NO. 23-50

In the
Supreme Court of the United States

JASCHA CHIAVERINI, ET AL.,

Petitioners,

v.

CITY OF NAPOLEON, OHIO, ET AL.,

Respondents.

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

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Teresa L. Grigsby
Jennifer A. McHugh
SPENGLER NATHANSON PLL
900 Adams Street
Toledo, OH 43604-2622
(419) 241-2201
tgrigsby@snlaw.com
jmchugh@snlaw.com

Megan M. Wold
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
mwold@cooperkirk.com

Counsel for Respondents

October 20, 2023

QUESTION PRESENTED

To make out a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983, a plaintiff must show a prosecutorial seizure without probable cause. The question presented is: In a Fourth Amendment malicious prosecution claim, must a court presume that every charged offense changes the nature or duration of the plaintiff's prosecutorial seizure, or may a court require the plaintiff to show that any charge unsupported by probable cause changed the nature or duration of the plaintiff's seizure?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES AND CODES

STATEMENT OF THE CASE

A. Chiaverini Purchases Stolen Property and Repeatedly Refuses to Return It.

Petitioner Jascha Chiaverini managed a jewelry store in Napoleon, Ohio called the Diamond and Gold Outlet (the "Outlet"). [1] Petitioner Chiaverini, Inc. owned the Outlet.

On behalf of the Outlet, Jascha Chiaverini purchased stolen jewelry from a thief named Brent Burns. R.97-1, Page ID #2504–05; R.93-4, Page ID #2311. The jewelry actually belonged to David and Christina Hill, who called Chiaverini multiple times to seek its return. *Id*. Chiaverini refused and told the Hills to file a police report. *Id*.; *see also* R.98, Page ID #2557. On the last call, David Hill told Chiaverini: "I know you bought it … [Y]ou bought it from Brent Burns." *Id*. Chiaverini replied, "[T]his conversation is ending." *Id*.

Later the same day, the Hills went to the Outlet to retrieve their stolen property, and in a confrontation with David Hill, Chiaverini again refused to return the Hills' stolen jewelry. R.97-1, Page ID #2504–05; R.98, Page ID #2557. David Hill called the police for help.

---

[1] The Petition calls both Jascha Chiaverini and Chiaverini, Inc. "Petitioners" in this action, Pet. ii, but the only claim at issue pertains to malicious prosecution, and Chiaverini has already "concede[d] that Chiaverini, Inc. cannot maintain actions for malicious prosecution or false arrest and imprisonment." R.135, Page ID #3882 n.11. Accordingly, Respondents will refer throughout to "Petitioner" to mean only Jascha Chiaverini.

Chiaverini also called the police. For his part, Chiaverini told the police dispatcher: "There's going to be a man calling you making a police report on some jewelry. Okay? … I believe—and I'm not going to talk to him and I'm not going to get into a pissing battle with the victim or something here. But I believe I may have his property." R.93, Page ID #2022. As Chief Weitzel later testified, calls of this kind are not necessarily indicative of innocence: "I've seen many, many cases where somebody rushes to the phone to make excuses." R.93, Page ID #2024.

The dispatcher told Chiaverini, "I'm going to put you on hold real quick. I think the other dispatcher might be on the line with that." R.93, Page ID #2022. Indeed, another dispatcher was on the phone with David Hill at that moment. The dispatcher then told Chiaverini that officers were on their way. *Id*.

Respondents Steward and Evanoff were dispatched to the Outlet to respond to the Hills' complaint that Burns had stolen their jewelry. R.93-4, Page ID #2311. Officer Steward spoke with David Hill outside, while Officer Evanoff went inside to talk to Chiaverini. *Id*. Chiaverini told Officer Evanoff that in the past, Burns had brought in fake jewelry. R.98, Page ID #2552. Even though Burns brought in real jewelry on this day, Chiaverini did not ask Burns where he acquired the jewelry. R.98, Page ID #2555. Chiaverini said he had Burns fill out a buy card for the jewelry because he suspected Burns had stolen it. R.93-4, Page ID #2311.[2]

---

[2] Officer Steward added this detail to his narrative summary after he initially prepared that document. Officer

After collecting information separately and comparing notes (including pictures of the jewelry in question), Steward concluded that Chiaverini was indeed in possession of jewelry that belonged to the Hills and had been stolen by Burns. *Id.* Officer Evanoff told Chiaverini to hold the items in question and not sell them because they were confirmed to belong to the Hills. *Id.*

The next day, police delivered a hold letter to Chiaverini, R.98, Page ID # 2558, which stated:

> I have confirmed that a men's ring, white gold with six stones in three recessed settings and a princess cut diamond stud earring was sold to your store on November 16, 2016 for a price of $45.00. These items were stolen regarding case #16-009538 in the City of Napoleon, Henry County Ohio. I am formerly [sic] requesting that you hold this item as in ORC 4727.12 states, as evidence of the crime of Theft. Please accept this letter as the official request for retaining the items that are

---

Steward testified that he did not initially include this detail because when he wrote the narrative summary, Chiaverini "wasn't under investigation for receiving stolen property[,] … [i]t was Brent Burns being investigated for the theft." R.88, Page ID #1026. Later, when Chiaverini had repeatedly refused to return the Hills' property and was therefore suspected of the offense of receiving stolen property, "it was now important information," and Officer Steward added it to the narrative summary. *Id.* Chiaverini disputes this statement and testified that he did not suspect the jewelry was stolen when he purchased it. Police Chief Weitzel testified that narrative summaries "are live documents" and that "on a fairly regular basis" "[y]ou remember something you should have put in" and "go back and put it in," just as Officer Steward did. R.93, Page ID #2027.

> confirmed to be stolen and the rightful owner being David Hill …. Please release these items to David or Christina Hill.

R.93-11, Page ID #2370. Soon after, Christina Hill went to the Outlet to pick up her stolen jewelry, but again, Chiaverini refused to return it. R.98, Page ID #2559–60. Instead, he called the police.

Officer Steward prepared the call report:

> [Jascha Chiaverini] stated that he did not want to return the stolen items because they were "his property." Jascha exclaimed that he was choosing to not return the stolen items because of a previous interaction with David Hill the day before. Jascha was still upset with how David approached him regarding the stolen property. He continued to explain to us and Christina that he didn't even have to hold the property, despite being issued a letter of hold earlier in the shift. Ptl. Evanoff escorted a distraught Christina to the parking lot where I remained in a dialogue with Jascha. At this point Jascha told me that he would be within his rights if he "put that ring in his crucible and took a torch to it."

R.92-6, Page ID #1839. When deposed, Chiaverini did not deny having made these statements. R.98, Page ID #2559.

A few days later, Chiaverini went to the police station and confronted Police Chief Weitzel about the Hills' stolen jewelry. R.98, Page ID #2562. Chiaverini told Chief Weitzel that he would not release the

jewelry, and he also implied that he did not have a license to operate the Outlet (Chiaverini appears to have believed this fact would absolve him from obeying the hold letter). R.98, Page ID # 2562–63; R.93, Page ID #2037. Officers Steward and Evanoff also returned to the Outlet and offered to make Chiaverini a "co-victim," so he would be entitled to restitution for the cost of purchasing the Hills' stolen jewelry. R.88, Page ID #1023–24. Chiaverini refused this offer and refused to return the stolen jewelry. *Id.*; R.98, Page ID #2563.

B. Chiaverini Is Charged With Three Criminal Offenses.

By this time, Chief Weitzel feared the Hills' stolen jewelry would be lost because Chiaverini was refusing to honor the hold letter. R.93, Page ID #2041. Chief Weitzel then reviewed the Ohio Department of Commerce's website and determined that a license formerly issued to the Outlet had been cancelled. R.93, Page ID #2037–38. Chief Weitzel reasonably believed Chiaverini had committed the crime of receiving stolen property: "At the point where [Chiaverini] continually refused to turn [the jewelry] over, he was retaining possession, knew it was stolen. He didn't have a license, so he had no protection under the license. He was now receiving stolen property." R.93, Page ID #2045.

After consulting with the Napoleon Law Director, Billy Harmon, who also consulted with the Henry County Prosecuting Attorney, Officer Evanoff applied for a search warrant and arrest warrant. R.92-3, Page ID #1790; R.92-1, Page ID #1585. The probable cause affidavit in support of the arrest warrant described

that Chiaverini had been "informed by the Napoleon Police Department that [a ring in his possession] was confirmed stolen," and that Chiaverini "furthered the commission of corrupt activity by refusing the return of this stolen property." R.91-4, Page ID #1374. Also, Chiaverini "was … learned to be operating this business without the proper licenses required by the state of Ohio since 06-30-2013." *Id*. A municipal judge reviewed and signed the arrest and search warrants.

Respondent Evanoff also charged Chiaverini with three criminal offenses: (1) receiving stolen property in violation of Ohio Rev. Code § 2913.51(A); (2) license requirements in violation of Ohio Rev. Code § 4728.02; and (3) money laundering in violation of Ohio Rev. Code § 1315.55(A)(1). The money laundering charge depends on an underlying "corrupt activity," which is defined to include "[r]eceiving stolen property" in violation of Ohio Rev. Code § 2913.51(B). Ohio Rev. Code §§ 1315.55, 2923.31(I). The offense of "[r]eceiving stolen property" says "[n]o person shall receive, *retain*, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." Ohio Rev. Code § 2913.51(A) (emphasis added).

On December 2, 2016, officers executed the search warrant at the Outlet and seized the Hills' stolen jewelry, along with items related to the licenses, sales, and purchases of precious metals, which would be relevant to Chiaverini's licensure charge. R.42-8, Page ID #569, 578. They arrested Chiaverini, who was released on bond three days later. R.98, Page ID #2566–67.

C. At a Preliminary Hearing, a Judge Determines Probable Cause Supports the Charges Against Chiaverini.

On December 12, 2016, a judge conducted a preliminary hearing on Chiaverini's felony money-laundering charge. The judge heard conflicting testimony from Officer Evanoff and Chiaverini about whether Chiaverini told Officer Evanoff he suspected the jewelry was stolen when he bought it from Burns. *Compare* R.42-8, Page ID #573–74, 626. The judge was presented with a copy of the police letter issued to Chiaverini and heard Chiaverini testify about why he did not return the jewelry to the Hills. R.42-8, Page ID #623. The judge determined that probable cause existed to suspect that Chiaverini had committed the crime of money laundering under Ohio law, premised on the underlying corrupt activity of receiving stolen property. The judge explained:

> I do not see the ambiguity of the [hold] letter sent to the defendant in Defendant's Exhibit #1. The last sentence of that letter states, please release these items to David or Christina Hill. It was further testified that Ms. Hill went to the store with two uniformed police, and that letter was signed by the Chief of Police, the testimony was that Ms. Hill and two officers in uniform went to the store and were not released that property. And the property was only then obtained after the conduct of the search warrant in conjunction with the arrest of the defendant on these charges.

> Certainly with the sending of this letter [sic] the defendant, I find that … the defendant had probable cause to believe these items were stolen and he retained them contrary to the clear statement of the Chief of Police and the patrolman whose case this was.
>
> Did the defendant conduct or attempt to conduct the transaction knowing that the property involved in this transaction was proceeds? … In this case, there were [sic] conflicting evidence that there was testimony that the defendant said he knew that the property or he knew that the property was likely to be stolen at the time he bought it from Mr. Burns. And in fact Mr. Burns has been charged with a theft offense. The defendant did testify that was not the case. But given the other circumstances surrounding the retention of this property, in the face of what I determine to be clear evidence and clear direction to give this property back. To me that speak [sic] with his purpose in the matter as well.
>
> Therefore I am going to find that there is probable cause to believe … the defendant committed that crime in these cases.…

R.42-8, Page ID #640–42.

D. The Charges Against Chiaverini Are Dismissed Without Prejudice.

Ohio's procedural rules required a grand jury to take final action within 60 days of the judge's order at

the preliminary hearing. When that window elapsed, the criminal charges against Chiaverini were dismissed without prejudice.

E. Procedural History.

Chiaverini and Chiaverini, Inc. filed a complaint against Officers Evanoff and Steward, other individual defendants, and the City of Napoleon. The complaint sought over $3 million in damages and alleged ten counts, including common law and constitutional violations for unlawful search and seizure, false arrest, and malicious prosecution. R.1-1, Page ID #24, 30–31.

The officers moved for summary judgment based on qualified immunity and state-law immunity. The district court granted summary judgment because "probable cause existed for both [Chiaverini's] arrest and continuation of legal proceedings." R.135, Page ID #3882. The district court concluded that Chiaverini's arrest and search warrants were not issued on the basis of knowing or reckless falsehoods. The district court also concluded that the preliminary hearing was not deficient because the state court judge had not relied on the disputed testimony about Chiaverini's suspicions at the time he purchased the stolen jewelry, but relied on his refusal to return the items to the Hills after police had confirmed the theft. *Id*. Chiaverini appealed.

The Sixth Circuit denied Chiaverini's claims on appeal because "[p]robable cause justified [his] search, arrest, and prosecution." Pet. App. 9a. Specifically, the court held that "there was probable cause to arrest and prosecute [Chiaverini] for both his receipt of

stolen property and the licensure violation," and for that reason "all of Chiaverini's … malicious prosecution claims fail." *Id.* at 10a. The court did not decide whether probable cause supported Chiaverini's money-laundering charge. *Id.* at 10a n.10. Because probable cause supported two of Chaiverini's three charges, the Sixth Circuit concluded that Chiaverini was "no more seized when he was detained to await prosecution for several charges than if he were seized for just one valid charge." *Id.* at 10a (cleaned up).

SUMMARY OF THE ARGUMENT

Petitioner incorrectly labels the Sixth Circuit's rule an "any crime rule." In fact, probable cause supporting "any crime" charged does *not* automatically negate a claim of malicious prosecution in the Sixth Circuit. If a plaintiff can show that an additional crime unsupported by probable cause changed the nature of the prosecutorial seizure or lengthened its duration, then the lack of probable cause could support a claim of malicious prosecution.

In light of that fact, Petitioner's alleged circuit split is narrow in scope. The Third Circuit applies substantially the same rule as the Sixth Circuit, and to the extent the Second and Eleventh Circuits depart from that approach, they do so merely because they apply a *presumption* that additional, unfounded charges change the nature or duration of a prosecutorial seizure, rather than requiring a plaintiff to demonstrate that fact. Indeed, *at most* Petitioner's alleged circuit split is implicated only where a charged crime is unsupported by probable cause but does not change the nature or duration of the accused's seizure—a circumstance that would entitle a plaintiff

to nominal damages at best, under the Eleventh Circuit's most plaintiff-favorable rule.

Petitioner's alleged circuit split is also shallow, implicating only four circuits after percolating for more than thirty years. That is a further indication that the question presented here recurs only rarely. In more than thirty years, only four courts of appeals have had a reason to weigh in.

Lastly, this case is a bad vehicle for certiorari review because even if this Court were to favorably decide the Petition, it would not ultimately affect the outcome of the case. Even if Petitioner's money-laundering charge is not supported by probable cause, Petitioner cannot demonstrate that the money-laundering charge deprived him of liberty any more than did his arrest on the other two charges. Respondents are also entitled to qualified immunity. Accordingly, any review by this Court will have no effect on the final disposition of this case. The Court should conserve its judicial resources for a case in which its review could change the outcome.

Respondents urge the Court to deny Petitioner a writ of certiorari.

ARGUMENT

I. The Sixth Circuit's Rule Is Not an "Any-Crime" Rule.

Petitioner acknowledges that *Howse v. Hodous*, 953 F.3d 402, 414 (6th Cir. 2020), is the "Sixth Circuit's most extended discussion of" the role probable cause plays in deciding a malicious

prosecution claim, but Petitioner misstates the rule of *Howse* as an "any crime" rule. It is not.

In *Howse*, the Sixth Circuit explained that a malicious prosecution claim arises under the Fourth Amendment, and is "really a claim for an 'unreasonable prosecutorial seizure' governed by Fourth Amendment principles." 953 F.3d at 408–09; *see Thompson v. Clark*, 142 S. Ct. 1337, 1341 (2022) (subsequently holding that § 1983 malicious prosecution claims arise under the Fourth Amendment). The Sixth Circuit analogized this "prosecutorial seizure" to a Fourth Amendment claim for false arrest. In a Fourth Amendment false arrest claim, courts look to whether probable cause existed for the arrest. Where an arrest is based on multiple charges, it is not relevant whether probable cause existed for each charge so long as probable cause existed for the arrest. 953 F.3d at 409. "What matters is the validity of the *arrest* (the seizure) and not the validity of every *charge* (the potential justifications for the seizure)" because as long as "the facts known to the officers support probable cause in any form, then an individual may lawfully be arrested." *Id*. at 409.

The Sixth Circuit then applied the same principle to a claim of malicious prosecution: "[J]ust like in the context of false arrests, a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge." *Id*. So, where an individual is detained on multiple charges, so long as probable cause supports *one* of the charges, no Fourth Amendment malicious prosecution claim will lie. *Id*.

Petitioner stops there, but the *Howse* opinion does not. *Howse* goes on to note that adding additional meritless charges "does not change the nature of the seizure," but "[i]f *hypothetically it were to change the length of detention*, that would be a different issue." *Id.* at 409, n.3. In *Howse*, "the plaintiff [did] not present[] any evidence that the additional assault charges caused Howse to suffer longer detention," and so it was sufficient that the plaintiff's detention was supported by probable cause as to one charge. *Id.*

The Sixth Circuit's rule is thus not an "any-crime rule," as Petitioner contends, but a length-of-detention rule based on the injury a malicious prosecution plaintiff claims to have sustained. If probable cause exists for only one of multiple charges (in other words, if probable cause exists for "any crime"), a plaintiff generally cannot prove malicious prosecution *unless* the unfounded charges changed the nature of the plaintiff's seizure or prolonged the plaintiff's detention. *Id.*

Although *Howse* had been published two years earlier, Petitioner's appellate briefing did not argue that any of the charges against him "change[d] the length of [his] detention" or otherwise "change[d] the nature of [his] seizure." *Id.* In particular, Petitioner did not claim that the nature or duration of his seizure was changed by the additional money laundering charge, the only charge for which the court below did not engage in a probable cause analysis. Accordingly,

Petitioner has waived any argument along these lines by failing to present it in the court of appeals.[3]

The court below followed *Howse* and specifically cited that opinion. Pet. App. 10a.

II. The Rule of Other Circuits Is Not Substantially Different.

Petitioner claims that three circuits have adopted a rule clearly contrary to the Sixth Circuit's, but in

---

[3] In connection with his false arrest claim in the district court, Petitioner argued that "[b]ut for the felony money laundering charge, Mr. Chiaverini would have been issued a summons," not arrested. R.102, Page ID #2755. Petitioner did not raise this argument in connection with his malicious prosecution claim in the district court, and did not raise it in the appellate court at all. Accordingly, it is waived.

Regardless, misdemeanors committed in the presence of an officer are subject to arrest in Ohio, *State v. Hipsher*, 2023 WL 6799331, at *2 (Ohio Ct. App. Oct. 16, 2023), and Petitioner's misdemeanors here were committed in the presence of an officer (receipt of stolen property committed by retention and improper licensure). Petitioner would have been arrested and detained on these charges with or without the money laundering charge.

Furthermore, Petitioner has admitted he was a convicted felon who possessed a gun on the Outlet premises at the time of his arrest, which provides another independent justification for Petitioner's arrest. R.98, PageID #2518, 2523.

To the extent the Petition suggests Petitioner suffered reputational damage attributable to the money laundering charge, Pet. 9–10, that argument has been waived for the reasons already given, is factually unsupported, and is irrelevant in any event. The Fourth Amendment protects against unreasonable *searches and seizures*, and Petitioner's malicious prosecution claim sounds in the Fourth Amendment. Reputational damage does not change the nature of a search or seizure and cannot demonstrate a violation of the Fourth Amendment.

reality, these circuits' rules are not substantially different.

The Second, Third, and Eleventh circuits examine each charge for probable cause because additional charges can change the nature of a plaintiff's seizure or prolong a plaintiff's detention. The Sixth Circuit also considers these factors and does not absolve a defendant of liability for malicious prosecution where an unfounded charge changes the nature of the plaintiff's seizure or prolongs the plaintiff's detention.

1. In *Johnson v. Knorr*, 477 F.3d 75 (3d Cir. 2007), the Third Circuit considered a malicious prosecution claim where the plaintiff had been charged with simple assault, aggravated assault, making terroristic threats, and reckless endangerment. 477 F.3d at 79. The Third Circuit noted the difference between multiple charges of similar significance and multiple charges of widely varying severity. Where multiple charges are of similar significance, the plaintiff "could have been lawfully arrested and thus seized on at least one charge," but "on the other hand," where prosecution is for multiple disparate charges "the additional charges for which probable cause is absent almost surely will place an additional burden on the defendant." *Id*. at 84.

Accordingly, the Third Circuit held that when a malicious prosecution claim is "based on the prosecution of more than one charge," "the validity of the prosecution for each charge comes into question inasmuch as the plaintiff was subject to prosecution on each individual charge which, … is likely to have placed an additional burden on the plaintiff." *Id*. at 85. The Third Circuit further clarified that the types of

burdens that are relevant to a malicious prosecution claim are those that "sound[] in the Fourth Amendment" for which "the plaintiff must show some deprivation of liberty consistent with the concept of seizure." *Id*. at 85, & n.14. The Third Circuit stopped short of holding that every charge must *always* be supported by probable cause to defeat a claim of malicious prosecution. Rather, the Third Circuit held that "a defendant initiating criminal proceedings on multiple charges *is not necessarily insulated* in a malicious prosecution case merely because the prosecution of one of the charges was justified." *Id*.

Here, Petitioner was not subjected to prosecution on each of the charges against him. Rather, he was detained for three days—a detention that would have been identical in length whether he had been subject to the money-laundering charge or not. And, in keeping with the Third Circuit's approach, the Sixth Circuit below did "separately analyze the charges claimed to have been maliciously prosecuted," concluding that probable cause supported two of them. *Id*. at 85. While the Sixth Circuit did not reach a conclusion about probable cause as to the money laundering charge, neither did Petitioner argue that the money laundering charge changed the nature of his seizure or prolonged his detention. Because Petitioner failed to show "an additional burden" stemming from the money laundering charge, the outcome of Petitioner's case almost certainly would have been the same had it been brought in the Third Circuit.

Petitioner neglects to discuss other Third Circuit precedents that reinforce this view, both before and

after *Johnson*. Before *Johnson*, in *Wright v. City of Philadelphia*, 409 F.3d 595 (3d Cir. 2005), the Third Circuit determined that probable cause limited to one claim "disposes of … malicious prosecution claims with respect to all of the charges brought against" a plaintiff. *Id*. at 604; *see also Kossler v. Crisanti*, 564 F.3d 181, 194 (3d Cir. 2009) (en banc) (describing *Wright*'s holding: "[W]e determined that the existence of probable cause for [an] arrest—stemming from the existence of probable cause for at least one charge—precluded the plaintiff from proceeding with her malicious prosecution claim with respect to any of the charges brought against her.") That is precisely the rule Petitioner ascribes to the Sixth Circuit, and yet Petitioner counts the Third Circuit on the *opposite* side of its alleged circuit split. In reality, *Wright* remains good law in the Third Circuit because *Johnson* itself expressly stated that *Wright* retains its precedential status, 477 F.3d at 82, n.9, a fact the en banc Third Circuit acknowledged after *Johnson*, too. *Kossler*, 564 F.3d at 194 ("*Wright* and *Johnson* both illustrate that the analysis of malicious prosecution claims involving multiple charges is a fact-intensive one."). *See also Van De Weghe v. Chambers*, 569 F. App'x 617 (10th Cir. 2014) (describing Third Circuit precedent as precluding a malicious prosecution claim where probable cause supports one charge arising from the same set of facts).

Thus, the Third and Sixth Circuits share a fact-intensive view of malicious prosecution claims in which the facts that matter are those demonstrating that an additional charge changed the nature or duration of the plaintiff's seizure. These circuits are not in opposition.

2. In *Williams v. Aguirre*, 965 F.3d 1147 (11th Cir. 2020), the Eleventh Circuit held that a malicious prosecution claim may only be defeated where each charge is supported by probable cause because "[t]he charges that support a defendant's pretrial detention—that is, the seizure pursuant to legal process—meaningfully affect the existence and duration of that seizure." 965 F.3d at 1161. In *Williams*, the plaintiff was charged and arrested for two counts of attempted murder, but police asserted that they also had probable cause to arrest the plaintiff for carrying a concealed firearm without a permit. *Id.* at 1157. The plaintiff ultimately "spent longer in pretrial detention—more than 16 months—than the maximum one-year sentence of imprisonment he could have received if a jury convicted him of the 'other' crime—carrying a concealed firearm without a permit." *Id.* at 1155, 1161.

Had the *Williams* fact pattern arisen in the Sixth Circuit, the result would not have been substantially different. The *Williams* plaintiff clearly demonstrated that a charge unsupported by probable cause "change[d] the nature of the seizure" and "change[d] the length of detention." *Howse*, 953 F.3d at 409, n.3. In that circumstance, the Sixth Circuit would *not* hold that probable cause supporting another, lesser charge is sufficient to negate a claim of malicious prosecution.

3. In *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991), the Second Circuit also crafted a rule based on the effect of the charges in a malicious prosecution claim. In *Posr*, the malicious prosecution plaintiff had been previously charged with three crimes: disorderly conduct, resisting arrest, and assault. 944 F.2d at 100.

The jury was instructed that if probable cause existed as to one of the three claims, no liability for malicious prosecution could be found. *Id*. The Second Circuit rejected that instruction and returned the case for a retrial because "disorderly conduct is a lesser charge than resisting arrest and assaulting an officer," so "we should not allow a finding of probable cause on this charge to foreclose a malicious prosecution cause of action on charges requiring different, and more culpable, behavior." *Id*. That is because the more "serious, unfounded charges … would support a high bail or a lengthy detention," and should not be insulated from liability for malicious prosecution merely because probable cause existed to support a less serious charge. *Id*. This is not substantially different than in the Sixth Circuit, where if a claim for malicious prosecution would not be foreclosed if a more "serious, unfounded charge[]" demanded higher bail or a lengthier detention.

The Second Circuit's more recent case, *Kee v. City of New York*, 12 F.4th 150 (2d Cir. 2021), merely paraphrases the holding of *Posr* but did not apply that holding to dispose of the case. In *Kee*, the malicious prosecution plaintiff had been charged with a series of drug offenses. 12 F.4th at 157. The Second Circuit concluded that the facts surrounding all of those offenses were disputed and not appropriate for decision on a motion for summary judgment. *Id*. at 166. The Second Circuit therefore reversed the district court's summary judgment decision and remanded. *Kee* did not otherwise engage with the holding of *Posr*.

4. Petitioner's references to other circuits are not considered holdings of those courts on the question

presented here and cannot form the basis of a circuit split.

In *Holmes v. Vill. Of Hoffman Est.*, 511 F.3d 673, 682 (7th Cir. 2007), the Seventh Circuit applied a charge-specific approach in a state-law malicious prosecution case. In doing so, it partially relied on a relevant state court precedent to predict how a state supreme court would decide the question. 511 F.3d at 683.

The Fifth Circuit's statement in *Armstrong v. Ashley*, 60 F.4th 262, 279 & n.15 (5th Cir. 2023), that "if the prosecution is supported by probable cause on at least one charge," then "a malicious prosecution claim 'cannot move forward,'" is merely dicta—a fact Petitioner acknowledges. Pet. 18 (quoting *Armstrong*, 60 F.4th at 279 n.15).

5. The Sixth Circuit's rule is that unfounded charges do not support a malicious prosecution claim unless they change the nature of a seizure or prolong a detention. That rule is not substantially different from the approach taken by the Second, Third, and Eleventh Circuits. All four circuits agree that unfounded charges are relevant in a malicious prosecution action because they may change the nature of the seizure or prolong a detention. To the extent these courts' rules differ, it is in their willingness (or unwillingness) to *presume* that an additional unfounded charge necessarily changes a seizure or prolongs a detention. The Eleventh Circuit makes such a presumption, but the Sixth Circuit does not and instead requires a plaintiff to show that an unfounded charge *actually* affected the nature or duration of the plaintiff's seizure. This may be a

technical difference in approach, but it is not a substantial one and does not warrant this Court's review.

III. The Alleged Split Is Shallow and the Question Presented Does Not Recur Often.

The earliest case Petitioner cites for the alleged circuit split in *Posr*, 944 F.2d 91, which was decided in 1991. Since then, more than thirty years have elapsed, yet Petitioner can identify an alleged split in which—at most—only four circuits are participating. The shallowness of the alleged split counsels against this Court's certiorari review.

This is particularly true because the timing of the alleged split indicates that the question presented does not often recur among the courts of appeals. In more than thirty years, eight of the twelve regional circuits have not needed to decide the question presented here.

Petitioner disagrees because federal courts frequently perform a probable cause analysis in malicious prosecution claims, but that is not the relevant consideration. Probable cause analysis may occur frequently, but as the shallowness and long duration of the alleged circuit split show, very few cases involve the circumstances here: a case in which a court (here, the Sixth Circuit) has not resolved whether probable cause exists for *every* charge in a case with multiple charges but in which only a single seizure occurred. *That* issue does not frequently recur and does not warrant certiorari. Moreover, it is not at all clear in this case that Petitioner's money-

laundering charge was far more serious than the other charges. For example, while Petitioner's money-laundering charge could carry a penalty of 9 months imprisonment, *see* Ohio Rev. Code § 2929.14(A)(3)(B) his receiving-stolen-property charge could be punished by 6 months imprisonment, *see* Ohio Rev. Code § 2929.24. Both are serious charges.

Petitioner also disagrees because he thinks the holding below "leads to indefensible results," Pet. 26, but all of Petitioner's examples involve obviously disparate charges—a clearly less serious charge that is supported by probable cause, combined with a much more serious but unfounded charge. *Id*. at 26–27. Yet as *Howse* indicates, the Sixth Circuit would *not* hold that in all such cases probable cause to support the less serious charge forecloses a malicious prosecution claim for the more serious charge. That is precisely the circumstance where a plaintiff can likely show that the serious but unfounded charge has changed the nature of the plaintiff's seizure or prolonged it, and under Sixth Circuit precedent, "that would be a different issue." *Howse*, 953 F.3d at 409, n.3.

IV. This Case Is a Bad Vehicle.

This case is a bad vehicle for certiorari review because a favorable decision would not change the outcome of this case.

Chiaverini's money laundering charge was supported by probable cause. On three occasions, a judge has considered whether probable cause supports the money laundering charge, and each time, the answer has been yes. First, a state court judge determined that probable cause supported the money

laundering charge when it was presented as a warrant application. Pet. App. 25a–26a. Second, a state court judge held a preliminary hearing and determined that probable cause existed to bind over the money laundering charge. *Id*. at 37a. Finally, the district court determined that all of the charges against Chiaverini were supported by probable cause. *Id*. at 18a–48a.

Petitioner disagrees because he claims: (1) when money laundering is premised on an underlying offense of receiving stolen property, it requires knowledge at the time of purchase (not merely illegitimate retention of the stolen property; and (2) a $1,000 value threshold applied to the money-laundering charge and was not satisfied. Pet. 29. Even if these assertions were accurate statements of Ohio law (and Respondents do not concede that they are), Respondents were at most reasonably mistaken about the nuances of Ohio's money laundering statute when they initiated Petitioner's prosecution. Indeed, Respondents are police officers who acted at the direction of the City Law Director and with direct oversight from the County Prosecutor, both of whom believed the facts supported the money-laundering charge—a view that a state court judge twice confirmed. If the money-laundering charge was in fact based on a mistake of Ohio law, it was surely a reasonable one, and a reasonable mistake of law does not negate probable cause. "[T]he ultimate touchstone of the Fourth Amendment is reasonableness," "so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection." *Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014)

(quotation marks omitted). A seizure premised on a reasonable mistake of law does not violate the Fourth Amendment. *Id*.

Accordingly, if this Court were to grant certiorari and reverse the decision below, the Sixth Circuit on remand may determine that probable cause supported Petitioner's money-laundering charge, just as a state court judge and the federal district court concluded.

Even if, however, the Sixth Circuit concluded on remand that probable cause did not support Petitioner's money-laundering charge, the Sixth Circuit would almost certainly conclude that Petitioner has failed to satisfy the other requirements of a malicious prosecution claim. Petitioner cannot show that he suffered a deprivation of liberty as a result of the money-laundering charge that is different than the deprivation he would have suffered as a result of the other charges. Even if he could show that, his claim would still fail because Respondents would be entitled to qualified immunity. Respondents' conduct in arresting Petitioner on all three charges (including the money-laundering charge) did not violate clearly established law and was objectively reasonable, and so their actions are protected by qualified immunity. This Court should reserve its judicial resources for a case in which a favorable holding could affect the outcome. This is not such a case.

CONCLUSION

Respondents urge the Court to deny the petition for a writ of certiorari.

October 20, 2023

Respectfully submitted,

Megan M. Wold
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
mwold@cooperkirk.com

Teresa L. Grigsby
Jennifer McHugh
SPENGLER NATHANSON PLL
900 Adams Street
Toledo, OH 43604-2622
(419) 241-2201
tgrigsby@snlaw.com
jmchugh@snlaw.com

Counsel for Respondents