Case No.:22-80

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In a vacuum, an officer would not have probable cause to charge a bank teller with robbery based only on the fact that the teller participated in a crime by handing over money from the vault during a bank robbery. However, to compare Respondent Laurence Washington to an unassuming bank teller robbed at gunpoint as a means of undermining the Petitioners' entitlement to qualified immunity is a disingenuous distortion of the undisputed facts.

A more accurate analogy would be a case where a bank teller disclaimed prior knowledge of or involvement in a robbery, but later admitted that he had been drinking, smoking marijuana, and partying with the robbery suspect in the hours leading up to the crime and, further, that he and the suspect had arrived at the bank together that day after agreeing that the suspect would fraudulently cash a small check at the teller's window and split the profits with him, but instead the suspect pulled a weapon on the teller and demanded money from the vault – not the specific crime in which the teller had agreed to participate, but nonetheless a serious crime arising from his conspiracy to assist the robbery suspect in his capacity as a bank teller. In such a case, the investigating officers would undoubtedly have ample probable cause to arrest the teller for conspiracy.

Here, it is undisputed that on the date of the murder, Washington and non-party, convicted murderer, Michael Gaston, had been partying, drinking, smoking marijuana and, most notably, voluntarily embarking on a joint venture to a local convenience store to purchase marijuana from a dealer after having depleted their own stash. Washington's voluntary consorting with Gaston renders his involvement in the eventual murder of Marshall Wiggins more intimate in nature than the arms-length relationship that exists between bank teller and robber. Washington's attempt to disguise his appearance as he fled the scene of the purported drug-deal-gone-wrong further distinguishes this situation from the picture of the innocent bank teller to which Washington analogizes his conduct in the pithy yet inapposite hypothetical that opens his brief in opposition to the subject petition for certiorari.

In denying qualified immunity to the Petitioners, then-Detective Frank Napolitano[1] and then-Sergeant Francis McGeough,[2] both the District Court and the affirming majority of the divided panel of the Court of Appeals for the Second Circuit

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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.

went too far in requiring that officers include subjective opinions regarding Washington's protestations of innocence to establish probable cause for his arrest. Only this Court can correct the errors below by reaffirming its holding in *Devenpeck v. Alford*, 543 U.S. 146, 154-55 (2004); namely, that the subjective intent of an arresting officer is not a valid basis for invalidating an arrest. Such an affirmative measure is also necessary to unify the circuit split that this case has crystalized as to whether a law enforcement officer's "subjective, personal assessment of the credibility" of a suspect must be considered as part of the probable cause analysis. A-35.[3]

I. Respondent Mischaracterizes Multiple Undisputed Facts

Washington's first glaring distortion of the record is his contention that Sergeant Napolitano described the arrest warrant at issue in this case as "bogus." Op., at p. i, 3. At his deposition, Sergeant Napolitano explained that he engaged in "small talk," with Washington and, in response to a leading question posed by Respondent's attorney, ("did you tell him that the warrant was bogus?") Sergeant Napolitano said only "possibly," further clarifying that "if [he] was trying to gain [Washington's] confidence [he] probably told him whatever he

[3] Citations to "A-" refer to the Appendix filed with the underlying petition.

wanted to hear . . . ." C.A. App., at 312-13.[4] Sergeant Napolitano never affirmatively characterized the warrant as "bogus" in the manner Respondent now so brazenly asserts in his brief. C.A. App., at 312-14.

Second, Washington confirms that, at the time Gaston's weapon was initially discharged, he was sitting in the back row of the vehicle on the passenger side, directly behind Gaston, who was in the front passenger seat. Op., at p. 6. Throughout his opposition, Washington inaccurately reports that Wiggins fired a warning shot "where he was sitting," "near where he was sitting," "in his direction," and either at or into "the back of the vehicle." *Id.*, at p. 1-3, 6, 8, 11.

The undisputed record indicates that the first shot Gaston fired traveled through the back-seat driver's side window, such that it traveled in the exact opposition direction of where Washington was sitting. C.A. App., at 875-79. Washington's contention that the gun was fired "in his direction" is, accordingly, misleading.

Likewise, Washington avers on multiple occasions that the Petitioners placed him in witness protection. Op., at p. iii, 2, 4, 8, 10-12, and 26-27. Washington is no stranger to the witness protection

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[4] Citations to "C.A. App." refer to the Joint Appendix filed in the Court of Appeals.

program and understands that it is the Chief State's Attorney who, pursuant to Connecticut General Statutes § 54-82t(b), is responsible for administering the witness protection program and determining "whether a witness at risk of harm is critical to a criminal investigation or prosecution." C.A. App., at 51-52.

When the Chief State's Attorney certifies that a witness is eligible for protection, there must be a signed written agreement memorializing the terms of the agreement between the Chief State's Attorney and the witness. C.A. App., at 52, FN3. On or about May 18, 2016, Washington applied for witness protection with the State and executed a Witness Protection Agreement with Inspector Craig Davis, a designee for the Chief State's Attorney. *Id.* The Petitioners were neither part of, nor privy to, Washington's meeting with the State wherein his request for witness protection was considered. Washington's contention that the Petitioners "placed him" in witness protection mischaracterizes the process and is soundly rebutted by undisputed record evidence.

Notwithstanding, these mischaracterizations are repeated throughout Washington's opposition in an apparent effort to color the Court's consideration of the subject petition. The Court should ignore these misrepresentations and, instead, rely on the record evidence, which establishes that the

"warning shot" was fired in the opposite direction of Washington, and that it was the State of Connecticut, not the Petitioners, that placed him in the witness protection program.

II. Respondent Relies On Irrelevant Criminal Proceedings

Throughout his opposition, Washington cites to a probable cause hearing held in January 2017 and his bench trial on the remaining claims where he was acquitted by then-Superior Court Judge Omar Williams for the proposition that the Petitioners lacked probable cause for his arrest. Op., at p. 3, 14-15, 25. Specifically, Washington repeatedly quotes Judge Williams' statement that he "believed" Washington was innocent after hearing evidence in the case. *Id.*, at p. 3, 14-15. In the Majority Opinion, Judge Bianco of the Second Circuit Court of Appeals similarly cited to Washington's success at his probable cause hearing for the proposition that the Petitioners lacked probable cause for Washington's arrest. A-29, at FN8.

The reliance on the probable cause hearing and subsequent criminal trial to vitiate the probable cause inherent in the arrest warrant prepared by the Petitioners is deeply concerning. Pursuant to Connecticut General Statues § 54-46a(b), Washington was afforded the right to counsel, the opportunity to present argument to the court, and

the opportunity to cross examine witnesses at his probable cause hearing. Likewise, the bench trial before Judge Williams involved the presentation of evidence and witness testimony. Thus, any determinations made at either proceeding are wholly irrelevant to the probable cause determination, as those proceedings necessarily included information, testimony, and exhibits to which the Petitioners did not have access when preparing their arrest warrant affidavit. As such, any suggestion that either the January 2017 probable cause hearing or the bench trial where Washington was acquitted has any bearing on this matter is patently false, and should not be entertained by this Court.

III. The Second Circuit Majority Opinion Does Not Align With Precedent Regarding Qualified Immunity

A. The Issue At Hand Was Briefed Below

Washington proffers that the Petitioners' petition for certiorari should be denied because *Devenpeck v. Alford*, 543 U.S. 146 (2004), and its progeny were not raised in the briefs below. Op., at p. 19-20. Specifically, Washington requests that the reliance on *Devenpeck* be ignored as the Court "will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987). Washington's contention is

incorrect, however, as the fundamental issues addressed in *Devenpeck*, including issues about the probable cause analysis, a putative suspect's protestations of innocence, and the requirement that an arresting officer include exculpatory information in an arrest warrant application were each fully briefed below and, thus, are now fairly before the Court.

The Majority Opinion below concluded that the Petitioners are not entitled to qualified immunity because of the purported possibility that they may have subjectively deemed Washington's statements and protestations of innocence to be credible, but nonetheless chose to omit said determinations in the warrant for his arrest. A-6-7. Thus, subjective credibility determinations by the Petitioners were in fact the lynchpin of the Majority Opinion, such that the issues raised in this petition were necessarily briefed and considered by the Court below.

B. The Decision Below Does Not Align With Precedent

Washington and the Circuit Court Majority Opinion engage in mental gymnastics to, on one hand, purportedly recognize the "well-settled precedent establishing that an officer is not required to investigate an individual's innocent explanations as to an alleged crime, nor to resolve all credibility issues between witnesses, before making an arrest

based on probable cause[,]"A-6, while, on the other hand, simultaneously disturbing said precedent in holding that qualified immunity is unavailable to the Petitioners because "there is a question, at minimum, as to whether appellants offered to the magistrate judge their own subjective, personal assessment of the credibility of Washington's denial." A-35.

The Majority Opinion flies in the face of this Court's precedent in *Devenpeck* and *Whren v. United States*, 517 U.S. 806 (1996), by attempting "to root out subjective vices (the Petitioners' credibility determinations) through objective means." *Devenpeck*, 543 U.S. at 154; *quoting Whren*, 517 U.S. at 814. The *Devenpeck* Court elaborated that "[s]ubjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest." *Devenpeck*, 543 U.S. at 154-55 (emphasis in original).

It is well settled that establishing probable cause for an arrest "is not a high bar." *Dist. Of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). Where there are facts sufficient to establish probable cause, it is not within the officer's purview or authority to sit as judge or jury and any credibility determinations regarding a suspect's protestations of innocence are, at that point, properly left to the fact finder. *Panetta v. Crowley*,

460 F.3d 388, 396 (2d Cir. 2006). It is also not the arresting officer's burden to weigh the evidence or finally determine guilt. *Krause v. Bennett*, 887 F.2d 362, 371 (2d Cir. 1989).

The existence of probable cause is gauged from the reasonable conclusions to be drawn from the facts known to the arresting officer at the time of arrest, not at later evidentiary hearings, as Washington would prefer. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Accordingly, the Majority Opinion's holding that the Petitioners were required, but failed to, include their own subjective credibility determinations about Washington's protestations of innocence in their arrest warrant application directly contravenes clearly established caselaw, and must be addressed and corrected by this Court to avoid further erosion of the qualified immunity doctrine and the interests it exists to safeguard.

Washington's effort to distinguish this case from *Devenpeck* is unpersuasive. While the *Devenpeck* Court considered the "reasonableness" standard as it pertained to the "closely related offense rule," its holding that the subjective intent of the arresting officer cannot invalidate an arrest is sound, and applies with equal weight to this matter. Where, as here, Washington's admitted conduct and presence with Gaston in the hours leading up to the murder of Wiggins supported probable cause, or at

least arguable probable cause, the Petitioners' subjective belief about Washington's credibility and protestations of innocence is simply irrelevant to the probable cause analysis.

As the Majority Opinion strays far afield from established precedent in *Devenpeck* and *Whren* in denying the Petitioners summary judgment based on qualified immunity, the Petitioners respectfully request that this Court grant certiorari to correct the Second Circuit's error.

IV. Consideration By This Court Is Warranted As The Second Circuit Majority Opinion Creates A Circuit Split Regarding The Application Of Qualified Immunity

The Majority Opinion's explanation that it does not disturb the well-settled precedent that officers are not required to investigate innocent explanations from a suspect as the "appellants already had the exculpatory information in their possession at the time of the submission of the warrant application" as echoed by Washington in his opposition, is a distinction without a difference. *See* A-6; Op., at p. 26. An arresting officer would, of course, have access to a suspect's protestations of innocence prior to the suspect's arrest. However, these considerations are of no moment, as once an 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). To the contrary, as set forth above, when an officer possesses facts sufficient to establish probable cause, as the Petitioners did here, credibility determinations regarding a suspect's claimed innocence are properly left to the factfinder. *Panetta*, 460 F.3d at 396.

Washington cites to *Rainsberger v. Benner*, 913 F.3d 640 (7th Cir. 2019), the holding of which is readily distinguishable from this case, for the proposition that an officer is not entitled to qualified immunity when he omits information, including a plaintiff's innocent explanation for his suspicious conduct following a murder, from an arrest warrant affidavit. Washington also conflates the *Rainsberger* plaintiff's argument that the contents of the arrest warrant affidavit at issue were "undercut by the omission of exculpatory evidence[,]" with the ultimate holding of the Court. Op., at p. 30; *Rainsberger*, 913 F.3d at 642. This conflation should be disregarded.

Additionally, as then-Judge Amy Coney Barrett acknowledged in *Rainsberger*, the defendant officer in that case had "not argued that it would have been unclear to a reasonable officer that any of the information that he omitted was material to the probable cause determination.

Thus, we need not address whether he made any reasonable mistakes in that regard." *Id.*, at p. 654. Here, in contrast, the Petitioners have consistently argued that they are entitled to qualified immunity because their decisions to either include or exclude certain information from the warrant application were objectively reasonable, and did not violate clearly established law. C.A. App., at 632-33, 934-938.

Rainsberger is further distinguishable as the defendant in that case conceded that he knowingly or recklessly made false statements in the probable cause affidavit. *Rainsberger*, 913 F.3d at 642. That is not the case here, where the purported omissions regarding credibility were omitted in accordance with established law. *See Devenpeck*, 543 U.S. at 146. Even more significantly, Respondent does not even allege that the Petitioners made any *false statements* in the warrant; rather, Respondent relies solely on a theory that information was *omitted* from the warrant. Furthermore, the *Rainsberger* court was left to decide whether to include inculpatory evidence in a corrected warrant affidavit as opposed to exculpatory evidence, and it declined to do so. *Id.*, at p. 649-51.

Washington's attempt to distinguish the other cases relied upon by the Petitioners is similarly unavailing, as probable cause based on information known to the officer at the time of an

arrest defeats a false arrest claim whether the arrest was made on speedy information or obtained by warrant. *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (standard of probable cause applies to all arrests). Washington has also unsuccessfully tried to distinguish *Sennett v. United States*, 667 F.3d 531 (4th Cir. 2012). While *Sennett* involved a search warrant, and not an arrest, the Court was still tasked with analyzing whether there was probable cause to believe that the plaintiff was involved in criminal activity such that the search incident to that investigation was reasonable, rendering its discussions, as referenced by the Petitioners here, germane to the Court's evaluation of this petition for certiorari.

CONCLUSION

The Majority Opinion below departs from established caselaw and has otherwise created a circuit split as it presents a significant change to the caselaw from sister circuits regarding probable cause and qualified immunity, which are foundational elements of Fourth Amendment jurisprudence. Accordingly, this case presents a perfect vehicle for this Court to reaffirm existing caselaw and unify the emerging circuit split. Wherefore, the Petitioners respectfully request that their petition be granted, that the decision below be reversed, and that they be afforded qualified immunity.

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