of the Millenders' contentions that the affidavit was overly broad, *i.e.,* that the warrant improperly authorized the seizure of Mrs. Millender's legally-owned black 12-gauge "Mossberg" shotgun with a wooden stock, and a box of .45 caliber "American Eagle" ammunition, and improperly authorized the search for "gang-related" items. (With regard to the entry, the court found that the parties' claims could not be resolved on summary adjudication because of disputed facts.)

Messerschmidt and Lawrence appealed the denial of qualified immunity. The Millenders unsuccessfully attempted to appeal the district court's rejection of their contentions, including the finding that the affidavit established probable cause to believe Bowen would be found in their home and that Messerschmidt had not misled the magistrate. The Millenders' application for certification of the order for interlocutory appeal was denied. AER[2] 1887 [docket

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[1] "App." refers to the Petitioners' appendix.

[2] "AER" refers to Appellants' Excerpts of Record filed by Petitioners in the Ninth Circuit.

entry #114]. Consequently, the only issues before the Ninth Circuit concerned those portions of the warrant which the district court found overly broad.

The Court of Appeals correctly determined, App. 25, that it was clearly established that whether there is probable cause must be determined by what is in the affidavit. *Aguilar v. Texas*, 378 U.S. 108, 109 n. 1 (1964) ("It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention."), overruled on other grounds by *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Crowe v. County of San Diego*, 593 F.3d 841, 869 (9th Cir. 2010).

A corollary to this axiom is that "[t]he scope of the warrant, and the search, is limited by the extent of the probable cause," and that "probable cause must exist to seize all the items of a particular type described in the warrant." *In re Grand Jury Subpoenas*, 926 F.2d 847, 857 (9th Cir 1991); App.14-15, 22. Consequently the court correctly found that:

> "The affidavit indicated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items."

App.35.

The Ninth Circuit also agreed that there was no probable cause to search for "gang-related" items:

> Messerschmidt himself stated he had no reason to believe that Bowen's assault on Kelly was related to gangs, and there is no evidence in the affidavit (or the record) to suggest otherwise. Because the deputies failed to establish any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence is likewise invalid.

App.29.

FACTS

a. *The Millenders and Their Connection to Bowen.*

Seventy-three-year-old Augusta Millender (Mrs. Millender), the widowed matriarch of a large family ("the Millenders"), including five children, eighteen grandchildren, and eleven great grandchildren, served, many years earlier, as a foster parent for several children, one of whom was Jerry Lee Bowen.

Mrs. Millender is and was in poor health, with diabetes and very high blood pressure. AER 118 (A.M. 106:14-25). She also has metal pins in her femur and uses a walker. App.108-09. (Because of her health, delays in this litigation substantially increase the probability she will die before it is resolved.)

The Millenders do not now and have never claimed there was not probable cause to arrest Bowen; obviously Bowen should have been arrested, sooner rather than later. The misconduct of which the Millenders complain prevented that from occurring.

The Millenders were in no way responsible for Bowen. They are the entirely innocent victims of Defendants' poor police work.

Although it would make no difference if she were Bowen's natural mother, *Poolaw v. Marcantel*, 565 F.3d 721, 730 (10th Cir. 2009) ("we discern a clear rule: A familial relationship to someone suspected of criminal activity, without more, does not constitute probable cause to search or arrest"), Mrs. Millender was no longer even Bowen's "foster" mother. Bowen was thirty-four, **AER** 857 (Messerschmidt 37:22-24), married, and had not "resided" in the Millenders' home for more than a decade. **AER** 800-803 (A.M. 81:7-20, 85:15-87:14).

Mrs. Millender owned and lived in a very nicely kept family home she and her late husband had built over fifty years earlier. **AER** 533-538 (photos of the Millenders' home); **AER** 574-576 (defendants' pre-search aerial photos). Before this incident drove them away, Mrs. Millender's daughter and co-plaintiff, Brenda Millender (Brenda) and Brenda's son and co-plaintiff, William Johnson (William), lived there, too. There was a back house in which Mrs. Millenders' adult son Willie (who was arrested on a misdemeanor drug charge as a result of the search) lived.

Neither Mrs. Millender, nor her daughter and grandson were "criminals" or "gang" members. William was the music director at his church, a full-time student, and worked part-time as a care provider for people with disabilities, and was only 20 years old. App. 109. Brenda was 47, with high blood pressure and insulin-dependant diabetes. No plaintiff remotely resembled 34-year-old Bowen.

As Petitioners correctly explain, County of Los Angeles Sheriff's Department deputies were looking for Bowen, AER 857 (Messerschmidt 37:22-24), who had assaulted his live-in girl friend, Shelly Kelly, as a result of her decision to terminate their relationship and move out of the apartment they had shared (at 1425 West 97th Street, Los Angeles) for about six months. Bowen was also married, but not to Kelly.

The deputies were also searching for a black, sawed-off shotgun with a pistol grip which Bowen retrieved from their apartment during the assault and fired toward Kelly. Kelly gave Messerschmidt a photograph of Bowen holding the weapon. App.20.

Bowen's connection to the Millenders was this: Mrs. Millender was Bowen's foster mother when he was 13-18. years old. Then, for about two months in spring of 2003, Bowen temporarily stayed at the Millenders' back house. (He had apparently been ordered out of his home due to a spousal abuse charge involving his wife. See AER 584.) After leaving the Millenders, Bowen and Kelly moved into the apartment at 1425 West 97th Street, Los Angeles. App.109.

In June 2003, after Bowen had left the Millenders and moved in with Kelly, a State of California social services agency sent a letter for Bowen to the Millenders' address. Bowen never got it. Five months later, during the November 6, 2003, search, Defendants found it. This one letter was the only indication that Bowen had any connection to the Millenders. **AER 79 (12:14-17)**. There was no indication Bowen lived in the Millenders' home, or intended to return.

b. Messerschmidt's "Determination" That Bowen Lived at the Millenders' Address.

Attempting to locate Bowen, Messerschmidt interviewed Kelly, on video tape:

Mess.: So he's staying at this 120th —

Kelly: *I believe so. If I'm not mistaken. I believe that's where he's hiding out at.*

Mess.: And you said that's his . . .

Kelly: His foster mother's house.

AER 565 (19:11-15) (Italics added); see also **AER 71** (4:20-21); **AER 860-861** (Messerschmidt 48:23–54:12).

Kelly also gave Messerschmidt a traffic citation with Bowen's address on it. Messerschmidt said he lost the citation and could not remember what address was

on it. AER 72 (5:18-21).

That was the totality of Messerschmidt's information from Kelly about Bowen's whereabouts. Messerschmidt never asked *why* Kelly thought Bowen was "hiding out" at the Millenders'; never asked *where* she got her information; never asked *when* she got it; and never asked if it was based on her own personal knowledge or what someone else told her. AER 860-861 (Messerschmidt 48:23–54:12).[3]

In short, Defendants did not attempt to determine why an apparently law-abiding 73-year-woman would be "hiding out" a foster child of twenty years earlier, and his sawed-off shotgun, and whatever other weapons he might conceivably have, as well as "articles of evidence of street gang membership or affiliation with any street gang," in her meticulously-kept family home.

According to his affidavit, Messerschmit also searched "departmental records, state computer records and other police agency records" and claimed to have "determined" that Bowen "resided" at plaintiffs'

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[3] Although not in his affidavit, nor documented in any report, Messerschmidt later claimed Kelly told him she had been to the Millenders with Bowen, at some unidentified time, "prior to the assault." AER 860 (Messerschmidt 52:6-9). Although Messerschmidt claimed he documented everything important, Kelly's alleged statement was not documented anywhere. AER 859-860 (Messerschmidt 48:7-12, 52:10-13). Even if true, Messerschmidt's claim is not helpful to Defendants, because he never found out *when* Bowen had visited the Millenders and visiting someone's home does not make it your residence.

home. AER 639 (Affidavit 3:11-25). In this critical regard, Defendants' affidavit is "bare bones." It does not say what records were searched or what the records in fact showed.

As noted above, as a result of the search, Willie, a son living in the back house, was charged with a misdemeanor. At the request of Willie's public defender, after an evidentiary hearing at which Messerschmidt testified, AER 864, 882 (Messerschmidt 68:1-3, 138:15–139:6), the court quashed the warrant because the affidavit on its face did not establish probable cause to believe Bowen would be found at the Millenders', and the case was dismissed. AER 770-772 (RT 75:6-77:14).

The Superior Court judge, who presumably understood California "police agency records," found Messerschmidt's reference to unidentified police records inadequate: "It doesn't say anything. . . . It doesn't name the records or what they were, or what he found out about them; 'state computer records,' that's a generic term for – it could be whatever, who knows what he had checked, if anything, 'and other police agency records.' That tells me nothing, ... It looks very impressive, but it doesn't say anything. . . . That paragraph is useless." AER 770 (RT 75:17–76:1).

The Superior Court was right. Messerschmidt's unequivocal representation that the police records "confirmed" that Bowen "resided" at 2234 E. 120th Street, Pet. 4, AER 639 (affidavit), was far from accurate.

As even Messerschmidt acknowledged, **AER 862-63** (Messerschmidt 58:6–64:18), according to all the police records he reviewed, Bowen's most recent address was 1425 W 97th Street, not the Millenders. The DMV records last mentioned the Millenders' address eight months earlier, in March. **AER 592** (DMV record). The other records (CLETS and CCHRS) only confirmed that Bowen had last been associated with the Millenders' address in May, almost six months before Defendants and their SWAT team broke into the Millenders' home at night. Moreover, the records also showed that in May, at exactly the same time that the Millenders' address turned up, Bowen was reported to be living at another address, 2303 S. Marvin Ave. **AER 584, 590-91** (CLETS and CCHRS reports). The records also showed many other addresses—not the Millenders'—in the many years of Bowen's adulthood.

c. Defendants' Other Pre-Search Activities.

Before the search, Defendants "scouted" the Millenders' home. On November 3 & 4, Messerschmidt and other deputies took "drive-by" photographs. **AER 577-578** (photos); **AER 644** (Team Activation Packet (TAP), SEB0005). On November 5, deputies went to the door between 10:00 a.m. and 1:00 p.m. and spoke with Mrs. Millender and Brenda. **AER 922** (Walker 104:8–105:8); **AER 949-951** (Rector 26:22-24, 31:11-33:9); **AER 1004-1005** (Nichiporuk 28:16-32:12). According to Defendants, they did so to alert the Millenders to men "gambling on the street in front of the house." **AER 167** (3:11-15).

According to Mrs. Millender, the deputies asked if Bowen was there and Mrs. Millender said he was not. They then asked if they could search. Mrs. Millender said, yes, if they had a warrant. The deputies just laughed. **AER 788-794, 796-800** (A.M. 66:15-72:20, 74:13-77:3).

In the week before the search, William more than once saw marked cars drive by and slow down. **AER 839-840** (W.M. 35:25-36:11). Deputies once stopped William in the driveway and told him "he fit the description" of someone they were looking for. Another time, deputies walked up the driveway and asked William where he was going. **AER 840-843** (W.M. 36:13-39:8). Deputies once followed William from home and pulled him over, but did not cite him. **AER 844** W.M. 40:5-41:23).

Brenda found deputies searching her Ford Escort in the driveway. They told Brenda only that they were looking for a suspect. **AER 816-824, 826** (Brenda 68:8-12, 68:12-70:5, 70:23-71:24, 72:11-76:5, 78:7-80:2). The next day, deputies were pulling out of the driveway when Brenda wanted to pull in. **AER 825** (Brenda 77:1-12).

Defendants had no information that the Millenders — or anyone in the Millenders' neighborhood — were trying to keep Bowen from being arrested. **AER 1461** (Messerschmidt 146:2–147:7.

Defendants included none of this information in the affidavit. Messerschmidt never even mentioned the Millenders or that 2234 East 120th Street was the

Millenders' home. Messerschmidt's affidavit made in sound like Bowen lived at 12234 East 120th Street alone.

After the Millender fiasco, Messerschmidt put 1425 W 97th Street (where Bowen had lived with Kelly, last known address) under surveillance and asked Kelly if she had any "additional information as to the possible whereabouts of Bowen." Kelly suggested Bowen's mother-in-law's residence and a local motel. Thirty minutes later, during the day, deputies went to the motel, knocked on the door, were admitted by Bowen's wife, and found Bowen hiding under the bed. AER 79-80 (Messerschmidt Dec. 12:24–13:2(Messerschmidt supplemental report 11/19/03).

d. What the Affidavit Should Have Said.

The affidavit should have said:

> Kelly informed me that Mrs. Augusta Millender, 73 years old, is Bowen's former foster mother. Kelly told me that she thought Bowen might be "hiding out" at Mrs. Millender's home but added that she might be "mistaken."
>
> Kelly did not tell me why she thought Bowen might be hiding out at the Millenders, nor why she thought she might be mistaken, and I did not ask. Kelly did not tell me whether she came to her conclusions based on what she herself

knew, or based on second hand information, and I did not ask. Kelly did not tell me whether the information she relied on was fresh or dated, and I did not ask. Kelly did not tell me whether or not she thought Mrs. Millender knew that the authorities were looking for Bowen, and I did not ask. Kelly did not tell me who else might be living at the Millenders', and I did not ask. We have no information that Mrs. Millender might know that we are looking for Bowen.

Based on the Department's investigation, I know that the Millenders' home consists of two houses and a large storage shed. From aerial surveillance, it appears the main house has three bedrooms. Property records show the home has been owned by the Millenders for over 50 years. We have confirmed that at least Mrs. Millender, her daughter Brenda and her 20-year-old grandson reside there.

We have no reason to suspect the Millender family of any complicity in the crime we are investigating, nor in any other crime.

We surveilled the location for several days, including going up to the front door and speaking with Mrs. Millender and Brenda. We were unable to

obtain any information that Bowen is there, had recently been there, or intends to be there, or to develop any indication that, if Bowen is there, the Millenders have any knowledge that Bowen is wanted by the authorities.

I checked DMV , Consolidated Criminal History Reporting System ("CCHRS"), and "Calgangs" records. (Calgangs records are never to be used as probable cause of arrest.) According to all the records I reviewed, Bowen's most recent address was 1425 W 97th Street. The DMV records last mentioned the Millenders' address in March, 2003. The other records (CLETS and CCHRS) indicated that Bowen had last been associated with the Millenders' address in May, 2003, approximately five months before Bowen's assault on Kelly. The records also showed that in May, at exactly the same time that the Millenders' address was reported, Bowen was also reported to be living at another address, 2303 S. Marvin. The records go back many years and, other than as indicated above, there is no connection between Bowen and the Millenders' home.

Although Kelly told us and we have reason to believe that Bowen is associated with and possibly a member of the Mona Park Crips, we have no reason

> to believe that this crime of apparent domestic violence is gang related.
>
> Based the foregoing, we seek authorization to enter the Millenders' home at night, using a SWAT team to gain entry, and to search for and seize the items described below, whether or not there appears to be any connection to Bowen.

e. The Search Warrant.

The warrant broadly commanded the seizure of four categories of items:

> ✦ *any* firearm and *any* thing related to *any* firearm;
>
> ✦ "articles of evidence showing street gang membership or affiliation with any Street Gang;"
>
> ✦ "any photographs or photograph albums . . . *which may depict evidence of criminal activity*;"
>
> ✦ "articles of personal property tending to establish the identity of person [sic] in control of the premise [sic] or premises."[4]

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[4] Although his affidavit failed to say so, Messerschmidt knew Mrs. Millender was in control of the premises. AER 879-880 (Messerschmidt 128:21–129:16).

AER 634 (Warrant Attachment 2).

f. The Break In.

At 5:00 a.m. on November 6, 2003 deputies served the warrant. Walker, the SWAT leader, while on the porch, made an audio tape recording. AER 988 (Stella 71:17-24); AER 889 (Walker 8:9-11); AER 849 (Rector 8:4-9); AER 1000 (Nichiporuk 9:4-11). As one can hear, a pre-recorded announcement given from the street is incomprehensible and did not even begin until the moment defendants started breaking in. AER 988 (Stella 72:17-73:25).[5] In three seconds, defendants smashed the large window in the Millenders' living room, AER 533-538 (photographs), finished breaking in the front door, and entered.[6] As defendants entered, someone yelled, "Sheriff's Department, open the door, we have a warrant." AER 652-665 (Entry Tape and Partial Transcript).[7]

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[5] The pre-recorded announcement was played from a "vehicle public address system from the northwest corner of the lot." AER 666-668 (11/06/03 supplemental report). This was over 100 feet from the front door, and even farther from the home's bedrooms. AER 577-578 (photos from street); AER 574-576 (aerial photos); AER 579-582 (Los Angeles County Assessor's Map).

[6] The window smashing begins with "break and rake, break and rake."

[7] The After-Action Report inaccurately states that "several pre-recorded announcements, identifying us as law enforcement officers and describing our intentions to serve a search warrant, were played from a vehicle public address system from the north/west corner of the lot. Several verbal announcements were also made by members of the entry team at the front door of the location. When there was no response from the interior of the

Mrs. Millender, Brenda and William were all asleep. AER 779 (Mrs. Millender 12:15-17); AER 811 (Brenda 31:17-20); AER 832-833 (William 9:21-10:1). None of them had the least chance to open the door before defendants broke it down, smashed the picture window, and entered. Inside, defendants pointed guns at plaintiffs and immediately ordered them outside, in their nightclothes and without shoes. AER 934 (Walker 139:10:24), AER 782 (Augusta 47:17-22 (not allowed to get her walker or a sweater)). Plaintiffs were terrified. AER 806 (Augusta 105:11-16 ("Heard like gun shots going through that glass, coming through my kitchen window through my kitchen. I said, 'Lord, Whoever this is is going to kill us that night.'")). Later that day she was hospitalized, because of extraordinarily high blood pressure. AER 805 (Augusta 103:8-12 ("When I went to the hospital, I couldn't open my eyes. And the doctor asked me what was the matter. They put me on those machines. And my blood pressure was 200 over 200 something. I knew I was threatening something, but thank God I didn't have a stroke.")); AER 677-680 (ER record states BP is 204/98).

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main house and when containment personnel began to see movement in the addition on the east side of the house, deputies Schlegel and Demello began to try to force open the front security door. When it became apparent to sergeant Walker that it was going to be difficult, and timely, to breach the door, he ordered Dep. O'Sullivan to break the front window of the location, allowing the entry team to see into the location and protect the deputies as they tried to open the door." AER 667-668 (Stella Report). Apparently, no supervisor cared about the inaccuracy of the After-Action Report.

g. The Search.

Defendants found neither Bowen, his pistol-grip sawed off shotgun, his clothing, nor anything else indicating that Bowen resided in the Millenders' home. The only indication that Bowen had any connection to the Millenders was the five-month old letter to Bowen from a social services agency.

Not finding Bowen changed nothing. Defendants continued as if he were there. Deputies searched for about four hours.

The Millenders had to wait outside for hours and sat inside for another 45 minutes. AER 836-838 (WM 23:25-24:3, 32:21-23; AER 782, 785-787 (AM 47:4-10, 54:10-18, 58:24-59:24, 58:10-23; AER 814-815 (Brenda 58:23-59:5).

No one could use the bathroom. Mrs. Millender had to urinate in the street. AER 783, 784 (AM 51:12-21, 52:13-16). Mrs. Millender couldn't use her walker or get a sweater. AER 782 (AM 47:16-22). Brenda, fearful of the glass from the smashed window (because diabetics have problems healing) was not allowed shoes or slippers. AER 812-813 (Brenda 47:9-48:19). William was handcuffed the entire time. AER 834-835, 838 (WM 13:20-25, 14:15-22, 32:21-23).

Defendants dumped closets and drawers and went through the Millenders' papers and records.

Defendants seized Mrs. Millender's personal Mossberg shotgun, some .45 caliber ammunition, and

the June 16, 2003 letter from Social Services requesting Bowen to appear for a medical evaluation. AER 673 (letter). AER 675-676 (Receipt for Seized Property).

ARGUMENT

I. The Petition Does Not Meet the Requirements of Rule 10.

Petitioners do not assert that the Ninth Circuit's decision is in conflict with another United States court of appeals, or the decision of any state court, in any regard.

Rather, they assert that in the twenty-five years since the Court decided *Leon*, 468 U.S. 897 and *Malley*, 475 U.S. 335, there have been a "startling," "large and disturbing" number of cases that have provoked dissents regarding the application of *Leon* and *Malley*, Pet. 12, 30, 39, because the legal standard is "woefully open ended." Pet. 19.

Petitioners identify nineteen state and federal cases that have resulted in a dissenting opinion. Pet. 30-38. According to Westlaw (as of April 10, 2011), *Leon* has been cited 12,898 times and *Malley* 20,713. *Malley* is cited over 800 times a year, over 40 times a month.

In this context, eight dissenting opinions (including unpublished orders), from three federal courts of appeals (the 6th, 9th and 10th) and eleven from the courts of just six states (including intermediate

appellate courts), in 25 years, appears neither "large," nor "startling" nor "disturbing."[8]

Moreover, Petitioners identify no consistent thread in the nineteen cases. For the most part, they are quite different from one another. Many involve unique questions of law, *e.g.*, whether qualified immunity is appropriate when someone forgets to include the description of the items subject to seizure in the warrant, *Groh v. Ramirez*, 540 U.S. 551 (2004), or where the warrant is issued by a commissioner without jurisdiction, *Commonwealth v. Shelton*, 766 S.W.2d 628, 630-31 (Ky. 1989), or when information is communicated to the magistrate but not in the affidavit, *United States v. Luong*, 470 F.3d 898, 901 (9th Cir. 2006) (Callahan). Sometimes, *e.g., Poolaw*, 565 F.3d, 721, they involve interesting and important issues, such as whether one's status as the natural parent of a suspect is sufficient to establish probable cause.

Petitioners do not contend that any of these nineteen cases are specifically similar, factually or legally, to *Millender*.

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[8] *Cf. Connick v. Thompson*, * U.S. * (2011) (four reversals of dissimilar *Brady* violation in the 10 previous years could not have put the district attorney's office on notice of the need for specific training).

II. Petitioners' Contentions Were Not Properly Raised in the Courts Below.

Questions not properly raised below are not properly before the Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

As the Millenders pointed out below, Appellees' Brief at 27-28, Petitioners' entire qualified immunity argument in the district court, aside from boilerplate legal argumentation, was an assertion that "any mistakes of fact or law made by Det. Messerschmidt and by Lawrence were reasonable, entitling defendants to qualified immunity." **AER 22** (Motion 19:1-2). Defendants did not explain what their "mistakes of fact or law" were, much less why they should be considered "reasonable."

Defendants' arguments are fact-based.

For example, with regard to Mrs. Millender's Mossberg shotgun, in the Ninth Circuit Defendants for the first time argued, as they do now, that it was reasonable to take the Mossberg because Defendants "would not know if the suspect would be coming back and the officers would not want the suspect to gain access to more weapons and hurt other people, including the victim in this case." Brief 47.

This is a factual question which should have been brought up in the district court, where it could have been fully explored and surely rejected. Defendants point to no evidence that they took Mrs. Millender's Mossberg because they in fact thought

Bowen would return, or that it would have been reasonable to think so. As set forth above, the existing evidence strongly indicates that no reasonable person would believe Bowen "would be coming back." There was nothing suggesting Bowen had recently been at the Millenders' home, nor that he was likely to do be there in the future. None of Bowen's possessions, like his clothes, were there. A single, five-month-old letter Bowen never picked up was the only trace of any past connection. The letter's very presence indicated Bowen had not been there for at least five months.

And why would Mrs. Millender allow Bowen entrance, after learning the authorities wanted him, and were willing to destroy her home and take her property at the least suggestion he might be there? Where is the evidence that Mrs. Millender was crazy, or complicit in Bowen's crime, or that Bowen could get into the Millenders' home?[9]

Perhaps even more significantly, Petitioners' new arguments shed new light on the critical importance of what Defendants *left out* of the affidavit, *i.e.,* any mention that *anybody* else, in particular the *Millenders*, lived at 2234 E. 120th Street, and that Kelly only surmised, for unknown reasons, that Bowen was "*hiding out*" there (if she was not "mistaken").

The affidavit falsely made it appear that 2234 E. 120th Street was Bowen's place of permanent abode ("residence," as commonly defined), where he lived,

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[9] And there is no evidence Bowen knew the existence of, or needed, Mrs. Millender's Mossberg (he had his own gun).

alone. Nor did the affidavit reveal that there was no reason to believe that the Millenders knew Bowen (if he were there at all) was sought by authorities, or why.[10]

That 2234 E. 120th Street was the Millenders' permanent place of abode (and that Bowen's connection was limited to being a long-ago foster child) meant that not everything in the Millenders' two houses, garage, storage shed, and cars belonged to Bowen. The family actually living there (for over 50 years) would obviously have their own lawful possessions, untainted by Bowen. No reasonable person could think otherwise. Knowing this would have made it unlikely that any responsible person would authorize police rummaging through and seizing the Millenders' possessions, including Mrs. Millender's Mossberg, with no consideration to the Millenders' rights.

Moreover, it is unlikely that anyone knowing that Bowen , at most, was "hiding out" at the Millenders' (without the Millenders' knowing he was "hiding out") would have approved seizing Mrs. Millender's Mossberg, based on the highly unlikely speculative possibility, unsupported by a scintilla of evidence, that Bowen "would be coming back," after his "hideout" was discovered. By definition, people "hide out" where they are not expected to be. For example, the "spider hole" was Sadam Hussein's "hide out" (not his "residence"), and it is unlikely Sadam would have

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[10] Petitioners' argument that "There is no accusation that [Defendants] deliberately omitted or manufactured any information in order to procure the warrant," **Pet.26**, is laughable.

"come back" after its location was discovered. That Bowen was long gone was obvious.

No reasonable person would have seized Mrs. Millender's Mossberg based on the nonsensical notion that Bowen would "return" and arm himself with it. Obviously, Defendants did not in fact think Bowen was going to "return." They put Bowen's last-known residence (1425 West 9th Street, where the crime occurred) under surveillance and contacted Kelly to inquire about "the possible whereabouts of Bowen." This unfortunately belated inquiry led immediately to Bowen's arrest. AER 79:24-26.

The Ninth Circuit properly rejected the similar arguments that Defendants should be immune for illegally seizing Mrs. Millender's property because they could have established probable cause to search for and seize any firearms-related items in the Millenders' possession, because Bowen was dangerous and had been convicted of a felony. App.22-23.

Like Defendants' other arguments, these were never made in the district court. The "felon in possession" claim was never briefed at all. The Ninth Circuit declined to consider it because "the deputies would need to present evidence on critical factual issues" including whether it would be immediately apparent that Mrs. Millender's Mossberg was contraband or evidence of a crime when Bowen did not have *any*, much less "sole dominion or control over the 120th St. address." App.23-24, fn.5. "Access to premises does not equate to possession," *United States v. Ruiz*, 462 F.3d 1082, 1089 (9th Cir. 2006), and here

there was no evidence that Bowen even had access to the premises, much less to Mrs. Millender's Mossberg.

With regard to the "gang-related" items, Petitioners' argument that when Messerschmidt "applied for the warrant, he did not know Bowen's assault on Kelly was not gang-related," Pet 25, was never raised below.

As the Ninth Circuit majority recognized, this argument "borders on the frivolous, given Messerschmidt's statement that he had no reason to hold such a belief, and the absence of any evidence that the crime at issue was gang-related." App.35.

Aside from Messerschmidt's testimony that he had no reason to believe the domestic violence between Bowen and Kelly was somehow "gang-related," there *is* no evidence. Certainly, there is no indication that Messerschmidt *ever* thought it was "gang-related," or even that, at the time he applied for the warrant, he didn't know it wasn't. AER 877 (Messerschmidt 119:9–120:10). Had the issue been raised below, any factual issues could have been addressed.

Had Defendants made the claim, it would most likely have been rejected. First, Messerschmidt's testimony, given while discussing the affidavit and his knowledge at the time, in the past tense, unmistakably appears to have reflected his knowledge at the time he completed the affidavit. AER 877 (Messerschmidt 119:9–120:10 ("Q: So you didn't have any reason to believe that the assault on Kelly was any sort of gang

crime, did you? A: No."). Second, there is no suggestion that Messerschmidt learned something new about the incident *after* applying for the warrant which made it clear to him that the incident was not "gang-related." Defendants have never claimed he did, nor even hypothesized what such information could possibly be.

Second, and more basically, the question whether the *absence* of information may supply probable cause could have been addressed. Not knowing the incident was *not* "gang-related" is no more justification for assuming it was than "I didn't know he *wasn't* dangerous" is for shooting a fleeing suspect in the back. *Tennessee v. Garner* 471 U.S. 1, 21 (1985). This concept is elementary.

Petitioners' argument that it was reasonable to search for "gang-related" items because Bowen's gun could be "concealed in Mona Park Crip clothing," Pet.25, also should have raised below, and was not. What is "Mona Park Crip clothing?" Does it even exist?

Petitioners' argument that Defendants' failure to justify the warrant's breadth was due to Messerschmidt's inadvertent failure to include information, Pet.25, was also never raised below. Petitioners point to no evidence supporting that claim. When asked if he had inadvertently omitted anything from the affidavit, Messerschmidt testified he had not. AER 850-51 (Messerschmidt 12:10–13:12). Consequently, this case is unlike *Groh v. Ramirez*, 540 U.S. 551 or *United States v. Hove*, 848 F.2d 137 (9th Cir. 1988), where there were in fact mistakes.

Petitioners' argument that Defendants' failures should be excused because of "borderline exigent circumstances," and "an imminent danger to the public," Pet.26, was not raised below. These are primarily factual arguments. Had they been raised below, they likely would have been rejected. The crime, of which Defendants were immediately aware, occurred October 17, 2003. The search was three weeks later, November 6.

In the interim, Defendants had time, among many other things, to interview Kelly as well as a witness, at the station (on videotape), to obtain both drive-by and aerial photographs of the Millenders' home, to photograph Kelly's car, to stop and detain William Johnson, to search Brenda's car, and to investigate and personally discuss with the Millenders the presence of loiterers gambling near the Millenders' home. AER 252:11-18. Of these facts there is no dispute. Defendants offer no explanation how, under these circumstances, their failures may be excused because of any supposed "exigency."

III. Petitioners' Contentions Should Be Rejected.

The clearly-established rules that "in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention," *Aguilar v. Texas*, 378 U.S. at 109 n. 1, and that "probable cause must exist to seize all the items of a particular type described in the warrant," *In re Grand Jury Subpoenas*, 926 F.2d at 857, should not be abandoned; certainly not on this record.

Petitioners' laundry list of "cures," **Pet.13**, for the "problems" of *Leon* and *Malley*, none of which have been adopted by any court, would not help matters.

Limiting challenges to instances in which affiants "intentionally and recklessly" [*sic*?] give magistrates false information would eliminate challenges even where the warrant was indisputably inadequate, and have the perverse effect of encouraging "bare-bones" warrants. The less said, the more difficult to challenge its truthfulness. Moreover, it would not eliminate the difficulty of determining whether the "false information" was sufficiently material to make a difference.

Petitioners do not explain what a magistrate "abandon[ing] his or her neutral judicial role or [being] incapable of fulfilling it" due to "particular circumstances" is supposed to mean. Would it include cases where the "magistrate" did not have the authority to issue a warrant, *e.g., Shelton,* 766 S.W.2d 628, or those where someone mistakenly failed to tell the magistrate what the probable cause was, *e.g., Hove*, 848 F.2d 137, *State v. Belmontes*, 615 N.W.2d 634 (S.D. 2000), or something else? What exactly is a "particular circumstance?"

Limiting challenges to "bare-bones" or "insubstantial" affidavits would cause more problems than it "solved." What is a "bare-bones" affidavit? Is it to be judged by length or does substance count? By any fair standard, the affidavit here could appropriately be called "bare-bones" and "insubstantial." Probable cause to arrest Bowen was easy and indisputable.

Messerschmidt's training and experience had virtually no bearing. The only real issue was whether Defendants should have been searching the Millenders' home at all — much less at night in a terrifying SWAT break-in. As discussed above, Defendants' affidavit contained not a syllable about *why* Kelly supposed that Bowen was "hiding out" at the Millenders' (unless she was "mistaken"). Her acknowledgment that she might be "mistaken" was an obvious tip off that it might be total, inaccurate, speculation, as it was. What information did she in fact have? Where did she get it? When? How stale was it? There was just as little about why Messerschmidt concluded that Bowen's supposed "hiding out" somehow made the Millenders' home into Bowen's "residence." As discussed above, people don't "hide out" where they are routinely expected to be. Messerschmidt's bogus, one sentence representation that police records had "confirmed" that Bowen "resided" in the Millenders' home was, as the Superior Court found, "insubstantial."

Having a "supervisor or prosecutor" review an affidavit should not eliminate liability. Since approval by a judge does not provide immunity, *Malley*, neither can approval by a supervisor or prosecutor. *See Coolidge v. New Hampshire,* 403 U.S. 443 (1971) (probable cause determination by state attorney general invalid). A prosecutor is by definition not neutral, but an adversary, engaged in the "often competitive enterprise of ferreting out crime." *Coolidge*, 403 U.S. at 449. Does the diligence or competence of the prosecutor make any difference? Especially because prosecutors generally enjoy immunity, only Dr. Pangloss would trust prosecutorial approval not to become a perfunctory rubber stamp.

Eliminating the clearly-established rule that the affidavit must establish probable cause would essentially eliminate the protections afforded by warrants. It would no longer matter whether searching officials established probable cause to search one's home before an impartial magistrate. After-the-fact explanations would be just as good. A bare-bones affidavit could later be "cured" by information officials later claimed to have had. The opportunities for seemingly endless litigation would increase. Moreover, as some knowledgeable jurists have observed:

> "[A]nd although the effective neutrality and independence of magistrates in ex parte proceedings for the issuance of search warrants may be doubted, there is a practical reason for requiring warrants where feasible: it forces the police to make a record before the search, rather than allowing them to conduct the search without prior investigation in the expectation that if the search is fruitful a rationalization for it will not be difficult to construct, working backwards."

United States v. Sims, 553 F.3d 580, 583 (7th Cir. 2009) (Posner) quoting *United States v. Mazzone*, 782 F.2d 757, 759 (7th Cir. 1986).

Defendants' suggestion that *Aguilar's* requirement should be abandoned when "officers inadvertently, though reasonably given their responsibilities and circumstances, omitted facts establishing probable cause," Pet.13,and that ***this*** was

such a case, because of "borderline exigent circumstances," Pet.26, is, as discussed above, ludicrous. Defendants have offered no excuse for their failures and there are none.

Had Defendants acted appropriately given the seriousness of Bowen's crimes, they would have spent a moment more with Kelly exploring what she knew about Bowen's whereabouts. A moment more was all it took to find and arrest Bowen without incident. When Defendants eventually got around to doing so, on November 19, 2003, Kelly told them that Bowen might be found at his mother-in-law's or a motel at "41st Street and Figueroa Avenue." AER 79. As explained above, about thirty minutes later, Defendants went to the motel, knocked on the door, were admitted by Bowen's wife, and found Bowen hiding under the bed. AER 682-84.

Petitioners' final proposal, that an affidavit's failures should be overlooked if the "warrant, even if overbroad, did not expand the scope of the search beyond areas properly searched if the warrant were narrowly tailored," Pet.13, is not thought out. Apparently, this "only-size-matters approach" would excuse any overly broad warrant if there were probable cause to search for one small item. Moreover, it does not at all address the problem in this and many other cases, the *seizure* of items for which there was no probable cause — here, for example, Mrs. Millender's Mossberg — which she, in addition, had a specific constitutional right to possess. *District of Columbia v. Heller*, 554 U.S. 570, 626-629 (2008). "[O]wning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm

of some sort . . . ." *Staples v. United States*, 511 U.S. 600, 613-14 (1994). "Common sense tells us that millions of Americans possess these items [revolvers, pistols, rifles, and shotguns] with perfect innocence." *United States v. Anderson*, 885 F.2d 1248, 1254 (5th Cir. 1989).

Moreover, Petitioners do not explain how the warrant's authorization to search for "gang-related" items, including, for example, "photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership," AER 118, did *not* expand the scope of the search. A search for even a "small" shotgun would not have required Defendants to examine the Millenders' family photo albums.

IV. If the Court Wishes to Take Up this Case it Should Direct its Attention to Issues of Much Greater Significance.

a. The standard for civil liability should be different than the standard for suppressing evidence in a criminal case.

Petitioners' main theme is that the Court should make it more difficult for civil plaintiffs to recover for constitutional violations because that would also reduce the impact of the exclusionary rule. Pet. i, 12, 16, 19, 31, 32, 34, 39, 40. Consequently, according to Petitioners, civil plaintiffs should be permitted to recover only for the most "egregious" constitutional violations. Pet.17, 19, 20, 38, 41, 42.

The Millenders respectfully disagree. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . ." The Founding Fathers, obviously, did not intend Constitutional protections to prohibit only the most "egregious" violations. For a wrong, there should be a remedy.

Leon involved the suppression of evidence in a criminal case. The Court weighed the interests of the Fourth Amendment against the interests of the penal system and found that it was very important to allow a prosecutor to use evidence against a criminal suspect and that when the officer acted in good faith in procuring a warrant, that should not affect the prosecutor's ability to convict criminals. *Leon*, 468 U.S. at 922 ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").

In contrast, civil cases have nothing to do with suppressing evidence or convicting criminals, and therefore *Leon*'s reasoning does not apply. To the contrary, "in the case of the § 1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefitting the victim of police misconduct one would think most deserving of a remedy — the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason. *Malley* 475 U.S. at 344 (*citing Owen v. City of Independence*, 445 U.S. 622, 653 (1980)); *Hudson v. Michigan*, 547 U.S. 586, 597-99 (2006) (Benefits of civil

remedy for damages under 42 U.S.C. § 1983 for innocent victims of Fourth Amendment violations).

Guzman v. City of Chicago, 565 F.3d 393 (7th Cir. 2009), citing *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 700 (2009), and *Sims*, 553 F.3d 580, observed that it might be wise to "approach civil cases differently from criminal cases because to find a violation in a civil case raises 'no concern that the sanction for violating the Fourth Amendment would be disproportionate to the harm caused by the violation.' "

It makes *less* sense to cause the Millenders to suffer "because the constable has blundered," *People v. Defore*, 242 N.Y. 13, 21,150 N.E. 585, 587 (1926) (Cardozo, J.,), *Wolf v. Colorado*, 338 U.S. 25, 31(1949), than to allow the criminal "to go free." *Id.*

b. Public entities should be responsible, under the doctrine of respondeat superior, for their agents.

As explained by Justice Stevens, when "a police officer is engaged in the performance of his official duties, [and] violates the Federal Constitution while he is performing that mission, . . . federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual." *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 834 (1985) (Stevens, J., dissenting).

The Court should reconsider Justice Stevens views.

Respondeat superior liability would substantially increase the probability that victims of Constitutional violations would obtain redress. As it is now, many clear violations are not redressed. The individual who commits the act claims and often is awarded immunity; and entities will withstand efforts to prove the violation was caused by a custom, practice or policy of the entity.

Public entities, sadly, have no more obligation to compensate victims of clear constitutional wrongs perpetrated by their agents than do private parties to compensate the victims of their transgressions. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (public prosecutor's obligation "that justice shall be done").

As a result, public entities vigorously avoid compensating victims by claiming that the employee is entitled to immunity, and the plaintiff cannot establish liability under *Monell v. New York Dept. of Social Servs.*, 436 U.S. 658 (1978).

As Petitioners capably demonstrate, qualified immunity is always subject to argument. There is a qualified immunity appeal in virtually every case. Such appeals automatically buy defendants years, while consuming enormous resources.

Monell liability is no less litigable. *E.g., Connick v. Thompson*, ___ U.S. ___ (2011) (four reversals for dissimilar *Brady* violations in 10 years did not put the district attorney's office on notice of the need for specific training). "*Monell*" discovery and the attendant inevitable disputes, not to mention summary

judgment motions, trials and appeals, enormously complicate what would otherwise be the simplest case.

The absence of *respondeat superior* and the complications of *Monell* mean that it is easy, albeit costly, to avoid redressing constitutional violations. If the plaintiff manages to withstand the entity's summary judgment motions, the defense trial strategy is to seek "bifurcation" (trial of individual liability in a "first phase," before entity liability). The first phase goal is convince jurors the individuals should be exonerated because they were only doing what their employer trained and expected them to do; or at least condoned (which is generally obvious because they are still employed and there is no evidence of any discipline). This works because "jurors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department policy as an obedient employee." Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HAST. L.J. 499, 548 (1993). If no individual liability is found, the entities then argue there can be no liability at all, for want of a constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

This exercise, which exploits jurors' natural sympathy for lower-level workers, especially law enforcement officers performing necessary and dangerous jobs, and jurors' uncertainty about whether individual defendants will be required to pay an award, is largely a charade, unbecoming the integrity of the judicial process. Generally, as in California, entities are as a matter of law both vicariously liable for employees' mistakes and obligated to indemnify.

Robinson v. Solano County, 278 F.3d 1007, 1013, 1016 (9th Cir. 2002) (*en banc*) ("California . . . has rejected the Monell rule and imposes liability on counties under the doctrine of respondeat superior for acts of county employees"); Cal. Gov't Code §§ 815.2(a), 825(a).

Consequently, the absence of *respondeat superior* and the complications of *Monell* mean that dispute-resolution costs frequently outstrip everything else. This case could be "**Exhibit A.**" Without disrespect to Defendants' counsel, it appears the primary beneficiaries are the lawyers the public pays with hard tax dollars, since this expensive process does not save the public. Also, prevailing plaintiffs become entitled to compensation for reasonable attorney fees, in amounts significantly increased by the absence of *respondeat superior*. *Respondeat superior* liability would rationalize the process, save resources, and provide redress where it is merited.

CONCLUSION

For the foregoing reasons, respondents urge the Court to deny the petition for *certiorari*.

Respectfully Submitted,

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