Case No.:_____

In The Supreme Court of the United States

DETECTIVE, #314 FRANK NAPOLITANO
and FRANCIS JOSEPH MCGEOUGH

Petitioners,

v.

LAURENCE WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On May 16, 2016, members of the East Hartford Police Department (the "EHPD") began investigating the murder of Marshall Wiggins. On May 17, 2016, Laurence Washington called the EHPD and agreed to provide a sworn statement regarding his knowledge of Mr. Wiggins' murder. As part of their investigation, officers from the EHPD discovered that three individuals were in the car when Mr. Wiggins was murdered: Mr. Wiggins, Laurence Washington, and Michael Gaston. Washington protested his innocence in his sworn written statement and indicated that Mr. Gaston had murdered Mr. Wiggins. The questions presented are:

1. Whether the Court of Appeals improperly denied qualified immunity by requiring an officer to disclose his subjective intent and state of mind in a warrant application in direct contravention of this Court's precedent in *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), which established that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause" and that "[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," in holding that the investigating officers were not entitled to qualified immunity because they may have subjectively believed Washington's protestations of innocence?

2. Whether the Court of Appeals improperly decided an important issue of law with respect to qualified immunity and created a circuit split that should be addressed when it determined that the investigating officers were not entitled to qualified immunity for failing to include each of Washington's protestations of innocence, even those that they did not deem credible, in a warrant for his arrest where the Court itself acknowledged that an officer is not required to investigate an individual's innocent explanations, nor to resolve all credibility issues before making an arrest based on probable cause?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit, whose judgment is sought to be reviewed, are Petitioners, and Defendants below, then-Detective Frank Napolitano and then-Sergeant Francis McGeough (hereinafter the "Petitioners" or "Defendants").

Respondent, and Plaintiff below, is Laurence Washington (hereinafter "Washington" or the "Respondent").

The Hon. Julia Dewey, Assistant State's Attorney David Zagaja, the East Hartford Police Department, and Detective Daniel Ortiz, Defendants below, are not parties to this Petition.

No corporations are involved in this proceeding.

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PETITION FOR CERTIORARI

The Petitioners, then-Detective Frank Napolitano[1] and then-Sergeant Francis McGeough,[2] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Majority Opinion of the divided panel of the Court of Appeals for the Second Circuit (*Bianco, J.*) affirming the decision of the United States District Court for the District of Connecticut and the Dissenting Opinion (*Sullivan, J.*) have been published as *Washington v. Napolitano*, 29 F.4th 93 (2d Cir. 2022).

The memorandum of decision of the District Court denying summary judgment to the Petitioners has been published as *Washington v. Dewey*, 433 F. Supp. 3d 334 (D. Conn. 2020).

JURISDICTION

The Second Circuit entered its judgment on May 4, 2022, upon denying the Petition for Rehearing or

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[1] Since the date of the incident in question, Detective Napolitano has been promoted to Sergeant, and will hereinafter be addressed by his new title.

[2] Since the date of the incident in question, Sergeant McGeough has been promoted to Lieutenant, and will hereinafter be addressed by his new title.

Petition for Rehearing En Banc filed by the Petitioners. The Petitioners have timely filed this Petition for Writ of Certiorari on July 25, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent brought the underlying action pursuant to 42 U.S.C. § 1983, alleging that he was arrested pursuant to a duly issued warrant, by the Petitioners, without probable cause. Section 1983 states, in pertinent part:

> 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 . . . .

The Fourth Amendment to the United States Constitution provides:

> 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.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On May 16, 2016, the EHPD received several emergency 9-1-1 calls reporting that a man had been shot on Rector Street. Responding officers located a male victim, later identified as Marshall Wiggins, suffering from fatal gunshot wounds inside a vehicle parked at 39 Rector Street. Mr. Wiggins was transported to Hartford Hospital, where he was later pronounced dead.

The Respondent was present in the vehicle at the time Mr. Wiggins was shot on May 16, 2016. Earlier that day, the Respondent worked his part-time job at Bubbles Car Wash, where he drank Corona beers while washing cars. After work, the Respondent ran into "G" (Michael Gaston) in his apartment building, and they discussed basketball games.

Thereafter, the Respondent went back to his apartment where he was joined by his friend, "Black," to smoke marijuana, drink alcohol, listen to music, and watch basketball games and other videos. As Washington and "Black" proceeded with their evening, Gaston knocked on the Respondent's apartment door

to ask if he wanted to smoke marijuana. The Respondent invited Gaston into his apartment to smoke marijuana, drink, and watch a basketball game because the Respondent's girlfriend was incarcerated at the time.

At halftime of the basketball game, the Respondent and his guests decided that they needed, marijuana, Dutch cigars to make marijuana joints, cigarettes, and additional soda to mix with their liquor. Gaston decided to visit a local convenience store to obtain the additional items and the Respondent volunteered to join him. As they were walking to the store, Gaston was texting someone and the Respondent assumed that Gaston knew someone who would sell them marijuana.

Once at the convenience store, Gaston began speaking with a large male that was later identified as Mr. Wiggins. Upon exiting the store, Gaston informed the Respondent that they would need to go with Wiggins to his house where Wiggins had enough marijuana to fulfill their purchase request. Wiggins agreed to drive the Respondent and Gaston to his home to purchase additional marijuana and, thereafter, to drop them off at the Respondent's apartment building. Gaston got into the front passenger seat of Wiggins' vehicle and the Respondent sat directly behind Gaston on the passenger side in the rear compartment of the vehicle. The Respondent had drank "a whole lot" of

alcohol that evening and smoked a sufficient amount of marijuana that he was "hammered."

The Respondent testified that he closed his eyes and rested his head in his hands while Wiggins drove the car to his residence. Once the car came to a stop at Wiggins' house, the Respondent opened his eyes and saw Gaston pointing a gun at Wiggins. According to the Respondent, Gaston then ordered Wiggins to hand over his rings and glasses and fired a round from his gun in the direction of Wiggins when Wiggins failed to comply with the orders. After firing the round from his gun, Gaston gestured with the gun toward the Respondent and ordered Wiggins to hand over his personal belongings to the Respondent.

Upon handing his glasses to the Respondent, Wiggins attempted to grab the gun that Gaston was brandishing and the two began struggling for control of the weapon. The Respondent testified that he exited the vehicle at this point and began running away with Wiggins' glasses in his hand while additional shots were fired. While fleeing the murder scene, the Respondent threw Wiggins' stolen glasses aside, took off his sweatshirt, and let down the braids in his hair to disguise himself and avoid detection.

After changing his appearance, the Respondent ran back to his apartment and was informed by "Black" that Gaston had just been looking for him. Shortly thereafter, Gaston returned to the Respondent's

apartment soliciting assistance in recovering the murder weapon, which he had thrown in a trash can at the local Save-A-Lot store. The Respondent agreed to assist Gaston in retrieving the gun but convinced him that they needed to leave the apartment separately to avoid raising suspicion.

Upon leaving the apartment building, the Respondent traveled by foot to Hartford Hospital instead of helping Gaston recover the murder weapon. Once at Hartford Hospital, the Respondent checked himself into the psychiatric unit while reporting suicidal ideations. The Respondent was discharged from the hospital the following day and called Elizabeth Reyes, the mother of his daughter, for a ride.

When she heard the Respondent's story, Ms. Reyes convinced him to share his story regarding Mr. Wiggins' murder with the EHPD. The Respondent initially spoke with Detective Ortiz over the phone but was later transported to the EHPD by the Petitioners. The Respondent was advised of his *Miranda* rights at the EHPD and was informed that he was free to leave at any time. Following that discussion, the Respondent provided a voluntary written statement, agreed to be interviewed, identified Gaston as the shooter in a photo line-up, and submitted to a gunshot residue kit.

During his interview, the Respondent informed the Petitioners that he did not feel safe going home. In

response, the Petitioners contacted Emory Hightower from the State's Attorney's Office to seek guidance and explore whether the Respondent would be eligible for witness protection. In cases as serious in nature as the murder of Mr. Wiggins, it was customary for EHPD investigating officers to contact the State's Attorney's Office for guidance.

Based on Inspector Hightower's input, Lieutenant McGeough allowed the Respondent to request witness protection services from the State of Connecticut recognizing that the EHPD could prepare a warrant for his arrest, if deemed appropriate, on a later date. By the time Lieutenant McGeough confirmed that the Respondent would be requesting witness protection it was late in the evening and Inspector Hightower had stopped returning his calls. Thus, to protect the Respondent and ensure he would be able to apply for witness protection the following day, the investigating officers agreed to put the Respondent up in a hotel room for the evening until the State could process his application.

The next morning, Sergeant Napolitano, Detective Ortiz, and Lieutenant McGeough transported the Respondent to meet with Inspector Hightower so that his request for witness protection could be reviewed. Sergeant Napolitano, Lieutenant McGeough, and Detective Ortiz did not attend the meeting between Respondent and the State officials. On May 18, 2016, the Respondent entered into a

written Witness Protection Agreement with the Office of the Chief State's Attorney and was moved to an apartment in New Britain, where he remained until his arrest in September 2016.

On May 19, 2016, Sergeant Napolitano prepared a warrant for the arrest of Gaston and charged him with Murder, Felony Murder, Robbery in the First Degree, Criminal Possession of a Pistol/Firearm, and Carrying a Pistol/Revolver without a permit. The warrant for Gaston's arrest was reviewed and signed by State's Attorney Gail Hardy and Superior Court Judge Julia Dewey based on their independent determinations that the facts set forth in Sergeant Napolitano's affidavit established probable cause for the crimes charged.

Gaston was arrested in Massachusetts and extradited to Connecticut to face the charges set forth in Sergeant Napolitano's warrant. Before Gaston's trial, Assistant State's Attorney David Zagaja submitted a substitute information, adding a charge against Gaston for conspiracy to commit robbery. On June 6, 2018, following a jury trial, Gaston was convicted of murder, felony murder, and robbery in the first degree. He was not convicted on the conspiracy charge added by State's Attorney Zagaja.

On June 7, 2016, the Respondent's incarcerated girlfriend, Tasharia Webb, was scheduled to appear for a Court date in Manchester. Ahead of that

appearance, the Respondent, as the victim in Ms. Webb's criminal case, left messages for the victims' advocate and the prosecutor's office in support of Ms. Webb. In his message, the Respondent also indicated that he did not want to press criminal charges against Webb. In the message left with the prosecutor's office, the Respondent also threatened that he would not cooperate with the prosecutor handling the Gaston case if Ms. Webb was not released.

At some point in the summer of 2016, State's Attorney Zagaja contacted the EHPD about preparing a warrant for the Respondent's arrest after he decided to proceed with the case against the Respondent. Attorney Zagaja reasoned that despite Respondent's claim that he was forced to take Wiggins' glasses by Gaston, Respondent's claim of innocence constituted an affirmative defense of duress, which did not itself undermine the ample probable cause in support of his arrest. Accordingly, on August 31, 2016, at the direction of State's Attorney Zagaja, Sergeant Napolitano prepared a warrant for the Respondent's arrest, seeking to charge him with Felony Murder, Robbery in the First Degree, and Conspiracy to Commit Robbery in the First Degree. Lieutenant McGeough reviewed and signed off on the warrant oath but did not draft or prepare the warrant.

The warrant for the Respondent's arrest was reviewed and signed by State's Attorney Zagaja and Judge Dewey based on their independent

determinations that the facts set forth in Sergeant Napolitano's affidavit established probable cause for the crimes alleged. When the warrant issued, Sergeant Napolitano called the Respondent and asked him to turn himself in. The Respondent requested that he be allowed to surrender the next day so that he could enjoy the Labor Day weekend. The following day, September 6, 2016, the Respondent called Sergeant Napolitano and was taken into custody.

The Felony Murder charge against the Respondent was dismissed in January 2017 at a probable cause hearing. The Respondent was later acquitted of the remaining charges after a bench trial.

B. DISTRICT COURT PROCEEDINGS

The Respondent's initial complaint, dated July 26, 2017, was directed at Judge Julia Dewey, State's Attorney Zagaja, the EHPD, Sergeant Napolitano, Detective Ortiz, and Lieutenant McGeough. After conducting an initial review of the Respondent's complaint, the District Court (*Bryant, J.*) dismissed all claims against Judge Dewey, State's Attorney Zagaja, the EHPD, and Lieutenant McGeough. The District Court also dismissed all claims under the Fifth and Sixth Amendments. The Respondent was allowed to proceed with his Fourth and Fourteenth Amendment false arrest and malicious prosecution claims against Sergeant Napolitano and Detective Ortiz.

Pro bono counsel was later appointed for the Respondent and, with leave of the Court, filed an amended complaint on May 1, 2019. On May 24, 2019, the Petitioners answered the Respondent's amended complaint, denying all material allegations of liability and asserting various affirmative defenses, including qualified immunity. On May 30, 2019, the Petitioners filed a renewed motion for summary judgment as to the amended complaint.

On February 4, 2020, the District Court issued a memorandum of decision granting in part, and denying in part, the Petitioners' motion for summary judgment. Specifically, the District Court determined that the Respondent had abandoned his claims against Detective Ortiz and, thus, dismissed him as a party defendant. The District Court denied the Petitioners' motion for summary judgment as to the remaining claims set forth against Sergeant Napolitano and Lieutenant McGeough.

More specifically, the District Court denied the Petitioners summary judgment as to the false arrest and malicious prosecution claims, finding that a genuine issue of material fact existed regarding whether certain alleged omissions from the Respondent's arrest warrant vitiated the existed of probable cause or arguable probable cause thus depriving the Petitioners of qualified immunity.

The District Court also denied the Petitioners absolute prosecutorial immunity. Specifically, the District Court determined that, even though the Petitioners were acting at the direction of State's Attorney Zagaja in preparing a warrant for the Respondent's arrest, they, as police officers, could not avail themselves of absolute prosecutorial immunity.

C. OPINION OF THE COURT OF APPEALS

Sergeant Napolitano and Lieutenant McGeough brought a timely interlocutory appeal in which they argued that they were entitled to qualified immunity as to the false arrest and malicious prosecution claims against them. In their principal brief, the Petitioners argued, in part, that the District Court erred in denying them qualified immunity because the information known to them at the time they prepared the Respondent's arrest warrant provided ample probable cause for his arrest. Accordingly, the Petitioners argued that they were entitled to qualified immunity because it was objectively reasonable for them to believe probable cause or, at the very least, arguable probable cause supported the Respondent's arrest.

The Majority Opinion from the Second Circuit held that:

> [t]he district court identified relevant and exculpatory omissions from the arrest warrant affidavit related to plaintiff's intent and

> credibility that, construing the evidence in a manner most favorable to plaintiff, could have materially impacted a magistrate judge's determination as to whether probable cause exited for plaintiff's arrest, and such factual issues preclude summary judgment for appellants on the ground of qualified immunity at this stage of litigation."

Washington v. Napolitano, 29 F.4th 93, 98 (2d Cir. 2022).

Judge Sullivan authored a dissenting opinion providing a well-reasoned road map lending to and supporting the conclusion that probable cause, or, at the very least, arguable probable cause, existed for plaintiff's arrest. In Judge Sullivan's view, the majority "muddies the longstanding rules that the probable-cause inquiry is objective and does not depend on police officers' subjective motivations or views." Id., at 113. Judge Sullivan continued that the purported "omissions" are either immaterial or redundant when compared with the information disclosed in the warrant. Id., at 113-14. It is Judge Sullivan's opinion that, at the very least, the record reflects the existence of arguable probable cause such that he would have reversed the decision of the District Court and held the Petitioners immune from this suit. Id., at 114.

The Petitioners subsequently filed a petition for rehearing or a petition for rehearing en banc, which was denied by the Second Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully request that certification be granted, as the Second Circuit's decision is in direct contravention of the clear precedent of this Court, creates an unnecessary split among the circuits with respect to the necessity of including officers' subjective opinions of protestations of innocence and exculpatory information offered by putative suspects and undermines the intent and purpose of the doctrine of qualified immunity, such that this Court is justified in exercising its discretionary power to hear this matter.

A. THE COURT OF APPEALS MAJORITY OPINION DIRECTLY CONTRAVENES PRECEDENT SET BY THIS COURT ON THE AVAILABILITY OF QUALIFIED IMMUNITY, REQUIRING THAT THE LAW AT ISSUE BE CLEARLY ESTABLISHED IN A PARTICULARIZED SENSE

As a preliminary matter, probable cause to make an arrest constitutes an absolute defense to a false arrest claim. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995). Probable cause to effectuate an arrest likewise defeats a claim for malicious prosecution. *Betts v. Shearman*, 751 F.3d 78,

82 (2d Cir. 2014). Probable cause exists where "officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007) (internal quotation marks omitted).

In reviewing the existence of probable cause, Courts must look to the totality of the circumstances. *See Dufort v. City of New York*, 874 F.3d 338, 348 (2d Cir. 2017). "[P]robable cause does not require an officer to be certain that subsequent prosecution of the arrestee will be successful." *Krause v. Bennett*, 887 F.2d 362, 371 (2d Cir. 1989); *Curley v. Suffern*, 268 F.3d 65, 70 (2d Cir. 2001). In fact, "[o]nce a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997); *see also Krause*, 887 F.2d, at 372.

Once an officer possesses facts sufficient to establish probable cause, it is not within his or her purview to sit as a prosecutor, judge, or jury such that credibility determinations regarding a suspect's story and protestations of innocence are, at that point, properly left to the factfinder. *Panetta v. Crowley*, 460 F.3d 388, 396 (2d Cir. 2006). In fact, it is the

responsibility of the officer "to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence." *Krause*, 887 F.2d at 372. Moreover, "[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *citing Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

The jurisprudence of this Court has long established that probable cause is not a high bar:

> To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause …. Because probable cause deals with probabilities and depends on the totality of the circumstances … it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules …. It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity …. Probable cause is not a high bar.

Dist. of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (internal quotations and citations omitted).

While the burden for establishing probable cause is quite low "[a] plaintiff who argues that a warrant was issued on less than probable cause faces a heavy burden." *Rivera v. United States*, 928 F.2d 592, 602 (2d Cir. 1991). This is because "the issuance of a warrant by a neutral magistrate, which depends on a finding of probable cause, creates a presumption that it was objectively reasonable for the officers to believe that there was probable cause…." *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991) (citations omitted). As this Court has elucidated:

> [W]here [the] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypothetical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

United States v. Ventresca, 380 U.S. 102, 109 (1965).

To overcome this presumption, a plaintiff must show that the officers knowingly or recklessly omitted material information from the warrant affidavit. *Mara*

v. Rilling, 921 F.3d 48, 73 (2d Cir. 2019). Given the totality of the circumstances in the record, along with the common-sense conclusions and reasonable inferences that the Petitioners could draw therefrom, the Respondent has not satisfied this substantial burden.

Even if this Court were to conclude that probable cause was lacking, the Petitioners remain entitled to the defense of qualified immunity. Review by this Court is warranted to restore the balance embodied in the qualified immunity doctrine, to protect officials who act reasonably (even if mistakenly), which balance was disturbed by the Court of Appeals Majority Opinion. Absent thorough review and thoughtful consideration by this Court, the Majority Opinion will serve as a cautionary tale to any officer seeking to arrest a suspect who had claimed innocence during their questioning or a voluntary interview, because that suspect, once arrested, may follow the Respondent's roadmap and claim he was falsely arrested based on his initial protestations of innocence, regardless of their persuasive value, and a conclusory allegation that the arresting officers had believed such protestations.

The doctrine of qualified immunity protects government officials from suit provided that their conduct did not violate a statutory or constitutional right that was clearly established at the time of the challenged action. *Wood v. Moss*, 572 U.S. 744, 757

(2014); *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law . . . ." *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 569 (2d Cir. 1996); citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

A right is clearly established if "(1) the law is defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has recognized the right, and (3) a reasonable defendant would have understood from the existing law that his conduct was unlawful." *Reuland v. Hynes*, 460 F.3d 409, 420 (2d Cir. 2006). In making this determination, the Second Circuit was circumscribed to considering "Supreme Court and Second Circuit precedent as it existed at time of the challenged conduct." *McGowan v. United States*, 825 F.3d 118, 124 (2d Cir. 2016). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

Here, the Second Circuit erred in concluding that certain purported omissions were sufficiently relevant and exculpatory as to create a genuine issue of material fact regarding the existence of probable cause to arrest. *See* App. A, at A-28 – A-30. As noted in the Majority Opinion, the purported omissions must not be considered individually, but, instead, "as a whole in determining if probable cause continues to

exist." *United States v. Marin-Buitrago*, 734 F.2d 889, 895 (2d Cir. 1984); App. A, at A-30.[3] While the Petitioners addressed each of the purported omissions in turn, their overall analysis established that the warrant application for Respondent's arrest was replete with exculpatory information provided by the Respondent such that the record evidence does not support a finding that any remaining purported omissions identified with the benefit of 20/20 hindsight, were knowingly or recklessly omitted from the affidavit. *Mara*, 921 F.3d at 73. In the absence of reckless or malicious exclusion, the Petitioners cannot be held liable and are entitled to qualified immunity.[4]

Despite recognizing the longstanding principle that the Petitioners were not required to investigate every claim of innocence by the Respondent, the Majority Opinion held that the inclusion of the

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[3] Equally concerning in this respect is the Majority Opinion's citation to Respondent's success at a probable cause hearing for the proposition that the Petitioners lacked probable cause to arrest him on certain charges. At the probable cause hearing, the Respondent was afforded the right to counsel, could present evidence, and was able to cross-examine witnesses. Thus, any determination made at the probable cause hearing is irrelevant because it necessarily included information, testimony, and exhibits that were neither known nor readily available to the Petitioners at the time they sought a warrant for the Respondent's arrest.

[4] The suggestion that Sergeant Napolitano and Lieutenant McGeough recklessly or maliciously omitted information from the warrant is undercut by the warrant itself, which is filled with exculpatory information advanced by the plaintiff.

Respondent's protestations of innocence, the Respondent's claim that Gaston acted on his own, the acknowledgement that the Respondent was scared and could not believe what was happening, and the Respondent's excited utterance when Gaston brandished a firearm was insufficient to conclusively establish probable cause because it omitted certain additional details regarding why the Respondent's presence was innocent. App. A, at A-30.

This holding ignores the commonsense conclusions drawn by the Petitioners that the information contained in the warrant, when compared against all facts known to them at the time, presented ample probable cause or, at the very least, arguable probable cause, for the Respondent's arrest. The Majority Opinion would demand that the Petitioners do exactly what Panetta and Krause warn against by requiring the inclusion of every protestation of innocence and purported innocent explanation advanced by the Respondent in order to establish probable cause for his arrest. This requirement goes well beyond the established principles regarding the information necessary to establish probable cause.

In order to reconcile this inconsistency, the Majority Opinion held that the omitted information was sufficiently exculpatory to create a material question as to whether the Petitioners had credited the Respondent's exculpatory statements of innocence. App. A, at A-35. The lynchpin of the Majority Opinion

is that "if these exculpatory statements by the Respondent were deemed credible, he would have lacked the requisite intent to be part of any robbery conspiracy, regardless of any potential duress defense." Id., at A-29. However, this holding flies in the face of established Second Circuit jurisprudence, recognized in the Majority Opinion, that "[o]nce a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Ricciuti*, 124 F.3d at 128.

The Majority Opinion would have the Petitioners include their own subjective analysis regarding the Respondent's protestations of innocence in the warrant application affidavit. However, because an officer's state of mind and his or her subjective reasons for making the arrest - whether or not it is related to the criminal offense at issue - does not invalidate the conduct so long as the action taken, when viewed objectively against all facts and circumstances known to the officer, was justified. *Whren v. United States*, 517 U.S. 806, 812-13 (1996). The Fourth Amendment standard of "reasonableness" allows for certain actions that are in accordance with law regardless of the officer's subjective intent in carrying out the act in question. *Id.*, at 814.

Thus, the flawed subjective standard imposed upon the Petitioners in the Majority Opinion, which

finds no basis in established caselaw, must be addressed and corrected by this Court to avoid further confusion and erosion of the qualified immunity doctrine. When viewed against the totality of the circumstances, the Petitioners knew that the Respondent had been with Mr. Gaston for some time before the murder of Mr. Wiggins, that the Respondent and Gaston were going to a store to purchase marijuana together, that the Respondent voluntarily entered Wiggins' car, that the Respondent (even if under duress) took Wiggins' glasses from the vehicle and discarded them while fleeing, and that the Respondent purposefully changed his appearance while fleeing from the murder scene in order to avoid detection.

Because the warrant contained the Respondent's protestations of innocence, the magistrate reviewing the arrest warrant application had notice of the Respondent's claimed innocence and could weigh his innocent explanations, like the Petitioners did, against the objective facts set forth in the warrant, to draw a reasonable conclusion that probable cause existed for the Respondent's arrest. Thus, the contents of the warrant for Respondent's arrest were objectively reasonable and in accordance with clearly established law. There is no basis in any established law for the Majority Opinion's holding that the purported omissions overcame the Respondent's heavy burden in challenging the presumption of

probable cause inherent in the warrant for his arrest. *Golino*, 950 F.2d at 870.

To the contrary, it must be determined that the absence of citations to any caselaw requiring the inclusion of all protestations of innocence discovered during a voluntary interview in an arrest warrant in the Majority Opinion precludes this law from having been "clearly established." If, as here, "the law at the time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). When taken on the whole, the purported omissions would not have impacted the magistrate's probable cause analysis because many of the omissions were in fact included in the warrant. The magistrate was on notice of the Respondent's protestations of innocence and his claim that Gaston acted alone, and there was no clearly established law requiring the Petitioners to include each of plaintiff's additional protestations of innocence in the warrant for his arrest.

A review of the warrant establishes a vivid picture of the Respondent's claimed innocence, which is not further advanced in any material way by the purported omissions. As such, even under a corrected warrant affidavit, including the purported omissions, it is difficult to imagine how the modifications advanced by the majority would vitiate the existence of probable cause or, at the very least, arguable probable

cause presumptively inherent in the warrant. As probable cause is a complete defense to the Respondent's false arrest and malicious prosecution claims, this Court should grant certiorari to correct the error of the Second Circuit, the ruling of which undermines the probable cause analysis and muddies the water with respect to long established Fourth Amendment jurisprudence.

Clearly established law at the time the warrant was prepared did "not demand that an officer applying for a warrant 'volunteer every fact that arguably cuts against the existence of probable cause.'" *Walczyk*, 496 F.3d at 161; *quoting Brown v. D'Amico*, 35 F.3d 97, 99 (2d Cir. 1994). In concluding that the Petitioners should have included each of the Respondent's protestations of innocence in the warrant for his arrest despite the suspicious circumstances known to them including that the Respondent was present at the time of the murder of Mr. Wiggins with another individual he had spent the balance of the day with the Majority opinion ignored well-settled precedent that even though a putative suspect "may have innocent explanations; … the availability of an innocent explanation does not create an issue of fact as to the reasonableness of the suspicion." *Holeman v. City of New London*, 425 F.3d 184, 191 (2d Cir. 2005); *citing United States v. Arvizu*, 534 U.S. 266, 278 (2002). Nor, as this Court has held, does a probable cause determination require "officers to rule out a suspect's innocent explanation for suspicious facts." *Wesby*, 138 S. Ct. at 588.

Supreme Court and Second Circuit jurisprudence has never required an officer to include his subjective views in an arrest warrant application because "the probable cause inquiry is based upon whether the facts known by the arresting officer at the time of the arrest objectively provided probable cause to arrest." *Jaegly v. Couch*, 439 F.3d 149, 153 (2d Cir. 2006). In preparing the warrant with such objective facts, the officer is "not required to credit an innocent explanation that seemed implausible given his knowledge at the time." *Grice v. McVeigh*, 873 F.3d 162, 167 (2d Cir. 2017). Despite the implausibility of the Respondent's protestations of innocence when stacked up against the totality of the circumstances, including the Respondent's admitted cavorting with the murderer, Mr. Gaston, the Petitioners still included the Respondent's purported innocent explanations in the warrant for his arrest, thus, putting the magistrate on notice of his claimed innocence.

Additionally, in order for the Petitioners to be denied qualified immunity, the facts must have been "sufficiently clear that **every** reasonable official would have understood that" failing to include said omissions violated plaintiff's rights. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citation omitted; emphasis added). Clearly established law must be "particularized" to the facts of each case to avoid the unwanted result of plaintiff being "able to convert the rule of qualified immunity … into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White v. Pauly*, 137 S. Ct. 548, 552

(2017); *quoting Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

Here, the panel Majority misconstrued the "clearly established" analysis as it failed to identify a case where officers acting under sufficiently similar circumstances to the Petitioners were found to have violated a suspect's Fourth Amendment rights. In fact, the existence of the Dissenting Opinion offered by Judge Sullivan necessarily undermines the finding of the panel majority that "no reasonable officer would have believed probable cause existed for Washington's arrest if Washington's exculpatory explanation was deemed credible." App. A, at A-42 – A-43 Not only does the Majority's finding necessarily imply that the Petitioners believed the entirety of the Respondent's statement, an implication not supported by record evidence, it is also further undermined by the well-reasoned dissent, as it cannot be said that every officer facing the same circumstances as the Petitioners would know that the conduct complained of violated clearly established law. *Grice*, 873 F.3d at 165.

Consistent with the record in this matter, Sergeant Napolitano and Lieutenant McGeough reasonably believed that the objective facts set forth in the arrest warrant affidavit established probable cause for the Respondent's arrest. Since reasonable minds can disagree regarding the import of the alleged exculpatory omissions and Respondent's credibility, as evidenced by the dissent in this matter, the conclusions of Sergeant Napolitano and Lieutenant McGeough, in seeking a warrant for the Respondent's arrest, plainly

did not violate any clearly established law. Thus, the Petitioners are entitled to qualified immunity because they had probable cause or, at the very least, arguable probable cause, for the Respondent's arrest. It cannot be said that it would have been clear to every reasonable officer that preparing a warrant for the Respondent's arrest was unlawful under the circumstances presented, namely, in the face of the Respondent's admitted presence at the scene of Wiggins' murder, the time he spent with Gaston prior to the murder, and his conduct in changing his appearance to avoid detection following the murder.

Accordingly, the Second Circuit erred in concluding that Sergeant Napolitano and Lieutenant McGeough were not entitled to qualified immunity because the law was not clearly established that an arrest warrant needed to include their subjective belief regarding plaintiff's claimed innocence and each protestation of innocence, even the most implausible among them, offered by the Respondent at his voluntary interview. This Court should, therefore, grant certiorari to address the error of the Second Circuit's ruling, which threatens to undermine the very intent and purpose of the doctrine of qualified immunity as it relates to the Fourth Amendment probable cause analysis.

B. THE COURT OF APPEALS MAJORITY OPINION CREATES A CIRCUIT SPLIT REGARDING QUALIFIED IMMUNITY AS IT RELATES TO THE PROBABLE CAUSE ANALYSIS, WHICH SHOULD BE ADDRESSED BY THIS COURT TO AVOID FURTHER CONFUSION

The Majority Opinion squarely conflicts with decisions of other circuit courts of Appeal. In both criminal and civil contexts, each circuit court, including the Second Circuit, has held that an officer is not required to rule out all innocent explanations to establish probable cause or, since *Wesby*, has acknowledged that officers are not required to rule out all innocent explanations to establish probable cause.

In *Washington v. Howard*, 25 F.4th 891 (11th Cir. 2022), the Eleventh Circuit upheld the district court's grant of summary judgment to an officer on a Fourth Amendment unreasonable seizure claim based on qualified immunity. The petitioner argued that the officer violated her rights by continuing to detain her pursuant to an arrest warrant after uncovering exculpatory information. *Id.*, at 898. Even acknowledging the purported exculpatory information, the Eleventh Circuit held that the correct standard to determine if probable cause existed was to "ask whether a reasonable officer could conclude … that there was a substantial chance of criminal activity." *Id.*, at 902; *citing Wesby*, 138 S. Ct. at 588.

The petitioner specifically argued that probable cause evaporated when a purported co-conspirator, Cortavious Heard, recanted an earlier statement that identified the petitioner as an involved party in an alleged crime. *Washington*, 25 F.4th at 902. However, the officer did not release the petitioner until after Mr. Heard passed a lie detector test indicating that the petitioner was not involved. The Eleventh Circuit determined that even though the recanted statement, if true, was exculpatory, the officer "was not required to believe it or to weigh the evidence in such a way as to conclude that probable cause did not exist." Id. That is, "a police officer need not resolve conflicting evidence in a manner favorable to the suspect." Id.

As the Petitioners determined here after considering that the Respondent had admittedly been with the murderer for the balance of the day, had voluntarily entered the vehicle of Mr. Wiggins, and purposefully changed his appearance when fleeing the scene of the murder, among other suspicious facts, the Eleventh Circuit in *Washington* held that there were plenty of reasons for the officer to doubt the innocent explanation advanced by the petitioner (the recanting by Mr. Heard, which was inconsistent with his original statement). Since probable cause remained for the petitioner's detention after the statement was recanted and before the polygraph test was passed by Mr. Heard, qualified immunity was afforded to the officers involved for the Petitioner's continuing detention.

In *United States v. Perry*, 908 F.3d 1126 (8th Cir. 2018), the Eight Circuit analyzed probable cause in the criminal context. There, the petitioner challenged probable cause based on his contention that his appearance was not similar to the 9-1-1 caller's description of the suspect, because he was calm and polite during his interaction with police, and because he interacted with officers blocks from where the shooting had occurred approximately eight to ten minutes after the shooting, when, in the petitioner's mind, a guilty person would have been "long gone" or "would have fled, hid, or otherwise acted suspiciously when seeing the police." *Id.*, at 1129.

In citing *Wesby*, the Eighth Circuit held that "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Id.*, *quoting Wesby*, 138 S. Ct. at 588. Nor, as the Eighth Circuit elucidated, does the suspect's possible innocent explanation require an investigating officer to "disregard other, less innocent possibilities or to ignore the other circumstances indicating guilt." *Perry*, 908 F.3d at 1129-30; *citing Wesby*, 138 S. Ct. at 588-89. The Seventh Circuit adopted similar reasoning in the criminal context when holding that "[t]he possibility of an innocent explanation does not vitiate properly established probable cause." *United States v. Booker*, 612 F.3d 596, 601 (7th Cir. 2010).

The *Wesby* reasoning was likewise applied in the First Circuit in the criminal context where the officer

was not required to rule out the suspect's "innocent explanation for suspicious facts." *United States v. Merritt*, 945 F.3d 578, 585 (1st Cir. 2019). *Wesby* was also cited by the Third Circuit when affording officers who had been sued for lack of probable cause in search and arrest warrants qualified immunity. Specifically, when analyzing the arrest warrant in question, the Third Circuit, relying on *Wesby* held that "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Olson v. Ako*, 724 Fed. Appx. 160, 167 (3d Cir. 2018); *quoting Wesby*, 138 S. Ct. at 588.

The Tenth Circuit adopted the same reasoning in *Rife v. Oklahoma Department of Public Safety*, 854 F.3d 637 (10th Cir. 2017). Specifically, the Tenth Circuit held that "probable cause does not require police officers to rule out all innocent explanations for a suspect's behavior." *Id.*, at 644-45. As recognized by the Ninth Circuit, "[i]t is decidedly not the officers' burden to 'rule out the possibility of innocent behavior' in order to established probable cause." *Lingo v. City of Salem*, 832 F.3d 953, 961 (9th Cir. 2016); *quoting Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009).

In *Prim v. Stein*, 6 F.4th 584 (5th Cir. 2021), the Fifth Circuit afforded qualified immunity to officers who arrested an individual who appeared intoxicated, but claimed that she had multiple sclerosis (MS) which caused her to appear intoxicated. Specifically, officers

observed the individual stumbling and unable to stand without assistance. *Id.*, at 594. The arrestee also admitted that she had been drinking at a concert earlier in the evening. *Id.* Thus, even with the arrestee's purported innocent explanation, the arresting officers were afforded qualified immunity as they were not required to investigate the innocent explanation with the suspicious facts known to them, and because a reasonable officer knowing the same facts and circumstances could conclude that there was probable cause for the arrest. *Id.*

Similarly, in the Fourth Circuit in *Sennett v. United States*, 667 F.3d 531, 536-37 (4th Cir. 2012), the circuit court upheld the district court's decision granting the United States summary judgment on a claim seeking money damages for alleged Privacy Protection Act ("PPA") violations. In so holding, the Court determined that the innocent explanations advanced by the petitioner for her behavior could not "eliminate the suspicious facts from the probable cause calculus. The test is not whether the conduct under question is consistent with innocent behavior; law enforcement officers do not have to rule out the possibility of innocent behavior." *Id.*, at 536; *citing Ramirez*, 560 F.3d at 1024 (internal quotation marks omitted). Nor do plausible explanations based on a putative suspect's subjective mindset, such as fleeing for fear of one's safety, factor into the probable cause analysis. *Sennett*, 667 F.3d at 536.

Prior to *Wesby*, the Sixth Circuit acknowledged that "[o]fficers are not required to rule out every possible explanation other than a suspect's illegal conduct before making an arrest." *United States v. Reed*, 220 F.3d 476, 478 (6th Cir. 2000). Similarly, in the Second Circuit, which precedent the Majority Opinion ignored here, "[t]he fact that an innocent explanation may be consistent with the facts alleged … does not negate probable cause." *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985). However, since *Wesby*, the Sixth Circuit and, now, the Second Circuit with the Majority Opinion at issue, have deviated from *Wesby* by requiring officers to explore innocent explanations on the "totality of the circumstances," even after they have probable cause to arrest a suspect.

In *Greve v. Bass*, 805 Fed. Appx. 336 (6th Cir. 2020), the Sixth Circuit denied an officer qualified immunity for an arrest based on the officer's purported failure to consider the suspect's innocent explanations. *Id.*, at 344-47. Mr. Greve had been hired to document the day-to-day activities of a musician in the lead up to an album release party at a local club. *Id.*, at 338. While working the album release party, Mr. Greve ate from the complimentary buffet and drank approximately five (5) beers. *Id.*

Following the event, Mr. Greve was directed to assist others in disassembling the stage and loading equipment into a truck. *Id.*, at 338-39. The employees

were still packing everything up at approximately 1:00 a.m. *Id.*, at 339. While the equipment was being packed, the night manager of the club, Oleg Bulut, was pacing around impatiently. *Id.*, at 337, 339. Upon returning to the club at approximately 1:00 a.m., Greve and the others discovered that they had been locked out. *Id.*, at 339.

Shortly thereafter, the truck was gone and the other employees were driving away, leaving Greve there alone. *Id.* Two of the other employees told Greve that they had gained access to the club through the front door to retrieve their belongings. *Id.* When Greve grabbed the front door handle it fell off and the door remained locked. *Id.*

At approximately 2:00 a.m., Officer Bass responded to a break-in alarm at the club. *Id.*, at 337-38. Officer Bass located Mr. Greve upon arriving at the scene. *Id.*, at 338. Mr. Greve explained that he was trying to get inside the club to retrieve his belongings. *Id.* When Mr. Bulut arrived, he went into the club with Officer Bass and other responding officers. *Id.*, at 339-340. Mr. Bulut and the officers entering the club did not locate Mr. Greve's belongings. *Id.*, at 340. Mr. Bulut was then brought to the police car where he indicated that he could not identify Mr. Greve. *Id.*

Mr. Greve was arrested for public intoxication and attempted burglary. *Id.* The charges were later

dismissed and Greve brought a Fourth Amendment false arrest claim against Officer Bass. *Id.*, at 341. The District Court (*Campbell, J.*) granted summary judgment in favor of Officer Bass, and Mr. Greve appealed. *Id.*, at 337. The Sixth Circuit reversed, holding that Officer Bass was not entitled to qualified immunity because he failed to consider the protestations of innocence offered by Mr. Greve. *Id.*, at 347.

A dissenting opinion with respect to the qualified immunity analysis was authored (*Griffin, J.*). The dissent in *Greve*, similar to that offered in this case, provided a well-reasoned road map for concluding that Officer Bass had probable cause or, at least, arguable probable cause, for Mr. Greve's arrest. When weighing all inculpatory and exculpatory evidence known to Officer Bass at the time, including Mr. Greve's protestations of innocence, probable cause existed for Mr. Greve's arrest. *Id.*; *citing Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir. 2007). Specifically, Officer Bass knew that the club closed to the public at 10:00 p.m.; Mr. Bulut advised Officer Bass that the photography company had arranged to pick it up its equipment the following day; Mr. Bulut did not recognize Mr. Greve; and Mr. Bulut wanted to press charges. As officers are not required to "investigate independently every claim of innocence," the dissent determined that Officer Bass had probable cause for the arrest, and that qualified immunity should have

been afforded. *Greve*, 805 Fed. Appx. at 352-53; *quoting Logsdon*, 492 F.3d at 341.

The Majority Opinion adopted logic similar to that of the Majority in *Greve* in denying the Petitioners qualified immunity. While indicating that it was not disturbing well-settled precedent that an officer need not investigate innocent explanations as to an alleged crime, the Court nonetheless adopted a new framework that could be construed to require officers seeking an arrest warrant to include a statement indicating their subjective credibility determinations about any such statements provided by the suspect. App. A, at A-35 – A-41. While the Majority Opinion would have officers believe statements made by a suspect in an all or nothing fashion, the Petitioners were not required to, and did not afford, credibility to each statement made by the Respondent. *United States v. Norman*, 776 F.3d 67, 78 (2d Cir. 2015).

The Petitioners credited portions of the Respondent's statement and included those statements in the warrant for his arrest. However, based on the suspicious facts known to them, including Respondent's admitted conduct in being with the murderer for the balance of the day, voluntarily getting into Wiggins' vehicle, and purposefully changing his appearance while fleeing the murder scene to avoid detection, the Petitioners were not required to investigate and rule out each of the Petitioner's

innocent explanations to establish probable cause. *Wesby*, 138 S. Ct. at 588.

The Majority Opinion hinges on a finding that the Petitioners may have credited the entirety of the Respondent's protestations of innocence. However, this analysis necessarily involved a subjective element, which would have required the Petitioners to ignore other circumstances, as highlighted above, that tended to indicate the Respondent's guilt in this case. As ignoring circumstances indicating guilt in favor of a hypothetically feasible innocent explanation is not required, the Majority Opinion arguably alters the landscape regarding the probable cause analysis and qualified immunity jurisprudence.

Even if the Petitioners had credited the Respondent's protestations of innocence, a factual predicate upon which the Majority Opinion necessarily relies, "the availability of an innocent explanation does not create an issue of fact as to the reasonableness of the suspicion." *Holeman*, 425 F.3d at 191. There was ample suspicion regarding the Respondent's conduct such that probable cause existed for his arrest. The Sixth and Second Circuits have strayed far afield from settled Supreme Court precedent and their sister circuit courts by laying the groundwork for suspects to create an issue of fact regarding probable cause and the qualified immunity analysis in any false arrest case by claiming innocence that is not fully investigated by the officer before an arrest is made.

The opinion below presents a significant change to the caselaw from the circuit courts, as highlighted above. This new split of authority is of the utmost importance because it touches upon the tenets of probable cause and qualified immunity, which are foundational elements of Fourth Amendment jurisprudence. Given the stark divergence from established caselaw and other circuit courts, there is no realistic prospect that this emerging circuit split will disappear on its own as these underlying opinions are adopted and cited throughout the Second Circuit and Sixth Circuits.

The issue cannot and need not percolate further. Qualified immunity is designed to give "government officials breathing room to make reasonable but mistaken judgments," and is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 571 U.S. 3, 5 (2013); *Ashcroft*, 563 U.S. at 743; *Malley*, 475 U.S. at 341. The underlying decision of the Second Circuit flies in the face of this precedent and will harm the ability of police officers to make arrests when individuals come forward and provide useful information for an investigation while they remain a suspect in the underlying criminal investigation. By adopting the "all or nothing" framework with respect to believing the statements of the Respondent, the Second Circuit has eroded long-standing and well establish qualified immunity jurisprudence while simultaneously

creating an unnecessary circuit split, which only this Court can resolve.

Not only does the opinion below substantively change the law regarding qualified immunity in the probable cause context, but it is incorrect, as highlighted above, because the dissent itself provides exactly what is needed for qualified immunity to apply. Specifically, a reasonable individual has looked at the facts available to the Petitioners, and determined that probable cause or, at the very least, arguable probable cause, existed for the Respondent's arrest. Accordingly, this case cleanly presents a suitable vehicle for consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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