No. 18-348

IN THE

Supreme Court of the United States

ROBERT WEISLER, III, PETITIONER

v.

JEFFERSON PARISH SHERIFF'S OFFICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS' IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner submits that the question presented is "whether *Devenpeck* (*Devenpeck v. Alford*, 543 U.S. 146, 152 (2004)), which only protects officers who either incompetently or maliciously arrest a person for a crime the arrestee did not commit, should be overruled." As elucidated below, this is a patent misstatement. First, the issue is not properly presented because it was not preserved in the district court. Second, the lower courts never held that Petitioner did not commit a crime; on the contrary, the courts expressly held that Petitioner had committed a crime, to which he pleaded guilty. Third, the fact is that probable cause did exist for Petitioner's arrest for impersonating a law enforcement officer and illegal possession of prescription drugs, for which the Petitioner was also arrested. lastly, the Court's holding in *Devenpeck* is sound and should not be overruled.

This Court should deny Petitioner's application for certiorari.

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STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1254(1), which confers jurisdiction on the Court over cases in the courts of appeal by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE RELEVANT FACTS

On September 8, 2015, Petitioner was driving what was readily recognizable as an unmarked police cruiser. The cruiser had blacked out windows, which are illegal in this state. The cruiser also had police equipment, such as a mount for an on-board computer aided dispatch device, a siren, lights, and tactical police equipment. Petitioner was illegally in possession of prescription narcotics. When the Respondents stopped Petitioner for the illegal tint and began questioning Petitioner, Petitioner lied to the Defendants regarding his status as a peace officer to thwart the investigation. Petitioner admitted to possessing the narcotics without a prescription.

Petitioner was issued a misdemeanor summons for having illegal window tint, which he pleaded guilty to at arraignment.

Petitioner was also arrested for false personation and for being in possession of numerous prescription narcotics without a prescription.

The relevant background, case history and arguments of the parties was set forth in detail by the district court in its November 9, 2017 Order and Reasons (Pet. App.11a-20a), and by the United States Court of Appeal for the Fifth Circuit ((Pet. App. 2a-3a),

which recitations are hereby adopted and incorporated herein by reference as if copied *in extenso*.

Petitioners further submit the following statement of facts:

THE POLICE REPORT (ROA.215-217)[1]

On September 8, 2015, Detective Michel and Deputy Enclard were conducting proactive patrols in an area known to be a high crime/drug trafficking area when they observed Petitioner's vehicle, a white Crown Victoria commonly used in law enforcement, being operated with extremely dark window tint such that Detective Michel was unable to observe in any of the windows.

Detective Michel activated his emergency lights and siren and conducted a traffic stop of the Plaintiff.

As Detective Michel approached the Petitioner's vehicle he requested that Petitioner roll down his rear passenger window so that Detective Michel could observe into the vehicle for his safety.

Detective Michel observed in the vehicle what was obviously law enforcement equipment. He asked for Petitioner's driver's license and proof of registration and insurance, which Petitioner provided.

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[1] Former JPSO Deputy DAVID MICHEL authored the Police Report. Tragically, however, Deputy Michel was killed in an unrelated line-of-duty incident. He was never served with the instant suit. His deposition was never taken, and he was never served with and did not answer any written discovery requests. There was no objection in the district court to the report being admissible. Further, Petitioner does not dispute the material facts alleged in the report. ROA.231:17-232:3, 233:25-235:1; Appellant's Brief, at p. 25.

Petitioner was wearing a hat with the acronym S.W.A.T. on it. Detective Michel asked Petitioner whether he was a law enforcement officer. Plaintiff replied that he was. Petitioner provided identification from two law enforcement agencies, both expired. Sgt. Alvarado, who had arrived on scene, was able to call and verify that Petitioner was not a currently commissioned law enforcement officer and had not been so for some fourteen years. In fact, Petitioner has not been a commissioned law enforcement officer since 2001.

Petitioner was informed of his rights, which he understood, and told that he was being arrested for impersonating a law enforcement officer in violation of La. R.S. 14:112.

During a routine search incident to arrest it was discovered that Petitioner was in possession of a large quantity of prescription pills. Petitioner was informed that he would also be charged with possession of controlled dangerous substances in violation of La. R.S 40:967.

Petitioner was also issued a summons for having illegal window tint in violation of La. R.S. 32:361.1.

THE CONVICTION

On October 26, 2015, Petitioner pled guilty as charged at his arraignment for the misdemeanor charge of having improperly tinted windows in violation of La. R.S. 32:361.1. ROA.218.

THE TESTIMONY IN THE RECORD

Petitioner admits that he had illegal tint on his windows and that he pled guilty to the charge.

ROA.247:20-248:2. Petitioner admits to possessing a single prescription pill bottle containing numerous different prescription medications when he was arrested as alleged in the Police Report. ROA.241-244, 260. Petitioner admits that he did not have a prescription for any of those medications. *Id.*

When shown a copy of the police repot and asked whether he disputed any of the facts therein, Petitioner stated that the only factual inaccuracy was that the Detective asked him whether he was a "26," which is police code for police officer, as opposed to just being asked whether he was a police officer. ROA.231:17-232:3, 233:25-235:1.

Petitioner admits that when asked by Defendants if he was a police officer, he answered that yes, he was. ROA.235:17-236:4; Appellant Petitioner's Brief, at p. 25. Petitioner admits that on the date of his arrest, he had not been a police officer for over fourteen years. ROA.229:22-230:1, 239-240. Petitioner admits that his vehicle was equipped with police equipment, including lights, sirens, and a mount for an on-board computer. ROA.235.8-16.

Sgt. Alvarado testified that he arrived on the scene of the Petitioner's traffic stop, which was in a high crime area; he explained that there were murders in the area, that the area was known for narcotics activity, and that he had experience with drug dealers buying used police cars cheaply that had tinted windows to "throw off police." ROA.299:10-300:2. He testified that Petitioner presented two expired Police IDs, identified himself to the investigators as a police officer and then recanted to state that he was a retired police officer, neither of which was true based upon Sgt. Alavarado's investigation. ROA.304:10-305:14. Sgt. Alvarado stated that he believed Petitioner was trying

to "get out of… the police interaction." ROA.311:20-22, 312:3-4.

Sgt. Alvarado testified that a search incident to arrest revealed that Petitioner "had several different pills in a bottle that was marked for something totally different [and] that didn't didn't even correspond to any of the pills that he had… [Petitioner] couldn't even provide any prescriptions [and] he didn't tell us where he got them prescribed so we [could] call and verify." ROA.307:8-20.

Sgt. Alvarado testified that Petitioner was issued a citation for the illegal window tint, which Petitioner signed for. ROA.308:8-11, 312:5-6.

Deputy Enclard testified that when he and his partner elected to stop Petitioner, he immediately noticed "the window tint, it was pitch black. You couldn't see through it." ROA.341:16-17.

Deputy Enclard explained that, upon approaching Petitioner's vehicle, Detective Michel ordered Petitioner "to roll down all his windows because we couldn't see in the vehicle." ROA.342:2-4. He further testified that he and Detective Michel observed "police equipment in the vehicle," including "a[n] [on-board] computer stand… dash lights… a siren" and "tactical equipment in [the] front seat." ROA.343:19-344:3.

Deputy Enclard testified that "Detective Michel conducted a search incident to arrest and recovered a pill bottle full of prescription medication in [Petitioner's] front pocket." ROA.345:22-25.

Deputy Enclard testified that the Petitioner was issued a citation for the window tint violation, which the Petitioner signed for. ROA.357:17-19.

SUMMARY OF THE ARGUMENT

First, Petitioner is not properly before the Court because he failed to preserve the issue of whether *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) should be overruled by raising it in the district court. Second, Petitioner is otherwise not properly before the Court to challenge the jurisprudential rule established in *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) because probable cause existed for Petitioner's arrest on all of the crimes for which he was arrested.

Third, the rule that an Officer's subjective motivations for making an arrest are irrelevant is sound and should not be overturned.

ARGUMENT

I. THE "ISSUE PRESENTED" IS NOT PROPERLY BEFORE THE COURT AS IT WAS NOT PRESEVED IN THE DISTRICT COURT

Supreme Court Rule 15.1 admonishes that counsel have an obligation to the Court to point out in the brief in opposition any perceived misstatement made in the Petition. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985)(Non-jurisdictional defects should be brought to the Court's attention no later than in respondent's brief in opposition to the petition for certiorari).

In this case, it is uncontested that the Petitioner "never argued that the Supreme Court should overrule its objective reasonableness approach and take into account officers' subjective intent—indeed, he did not so much as cite *Whren* or a case following it. And

nowhere in his district court briefing did he argue that the qualified immunity doctrine contravenes § 1983." Pet. App. 7a(B).

Accordingly, Defendants expressly object to the Court considering the issue, and the Court should deny Petitioner's application. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 275 (1987).

II. PETITIONER IS OTHERWISE NOT PROPELRY BEFORE THE COURT BECAUSE PROBABLE CAUSE EXISTED FOR PETITIONER'S ARREST, BARRING HIS SUIT FOR FALSE ARREST

Petitioner's entire argument rests on the misplaced notion that he was arrested for a crime that he did not commit. This assertion belies the record. First, probable cause existed for Petitioner's arrest for illegal window tint, to which he pleaded guilty. Second, probable cause existed for Petitioner's arrest for false impersonation of a police officer and illegal possession of prescription narcotics for which he was also arrested.

A. THE COURT'S HOLDING IN *DEVENPECK*

In *Devenpeck*, as here and based on facts very similar to the instant action, Plaintiff was suspected of impersonating a law enforcement Officer. After an investigation, Plaintiff was arrested for tape recording the traffic stop, but not for impersonating an officer. Unlike here, all charges for which Plaintiff was arrested or cited were dropped by prosecutors.

The Court held that a warrantless arrest by a law officer is reasonable under the Fourth Amendment if, given the facts known to the officer, there is probable

cause to believe that a crime has been or is being committed. The Court, citing *Whren v. United States*, 517 U.S. 806, 812–815, 116 S.Ct. 1769, 135 L.Ed.2d 89 further held that the Ninth Circuit's additional limitation—that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense the arresting officer identifies at the time of arrest—is inconsistent with the Court's precedent, which holds that an arresting officer's state of mind (except for facts that he knows) is irrelevant to probable cause. The Court further reasoned that the "closely related offense" rule is condemned by its perverse consequences: It will not eliminate sham arrests but will cause officers to cease providing reasons for arrest, or to cite every class of offense for which probable cause could conceivably exist. *Devenpeck*, 543 U.S. at 151-155.

B. PETITIONER IS NOT PROPERLY BEFORE THE COURT BECAUSE PROBABLE CAUSE EXISTED FOR APPELLANT'S ARREST FOR HAVING ILLEGAL WINDOW TINT IN VIOLATION OF LA. R.S. 32:361.1, TO WHICH PLAINTIFF PLEADED GUILTY

As in the district court, Appellant does not dispute that on the date of his arrest he was operating a vehicle with illegal window tint. Likewise, Appellant does not dispute that he pleaded guilty to, and accepted responsibility for the offense.

In dismissing Appellant's claims, the district court properly reasoned and held thusly:

> Defendants argue that Plaintiff admits there was probable cause for the deputies to arrest him,

since he admits that his windows were improperly tinted. However, Plaintiff reiterates that he was arrested for false personation and only cited for tinted windows. Plaintiff points to Deputy Enclard's deposition testimony, where he stated that improper window tinting is not probable cause for an arrest. Thus, Plaintiff argues, "There exists a genuine issue of material fact as to whether Defendants had probable cause to arrest Mr. Weisler for false personation."

As explained by the U.S. Supreme Court, an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." The Court reasoned that "[t]he Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, whatever the subjective intent." Thus, the fact that officers may not have had probable cause to arrest Plaintiff for false personation is immaterial if probable cause existed for another offense. In his opposition, Plaintiff "concedes that probable cause for the window tint certainly did exist, and he has taken full responsibility for this violation."

Here, rather than disputing probable cause for improper window tint, Plaintiff asserts that a window tint violation is "not an offense for which an arrest may be conducted." However, the Supreme Court has expressly rejected a distinction between "jailable" and "fine-only" offenses. In *Atwater*, where the plaintiff had

violated a Texas seatbelt requirement, the Supreme Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Here, a "window tint" violation is certainly a "very minor criminal offense" similar to failing to wear a seatbelt. Nevertheless, as recognized by the Supreme Court, it is within police officer authority to arrest an individual for such a violation.

Plaintiff argues that such a determination "would create the absurd result that any traffic stop for tinted windows could then be turned into an arrest for any unrelated crime without the existence of probable cause." However, responding to a similar argument in *Atwater*, the Supreme Court stated that "just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests."

Consequently, the arresting officers had probable cause to arrest Plaintiff for his window tint violation. As stated above, the Fifth Circuit has stated, "To ultimately prevail on [] section 1983 false arrest claims, [plaintiff] must show that [defendants] did not have probable cause to arrest [him]." Thus, Plaintiff's Section 1983 false arrest claims, which include claims regarding the Fourth, Fifth, and Fourteenth Amendments, must be dismissed as a matter of law.

Pet. App. 28a-30a; *citing Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

Likewise, the Court of Appeal reasoned and held thusly:

> According to Weisler, it is clearly established that the Fourth Amendment prohibits arrests for noncriminal regulatory offenses.[2] Because the Louisiana window-tint statute is, in Weisler's view, a regulatory offense, any reasonable officer would have understood that the Fourth Amendment prohibited arresting Weisler for violating it.
>
> Weisler is wrong on both fronts. As an initial matter, he fails to cite any cases from this circuit holding that an arrest for a noncriminal regulatory offense violates the Fourth Amendment. Moreover, as this court recently made clear, the Fourth Amendment does not limit arrests to criminal law violations.[3] *See City of El Cenizo v. Texas*, No. 1750762, 2018 WL 2121427, at *13 (5th Cir. May 8, 2018) (published opinion). "Courts have upheld many statutes that allow seizures absent probable cause that a crime has been committed." *Id.* (collecting cases). Accordingly, it was by no means clearly established at the time of Weisler's arrest that the Fourth Amendment allows arrests only on probable cause of a criminal offense. *See id.* If anything, Supreme Court caselaw would have suggested to the officers that the Fourth Amendment did not stop them from arresting Weisler for a minor traffic offense, *see Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)—even if state law prohibited them from doing

so, *see Virginia v. Moore*, 553 U.S. 164, 171-73, 176 (2008).

Even were that not so, the Supreme Court of Louisiana has described the window-tint statute as "regulating the tinting of car windows and providing criminal penalties and fines for infractions." *State v. White*, 1 So. 3d 439, 442 (La. 2009) (emphasis added) (citing La. R.S. 32:361.1); *see also State v. Wyatt*, 775 So. 2d 481, 483 (La. Ct. App. 2000) ("LSA–R.S. 32:361.1 provides restrictions on how darkly windows of a car may be tinted, and provides criminal penalties . . . ." (emphasis added)); *State v. Dillon*, 670 So. 2d 278, 282 (La. Ct. App. 1996) (describing a "violation of the tint law" as "a criminal offense"). Far from it being clear that a violation of the window-tint statute was a non-criminal, regulatory offense, if anything just the opposite was clear. Given that the state's courts have repeatedly characterized a violation of the window-tint statute as criminal, a reasonable officer could have believed that the Fourth Amendment did not prohibit him or her from arresting a person for violating it.

As such, it was not clearly established at the time of Weisler's arrest that the Louisiana window-tint statute was a non-criminal offense or that the Fourth Amendment prohibited arrests for such offenses. A reasonable officer who arrested a person under similar circumstances could have believed that he or she could legally do so.

Pet. App. 5a(A)-6a.

C. PETITIONER IS NOT PROPERLY BEFORE THE COURT BECAUSE PROBABLE CAUSE EXISTED FOR PETITIONER'S ARREST FOR FALSE PERSONATION IN VIOLATION OF LA. R.S. 14:112

"Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Resendiz v. Miller*, 203 F.3d 902, 903 (5th Cir.2000). Probable cause is defined as "reasonable grounds for belief in guilt." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

La. R.S. 14;112 provides: "A. False personation is the performance of any of the following acts with the intent to injure or defraud, or to obtain or secure any special privilege or advantage: (1) Impersonating any public officer, or private individual having special authority by law to perform an act affecting the rights or interests of another, or the assuming, without authority, of any uniform or badge by which such officer or person is lawfully distinguished. La. R.S. 14:112.

In *State v. Gordon*, 95-1247 (La. App. 4th Cir. 1/19/96), 668 So.2d 462, the Louisiana Fourth Circuit Court of Appeal reasoned and held that

> impersonating an officer is an act unto itself and does not require a showing that he wore a uniform or carried a badge. Gordon admitted at trial that he had pasted his photo on top of Officer Marshall's NOPD identification card and that he had possessed the card for [95-1247

> La.App. 4 Cir. 3] approximately eight years. The arresting officer testified that when he asked Gordon for his license, registration, and proof of insurance, Gordon "automatically handed me the I.D. card" and that "[t]herefore, I was taking it that he was a police officer." Viewing this evidence in the light most favorable to the prosecution, any reasonable juror could have found that, upon being stopped for a traffic violation, Gordon impersonated a police officer with the intent of obtaining a special privilege or advantage.

Gordon, 668 So.2d 462, at 464.

Here, Petitioner admits that when asked by Respondents if he was a police officer, he answered that yes, he was. ROA.235:17-236:4; Appellant's Brief, at p. 25. Petitioner admits that on the date of his arrest, he had not been a police officer for over fourteen years. ROA.229:22-230:1, 239-240. Petitioner admits that his vehicle was equipped with police equipment, including lights, sirens, and a mount for an on board computer. ROA.235.8-16.

Sgt. Alvarado testified that he arrived on the scene of the Petitioner's traffic stop, which was in a high crime area; he explained that there were murders in the area, that the area was known for narcotics activity, and that he had experience with drug dealers buying used police cars cheaply that had tinted windows to "throw off police." ROA.299:10-300:2. He testified that Petitioner presented two expired Police IDs, identified himself to the investigators as a police officer and then recanted to state that he was a retired police officer, neither of which was true based upon Sgt. Alavarado's investigation. ROA.304:10-305:14. Sgt.

Alvarado stated that he believed Appellant was trying to "get out of… the police interaction." ROA.311:20-22, 312:3-4.

Therefore, Respondents had a "reasonable belief," *Brinegar*, 338 U.S. 160, at 175, that the Petitioner was personating a police officer to "get out of… the police interaction." Accordingly, Petitioner's application should be denied.

D. PETITIONER IS NOT PROPERLY BEFORE THE COURT BECAUSE PROBABLE CAUSE EXISTED FOR APPELLANT'S ARREST FOR ILLEGAL POSSESSION OF PRESCRIPTION NARCOTICS

As established above, Petitioner was lawfully arrested for false personation and illegal window tint. It is axiomatic that when an officer makes a lawful arrest, the officer may search the arrestee. *Chimel v. California*, 395 U.S. 752 (1969). Here, it is uncontested that Petitioner was searched incident to arrest and that prescription medications were found, for which the Petitioner did not have valid prescriptions. Petitioner was therefore charged with illegal possession of prescription medication in violation of La. R.S. 40:967, La. R.S. 40:969, and La. R.S. 40:1238.1. ROA.212-213.

La. R.S. 40:967 provides, in pertinent part: "C. Possession. It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner, as provided in R.S. 40:978 while acting in the course of his professional practice, or except as otherwise authorized by this Part." Similarly, La. R.S. 40:969 provides, in pertinent

part: "C. Possession. It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance classified in Schedule IV unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner, or as provided in R.S. 40:978, while acting in the course of his professional practice or except as otherwise authorized by this Part." La. R.S. 40:1238.1, redesignated as La. R.S. 40:1060.13, provides: "A. It shall be unlawful for any person to sell, deliver, or possess any legend drug except upon the order or prescription of a physician or licensed health care practitioner as defined in R.S. 40:961(31)."

In this case, Sgt. Alvarado testified that a search incident to arrest revealed that Petitioner "had several different pills in a bottle that was marked for something totally different [and] that didn't didn't even correspond to any of the pills that he had… [Petitioner] couldn't even provide any prescriptions [and] he didn't tell us where he got them prescribed so we [could] call and verify." ROA.307:8-20. Appellant admits to possessing a single prescription pill bottle containing numerous different prescription medications when he was arrested as alleged in the Police Report. ROA.241-244, 260. Petitioner admits that he did not have a prescription for any of those medications. *Id.*

Therefore, there is no doubt that probable cause existed at the time of Petitioner's arrest that he was illegally in possession of prescription narcotics in violation of the above statutes. Further, "it is irrelevant to the justification of an arrest that the charges were later dropped by a criminal court." *Spencer v. Rau*, 542 F.Supp.2d 583, 591-592 (W.D. Texas 10/11/07). Instead, when reviewing the issue of probable cause, the court determines the "reasonableness of the actions taken in

light of the cause that existed *at the time of arrest*." *Id.*; *citing Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir.2000) (emphasis in original). It is the totality of the circumstances that matters. *Mendenhall*, 213 F.3d at 231.

Further, Petitioner's argument in the lower courts that because he was later able to produce prescriptions to the prosecutor is of no moment. Indeed, the law expressly provides a mechanism for doing just that. In *State v. Ruth*, 2013-KA-1547 (La. App. 4th Cir. 2014), 147 So.3d 1177, the Louisiana Fourth Circuit Court explained:

> La. R.S. 40:991(A), provides that any person "who claims possession of a valid prescription for any controlled dangerous substance as a defense to a violation of the provisions of the Uniform Controlled Dangerous Substances Law shall have the obligation to produce sufficient proof of a valid prescription to the appropriate prosecuting office." It further states that the "[p]roduction of the original prescription bottle with the defendant's name, the pharmacist's name, and prescription number shall be sufficient proof of a valid prescription." Subsection (C) requires anyone claiming the defense of a valid prescription to raise this defense before trial through a motion to quash. See La. R.S. 40:991(C). La.C.Cr.P. art. 532(10) further allows the trial court to grant a motion to quash where "[t]he individual charged with a violation of the Uniform Controlled Dangerous Substances Law has a valid prescription for that substance."

Id., at 1179.

The defendant bears the burden of proving that he possessed otherwise illegal drugs pursuant to a valid prescription. *State v. Ducre*, 604 So. 2d 702, 708 (La. App. 1st Cir. 1992). The State is not required to prove the absence of a prescription. Instead, the defendant has the burden to rebut the State's charges by asserting an affirmative defense. *See State v. Rodriguez*. 554 So. 2d 269, 270 (La. App. 3d Cir. 1989), writ granted in part, denied in part on other grounds, 558 So. 2d 595 (La. 1990) (the burden of showing the controlled dangerous substance was possessed pursuant to a valid prescription was on the defendant as an affirmative defense to the crime of possession).

Here, again, it is not disputed that, on the scene of the arrest, Petitioner was in possession of prescription narcotics without any proof that they were lawfully prescribed. Probable cause existed for Petitioner's arrest.

The Petitioner's application should be denied.

III. THE COURT'S HOLDING IN *DEVENPECK* IS SOUND AND SHOULD NOT BE DISTURBED

Indeed, the Court did not depart from exiting precedent in its holding. The Court explained: "Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. See *Whren v. United States*, 517 U.S. 806, 812–813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (reviewing cases); *Arkansas v. Sullivan*, 532 U.S. 769, 121 S.Ct. 1876, 149 L.Ed.2d 994 (2001) *(per curiam)*. That is to say, his subjective reason for making the arrest need not be the criminal

offense as to which the known facts provide probable cause. As we have repeatedly explained, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Whren, supra,* at 813, 116 S.Ct. 1769 (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978)). "'[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.'" *Whren, supra,* at 814, 116 S.Ct. 1769. "'[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Horton v. California,* 496 U.S. 128, 138, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)." *Devenpeck,* 543 U.S., at 153.

For the reasons stated by the Court, which are obvious, this is sound policy. Petitioner's application should be denied.

CONCLUSION

First, Petitioner is not properly before the Court because he failed to preserve the issue of whether *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) should be overruled by raising it in the district court. Second, Petitioner is otherwise not properly before the Court to challenge the jurisprudential rule established in *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) because probable cause existed for Petitioner's arrest on all of the crimes for which he was arrested. Third, the rule that an Officer's subjective motivations for making an

arrest are irrelevant is sound and should not be overturned.

For the foregoing reasons, Respondents respectfully requests that this Court deny Petitioner's application for certiorari

Respectfully submitted,

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