No. 18-218

In The
Supreme Court of the United States

TREY BEAM,

Petitioner,

-v-

ROBERT ABERCROMBIE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Carroll v. United States*, 267 U.S. 132, 162 (1925), this Court noted that an arresting officer must have sufficient facts and circumstances within their knowledge and of which they had reasonably trustworthy information . . . to warrant a man of reasonable caution in the belief "a crime had not been committed."

The Eleventh Circuit required no more.

The question presented is as follows:

> May a police officer close his eyes to facts that would help clarify the circumstances of an arrest when such information is readily available to him?

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STATEMENT OF THE CASE

I. Facts Giving Rise To This Case.

Ms. Priscilla Nixon claimed on December 10, 2014 that she had been assaulted by Mr. Robert Abercrombie. She had alleged that Mr. Abercrombie had thrown a one-page document at her.[1] Despite her claim, she calmly waited in the respondent's store until the petitioner arrived.

When petitioner arrived, he entered the store and spoke to Ms. Nixon and her husband. He did not try to speak with any of the several other people there: Mr. Abercrombie, Mr. Abercrombie's sister, Ms. Bryant, another employee Mr. Diamond, and a customer. He arrested Mr. Abercrombie; he refused to tell Mr. Abercrombie what he was being arrested for.

As Ms. Bryant, respondent's sister testified, petitioner threatened her twice with arrest when she asked what her brother was being arrested for. He was yelling at her "I'll get you for obstruction of an officer."

The Eleventh Circuit, held that respondent had neither probable cause nor arguable probable cause to arrest Mr. Abercrombie and therefore he was not entitled to qualified immunity (App. 9a).

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[1] The videotape of the incident revealed that respondent had not done so. Significantly for petitioner's application, the Eleventh Circuit refused to hold that petitioner should have reviewed the videotape.

Specifically, the Court held that:

> there was not arguable probable cause under the totality of the circumstances because Nixon's story was not credible and Beam failed . . . to interview readily available witnesses.

(App. 12a)

> Specifically, in Abercrombie's version of events, Beam failed to question Abercrombie, Bryant, Diamond, or the other customer about the incident.

(App. 14a)

REASONS FOR DENYING THE WRIT

I. NO CIRCUIT ALLOWS AN OFFICER TO TURN A BLIND EYE TO READILY AVAILABLE INFORMATION IN DETERMINING PROBABLE CAUSE

In ruling against petitioner, the Court applied the clearly established holding of *Kingsland v. City of Miami*, 382 F. 3d 1220 (11th Cir. 2004).

In *Kingsland*, the Court explicitly relied upon a Fourth Circuit case, *Sevigney v. Dicksey*, 846 F. 2d 953 (4th Cir. 1988) and a Seventh Circuit case, *BeVier v. Hucal*, 806 F. 2d 123 (7th Cir. 1986). The Court's holding was a narrow one.

> [O]fficers must investigate objectively and consider all information available to them at the time.

Id. at 1229. Significantly, the Court said:

> We recognize, however, that a police officer 'is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.'

citing *Ricciuti v. N.Y.C. Transit Authority*, 124 F. 3d 123, 128 (2d Cir. 1997).

That is, the Court was specifically saying that what petitioner claims is the law of the Eleventh Circuit is *not* the law of the Eleventh Circuit. It was not the law enunciated in *Kingsland* and it is not the law enunciated in this case. More to the point at fn. 10 the *Kingsland* Court explained:

> We are aware that officers are not required to perform error-free investigations or independently investigate every proffered claim of innocence.

citing *Baker v. McCollan*, 443 U.S. 137, 145-146 (1979).

The Court explained, however:

> *Kingsland* alleges that the defendants turned a blind eye to immediately exculpatory information. . . .

Id. at fn. 10.

Petitioner accuses the Court below of requiring officers "to perform error-free investigation or

independently investigate every proffered claim of innocence." The decision below belies that assertion. In fact, the Court specifically stated that petitioner was not required to have viewed the available videotape of the incident.[2]

Petitioner cites a number of Circuit cases which purport to conflict with the Eleventh Circuit, but there is no tension between their holdings and the decision below.

In *Acosta v. Ames Department Stores, Inc.*, 386 F. 3d 5 (1st Cir. 2004), the officer did a reasonable investigation. The store detective had watched the shoplifting being committed. One of the children with plaintiff "admitted he had donned the jacket in the store." The officer did in fact talk to the plaintiff (unlike in this case) and although plaintiff produced a layaway receipt she did not produce a sales receipt. Faced with these facts, the Court said exactly what *Kingsland* did, the officer:

> has no constitutional duty either to explore the possibility that exculpatory evidence may exist or to conduct any further investigation in the hope of finding such evidence.

Acosta, *supra*, 386 F. 3d 11.[3] *Compare Rodriguez v. Comas*, 888 F. 2d 899, 902 and fn. 13 (1st Cir. 1989).

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[2] *See* Petition For Writ of Certiorari, App. 16a.

[3] It was also significant that the store's security officer gave the report. 386 F. 3d 10.

Petitioner also cites to *Boykin v. Van Buren Tp.*, 479 F. 3d 444, 449 (6th Cir. 2007) as contrary to the Court's decision below. It is not. The officers in that case questioned the plaintiff.

> [D]uring the course of their discussions with him, plaintiff acknowledged that he was at Meijer and that he was in possession of a drill from Meijer.

Id. He had no receipt to show he had paid for the drill. *Id*. This was consistent with prior Sixth Circuit law, *see Wilson v. Morgan*, 477 F. 3d 326, 336 (6th Cir. 2007)[4] and subsequent Sixth Circuit law, *Logsdon v. Harris*, 492 F. 3d 334, 343 (6th Cir. 2007):

> Probable cause assessments depend on the totality of the circumstances known to the officer. Here, the totality should have encompassed readily available accounts, but did not because defendants refused to listen.

That is exactly what happened in this case.

Petitioner cites to the unpublished Third Circuit case of *Lincoln v. Hanshaw*, 375 Fed. Appx. 185 (3d Cir. 2010). But this case was based on an arrest pursuant to warrants. As the Court noted, "The District Court concluded, and we agree, that the warrant applications establish probable cause on their face: "*plaintiffs do not appear to challenge this ruling on appeal*" (emphasis added). Unlike this case, there was physical

[4] It is, of course, respondent's argument that petitioner did in fact turn a blind eye to exculpatory evidence – what the Sixth Circuit said an officer could not do.

evidence of "Lacerations to the face." Despite the decision, whether there is a duty to investigate is "not well defined within the circuit." *Briscoe v. Jackson*, 2 F. Supp. 3d 635 fn. 5 (E.D. Pa. 2014). *Compare Andros v. Gross*, 294 Fed. Appx. 731, 734 (3d Cir. 2008) in which the Court distinguished cases requiring a reasonable investigation because a reasonable investigation had been conducted.

Finally, petitioner cites to two Seventh Circuit cases (despite *BeVier*, *supra*) to show that the decision of the Court below is contrary to that circuit.

In *Mustafa v. City of Chicago*, 442 F. 3d 554 (7th Cir. 2006), "the earliest arriving officer . . . observed 'commotion' and 'agitation' in progress, with [plaintiff] at its center, at a crowded ticket counter at an international airport." The manager's credibility had not been questioned. Here, petitioner observed nothing other than respondent, another employee, and a customer calmly going about their business. And Ms. Nixon's credibility was in question. She claimed to have been assaulted, but didn't bother to leave the scene of the alleged assault.

In *Anderer v. Jones*, 385 F. 3d 1043 (7th Cir. 2004), the witness "was bleeding from his nose and mouth and had blood on his clothing." No such facts exist here. Unlike petitioner Beam, a sergeant asked the plaintiff about the incident.

What these two cases do not establish is that the failure to do any investigation at all provides immunity, and subsequent Seventh Circuit cases make that

point clear. *See Phelan v. Village of Lyons*, 531 F. 3d 484, 488 (7th Cir. 2008) ("In determining whether a defendant's alleged actions violated a clearly established right, courts may properly take into account any information the defendant ought reasonably have obtained.").

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S AND OTHER COURTS' PRECEDENT

In *Carroll v. United States*, 267 U.S. 132, 162 (1925), this Court noted:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that, is upon a belief, reasonably arising out of circumstances known to the seizing officer . . . the search and seizure are valid.

Those circumstances include not only facts but the persons immediately present who can supply such facts. *See Lafave*, *Search and Seizure*: *A Treatese on the Fourth Amendment* § 3.2(d) ("If the action is taken without a warrant, the information to be considered is the 'totality of facts' available to the officer at the time of arrest or search. . . ." (footnotes omitted).

There is not one Circuit Court wherein the settled law allows an officer to ignore easily obtainable facts. Petitioner has not cited one case to the contrary.

Requiring a minimal investigation is not too much to ask before "invoking the awesome power of arrest and detention." *BeVier v. Hucal*, 806 F. 3d 123, 127 (7th Cir. 1986).

Petitioner also cites at 13 noncurrent cases all distinguishable on their facts. In *Curley v. Village of Suffern*, 268 F. 3d 65 (2d Cir. 2001), there was blood on the victim's face and another victim whom the manager admitted he had struck. Again the officer questioned the plaintiff before he arrested him. *Compare Loria v. Gorman*, 306 F. 3d 1271, 1293 (2d Cir. 2002).

Beard v. City of Northglenn, Colo., 24 F. 3d 110 (10th Cir. 1994), is completely different. In this case, Beard did in fact do an investigation beyond the victim. Recall, that in this case, the panel did not require an extensive investigation, which is why the Court specifically stated that Mr. Beam had no duty to view the videotape. *Compare Maresca v. Bernalillo County*, 804 F. 3d 1301, 1310 (10th Cir. 2015).

In *Cross v. City of Kent*, 867 F. 2d 259 (6th Cir. 1988), the probable cause did not come from the victim. Nor was the alleged perpetrator on hand. More to the point is the fact that under Ohio law it didn't matter, as the Court notes in citing *State v. Hankerson*, 434 N.E.2d 1362 (Ohio 1982).

III. THE DECISION BELOW IS CORRECT.

Petitioner spends the overwhelming part of his petition (pages 9-13) arguing that the decision below is

wrong. But as the Court has cautioned, "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review," *Ross v. Moffett*, 417 U.S. 600, 616-617 (1974), nor does this Court "grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). *See also Butler v. McKeller*, 494 U.S. 407, 417 fn. 11 (1990) (Brennan J., dissenting).

In this case, petitioner did not even do a minimal investigation. He even refused to talk to witnesses, including Mr. Abercrombie, who tried to explain what had happened.

This case is not about the degree of thoroughness that an officer must make before he makes an arrest because petitioner arrested Mr. Abercrombie without making a minimal effort to establish the facts.

Moreover as demonstrated above, the decision below is correct.

CONCLUSION

The Petition for writ of certiorari should be denied.

Respectfully submitted,

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