No. 23-_____

IN THE

Supreme Court of the United States

RANDY SMITH, SHERIFF; DANNY CULPEPER; KEITH CANIZARO,

Petitioners,

v.

JERRY ROGERS, JR.

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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November 7, 2023

QUESTIONS PRESENTED

Qualified immunity is a legal doctrine of federal constitutional law that grants government officials performing discretionary functions immunity from lawsuits unless the official violates clearly established statutory or constitutional rights of which a reasonable person would have known. 42 U.S.C. § 1983; see also *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396, 1982 U.S. LEXIS 139, *1. The questions presented are:

1. What does it mean for a statutory or constitutional right to be "clearly established," beyond debate for purposes of § 1983 qualified immunity?

2. When can a government official be held liable for effectuating an arrest made under authority of a properly issued warrant?

PARTIES TO THE PROCEEDING

Petitioners (Defendants/Appellants):

- St. Tammany Parish Sheriff Randy Smith (party);
- Maj. Danny Culpepper (party);
- Capt. Keith Canizaro (party);
- OneBeacon Insurance Group LLC by Atlantic Specialty Insurance Company (Liability Insurer to St. Tammany Parish Sheriff's Office)

Respondent (Plaintiff/Appellee):

- Jerry Rogers, Jr.

RELATED PROCEEDINGS

Jerry Rogers, Jr. v. Randy Smith, Sheriff, Danny Culpeper, Keith Canizaro, No. 2:20-cv-00517, United States District Court, Eastern District of Louisiana. Judgment entered May 13, 2022.

Jerry Rogers, Jr. v. Randy Smith, Sheriff, Danny Culpeper, Keith Canizaro, No. 22-30352, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 9, 2023.

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The Fifth Circuit's decision (Pet. App. 1A) is available at 2023 U.S. App. LEXIS 20871. The District Court's opinion (Pet. App. 2A-14A) is available at 2022 U.S. Dist. LEXIS 86675.

JURISDICTION

The Fifth Circuit entered its decision on August 9, 2023. Pet. App. 1A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are as follows:

1. U.S. CONST. amend. I:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. CONST. amend. IV:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

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

3. U.S. CONST. amend. XIV

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except

> that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

Qualified immunity is a legal doctrine of federal constitutional law that grants government officials performing discretionary functions immunity from lawsuits unless the official violates clearly established statutory or constitutional rights of which a reasonable person would have known. 42 U.S.C. § 1983; see also *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396, 1982 U.S. LEXIS 139, *1. In order to be "clearly established," this Court has held that existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017). Clearly established law should not be defined at a high level of generality but must be *particularized* to the facts of the case. *Id*. at 552.

Since 1982, courts have generally and uniformly recognized that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," (*Whitney v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013)), and it exists to ensure that "fear of liability will not unduly inhibit officials in

the discharge of their duties." *Camreta v. Greene,* 563 U.S. 692, 705 (2011), quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). In line with the purpose of qualified immunity, courts have generally held that police officers are shielded from suit "when [the officer] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [the officer] confronted. *Kokesh v. Curlee,* 14 F.4th 382, 393 (5th Cir. 2021) (internal citations omitted). When a defendant asserts qualified immunity, the defendant's conduct is judged based on an objective reasonableness standard. *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 419 (5th Cir. 2008) (internal citations omitted).

Similarly, in Fourth Amendment cases that involve a warrant, such as this case, "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'" *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (internal citations omitted). Indeed, this Court has held that an officer cannot be expected to question the magistrate's probable cause determination, because it is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant. *Messerschmidt*, 565 U.S. 535, 546 (internal citations omitted).

These prior consistencies in the law have now been disrupted by the below opinions in this case. On interlocutory appeal, a U.S. Fifth Circuit Court of Appeals panel reviewed the district court's denial of

summary judgment to the Defendants/Petitioners and, after hearing oral argument, affirmed the district court's summary judgment determinations without addressing any of the legal errors that Defendants/Petitioners raised on appeal. The Fifth Circuit's judgment leaves in place an incorrect district court decision that: (1) improperly denied summary judgment by denying petitioners' qualified immunity; and (2) improperly found that Petitioners lacked probable cause to effectuate an arrest made under the authority of a valid arrest warrant. Indeed, the Fifth Circuit panel offered no opinion on the matter and simply affirmed without explanation.

Petitioners, St. Tammany Parish Sheriff Randy Smith ("Sherrif Smith"), Danny Culpeper, and Keith Canizaro, request that this Court issue a Writ of Certiorari and reverse the incorrect precedent that (a) government officials can be denied qualified immunity protections for discretionary actions that do not violate any clearly established law and (b) that police officers can be held civilly liable for effectuating an arrest made under the authority of a valid warrant. In addition, or in the alternative to this request, Petitioners further request that this Court define what it means for a statutory or constitutional right to be "clearly established" for § 1983 purposes, and also under what circumstances a police officer's objective good faith is negated when establishing probable cause in obtaining an arrest warrant.

STATEMENT OF THE CASE

1. Statement of Facts

This case started with the death of Nanette Krentel on July 14, 2017, in St. Tammany Parish. The St. Tammany Parish Sheriff's Office ("STPSO") promptly began investigating Ms. Krentel's death. During that homicide investigation, detectives were made aware of anonymous emails being sent to the murder victim's family – namely, to Nanette Krentel's sister, Kim Watson. In response, Gina Watson, another family member, contacted the lead investigator, Detective Daniel Buckner, and reported the emails. These emails contained information about the ongoing Krentel investigation and included derogatory statements about Detective Buckner and others involved in that case.[1] Though the anonymous emails contained false information, they succeeded in alarming Ms. Krentel's family, caused them to distrust the Sheriff's Office, and impaired the Detective's ability to investigate Ms. Krentel's homicide. In addition to stating her alarm, Gina Watson began forwarding the emails from the anonymous sender to Detective Bucker and requested that he find the source of the emails.

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[1] The emails claimed that Detective Buckner was "clueless," accused him of being a "stone cold rookie" with no experience and suggested that "anything is better than" Detective Buckner. Detective Buckner was, however, a Louisiana-certified Homicide Investigator, who at the time of the Krentel investigation, had been a certified law enforcement officer for 19 years and a detective for 8 years. He was a seasoned and successful homicide investigator.

Thereafter, a subsequent investigation was opened regarding potential obstruction of justice caused by these emails, which were obtained by STPSO under a search warrant citing violation "14:0000." Violation 14:0000 is a common placeholder used by law enforcement officers when a potential crime is not yet associated with a violation of a specific statute. While investigating the emails' source, the Criminal Investigation Division, led by Petitioner, Danny Culpeper, was able to link a Federal Government IP address with Plaintiff, Jerry Rogers. Rogers was a Federal agent with the U.S. Department of Housing and Urban Development (HUD) and also a former STPSO employee. On August 13, 2019, Lt. Alvin Hotard and Detective Buckner traveled to Rogers' workplace in the Hale Boggs building in New Orleans, Louisiana, to interview him about the emails sent to Ms. Krentel's family. During this interview, Plaintiff admitted to sending the emails and that he obtained information about the investigation from a then-current STPSO employee.

On August 15, 2019, Petitioner, Keith Canizaro, assigned to the Major Crimes Unit of STPSO, was tasked with investigating the possible obstruction of justice related to Nannette Krentel's open homicide investigation. That investigation uncovered insufficient facts to charge Rogers with obstruction of justice, but it did reveal sufficient evidence to charge him with Criminal Defamation under LSA – R.S. § 14:47.[2] Although § 14:47 was later

[2] "Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends: (1) To expose any person to hatred, contempt, or

repealed in 2021, at the time of the events giving rise to this matter (2017-2019), the statute remained valid and enforceable. Admittedly, however, there was some debate over the statute's constitutionality in certain contexts. While no court had ever ruled § 14:47 unconstitutional in its entirety, some courts limited its scope.[3]

On September 3, 2019, Petitioner Canizaro received an email from fellow STPSO officer Grey Thurman containing the *McLin* case, in which the U.S. Fifth Circuit Court of Appeals held LSA – R.S. § 14:47 to be unconstitutional in some circumstances. See *McLin v. Ard*, 866 F.3d 682 (5th Cir. 2017). Canizaro understood that some unconstitutional circumstances included use of the statute against public officials, but what remained unclear was whether the facts of *McLin* applied to the facts of the Rogers investigation, and whether Detective Buckner was considered a public official under the statute.

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ridicule, or to deprive him of the benefit of public confidence or social intercourse; or (2) to expose the memory of one deceased to hatred, contempt, or ridicule; or (3) to injure any person, corporation, or association of persons in his or their business or occupation." La. R.S. § 14:47 Defamation [Repealed].

[3] While investigating, Petitioner Canizaro utilized the *2018-2019 Edition of the Louisiana Criminal Law and Motor Vehicle Handbook* and found LSA – R.S. § 14:47. The statute was not yet repealed and, as it was written in the very book utilized by Canizaro, contained no exception, limitation, or comments suggesting its unconstitutionality. This statute book, commonly used in law enforcement, was produced in relevant part during discovery.

On September 13, 2019, Petitioners Canizaro and Culpeper met with attorneys from the District Attorney's ("DA") office for the 22nd Judicial District Court regarding the Jerry Rogers investigation. The STPSO officers presented Rogers' emails and discussed the possibility of arresting Rogers for Criminal Defamation. ADA Collin Sims expressed some concerns about the possible unconstitutionality of § 14:47, but he was unsure. The *McLin* case was also discussed, but the same ambiguities remained at the conclusion of that meeting – no definite answers were provided. Sims stated that his office would look into it further and get back to the officers.

Three days later, Petitioner Culpeper called ADA Sims to follow up regarding the potential arrest of Jerry Rogers, and Sims told Culpeper that the DA's office still had not met to discuss the matter. After still receiving no official position from the DA's office, Petitioner Culpeper briefed Petitioner, Sheriff Randy Smith, on the status of the Rogers investigation and on the potential Criminal Defamation charge against him. Based on sufficient evidence to support a probable cause determination that Jerry Rogers had violated the law, the Petitioners decided to submit an affidavit for an arrest warrant to the 22nd Judicial District Court.

Later that morning, ADA Sims and Petitioner Culpeper again discussed the facts of the Rogers investigation and the application of the Criminal Defamation statute. Culpeper informed Sims that the Rogers matter had been effectively concluded, and that the Petitioners had decided to put the matter

before a judge, who could then evaluate the facts in the affidavit to determine if there was sufficient probable cause to issue an arrest warrant. Sims again offered his opinion that the arrest may be unconstitutional, but he did not instruct Petitioners not to make an arrest, nor could he provide any law on point.

Accordingly, on September 16, 2019, Petitioner Canizaro submitted an affidavit for an arrest warrant for Jerry Rogers, Jr. for the charge of Criminal Defamation, LSA – R.S. § 14:47. The affidavit contained entirely factual information supporting probable cause to arrest Rogers, and the warrant was granted and signed by the Honorable Raymond Childress. Rogers was arrested and released on bail that same day.

2. Procedural History

Jerry Rogers, Jr. filed the instant action on February 13, 2020, alleging violations of his civil rights under Federal and state law and later filed an amended Complaint, more specifically alleging: (1) First Amendment Retaliation; (2) Unlawful Seizure; (3) False Arrest; (4) Violation of the Louisiana Constitution; (5) State Law Malicious Prosecution; and (6) Abuse of Process.

On May 12, 2020, Petitioners filed a *Partial Motion to Dismiss and Motion for More Definite Statement* pursuant to Rule 12(b)(6) regarding Plaintiff's malicious prosecution claim and his state law claims. Plaintiff filed both an Amended

Complaint and an *Opposition to Defendants' Partial Motion to Dismiss*, but on July 17, 2020, the district court granted Petitioners' motion, finding that Plaintiff had failed to state a claim for malicious prosecution.

On January 10, 2022, Plaintiff filed a *Motion for Partial Summary Judgment* on his § 1983 false arrest, state law false arrest, and false imprisonment claims. On February 10, 2022, Petitioners filed their own *Motion for Summary Judgment* on all of Plaintiff's remaining claims, specifically raising qualified immunity as a defense. The district court heard oral arguments on these motions on March 15, 2022. On May 13, 2022, the court issued its Order and Reasons largely denying Petitioners' *Motion for Summary Judgment* and granting Plaintiff's *Motion for Partial Summary Judgment*.[4] The district court declined to grant Petitioners qualified immunity.

Finally, on June 9, 2022, Petitioners filed a *Rule 54(b) Motion for Reconsideration of the Court's Order and Reasons*. Out of an abundance of caution regarding procedural delays, Defendant-Appellants also filed a Notice of Appeal of the interlocutory Order denying qualified immunity (and therefore summary judgment). The district court subsequently denied the *Motion for Reconsideration* as "moot" by the filing of Petitioners' notice of appeal.

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[4] Petitioners' *MSJ* was "granted in part" to the extent that Plaintiff's claims against Canizaro and Culpeper in their official capacities were dismissed with prejudice as redundant.

Thus, the case proceeded to the U.S. Fifth Circuit Court of Appeals, which entered judgement on August 9, 2023, just hours after oral argument, affirming the district court's judgment without addressing any of the legal errors raised on appeal.

REASONS FOR GRANTING THE PETITION

Petitioners submit that Certiorari should be granted, as the lower courts committed numerous reversible errors in the opinions below, including errors that conflict with or contradict decisions of the Supreme Court of the United States, as well as other decisions from the U.S. Court of Appeals for the Fifth Circuit. In addition, the U.S. Fifth Circuit's decision to uphold the district court's judgment in this matter perpetuated the district court's misapplication of an important federal law that should be settled by this Court.

This Court has reversed several federal court opinions in recent years based on qualified immunity, finding it necessary both because "qualified immunity is important to *society as a whole*…and because as an immunity from suit, qualified immunity is 'effectively lost if a case is erroneously permitted to go to trial.'" *White, supra*, at 551; quoting *Pearson v. Callahan*, 555 U. S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Because the qualified immunity doctrine is driven by the desire to quickly resolve claims against government officials, this Court has stressed the significance of "resolving immunity questions at the earliest possible stage in litigation." *Pearson*, *supra*, at 231-232. By dismissing these cases quickly, courts

avoid '[subjecting] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985).

Qualified immunity balances two societal interests: the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson, supra* at 231.

Once Petitioners properly asserted qualified immunity, the burden was on Plaintiff to negate that assertion. To do so, Plaintiff was required to prove: (1) that an official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (internal citation omitted). Plaintiff failed to meet that burden, and through legal error, the lower courts failed to find in favor of Petitioners.

1. <u>The lower courts have erred in the opinions below.</u>

The lower courts, in their opinions below, have committed legal errors which Petitioners submit resulted in the lower courts' ignoring clear and binding precedent. Throughout the district court's judgment, the court misapplied the qualified immunity standard and wholly failed to address

binding authority cited by Petitioners in support of their motion for summary judgment. The district court also erred in finding that no probable cause existed to arrest Plaintiff, which was an essential component to establishing the qualified immunity defense. Petitioners would especially note that in denying them qualified immunity protections, the district court committed legal error by relying on jurisprudence that addressed qualified immunity as a general proposition rather than requiring Plaintiff to identify particularized case law which would support the denial of qualified immunity.

More specifically, the lower courts strayed from precedent by the following: (1) denying Petitioners qualified immunity for an arrest made pursuant to a valid warrant issued by a neutral magistrate; (2) denying Petitioners qualified immunity for an arrest made pursuant to a law which was enforceable at the time of Plaintiff's arrest; and (3) denying Petitioners qualified immunity based on generalized, factually distinct cases, such that it cannot be reasonably ascertained that the law Petitioners allegedly violated was clearly established at the time of Plaintiff's arrest.

First, in improperly denying Petitioners qualified immunity (and similarly granting Plaintiff's motion for summary judgment), the lower courts improperly relied upon Fifth Circuit precedent in *McLin v. Ard*. The district court held "[s]peech criticizing the official conduct of public officials is protected by the First Amendment and does not constitute criminal Defamation. Accordingly, the

issue is beyond debate." Pet. App. 8A; citing *McLin, supra* at 682. This conclusion by the district court was erroneous for several reasons.

In *McLin*, defamatory comments were made against members of the Livingston Parish Council and the Sheriff's Office (all elected officials) regarding alleged misuse of public funds, whereas the matter at hand involves a detective and the regular discharge of his duties. This conclusion by the district court also completely ignored the fact, and the distinction drawn by Petitioners, that *McLin* dealt with public Facebook posts, not private emails sent in the midst of an open homicide investigation. Moreover, in making this determination, the district court declined to rule that Facebook posts and private emails sent during a homicide investigation are treated the same – the court simply ignored the distinction entirely. Again, the Petitioners here could not have been expected to know that § 14:47 was "clearly established to be unconstitutional under all circumstances as applied to an unelected detective" when even the district court was unable to provide clear language to that effect.

Second, in improperly denying Petitioners qualified immunity (and similarly granting Plaintiff's motion for summary judgment), the district court improperly found that Petitioners lacked probable cause to arrest Plaintiff. Pet. App. 9A. The U.S. Supreme Court has defined probable cause as the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable causation, in believing, in the circumstances shown, that the suspect has

committed, is committing, or is about to commit an offense." *Piazza v. Mayne*, 217 F.3d 239, 245-46 (5th Cir. 2000) (quoting *Michigan v. DeFillippo*, 99 S.Ct. 2627, 2632 (1979)).

A police officer is "entitled to qualified immunity for an arrest 'if a reasonable person in [his] position could have believed he had probable cause to arrest.'" *Glenn v. City of Tyler*, 242 F.3d 307, 313 (5th Cir. 2001). Under this defense, an officer is shielded from suit when [the officer] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [the officer] confronted." *Kokesh, supra* at *19.

Notably, this Court has held that, "[t]he constitution does not guarantee that only the guilty will be arrested…Where an arrest is made under authority of a properly issued warrant, the arrest is simply not a false arrest. Such an arrest is not unconstitutional, and a complaint based on such an arrest is subject to dismissal for failure to state a claim." *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982).

The district court's judgment stated:

> [N]o reasonable officer could have believed that probable cause existed where the unconstitutionality of Louisiana's criminal defamation statute as applied to public officials has long been clearly established and where the officers had been

> specifically warned that the arrest would be unconstitutional.

Pet. App. 9A.

Petitioners submitted that the alleged warning has no authority and is not binding. Additionally, this determination conflicts entirely with well settled U.S. Fifth Circuit precedent that the magistrate's review of the affidavit submitted by an officer and judicial determination for a warrant serve as a shield for that officer. Indeed, in *Deville*, the Fifth Circuit held that "[i]t is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulting the initiating party." *Deville v. Marcantel,* 567 F.3d 156, 170 (5th Cir. 2009); *citing Taylor v. Gregg,* 36 F.3d 453, 456 (5th Cir. 2005).

The district court took issue with the fact that the affidavit for an arrest warrant submitted by the Petitioners did not include information about the DA's alleged warning that the arrest might be unconstitutional, and thus, concluded that no probable cause existed to arrest Plaintiff. However, missing information, even if true, is not the standard for assessing the legitimacy of an affidavit for an arrest warrant. There is nothing in the record of this case, nor has there been any allegation, that the affidavit for an arrest warrant submitted to the judge by the Petitioners was false, fraudulent, incorrect, or that it contained any inaccurate information. Thus, the lower courts' were incorrect to find that Petitioners lacked probable cause to arrest Plaintiff.

Moreover, under *Kokesh, supra*, qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." Petitioners, here, arrested Plaintiff under LSA – R.S. § 14:47, which was a valid and enforceable statute from 1950 to 2021. Although the statute was repealed in 2021, it was part of Louisiana's law during the entire investigation and arrest at issue. For many years before its repeal, the statute received inconsistent treatment. Thus, Petitioners' probable cause determination leading to Plaintiff's arrest was not unreasonable.

Third, the opinions below also committed legal error in determining that the law at issue (LSA – R.S. 14:47) was *clearly established* to be unconstitutional at the time of Plaintiff's arrest. Indeed, at the time of Plaintiff's arrest in 2019, the case law on the matter was not yet settled so as to give Petitioners proper notice required to deprive them of qualified immunity. At that time, LSA – R.S. § 14:47 was still good law on the books and was actively being applied in St. Tammany Parish.[5]

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[5] Petitioners provided the lower courts with three examples that LSA – R.S. § 14:47 was still good law, in use, at the time of Plaintiff's arrest. Petitioners' Motion for Summary Judgment cited a key instance in which, at the time of Plaintiff's arrest, the same DA's office had recently accepted a Criminal Defamation charge under LSA – R.S. § 14:47 involving another victim, National Guardsman Colonel John Plunkett, who like Detective Buckner, was employed by the government. Petitioners also listed another 2017 case in St. Tammany Parish involving an individual who was arrested and charged under § 14:47 for a series of defamatory online comments made about a high school teacher. See *State ex. rel. G.J.G.,* 19-768 (La. App. 3 Cir. 2020); 297 So.3d 120, (in which the Third Circuit recently upheld a

Before LSA – R.S. 14:47 was repealed, the Western District of Louisiana provided guidance on this issue through a separate matter, holding, "[w]e find that the Louisiana statutory provisions in question [LSA – R.S. § 14:47, *et seq*.] are not unconstitutional *per se*, but that they may be susceptible of a limiting construction…" *Snyder v. Ware*, 314 F.Supp. 335, 336 (W.D. La. 1970); see also *Payton v. Town of Maringouin*, 2021 U.S. Dist. LEXIS 115260 at *52 (M.D. La. 2021).

Petitioners argued that the local pattern of uncontested defamation charges in recent years from this same jurisdiction completely negated Plaintiff's case based on the "clearly on notice" predicate of qualified immunity, but the lower courts erroneously found in favor of Plaintiff despite lingering issues regarding the applicability of LSA – R.S. 14:47. Moreover, the lower courts committed legal error by relying on generalized cases with distinctly dissimilar facts from the case at hand in reaching their opinions.

Again, in order to be "clearly established," this Court has held that existing precedent must have placed the statutory or constitutional question beyond debate." W*hite*, supra, at 551. Importantly, this Court has recently ruled that "[s]pecificity is especially important in the Fourth Amendment context, where…it is sometimes difficult for an officer to determine how the relevant legal doctrine…will apply to the factual situation the officer confronts." *Rivas-Villegas v. Cortesluna*, 142 S.Ct. 4, 8, 211 L.Ed.2d 164,

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conviction under LSA – R.S. § 14:47 of a student in which the victim was a public high school teacher).

168 (2021) (*citing Mullenix v. Luna,* 577 U.S. 7, 12, 136 S.Ct. 305, 309, 193 L.Ed.2d 255, 259 (2015) (emphasis added)). This high burden requires plaintiffs to identify a "case where an officer acting under similar circumstances as [each of the defendants] was held to have violated [a person's constitutional rights]." *White, supra,* at 552.

Here, while some of the cases relied on by the lower courts attempted to cast doubt on the validity of LSA – R.S. § 14:47, and while some of these cases limited the construction of the statute in some instances, not a single case presented held the statute to be uniformly unconstitutional. The exhibit below best summarizes the cases improperly relied upon by the lower courts, including *McLin v. Ard*.[6]

Case	Defamer	Defamed Party	Forum
Garrison v. La (1964)	District Attorney	Judges	Press Conference
State v. Snyder (1973)	Mayoral candidate	Other Mayoral candidate(s)	Campaign
State v. Defley (1981)	Individual citizen	- Parish School Supervisor - Parish School Superintendent	Public Meeting
Anderson v. Larpenter (2017)	Individual citizen	- Sheriff's Office - President of the Parish Levee and Conservation District Board of Commissioners	Exposed at (website/blog) and Facebook
McLin v. Ard (2017)	Individual citizen	- Parish Council Members	Facebook

Petitioners note that while the defamed party in this case is a detective, the defamed parties in all of the cases relied upon by Plaintiff and the lower courts

[6] See (generally) *State v. Defley,* 395 So. 2d 759 (La. 1981); *Garrison v. La*., 379 U.S. 64 (1964); *State v. Snyder*, 277 So.2d 660 (La. 1972); *Anderson v. Larpenter*, 2017 U.S. Dist. LEXIS 111907 (E.D. La. 2017); *McLin*, *supra*.

were judges, councilmen, and a mayoral candidate – all elected officials. While elected public officials undoubtedly accept the responsibilities of a public official and relinquish some protection from defamation, Detectives like Daniel Buckner in this matter do not accept such public responsibilities as they do not run for office, and as such, do not relinquish such protections. Furthermore, three of the Defamation cases cited above (*Garrison*, *Snyder*, and *Defley*) occurred in the context of a press conference, a public meeting, and a mayoral campaign (respectively) – all highly public forums. These cases are entirely distinguishable from the case at hand, in which Plaintiff sent anonymous emails to the victim's family in the midst of a homicide investigation.

Accordingly, the ambiguous, inconsistent application of LSA – R.S. 14:47 at the time of Plaintiff's arrest, as well as the lack of any particularized case applicable to the situation the Petitioners confronted, dictate that the law was not clearly established as to deny Petitioners qualified immunity.

2. <u>The lower courts' decisions conflict with existing precedent on these issues.</u>

The below courts' decisions in this matter have upset or otherwise undermined legal precedent that this Court should now cure.

Harlow v. Fitzgerald

The district court's judgment, which was improperly upheld by the U.S. Fifth Circuit, was inconsistent with *Harlow v. Fitzgerald*. According to the Supreme Court, qualified immunity shields government officials from liability when they are acting within their discretionary authority and their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known. *Harlow,* 457 U.S. 800, 818; *Wallace v. County of Comal,* 400 F.3d 284, 289 (5th Cir. 2005). Qualified immunity and its underlying objective represent the fundamental principle at the heart of this litigation. Public policy mandates that government officials be and are entitled to qualified immunity where it will defeat insubstantial claims that would resort to trial. *Harlow*, *supra* at 813.

In this case, there is no debate that Petitioners were acting within their discretionary authority at all relevant times. The issue arises regarding whether their conduct violated some clearly established statutory or constitutional law of which a reasonable person would have known. The statute under which Plaintiff was arrested, which forms the basis of this litigation, is LSA – R.S. § 14:47 (repealed) for criminal defamation. Petitioners have submitted into the record of this case abundant evidence establishing that at the time of Plaintiff's arrest in 2019, LSA – R.S. § 14:47 was still good law which was actively being applied in St. Tammany Parish, where the actions giving rise to this litigation occurred.

Accordingly, there can be no reasonable conclusion that Plaintiff's alleged right to be free from arrest for criminal defamation under LSA – R.S. § 14:47 was "clearly established" at the time of his arrest. The fact that some courts at the time of Plaintiff's arrest had narrowed Louisiana's defamation statute before its repeal to afford certain citizens greater freedom of speech is not a "right" which a reasonable person would have known, especially in light of the fact that the record of this matter contains conflicting case law on this very point. Thus, Petitioners were entitled to qualified immunity at the summary pleading stage of this litigation in accordance with *Harlow*.

The district court erroneously found that based on conflicting precedent holding a charge for criminal defamation unconstitutional as applied to public officials, that Plaintiff's right was clearly established at the time of his arrest so as to deny Petitioners qualified immunity. On appeal, Petitioners urged that the very fact that the parties had and were continuing to submit opposing case law on this issue demonstrated that the issue was not beyond debate at the time of Plaintiff's arrest. Moreover, Petitioners argued that the key distinctions present in all of these cases relied upon by the district court rendered them wholly inapplicable to Petitioners' claim for qualified immunity, in which the cases presented must be particularized to the facts of the present case in accordance with *White*, supra, at 551.

Moreover, under *Harlow*:

> *Qualified immunity is defeated if an official knows or reasonably should know that the action he takes within his sphere of official responsibility will violate the constitutional rights of the plaintiff, or if he takes the action with the malicious intention to cause a deprivation of constitutional rights or other injury.*

Id. at 815.

In this case, no such grounds exist to defeat qualified immunity. There is no evidence that Petitioners knew their actions would violate any individual's constitutional rights, aside from the DA's unofficial, verbal opinion, which Petitioners took for what it was – an opinion. Moreover, Plaintiff's claim against Petitioners for malicious prosecution was dismissed by the district court on July 17, 2020 upon finding that Plaintiff failed to state such a claim.

Thus, the below courts' decisions were inconsistent with Supreme Court precedent established by *Harow v. Fitzgerald*, and reversal by this Court is warranted.

<u>*Rykers v. Alford*</u>

The district court's judgment, which was improperly upheld by the U.S. Fifth Circuit, was inconsistent with *Rykers v. Alford*. The district court's judgment pointed out that *Rykers* stated that "an officer charged with enforcing Louisiana law can

be presumed to know that law." *See Rykers v. Alford*, 832 F.2d 895, 898 (5th Cir. 1987). Petitioners noted that the district court's citation of *Rykers* is interesting, because the *Rykers* court also stated the following: *"[t]his Court has repeatedly held that a claim for false arrest or analogous torts is subject to dismissal for failure to state a claim when the arrest is made under a properly issued, facially valid warrant,"* which is precisely what occurred in the case at bar. *Id* ., citing *Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982). After stating that officers are presumed to know the law, the *Rykers* court went on to affirm qualified immunity for the deputy-Defendant. *Id* . In *Rykers*, although the officer omitted key facts from the affidavit for an arrest warrant, the U.S. Fifth Circuit held that there were "several difficulties in the law and facts as they appeared to Officer Fuqua on the day he signed the affidavit. *Id* . These facts lead us to agree with the district court that Rykers' (plaintiff) rights were not 'clearly established' on that date." *Id*.

The U.S. Fifth Circuit in *Rykers* noted that if the Louisiana courts themselves could interpret the statute in question multiple ways, "then Officer Fuqua can be forgiven for doing the same" (*Id*. at 899), which Petitioners in this case have repeatedly argued. Officer Fuqua was granted qualified immunity because he had sufficient information to justify his reasonable belief that the plaintiff *could be* arrested under the statute in question, regardless of Fuqua's omission of certain facts from the affidavit, because the Court reasoned that the facts of the case were not clear on the day of the affidavit. Moreover, the U.S. Fifth Circuit noted that the emergency situation in

Rykers precluded the officer's need from conducting further investigation and further entitled the officer to qualified immunity for his actions during extraordinary circumstances under *Harlow v. Fitzgerald*. *Harlow, supra*, 818. Due to the non-uniform application of the law and the gaps in the facts of that case, Officer Fuqua was ultimately granted qualified immunity.

Similarly, Petitioner Canizaro was likewise justified in his reasonable belief that Plaintiff could be arrested for criminal Defamation under LSA – R.S. § 14:47, which remained the law at the time of Plaintiff's arrest. Unlike Officer Fuqua, Canizaro did not omit any facts from his affidavit. He did omit the vague and unofficial opinion of the DA's office from the affidavit of arrest as he justifiably believed opinions were irrelevant in an affidavit for arrest, since it is the role of the Court to determine legal questions in light of the facts presented in the affidavit; and under the *Rykers'* holding, even if the DA's opinion was arguably relevant, this omission would nonetheless be insufficient to deny qualified immunity given the lack of clarity with regards to the application of § 14:47 on the day that Canizaro signed the affidavit.[7] In addition, like the emergency situation faced in *Rykers*, the STPSO was dealing with Jerry Rogers, who despite being investigated for the misdemeanor

[7] Officer Canizaro testified in his 30(b)(6) deposition regarding STPSO's policies and procedures for obtaining an arrest warrant and noting that the DA's interpretation of a law or statute is not information that is typically disclosed in an affidavit of sworn facts.

charge of Criminal Defamation, was known to have attempted suicide by police just weeks prior to the arrest in question. Rogers was also actively and anonymously spreading false information to the family of a homicide victim in an open homicide investigation. Thus, Petitioner Canizaro was clearly entitled to the same protections under the qualified immunity doctrine that the U.S. Fifth Circuit afforded to Officer Fuqua in *Rykers,* and for strikingly similar reasons.

Thus, the lower courts' decision undermines precedent set by the U.S. Fifth Circuit in *Rykers*, based on strikingly similar facts, and should therefore be reversed.

Davis v. Strain

The district court's judgment, which was improperly upheld by the U.S. Fifth Circuit, was inconsistent with *Davis v. Strain*, in which the U.S. Fifth Circuit recently upheld a district court's ruling in favor of Defendant-police officers in a scenario substantively identical to that at hand. In *Davis v. Strain,* 676 F. App'x 285 (5th Cir. 2017), the U.S. Fifth Circuit affirmed a summary judgment ruling based on qualified immunity regarding a doctor's Fourth Amendment false arrest claim. The plaintiff, a doctor, filed suit against the sheriff and three officers ("defendants") after she was arrested based on evidence that a patient had obtained a backdated prescription from the doctor after learning the patient had failed a drug screen. The plaintiff alleged both Federal and state law claims of false arrest in

violation of her Fourth Amendment rights, and the defendants asserted qualified immunity. *Id.*

There, the district court held, and the U.S. Fifth Circuit affirmed, that the information available to the officers at the time of arrest, discounting that contested by the doctor, was sufficient to support a finding of probable cause. The officers had received information from at least two individuals, including another doctor and a pharmacist, and the officers executed search warrants and independently verified many of the facts provided to them. *Id.* The plaintiff, however, argued that the officers omitted critical information from the affidavit for her arrest warrant, particularly the fact that the patient had an extensive criminal history, including crimes for illegal drugs and deception. The plaintiff asserted that if the affidavit were rewritten to include those omitted facts, then there would have been no probable cause. *Id.*

The district court found, and the U.S. Fifth Circuit affirmed, that enough evidence to support a conviction is not required to establish probable cause. Though the plaintiff was not ultimately found guilty of the offense, the information available to the defendants-officers at the time of arrest, was sufficient to support a finding of probable cause. Importantly, the U.S. Fifth Circuit stated the following in its holding affirming summary judgment:

> Probable cause to arrest exists if, at the moment an arrest is made, the facts and circumstances within the arresting officers' knowledge and of which they

> have reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense, but enough evidence to support a conviction is not required. Subjective intent, motive, or even outright animus are irrelevant, and a court confines its inquiry to an objective assessment of whether a reasonable officer could have believed the arrest at issue to be lawful, in light of clearly established law and the information the arresting officers possessed.

Id. at 287.

The court in *Davis* also reiterated the well-established rule that an arrest made pursuant to a properly issued warrant "is simply not a false arrest…" and only an affidavit for a warrant that contains "inaccurate statement which materially affect its showing of probable cause" may render the warrant invalid. *Davis, supra* at 287 (*citing Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982)). There has never been any suggestion that Petitioner Canizaro's affidavit contained any "inaccurate statements" whatsoever. The only argument asserted by the Plaintiff was that the affidavit should have also included the DA's opinion of the potential constitutional defect in the statute. Petitioners are, however, unaware of any jurisprudence which would support such an argument. Therefore, again, it cannot be said that Petitioners violated any "clearly

established" rights of the Plaintiff by omitting the opinion of a third party in the affidavit for arrest.

Thus, Certiorari should be granted to the Petitioners based on precedent established by *Davis v. Strain*.

3. <u>These issues are of great legal and national significance</u>

The issues in this case present an important question of federal law that should be settled by this Court. Qualified immunity is an important legal doctrine of federal constitutional law, and it exists for the very important societal interest of shielding officials from harassment, distraction, and liability when they perform their duties reasonably. As such, police officers are entitled to a clear understanding from this Court on what it means for a right to be clearly established or beyond debate for purposes of executing their job duties properly and effectively, in order to continue to prevent officer from having to second guess themselves or look over their shoulders while faced with uncertain or unforeseen circumstances in the line of duty.

Similarly, police officers need to have a clear understanding from this Court on under what circumstances an officer can be held personally liable for effectuating an arrest made under the authority of a properly issued warrant. More specifically, officers need to have a clear understanding of what facts and information are required to be included in an affidavit for an arrest warrant submitted to the deciding judge.

More to the point of this matter, are officers required to disclose opinions or comments made to them regarding the potential status of a law for the judge to consider in making a determination to issue an arrest warrant? Petitioners have argued ad nauseum that such a standard would represent a seismic shift in the law and would put police officers in a compromised position regarding their obligation to submit only true and factual information in support of a warrant. However, should this Court take a position contrary to Petitioners, this new standard should be declared at this juncture so that it may be nationally recognized and to prevent future litigation regarding this issue.

Both of the Questions Presented by this petition involve fair and adequate notice to police officers regarding the proper administration of their duties. In order for qualified immunity to carry any weight, officers must be afforded fair and adequate notice that a statutory or constitutional right exists before making the determination to act or refrain from acting, especially while working in the field. With "law enforcement" comprising so much attention in society today, it is important that the legal issues and inconsistent court holdings presented by this case be resolved by this Court to maximize the protection of individuals rights and to minimize the fear of law enforcement officers in carrying out their duties without fear of retaliation for reasonable mistakes.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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