No. 23-1107

IN THE

Supreme Court of the United States

JOAN GHOUGOIAN, *et al.*,

Petitioners,

v.

LAMARR MONSON,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A grant of Certiorari is not proper in this case because the Court lacks jurisdiction over the questions presented by Petitioners. In this interlocutory qualified immunity appeal, Petitioners ask this Court to address issues that are not in dispute. The Petition does not challenge or seek review of the Sixth Circuit's opinion. There is no dispute regarding the constitutional rights at issue, nor the fact that such rights were clearly established at the time of the occurrence. While laudable, Petitioners' gratuitous concerns regarding local governments and the state of the judiciary do not identify a justiciable "case or controversy." There is no "record evidence" before the Court, framing these issues. Therefore, the Respondent respectfully submits that Petitioners' Writ of Certiorari should be denied.

Although Respondent does not believe that this case merits the granting of certiorari, in considering the Petition, the following questions should be considered:

1. Whether this Court has jurisdiction to address the questions presented in this qualified immunity interlocutory appeal where the Petition does not challenge the Sixth Circuit's conclusion of law that, in 1996, it was a known constitutional violation for a police officer to influence a prosecution without probable cause; fabricate material evidence; and offer a detainee leniency in exchange for an inculpatory statement.

2. Whether, given that Respondent was arrested, detained, and charged without probable cause to

believe he had committed any crime, this case is an appropriate vehicle to amend, modify, or change the requirement that a malicious prosecution civil action can only be maintained when there was no probable cause for the crime charged, to an action for malicious prosecution can only be maintained if there is no probable cause for any crime at the time of arrest.

3. Whether in this interlocutory appeal of denial of qualified immunity to Petitioners, this Court should decide if a person can challenge the voluntariness of a statement he previously swore under oath was voluntary, where the law already provides for the circumstances where a person can challenge the voluntariness of a statement, and where Respondent herein has never claimed that the statement referenced was coerced or involuntary.

4. Whether this case is an appropriate vehicle for Petitioner to challenge this Court's decision in *Thompson v. Clark*, 596 U.S. 36 (2022), where none of the issues before the Court in *Thompson* were raised by the Petitioners below, including whether Respondent's action properly falls within the Fourth Amendment, or whether Petitioner's obtained a favorable termination of the underlying criminal prosecution.

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STATEMENT OF JURISDICTION

Respondent agrees that 28 U.S.C. § 1254(1) generally confers jurisdiction over cases appealed from the circuit courts. Respondent denies that the Court has jurisdiction to decide the questions presented by Petitioners, which were not raised in the proceedings below, and would require the Court to review the extensive evidentiary record or reject the factual findings of the Courts below. Respondent also denies that the case satisfies the standards set forth in Supreme Court Rule 10.

INTRODUCTION

A grant of Certiorari is not proper in this interlocutory appeal because the Court lacks jurisdiction over both questions in the Petition. Petitioners first asks the Court to hold that if there is probable cause to charge the person for any crime, including uncharged crimes, a malicious prosecution claim is barred.

This case is not a proper vehicle to decide that question for several reasons. First, even if the Court decided that question it would not affect the outcome of this case because Respondent was arrested and charged without probable cause, as found by the Courts below. In order to rule squarely on this issue, the Court would have to resolve disputed facts, and reject the factual findings that have already been found by the lower courts. Second, Petitioners have waived this issue because it was not raised on summary judgment below. Third, Petitioners now seek a rule opposite their arguments below that a malicious prosecution claim requires a showing that there was no probable cause for the prosecution for the crime

charged. Finally, to the extent Petitioners seek a new rule that the existence of uncharged crimes would provide the basis for probable cause to prosecute, and negate a malicious prosecution claim, such a rule would be unfair and highly prejudicial. Again, such a holding would not affect the outcome of this case because no drugs, or even drug paraphernalia, were ever identified or recovered by police to charge Respondent with a drug-related crime.

The second issue presented by Petitioners also fails to present a question within the Court's jurisdiction. Respondent has never claimed that his first statement was involuntary. The second statement, however, was involuntary because it was given in exchange for Ghougoian's illusory promise to Respondent that he could go home if he signed a second statement. Respondent has consistently testified and asserted in legal submissions that his second statement was coerced.

The Petition for a Writ of Certiorari does not challenge or seek review of the Sixth Circuit's application of summary judgment or qualified immunity standards, including that the constitutional rights at issue had been clearly established by the relevant time. Because they have no justiciable controversy, Petitioners feign concern that this Court's recent acceptance, in *Thomas v. Clark*, that malicious prosecution claims are housed in the Fourth Amendment, is sowing confusion and causing circuit courts to "struggl[e] to reconcile the threshold constitutional principles spanning the Court's Fourth Amendment jurisprudence."

Petitioners also attempt to compare themselves with local government agencies, overburdened with convictions

being overturned because of advances in forensic science. Petitioners are not local government agencies grappling with overwhelming "reverse conviction" cases stemming from forensic science improvements. And their conduct did not involve confusion about what is and what is not unconstitutional conduct, the exercise of discretion, or the need to make split-second decisions in the face of potential danger. As officers sworn to protect and serve, Petitioners abused their power and demonstrated no regard for Fourth Amendment principles in 1996 when they arrested and detained Respondent without probable cause; coerced a false confession from him by making an illusory promise he could go home; and then submitted fabricated evidence to the prosecutor in order to charge Respondent with first-degree murder.

Because of their unconstitutional conduct, Respondent was charged, convicted, and incarcerated for murder for over 21 years without probable cause for his arrest or charge. There were no facts or circumstances within the knowledge of Petitioners that would cause them to believe that any crime had been committed by Respondent at any stage of his arrest, detention, or prosecution. As the Prosecutor noted when it dismissed the charges against Respondent, and acknowledged the evidence supporting a coerced confession and other police misdeeds, such unlawful conduct cannot be condoned.

STATEMENT OF THE CASE

Late in the evening of January 19, 1996, Respondent Lamarr Monson left an apartment ("the apartment") in a semi-abandoned building that he frequented and hung out with others. Monson, stopped briefly at the home where

he lived with his parents, and then after 11:30 p.m. went to the home of the mother of his child where he stayed until late morning the following day. When Monson left the apartment on January 19, 1996, Christina Brown was still alive and uninjured. Monson returned to the apartment around 1:30 p.m. the next day, on January 20, 1996. Monson spoke with Linda Woods and Robert Lewis on his arrival. Monson, Woods, and Lewis went into the building where they found Christina lying on the bathroom floor of the apartment, severely injured and bleeding. Hysterical, Monson ran to the apartment next door and asked for help. Because there were no phones in the building, Monson drove to his sister's home and called 911. When he returned to the apartment to wait for the police, Monson saw that Christina was not breathing. He covered her with a blanket and began chest compressions. He then went to the apartment entrance to wait for the police.

When police arrived Monson led them to the apartment. Petitioner Crockett testified during the criminal trial that Monson, Lewis, and Woods all attempted to leave the scene, but were prevented by police from doing so. Crockett also testified that he transported all of the witnesses in his car to the Detroit Police Department ("DPD") homicide section ("homicide"). ECF 237-4, PageID.12165-66. Crockett's report indicated he had no suspects and, in response to requests for admissions in this case, he admitted he had no probable cause to arrest Monson for any crime when he transported Monson to homicide. ECF 237-3, PageID.12150. At Monson's preliminary examination in the underlying criminal trial, Petitioner Simon testified that Monson had been arrested around 3:00 p.m. on January 20, 1996. ECF 237-11, PageID.12577-78. In her deposition, Simon testified

that Monson had been arrested when they left the crime scene, but she was unable to give the reasons he had been arrested at that time. ECF 237-10, PageID.12338-39.

Respondent's detention without probable cause continued at police headquarters. Simon gave Monson Miranda warnings around 3:25 p.m., and she and other officers questioned and accused Respondent of murdering Christina for several hours. Simon began drafting Monson's statement at 7:45 p.m. She included in the document many of her accusations that Monson had specifically denied, including that he had sex with Christina on one occasion. DPD documents show that Monson was locked up around midnight for murder. Simon admitted during Monson's criminal trial that when she left homicide that evening, the only evidence she had about Monson's involvement was his first statement, and the statements of other witnesses; none of which implicated Monson. When Monson's criminal attorney asked why she had left Monson in jail that night, Simon responded "[t]here was an investigation going on of a fatal stabbing…." ECF 237-14, PageID.12681-82.

Monson was taken to Petitioner Ghougoian's office, between 5:00-5:30 a.m., on January 21, 1996, hours after being sent to lock-up. Ghougoian interrogated him for approximately 2.5 hours. Although she had not given him Miranda warnings, Ghougoian told Monson that she wanted to "help" him, but they wanted to charge him with first degree murder. Ghougoian told Monson that if he would sign an informational summary stating that he had stabbed Christina accidentally in self-defense, she guaranteed him that he would be home within 24 hours. Monson agreed to sign the informational summary, and Ghougoian had Petitioner Braxton, draft the document.

Monson testified that he gave Braxton some background information, and he was so tired he laid his head on the desk while Braxton typed the document. Ghougoian came in and out of the room, communicating with Braxton, and showing him what appeared to be notes, as he typed the "summary." Braxton gave the document to Monson, and told him where to sign and initial. Monson signed the document without reading it. That document turned out to be Monson's second statement. It contained a story completely fabricated by Ghougoian and Braxton that Monson had returned to the apartment, where he got into a physical confrontation with Christina, resulting in her being accidentally stabbed and her head being pushed through the window. After signing the document, Monson was returned to lock-up. He was not let go and the following day he was arraigned for the murder of Christina Brown.

Monson's inculpatory second statement was given to the prosecutor, and used to initiate and prosecute criminal charges against Monson. Simon's Investigator's report was also provided to the prosecutor. The Investigator's Report contained false information, including claims attributed to "Paris Thompson" that had been fabricated by Crockett and Simon. The report also falsely stated the medical examiner would testify that Christina had been stabbed to death, when in fact the January 21, 1996, Certificate of Death identified the cause of Christina's death as craniocerebral injuries. The Investigator's Report omitted certain exculpatory evidence known to police prior to Monson's arraignment. For example, Simon failed to disclose to the prosecutor a Latent Print Check form dated January 20, 1996, indicating that a bloody toilet tank lid found at the crime scene contained usable fingerprints and palm prints.

In the spring of 1997, Monson was tried, convicted, and sentenced to 30 to 50 years in prison for the murder of Christina Brown.

In 2012 Shellena Bentley contacted the Detroit Police Department and informed officers that her former boyfriend, Robert Lewis, had killed Christina Brown – not Monson. In 1996, Bentley was residing in the apartment building where Christina was killed. She told police that during the night of January 19-20, 1996, Lewis had gone back and forth to the apartment to purchase drugs from Christina Brown. At some point he returned covered in blood, and stated that he had "killed that bitch." Lewis made Bentley leave the apartment and stay at his mother's home for three months. Bentley indicated that shortly thereafter she contacted the police and told them Monson was not the killer, but they did not follow up with her.

The Michigan Innocent Clinic subsequently got involved, and evidence from the crime scene was forwarded to the Michigan State Police (MSP). A palmprint and seven fingerprints were identified to Robert Lewis by MSP, Bentley's former boyfriend. The prints were on the bloody toilet tank lid that was used to crush Christina Brown's skull. The Michigan State Court granted Monson a new trial. The charges against Respondent were eventually dismissed by the prosecutor, without a retrial; and the State of Michigan subsequently found by clear and convincing evidence that Respondent had no involvement in the murder for which he had been wrongfully prosecuted and incarcerated.

Following his release, Respondent filed this action against Petitioners alleging, among other things, malicious

prosecution, fabrication of evidence, Brady violations, and coercion of a false confession. All of the Petitioners testified in this litigation that they commonly arrested witnesses without probable cause. Petitioner Ghougoian, who was the acting head of homicide at the time, also testified that she would do "nothing" upon learning that a witness or person had been arrested without probable cause. ECF 269-20, PageID.20102.

Following the conclusion of discovery, Petitioners sought summary judgment, claiming qualified immunity. The District Court largely denied Petitioners' claims of qualified immunity, finding that there are genuine issues of material fact that must be resolved by the jury. Namely, the jury must determine whether each Petitioner violated Respondent's constitutional rights that were clearly established in 1996. The District Court also granted Respondent's summary judgment motion, holding that Respondent had been arrested without probable cause.

Petitioners immediately filed an interlocutory appeal, challenging the District Court's denials of qualified immunity. Petitioners argued that the District Court's erred when it found they were not entitled to qualified immunity because Petitioners did not violate Respondent's constitutional rights which were clearly established by 1996. The District Court decision was affirmed by the Sixth Circuit on all issues except Respondent's Brady claim. Raising new issues and misstating the facts and claims made to the lower courts, Petitioners now request this Court rewrite the law of malicious prosecution, rule on claims not made by Respondent, and set rules on issues not argued below. Neither issue stated in Petitioners' Petition was before the Sixth Circuit.

The Fourth Amendment sets forth a person's constitutional right to be free of unreasonable searches and seizures. The standards applicable to criminal violations and different tort causes of action brought under Section 1983 for Fourth Amendment violations, have been developed through case law and legislation. There is no single set of standards, elements, or burden of proof requirements applicable to all Fourth Amendment cases. Here, Petitioners had no probable cause whatsoever to arrest or charge Respondent. Moreover, Petitioners fabricated evidence and provided it to the prosecutor to provide probable cause to charge Respondent with first degree murder.

Ghougoian was denied qualified immunity on Respondent's coerced confession claim because of evidence supporting Respondent's claims. For example, the record evidence includes the fact that while the second statement is consistent with Petitioners' theory of the cause of Christina's death at the time the second statement was written, it does not account for the cause of Christina's death as found by the medical examiner, namely craniocerebral injuries. Additionally, despite Ghougoian's claim she would never promise a detainee release in exchange for a statement, in fact the record evidence includes findings by a judge and a DPD review board that Ghougoian had made similar promises to four other people in DPD custody.

REASONS FOR DENYING THE PETITION

1. THE PETITION SHOULD BE DENIED IN THIS INTERLOCUTORY APPEAL BECAUSE IT NEITHER ALLEGES NOR SHOWS ANY LEGAL ERROR BY THE SIXTH CIRCUIT, AND THE FACTUAL FINDINGS OF THE COURTS BELOW CANNOT BE CHALLENGED IN THIS COURT.

This Court lacks jurisdiction in this matter because the Petition is essentially a thinly veiled attempt to revisit the facts in this case. Petitioners simply set forth their grievances and demand reform to shield them from being held accountable for their unconstitutional conduct. Although Petitioners attempt to frame their request for certiorari as issues of law, they have failed to show, or even allege, entitlement to certiorari on a single issue that was presented to the district court and affirmed by the Sixth Circuit.

In an interlocutory appeal based on the qualified immunity defense, *Johnson v. Jones*, bars appeal of the district court's factual findings that the pretrial record sets forth genuine issues of material fact for resolution by the factfinder. 515 U.S. 36, 313-320 (1995). The *Johnson* Court reasoned that such interlocutory orders are not appealable because: (1) interlocutory appeals in qualified immunity cases should be limited to issues of law, not factual disputes; (2) immunity claims are conceptually distinct from the merits of the plaintiff's claim; and (3) the existence, or nonexistence, of a triable fact is best left to trial judges, not to appellate judges.

In this case, the Sixth Circuit correctly affirmed the District Court's findings that for each of the causes of action that survived summary judgment (except the *Brady* claim against Simon), there are genuine issues of material fact that must be resolved by the jury. And even if the issue were properly before either court below, the Petitioners would not be entitled to relief in this Court because the facts of this case do not warrant the relief requested by Petitioners.

2. THIS CASE IS NOT THE APPROPRIATE VEHICLE TO MODIFY THE PROBABLE CAUSE REQUIREMENT OF A MALICIOUS PROSECUTION CAUSE OF ACTION.

Petitioners request the law of malicious prosecution be changed from a civil action may be maintained when charges filed against an individual were initiated without probable cause—to a malicious prosecution action can only lie so long as there is no probable cause to believe an individual has committed any crime. Petitioners have not provided any legal justification for making such a change.

Their description of the legal standard stated by the Court is also misleading. Petitioners state on page 6 of the Petition that the "Sixth Circuit … held that to avoid a malicious prosecution claim, all of the police officers involved in the underlying investigation (Petitioners) had to have probable cause to support the specific charge brought against Monson …. (App., *infra.*, 16a …)." This is not true, and it misrepresents the Sixth Circuit's holding. The Sixth Circuit did acknowledge that a lack of probable cause for criminal charges is an essential element of a malicious prosecution claim. It did not state that all

involved officers needed to establish probable cause for the criminal charges. The Sixth Circuit actually stated that in a malicious prosecution case plaintiff must "'provide evidence that each defendant personally violated their rights.'" Pet. App. 16a. The Sixth Circuit also held that Respondent must establish each Petitioner's individual participation in the decision to prosecute. *Id.* In Monson's case, he was able to show the different ways the individual Petitioners violated his rights and participated in the decision to prosecute.

Probable cause for a warrantless arrest by a police officer exists when it is "reasonable to believe that a crime has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152 (2006). Probable cause to prosecute means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, *that the person charged was guilty of the crime for which he was prosecuted*." *Cervantes v. Jones*, 188 F.3d 805, 811 (7th Cir. 1999) (emphasis added). A police officer that suppresses evidence, or supplies false or fabricated evidence to the prosecutor in order to induce the filing of charges against a person may be held responsible for malicious prosecution. *Sykes v. Anderson*, 625 F.3d 294, 308-309 (6th Cir. 2010). Because probable cause at the time of arrest only requires a reasonable belief that a crime has been committed or is being committed and does not require a reasonable belief that the person arrested be guilty of the crime, it is clear that probable cause to prosecute is a higher standard than probable cause to arrest.

A. This Case is not a Proper Vehicle to Amend or Modify the Probable Cause Standard for a Malicious Prosecution Civil Action Under the Fourth Amendment Where Petitioners had no Probable Cause to Arrest Monson

Petitioners choose to overlook the fact that they admit, and the trial court found, that Monson had been arrested without probable cause. It is therefore impossible to find, in this case, that other crimes existed that Monson could have been charged with at the time of his arrest. And, under the circumstances of this case, even if this Court were inclined to grant Petitioners' request for a writ of certiorari, there would be no relief this Court could grant because there was no probable cause for "any crime(s)" attributable to Monson within the knowledge of the police officers on January 20, 1996, at the time of his arrest. The 28 years that have elapsed since then has not brought forth a scintilla of evidence to suggest that probable cause ever existed to charge Monson with "any crime" at the time of his arrest. Thus, the argument that probable cause existed to charge Monson with a crime that would have prevented a malicious prosecution is a claim Petitioners know to be false.

With respect to the possibility of Monson being charged with other crimes of drug possession or drug sales, no physical evidence of illegal drug(s), or drug paraphernalia, was recovered in the apartment where Christina was found. So, if Monson were to be charged with drug related crimes, he would have to be charged under Michigan law. Under Michigan law, to prove Monson guilty of the lowest drug crime of possessing an illegal drug, the prosecutor must prove that Monson exercise

dominion and control over the drug. *People v. McKinney*, 670 NW2d 254 (Mich. Ct. App. 2003). Of course, having found no illegal drugs on Respondent or at the premises at the time of his arrest—or at any time thereafter, probable cause simply did not exist to charge Monson with any drug related offense.

Petitioners complain that:

> The Sixth Circuit rejected Petitioners argument that they had probable cause to hold him on other charges (not murder), such that the arrest was constitutional. Petitioners further argued that they continually had grounds to hold him and infringe on his liberty when he **was** charged based on these other crimes, such that Monson's malicious prosecution claim failed for the same reason (emphasis added). Pet., p. 9.

If Petitioners are stating that Monson "was" held on charges, other than murder, then this is a misstatement of the facts—Monson was never "charged" with any other crime other than murder. Pet. App. 55a. Petitioners also attempt to distance themselves from the prosecutor's decision to charge. However, Simon locked up Respondent for the crime of murder, with no evidence that he had killed Christina. Simon was the Complaining Witness in the Felony Complaint, who identified one count of "HOMICIDE MURDER FIRST DEGREE – PREMEDITATED" against Monson, and requested that he be apprehended and dealt with according to the law.

No other recommendation, including for drug sales or any other crime, was made by Petitioners despite the

so-called confession that Monson and Christina were selling drugs. And Simon's Investigators Report which contained misleading and false statements, as well as exculpatory omissions, was used and relied on by the prosecutor in its charging decision.

Thus, if Petitioners are stating that Monson "could have been charged" with other crimes at the time of his arrest, then the Petitioners have not identified any evidence to support this claim. And the claim is disingenuous in light of the admissions by the arresting officers that they had no probable cause to believe Monson had committed any crime. ECF No.237-6, Page ID. 12222 (Crockett); ECF 237-9, Page ID.12298 (Wilson). Admissions may be used to establish a fact. *Federal Rule of Civil Procedure, Rule 36(b)* ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."). These admissions were served on May 18, 2022 and have not been withdrawn or amended. What these admissions establish is that the police officers did not have probable cause to charge Monson with "any crime" at the time of his arrest at the crime scene on January 20, 1996.

Petitioners' assertion that "Monson acknowledged knowing the victim and that she held drugs for him" establishes "probable cause that Monson committed numerous drug and related crimes" is logically inconsistent, especially when the Petitioners state that Monson's "confessions" . . . have no impact on the existence of probable cause as to the drug crimes." Pet., p. 4. Monson agrees with Petitioners—his so-called confessions have no impact on the existence of probable cause to charge him with any crime. Even with such a "confession," there

would not be probable cause to charge Monson because no drugs were ever recorded or observed by police, and therefore there is no evidence a crime, i.e., a drug sale, actually occurred.

B. Petitioners Offer no Legal Support for Lowering the Probable Cause Standard in Malicious Prosecution Cases to Align With the Standard for a Warrantless Arrest

Petitioners' Statement of the Case unsuccessfully attempts to show a reviewable legal controversy in this case. According to Petitioner, "there can be no Fourth Amendment violation because, objectively, there was probable cause to believe Monson committed the drug crimes (emphasis added). Pet., p. 4 This contention is not only misplaced, it is an incorrect statement of the law and facts in this case. The statement is factually incorrect because, again, at the time of his arrest, Petitioners had no information that Respondent was involved in any alleged drug crimes, or any other crime, and therefore he had been arrested without probable cause.

Additionally, Petitioners' phraseology, including the word "committed," show that Petitioners are asking this Court to lower the probable cause standard in malicious prosecution cases brought under the Fourth Amendment and § 1983 of Title 42 of the United States Code, to align with the standard for a warrantless arrest. Recalling the definition of probable cause for a warrantless arrest stated in *Devenpeck,* i.e., probable cause for a warrantless arrest exists when it is "reasonable to believe that a crime has been or is being committed." By contrast, the standard necessary to establish probable cause to initiate criminal

charges are markedly different. Probable cause to institute a criminal charge requires "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Cervantes*, 188 F.3d at 811. Thus, the probable cause standards for instituting a criminal charge and for a warrantless arrest are not interchangeable.

There is no basis for this Court weakening the probable cause standard for malicious prosecution claims. Petitioners reference Monson's alleged conduct and the impact these cases have on local governments. But they take no ownership for their own conduct. Indeed, the best protection against being the subject of a malicious prosecution lawsuit was for Petitioners to remain faithful to their constitutional obligations. Officers who do not violate the constitutional rights of citizens by fabricating evidence and engaging in other intentional misconduct are protected against non-meritorious claims through dispositive motions and qualified immunity. Having engaged in misconduct, these Petitioners now demand weakening of standards in malicious prosecution cases, so as to further insulate against their lawless, unconstitutional behavior. When the Prosecutor's office dismissed the criminal charges against Monson, it publicly described the evidence supporting Monson's coerced confession claim and other police misdeeds, and stated that such unlawful conduct of officers cannot be condoned.

C. Petitioners' "Any Crime" Doctrine was not Raised in District Court

To the extent Petitioners are requesting that the law is changed to hold that a malicious prosecution civil action under § 1983 should not lie if there is probable cause to support any crime that could have been charged at the time Monson was arrested—without regard to whether he was actually charged with those other crimes in the complaint filed against him in the criminal case, that request is also not properly before this Court. The "any crime" theory that would eliminate probable cause to file a malicious prosecution civil action was not raised in the District Court and, as such, an appellate court ordinarily would not consider it. *Smoot v. United Transp. Union*, 246 F.3d 246 F.3d 633, 648 n.7 (6th Cir. 2001)(citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

Moreover, the Petitioners did not raise their "any crime" theory for finding probable cause to prevent the filing of a malicious prosecution civil action—in its current form before this Court—in the issues presented to the Sixth Circuit for review; thus, this Court should not consider it. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.6 (1994) ("Finding no exceptional circumstances that would warrant reviewing a claim that was waived below, we adhere to our general practice and decline to address respondent's Fourth Amendment argument."). As this Court held in *Giordenello v. United States*, 357 U.S. 480, 488 (1958): "[t]o permit . . . [a party] to inject its new theory into the case at this stage would unfairly deprive [defendant] of an adequate opportunity to respond." As stated in *Smoot*, *supra*, "[t]he purpose behind the waiver rule is to force the parties to marshal all of the relevant

facts and issues before the district court, the tribunal authorized to make finding of facts." Raising its "hybrid any crime doctrine" for the first time in appellate courts deprives Monson of an adequate opportunity to marshal the relevant facts and issues before the court.

Moreover, it is clear why Petitioners' "hybrid any crime doctrine" was not presented in district court; namely, the Petitioners were well aware that at the time of Monson's arrest, there was no probable cause to arrest Monson for "any crime." The Petitioners should not be permitted to make an end run around their deliberate decision not to raise their "hybrid any crime doctrine" in district court.

D. The Sixth Circuit Already Applies the "Any Crime" Doctrine

First, and foremost, the Sixth Circuit already applies the "any crime" standard in civil actions alleging malicious prosecution under the Fourth Amendment. In the case of *Howse v. Hodous*, 953 F.3d 402, 408-409 (2020), the Sixth Circuit held:

> Howse . . . argues that Hodous and Middaugh committed malicious prosecution when they helped prosecutors charge him with two counts of assault and one count of obstructing official business. To win on that claim, Howse must show that the officers helped start a prosecution against him without probable cause. *King v. Harwood* , 852 F.3d 568, 580 (6th Cir. 2017). Probable cause exists when there are enough "facts and circumstances" to make a reasonable person believe that "the accused was guilty of

> the crime charged." *Webb v. United States*, 789 F.3d 647, 660 (6th Cir. 2015).
>
> * * *
>
> Howse himself admitted that he tried to make it more difficult for the officers to arrest him by stiffening up his body and screaming at the top of his lungs. That's enough to provide probable cause for the obstructing official business charge.
>
> * * *
>
> And because there was probable cause for that charge, Howse cannot move forward with any of his malicious prosecution claims. *Howse*, 953 F.3d at 408.

Thus, so long as a prospective plaintiff is "charged" with more than one crime in the charging instrument, probable cause for any one of the crimes charged will prevent a malicious prosecution claim on any charge that was dismissed. It should be noted that Monson was wrongfully charged with only a single count of first-degree premeditated murder. Thus, under the facts and circumstances of Monson's case, the "any crime" doctrine as it exists in the Sixth Circuit, does not apply because there is no other crime actually alleged in the criminal complaint filed against Monson.

E. Petitioners' New Hybrid "Any Crime" Doctrine Does Not Apply

If Petitioners seek a hybrid "any crime" doctrine that applies to charges that could have been alleged in a criminal complaint against Monson for which there was probable cause for other crimes that may have existed at the time of Monson's arrest—then Petitioners would still lack grounds for dismissal of Monson's malicious prosecution claim under a hybrid "any crime" doctrine because Monson's arrest was without probable cause to believe he had committed "any crime." Again, the district court determined that Monson's arrest was without probable cause:

> Monson was "detained at the scene" because he "was not free to leave, *** "[although] [D] efendants continue to argue in the briefing that Monson's mere presence at the scene [provided] probable cause to arrest him, [t]he Court has already ruled that it [did] not." See *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

The District Court's decision was based on the record evidence, including sworn testimony of the arresting officers. Thus, the Sixth Circuit correctly affirmed the District Court's determination that Respondent had been arrested without probable cause.

3. THE PETITION DOES NOT IDENTIFY A REVIEWABLE OR COGNIZABLE LEGAL QUESTION SPECIFIC TO THE SIXTH CIRCUIT'S RULINGS ON PETITIONERS' SUMMARY JUDGMENT REQUESTS RELATED TO MONSON'S TWO STATEMENTS

Petitioners' summary judgment motion disputed the sufficiency of the factual record surrounding Respondent's claim that his first statement contained fabrications, and his second statement was completely fabricated. The District Court ruled that there are genuine issues of material fact supporting Respondent's claims against Simon, Braxton, and Ghougoian related to the two statements. Because sufficiency of the evidence is not appealable on a qualified immunity interlocutory appeal to the Sixth Circuit, Petitioners attempted to identify "neat abstracts of law" related to the statements. To do so, Petitioners argued for the first time that the claim that judicial estoppel and the sham affidavit doctrine precluded Respondent's claim that the first statement contained fabrications. Petitioners also alleged, for the first time, that Respondent waived his right to contest the voluntariness of his second statement because he signed Miranda warnings.

The Sixth Circuit rejected Petitioners' "legal" challenges. Although the Sixth Circuit held the claims were waived since they had not been raised on summary judgment, it nonetheless evaluated Petitioners' claims. The Court found that estoppel and the sham affidavit are inapplicable to the facts of the case, and a confession can still be coerced after a person is given Miranda rights. As they did below, Petitioners now raise new theories before this Court regarding Monson's two statements.

Petitioners make the false claim that Respondent is now claiming that his first statement, given to Simon, was involuntary. Respondent has never made that claim. Petitioners also claim that Respondent testified at his Walker hearing that the first statement was "true and voluntary." That is true. Respondent's answer to an overbroad question at his Walker hearing did not conflict with the testimony at his deposition – more than 25 years later. At his Walker hearing, Respondent was asked:

> Q. … did you give a statement to … officer … [Simon]? ***
>
> A. Yes, sir.
>
> Q. The Statement you gave her at that time, was that statement true and voluntarily given?
>
> A. Yes, it was.

ECF 241-3, PageID.12826.

In the Second Amended Complaint, Monson alleges that Simon included certain things in the Statement she drafted that were not true. In his Complaint and at his deposition Monson testified that he and Simon argued for hours about his account of what happened, and she continually insisted that he did things he did not do. At his deposition, Petitioners' counsel went through the multi-page statement written by Simon and asked Monson about the different alleged questions and answers in the document. Monson responded to each account, confirming or denying whether those were his words, or Simon's.

ECF 241-8, PageID.13321-13331, and *passim*. When asked about his Walker hearing testimony that the Statement was true and voluntarily given, Monson testified:

> My answer of yes to that question was pertaining to the fact that I had no involvement in the murder of Christina Brown. ECF 241-8, PageID.13326.

Monson also pointed Petitioners' counsel to his testimony in the Walker hearing where he testified that he and Simon argued about his statement for about three hours. *Id.*

In this case, Petitioners seek a court ruling that Respondent should be prevented from explaining his Walker hearing testimony, and that they should be entitled to a ruling that Respondent's answer to an overbroad question about a statement he gave that Simon wrote out over five pages should be interpreted in a way that is beneficial to Petitioners. While they certainly have the right to challenge Respondent on the issue, Petitioners have no right to insist that the Court enter an order adopting Petitioners' version of events.

A. The Petition Appears to Present Multiple Questions Related to Respondent's Statements, and the Questions Assume Facts Inapplicable to This Case

The second question presented in the Petition is confusing and described differently within the document. Question 2 asks:

"Whether an individual can challenge the *voluntariness of a statement* in a suit brought under Section 1983 after being given the opportunity to challenge it and testifying under oath that it was voluntary in state court?"

The question does not involve a fact pattern in this case, because the only statement that Respondent testified was voluntary was his first statement, and he has never challenged the voluntariness of that statement.

Next, in the Introduction this Court is requested to:

> "address the bounds of sworn testimony, including the ability of a party to recant sworn statements." Pet., p. 3.

This question is very broad, seemingly extending to numerous fact patterns that are unrelated to the facts here. The question also falsely suggests that one or both of the statements signed by Respondent were sworn under oath.

Finally, in their Reasons for Granting the Petition, Petitioners ask the Court to:

> Hold that a Party cannot challenge a *Confession* when that party previously swore under oath that the *Confession* was true and voluntary. Pet., p. 11.

To make it appear that a controversy actually exists regarding positions taken by Respondent, Petitioners also conflate the false confession coerced by Ghougoian and Braxton, with the voluntary statement taken by

Simon that contained some fabrications. Monson's position has always been consistent that his first statement was voluntary, although it contained false statements added by Simon. He has always testified that the second statement – the false confession that he stabbed Christina – was coerced.

B. The District Court was not Asked to Address Either Iteration of Question 2

With respect to the two statements at issue in this case, Petitioners argued on summary judgment that the evidence does not support Monson's claim that either statement contained fabrications. Similarly, Simon and Braxton argued Respondent failed to "prove" that Simon fabricated non-testimonial evidence, or that it had a reasonable likelihood of affecting the jury's decision. ECF 241, PageID.12783-85. The District Court found that the fabrication of evidence claims against all Petitioners were supported by the evidence, in various ways.

Respecting Ghougoian's illusory promise that Respondent could go home if he signed an "informational summary," Petitioners argued on summary judgment that conflicts in Monson testimony established that Ghougoian did not violate Monson's clearly established rights. Petitioners also claimed Respondent failed to establish that Ghougoian's conduct was objectively coercive. ECF 241, PageID.12791. The District Court held that before 1996 it had been clearly established that a promise of lenient treatment in return for an inculpatory statement is coercive. The District Court also found that the record contained genuine issues of material fact, precluding summary judgment related to Monson's claim that his

constitutional rights had been violated. The District Court found that there was sufficient evidence that Ghougoian coerced a false confession, but dismissed that claim against Braxton.

The Sixth Circuit correctly affirmed the District Court's legal conclusion that the constitutional violation had been clearly established before 1996. The District Court's factual findings were affirmed based on the Sixth Circuit's review of the record.

C. Petitioners Raise new Issues in the Sixth Circuit Regarding the two Statements That Were not Raised in District Court

The Petitioners' claims to the Sixth Circuit included factual disputes, but also new theories. Petitioners argued in their interlocutory appeal that Respondent should be judicially estopped from arguing that the second statement contained fabrications. Petitioners further argued on appeal that the sham affidavit doctrine precludes Monson from asserting that the first statements contained fabrications because during one of his criminal hearings he testified that the first statement he gave Simon was true and voluntary. While Respondent did so testify, the question presented to him about the first statement was broad and general, and not focused on any particular question or answer in the statement. *See, e.g., Reich v. City of Elizabethtown,* 945 F.3d 968, 976 (6th Cir. 2019), cert. denied, 141 S. Ct. 359 (2020) (affidavit must be direct contradiction to earlier testimony; "contradiction" is narrowly defined in the Sixth Circuit). Monson also did not provide an affidavit on this issue after Petitioners' summary judgment motion. More importantly, the

question asked of Respondent during that hearing did not distinguish between the verbal statement given by Monson to Simon, and what Simon wrote in the document. These points were made by Respondent during his deposition in this case.

The Sixth Circuit rejected Petitioners' evidence insufficiency arguments, as well as their new claims related to estoppel, the sham affidavit doctrine, and waiver related to Respondent's Miranda warning. The appellate court held:

In response to the district court's ruling, Defendants point out that Monson voluntarily endorsed a notification of his constitutional rights and that he had "not been threatened or promised anything." This, they argue, defeats any coercion claim. *A waiver can be voluntary, however, and a subsequent confession can still be coerced*. … *See Williams v. Withrow*, 944 F.2d 284, 289 (6th Cir. 1991) (finding a confession involuntary even after Miranda warnings), rev'd on other grounds, 507 U.S. 680 (1993). The same is true here. Monson alleged that Ghougoian induced him to sign the statement based on false promises. Even if he chose to endorse this constitutional notification, his resulting statement may still qualify as coerced. In this regard, the District Court held:

> Monson's statements at an earlier hearing do not alter this analysis. Defendants submit that because of minor differences between Monson's earlier and later statements about Ghougoian's conduct, he should be prevented from arguing that Ghougoian promised him anything. But here, too, judicial estoppel does

> not apply—there is no evidence any court relied on the minor differences between Monson's testimony, and in any event, Monson lost the earlier proceeding.
>
> * * *
>
> Taking 'the facts that the district court assumed,' as we must, *see* Johnson, 515 U.S. at 319, 'early [on January 20], Ghougoian interrogated Monson and promised him that he could go home if he signed a Second Statement.' '[Monson] agreed to the deal, and Braxton typed up the selfdefense story that Ghougoian had contrived.' The court held that 'the evidence amply supports Monson's allegations that Ghougoian made false promises of leniency to Monson which Ghougoian knew would not be fulfilled.' Defendants' arguments do not undermine [the] legal conclusion [that Ghougoian's conduct violated clearly established law], and we therefore affirm (emphasis added). Pet. App. 21a-22a.

There should be no dispute that, under the facts and circumstances of this case, the Sixth Circuit correctly affirmed the District Court's holding that the jury must determine whether Monson's second statement was coerced. And, as such, it is not subject to interlocutory review pursuant to this Court's decision in *Johnson*. *See* ECF 292, PageID.22313 ("Accordingly, the evidence amply supports Monson's allegations that Ghougoian made false promises of leniency to Monson which Ghougoian knew would not be fulfilled. So, for the reasons given in

the Court's opinion on the motion to dismiss, The Court finds that there are genuine disputes as to material facts and DENIES the motion as to this claim." (*See* ECF 43, PageID.1934-1938)).

D. There is no Need for This Court to Create new Rules Where Legal Remedies Already Exist

Petitioners' second question seeks resolution of a nonexistent void in the law. As demonstrated by their new Sixth Circuit arguments, Petitioners are aware of the judicial remedies that can be employed when a witness changes their sworn testimony; i.e., judicial estoppel and the sham affidavit document. These remedies do not apply to the facts in this case, as held by the Sixth Circuit. And Petitioners also have the ability to attempt to impeach or discredit Respondent, and let the jury – not the court – decide his credibility. But Petitioners are well aware they will not be able to discredit Respondent because he has never claimed his first statement was coerced, and he has never testified that his second statement was voluntary.

4. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR PETITIONERS TO CHALLENGE *THOMPSON V. CLARK* BECAUSE PETITIONERS DID NOT RAISE ANY ISSUES RELEVANT TO *THOMPSON V. CLARK* BELOW

For the first time in this litigation, Petitioners complains that malicious prosecution claims are housed in the Fourth Amendment. Below, Petitioners seemingly lauded that fact, repeatedly asserting that the Fourth Amendment is the "proper point of analysis." *See, e.g.,* Petitioners' Brief on Appeal to Sixth Circuit, Document

36, page 28. This Court's decision in *Thompson v. Clark*, answered only one narrow question at issue: what does it mean for the prosecution of a claim based upon malicious prosecution to be terminated in favor of the plaintiff? In this regard, this Court held that "[a] plaintiff need only show that the criminal prosecution ended without a conviction." Before the District Court, Petitioners agreed that Respondent obtained a favorable termination of the underlying criminal prosecution. ECF 292, PageID.22268-69. Therefore, since a favorable termination of Monson's criminal charges is not an issue in this appeal, the *Thompson* decision does not apply to any issue raised in the Petition.

Notwithstanding their contrived claim that malicious prosecution claims "have blossomed into creatures foreign to the Fourth Amendment[]" under *Thomas v. Clark*, Petitioners fail to identify, or even allege, a single error made by the Sixth Circuit, and certainly nothing that remotely relates to the questions they present in this case. They never claimed below that Sixth Circuit opinions fuel conflicts with prior opinions on the Fourth Amendment's objective analysis or principles, or violate the tenets of this Court's holdings in *Devenpeck* and *Graham*. In fact, citing *Devenpeck* and *Graham,* Petitioners argued to the Sixth Circuit that malicious prosecution claims should be analyzed under the Fourth Amendment, which protects against unreasonable seizures, i.e., seizures unsupported by probable cause. Petitioners sought dismissal on summary judgment, claiming that there was probable cause for Respondent's arrest *and* prosecution. Petitioners also argued that they were entitled to qualified immunity because no constitutional violation ever occurred, or the constitutional violation was not clearly established at the time of Respondent's arrest.

In response, Respondent pointed to the considerable factual record, the circumstances surrounding his arrest, and the arresting officers' admissions that Petitioners had no probable cause to believe that Respondent had committed any crime at the time of his arrest. The District Court also found, on the record evidence, that Respondent was arrested without probable cause. With respect to Petitioner's claims of qualified immunity, the District Court found that: (1) genuine issues of material fact existed precluding summary judgment on the claims that Petitioners had violated Respondent's constitutional rights; and (2) it had been clearly established well before 1996 that fabrication of evidence, malicious prosecution, and an illusory promise of lenient treatment in exchange for an inculpatory statement are constitutional violations. After undertaking review of the considerable factual record, the Sixth Circuit dismissed Respondent's Brady claim, and it properly affirmed the District Court's rulings with respect to the surviving claims.

CONCLUSION

This Court lacks jurisdiction over the issues raised by Petitioners. They do not identify error in the Sixth Circuit's rulings on Petitioners' interlocutory appeal of the District Court's order denying qualified immunity. Also, because the questions presented in the Petition are not based on the record evidence, certiorari would not change the outcome in this case. Finally, the Petition does not address any claim at issue in *Thompson v. Clark*. Therefore, this case is not a proper vehicle for granting certiorari in this case, and the Petition should be denied.

Respectfully submitted

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