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ASHCROFT V. AL-KIDD: TROUBLING DEVELOPMENTS IN POST-9/11 FOURTH AMENDMENT JURISPRUDENCE

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In March 2003, FBI agents pretextually arrested Abdullah al-Kidd under the federal material witness statute. As a result, al-Kidd brought a Bivens *action in federal district court against U.S. Attorney General John Ashcroft. The court denied Ashcroft's assertions of absolute and qualified immunity, and the U.S. Court of Appeals for the Ninth Circuit affirmed. In* Aschroft v. al-Kidd *the U.S. Supreme Court correctly held that qualified immunity protected Ashcroft against al-Kidd's lawsuit. But the Court's unnecessary conclusion that Ashcroft did not violate the Fourth Amendment is troubling. Not only did the Court expand the "objectively reasonable" test that is typically applied to law enforcement officers in the field but it also proposed a definition of "suspicion" that is at odds with its own precedent. The combined effect of these developments is an alarming ability on the part of authorities to avoid the probable cause requirement for arrest warrants. When an arresting authority's state of mind is shielded from constitutional scrutiny, and when the definition of suspicion is as broad as the Court has construed it, the result is the erosion of basic Fourth Amendment protections.*

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I. INTRODUCTION

In March 2003, Federal Bureau of Investigation (FBI) agents arrested Abdullah al-Kidd under the federal material witness statute.[1] Al-Kidd brought suit against U.S. Attorney General John Ashcroft, alleging that Ashcroft used the statute as a pretext for detaining suspected terrorists.[2] Ashcroft asserted qualified and absolute immunity.[3] In *Ashcroft v. al-Kidd*, the U.S. Supreme Court held that Ashcroft was protected by qualified immunity, thus overturning the decision of the U.S. Court of Appeals for the Ninth Circuit.[4] The Court emphasized that Supreme Court precedent, particularly *Whren v. United States*,[5] shows that the Court only considers that which is objectively reasonable—not subjective intentions—when applying the Fourth Amendment.[6] As Ashcroft's actions were objectively reasonable under the material witness statute, he did not violate al-Kidd's Fourth Amendment rights and thus was protected by qualified immunity against al-Kidd's claims.[7]

Despite its apparently uncontroversial holding, *al-Kidd* may have far-reaching, detrimental consequences for Fourth Amendment jurisprudence. Although the Court was correct in emphasizing that *Whren* and similar cases refused to consider the subjective intentions of law enforcement officers,[8] the Court failed to consider the particular factual contexts in which those cases arose. Each of the Supreme Court cases that emphasized the irrelevancy of subjective intentions involved law enforcement officers who conducted warrantless searches and seizures.[9] In contrast, *al-Kidd* involved a

1. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2079 (2011).
2. *Id.*
3. *Id.*
4. *Id.* at 2085.
5. 517 U.S. 806 (1996).
6. *al-Kidd*, 131 S. Ct. at 2083.
7. *Id.*
8. City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000); *Whren*, 517 U.S. at 814; Scott v. United States, 436 U.S. 128, 138 (1978).
9. *E.g.*, *Edmond*, 531 U.S. at 34–35 (discussing warrantless vehicular checkpoint searches); *Whren*, 517 U.S. at 808 (discussing the temporary detention of a motorist). In *Scott*, government agents installed wiretaps pursuant to valid court authorization. 436 U.S. at 130–31. However, the issue in that case was whether the agents went beyond the scope of the court's authorization by failing to "minimize the interception of communications not otherwise subject to interception

high ranking federal official who implemented a broad policy of preventive detentions with ostensibly valid arrest warrants.[10] The Court therefore applied the factually confined holdings of *Whren* and similar cases to the factually dissimilar case of *al-Kidd*.

Such an expansion of the "objectively reasonable" test is particularly troubling in light of the Court's adoption of a new definition of "suspicion" in *al-Kidd*. The Court argued in a footnote that suspicion involves not merely suspicion of wrongdoing but rather suspicion of *anything*, including benign behavior such as knowledge of a crime or of a criminal defendant.[11] When combined with the Court's refusal to consider the subjective intentions of law enforcement officers and prosecutors alike, the result is an alarming ability on the part of authorities to avoid the probable cause requirement for arrest warrants. Now, prosecutors may pretextually seek arrest warrants for suspects under statutes that do not require a showing of wrongdoing and without providing probable cause for the *actual* reasons for the arrest warrants.

This Comment argues that the Court's holding in *al-Kidd* constitutes troubling new developments in Fourth Amendment jurisprudence. Part II outlines the facts and procedural history of the case. Part III summarizes the Court's reasoning. Part IV gives a historical overview of the material witness statute, with an emphasis on the differences in the federal government's use of the statute before and after September 11, 2001. Part V argues that the Court's holding in *al-Kidd* misapplies precedent and inappropriately expands the objectively reasonable test that courts use in search and seizure cases. Part V also discusses the Court's new definition of suspicion, which, combined with the Court's expansion of the objectively reasonable test, erodes the probable cause requirement for arrest warrants.

under" the applicable statute. *Id.* at 130. In that sense, the issue in *Scott* was whether the government agents conducted unlawful warrantless searches.

10. *al-Kidd*, 131 S. Ct. at 2079.

11. *Id.* at 2082 n.2.

II. STATEMENT OF THE CASE

FBI agents apprehended al-Kidd in March 2003 as he was checking in for a flight to Saudi Arabia.[12] They arrested al-Kidd under the federal material witness statute,[13] which authorizes judges to "order the arrest of [a] person" whose testimony "is material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena."[14] Two days before al-Kidd's arrest, federal officials had informed a U.S. magistrate judge that information crucial to the prosecution of suspected Saudi Arabian terrorist Sami Omar al-Hussayen[15] would be lost if al-Kidd were to board his flight to Saudi Arabia.[16] Federal officials held al-Kidd in custody for sixteen days, and although al-Kidd remained on supervised release for fourteen months until the conclusion of al-Hussayen's trial, the prosecution never called him as a witness.[17]

In March 2005, al-Kidd filed a *Bivens* action against Ashcroft.[18] Al-Kidd alleged that Ashcroft used the material witness statute as a pretext for arresting and investigating people whom he suspected of having ties with terrorist organizations.[19] Al-Kidd argued that because federal officials lacked sufficient evidence to charge such individuals with a crime, federal officials instead detained them under the material witness statute.[20] According to al-Kidd, federal officials never intended to call him as a witness.[21] Rather, they

12. *Id.* at 2079.

13. *Id.*

14. 18 U.S.C. § 3144 (2006); *al-Kidd*, 131 S. Ct. at 2079.

15. Sami Omar al-Hussayen had been charged with multiple false-statement and visa-fraud offenses. Brief for Petitioner at 3, *al-Kidd*, 131 S. Ct. 2074 (No. 10-98). Although al-Hussayen indicated on his student visa application that he was entering the United States solely for the purpose of pursuing academic study, federal prosecutors believed that he was providing support to a terrorist organization in North Africa. *Id.* The jury acquitted him on some charges and failed to reach a verdict on others. *Id.* at 5.

16. *al-Kidd*, 131 S. Ct. at 2079.

17. *Id.*

18. *Id.*; *see generally* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (creating a cause of action against federal officials for injuries that were caused by violations of the Fourth Amendment).

19. *al-Kidd*, 131 S. Ct. at 2079.

20. *Id.*

21. *Id.*

suspected him of ties to al-Hussayen and thus arrested him as part of their "pretextual detention policy."[22]

Ashcroft filed a motion to dismiss al-Kidd's complaint, asserting absolute and qualified immunity.[23] The U.S. District Court for the District of Idaho denied Ashcroft's motion, and a divided panel of the Ninth Circuit affirmed.[24] The Ninth Circuit held that Ashcroft was protected by neither absolute nor qualified immunity and that the Fourth Amendment disallows pretextual material witness arrests without probable cause of criminal wrongdoing.[25] The Supreme Court granted certiorari.[26]

III. REASONING OF THE COURT

The issue before the Court in *al-Kidd* was whether qualified immunity protected Ashcroft from a suit that arose out of al-Kidd's arrest—an arrest that was lawful under the material witness statute but that lacked evidence of wrongdoing.[27] The Court examined whether al-Kidd pled facts sufficient to satisfy the Court's two-pronged qualified immunity test, which looks to whether (1) the official violated a constitutional or statutory right; and (2) the right was clearly established at the time of the challenged conduct.[28] While the Court recognized that it did not need to address both prongs of the test in order to overturn the lower court's decision, it did so nonetheless, emphasizing that when a "Court of Appeals does address both prongs of qualified-immunity analysis, we have discretion to correct errors at each step."[29]

The Court first looked to whether Ashcroft violated al-Kidd's Fourth Amendment rights. The Fourth Amendment protects people from "unreasonable . . . seizures,"[30] and an arrest is an example of

22. *Id.*

23. *Id.*

24. *Id.*; al-Kidd v. Ashcroft, 580 F.3d 949, 981 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011). The Ninth Circuit denied rehearing en banc. al-Kidd v. Ashcroft, 598 F.3d 1129 (9th Cir. 2010), *cert. granted in part*, 131 S. Ct. 415 (2010).

25. *al-Kidd*, 131 S. Ct. at 2079; *al-Kidd*, 580 F.3d at 952, 970. Judge Bea dissented from the Ninth Circuit court's holding. *al-Kidd*, 580 F.3d at 981 (Bea, J., dissenting).

26. *al-Kidd*, 131 S. Ct. at 2080.

27. *Id.* at 2079.

28. *Id.* at 2080 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

29. *Id.*

30. *Id.* (quoting U.S. CONST. amend. IV) (internal quotations omitted).

such a seizure.[31] According to the Court, although al-Kidd conceded the reasonableness of using the material witness warrant for the purpose of securing his testimony, he challenged the reasonableness of using the material witness warrant for the purpose of detaining him as a suspected terrorist.[32] Ultimately, the determinative issue was whether Ashcroft's subjective intent should be considered in determining the reasonableness of his actions under the Fourth Amendment.[33]

The Court emphasized that Fourth Amendment reasonableness is "predominately an objective inquiry."[34] It looks to the objective circumstances of the challenged action,[35] not to the subjective intent of the officer.[36] Nonetheless, the Court acknowledged that it had created an exception to this rule in *City of Indianapolis v. Edmond*,[37] in which it held that the Fourth Amendment prohibits suspicionless vehicle checkpoints that are used for detecting illegal drugs.[38] The Ninth Circuit, which principally relied on *Edmond*, interpreted the case to mean that an arrest violates the Fourth Amendment if law enforcement officers conducted it with an illicit "programmatic purpose," such as general crime control.[39] But the Court dismissed this interpretation, stating that *Edmond* only prohibits searches or seizures that police conduct with an illicit programmatic purpose and make "pursuant to a general scheme without individualized suspicion."[40] Thus, the Court held, the determining factor under *Edmond* is not "programmatic purpose" by itself, but "programmatic purpose" *and* a lack of "individualized suspicion."[41] Here, the Court stated that because a neutral U.S. magistrate judge issued a warrant

31. *Id.* (internal quotations omitted) (citing Dunaway v. New York, 442 U.S. 200, 207–08 (1979) (stating that arrest qualifies as a "seizure")).

32. *Id.*

33. *Id.*

34. *Id.* (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000)).

35. *Id.* (citing Scott v. United States, 436 U.S. 128, 138 (1978)).

36. *Id.* at 2081 (citing Whren v. United States, 517 U.S. 806, 814 (1996)).

37. 531 U.S. 32 (2000).

38. *al-Kidd,* 131 S. Ct. at 2081 (citing *Edmond*, 531 U.S. at 48). The Court also briefly discussed special-needs and administrative-search cases, where "actual motivations" are relevant. *Id.* at 2080–81 (quoting United States v. Knights, 534 U.S. 112, 122 (2001)).

39. *See id.*; al-Kidd v. Ashcroft, 580 F.3d 949, 968–69 (9th Cir. 2009).

40. *al-Kidd*, 131 S. Ct. at 2081 (quoting *Edmond*, 531 U.S. at 45–46).

41. *Id.*

based on "individualized reasons," this was not an instance where officials lacked individualized suspicion.[42]

The Court stressed that a warrant based on individualized suspicion affords the arrestee (here, al-Kidd) greater protection than he would get in the factual situations of other Court cases where the Court "eschew[ed] inquiries into intent."[43] For example, in both *Whren*[44] and *Devenpeck v. Alford*[45] the Court refused to consider the subjective intent of officers who undertook seizures that were supported by probable cause but that lacked a warrant.[46] And in *Terry v. Ohio*[47] and *United States v. Knights*[48] the Court applied an objective standard to warrantless searches supported by reasonable suspicion.[49]

The Court then examined whether Ashcroft's conduct violated clearly established law. An official violates clearly established law if, at the time of the conduct, "[t]he contours of [a] right [are] sufficiently clear" such that a "reasonable official would have understood that what he is doing violates that right."[50] The Court noted that no judicial opinion has held that an objectively reasonable arrest that is made under the material witness statute is unconstitutional due to pretext.[51] Also, the Court dismissed the Ninth Circuit's argument that Ashcroft was given clear warning of the unconstitutionality of his actions because a footnote in a district court opinion stated that his actions were illegitimate.[52] The Court emphasized that a district court dictum in a footnote is not controlling in any jurisdiction, much less in the entire nation.[53] Finally, the Court rebutted the Ninth Circuit's assertions that

42. *Id.* at 2082.
43. *Id.*
44. Whren v. United States, 517 U.S. 806, 813 (1996).
45. 543 U.S. 146 (2004).
46. *al-Kidd*, 131 S. Ct. at 2082 (citing *Devenpeck*, 543 U.S. at 153; *Whren*, 517 U.S. at 813).
47. 392 U.S. 1 (1968).
48. 534 U.S. 112 (2001).
49. *al-Kidd*, 131 S. Ct. at 2082 (citing *Knights*, 534 U.S. at 121–22; *Terry*, 392 U.S. at 21–22).
50. *Id.* at 2083 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
51. *Id.*
52. *Id.* at 2084. The footnote in question reads in part: "Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute." United States v. Awadallah, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002).
53. *al-Kidd*, 131 U.S. at 2084.

Ashcroft's conduct violated the history and purpose of the Fourth Amendment, stating that courts should not "define clearly established law at a high level of generality."[54]

Accordingly, the Court concluded that Ashcroft did not violate clearly established law.[55] Thus, as neither prong of the two-part qualified immunity test was met, the Court held that qualified immunity did protect Ashcroft against al-Kidd's claims.[56] The Court's decision, which it announced in an opinion by Justice Scalia, was unanimous.[57] However, Justice Kennedy, Justice Ginsburg, and Justice Sotomayor each filed their own concurrences.[58] Justice Kennedy briefly discussed the material witness statute in light of Fourth Amendment warrant requirements, and he proposed judicial deference to national office holders for qualified immunity purposes.[59] Justice Ginsburg questioned the validity of the warrant, and in a footnote she discussed the Court's traditional definition of suspicion.[60] Justice Sotomayor disputed the majority's decision to rule on the constitutionality of Ashcroft's actions under the Fourth Amendment rather than simply hold that Ashcroft did not violate clearly established law.[61]

54. *Id.*

55. *Id.* at 2085.

56. *Id.*

57. *Id.* at 2078.

58. Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined Part I of Justice Kennedy's opinion. *Id.* at 2085 (Kennedy, J., concurring). Justice Breyer and Justice Sotomayor joined Justice Ginsburg's opinion. *Id.* at 2087 (Ginsburg, J., concurring). Justice Ginsburg and Justice Breyer joined Justice Sotomayor's opinion. *Id.* at 2089 (Sotomayor, J., concurring). Justice Kagan did not take part in the decision. *Id.* at 2085.

59. *Id.* at 2085–87 (Kennedy, J., concurring); Lyle Denniston, *A New "Kennedy Doctrine,"* SCOTUSBLOG (June 4, 2011, 2:14 PM), http://www.scotusblog.com/2011/06/a-new-kennedy-doctrine (discussing Justice Kennedy's proposition that presidential cabinet members should have "even greater legal immunity . . . than has existed").

60. *Id.* at 2087–89 (Ginsburg, J., concurring).

61. *Id.* at 2089–90 (Sotomayor, J., concurring). The concurrences also seemed to call into question the constitutionality of the material witness statute. Justice Kennedy stated that "the scope of the [material witness] statute's lawful authorization is uncertain," and the Court's holding "leaves unresolved whether the Government's use of the Material Witness Statute in this case was lawful." *Id.* at 2085–86 (Kennedy, J., concurring). Similarly, Justice Sotomayor stated that "this case does not present an occasion to address the proper scope of the material witness statute or its constitutionality." *Id.* at 2090 (Sotomayor, J., concurring).

IV. HISTORICAL OVERVIEW OF THE MATERIAL WITNESS STATUTE

The authority of the federal government to arrest and detain a witness dates back to the eighteenth century.[62] The Federal Judiciary Act of 1789 granted federal courts the authority to issue "a warrant for the removal of the offender, [or] the *witness*."[63] The Court has articulated the rationale for such broad authority by emphasizing that the "duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained . . . as a material witness."[64] This rationale and authority is ultimately rooted in the English law that was in effect at the time of American independence, which provided that all British subjects owe the king their "knowledge and discovery."[65]

Consistent with this history, in 1984 Congress passed the material witness statute.[66] The material witness statute authorizes federal courts to issue an arrest warrant for witnesses who have material information and who could flee if they were subpoenaed.[67] Prior to 9/11, the material witness statute was used almost exclusively by the Immigration and Naturalization Service (INS) to arrest illegal immigrants and secure their testimony against their smugglers before they left the country.[68] According to a study by the Bureau of Justice Statistics, the INS made 3,959 of the 4,203 material witness arrests between October 1, 1999, and September 30,

62. Bacon v. United States, 449 F.2d 933, 938–39 (9th Cir. 1971).

63. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789–1799) (emphasis added).

64. Stein v. New York, 346 U.S. 156, 184 (1953), *overruled on other grounds by* Jackson v. Denno, 378 U.S. 368, 377 (1964).

65. Blair v. United States, 250 U.S. 273, 279–80 (1919) (citing Countess of Shrewsbury's Case, 2 How. St. Tr. 769, 778 (1612)).

66. Human Rights Watch & ACLU, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11*, HUM. RTS. WATCH, June 2005, at 1, 11 n.13 [hereinafter *Witness to Abuse*], *available at* www.aclu.org/FilesPDFs/materialwitnessreport.pdf.

67. 18 U.S.C. § 3144 (2006).

68. *Witness to Abuse*, *supra* note 66, at 14; *see also* Donald Q. Cochran, *Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start?* 18 GEO. MASON L. REV. 1, 7–8 (2011) (discussing how federal witnesses were typically detained to testify in immigration offense prosecutions).

2000.[69] In contrast, the FBI made only 24 arrests under the material witness statute during the same period.[70]

After 9/11, however, the federal government began using the material witness statute to detain terrorism suspects as witnesses.[71] High government officials noted the importance and effectiveness of the material witness statute as a means of combating terrorism.[72] Ashcroft stated that "[a]ggressive detention of lawbreakers and *material witnesses* is vital to preventing, disrupting, or delaying new attacks."[73] Similarly, then- Assistant U.S. Attorney General Michael Chertoff emphasized that the material witness statute is an "important investigative tool in the war on terrorism . . . . Bear in mind that you get not only testimony—you get fingerprints, you get hair samples—so there's all kinds of evidence you can get from a witness."[74]

This policy of "aggressive detention" that Ashcroft and Chertoff outlined was reflected in the number and pattern of arrests that were made under the material witness statute. Whereas the number of INS material witness arrests decreased from 3,959 in 2000 to 3,482 in 2002, the number of FBI material witness arrests increased from 24 in 2000 to 123 in 2002.[75] Although the Department of Justice did not reveal how many of its arrestees were held in connection with counterterrorism investigations, a study that Human Rights Watch (HRW) and the American Civil Liberties Union (ACLU) conducted

69. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2000, at 16 (2002) [hereinafter COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2000], *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=605.

70. *Id.*

71. *Witness to Abuse*, *supra* note 66, at 15–16. *See generally* Ricardo J. Bascuas, *The Unconstitutionality of 'Hold Until Cleared': Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 682–95 (2005) (discussing the federal government's pretextual use of the material witness statute after 9/11).

72. *Witness to Abuse*, *supra* note 66, at 17–19; *see* Laurie L. Levenson, *Detention, Material Witnesses, and the War on Terror*, 35 LOY. L.A. L. REV. 1217, 1225 (2002) ("Material witness laws provide the government with the perfect avenue to jail those it considers dangerous.").

73. John Ashcroft, U.S. Attorney Gen., Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force (Oct. 31, 2001) (emphasis added), *available at* http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm.

74. Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo*, WASH. POST, Nov. 24, 2002, at A1.

75. COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2000, *supra* note 69, at 16; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2002, at 16 (2004), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=597.

reveals that, as of June 2005, the federal government had arrested at least 70 material witnesses in connection with such investigations.[76]

V. ANALYSIS

In *Bivens v. Six Unknown Federal Narcotics Agents*,[77] the Court held that a violation of a person's Fourth Amendment rights gives rise to a federal cause of action against the offending government official.[78] However, government officials are immune from liability for civil damages so long as they do not (1) violate a statutory or constitutional right that is (2) clearly established.[79] In *al-Kidd*, although the Court was correct in concluding that al-Kidd's Fourth Amendment right was not clearly established at the time of his arrest, it improperly concluded that the FBI did not violate that right.

A. Aschroft Did Not Violate Clearly Established Law

The Court in *al-Kidd* properly concluded that Ashcroft did not violate clearly established law. The Court's emphasis in *Whren* that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"[80] shows that al-Kidd's rights were not clearly established at the time of his arrest. As Justice Ginsburg acknowledged in her concurrence, "[g]iven *Whren v. United States* . . . no 'clearly established law' renders Ashcroft answerable in damages."[81] However, this does not mean that Ashcroft did not violate al-Kidd's Fourth Amendment rights. It only means that such rights were not clearly established at the time of al-Kidd's arrest.

B. Ashcroft Violated al-Kidd's Fourth Amendment Rights

The Court misapplied its own precedent in holding that Ashcroft did not violate al-Kidd's Fourth Amendment rights. In particular, it removed the holdings of *Whren* and similar cases from their factual contexts and applied them to the factually dissimilar case of *al-Kidd*,

76. *Witness to Abuse*, *supra* note 66, at 16.
77. 403 U.S. 388 (1971).
78. *Id.*
79. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *supra* note 28 and accompanying text.
80. Whren v. United States, 517 U.S. 806, 813 (1996).
81. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2087 (2011) (Ginsburg, J., concurring) (citation omitted).

thereby expanding the objectively reasonable test that is used in Fourth Amendment analysis. Combined with the Court's new definition of suspicion, its decision erodes the probable cause requirement for arrest warrants.

1. Misapplied Precedent and an Expansion of the Objectively Reasonable Test

Whether a government official violated a person's constitutional rights is determined by the contours of the Fourth Amendment.[82] Typically, when it has decided whether a search or seizure is reasonable under the Fourth Amendment, the Court has declined to consider as determinative the subjective intent of the officer.[83] Rather, the Court has objectively examined the circumstances of the challenged action.[84] In *Scott v. United States*[85] the Court stated that "[s]ubjective intent . . . does not make otherwise lawful conduct illegal or unconstitutional"[86] and noted its own past emphasis on "the objective aspect of the term 'reasonable.'"[87] Most importantly, in *Whren* the Court held that police officers' brief detention of a motorist who had committed a civil traffic violation was not made invalid by the officers' intention to search the vehicle for illegal narcotics.[88] The Court stressed that subjective intent is largely irrelevant in typical Fourth Amendment analysis and thus refused to consider as probative the officers' ulterior motive in stopping the motor vehicle.[89]

However, the particular language that the Court used in past cases suggests that application of the objectively reasonable test is limited. In *Whren* the Court stated that an officer's subjective intent plays "no role in *ordinary*, probable-cause Fourth Amendment

82. U.S. CONST. amend. IV. Of course, government officials can violate rights that are derived from other amendments to the Constitution. This Comment, however, limits its discussion to the Fourth Amendment.

83. *See Whren*, 517 U.S. at 813.

84. *Id.*

85. 436 U.S. 128 (1978).

86. *Id.* at 136.

87. *Id.* at 137 (discussing Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).

88. 517 U.S. at 812–13 (quoting United States v. Robinson, 414 U.S. 218, 221 n.1 (1973)).

89. *Id.*

analysis."[90] Applying this language in *Edmond*, the Court recognized the general applicability of the objectively reasonable test but nonetheless concluded that "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."[91] In addition, the Court has deemed both special-needs cases and administrative-search cases to be outside "ordinary" Fourth Amendment analysis such that the Court must consider the motivations of the officers who conducted the searches.[92] These cases show the Court's unwillingness to apply the objectively reasonable test universally to Fourth Amendment cases. For these reasons, the Court in *al-Kidd* attempted, albeit unsuccessfully, to place al-Kidd's case squarely within the *Whren* line of cases and qualify it for the objectively reasonable test.

The Court in *al-Kidd* implied that an arrest that was made with a material witness warrant falls within the ordinary Fourth Amendment analysis that it had identified in *Whren*. It did so by stating that an arrest "qualifies as a 'seizure.'"[93] This is true, but as Justice Sotomayor noted in her concurrence, the Court has never considered whether an official's subjective intent matters in the "novel" situation where officials detain an individual for a prolonged period "without probable cause to believe he had committed any criminal offense."[94] Also, the Court has historically applied the objectively reasonable test only to situations where an officer is conducting a warrantless search or seizure, not where an officer is arresting a person with an ostensibly valid warrant. For example, in *Devenpeck* the Court did not consider the intentions of officers who undertook the *warrantless* arrest of a person who was impersonating a police officer.[95] Similarly, in *Whren* the Court refused to consider the

90. *Id.* at 813 (emphasis added); *see also* United States v. Knights, 534 U.S. 112, 122 (2001) (deciding not to consider subjective intent because "our holding rests on ordinary Fourth Amendment analysis").

91. City of Indianapolis v. Edmond, 531 U.S. 32, 45–46 (2000).

92. *E.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (special needs); Michigan v. Clifford, 464 U.S. 287, 294–95 (1984) (administrative search).

93. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011). The Court also stated that Ashcroft's case was neither a special-needs case nor an administrative-search case. *Id.* at 2081.

94. *Id.* at 2090 (Sotomayor, J., concurring). The fact that it is unclear whether law-enforcement officers validly obtained the warrant makes this factual scenario even more unique. *Id.* at 2087–88 (Ginsburg, J., concurring).

95. *See* Devenpeck v. Alford, 543 U.S. 146, 149–50 (2004).

subjective intent of police officers who briefly detained suspects *without a warrant* during the course of a traffic stop.[96] In both *Terry* and *Knights* the Court examined the objectively reasonable behavior of police officers who conducted *warrantless* searches. *Al-Kidd* did not involve an example of such warrantless arrests or searches. Instead, it involved Ashcroft's policy of obtaining valid material witness warrants for the purpose of preventive detention.

Most importantly, *Whren* and similar cases applied the objectively reasonable test to law enforcement officers in the field, not to high-ranking federal prosecutors such as the attorney general. Each of the cases that the Court cited in support of its refusal to consider the subjective intent of Ashcroft—*Whren*, *Scott*, and *Edmond*—involved the decisions of law enforcement officers in the field.[97] In *Whren* police officers searched a vehicle,[98] while in *Scott* government agents installed wiretaps,[99] and in *Edmond* police officers conducted a vehicular checkpoint.[100] The Court implicitly acknowledged this distinction in *Devenpeck* when it stated that an "*officer's* state of mind . . . is irrelevant to the existence of probable cause."[101]

In contrast, in *al-Kidd* the relevant subjective intentions were not those of the arresting officer but rather those of Ashcroft, the attorney general. In making the objectively reasonable test applicable to high-ranking federal officials, the Court signaled its intent not to question the motives behind potentially far-reaching prosecutorial decisions. Thus, the Court extended the applicability of the objectively reasonable test beyond the individual decisions of law enforcement officers and agents to the broad policies of federal policy makers—an obvious example of which is the federal government's national policy of detaining terrorist suspects under the material witness statute.

96. Whren v. United States, 517 U.S. 806, 808–09 (1996).

97. City of Indianapolis v. Edmond, 531 U.S. 32, 34–35 (2000); *Whren*, 517 U.S. at 808–09; Scott v. United States, 436 U.S. 128, 131–32 (1978).

98. *Whren*, 517 U.S. at 808–09.

99. *Scott*, 436 U.S. at 131–32.

100. *Edmond*, 531 U.S. at 34–35.

101. Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (emphasis added).

2. A New Definition of Suspicion and an Erosion of the Probable Cause Requirement for Arrest Warrants

The consequence of expanding the objectively reasonable test is particularly alarming when it is considered in conjunction with the Court's new definition of suspicion. In discussing the warrant that federal officials used in *al-Kidd*, the Court emphasized that a warrant that is based on individualized suspicion affords arrestees significant protection.[102] In footnote two of its decision, the Court provided a definition of such suspicion.[103] According to the Court, suspicion in the context of the Fourth Amendment does not mean suspicion of "wrongdoing."[104] Rather, the Court stated that the "common and idiomatic" use of the word suspicion means suspicion of *anything*, such as "I have a suspicion she is throwing me a surprise birthday party."[105]

As Justice Ginsburg argued in her concurrence,[106] the term "suspicion" in "legal argot" is not susceptible to this definition[107] because suspicion means "individualized suspicion *of wrongdoing*."[108] In *O'Connor v. Ortega*,[109] for example, the Court discussed the individualized suspicion of *misconduct* by the person whose offices were searched by police.[110] In *New Jersey v. T.L.O.*[111] the Court noted that a search of a student's purse was based on suspicion that she had *violated school rules*.[112] And in *Michigan v. Summers*,[113] while discussing exceptions to the probable cause requirement, the Court emphasized that police must have "an articulable basis for suspecting *criminal activity*."[114]

The Court's refusal in *al-Kidd* to accept the traditional definition of suspicion does not bode well for the probable cause requirement

102. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2082 (2011).
103. *Id.* at 2082 n.2.
104. *Id.* at 2082.
105. *Id.*
106. *Id.* at 2088–89 n.3 (Ginsburg, J., concurring).
107. *Id.*
108. *Id.* at 2088 n.3 (quoting Indianapolis v. Edmond, 531 U.S. 32, 37 (2000)).
109. 480 U.S. 709 (1987).
110. *Id.* at 726.
111. 469 U.S. 325 (1985).
112. *Id.* at 342 n.8.
113. 452 U.S. 692 (1981).
114. *Id.* at 699 (emphasis added).

for arrest warrants. The language that the Court used seems to explicitly sanction warrants, such as the material witness warrant, that are not supported by suspicion of wrongdoing but suspicion of whatever a federal or state statute identifies as a permissible reason for arrest. This alone may not be alarming because the federal government's authority to arrest material witnesses has been in effect since the nation's founding. Yet when the Court's definition of suspicion is combined with the Court's refusal to consider the subjective intentions of prosecutors and policy makers, its decision allows officials to avoid the probable cause requirement for arrest warrants. As long as officials have probable cause to believe that a suspect qualifies for arrest under a state or federal statute—which, in light of the Court's opinion, need not require wrongdoing—they may obtain an arrest warrant *despite the fact* that they lack probable cause for that which the suspect is *actually* suspected of and arrested for.[115]

Al-Kidd provides an example of this. Although Ashcroft had probable cause to believe that al-Kidd had material information that was necessary for the trial of al-Hussayen, al-Kidd was actually arrested as a suspected terrorist, for which Ashcroft lacked probable cause.[116] As the Ninth Circuit emphasized in its decision, although al-Kidd was named in the warrant, the result is nonetheless the same as that of a general warrant and its inherent disregard of individualized probable cause—"gutting the substantive protections of the Fourth Amendment's 'probable cause' requirement and giving the state the power to arrest upon the executive's mere suspicion."[117]

The federal government's use of the material witness statute after 9/11 further highlights these concerns. As the study by HRW and the ACLU shows, between September 11, 2001, and June 2005, at least seventy suspects were detained in connection with counterterrorist investigations under the material witness statute.[118] Although the government presumably provided probable cause to believe that such suspects were material witnesses, it did not provide probable cause to believe that they committed illegal terrorist activities. Thus, the government arrested more than seventy people

115. *See generally* Bacon v. United States, 449 F.2d 933, 941–43 (9th Cir. 1971) (discussing the probable cause requirement in the context of the material witness statute).

116. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2079 (2011).

117. al-Kidd v. Ashcroft, 580 F.3d 949, 972 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

118. *Witness to Abuse*, *supra* note 66, at 16.

without providing probable cause for the true reason for which they were arrested (i.e., wrongdoing). Such a systematic avoidance of the probable cause requirement for arrest warrants is far more alarming than the relatively isolated incidents in *Whren* and similar cases are.

VI. CONCLUSION

Although the *al-Kidd* Court was correct in holding that Ashcroft did not violate a clearly established law, its conclusion that Ashcroft did not violate al-Kidd's Fourth Amendment rights will have detrimental consequences for Fourth Amendment jurisprudence. Among other statements, the Court's emphasis in *Whren* that subjective intent plays "no role in *ordinary*, probable-cause Fourth Amendment analysis"[119] forecloses the assertion that al-Kidd's rights were clearly established at the time of his arrest. Although the Court could have ended its inquiry at this point, it further analyzed whether Ashcroft violated al-Kidd's rights, clearly established or not. It is this analysis that makes the opinion far more wide reaching—and detrimentally so—than was originally necessary. The opinion constitutes a significant expansion of the objectively reasonable standard for determining Fourth Amendment violations, and, when it is combined with the Court's definition of suspicion, it creates a potentially severe erosion of the probable cause requirement for arrest warrants.

119. Whren v. United States, 517 U.S. 806, 813 (1996) (emphasis added).