No. _____

IN THE
SURPREME COURT OF THE UNITED STATES
October Term 2020

JUSTIN STROLIS,
Petitioner,
v.

LUCAS HEISE,
individually, for actions taken under color of law
as a deputy with the Augusta Richmond County
Sheriff's Department,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari
To the Eleventh Circuit

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June 21, 2021

QUESTIONS PRESENTED

I. In this civil malicious prosecution claim, is it error to replace the Fourth Amendment's totality-of-the-circumstances test for probable cause as to the reliability of a witness' purported identification of the Plaintiff with the Eleventh Circuit's presumption, that a "co-defendant's" identification of another is credible and shows probable cause of Plaintiff's participation, where the totality shows it was highly likely only one person committed the crime, and where the presumption imported into civil cases, derives from post-conviction challenges to guilt and identification by guilty co-defendants, under *Craig v. Singletary*, 127 F.3d 1030, 1044 (11th Cir. 1997) (en banc), where under the challenged presumption the "co-defendant's" identification of Plaintiff is reversed only when "incredible or [it] contradicts known facts to such an extent no reasonable officer would believe it?" (App. at 71).

II. Whether under the totality of the circumstances the Eleventh Circuit clearly misapprehended the summary judgment standard erroneously preventing a jury trial on Petitioner's Fourth Amendment malicious prosecution claim, predicated on the principles from *Franks v. Delaware*, 438 U.S. 154 (1978), that probable cause, for identification, cannot be based on fabricated evidence, where qualified immunity was granted to Respondent Heise on arguable probable cause?

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PARTIES TO PROCEEDING

The undersigned certifies that all parties are listed in the caption.

Respectfully submitted this 21st day of June, 2021.

/s/ John P. Batson
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LIST OF PROCEEDINGS

Order granting summary judgment to Defendant Heise. *Strolis v. Heise*, 1:18-cv-00137-JRH-BKE (S.D. Ga. March 23, 2020 (Doc. 34)).

Eleventh Circuit's order affirming grant of summary judgment to Defendant Heise. *Strolis v. Heise*, 11th Cir. No. 20-11554 (11th Cir. Nov. 3, 2020).

Rehearing denial by the Eleventh Circuit. *Strolis v. Heise*, 11th Cir. No. 20-11554-BB (11th Cir. Jan. 20, 2021).

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS
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The order granting summary judgment to Defendant Heise, *Strolis v. Heise*, 1:18-cv-00137-JRH-BKE (S.D. Ga. Mar. 23, 2020) (App. 23-60), is available at 2020 WL 1492170.

The Eleventh Circuit's order affirming the grant of summary judgment to Defendant Heise, *Strolis v. Heise*, 20-11554, (11th Cir. Nov. 3, 2020) (App. 61-72), is unpublished but available at 834 F. App'x 523.

The denial of rehearing by the Eleventh Circuit. *Strolis v. Heise*, 20-11554-BB, (11th Cir. Jan. 20, 2021) is unreported.

STATEMENT OF JURISDICTION

Petitioner seeks review of the Eleventh Circuit's opinion affirming the grant of summary judgment to Defendant Heise by the Southern District of Georgia in *Strolis v. Heise*, 20-11554, (11th Cir. Nov. 3, 2020) (App. 61-72).

Rehearing was timely filed on Nov. 24, 2020, (11th Cir. R. 40-3 (21 days to file for rehearing)) which was denied on January 20, 2021. *Strolis v. Heise*, 20-11554, (11th Cir. Jan. 20, 2021).

This Court's order of March 19, 2020, established a period of 150 days to file certiorari petitions. The 150th day from rehearing denial is June 19, 2021. Because the last day for filing falls on a Saturday, the last date for timely filing is extended to Monday, June 21, 2012. SUP. CT. R. 30.1.

The Supreme Court's Jurisdiction for this petition for writ of certiorari from a judgment of the Eleventh Circuit Court of Appeals is under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. IV.

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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Introduction and Summary

It is a fundamental error of law to supplant or undermine the burden placed on the government to demonstrate probable cause based on objectively reliable grounds under traditional Fourth Amendment totality-of-the-circumstances analysis. The Courts below erred by using the Eleventh Circuit's presumption of the credibility of a witness' identification of another as a participant where credibility is assigned to someone who has admitted to a crime and has accused an alleged accomplice[1] of participation, in civil cases of false arrest or malicious prosecution, where the participation of the plaintiff is at issue under circumstances where any reasonable officer would know that the crime could have been committed by one individual.

The challenged presumption derives from the criminal arena, *Craig v. Singletary*, 127 F.3d 1030, 1044 (11th Cir. 1997) (en banc) and is inapposite. This erroneously transposed witness credibility presumption is based on post-conviction challenges to in-trial identification by co-defendants, where a jury has heard evidence about the person raising the challenge to his conviction and participation,

---

[1] Even if Dominguez were labeled a victim, the "circumstances ... raise doubts as to [Dominguez's] veracity" as a source to indicate Strolis' participation. *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995) ("An arresting officer advised of a crime by a ... victim ... has probable cause to effect an arrest absent circumstances that raise doubts as to the victim's veracity.").

Probable cause to arrest "depends on the totality of the circumstances." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (citing *Maryland v. Pringle*, 540 U.S. 366, 371, (2003)). Mere suspicion is insufficient for probable cause. *Henry v. U.S.*, 361 U.S. 98, 104 (1959).

and the jury has found the testimony proving participation, and therefore identification, credible beyond a reasonable doubt. This presumption of credibility for identification and participation found its way into the civil arena in *Damali v. City of East Point*, 766 F. App'x 825, 827 (11th Cir. 2019), and was relied upon below, even though the totality of the circumstances shows that any reasonable officer would find that this crime could have been committed by one person. App. 71.

It was error to grant qualified immunity to Officer Heise using arguable probable cause (App. at 72; App. at 59), because when the evidence is correctly construed,[2] the totality of the circumstances supports the conclusion that Heise's challenged actions include a confusing warrant affidavit of July 9th,(App. 78), based on false facts Heise fed Dominguez in their July 7th interview, alleging that Strolis was present, as shown below, Facts p. 13-14. While the evidence showed mere suspicion of Strolis' presence, because of mere association with Dominguez before the break-ins, Heise's warrant affidavit statement that Strolis was present violated *Franks v. Delaware*, 438 U.S. 154 (1978) (Fourth Amendment prohibits falsification of probable cause), and his actions found to have been that of an officer "plainly incompetent or [one who] knowingly violate[d] the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), requiring qualified immunity denial.

Justifying summary judgement for Heise under arguable probable cause under the record of this case undermines the Fourth Amendment's probable cause

[2] *Tolan v. Cotton*, 572 U.S. 650, 659–60 (2014) (summary judgment reversed due to "clear misapprehension of summary judgment standards").

standard, and in the totality of the circumstances and evidence correctly construed, the arguable probable cause finding impugns the courts' independence, given facts showing Heise fed false facts to Dominguez, that formed the basis of the arrest warrant and prosecution. No objectively reasonable officer, standing in Heise's shoes at the time the warrant affidavit was sworn out, would not have had serious doubts about a claim that Strolis was present, even if any reasonable officer would have had mere suspicion about Strolis' presence. No reasonable officer would have taken out the warrant because Strolis indicated he was seeking counsel or before talking to Strolis' Father or checking the work records. *See* Facts p. 10 & 15.

The totality shows:

(1) It was highly likely that only one person was needed to commit the auto break-ins, and no reasonable officer would have concluded that the crime could not have been committed by only one person, in this case Dominguez; (Facts p. 11);

(2) Heise used leading questions to prompt Dominguez to say Strolis participated, on the "other side of the street," to knowingly account for absence of evidence linking Strolis to the break-ins beyond mere suspicion by association; (Facts p.13-14)

(3) During Heise's interview on July 7th Dominguez admitted to breaking into all the vehicles; (Facts p. 12)

(4) Heise knew that only Dominguez possessed or used stolen credit cards, and on accounts in Dominguez' name; (Facts p.8);

(5) Dominguez admitted he was the sole individual in four of the home security videos of the break-ins (Facts p.12);

(6) Heise knew that Dominguez had a record for auto break-ins and Strolis did not (Facts p.8-9);

(7) Heise knew from Strolis that Strolis lived with his Father, and Strolis had maintained in his July 1st interview that his Father could verify that Strolis was at home during the June 12th break-ins and his Father took him to work the next morning, where he clocked in (Facts p. 9-10);

(8) Heise gave Dominguez an incentive to cooperate and blame Strolis, namely help from the judge (Facts p.15);

(9) The only objective evidence concerning Strolis was mere association with Dominguez the day before the break-ins (Facts p.9-11);

(10) Heise and any reasonable officer would know that Dominguez's response to Heise's leading question, that the idea for the break-ins was Strolis', was not credible, and the fact Heise asked this question is another example of Heise suggesting Strolis' participation, when there was no corroboration of participation (Facts p.13-14)

(11) Heise knew Dominguez had lied and accused Strolis of using the stolen credit cards (Facts p.12);

(12) Heise knew Strolis consistently maintained a chronology of events that placed him with Dominguez on Dominguez's first night in town, verified by hotel records showing Dominguez's first day at the hotel was June 10th (Facts p. 9-10);

(13) Strolis had instructed Heise that his chronology of when he was with Dominguez and when he returned home June 11th showed he did not participate in the June 12th break-ins could be furthered verified by checking with his Father about the dates, where an interview of his Father would have revealed that he kept a calendar of dates he had to drive Strolis to work (Doc. 25-10 ¶4-5 (Father's affidavit); Doc. 25-11 (calendar)), and by checking Strolis' work records (Facts p.10).

Facts

A. Initial investigation linking only Dominguez to break-ins and stolen items.

On June 12, 2015 between 1:00 and 3:30 a.m. auto break-ins occurred in an Augusta, Georgia neighborhood, and several days later Officer Heise was assigned to investigate. Investigator Rep., Doc. 25-4, at 1-4.; Pl. Int. Pt.3, Doc. 15 at 00:12.

On June 25th Heise learned one of the stolen credit cards had been used to pay the Match.com account of Joshua Dominguez. Investigator Rep Doc.25-4 at 12-13.

On June 30th Heise learned that Dominguez had a record of auto break-ins. Doc.14-3 at 14.

On July 1st Heise learned that the second stolen card had been used to pay on the Boost mobile account of Dominguez. Investigator Rep Doc.25-4 at 15 & 20.

Heise reviewed home surveillance footage showing only one person entering two of the ten autos entered. *Id*. at 4; Doc. 26 (videos).[3]

[3] Dominguez admitted to being the person in the home security video. Dominguez Int., Doc. 15 at 24:07-25:20.

Heise reviewed Dominguez's phone records noticing repeated calls to a local number in North Augusta, South Carolina, which Heise called and Strolis answered. Doc. 25-4 at 20. Heise asked Strolis to come to in for an interview (*id*.) and Strolis' Father drove him and waited. Strolis Int. Pt.3 at 5:16.

B. July 1st Heise interviews Strolis showing consistent chronology, no participation in break-ins, and that Heise is asked to verify Strolis was at home with his Father on June 12th consistent with Strolis' chronology despite Heise's attempts to confuse the dates.

Heise and Strolis discussed that Strolis had no record for break-ins (Strolis Int. Pt.1 at 23:15). Strolis was a meat department manager at a grocery store (Pl. Int. 2 at 8:00; Int. 3 at 6:00); (Doc. 25-8 at 2) and lived with his father. (Strolis Int Pt. 2 at 11:38; 29:30; Int. 3 at 13:30).

Near the end of the interview Heise reflects that he knows Strolis' Father is waiting outside (Strolis Int. Pt.3 at 5:16) and that Strolis has said he was at his Father's house at the time of the break-ins. *Id*. Pt. 2 at 33:30-33:40.

Strolis consistently maintained that although he had been with Dominguez on the evening of June 10th, Dominguez's first night in Augusta, (Pl. Int. Pt. 2, Doc. 15, at 8:50, 31:00-34:00; Pt. 3 at 00:25-1:10.), Dominguez took Strolis home the morning of June 11th, (Strolis Int. pt. 2 at 8:50, 33:00.), and Strolis spent the night at his Father's house, and the next morning his father drove him to work (Strolis Int. pt.2 43:40) where he clocked in at 6:06 a.m. on June 12th, consistently maintaining he had nothing to do with the break-ins. Pl. Int. Pt. 2 at 26:06-26:59.

Strolis was clear that he was unsure of the dates he had spent with Dominguez. (Strolis Int. 2 at 24:20; 28:25-28:35; Int. 3 at 01:00-03:55; 39:05-39:10),

but he was certain of the chronology that he only spent one night with Dominguez on Dominguez's first night in town before returning home. (Strolis Int. pt. 2 at 8:50, 33:00). Strolis was also clear of the fact that he did not know about ((Strolis Int. pt.1 31:15-32:15; pt.2 at 22:00; 25:00-26:00)) nor participate in the auto-break-ins. Pl. Int. Pt. 2 at 26:06-26:59; pt. 3 at 38:12, Pt. 3 at 25:00; 29:42. Strolis only used dates to accept the ones proffered by Officer Heise to cooperate and facilitate the discussion. Strolis Int. Pt. 2 at 28:30.

Strolis affirmatively told Heise that work records would verify the dates and that his father could "attest" to his presence at home on June 11th and June 12, Strolis Int. 2 at 43:40, but Heise failed to investigate Strolis' work records or interview his Father. (Absence in record); Strolis Dec. Doc. 25-8 at 3.

In the Strolis-Heise interview of July 1st Heise attempted to manipulate and confuse the dates of Strolis' timeline to place him with Dominguez during the break-ins, (Doc. 25-8 at 3 Strolis Dec.), by giving the wrong date relative to the day of the week Strolis hung out with Dominguez, (Pl. Int. Pt. 2, Doc 15 at 5:50, 9:33, 10:10.), and by claiming Dominguez's first day in town was the 11th or 12th. *Id*. at 23:41-24:20.

C. Hotel records confirm chronology of association of Strolis and Dominguez was only on June 10th and 11th.

Heise's investigation notes (Doc. 25-4 at 23 (entry for 1515 Hours)) show that the hotel manager provided records indicating that Dominguez's mother paid for a room from June 10-12 with check out the 13th. This confirms that as Strolis had contended in his interview that Dominguez's first day in town was June 10th, which

was consistent with Strolis' version that Dominguez's first night in town was the only night Strolis and Dominguez hung out.

D. Summary of what Heise knew before the July 7th Dominguez interview.

At this point in the investigation including the Strolis interview, Heise knew the evidence all pointed to Dominguez's sole involvement. Dominguez was the only one with stolen goods Doc.25-4 at 12-13 & 15,20. In Heise's own words: "All these crimes were committed between . . . 1:00 a.m. and 3:30 a.m. when [Dominguez] made all the charges. He made all those charges. His pictures were on it. Cell phone did it. The cell phone's his. Photos of him doing it. Gas station surveillance. Holy crap, I've never had so much evidence under one person." (Pl. Int. Pt.3, Doc. 15 at 00:12) (emphasis added.) Shortly after Dominguez's arrest for additional auto break-ins in Atlanta, Heise told victims of the break-ins, "You can rest assured that the individual has been apprehended," specifying "in Gwinnett County" (William Owens Int., Doc. 26 at 06:30; Laura Beverage Int., Doc. 26 at 00:45) where Dominguez had just been arrested on July 1st. Doc. 25-4 at 21.

Items 1, 6, 7, 9, 12, and 13 listed above at p.6-8, are objective facts or reasonable inferences a reasonable officer would have known before interviewing Dominguez.

E. July 7th interview of Dominguez in which Heise feed false facts to foreseeably get Dominguez to parrot words to implicate Strolis.

On July 7th, Heise drove to Atlanta to interview Dominguez. Doc. 14-3 at 21-22. During the beginning of the interview, before the challenged suggestive questions, Heise asked questions which gave Dominguez an opportunity to admit to

the Augusta break-ins and to volunteer what if any involvement Strolis had in the break-ins during a discussion of his relationship with Strolis, (Dominguez Int. Doc. 15 at 18:50-19:13) but Dominguez did not link Strolis and at first even denied his own participation. Dominguez Int. at 22:00-22:30.

After Heise presents the home security footage Dominguez admits to being in the video of the break-ins. Dominguez Int. at 23:30.

Heise knew Dominguez was falsely accusing Strolis because Dominguez claimed Strolis had used the two stolen credit cards and his phone during the break-ins, and Heise had to tell him this was false based on the objective evidence. (Dominguez Int., Doc. 15 at 33:40-35:00. Dominguez ultimately admitted to breaking into the same number of vehicles that had been reportedly broken into, (Dominguez Int. at 1:13:00-1:14:00.; Investigator Rep., Doc. 25-4, at 1-4.); and Dominguez told Heise that Strolis did not enter any of the vehicles that he did. (Dominguez Int., Doc. 15 at 1:12:00-1:13:00.

After Heise forced Dominguez to admit to his participation in the Augusta break-ins, Heise engaged in the following leading and suggestive conversation giving Dominguez facts to be parroted back by Dominguez. Heise never warned Dominguez that if he lied about Strolis he could be in legal trouble.

Heise used confusion about the dates, without asking Dominguez whether he knew the exact dates, to lead Dominguez into a chronology of Strolis being present with Dominguez during the break-ins.

> Heise: We're talking about the 11, let's think back, right? The 11th of June. Okay. That was a Thursday. Right? Your boy was with you that night. Uh, Justin.
>
> Dominguez: Was he?
>
> Heise: That's what he said,
>
> Dominguez: Like maybe, yeah.
>
> Heise: Y'all went…what y'all do that night? Yeah, it was a while ago. Shit, the best you can remember.
>
> Dominguez: I think we went to [inaudible] that night
>
> Heise: Yeah, yeah. You went to the pub, right?
>
> Dominguez: Yeah.

Dominguez Int. at 27:17-27:30. Dominguez does not immediately jump on board but ultimately confirms Heise's allegations about Strolis.

Heise them prompts Dominguez to say Strolis was with him on Ramsgate where the break-ins occurred:

> Heise: Lot of missed calls too. Like, someone not answering the phone, being a dick.
>
> Dominguez: (laughing)
>
> Heise: So that night, was he with you, on Ramsgate?
>
> Dominguez: Possible.

Id. at 28:20- 28:45. Dominguez is getting the message that Heise wants Dominguez to say that Strolis participated.

Heise then showed Dominguez all of the locations that were broken into and then to cover for the lack of objective evidence implicating Strolis suggested that the auto break-ins were Strolis' idea:

> Heise: Whose idea was it? Was it Justin's?
>
> Dominguez: Yeah.
> Heise: Huh?
>
> Dominguez: Yeah.
>
> Heise: Yes. Cause I mean you've already been away for it. It's kind of risky for you to do it, right?

Id. at 29:20- 29:36.

Dominguez has picked up on Heise's suggestions to implicate Strolis, and Heise prompts Dominguez to say Strolis participated in the break-ins:

> Heise: So, it was his idea to go to Ramsgate? Because you also lived there. Basically. Behind there. In the apartment complex. And, who goes to -- is he going into the cars too?
>
> Dominguez: He was…working the other side of the street.
>
> Heise: He was working the other side of the street?
>
> Dominguez: Mmhmm.

Id. at 30:20-30:55.

F. Heise implies to Dominguez he will help Dominguez with judge or sentencing.

Heise provided Dominguez motivation to fabricate evidence to help Heise link Strolis to the crime. Early in the interview, while discussing the Augusta break-ins, Heise said, "consider me your PR man, right? So right now, I'm talking to you. Whatever you tell me is what I'm going to tell the judge." Dominguez Int. at 22:35-23:20. Later in the interview Dominguez and Heise also discuss Dominguez having something to gain and clearing his name for providing information. *See* 1:07:33-1:8:35 (Heise says what you saw "could possibly get you out of trouble"); 1:17:47 (Dominguez asks "how do I clear my name"); 1:20:18 (Dominguez offered to be a confidential informant); 1:30:52 (Heise implying he would reward Dominguez for information, saying "[n]o one does anything for free.").

G. Heise called Strolis for another interview and Strolis conditions the interview on getting a lawyer.

On July 8th Heise called Strolis to interview him again (Strolis Dec. Doc. 25-8 at 2) but because of the "confusing and abusive way Heise would ask a question and then ignore my answer, his confusing presentation of dates, and [his trying] to change what I was saying", (Id. at 3; Pl. Int. Pt. 2, Doc 15 at 5:50, 9:33, 10:10), Strolis told Heise he would first obtain counsel. Strolis Dec. Doc. 25-8 at 3. Heise told Strolis he'd regret it. *Id*.

H. Heise's confusing warrant affidavit of personal knowledge falsely indicating Strolis' presence, and reflecting material omissions.

Heise then prepared an arrest warrant recklessly omitting that his only evidence came from his leading questions linking Strolis. Doc. 25-8 at 3; Doc. 14-4.[4]

> Personally came Lucas J. Heise, who ... of his/her personal knowledge and belief, Justin Strolis did, on Jun 12, 2015 at approximately 2:00 AM in Richmond County, Georgia commit the offense of entering automobile to commit a theft- felony in violation of O.C.G.A. 16-8-18, ... in that said accused ... did enter an automobile, [Suzuki] ... and removed a credit card ... according to the owner. While co-defendant Joshua Dominguez was entering said vehicle, said accused entered other vehicles without authority, on the other side of the street in Ramsgate neighborhood ... .

App. 78. The warrant affidavit omitted that initially when he could have mentioned Strolis, Dominguez did not, Dominguez Int. at 22:00-22:30 **,** that Heise had prompted Dominguez to say Strolis participated (Dominguez Int. at 27:17-27:30); (*Id*. at 28:20- 28:45); (*Id*. at 30:20-30:55), and the affidavit misrepresented Dominguez's words as being credible, eyewitness, independent testimony. Doc. 14-4. Further the affidavit omits that Dominguez attempted to accuse Strolis of using the stolen cards which Heise knew was false. Dominguez Int., Doc. 15 at 33:40-35:00.

Strolis was arrested and had to hire a lawyer. Compl. Doc. 1-1 at 15 ¶82-83.

The criminal case was dismissed August 3, 2016. Doc. 14-7.

STATEMENT OF DISTRICT COURT JURISDICTION

Strolis' Fourth Amendment claim was brought through 42 U.S.C. §1983 and supports federal jurisdiction because it arises under the Constitution and laws of

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[4] Petitioner raised this below in the district court (Doc. 25 20-22); and on appeal (App.'s Br. at 24-27 & 45-48).

the United States and asserts civil rights. 28 U.S.C. § 1331 and §1343(3); App. at 1 (Compl. ¶1).

REASONS TO GRANT CERTIORARI

I. Use of the Eleventh Circuit's presumption of reliability of a "co-defendant's" identification of a crime participant in a civil malicious prosecution claim to grant the officer judgment on arguable probable cause, where charges were dismissed and plaintiff was not guilty, undermining an inference of participation, contravenes the Fourth Amendment's required totality-of-the-circumstances analysis.

A. It is error to replace the totality-of-the-circumstance test with a presumption of post-conviction, criminal, co-defendant identification reliability in this civil context.

The Fourth Amendment's totality-of-the-circumstances test cannot be replaced by a presumption of reliability of any person who participated in a crime, especially as to statements identifying persons as having participated in circumstances where the totality shows only mere suspicion, the crime could likely have been committed by one person and there is surrounding evidence of manipulation of facts used to support probable cause.

Strolis' Fourth Amendment malicious prosecution claim asserts that Heise relied on false information by suggesting answers to Dominguez, foreseeably causing Dominguez to parrot the notion that Strolis was involved. Heise had no credible corroboration that Strolis was present. No reasonable officer in Heise's shoes would have believed there was more than mere suspicion as to Strolis' participation. *Henry v. U.S.*, 361 U.S. 98, 104 (1959) (mere suspicion is insufficient for probable cause). Lumping Strolis with Dominguez on mere association and suspicion, and then throwing Strolis into the criminal process when readily available credible information should have been weighed, eliminates the meaningful protection of the Fourth

Amendment's probable cause standard and renders the presumption of innocence meaningless.[5]

1. The Eleventh Circuit erroneously adopts a post-conviction criminal presumption of credibility into a criminal case running afoul of this Court's disfavor of bright-line rules for credibility.

The Eleventh Circuit and trial court applied a presumption of reliability:[6] "Under this Circuit's binding precedent, the identification of Mr. Strolis by Mr. Dominguez—who was a known participant in the vehicle break-ins—was sufficient to establish probable cause ... ." App. at 71 (citing *Craig v. Singletary*, 127 F.3d 1030, 1044 (11th Cir. 1997) (en banc); *Damali v. City of East Point*, 766 F. App'x 825, 827 (11th Cir. 2019)).[7]

The Eleventh Circuit's presumption eliminates the totality-of-the-circumstances test and contradicts this Court's Fourth Amendment analysis of witness trustworthiness that has "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Fla. v. Harris*, 568 U.S. 237, 244 (2013); *Illinois v. Gates*, 462 U.S. 213 (1983).

The courts below erred in applying the post-conviction criminal presumption of the reliability of "co-defendant" Dominguez in this civil context finding that the

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[5] "'Arrest them all and let the system sort them out' may work on a bumper sticker, but it hardly passes constitutional muster." *Davis v. City of Apopka*, 356 F. Supp. 3d 1366, 1375 (M.D. Fla. 2018).

[6] Petitioner raised this *Craig* presumption argument in the district court, Doc. 25 at 12-14, and on appeal. App. Open. Br. at 49-53.

[7] The District Court also relied on the *Craig* presumption: finding that "[t]he standard is different" from an "informant" and that probable cause is almost-automatically established by any informant who is labeled an "'admitted accomplice.'" App. at 48 (citation omitted).

presumption applies unless it is "incredible or contradicts known facts to such an extent no reasonable officer would believe it." App. at 71 (citing *Craig*, 127 F.3d at 1045-46). *United States v. Flores*, 572 F.3d 1254, 1263 (11th Cir. 2009) (standard for reversing conviction based on witness credibility: must relate "to facts that the witness could not have possibly observed or events that could not have occurred under the laws of nature").

The evidence shows that Dominguez had opportunity to say that Strolis participated but it was not until Heise indicated Strolis was involved (Dominguez Int. at 29:20-30:55), that Dominguez hesitantly but ultimately agreed with Heise, in the hopes that, as Heise said, he would act as Dominguez's "PR man" to the judge (Dominguez Int. at 22:35-23:20). *See also* Facts p.15. Heise represented in the warrant affidavit that Strolis was present as if Heise had not fed the allegations that implicated Strolis to Dominguez. Warrant quoted at p. 16 & App. 78. Heise is charged with violating the prohibition of creating false evidence in *Franks v. Delaware*, 438 U.S. 154 (1978).[8]

The Eleventh Circuit's presumption should be ruled as error and arguable probable cause be denied allowing for jury resolution.[9] In the civil context where the

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[8] Qualified immunity is defeated by falsification or reckless omissions in the warrant affidavit. *Madiwale v. Savaiko*, 117 F.3d 1321, 1326-27 (11th Cir. 1997). *Malley v. Briggs*, 475 U.S. 335, 341, (1986) (Qualified immunity is denied when an officer is "plainly incompetent or ... knowingly violate[d] the law.")

[9] "Ordinarily, when the facts are in dispute, the question of probable cause is one for the jury." *Moore v. Hartman*, 569 F. Supp. 2d 133, 137 (D.D.C. 2008), vacated and remanded, 571 F.3d 62 (D.C. Cir. 2009).

totality-of-the-circumstances test shows mere association and suspicion, the question is begged as to whether the plaintiff was a participant and truly an accomplice.

Instead of applying the totality-of-the-circumstances test the Eleventh Circuit relied on a presumption of reliability. App. at 71. Although the Panel notes the caveat that that the accomplice's statement must not be "incredible or contradicts known facts to such an extent no reasonable officer would believe it," App. 71,[10] this standard presumes the accomplice is credible, and is not merely trying to shift blame or curry favor with the police to sway a sentencing judge. The standard is also inapposite when the "co-defendant," with a criminal record of similar auto break-ins, could clearly have perpetrated the crime alone and is the only one connected to stolen items.

In practice in the civil context the *Craig* presumption would be nearly impossible to rebut, because it requires evidence that would be objectively without credit or physically impossible to conclude the person participated, which is higher than the Fourth Amendment's totality-of-the-circumstance test, that can weigh a suspect's motive to shift blame and requires that the accusation be "reasonably trustworthy information." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

Even though Heise spoon fed the alleged "co-conspirator" the accusation against Strolis, the challenged presumption eliminates the Fourth Amendment's protection. Dominguez, who has a record for break-ins and used the stolen property,

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[10] "For example, the confession of a mental patient that he and the suspect, aided by an army of little green men, committed the crime clearly would not pass muster." *Craig*, 127 F.3d at 1045.

is nothing more than a witness or tipster. The trial court, App. at 55, noted that Dominguez was credible because he "offered many details" of how the break-ins occurred, but the fact that Dominguez was present at a crime that could have easily been committed by a single person, and recalls the event does not establish credibility as to whether Petitioner was present. Requiring corroboration prevents "restricting everyone's liberty based on the optimistic hope that those who name names … [act] in good faith." *United States v. Lopez*, 907 F.3d 472, 483-84 (7th Cir. 2018).

The challenged civil co-defendant presumption eliminates accepted law on how "tip" information is assessed under a totality test. "Tips may contribute to a probable cause determination, but in assigning probative weight to such tips, courts must assess the totality of the circumstances surrounding them, including the tips' reliability." *Cozzi v. City of Birmingham*, 892 F.3d 1288, 1295 (11th Cir. 2018) (citing *Illinois v. Gates*, 462 U.S. 213, 230-32 (1983)). "Some tips . . . either warrant no police response or require further investigation" before justifying an arrest. *Adams v. Williams*, 407 U.S. 143, 147 (1972). "[T]here exists a danger that the informant sought to implicate another in order to curry the favor ... [and] gain immunity for himself." *United States v. Martin*, 615 F.2d 318, 25-26 (5th Cir.1980). The Heise-Dominguez interview reflects attempts to curry favor and implication that favor would be sought as a quid pro quo.

The Eleventh Circuit's presumption is rooted in the claim that statements against one's penal interest are reliable,[11] but "admissions of crime do not always lend credibility to ... accusations of another" for probable cause purposes. *U.S. v. Harris*, 403 U.S. 573, 583-84 (1971) (plurality opinion). A "broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Williamson v. U.S.,* 512 U.S. 594, 599 (1994).[12]

B. The rule from *Craig*, a post-conviction criminal case, is inapplicable in this civil case.

Craig's presumption of reliability of a "co-defendant's" identification derives from post-conviction case law in which a conviction based on a co-defendant's testimony, after cross examination and jury instructions on credibility,[13] could not be overturned as a matter of law unless "it relates to facts that the witness could not have possibly observed or events that could not have occurred under the laws of nature," and prior inconsistent statements are insufficient when they "were made known to the jury." *U.S. v. Flores*, 572 F.3d 1254, 1263 (11th Cir. 2009).

Obviously the state court Magistrate considering only Heise's warrant affidavit, (App. 78), did not sift through the evidence of a trial at which Strolis,

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11 *Craig*,127 F.3d at 1045. The logic of one person's confession being relevant does nothing to show an accusation against another person was credible.

12 Although *Craig* relied on case law holding that testimony under the hearsay exception Rule 804(b)(3) for statements against self-interest can suffice as a matter of law for conviction, the more analogous hearsay-in-criminal-context analogy would be a non-testifying alleged-accomplice's confession addressed in *Williamson*.

13 At trial there would be a jury instruction that "an accomplice's testimony is to be received with care and suspicion." *U.S. v. Curry,* 471 F.2d 419, 422 (5th Cir. 1973).

Dominguez, and Heise had to testify, and where all were cross examined based on transcripts of interviews and sworn statements. The Magistrate knew nothing of the background information of Heise intentionally leading Dominguez to parrot the words he would later use in the affidavit. The warrant makes a confused representation that the victim and/or Dominguez had personal knowledge of Strolis' presence. *See* above p. 16 ; App. at 78.

In Strolis" case, in which the alleged "co-defendant" easily could have perpetuated the crime alone, there is no justification for a presumption that another person must have participated, whereby mere suspicion gets mis-transposed into probable cause. The distinctions, both factual and the procedural legal setting, between Strolis' case and *Craig,* highlight why the presumption is doubly wrong, because in *Craig*, the police officers know from other evidence that the crime involved multiple participants. In *Craig*, co-defendant Newsome's confession implicated Craig, and was "consistent with the description of the crime given by the only surviving eyewitness." *Craig*, 127 F.3d at 1045. In *Craig*, a third party, the surviving witness, confirmed the presence of others. Detectives received a tip that "was corroborated… by Newsome's confession, and … is a fact that a reasonable police officer would consider in making a probable cause determination." *Id.* at 1046. The Court also noted other evidence of guilt related to the identification that Craig provided a fake name with false identification, and deceptive polygraph results denying involvement. *Id.*

The cases relied upon by *Craig* are post-conviction criminal cases where it was highly unlikely that the crime could have been perpetuated by only one person and instead involve multiple perpetuators and some corroborating evidence. *See Craig*, 127 F.3d at 1044; *U.S. v. LeQuire,* 943 F.2d 1554, 1557 (11th Cir.1991) (trial ID testimony challenged, where trial included tapped telephone conversations, with two or more people, that revealed "an extensive, well-orchestrated conspiracy".); *U.S. v. Broadwell,* 870 F.2d 594, 601 (11th Cir. 1989) (in addition to co-defendant's statement ID, evidence included victim Wilkin's statement, and "Broadwell later took credit ... stating 'We got [Wilkin]. We got [Wilkin] good.'"); *U.S. v. Stitzer,* 785 F.2d 1506, 1515 (11th Cir.) (multiple year, several city, drug conspiracy involving several instances of Defendants' participation in several cocaine transfers and participation "corroborated by documents" showing calls among the Defendants); *U.S. v. Rodriguez,* 498 F.2d 302, 310-11 (5th Cir.1974) (Rodriguez admitted ownership of a pistol found in truck involved and testimony of co-defendant who had plead guilty providing "sufficient circumstantial evidence to sustain his conviction..."); *U.S. v. Curry,* 471 F.2d 419, 421-22 (5th Cir. 1973) (accomplice testimony was proper and corroborated by "two government agents who posed as prospective buyers" and physical evidence linked to Defendant); *Smith v. U.S.,* 343 F.2d 539, 544 (5th Cir. 1965) (circumstantial evidence supported inference that stolen letters were forged and mailed by all defendants.).

C. The totality of the circumstances show no reasonable officer would find Dominguez credible, where Heise spoon fed Dominguez's words of Strolis' participation, and Dominguez was not initially forthcoming with the truth of his verifiable involvement.

1. Heise spoon-fed Dominguez the words he used to have Strolis arrested.

When Dominguez's credibility is subjected to a totality-of-the-circumstances analysis instead of bolstered by the challenged presumption, no reasonable officer would find him reliable.

As is shown above p.13-14 in greater detail from the record, Heise prompted Dominguez to say that Strolis was with him the night of the break-ins, and Dominguez processed the suggestive hint, and responded "[W]as he?" and then "like maybe, yeah." Dominguez Int. at 27:17-27:30. Heise then prompted Dominguez to say Strolis was with him on Ramsgate where the break-ins occurred, to which Dominguez tentatively responds "Possible." *Id*. at 28:20- 28:45. Heise, then prompted Dominguez to say the auto break-in was Strolis' idea. *Id*. at 29:20- 29:36. Heise prompted Dominguez with, "[I]s he going into the cars too?," to get Dominguez to say Strolis was breaking into cars. *Id*. at 30:20-30:55. Foreseeably, Dominguez followed Heise's leading questions to regurgitate the words Heise provided.

2. The totality of the circumstances show no reasonable officer would find Dominguez credible as to allegations of Strolis' participation.

Dominguez falsely claimed that Strolis used the two stolen credit cards and Dominguez's phone during the break-ins, and Heise told him this was false, using known facts. Dominguez Int., Doc. 15 at 33:40-35:00.

Dominguez also admitted he broke into ten to twelve vehicles, (Dominguez Int. at 1:13:00-1:14:00), where ten is the number of vehicles reportedly illegally entered. Investigator Rep., Doc. 25-4, at 1-4. However, Dominguez said that Strolis did not break into any of the same vehicles that he did. Dominguez Int., Doc. 15 at 1:12:00-1:14:00. When combined these positions foreclose Strolis' participation.

Officer Heise knew that Dominguez had a record of auto break-ins (Doc.14-3 at 14) and Strolis had no such record. Strolis Int. Pt.1 at 23:15.

In the opening portions of the interview, when Heise and Dominguez discuss the Augusta break-ins, Dominguez did not mention nor implicate Strolis, and at first, even denied his own participation. Dominguez Int. at 22:00-22:30.

3. Heise unreasonably promised officer influence in Dominguez's case and Dominguez sought to curry favor by his foreseeable response to Heise's suggestions.

At several occasions in the interview Heise indicated to Dominguez that if Dominguez cooperated Heise would provide good "PR" for him to the "judge." Dominguez Int. at 22:35-23:20. See other examples of Heise implying help for Dominguez with the court above at p.15.[14]

4. Summary of Dominguez's lack of credibility, putting aside false-fed facts.

Dominguez offered no independently corroborative facts to show Strolis' participation. Dominguez's allegations against Strolis are inconsistent, he was hesitant and equivocal in response to Heise's leading questions and no reasonable

[14] State law prohibits acceptance of confessions that are induced by promise of a benefit. O.C.G.A § 24-8-824.

officer would conclude that Dominguez was free from motivation to curry favor with the police. All objective evidence and credibility assessments pointed to Dominguez's involvement alone, and only mere suspicion and association as to Strolis.

Certiorari should be granted to correct the Eleventh Circuit's replacement of the totality-of-the-circumstances test with a presumption of reliability. Instead of mechanistic bright-line rules, we must "slosh our way through the factbound morass of 'reasonableness'" *Scott v. Harris*, 550 U.S. 372, 383 (2007), to address the total circumstances including suggestive questioning. *See People v. Maestas*, 204 Cal. App. 3d 1208, 1212 (1st Dist. 1988) (finding lack of probable cause in part because it was the officer who first brought up the defendant's name to the source).

II. Certiorari is necessary to correct the Eleventh Circuit's clear misapprehension of the summary judgment standard by drawing adverse inferences and selectively viewing the record.

Reversal is necessary to correct a clear misapprehension of the summary judgment standard, as noted in *Tolan v. Cotton*, 572 U.S. 650, 659–60 (2014): "[W]e intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents." (other citations omitted).

A. When Heise's warrant affidavit is compared to the Heise-Dominguez interview a *Franks* violation is shown because he uses false-fed facts to assert Strolis was present.

The totality of the circumstances show there was no arguable probable cause to arrest Strolis, and in fact Heise either incompetently or intentionally misrepresented the truth in his warrant affidavit. *See* Facts p. 16. Heise's warrant affidavit App. at 78 affirmatively represents that "Strolis ... enter[ed] an automobile, [Suzuki] ... and removed a credit card ... according to the owner. While co-defendant Joshua Dominguez was entering said vehicle, said accused entered other vehicles without authority, on the other side of the street ... ." App. 78 (full affidavit). Heise portrays this as personal knowledge of the victim or Dominguez, and portrays Strolis as having entered vehicles "on the other side of the street." Heise omits any reference to circumstances showing that the source of this allegation was his leading suggestive questions. App. at 78.

Falsehoods, reckless omissions, and overstatements in a warrant affidavit violate the Fourth Amendment. *See, e.g., Franks v. Delaware*, 438 U.S. 154 (1978);

Malley v. Briggs, 475 U.S. 335 (1986); *Madiwale v. Savaiko*, 117 F.3d 1321, 1326 (11th Cir. 1997).

Heise failed to investigate Strolis' work records and failed to interview Strolis' Father who Heise had been informed could verify Strolis' chronology. Strolis Int. 2 at 43:40. "An officer cannot ... ignore [facts] that are exculpatory." *See Cozzi v. City of Birmingham*, 892 F.3d 1288, 1294 (11th Cir. 2018). Officers cannot choose to disregard "easily discoverable facts" that would create "serious doubts" about a suspect's guilt. *Washington v. Rivera*, 939 F.3d 1239, 1248 (11th Cir. 2019).

B. District Court misapplies and selectively ignores the evidence from the totality of the circumstances and erroneously granted summary judgment.

At App. 45, the District Court posited four facts which it found did "not foreclose the possibility" of Strolis' involvement in the auto break-ins, which is not reasonable probable cause, but only mere suspicion. The Court found that: (1) Dominguez being the only person to use Cards 1 and 2 "does not foreclose the possibility that Plaintiff assisted in the break-ins;" (2) "Plaintiff not having a car or driver's license does not make it impossible" that he purchased gas at the Raceway as Dominguez claimed; (3) "Plaintiff not possessing any stolen goods does not mean he did not participate in the break-ins because he could have sold the goods ... or allowed Dominguez to retain them;" and, (4) Dominguez's responsibility for the reported stolen items "does not foreclose the possibility that" Strolis took unreported items. App. 45. The Court is merely speculating that the evidence does not foreclose Strolis's participation. *Brinegar v. U.S.*, 338 U.S. 160, 175 (1949) (probable cause "mean[s] more than bare suspicion").

The Court acknowledges that Heise knew Dominguez's mother booked a room at the Masters Inn from June 10 to June 12, and that Dominguez and Strolis both told Heise they met up on Dominguez's first day in town. App. 46. The date information from the hotel confirmed that the first date of the Dominguez-Strolis association occurred on June 10th confirming Strolis' consistent chronology. See Facts p. 9-10. But the Court construed this conflict in Defendant's favor as "indirectly" but not "directly," contradicting evidence of Strolis' participation on the 12th. App. 46-47. But correctly construed the hotel date information confirms Strolis' chronology and lack of participation.

Plaintiff argued that Heise should have communicated with Strolis' Father who could confirm that Strolis was home on the 12th and that Heise should have consulted Strolis' work records to confirm the accurate dates. See Facts above p. 10. about Heise-Strolis interview. The Court erroneously found an unreasonable investigation could not be shown by switching to Heise's attempt to gain location data from Plaintiff's phone and by general reference to the Dominguez interview. App at 47. But Dominguez's interview confirmed that Dominguez was with Strolis the first night Dominguez was in town, June 10th, App. 46, and Heise failed to investigate two readily available sources of evidence, namely Strolis' work records and his Father. Strolis Int. 2 at 43:40.

The Court found that the evidence that Dominguez hesitated before accusing Strolis, said he and Plaintiff saw each other two weeks earlier, and said Strolis took a two-hour break during the break-ins that only lasted about two hours, did not

make Dominguez untrustworthy. App. 52-53. Correctly construed these are inconsistencies and improbabilities that should be construed in Plaintiff's favor. The Court overlooks that Dominguez also lied about Strolis using the two stolen cards and Dominguez's phone, which Heise knew was false. (Dominguez Int., Doc. 15 at 33:40-35:00.).

The Court rejected the evidence that Dominguez's accusation of Strolis was based on shifting blame away from himself, by relying on the challenged *Craig* presumption. App. 53-54. The error of presuming credibility is addressed above § I. As discussed above, p.11-15, the totality of the circumstances, including Dominguez's lies, hesitation, equivocation, Heise's prompting him, his motive to shift blame to get a lesser sentence, and prior record of break-ins, shows that no reasonable officer would find Dominguez's accusation credible.

The Court rejected the argument, that an officer should consider Dominguez untrustworthy because the officer would know Dominguez was pursuing a lesser sentence by cooperating with Heise, as only being related to drug activity in Gwinnett County, finding these challenged statements by Dominguez were not "in an informant capacity." App. 54. Regardless of label of whether Dominguez was an "informant" or "co-defendant," his statements must pass muster under the totality of the circumstances. During and after the discussion when Dominguez was pursuing a lesser sentence (Dominguez Int. at 22:35-23:20; 1:07:33-1:8:35; 1:17:47-1:20:18; 1:30:52) he shifted blame to Strolis (*Id*. at 27:00-29:30), he discussed the break-ins in "Richmond County" (Int. at 1:07), referencing "Justin [Strolis] walked

the road" (Int. at 1:09:20) and Heise asked about Strolis' involvement with the break-ins (Int. at 1:10; 1:12:40-1:13:30. So, the discussion was about the break-ins and Dominguez's accusation against Strolis were tainted with self-interest, to shift blame, and seek a lesser sentence for cooperation. "[T]here exists a danger that the informant sought to implicate another in order to curry the favor ... [and] gain immunity for himself." *United States v. Martin*, 615 F.2d 318, 25-26 (5th Cir.1980).

The Court rejected the conclusion that Dominguez's inconsistent statements impugned his credibility. Dominguez admitted to breaking in to all ten or twelve vehicles, and alleged Strolis had used the card Dominguez had stolen. App at 55-56. But these statements show that Dominguez lied to Officer Heise about Strolis, and that Dominguez's other statements accusing Strolis were unreliable. Heise knew Dominguez was lying about Strolis using the stolen card (Dominguez Int., Doc. 15 at 33:40-35:00.) and he knew that only ten auto break-ins had been reported, (Investigator Rep., Doc. 25-4, at 1-4.), and that Dominguez said Strolis did not break into any of the autos that Dominguez did, (Dominguez Int., Doc. 15 at 1:12:00-1:13:00.), which precludes the possibility of Strolis breaking into any of the vehicles.

C. The Eleventh Circuit misconstrues and selectively ignores the evidence.

The Eleventh Circuit found arguable probable cause based on (1) Dominguez's accusation of Strolis, (2) the challenged statements of Strolis being with Dominguez during the break-ins, "somewhat equivocal," (3) Strolis deleted messages from his phone, and (4) the volume of phone calls between Strolis and Dominguez. App. at 70.

First, the Circuit finds Dominguez's accusation about Strolis' participation supports arguable probable cause, because it erroneously relies on a presumption of reliability of Dominguez as a *Craig-Damali* "co-defendant", *see* Arg. § I, erroneously overlooking the totality of the circumstances showing no reasonable officer would find Dominguez's accusation credible. *See* Facts p. 11-15.

Second, the Circuit overlooks the evidence showing that Strolis consistently maintained his chronology that placed him with Dominguez only the night of June 10th, as confirmed by Dominguez and the hotel records, (*see* Facts p. 9-11) and that Heise manipulated the dates to get Strolis to repeat back to him that he was with Dominguez on the 12th. *See* Facts above p.10. Heise could have further verified the dates by checking Strolis' work records as Strolis had requested in the interview. Pl. Int. Pt. 2, Doc. 15 at 33:35-33:55; Work Records, Doc. 25-9. Heise could have checked with Strolis' Father as Strolis indicated. Pl. Int. Pt. 2, Doc, 15 at 43:40.

Third, any reasonable officer would find that Strolis' explanation[15] for the deletion of his phone messages was innocent and would not contribute to a conclusion that Strolis was present for the break-ins. The Eleventh Circuit, App. at

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[15] Strolis informed Heise that he was unable to provide his phone log because he routinely clears his phone's memory so as to prevent his protective father from going through private, and sometimes provocative communications. Pl. Int. Pt. 3, Doc. 15 at 14:00. Heise admitted that Strolis's Dad was very protective: "He lives with his daddy for a reason, right?," Heise continued, "I know that. You know that his dad keeps super tracks. Searches his phone searches his phone all the time for a reason." Dominguez Int., Doc. 15 at 1:09:44-1:09:57. Strolis stated that he deleted messages prior to the interview because some of his messages were "of a sexual nature that [he] didn't want to be read." Strolis Int. 2 at 20:30. He also admitted that some texts pertained to marijuana. Strolis Int. 2 at 22:04.

70, impermissibly drew inferences against Plaintiff by claiming that the deletion of the phone data, and loss of location information, made Strolis' account less plausible. *Tolan*, 572 U.S. at 657. The facts show that the loss of location information for Strolis' phone was not due to his deletion of phone date, instead "Verizon Wireless was unable to provide any Historical cell site data ... [because] it is deleted from their servers within 10 days of the date of 061215." Doc. 25-4 at 23.

Fourth, although the Eleventh Circuit relied on the phone-call records between Strolis and Dominguez,[16] to find arguable probable cause App. at 70, this shows mere association, which does not suffice for probable cause. "[P]robable cause to arrest . . . does not extend to another person in mere propinquity to that suspect." *Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir. 1996); *Holmes v. Kucynda*, 321 F.3d 1069, 1081 (11th Cir. 2003) (citing *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979)).

[16] The Panel stated that Strolis "had communicated frequently on the phone with Mr. Dominguez during and after the break-ins." App. at 64 (emphasis added) The Panel cites the lower court opinion Doc. 34 at 4 (App. at 26) which merely says they spoke "regularly" after Strolis left Dominguez on the 11th. Strolis' phone was not used to send or receive calls or texts June 12 at 1:31 AM to 5:45 AM, nor was it used to call Dominguez from June 11 at 9:00 PM to June 12 at 12:05 PM. Doc. 25-3 Case File at 24-28.

III. Certiorari should be granted to preserve judicial integrity and independence by reversing the grant of qualified immunity where the officer intentionally suggested evidence from mere suspicion to be parroted that recklessly used to convince a Magistrate Strolis participated causing arrest and prosecution, where there were no exigencies to excuse the warrant affidavit.

Certiorari should be granted and summary judgment on the basis of arguable probable cause reversed in order to preserve the integrity and independence of the judicial system, where the court purveys the law and each jury from the community resolves the details of factual conflicts, which can show Heise was "plainly incompetent or ... knowingly violate[d] the law." *Malley v. Briggs*, 475 U.S. 335, 341, (1986).

Judicial independence requires local juries, in each unique case, to consider the totality of the circumstances, to determine probable cause, without erroneous presumptions as hurdles to jury resolution, to determine whether false evidence caused the prosecution. *See e.g.*, *Fla. v. Harris*, 568 U.S. 237, 244 (2013) (totality of the circumstances governs probable cause) and *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (construction in non-movant's favor). The coaching evidence of Strolis as "accomplice," to lure Dominguez's confession that makes the confusing warrant purporting personal knowledge, false were swept under the rug of arguable probable cause, when there were no exigencies, and only suspicion by association, and further investigation unreasonably not pursued in the face of seeking counsel.

IV. Granting certiorari could promote state and federal judicial efficiency by protecting the right to counsel, post-*Miranda* but before arrest, to promote reasonable investigation of readily available information, preventing unreasonable arrests, meaningfully protecting innocence presumption, and minimizing the need for remedial federal litigation.

Certiorari could also allow warning officers to seek corroboration of others' alleged participation. *Manson v. Brathwaite*, 432 U.S. 98 (1977) can be the bookend to this case, where *Manson* has little chance of misidentification, Strolis' case has a high chance of mistaken identity, violating the principle that suggestive identification is unconstitutional. *Stovall v. Denno*, 388 U.S. 293 (1967) (single person show-up).

V. Certiorari should be granted because this is a false identification, suggestive interrogation and false warrant case, with a criminal case filed in direct response to Strolis' assertion of right to counsel, where a grant thereof will allow examination of how innocence is protected pre-arrest, preventing state criminal litigation and remedial federal litigation.

Any reasonable officer knew that the break-ins could have been done alone, therefore forbearance from questions suggesting Strolis' participation was necessary to ensure a trustworthy assessment of Strolis' alleged participation.

Instead, Heise used questions to coax an admission from Dominguez that minimized Dominguez's role by laying blame on an "accomplice," Strolis, and by promise of being Dominguez "PR" to the judge. *See* Facts p. 15.

Heise in effect used the Reid Technique which has substantial risk of false confessions. It caused the false identification of Strolis as a participant or "accomplice," because the steps include the investigator's "face-saving" details, to get the target's participation admission, while softening their role by laying blame

on an "accomplice."[17] There was undue suggestion of naming "accomplice" Strolis to shift blame, aided by lulling of empathy and Heise's promise of "PR" with the judge. *See* Facts p. 15.

A grant of certiorari can expose the danger in suggesting an accomplice, when there is serious doubt that there were any accomplices, and the tricked confession of the target laying blame on another ought not substitute for lawful probable cause.

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[17] As stated in *Dassey v. Dittmann*, 877 F.3d 297, 320-22 (7th Cir. 2017) the Reid Technique:

> .... follows a nine-step approach:
>
> > [A]n interrogator confronts the suspect with assertions of guilt (Step 1), then develops "themes" ... [to] excuse the crime (Step 2), interrupts ... denial (Step 3), overcomes the suspect's ... objections (Step 4), ensures [continued dialog of passive subject] ... (Step 5), shows sympathy ... [to urge] ... the suspect to cooperate (Step 6), offers a face-saving alternative ... [of] guilty act (Step 7), gets the suspect to recount the details of his or her crime (Step 8), and converts ... statement into a full written confession (Step 9).
>
> ... [Investigators] learn ways to build false empathy with suspects, such as shifting the moral blame for the offense to another person or expressing understanding for the suspect's actions
> ...
>
> See Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 223-24 (1997) (criticizing the Reid Technique's maximization methods, or scare tactics, such as the false evidence ploy, in addition to its minimization methods, which "impl[y] an offer of leniency," where police lull a suspect into a "false sense of security" by expressing sympathy, <u>blaming an accomplice</u>, and underplaying the gravity of the situation)

(emphasis added).

CONCLUSION

For the asserted reasons Petitioner asks the Court to issue a writ of certiorari to the Eleventh Circuit to review and vacate summary judgment affirmance.

This 21st day of June, 2021.

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