No.

In the Supreme Court of the United States

ALWASI YONG, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Courts examine "the facts known to the arresting officer at the time of the arrest" in assessing probable cause or reasonable suspicion under the Fourth Amendment. *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004). Nonetheless, an officer may lawfully act in reliance on an order issued by another officer who had the requisite personal knowledge. *United States* v. *Hensley*, 469 U.S. 221 (1985); *Whiteley* v. *Warden*, 401 U.S. 560 (1971).

The question presented is:

Whether, in the absence of such an order, an officer who lacks probable cause or reasonable suspicion may conduct an arrest, search, or frisk, so long as a court later determines that another officer who happened to be present at the scene had the requisite personal knowledge, even if that officer did not communicate it to the acting officer.

TABLE OF CONTENTS

Page

Question Presented I

Appendix Contents III

Table Of Authorities IV

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Introduction 1

Statement 3

Reasons For Granting The Petition 12

I. The Decision Below Exacerbates An Entrenched Circuit Split 12

A. At Least Four State Supreme Courts And Two Federal Circuits Allow Knowledge To Be Imputed Between Officers Even Absent Communication 13

B. Still Other Courts Require Only "Some" Unspecified "Degree Of Communication" Between Officers 17

C. At Least Two Federal Circuits And Several State High Courts Refuse To Allow Imputation Between Officers Absent Communication Of That Information Or An Instruction To Act 19

II. The Decision Below Is Wrong 25

III. This Case Presents an Ideal Vehicle for Resolving an Issue of Unquestionable Importance 31

Conclusion 33

APPENDIX CONTENTS

Page

A. Opinion of the Supreme Court of Pennsylvania . 1a

B. Opinion of the Pennsylvania Superior Court.... 36a

C. Transcript of suppression hearing..................... 61a

TABLE OF AUTHORITIES

Cases: **Page(s)**

Adams v. *Williams*,
407 U.S. 143 (1972) 25

Arizona v. *Gant*,
556 U.S. 332 (2009) 28, 29

Beck v. *Ohio*,
379 U.S. 89 (1964) 28

Brinegar v. *United States*,
338 U.S. 160 (1949) 3

Byrd v. *United States*,
No. 16-1371 (May 14, 2018) 28

Camara v. *Municipal Court of City and County of San Francisco*,
387 U.S. 523 (1967) 3

Carroll v. *United States*,
267 U.S. 132 (1925) 2, 3, 26

Commonwealth v. *Kenney*,
297 A.2d 794 (Pa. 1972) 5

Davis v. *United States*,
564 U.S. 229 (2011) 20, 27

Devenpeck v. *Alford*,
543 U.S. 146 (2004) ....I, 1, 2, 3, 25

Dunaway v. *New York*,
442 U.S. 200 (1979) 29

Elkins v. *United States*,
364 U.S. 206 (1960) 31, 32

Haywood v. *United States*,
584 A.2d 552 (D.C. 1990) 24, 26

Cases—Continued: **Page(s)**

Heien v. *North Carolina*,
135 S. Ct. 530 (2014) 25

Herring v. *United States*,
555 U.S. 135 (2009) 28, 29

Illinois v. *Andreas*,
463 U.S. 765 (1983) 26

In re L.J.,
79 A.3d 1073 (Pa. 2013) 8, 9

Maryland v. *Pringle*,
540 U.S. 366, 371 (2003) 3, 25

Montes-Valeton v. *State*,
216 So. 3d 475 (Fla. 2017) 2, 19, 22, 23

New York v. *Belton*,
453 U.S. 454 (1981) 29

Nix v. *Williams*,
467 U.S. 431 (1984). 28

People v. *Mitchell*,
585 N.Y.S.2d 759 (N.Y. App. Div. 1992)...... *passim*

State v. *Bell*,
948 S.W.2d 557 (Ark. 1997) 14, 15

State v. *Cooley*,
457 A.2d 352 (Del. 1983) 2, 19, 23

State v. *Iven*,
335 P.3d 264 (Okla. 2014) 24

State v. *Miller*,
510 N.W.2d 638 (N.D. 1994) 12, 24

State v. *Peterson*,
696 P.2d 387 (Kan. 1985) 14, 15

Cases—Continued: **Page(s)**

State v. *Tywayne H.*,
933 P.2d 251 (N.M. Ct. App. 1997) 24

State v. *Weber*,
139 So.3d 519 (La. 2014) 14, 18

Terry v. *Ohio*,
392 U.S. 1 (1968) 1, 4, 19, 30

United States v. *Cortez*,
449 U.S. 411 (1981) 4

United States v. *Ellis*,
499 F.3d 686 (7th Cir. 2007) 2, 19, 21, 22

United States v. *Gillette*,
245 F.3d 1032 (8th Cir. 2001) 17, 18

United States v. *Hensley*,
469 U.S. 221 (1985) .... *passim*

United States v. *Lee*,
962 F.2d 430 (5th Cir. 1992) 18

United States v. *Massenburg*,
654 F.3d 480 (4th Cir. 2011) .... *passim*

United States v. *McCarthy*,
77 F.3d 522 (1st Cir. 1996)...................................... 5

United States v. *O'Connell*,
841 F.2d 1408 (8th Cir. 1998) 13

United States v. *Ragsdale*,
470 F.2d 24 (5th Cir. 1972) 2, 11, 15, 16

United States v. *Ramirez*,
473 F.3d 1026 (9th Cir. 2007) 2, 18

United States v. *Shareef*,
100 F.3d 1491 (10th Cir. 1996) 2, 12, 16, 17

Cases—Continued: **Page(s)**

United States v. *Watson*,
423 U.S. 411 (1976) 3

Utah v. *Talbot*,
246 P.3d 112 (Ut. 2010).. 18

Whiteley v. *Warden*,
401 U.S. 560 (1971) .... *passim*

Wong Sun v. *United States*,
371 U.S. 471 (1963) 28

Ybarra v. *Illinois*,
444 U.S. 85 (1979) 1

Statutes:

28 U.S.C. § 1257(a) 1

Other Authorities:

Derik T. Fettig, *Who Knew What When? A Critical Analysis of the Expanding Collective Knowledge Doctrine*,
82 UMKC L. REV. 663 (2014) 13, 18

Unified Judicial System of Pennsylvania, "Justice David N. Wecht,"
https://goo.gl/kzMGyS 10

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, App., *infra*, 1a-35a, is reported at 177 A.3d 876. The opinion of the Superior Court of Pennsylvania, App., *infra*, 36a-60a, is reported at 120 A.3d 299.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 18, 2018. On April 9, 2018, Justice Alito extended the time in which to file a petition for writ of certiorari to and including May 18, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *.

INTRODUCTION

"[A] search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979). Police may also perform an investigatory stop and frisk based on reasonable suspicion that a weapon is present. See *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968). In making such determinations, police may rely on "the facts known to the arresting officer at the time of the arrest," *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004), or on information and instructions communicated by other officers. See *Whiteley* v. *Warden*, 401 U.S. 560,

568 (1971); *Carroll* v. *United States*, 267 U.S. 132, 161 (1925).

However, state and federal courts are deeply divided about whether a valid search and seizure can be based on facts *not* known to the officer who performed the search—but rather, on facts known only by some other officer on the scene. Some courts, including the Fourth and Seventh Circuits and the high courts of Delaware and Florida, maintain that probable cause depends on the knowledge of the officer actually conducting the search or seizure. See, *e.g.*, *United States* v. *Massenburg*, 654 F.3d 480 (4th Cir. 2011); *United States* v. *Ellis*, 499 F.3d 686 (7th Cir. 2007); *Montes-Valeton* v. *State*, 216 So. 3d 475 (Fla. 2017); *State* v. *Cooley*, 457 A.2d 352 (Del. 1983); see also *People* v. *Mitchell*, 585 N.Y.S.2d 759 (N.Y. App. Div. 1992). Other courts disagree, including the Fifth and Tenth Circuits and the Supreme Court of Pennsylvania in this case. Those courts hold that probable cause or reasonable suspicion can be based on facts concededly *unknown* to the acting officer, but known to some other officer present at the scene. See App., *infra*, 29a-30a; *United States* v. *Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996); *United States* v. *Ragsdale*, 470 F.2d 24, 30 (5th Cir. 1972). This notion is commonly referred to as the "collective knowledge doctrine" or the "fellow officer rule." See *United States* v. *Ramirez*, 473 F.3d 1026, 1032 n.4 (9th Cir. 2007).

The decision of the Supreme Court of Pennsylvania cannot stand. It conflicts with the bedrock rule that police action must be upheld based on "the facts known to the * * * officer at the time" of the search or seizure. *Devenpeck*, 543 U.S. at 152. The decision here would

"encourag[e] police without the requisite level of suspicion" to take actions known to be invalid, "in the hopes that his or her fellow officers possess such level of suspicion." App., *infra*, 34a (Donohue, J., dissenting). By converting search and seizure determinations from a weighing of known facts into a game of chance about what a court might later conclude other officers knew (but never bothered to communicate), the decision invites "arbitrary invasions by government officials"—the very evil the Fourth Amendment is intended to prevent. See *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967). The decision raises the real risk that imputed knowledge "could swallow" conventional Fourth Amendment analysis. App., *infra*, 34a (Donohue, J., dissenting). This Court's review is urgently warranted.

STATEMENT

1. Under the Fourth Amendment, police officers ordinarily cannot conduct an arrest or search without probable cause to believe that the subject committed a crime (or, in the case of a search, that evidence of a crime will be found). *United States* v. *Watson*, 423 U.S. 411, 417 (1976); *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949). "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck*, 543 U.S. at 152 (citing *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003)). An arresting officer may also rely "on facts communicated to him by others." *Carroll*, 267 U.S. at 161.

This Court has also condoned certain limited kinds of searches and seizures based on a lesser showing.

For example, an investigatory stop and frisk can be based on reasonable suspicion that an individual may be carrying a weapon that could threaten the officer's safety. *Terry*, 392 U.S. at 20. But such a search must be "narrowly drawn" to the purpose of finding weapons and performed only if the officer "*has reason to believe* that he is dealing with an armed and dangerous individual." *Id.* at 27 (emphasis added). The belief must be "particularized and objective." *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981).

Whiteley v. *Warden*, 401 U.S. 560 (1971), addressed when police may rely on orders from other officers in making an arrest. There, one officer arrested a suspect in reliance on information contained in a police bulletin broadcast by officers in another jurisdiction. This Court acknowledged that "police officers called upon to aid other officers in executing search warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause." But the Court also emphasized that if the requesting officer did not himself have probable cause, "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.* at 568-569. Because the police bulletin in *Whiteley* relied on a complaint that did not establish probable cause—and because the arresting officer himself lacked any "factual data tending to corroborate" probable cause—this Court held that the arrest was unconstitutional and evidence recovered therein should have been suppressed. *Ibid.*

United States v. *Hensley*, 469 U.S. 221 (1985), applied *Whiteley* in the context of investigatory stops. In

Hensley, officers stopped a suspect "in reliance on a flyer issued by another [police] department indicating that the [defendant] [wa]s wanted for investigation of a felony." The flyer did not communicate, however, "the specific and articulable facts which led the first department to suspect [his] involvement in a completed crime." *Hensley*, 469 U.S. at 229-230. This Court explained that under *Whiteley*, the admissibility of evidence gained during an investigatory stop turns "on whether the officers who *issued* the flyer possessed [reasonable suspicion]," not "whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance." *Id.* at 231.

Lower courts have consistently applied *Whiteley* and *Hensley* to situations where one officer directs another to make an arrest or investigatory stop. The focus of such inquiries is whether the officer who issued the directive had information sufficient to justify it. See*, e.g.*, *United States* v. *McCarthy*, 77 F.3d 522, 533 (1st Cir. 1996); *Commonwealth* v. *Kenney*, 297 A.2d 794, 796 (Pa. 1972). Courts have sharply divided, however, about how *Whiteley* and *Hensley* apply in the absence of communication between officers.

2. In September 2011, police officer Joseph McCook conducted surveillance of suspected drug activity along a block in Philadelphia's Fairhill neighborhood. App., *infra*, 2a. McCook saw a confidential informant hand money to petitioner, Alwasi Yong. *Ibid.* Petitioner handed the money to another man, who went inside a nearby house, returned with a small object (later determined to be marijuana), and handed it to the informant. *Ibid.* Police returned and conducted surveillance again the next day. Officer McCook did

not join them, and no officers saw petitioner there that day. *Id.* at 3a. McCook returned for the third day of surveillance, during which an undercover officer purchased an item later confirmed to be marijuana. *Ibid.* Although another officer saw petitioner in the area, petitioner did not take part in the transaction. *Ibid.*

Officers finished their surveillance around 1:15 pm on the third day. App., *infra*, 3a-4a. McCook then "met up with the other officers to get ready to execute [and] to brief them on the execution of the search warrant" issued for the house. *Id.* at 4a. The suppression record contains no testimony or other evidence about what McCook said to the other officers at this briefing, or which officers were present. Ten minutes later, at approximately 1:25 pm, officers returned to the house to execute the search warrant. *Ibid.*

A group of "approximately six to eight" officers entered the house, with McCook toward the rear. App., *infra*, 4a. Officer Gerald Gibson entered the living room area, where he found petitioner. *Ibid.* Just as McCook was entering the living room, Gibson arrested and handcuffed petitioner. *Ibid.*; see also *id.* at 67a, 72a-73a (suppression hearing). Gibson searched petitioner and found a .38 caliber revolver in his waistband. *Id.* at 4a.

3. Petitioner moved to suppress the evidence collected from Gibson's search, arguing that no officer on the scene had probable cause to search him, including Gibson. App., *infra*, 5a-6a, 74a-78a. Petitioner argued that the fact that McCook witnessed him accepting money once (before immediately turning it over to someone else) two days earlier was insufficient to raise concern that Yong could be armed or dangerous. *Id.* at

74a-75a. Petitioner also noted that no officer had testified to seeing a bulge or anything else to raise suspicion that petitioner might be armed. *Ibid*. Moreover, petitioner argued that Gibson was not present during any of the surveillance that could have suggested petitioner's involvement with *any* criminal activity, *id.* at 78a, and there was no evidence anyone had communicated such information to Gibson, *id.* at 5a-6a.

The trial court denied petitioner's motion to suppress. App., *infra*, 79a-80a. The court acknowledged that the Commonwealth had not actually introduced the warrant into evidence. Nonetheless, the court "assume[d] that [the warrant] noted that there were people who were involved on [the three surveillance days] [and that petitioner was] there on [the first and third days]." *Id.* at 76a. The court then held that the search warrant, which was issued based on McCook's surveillance, established probable cause for *McCook* to search petitioner incident to its execution. *Id.* at 79a. The trial court further held that "the knowledge of one [officer] is imputed to all on that scene that day, all the ones who are executing the search warrant." *Id.* at 76a. The fact that Gibson was not present during the surveillance was irrelevant, in the trial court's view, because "what is in the mind of the [officer who observed the earlier transaction involving petitioner] is imputed to that of all those who served the warrant." *Id.* at 79a.

A jury convicted petitioner of carrying a firearm without a license and conspiracy to commit possession of a controlled substance with intent to distribute. In a separate proceeding, the trial court found petitioner guilty of persons not to possess a firearm. Petitioner

was sentenced to an aggregate term of 5-10 years' imprisonment. App., *infra*, 7a & n.9.

4. The Superior Court unanimously reversed. App., *infra*, 36a-60a. As relevant here, and in a lengthy opinion written by then-Judge David Wecht, the court held that Gibson's search violated the Fourth Amendment and the resulting evidence should have been suppressed. *Id.* at 36a; see also *id.* at 40a-41a (Yong argued on appeal that arresting officer Gibson lacked probable cause or reasonable suspicion, but did not dispute that McCook had probable cause). Looking only to the evidence introduced during the suppression hearing, as state law requires, see *id.* at 42a (citing *In re L.J.*, 79 A.3d 1073, 1085 (Pa. 2013)), the court concluded that:

> there is nothing in the suppression record to suggest that: (1) Officer McCook ordered or directed Officer Gibson to arrest [petitioner]; or (2) Officer Gibson received information justifying [petitioner]'s arrest; or (3) Officer Gibson received information, which, coupled with facts that he personally observed, provided probable cause to arrest [petitioner].

Id. at 48a. The Superior Court emphasized the absence of communication between McCook and Gibson: "Officer McCook did not testify that he informed Officer Gibson of [petitioner]'s role in the narcotics transaction on [the first day of surveillance], nor did Officer McCook testify that he instructed Officer Gibson to arrest and/or search [petitioner]." *Id.* at 39a. For that reason, the court concluded that Gibson, "acting of his

own accord," made a warrantless arrest that was not supported by probable cause. *Id.* at 48a.[1]

The court concluded that *Whiteley* and its progeny did not validate the search. When an officer "instructs or requests another officer to make an arrest," the court reasoned, the arresting officer "shares in" the other officer's knowledge. App., *infra*, 46a. The court declined to "[e]xtend[]" the collective knowledge doctrine in the "absence of a directive or instruction to arrest issued by an officer" who possessed probable cause. Doing so, the court concluded, would ill serve the legitimate law enforcement interests underlying the collective knowledge doctrine—namely, enabling officers in different jurisdictions to rely on information provided by other officers to make arrests. *Id.* at 50a-51a.

Judge Anne Lazarus filed a concurring opinion to emphasize that, because no officer requested or authorized Gibson to arrest petitioner, the collective knowledge doctrine was wholly inapplicable. App., *infra*, 59a-60a. Finding nothing in the record to suggest that Gibson himself had probable cause, Judge Lazarus agreed that the evidence should have been suppressed. *Id.* at 60a.

5. The Supreme Court of Pennsylvania granted discretionary review and reversed by a four-to-two

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[1] The Superior Court noted, but did not find, that testimony presented for the first time at trial might have indicated that McCook communicated with Gibson regarding petitioner. But the Superior Court emphasized that evidence was not relevant to the determination because, as a matter of Pennsylvania law, its "scope of review in suppression matters is limited to the suppression hearing record, and excludes any evidence elicited at trial." App., *infra*, 54a-55a (citing *In re L.J.*, 79 A.3d at 1085).

margin.[2] The majority began by noting the "circuit split[] in [the] adoption" of the collective knowledge doctrine outside the narrow context of one officer directing another to make an arrest. App., *infra*, 21a. The court recognized widespread disagreement about

> whether the knowledge of a single officer with probable cause may be imputed to another officer where there is undisputed evidence that they were acting as a team, but there is no evidence the knowledge-holding officer gave a command to the officer who lacked probable cause or conveyed the information which gave rise to probable cause.

Id. at 24a-25a. The majority recognized that "under any approach that permits aggregation of unspoken information * * *, there remain serious concerns for protecting citizens from unconstitutional intrusions." *Id.* at 25a. Such a rule, the majority acknowledged, "would create an incentive for officers to conduct searches and seizures they believe are likely illegal" by immunizing searches even when an officer "know[s] that she lacks cause" because of the happenstance that a court later concludes that "her fellow officers h[e]ld enough uncommunicated information to justify the search." *Id.* at 26a-27a (quoting *United States* v. *Massenburg*, 654 F.3d 480, 494 (4th Cir. 2011)).

The majority nevertheless upheld the search. While conceding that "the arresting officer d[id] not have the requisite knowledge," App., *infra*, 30a, the

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[2] Justice Wecht, who authored the Superior Court opinion directing suppression, joined the Supreme Court of Pennsylvania in 2016. See Unified Judicial System of Pennsylvania, "Justice David N. Wecht," https://goo.gl/kzMGyS. He recused himself from that Court's consideration of this case.

majority found it sufficient that "Officer McCook had probable cause to arrest [petitioner]." *Id.* at 27a. According to the majority, "it would be hyper-technical to insist on bifurcating the knowledge of Officers McCook and Gibson * * * where the officers were working together and it is apparent the challenged conduct would have inevitably been undertaken if Officer Gibson had not acted too swiftly." *Id.* at 29a (citing *United States* v. *Ragsdale*, 470 F.2d 24, 30 (5th Cir. 1972)).

Justice Donohue, joined by Justice Todd, dissented. The dissent echoed the intermediate appellate court's concern that the majority's approach unjustifiably expanded an "exception to the traditional requirement that the arresting officer have probable cause to arrest an individual." App., *infra*, 31a. The dissent found this expansion particularly troubling in a situation (as here) involving "no communication whatsoever" (*id.* at 34a) and which "serves none of the legitimate law enforcement purposes" behind the doctrine, *id.* at 33a (quoting *Hensley*, 469 U.S. at 231). The dissent emphasized that the decision "threatens citizens" with the very "unconstitutional intrusions" the majority opinion warned about, because under it, "an arrest made by an officer without the requisite knowledge passes constitutional muster simply because * * * a hindsight evaluation reveals that [an] officer with knowledge was in some respects 'available' to direct" the arrest or search. *Id.* at 33a-34a. Because "[t]he exception announced by the Majority could swallow probable cause requirements," the dissenters "would [have] affirm[ed] on the basis of the rationale expressed in the opinion authored by then-judge, now-Justice Wecht." *Id.* at 34a-35a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates An Entrenched Circuit Split

In holding that knowledge can be imputed from one officer to an arresting officer who concededly "does not have the requisite knowledge and was not directed to so act," the Supreme Court of Pennsylvania deepened an acknowledged split among the federal circuits and state high courts. App., *infra*, 30a. Indeed, that court expressly recognized that disagreement and confusion about the issue "has led to circuit splits." *Id.* at 21a.

Courts and commentators alike have noted this division of authority. As the Tenth Circuit observed, some federal courts of appeals "have allowed the knowledge of officers working closely together on a scene to be mutually imputed without requiring proof of actual communication," while others "reject the idea of imputing knowledge, even among officers working closely together." *United States* v. *Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996). Similarly, the Fourth Circuit recently noted its disagreement with other circuits on this issue, explaining that while "[s]ome of our sister courts have authorized 'horizontal' aggregation of uncommunicated information[,]" it would not adopt such an "expansive aggregation rule." *United States* v. *Massenburg*, 654 F.3d 480, 494 (4th Cir. 2011); accord *State* v. *Miller*, 510 N.W.2d 638, 643 (N.D. 1994) ("[s]ome courts have imputed knowledge between officers in the absence of a directive where the officers were working closely together[,]" while others refuse to impute knowledge without "communication of either the information itself or a direction to arrest") (citing *United States* v. *O'Connell*, 841 F.2d 1408, 1418-1419

(8th Cir. 1998) and quoting *People* v. *Mitchell*, 585 N.Y.S.2d 759, 761 (N.Y. App. Div. 1992)).

Similarly, one leading academic article recognized a "circuit split over the expanded scope of the [collective knowledge] doctrine." Derik T. Fettig, *Who Knew What When? A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 UMKC L. REV. 663, 678, 703 (2014). As that article reports, some circuits "aggregate information from several officers to establish probable cause or reasonable suspicion and impute that knowledge to the officer who effectuates the search or seizure, sometimes without any communication between the officers," while others allow imputation only in "cases where an officer with probable cause or reasonable suspicion * * * directs another officer to take action." *Id.* at 666. The article concludes that while "the Supreme Court has not settled the ongoing split," "its intervention is needed." *Id.* at 678.

A. At Least Four State Supreme Courts And Two Federal Circuits Allow Knowledge To Be Imputed Between Officers Even Absent Communication

The Supreme Court of Pennsylvania rejected a requirement of actual communication between officers, and held that an arresting officer need not have *any information* supporting a stop or search so long as a court later concludes that another officer on the scene—perhaps unknown to anyone else—possessed the requisite knowledge.

The court's approach is hardly unique. Louisiana's Supreme Court similarly holds that knowledge can be imputed between officers "even in the absence of any affirmative evidence the actual communication took

place." *State* v. *Weber*, 139 So.3d 519, 522 (La. 2014) (per curiam). In *Weber*, an officer without probable cause authorized a blood draw from an unconscious individual suspected of driving while intoxicated and causing an accident. *Id.* at 520-521. The searching officer's colleague knew that the defendant owned and drove the truck that caused the accident, and therefore had knowledge that would have furnished probable cause to support the blood draw. *Id.* at 521. But there was no evidence the officer with probable cause communicated that information to the searching officer. *Ibid.* Despite the lack of communication, the Louisiana Supreme Court upheld the search simply because the two officers were working as a team. *Id.* at 521-522.

Similarly, when an arresting officer lacks probable cause, courts in Arkansas and Kansas aggregate information "within law enforcement's knowledge" in determining whether an arrest is justified, rather than requiring that the arresting officer individually have probable cause. *State* v. *Bell*, 948 S.W.2d 557, 561 (Ark. 1997); *State* v. *Peterson*, 696 P.2d 387, 393 (Kan. 1985). In *Bell*, an arresting officer interviewed a suspect as part of a murder investigation. *Id.* at 559. Despite doubts about whether the arresting officer had probable cause, the Arkansas Supreme Court held that courts should look not only to the arresting officer's knowledge, but also to "[t]he essential facts that were available to law enforcement[.]" *Id.* at 561. The *Bell* decision prompted a sharp dissent arguing that the majority had departed from existing precedent, under which "an arrest made by an officer who personally lacks probable cause to arrest is invalid unless the ar-

resting officer is specifically instructed to make an arrest by officers who possess probable cause to arrest." *Id.* at 567 (Newbern, J., dissenting) (emphasis omitted).

Similarly, Kansas courts hold that "the knowledge of one officer is the knowledge of all in determining the probable cause for an arrest[.]" *Peterson*, 696 P.2d at 392-393. Kansas courts look to officers' aggregate knowledge, treating as irrelevant which officers had probable cause, and what information each officer specifically possessed. "The correct test[,]" in the Kansas Supreme Court's view, "is whether a warrant if sought could have been obtained by the arresting officer." *Id.* at 393. That court reasoned that an arresting officer would have relied on his colleagues' knowledge if he had sought to obtain a warrant. *Ibid.*

The Pennsylvania decision here drew heavily on *United States* v. *Ragsdale*, where the Fifth Circuit upheld a search despite the searching officer's lack of probable cause. The Fifth Circuit held that "it would be hypertechnical to insist on bifurcating the knowledge of the" searching officer and his colleague. 470 F.2d 24, 30 (5th Cir. 1972). Instead, the panel effectively "h[e]ld that, when a police officer who is a member of a team conducts a warrantless search * * * with no personal knowledge capable of generating probable cause, his search is reasonable if his partner did possess sufficient knowledge[,]" even when "that knowledge was never communicated to the searcher." *Id.* at 32 (Rives, J., specially concurring). In *Ragsdale*, Officers Jones and Mullens stopped Ragsdale for a speeding offense. *Id.* at 25 (Clark, J., for the panel). The officers asked Ragsdale to exit the vehicle, and Jones (but not Mullens) saw a pistol on the floor of the

car. *Id.* at 26. While walking Ragsdale back to the police cruiser, Jones passed Mullens, and whispered that there was a gun in the car. *Ibid.* Mullens concededly did not hear Jones's whisper. *Id.* at 26, 33. Officer Mullens nevertheless proceeded to search Ragsdale's car. *Id.* at 26.

The Fifth Circuit found it "wholly improbable" that Mullens heard Jones, and thus did "not base [its] holding in anywise on the supposition that Mullens may have heard Jones'[s] whisper." 470 F.2d at 27. The Fifth Circuit also acknowledged that Mullens did not have probable cause "individually." *Ibid.* But the court upheld the search, reasoning that if Mullens had not acted, Officer Jones "would surely have commanded it," or would have conducted the search himself. *Id.* at 30. One member of the panel wrote separately, expressing concern that the Fifth Circuit's rule would allow warrantless searches without any communication from the officer possessing probable cause, creating an "unnecessary deviation from the exclusionary rule." *Id.* at 32 (Rives, J., specially concurring). Judge Rives explained that "[t]he mandate of the exclusionary rule is not directed to the collective intellect of an amorphous government entity, but to the individual searching officer." *Ibid.*

The Tenth Circuit takes a similar position, phrased in terms of a rebuttable presumption of communication. In that circuit, even without any evidence of communication, courts will presume any officer who had probable cause communicated it to the searching or arresting officer. *United States* v. *Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996). On the facts of *Shareef*, the Tenth Circuit held its presumption to be rebutted, because "the district court [there] found that in fact the

information had not been shared." *Ibid.* The Tenth Circuit nonetheless concluded that communication is not a requirement. "Even in the absence of communication among officers," the Tenth Circuit indicated willingness to uphold a search where "officers are working closely together at the scene[.]" *Ibid.*

B. Still Other Courts Require Only "Some" Unspecified "Degree Of Communication" Between Officers

Contributing to the disarray in the lower courts, several jurisdictions permit imputation of knowledge so long as there is some minimal degree of communication. In *United States* v. *Gillette*, 245 F.3d 1032 (8th Cir. 2001), for example, two officers went to a house where drug activity was allegedly occurring. *Id.* at 1033. The officers obtained consent to enter the house, where they saw items associated with methamphetamine manufacturing. *Ibid.* One officer then asked for consent to search the defendant's truck. *Ibid.* The homeowners did not own the truck, but they consented without disclaiming ownership. *Ibid.* A third officer arrived on the scene and, without conferring with the others, immediately searched the defendant's truck and found components of a methamphetamine lab. *Id.* at 1033-1034. There was no evidence that the homeowners' consent to search the truck had been communicated to the searching officer. *Id.* at 1034. Despite the absence of any evidence that the key information had been transmitted to the searching officer, the Eighth Circuit upheld the search because there was "some degree of communication between" the officers. *Ibid.* In the Eighth Circuit's view, "[t]he requirement that there be a degree of communication serves to distinguish between officers functioning as a 'search

team' and officers acting as independent actors who merely happen to be investigating the same subject." *Ibid.* (citations omitted).

As a practical matter, courts requiring "some degree of communication" do not explain how much communication is required, and have upheld searches based on effectively de minimis communication of facts unrelated to probable cause. See Fettig, 82 UMKC L. REV. at 677. Such courts "include[] no requirement regarding the *content* of the communication[.]" *United States* v. *Ramirez*, 473 F.3d 1026, 1037 (9th Cir. 2007). While some courts do not explain the reason for requiring 'some degree of communication,' see*, e.g.*, *United States* v. *Lee*, 962 F.2d 430, 435-436 (5th Cir. 1992), others make clear that the standard is undemanding. As the Eighth and Ninth Circuits, as well as the high courts in Utah and Louisiana have explained, a degree of communication simply shows that officers were working together as a team, which, in their view, is sufficient to warrant imputation. *Ramirez*, 473 F.3d at 1032-1033 (9th Cir.); *Gillette*, 245 F.3d at 1034 (8th Cir.); *Weber*, 139 So.3d at 522 (La.); *Utah* v. *Talbot*, 246 P.3d 112, 117 (Ut. 2010). Thus, "[t]he communication requirement adopted by the Ninth and other circuits is minimal in every sense of the word." Fettig, 82 UMKC L. REV. at 677. As a result, the "some degree of communication" test produces the same practical outcome as courts that do not require communication at all.

C. At Least Two Federal Circuits And Several State High Courts Refuse To Allow Imputation Between Officers Absent Communication Of That Information Or An Instruction To Act

In sharp contrast, at least two federal circuits and several state high courts have rejected imputation of uncommunicated information in the specific context of officers working together in close proximity. *E.g.*, *United States* v. *Massenburg*, 654 F.3d 480 (4th Cir. 2011); *United States* v. *Ellis*, 499 F.3d 686 (7th Cir. 2007); *Montes-Valeton* v. *State*, 216 So. 3d 475 (Fla. 2017); *State* v. *Cooley*, 457 A.2d 352 (Del. 1983); see also *People* v. *Mitchell*, 585 N.Y.S.2d 759 (N.Y. App. Div. 1992).

The Fourth Circuit holds that the Fourth Amendment forbids imputation of knowledge between officers at a scene absent communication of that information. See *Massenburg*, 654 F.3d at 493 ("[T]he collective-knowledge doctrine * * * does not permit us to aggregate bits and pieces of information from among myriad officers, nor does it apply outside the context of communicated alerts or instructions."). In *Massenburg*, the court reversed the district court's denial of a motion to suppress evidence obtained during a *Terry* frisk. *Id.* at 484-485, 496. Officers Gaines and Fries had stopped Massenburg and three other men in a high-crime area near where an anonymous tipster had reported hearing shots fired. *Id.* at 482-483. Fries conducted a consensual pat-down of one man while Gaines asked Massenburg if he would consent to a pat-down. *Id.* at 483. When Massenburg refused to consent but displayed "mild nervousness," Gaines frisked him. *Id.* at 483, 491. Before the frisk, the other officer (Fries)

had observed a small bulge in Massenburg's pocket but did not communicate that information to Gaines. *Id.* at 483.

The Fourth Circuit refused to impute Fries' knowledge of a bulge to Gaines, instead considering only what was known to the arresting officer when he conducted the frisk. The court explained that the collective knowledge doctrine developed in the context of police directives to arrest or stop a suspect to further the narrow and commonsensical goal of "minimiz[ing] the volume of information concerning suspects that must be transmitted to other jurisdictions [or officers] and enabl[ing] police . . . to act promptly in reliance on information from another jurisdiction [or officer]." *Id.* at 494 (quoting *United States* v. *Hensley*, 469 U.S. 221, 231 (1985)). Allowing imputation of uncommunicated information between officers at a scene was a "far more expansive rule" that would "serve[] no such ends." *Id.* at 493, 494.

Though the court had "studied [its] sister circuits' cases adopting [such] an aggregation rule, [it could] find no convincing defense of it." *Massenburg*, 654 F.3d at 494-495. Noting that "the exclusionary rule's 'sole purpose * * * is to deter future Fourth Amendment violations,'" *id.* at 494 (quoting *Davis* v. *United States*, 564 U.S. 229, 236-237 (2011)), the Fourth Circuit concluded that deterrence requires "look[ing] to each individual officer's decision-making process as she considers executing a search or effecting a seizure." *Id.* at 495. The more expansive rule adopted by other courts, the Fourth Circuit concluded, "would perversely reward officers acting in *bad faith*" and "would only create an incentive for officers to conduct searches and seizures they believe are likely illegal,"

making such a rule "directly contrary to the purposes of longstanding Fourth Amendment jurisprudence." *Id.* at 494 (emphasis in original). The Fourth Circuit also noted the troubling implications of allowing imputation absent communication: "If the Fourth Amendment is satisfied when, unbeknownst to the officer conducting a search, a fellow officer on the scene has the information necessary to justify it, why should the analysis change when the other officer is not on the scene?" *Id.* at 495.

The Seventh Circuit has likewise refused to impute uncommunicated information among officers working together at a scene. See *United States* v. *Ellis*, 499 F.3d 686, 690 (7th Cir. 2007) ("[T]he error in the district court was imputing the knowledge of the officers at the front door to [the arresting officer] at the side door."). In *Ellis*, the court considered officer Lopez's warrantless entry into the side door of a home tied to suspected drug activity, at a time when two other officers (McNeil and Chu) were conducting a "knock and talk" at the front door. *Id.* 687-688. Lopez stood at the side door, and could hear McNeil and Chu talking but could not understand what was being said. *Id.* at 690. The defendant spoke to McNeil and Chu through the front door and denied them entry in a manner those officers deemed suspicious. Lopez, at the side door, heard someone running up and down the stairs inside the home. *Id.* at 688. Lopez then decided to break down the side door. *Ibid.*

Even though Chu came to help Lopez break down the door, the Seventh Circuit refused to impute Chu and McNeil's knowledge to Lopez, since "[t]here [was] no evidence that [they] communicated [their knowledge] to Lopez before Lopez entered the home."

Id. at 690. The Seventh Circuit instead limited the Fourth Amendment analysis to what Lopez himself knew when he decided to break down the side door. *Ibid.* The court held that Lopez did not have probable cause, nor was the entry justified by exigent circumstances. Therefore, the court reversed the denial of the suppression motion. *Id.* at 692. The Seventh Circuit acknowledged this Court's precedents allowing officers to rely on the personal knowledge of other officers, but concluded that these cases were limited to situations where "an officer who is aware of such facts relay[s] them to the other officer." *Id.* at 690 (citing *United States* v. *Hensley*, 469 U.S. 221, 232-233 (1985)).

Several state high courts have also held that the Fourth Amendment forbids imputation of uncommunicated knowledge between officers at a scene. In *Montes-Valeton* v. *State*, the Florida Supreme Court held that "the fellow officer rule does not allow an officer to assume probable cause for an arrest or a search and seizure from uncommunicated information known solely by other officers." 216 So. 3d 475, 479 (Fla. 2017). That case involved an officer (Tejera) who arrived at the scene of a car accident and found the driver was disoriented and had alcohol on his breath. *Id.* at 477. Tejera "delegated the role of lead traffic crash investigator to Trooper Molina and thereby engaged in general communications with" Molina, but there was no evidence Tejera communicated his knowledge about the driver's intoxication to Molina. *Ibid.* Molina then ordered the driver's blood drawn. The Florida Supreme Court held that because Molina personally lacked probable cause (because he did not smell alcohol on the driver's breath or observe intoxication), the blood draw was invalid. *Id.* at 477, 479.

The court specifically rejected the government's argument that "general communications" between Tejera and Molina were sufficient to impute knowledge between the officers, holding that imputation requires communication of the presence of probable cause or specific facts supporting probable cause. *Id.* at 479.

The Supreme Court of Delaware similarly refuses to impute uncommunicated knowledge between officers at a scene. In *Cooley*, one officer (Shamany) arrived at the scene of a car accident and found the defendant incoherent and observed alcohol on his breath. 457 A.2d at 353. Another officer (McDerby) later arrived and directed a third officer (Thompson) to arrest Cooley. *Ibid.* The Court held that "[i]n light of the absence of communication between Shamany and McDerby, it follows that McDerby acted without probable cause[.]" *Id.* at 356. While under *Whiteley*, Thompson could permissibly "act in the belief that [McDerby's] judgment" was correct, McDerby himself still needed to have probable cause for the arrest to be valid. *Id.* at 355 (citing *Whiteley* v. *Warden*, 401 U.S. 560 (1971)). The court squarely rejected the government's suggestion that "what all of the officers on the scene knew as a group was enough to establish probable cause." *Ibid.* Because there was "no finding that Shamany directed McDerby to order Cooley's arrest" or otherwise communicated his knowledge, the Court held that "McDerby acted without probable cause in ordering Cooley's arrest." *Id.* at 355, 356. The Court affirmed the suppression of evidence obtained as a result. *Id.* at 357.

Likewise, New York courts have disallowed imputation of uncommunicated knowledge. In *Mitchell*, two

officers (Kokeas and Higgins) approached the defendant and saw him toss something to the ground. One (Kokeas) recovered the object and recognized that it contained drugs; the other (Higgins) pursued and arrested the defendant. The court held that one officer's discovery of drugs could not be imputed to the other: "[I]nasmuch as Higgins not only testified that he did not know what Kokeas had picked up from the ground, but never testified that he relied on, or even heard, Kokeas' request that defendant stop, Kokeas' knowledge of what defendant had discarded cannot be imputed to Higgins." 585 N.Y.S.2d at 760-761. The court thus held that Higgins lacked reasonable suspicion and that evidence derived from the defendant's arrest must be suppressed. *Id.* at 761-762. Numerous other courts take the same approach.[3] *E.g.*, *State* v. *Iven*, 335 P.3d 264, 269 (Okla. 2014) ("[the] collective knowledge doctrine requires a court to determine whether the individual officers communicated the information that they possessed individually"); *State* v. *Miller*, 510 N.W.2d 638, 643 (N.D. 1994) ("[I]nformation held by other officers but not communicated to the acting officer is not imputed to the acting officer."); *Haywood* v. *United States*, 584 A.2d 552, 557 (D.C. 1990) ("[W]here probable cause for arrest is predicated in part on the personal observations of the arresting officer, the court may not rely on facts which were available to other officers at the scene unless that information was *communicated to the arresting officer*.").

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[3] Other jurisdictions frequently cite *Mitchell* as a leading statement of the principles prohibiting imputation of uncommunicated information. *E.g.*, *State* v. *Miller*, 510 N.W.2d 638, 643 (N.D. 1994); *State* v. *Tywayne H.*, 933 P.2d 251, 257 (N.M. Ct. App. 1997).

II. The Decision Below Is Wrong

Under a faithful application of this Court's precedent, the Fourth Amendment prohibits imputing knowledge absent communication between officers. That conclusion follows from this Court's decisions, the broader purposes of the Fourth Amendment and the exclusionary rule, and the perverse incentives a contrary rule would create for police officers.

The general rule governing probable cause is clear and longstanding: "Whether probable cause exists depends upon the reasonable conclusion to be drawn *from the facts known to the arresting officer at the time of the arrest*." *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004) (emphasis added) (citing *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003)). Accord *Adams* v. *Williams*, 407 U.S. 143, 148 (1972). Similarly, "[r]easonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law." *Heien* v. *North Carolina*, 135 S. Ct. 530, 536 (2014).

In dicta, *Whiteley* recognized a limited exception to this rule that allowed an arresting officer to assume that officers "requesting aid" in arresting a suspect "offered the magistrate the information requisite to support an independent judicial assessment of probable cause." 401 U.S. at 568. At the same time, however, this Court emphasized that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Ibid.* And because the requesting officers in *Whiteley* in fact lacked probable cause, this Court had no occasion to authorize the imputation of information. *Ibid.*

Hensley subsequently held that an officer could rely on a flyer issued by another police department requesting that a suspect be stopped. "[I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on the flyer [by another officer] justifies a stop." 469 U.S. at 232. This approach, the Court explained, would "minimiz[e] the volume of information concerning suspects that must be transmitted to other jurisdictions and enabl[e] police in one jurisdiction to act promptly in reliance on information from another jurisdiction." *Id.* at 231.[4]

In the 30 years since *Hensley*, however, this Court has never applied the collective knowledge doctrine beyond the narrow contours of that case. And the courts that have expanded the doctrine have offered "no convincing defense of [its expansion]." *Massenburg*, 654

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[4] In dicta, this Court has stated in a footnote that "[w]here law enforcement authorities are cooperating in an investigation * * * the knowledge of one is presumed shared by all." *Illinois* v. *Andreas*, 463 U.S. 765, 771-772 n.5 (1983) (citations omitted). But in *Andreas*, "[t]here would be no question that Drug Enforcement Agents, posing as delivery men, knew that the container they brought to respondent's residence (a container which they had previously lawfully entered at the airport) contained a controlled substance." *Haywood* v. *United States*, 584 A.2d 552, 557 n.8 (D.C. 1990). Indeed, the searching officer there likely had personal knowledge that the container held drugs, because during a previous lawful search of the container, he conducted a field test and identified the substance as marijuana. *Andreas*, 463 U.S. at 767. At minimum, the officer had "hearsay" "kn[o]w[ledge] of its contents." *Id.* at 768. In other words, in *Andreas*, "the 'presumption of knowledge' * * * was so obvious as to be a fact," well within the bounds allowed by *Carroll* and *Whiteley*. *Haywood*, 584 A.2d at 557 n.8. This Court in *Hensley* did not cite or discuss *Andreas*.

F.3d at 495. *Hensley* and *Whiteley* are best understood as a limited exception to the general rule requiring that the arresting officer have personal knowledge of the facts supporting a search or seizure.

Nothing in *Whiteley* or *Hensley* supports expanding the collective knowledge doctrine in the manner the Pennsylvania court contemplated here, which allows a broad range of after-the-fact imputation, absent communication. *Whiteley*'s single paragraph addressing collective knowledge spoke only to situations (unlike here) where one officer is "called upon to aid" in an arrest. 401 U.S. at 568.

Hensley's rationale of facilitating interdepartmental cooperation is inapplicable where two officers are on a single team or physically present at the same scene. In those situations, there is no inherent difficulty in communicating. And even if there were, *Whiteley* itself contemplates communication as a critical predicate for imputation: there must be at least a "call[] * * * to aid" in an arrest, 401 U.S. at 568, or some equivalent communication. To allow imputation without *any* communication, as the Pennsylvania court did here, is a radical expansion of this Court's precedent, far afield from the narrow applications of collective knowledge at issue in *Whiteley* and *Hensley*.

Interpreting the collective knowledge doctrine to require a communication also properly serves the Fourth Amendment's purpose of deterring police misconduct. This Court has "said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis* v. *United States*, 564 U.S. 229, 246 (2011). Where an officer conducts an arrest while knowing that he lacks knowledge

amounting to probable cause, and is *not* relying on an order or information communicated by another officer, that is culpable misconduct. See *Wong Sun* v. *United States*, 371 U.S. 471, 482 (1963) (admitting evidence obtained by officer "act[ing] in his own, unchecked discretion upon information too vague * * * to [constitute] probable cause" would be contrary to "fundamental [Fourth Amendment] policy"); *Byrd* v. *United States*, No. 16-1371 (May 14, 2018), slip op. 6 (this Court "view[s] with disfavor practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects'" (quoting *Arizona* v. *Gant*, 556 U.S. 332, 345 (2009)). An arrest made without probable cause is also "sufficiently deliberate that exclusion can meaningfully deter it." *Herring* v. *United States*, 555 U.S. 135, 144 (2009). For these reasons, this Court has long suppressed evidence obtained in searches incident to such arrests. *E.g.*, *Beck* v. *Ohio*, 379 U.S. 89 (1964). These reasons dictate the same result in cases where (as here) probable cause existed but the arresting officer did not know this and, as such, "should have believed [the arrest was] illegal." *Massenburg*, 654 F.3d at 493.[5]

Allowing imputation in the limited situations discussed in *Whiteley* and *Hensley* likewise accords with

[5] The Pennsylvania court's reliance on what Officer McCook "would have inevitably and imminently ordered," App., *infra*, 30a, bears superficial resemblance to the doctrine of inevitable discovery. See *Nix* v. *Williams*, 467 U.S. 431, 441 (1984). But the two are entirely distinct. The inevitable discovery doctrine is an exception to the exclusionary rule where evidence was collected in violation of the Fourth Amendment. The Pennsylvania decision, by contrast, bears on the predicate question of whether a search was lawful.

Fourth Amendment purposes because it would serve no deterrent function to suppress evidence in those situations.[6] If an officer relies on an order or information communicated by another officer to arrest a suspect, there is no deliberate, culpable misconduct because such reliance is objectively reasonable. Cf. *Herring*, 555 U.S. at 146 (exclusion is not justified where police conduct is "objectively reasonable").

Further, a categorical rule against imputing uncommunicated knowledge advances the Fourth Amendment's goal of providing clear guidance to officers and citizens. See *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."); *New York* v. *Belton*, 453 U.S. 454, 459-460 (1981) (abrogated on other grounds by *Gant*, 556 U.S. 332) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."). It is much simpler for individual officers to consider only what they know or have been told, without speculating about what others might have known. From the perspective of law enforcement agencies, a simpler rule is easier to teach. And for the public, a categorical rule rejecting imputation of uncommunicated knowledge between officers

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[6] *Whiteley* assumed that the officers requesting aid would possess probable cause. 401 U.S. at 568. Requesting aid to arrest a suspect without probable cause is itself deterrable police misconduct, so *Whiteley*'s holding requiring exclusion is also consistent with Fourth Amendment purposes.

demystifies the Fourth Amendment by creating clear, easily understandable ground rules.

By contrast, the decision below frustrates the underlying purposes of the Fourth Amendment and exclusionary rule by *encouraging*, rather than deterring, police misconduct. The requirement that a court limit its analysis to the facts known to the arresting officer is necessary because "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968). "Where officers working closely together have *not communicated* pertinent information, the acting officer weighs the costs and benefits of performing the search in total ignorance of the existence of that information—it is not known to her, so it cannot enter into the calculus." *Massenburg*, 654 F.3d at 495. As such, the rule adopted here invites officers to arrest a suspect in bad faith without probable cause, in the hope that another officer's uncommunicated knowledge might retroactively cure their misconduct. See *id.* at 494 ("[An] aggregation rule would perversely reward officers acting in bad faith according to the result of an after-the-fact aggregation inquiry * * *.") (emphasis added). It would shield from Fourth Amendment scrutiny those circumstances where "no officer believed any other officer had pertinent information," and thus where "the acting officer undertook a search or seizure she should have believed to be illegal." *Id.* at 493.

III. This Case Presents an Ideal Vehicle for Resolving an Issue of Unquestionable Importance

1. The question presented here is of exceptional importance to the administration of criminal justice nationwide. In imputing knowledge between police officers even in the absence of communication, the rule adopted by the Supreme Court of Pennsylvania encourages officers to make arrests *known to be unlawful at the time*, on the hope that facts might exist that could later redeem their unconstitutional action. The issue merits this Court's attention for numerous reasons.

First, the issue arises with great frequency. Federal and state courts have addressed the "collective knowledge doctrine" (or its cognates) in more than a thousand decisions over the past decade alone. Cases explicitly addressing Fourth Amendment claims and the exclusionary rule, moreover, represent only a tiny fraction of actual interactions between police and criminal suspects, where police conduct is governed and shaped by Fourth Amendment doctrines. Cf. *Elkins* v. *United States*, 364 U.S. 206, 217-218 (1960) (noting that cases applying the exclusionary rule are minority of searches by police, and that the exclusionary rule is the only means of protecting against unlawful but fruitless searches which do not generally result in litigation).

Further, for the exclusionary rule to function as a meaningful deterrent, police officers must be able to determine at the time they choose to perform a search or seizure whether their action is lawful. Where a po-

lice officer would otherwise gain nothing from searching without cause, Pennsylvania's rule introduces the possibility that a baseless search might later be validated. This possibility encourages searching first and justifying later—the very incentive the exclusionary rule is meant to eliminate. See *Elkins*, 364 U.S. at 217 ("[The exclusionary rule's] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."). Worse still, this incentive may be disproportionately strong when suspicions against a particular suspect are weak: when the suppression of evidence is not likely to hamper an existing investigation, police stand only to gain by taking their chances. It also risks immunizing *all* police conduct. If the reasonableness of police action were gauged not just by facts known to the officers who acted, but by all information known to everyone present, it would tend to excuse all police action.

2. This case presents an ideal vehicle to resolve these issues. The imputation issue is the only question presented, and it is dispositive. The decision of the Supreme Court of Pennsylvania rests wholly on federal constitutional law, and there is no clear statement of an adequate and independent state-law ground to support the judgment below. The issue was properly preserved at every stage. The Superior Court and Supreme Court's opinions discuss the issue fully, and the latter has a well-developed dissent. Finally, the factual record is concise and (for present purposes) undisputed, and crisply tees up the legal issue. Both the Superior Court and the Supreme Court agree that while Officer McCook would have had probable cause to arrest Mr. Yong, Officer Gibson did not, and that

there is no relevant evidence that Officer McCook communicated his knowledge to Officer Gibson or ordered Gibson to arrest petitioner. App., *infra*, 2a, 24a-25a, 42a, 48a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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