

No. _____

In The
SUPREME COURT OF THE UNITED STATES

MATTHEW NEIDERMEYER
Petitioner,

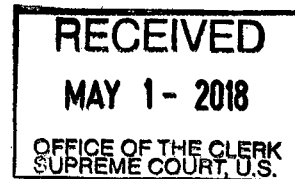
vs.

MICHAEL CALDWELL,
Respondent,

On Petition for Certiorari to the United States Court
of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Matthew Neidermeyer pro se
635 Baker Street Apt. J-206
Costa Mesa, CA 92626
Ph. 949- 423-8571



QUESTION PRESENTED FOR REVIEW

Whether Respondent California Highway Patrol, not the reasonable officer, but an unreasonable officer, can be shielded by qualified immunity, after pulling over the Petitioner motorist for weaving, violated Petitioner's constitutional rights when Respondent arrested the Petitioner for the sole reason that Petitioner refused to tell Respondent officer where Petitioner was going. On the dash cam video at 14:41 [<https://youtu.be/8enFYbXtBrA>] after the final time Petitioner declined to answer, Respondent stated: "You haven't answered any questions. All I wanted to know is where you're going. Now I know where you're going, you're going to jail, just because you didn't wanna answer questions."

LIST OF PARTIES

1. MATTHEW NEIDERMEYER, Plaintiff and Petitioner, pro se
2. MICHAEL CALDWELL, Respondent and Respondent

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STATEMENT OF FACTS

This action arises out of the violation of civil rights of Petitioner Matthew A. Neidermeyer by Officers Michael Caldwell on the morning of December 1, 2012, emanating from a traffic stop which occurred at 12:40 a.m. Petitioner was driving his Nissan automobile with his girlfriend

southbound on the I-5 freeway when Petitioner was pulled over by Respondent Officer Michael Caldwell, for weaving out of his lane.

SUMMARY OF THE ARGUMENT

The undisputed record clearly evinces that the grant of summary judgment in favor of Respondents by the District Court was inappropriate.

That court erred by finding that Respondent had a valid reason to believe that Petitioner was under the influence of drugs or alcohol when he was arrested on December 1, 2012. Petitioner submitted to a breath analysis test, which resulted in 0.00 blood-alcohol content. Respondent asked Petitioner where he was going prior to the arrest, nine times. Petitioner was under no obligation to tell Respondent his destination so Petitioner refused to tell him his destination. When Petitioner refused to tell Respondent his destination this became a verbal tug of war that Respondent refused to lose. Because Petitioner refused to reveal something that his constitutional rights permit the Petitioner not to answer, Petitioner was arrested. On the video Respondent admitted to Petitioner that he was arrested for not telling the officer the location of his destination. [14:41] This is a violation of Petitioner's civil rights and the dishonest reason for requesting a blood or urine test of Petitioner was an attempt by Respondent to conceal the true reason why Respondent arrested Petitioner.

FACTS

Petitioner was arrested by Respondent Officer on December 2012, at 12:40 a.m. Petitioner was driving his Nissan on the I-5 freeway, when he looked at his iPhone, causing him to swerve slightly. Petitioner was pulled over by Respondent and was arrested because he refused to tell Respondent Officer what his destination was at that time.

All of the evidence was contained on the police cruiser dash cam video. On the video [0:32] Petitioner's two left tires can be seen drifting left over the dotted line. Petitioner shifts lanes to the right using turn signal.[0:38] At page 4, line 8 of the police report, Respondent wrote: The Nissan drifted to the right and drifted completely into the #3 lane directly to the rear of another patrol vehicle nearly causing another collision. There is no mention of the first, alleged, collision.

At page 4, line 28 of his police report Respondent wrote: "As Neidermeyer exited his vehicle, he seemed fidgety, nervous and was looking around and he yelled to the passenger to make sure she was recording everything." Contrarily, the video demonstrates that there is no basis for Respondent to determine that Petitioner was fidgety. Respondent often lied to conceal his personal retaliatory reasons for the arrest.

At page 2 of his police report, Respondent describes Petitioner's demeanor as uncooperative. The video showed that Petitioner was very cooperative, but that Petitioner refused to tell Respondent where he was going. Respondent asked Petitioner 9 times to divulge his destination. Respondent placed Petitioner under arrest for not divulging his destination. Respondent knew that he could not retaliate by arresting Petitioner, but he did it anyway.

At page 2 of Respondent's DMV report Form DS 367, he wrote: "Upon contacting the suspect, I observed the objective signs and symptoms of drug impairment." Yet, Respondent, a claimed trained observer and highly skilled drug Recognition Expert, omitted any mention of these objective signs of drug impairment from his police report.

Respondent asked Petitioner to provide his drivers license, registration and insurance.[2:33] He then asks Petitioner [2:38] "Where you comin' from?" Petitioner responds without stuttering,

stammering, or hesitation, that he is coming from the Magic Castle. [2:41]

There was no reasonable basis for Respondent Caldwell to make a finding that Petitioner was impaired. The video clearly shows Petitioner's conduct, not stumbling, not slurring his speech, not drooping his eyes or his head, and not indicating in any manner that he is under the influence of drugs or alcohol.

Respondent asked Petitioner [4:10]: Have you had any alcohol tonight? In 3 seconds, without delay, or stammering, in a clear and responsive manner, Petitioner said: "None at all." [4:13]

On the video Petitioner can be seen cooperating and undergoing a Horizontal Gaze Test.

Respondent said to Petitioner: "Alright, just stay in the car, I'll be right back." [4:39] This is the most significant event of the arrest. This is the reason why the California Superior Court dismissed the criminal charges against Petitioner. Respondent allowed Petitioner to remain in the drivers seat, keys in the ignition and the motor running while he returned to his patrol vehicle for 3 minutes, 12 seconds. [4:41-7:53] This event that Respondent determined that Petitioner was not impaired. It proves that Respondent Caldwell did not honestly believe that Petitioner was impaired. Respondent returned to Petitioner's driver's side window [7:53]: Where you headed to right now? Petitioner said, "I don't wanna say." Respondent asked, "Why don't you wanna say?" [7:57] Petitioner said, "I'm not answering any questions without an attorney. [7:57] Respondent retaliates by saying: "Alright, step outta the vehicle for me." [8:01] Respondent took no action based upon impairment. Respondent returned to his patrol car and left Petitioner in control of his vehicle for 3:12. Respondent only removed Petitioner in retaliation.

Respondent violated every well established constitutional right that concerns Petitioner on that roadway, when he stated: "You're not gonna answer any questions? Are you gonna make

this difficult? Do you wanna go to jail because you don't wanna answer a couple questions?

[9:37] At this point, this retaliation is clear. Respondent never believed drugs were involved.

He never told Petitioner that he would go to jail for being impaired. He never told Petitioner that he would be arrested for any other reason other than exercising his constitutional rights. If

Respondent truly believed that drugs were involved, or that alcohol was impairing Petitioner, he could have called for help from a drug dog. Respondent continued to ask, "All I wanna know is where you're headed to." [11:57] and, "I wanna know where you're headed to, where you going? [12:31] Respondent finally said, "You haven't answered any questions. All I wanted to know is where you're going. Now I know where you're going, you're going to jail, just because you didn't wanna answer questions." [14:41]

Respondent could not have stated a constitutional violation more clearly. He may have tried, by saying that he was going to violate every possible constitutional protection that Petitioner had at that time, because Caldwell had a gun strapped to his hip, and handcuffs on his utility belt, and a partner who possessed the same weapons. The only weapon that Petitioner Neidermeyer had was the United States Constitution, but for the time being Respondent ripped it up and trampled on it and mocked it.

Petitioner asked: "What have I done to deserve being in the back of a car? I mean, this started with you pulling me over for swerving and now you're taking me to jail." [17:45] Respondent said, "You wouldn't answer any questions." [17:53]

Petitioner asked, "Am I obligated to answer any questions, what are you looking for?" [17:55] Within two seconds, Respondent stated that "I need to know where you're going... I need, I need to know some pertinent information." [17:57] The Constitution disagrees.

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Petitioner Matthew Neidermeyer prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit issued on December 3, 2017.

OPINIONS BELOW

On October 21, 2015 the district court issued its opinion granting summary judgment in favor of

Respondent. A copy of that opinion is attached as Appendix A

On December 5, 2017 the United States Court of Appeals for the Ninth Circuit entered judgment affirming the district court decision granting summary judgment. A copy of that opinion is attached as Appendix B.

On December 28, 2017 the United States Court of Appeals for the Ninth Circuit entered judgment granting Petitioner's Motion to Proceed pro se. [Neidermeyer v. Caldwell, 2017 U.S. App. LEXIS 27026] A copy of that opinion is attached as Appendix C.

On December 28, 2017 the United States Court of Appeals for the Ninth Circuit entered judgment denying Petitioner's Motion for Rehearing. [Neidermeyer v. Caldwell, 2017 U.S. App. LEXIS 27032] A copy of that opinion is attached as Appendix D.

JURISDICTION

On December 5, 1027 the United States Court of Appeals for the Ninth Circuit entered its judgment and opinion affirming the district court's judgment. Neidermeyer v. Caldwell, Appendix B.

On December 28, 2017 that court issued its decision denying Petitioner's Motion for Rehearing. (Appendix C) This petition has been timely filed within 90 days of the original order. Sup. Ct.

R. 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

BASIS FOR JURISDICTION IN THE DISTRICT COURT

The district court had jurisdiction pursuant to 18 US. C. §3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ISSUE ONE- Whether Petition has stated a cause of action pursuant to 42 U.S. C. § 1983:

§1983. Civil action for deprivation of rights

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, * * *

ISSUE TWO - Petitioner's right to be free from unreasonable search and seizure is based upon
the Fourth Amendment to the United States Constitution:

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.

ISSUE THREE - Whether prior case law clearly informed Respondent that he could not arrest
Petitioner in retaliation for exercising Petitioner's constitutional right to not answer the question
of his destination.

PRELIMINARY STATEMENT

There was never any significance to Petitioner's destination. Respondent never questioned
the passenger on their destination. What valuable intelligence would have been revealed to
Respondent if Petitioner said that he was going to buy a pizza?

Respondent Caldwell tells Petitioner that he has a "need." "I need, I need" that phrase is
stated and repeated two more times on the video. Respondent's own needs is his focus, not
drugs, not alcohol, not the commission of a crime. Respondent's focus is woefully misplaced.
He is on a witch hunt of his own, not trying to honestly determine whether or not Petitioner was
impaired. This is why he had no reasonable basis for requesting Petitioner to submit to a blood
test. Respondent's "need" violated the law and had no relationship to possible or probable drug
use.

In the trial court Petitioner and Respondent each moved for summary judgment on the issue

of qualified immunity relating to the unlawful arrest; and, Petitioner's allegation of an unlawful pat down. The district court granted summary judgment in favor of Respondent on qualified immunity for the unlawful arrest; and denied summary judgment on the issue of the an unlawful pat down. Then, Petitioner and Respondent moved for reconsideration on each issue. The district court then granted summary judgment in Respondent's favor on the issue of the pat down. The district court granted Respondent a summary judgment based upon qualified immunity, which was affirmed, because Petitioner could not cite any case that was based upon identical facts.

In the trial court and appeals court decisions relied upon the fact that Petitioner's behavior was unusual. Being unusual is no constitutional violation, nor a statutory violation. Being unusual is no reason for Petitioner to be placed in handcuffs and arrested. Respondent claimed to be a certified Drug Recognition Expert, so he should be able to detect the difference between unusual behavior and drug impaired behavior. Our prison populations would exponentially increase if unusual behavior was the criteria for arrest. Being unusual is the freedom to make choices and to follow one's own path. Being unusual worked for Thomas Edison, John D. Rockefeller, Henry Ford and the Wright Brothers. None of them were convicted for it. While Respondent is under an obligation to not violate the Constitutional rights of Petitioner, Petitioner is under no legal obligation to not be unusual, to not act silly, to not act in a juvenile manner, or to not be downright rude. That does not violate any constitutional provisions. And that behavior is constitutionally protected. Any court's attention to not be focused upon unusual behavior, but upon constitutional conformity.

STATEMENT OF THE CASE

a. PULLING OVER FOR WEAVING: Petitioner was pulled over for weaving in his lane and for the claimed reason that his tires crossed the white dotted line. If this was the case, he should

have been issued a citation and released.

b. THE NYSTAGMUS TEST. Petitioner cooperated, as the video shows, in the conduct of the nystagmus test. Petitioner's response to Respondent's conduct was satisfactory.

c. LEAVING PETITIONER IN THE CAR FOR 3 MINUTES 12 SECONDS: Respondent went back to his patrol vehicle and remained there for 3 min. 12 sec. while he allowed Petitioner to remain in full control of his own vehicle sitting in the driver's seat, keys in the ignition, motor running. Petitioner, if Respondent believed he was impaired, could have driven back on the highway. This proves that Respondent had no probable cause to pull him out of the car, no probable cause to arrest Petitioner.

d. QUESTIONING BY RESPONDENT, AND THE TRUE REASONS FOR THE ARREST: Respondent asked Petitioner to state the destination of his drive. Petitioner refused to answer the question. In retaliation for Petitioner invoking his constitutional right not to answer this question Respondent told Petitioner that he was arresting him for refusing to answer that question.

e. DISTRICT COURT GRANT OF SUMMARY JUDGMENT: Because Petitioner could not cite any other prior case where a police officer admitted that he was arresting a person who refused to divulge his destination, the district court granted qualified immunity to the officer, because the officer was not on notice that he could not violate a person's civil rights by this arrest.

f. NINTH CIRCUIT COURT OF APPEAL OPINION. By a 2 -1 majority, the appeals court agreed that because Petitioner could not cite any other prior case where a police officer admitted

that he was arresting a person who refused to divulge his destination, the district court granted qualified immunity to the officer, because the officer was not on notice that he could not violate a person's civil rights by this arrest. The dissent held that this was not a the conduct of a reasonable police officer as proven by his conduct and his lies, thereby depriving him of qualified immunity. Petitioner's Motion For Rehearing was denied by 2 -1 vote.

REASONS FOR GRANTING THE PETITION FOR WRIT

The court should grant the writ to clarify the law of arrest as retaliation, which the district court and appeals court found to be not clarified, allowing an officer to understand that he cannot arrest someone for the purpose of retaliation. Though the circuit courts are not divided, the appellate courts are not applying the law because there is not a prior case based on identical facts. This case should be that case which clarifies to lower courts and police officers of an officer's duty to not retaliate for constitutionally protected speech to not have to divulge one's destination.

The Ninth Circuit refused to reverse the grant of summary judgment because Petitioner could not cite any other case where the police officer told the arrested person that he was being arrested for one reason: that he would not tell the police officer his destination.

This district court granted Respondent a summary judgment based upon qualified immunity. The Ninth Circuit Court of Appeals affirmed for the identical reason, because Petitioner could not cite any case that was based upon identical facts. Identical facts are not required in a prior case to put an officer such as Respondent on notice that he cannot arrest a citizen who refuses to answer questions. *United States v. Lanier* 520 U.S. 259 (1997) stated:

"Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is "fundamentally similar" at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights."

This Court cited *United States v. Guest*, 383 U.S. 745, 759 n. 17 (1966)

A court must answer two questions to determine if qualified immunity applies: first, whether a constitutional right "would have been violated," *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir.

2008) (quoting *Saucier v. Katz*, 533 U.S. 194, 200 (2001)); and second, "whether the right at issue was clearly established at the time and under the circumstances presented." *Beaman*, 776 F.3d at 508; *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012). To answer the first question, "a court must decide whether the facts that a plaintiff has...shown make out a violation of a constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier*, 533 U.S. at 201).

Respondent can establish qualified immunity if he can show an analogous case establishing the right to be free from the conduct at issue; or (2) he can show the conduct was 'so egregious that no reasonable person could have believed that it would not violate established rights.'" *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)

Qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This demands a two-step analysis: whether a constitutional right was violated and whether the allegedly violated right was "clearly established." *McClendon v. City of Columbia*, 305 F.3d 314, 322–23 (5th Cir. 2002) (en banc) (per curiam). The Fifth Circuit clearly explained that to defeat qualified immunity, the plaintiff must show that the official's conduct was objectively unreasonable in light of a clearly established rule of law. Because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), we do not deny its protection unless existing precedent places the constitutional question "beyond debate," *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). Respondent fits into one, or both of the two categories. Respondent was

either plainly incompetent, or he selected the option of “knowingly” violating the law. This demonstrates that he is a combination of both.

Abstract or general statements of legal principle untethered to analogous or near-analogous facts are not sufficient to establish a right “clearly” in a given context; rather, the inquiry must focus on whether a right is clearly established as to the specific facts of the case. See *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

Thus, novel factual circumstances are no bar to showing a clearly established right, “so long as the state of the law at the time gave the respondents fair warning that their conduct was unconstitutional.” *Beaman v. Freesmeyer*, 776 F.3d 500, 509 (7th Cir. 2015)(citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); see also *Estate of Escobedo v. Martin*, 702 F.3d 388, 404 (7th Cir. 2012) (“A constitutional right is clearly established when ‘it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.’”) (quoting *Saucier*, 533 U.S. at 202).

Respondent’s conduct does present a novel factual circumstance. That is because there is no other law enforcement officer who has gone so far over the line for egregious retaliatory conduct relating to questioning a driver after making a traffic stop. “To determine whether a seizure is unreasonable, a court must ‘balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion’ and determine whether ‘the totality of the circumstances justified [the] particular sort of... seizure.’” *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). “A seizure becomes unlawful when it is ‘more intrusive than necessary.’” *Florida v. Royer*, 460 U.S. 491, 504 (1983).

This Court recognized in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) that previous cases do not have to be ‘fundamentally similar’ and that officials can still be on notice even in novel factual

situations."

The objectively reasonable standard has also been applied in determining when a police officer's use of force becomes excessive under the Fourth Amendment. See *Graham v. Connor*, 490 U.S. 386, 396 (1989). In *Graham*, this Court noted that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* This Court held that the "reasonableness" of a use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "Objective," this Court held, meant that "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

The Fourth Amendment standard of objective reasonableness also arises frequently in cases of qualified immunity involving searches or excessive force. In inquiring whether a government official violated clearly established law in a search and seizure case, the Supreme Court has held that this inquiry "turns on the objective reasonableness of the action, assessed in the light of the legal rules that were clearly established at the time it was taken." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009).

"[The Ninth Circuit] has recognized that a retaliatory police action such as an arrest or search and seizure would chill a person of ordinary firmness from engaging in future First Amendment activity." *Ford*, 706 F.3d at 1193 (collecting cases). Therefore, a rational jury could find that the officers deterred or chilled the future exercise of plaintiff's First Amendment rights. "To satisfy

the second requirement, the evidence must be sufficient to establish that [Hartwig's] desire to chill [plaintiff's] speech was a but-for cause of [Hartwig's] conduct." *Id.* at 1194. In other words, would Hartwig have arrested plaintiff but for Hartwig's desire to punish Petitioner for his speech?

The Ninth Circuit held that the nature of Morse's arrest reasonably suggests a retaliatory motive. It is undisputed that although a dozen or so other journalists were also detained in the protest group "blocking" the fare gates, every journalist except Petitioner was released without even a citation. While Respondents insist that this discrepancy can be explained by Petitioner's "active participation" in the protest, a reasonable jury could find otherwise. Petitioner testified that he documented the protest as a journalist, "follow[ing] the group around, taking photographs

Whether a right is clearly established for the purposes of qualified immunity "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderon v. Creighton*, 483 U.S. 635, 639 (1987). The right must not be stated as a broad general proposition, but rather must be defined with enough specificity to put a reasonable officer on notice that his conduct is unlawful. *Reichle v. Howards*, 566 U.S. 658 (2012). A right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances. See *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1073 (9th Cir. 2012). "The relevant inquiry is whether, at the time of the officers' action, the state of the law gave the officers fair warning that their conduct was unconstitutional." *Ford*, 706 F.3d at 1195. We must assess the legal rule "in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

In *Morse v. S. F. Bay Area Rapid Transit (BART)*, *supra*, the Ninth Circuit stated, "In this Circuit, '[p]olice officers have been on notice at least since 1990 that it is unlawful to use their

authority to retaliate against individuals for their protected speech.”” *Ford*, 706 F.3d at 1195.

"Moreover, [the Ninth Circuit's] 2006 decision in *Skoog* established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action." *Id.* at 1195 -96 (emphasis by the *Morse* decision). The Ninth Circuit finally determined that the issue of whether Officer Hartwig retaliated against plaintiff Morse for Morse's protected speech is a question of disputed fact, qualified immunity is inapplicable, even if probable cause existed for Morse's arrest.

In *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013), the Ninth Circuit stated that "In this Circuit, an individual has a right "to be free from police action motivated by retaliatory animus but for which there was probable cause." *Skoog*, 469 F.3d at 1235. That right was violated when the officers booked and jailed Ford in retaliation for his protected speech, even though probable cause existed for his initial arrest. That is very similar to Petitioner's circumstances.

The Ninth Circuit held that Ford's criticism of the police for what he perceived to be an unlawful and racially motivated traffic stop falls "squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech . . . is categorically prohibited by the Constitution." *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990).

At footnote 2, the court stated that while probable cause is not irrelevant to an individual's claim that he was booked and jailed in retaliation for his speech. Probable cause for the initial arrest can be evidence of a police officer's lack of retaliatory animus for subsequently booking and jailing an individual. See *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008) (holding that the issue of probable cause is not dispositive of ordinary retaliation claims, though it still has "high probative force") (alteration and quotation marks omitted). However, that

determination should be left to the trier of fact once a plaintiff has produced evidence that the officer's conduct was motivated by retaliatory animus.

Petitioner Neidermeyer had produced the video, which provides more than adequate evidence of Respondent's animus. Respondent admits to his own animus when he tells Petitioner the reason for taking him to jail. The pretense of the presence of Petitioner's drug or alcohol impairment backfired. When Petitioner blew a perfect zero in the breathalyzer, Respondent only had drug impairment to rely upon. The drug dog could have resolved that. But none was used. The dog is conspicuous by its absence.

In *Ford v. Yakima*, fn. 3, the Ninth Circuit stated that "Police officers are authority figures. Accordingly, there is little practical difference between officers 'punishing' Ford for his speech and providing Ford an "opportunity" to conform his views to those of the police in order to avoid arrest. And even if that were a meaningful distinction, the question whether the officers retaliated against Ford or simply permitted him to retreat voluntarily from his lèse-majesté is ultimately a factual one that would have to be resolved at trial.

A right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances. See *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1073 (9th Cir. 2012). The Ninth Circuit explained that in 2007, the law in that Circuit gave fair notice that it would be unlawful to jail Ford in retaliation for his First Amendment activity. It further explained that police officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech. That is exactly what Respondent did, and he even bragged to and taunted Petitioner that this is what he was doing. The Ninth Circuit cited *Duran*, 904 F.2d at

1375-78 (holding that a police officer's traffic stop and subsequent arrest of an individual who directed obscene gestures and words toward that officer was unlawful because it was well-established that police officers may not exercise their authority for personal motives, especially in response to an individual's criticism or insults); see also *Beck v. City of Upland*, 527 F.3d 853, 871 (9th Cir. 2008) (holding that Duran clearly established that police officers could not use their power to retaliate against an individual for his free speech).

The Ninth Circuit's 2006 decision in *Skoog*, SIX years before Respondent arrested Petitioner, established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action. 469 F.3d at 1235. In that case, *Skoog* claimed that a police officer seized his property to retaliate against his filing a lawsuit against another officer. *Id.* at 1227. The Ninth Circuit held that though the officer's search and seizure was supported by probable cause, it was unlawful because the officer's primary motivation was to retaliate against *Skoog*'s exercise of his First Amendment rights. *Id.* at 1235.

Long before Respondent encountered and arrested Petitioner on Dec. 2, 2012 the Ninth Circuit held that *Duran* clearly established that police officers may not use their authority to punish an individual for exercising his First Amendment rights, while *Skoog* clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action.

The Ninth Circuit, relying upon its previous decision that *Duran* clearly established that police officers may not use their authority to punish an individual for exercising his 1st Amendment rights, while *Skoog* clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action. Respondent's conduct falls squarely

within the prohibitions of *Duran* and *Skoog*. The Ninth Circuit held that a reasonable police officer would have understood that he could not exercise his discretion to book an individual in retaliation for that individual's First Amendment activity. The Ninth Circuit cited the officer's own statements to indicate that he was well aware of his discretion to book an individual he has arrested: "I have the freedom to take you to jail . . . we have discretion whether we can book or release you." He surely was aware that his discretion was subject to constitutional limits. Because the law concerning the right in question was clearly established at the time of Ford's arrest, the officers were not entitled to qualified immunity. This sounds remarkably similar to what Respondent had done, and to what Respondent had said to Petitioner. It appears that these two officers attended the same police academy simultaneously.

The Ninth Circuit held that because Ford had put forth facts sufficient to allege a violation of his clearly established First Amendment right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action, that the officers are not entitled to qualified immunity, and Ford's claims should proceed to trial. The Ninth Circuit reversed the district court's grant of summary judgment.

In *Ford*, the Ninth Circuit specifically applied *Skoog's* holding to a post-*Reichle* case in confirming that since 2006 it has been clearly established in the Ninth Circuit that retaliatory police conduct is actionable even if the officer's conduct was supported by probable cause. The Ninth Circuit noted that the Supreme Court, in *Reichle*, found that there was not a clearly established right to be free from a retaliatory arrest supported by probable cause under either Supreme Court precedent or Tenth Circuit precedent. The Court did not address the question of whether the absence of probable cause is necessary to state a claim for retaliatory arrest. See *Reichle*, 132 S.

Ct. at 2093. Although “[t]he Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury,” in the Ninth Circuit, the inquiry begins by looking to see “[i]f the right is clearly established by decisional authority of the Supreme Court or this Circuit.” *Boyd v. Benton Cnty.*, 374 F.3d 773, 781 (9th Cir. 2004). If it is, “[the] inquiry should come to an end.” *Id.* *Morse* held that “while the particular right at issue here has not been clearly established by the Supreme Court, it has been clearly established by the Ninth Circuit in *Skoog*, which ends the inquiry.” As *Morse v. S.F. Bay Area Rapid Transit* explained above, *Skoog* is binding precedent that since 2006 it has been clearly established in this Circuit that a person has a right to be free from a retaliatory arrest even if supported by probable cause.

The Ninth Circuit has continued to cite *Skoog*'s holding as good law. *Martin v. Naval Criminal Investigative Serv.*, 539 Fed. Appx. 830, 2013 U.S. App. LEXIS 18498, 2013 WL 4757224, at 1 (9th Cir., 2013) (unpublished) (“Our precedent has long provided notice to law enforcement officers ‘that it is unlawful to use their authority to retaliate against individuals for their protected speech,’ *Ford*, 706 F.3d at 1195, ‘even if probable cause exists for’ the challenged law enforcement conduct, *Skoog*, 469 F.3d at 1235.”).

Respondent did not need a body of evidence scotch taped to his forehead to give him notice that retaliating against Petitioner for asserting his constitutional right not to divulge where he was going, to say nothing, to not make any statements that could be used against him “in a court of law”, Respondent knew, or should have known, that he could not retaliate against Petitioner by arresting him. But, Respondent admitted on the video that he intentionally retaliated against Petitioner for the very reasons that any person, whether or not in law enforcement, knew that

Respondent could not do. But, he did it, and Petitioner's case is brought against Respondent to redress the very reasons that Respondent stated on the video.

In Petitioner's case, destination was the ONLY line of questioning. Petitioner was under no obligation to answer. Therefore, Respondent became unreasonable in his conduct and violated several police procedures. One: Respondent allowed Petitioner to remain in his vehicle, in the driver's seat, with the keys in the ignition and with the motor running, while Caldwell and Carter sat in their patrol vehicle for three minutes and twelve seconds. This is something Caldwell did not want his supervisor to see.

The question that we must determine in this case is whether Caldwell diligently pursued a means of investigation that was likely to confirm or dispel his alleged suspicions of impairment quickly, during which time it was necessary to detain the Respondent. *United States v. Sharpe* 470 U.S. 675, 682, 686-688 (1985.) Respondent wasn't pursuing an investigation but he trying to punish for not telling Respondent what he wanted to know, but had no constitutional right to know.

When Respondent pretended to continue his investigation after concluding the single sobriety test, he had no reasonable suspicion that Petitioner was involved in criminal activity, nor that Petitioner was impaired. That is betrayed by the fact that Caldwell walked back to his police cruiser, and allowed Petitioner to remain in the drivers seat, with the keys in the ignition, and the engine running, for three minutes and twelve seconds before returning to the Petitioner's vehicle. At that time, Respondent still did not order the car to be turned, or keys to be removed.

It matters not that Petitioner appeared nervous, or unusually nervous. Respondent had nothing, no standard behavior, with which to compare Petitioner's alleged nervous condition.

He never wrote in his police report that Petitioner began sweating profusely or that his hands were shaking, in comparison to before the questioning began. Respondent never wrote that Petitioner began to stutter and acted restless after exiting the car, in comparison to Petitioner's behavior at any time prior to exiting the car. Nothing that Respondent reported can support the position that Petitioner's nervousness alone may have been enough to prolong Petitioner's detention. Petitioner's alleged nervousness, or any claimed restlessness, or any phantom lack of eye contact is not sufficient.

Additionally, there were no further investigative steps, other than asking Petitioner NINE times the destination of his journey. Respondent did not have an objectively reasonable suspicion, supported by specific and articulable facts, justifying his request for a blood or urine test to detect the use of drugs. Respondent acted unreasonably when, after observing Petitioner's behavior, and no unusual nervousness, Petitioner's responses did not reasonably raise additional suspicions of alcohol or drug impairment.

A detention is constitutionally reasonable if the circumstances known or apparent to the detaining officer include "specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience, to suspect the same criminal activity and same involvement by the person in question." (*In re Tony C.* (1978) 21 Cal. 3d 888, 893 [148 Cal. Rptr. 366, 582 P.2d 957].) In Petitioner's case, there must be an objectively reasonable suspicion for Respondent to

believe that drug impairment was the basis for Petitioner's weaving. That objective determination was betrayed when Respondent sat in his patrol car, with Respondent's keys in HIS own vehicle's ignition, with HIS motor running; while also maintained control over HIS own vehicle, sitting behind HIS own wheel, with the keys in HIS own ignition, with HIS own engine running, for three minutes and twelve seconds. Petitioner could have accelerated on down the highway, inciting a high speed chase, and ending in a crash that could have killed several people. Cars careening into crowds causing multiple deaths is a headline that is read much too often.

In *People v. Daugherty* (1996) 50 Cal. App. 4th 275; 57 Cal. Rptr. 2d 666, the appeals court cited and relied upon *United States v. Sokolow* 490 U.S. 1 (1989) which stated that the destination of the Respondent alone is not enough to constitute reasonable suspicion compels reversal. The court stated that "We agree a traveler's destination alone is not enough to constitute reasonable suspicion to justify a detention." But, in total disregard of *Daugherty*, Respondent used Petitioner's refusal to provide a destination to make an arrest, based upon an impairment that the video proves was not justified. But Respondent admitted that on that basis alone, he arrested Petitioner. This case demonstrates that it is well established that arresting Petitioner was a violation of Petitioner's civil rights.

Nervousness, even if extreme, is not sufficient by itself to justify prolonging a detention. *U.S. v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, 724-726.) The concern seems to be that nervousness is "a subjective factor, one that can be wheeled out for use in almost every . . . case." *U.S. v. Weaver* (8th Cir. 1992) 966 F.2d 391, 397 (dis. opn. of Arnold, C.J.); *U.S. v. Beck* 140 F.3d 1129, 1139 (8th Cir. 1998) held that it is not uncommon for most citizens to be nervous when confronted by a law enforcement officer. Unless the officer has prior experience with the

Respondent, there is no measure with which to gauge behavior during the stop with normal behavior.

[T]he prohibition against retaliatory punishment is 'clearly established law' in the Ninth Circuit, for qualified immunity purposes." *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (quoting *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995)). Accordingly, the Ninth Circuit should have rejected Respondents' argument that they are entitled to qualified immunity.

Questioning during the routine traffic stop on a subject unrelated to the purpose of the stop is not itself a Fourth Amendment violation. Mere questioning is neither a search nor a seizure. (*U.S. v. Shabazz*, 993 F.2d 431, 5th Cir. 1992); accord *Florida v. Bostick* 501 U.S. 429, 435, 439 - 440 (1991) [Police may approach a person in a public place and ask potentially incriminating questions and request permission to search without implicating the Fourth Amendment, so long as a reasonable person would understand he or she could refuse to cooperate.].) While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. (*U.S. v. Shabazz*, *supra*, at p. 437; accord, *People v. Bell*, *supra*, 43 Cal. App. 4th at p. 768.)

In Petitioner's case, destination was the ONLY line of questioning. Petitioner was under no obligation to answer. Respondent never wrote in any report and did not testify that he smelled alcohol in the car or noticed open alcoholic containers in the car. After conducting sobriety tests, Respondent actually concluded Petitioner was not driving impaired. This is determined because he went back to his own patrol car and he left sitting behind the wheel in the driver's seat, with the keys in the ignition, and the car's engine running for 3:12 sec. No CHP officer would violate standard operating procedure and allow a person that was subjectively or objectively believed to

be impaired for ANY reason to remain in control of the vehicle.

There was no report or indication that passenger appeared to be nervous, or more, or less nervous than Respondent . The only standard by which to measure Petitioner's own nervousness is against that of Respondent's own nervous nature. Respondent never spoke to the passenger. By choosing to not question the passenger, we would never know if her answers to questions as to where she was coming from and where she was going differed from Petitioner's answers. A highly trained officer such as Respondent apparently had good reason not to question the passenger, or to remove the keys from Petitioner's vehicle as he left Petitioner in control of that vehicle for three minutes and twelve seconds. There was no point in asking Petitioner his destination. It was irrelevant. But Respondent did it anyway.

The question that we must determine in this case is whether Respondent was a reasonable officer and diligently pursued a means of investigation that was likely to confirm or dispel his alleged suspicions of impairment quickly, during which time it was necessary to detain the Respondent. (*People v. Avalos* (1996) 47 Cal. App. 4th 1569, 1577, quoting *United States v. Sharpe* (1985) 470 U.S. 675, 682, 686-688. Respondent was not really pursuing an investigation but punishing Petitioner for not telling Respondent what he wanted to know, but had no constitutional right to know.

When Respondent pretended to continue his investigation after concluding the single sobriety test, he had no reasonable suspicion that Petitioner was involved in criminal activity, nor that was impaired. That is betrayed by the fact that Respondent walked back to his police cruiser, and allowed to remain in the drivers seat, with the keys in the ignition, and the engine running, for 3 min., 12 seconds before returning to the Petitioner's vehicle. At that time, Respondent still did

not turn off the vehicle or remove the keys.

Additionally, there were no further investigative steps other than asking Petitioner NINE times the destination of his journey as seen on the video. Respondent never asked Petitioner's passenger what their destination was. There was nothing to balance Petitioner's answer against. The passenger was never asked any questions, as the video proves. The video demonstrates that Respondent did not diligently pursue a means of investigation reasonably designed to confirm or dispel his alleged suspicions of alcohol or drug impairment. There must be an objectively reasonable suspicion for Respondent to believe that drug impairment was the basis for Petitioner's weaving. That objective determination was revealed when Respondent sat in his patrol car, with Respondent's keys in HIS patrol vehicle's ignition, with HIS motor running; while Respondent also maintained control over HIS own vehicle, sitting behind HIS wheel, with the keys in HIS ignition, with HIS engine running, for 3: 12 seconds.

United States v. Sokolow (1989) 490 U.S. 1 stated that the destination of the Respondent alone is not enough to constitute reasonable suspicion compels reversal. This Court stated that "We agree a traveler's destination alone is not enough to constitute reasonable suspicion to justify a detention." Many state and federal cases have concluded that nervousness, even if extreme, is not sufficient by itself to justify prolonging a detention. (*People v. Loewen* (1983) 35 Cal.3d 117, 124-125, 196 Cal. Rptr. 846, 672 P.2d 436; *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 827-829; *U.S. v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, 724-726.) The concern seems to be that nervousness is "a subjective factor, one that can be wheeled out for use in almost every . . . case." (*U.S. v. Weaver*, 966 F.2d 391, 397 (8th Cir. 1992), (dis. opn. of Arnold, C.J.); *U.S. v. Beck* (8th Cir. 1998) 140 F.3d 1129, 1139 held that it is not uncommon for most citizens to be

nervous when confronted by a law enforcement officer. Unless the officer has prior experience with the plaintiff, there is no measure with which to gauge behavior during the stop with normal behavior. The video shows that Respondent belatedly attempted to embellish his description after being reminded that mere nervousness was insufficient to justify prolonging the detention, not to mention the basis to justify a blood or urine test for drugs.

Extreme nervousness is absent from the video. As explained in *United States v. Salzano* (10th Cir. 1998) 158 F.3d 1107, 1113: "Nervousness alone cannot support reasonable suspicion of criminal activity. This is because it is common for most people 'to exhibit signs of nervousness when confronted by a law enforcement officer' whether or not the person is currently engaged in criminal activity." (See also *People v. Loewen* (1983) 35 Cal.3d 117, 125, 196 Cal. Rptr. 846 ["to hold that police officers should in the proper discharge of their duties detain and question . . . all those who act nervous at the approach of officers would for practical purposes involve an abrogation of the rule requiring substantial circumstances to justify the detention and questioning of persons on the street."]

Where the Constitution is violated if an officer such as Respondent acts for forbidden reasons, qualified immunity ordinarily would not shield him from liability; there is no "unfairness [in] holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the Petitioner." *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998).

Where Supreme Court and Ninth Circuit precedents clearly establish the unconstitutionality of acting based on a specific motive—such as discrimination based on race or retaliation for protected speech, see *Wayte v. United States*, 470 U.S. 598, 608 (1985)—there is ordinarily no place for qualified immunity, and certainly not by reference to the objective validity of the c- on-

duct. Because the officer is alleged to have acted with a prohibited motive, he cannot claim to have acted “reasonably.” As this Court explained in *Crawford-El*, plaintiffs who claim retaliation are “alleg[ing] misconduct that was plainly unlawful,” and there is thus no “obvious unfairness in imposing liability”; the officer “knew, or should have known,” that acting on such motives “violated the constitutional rights of the plaintiff.” *Crawford-El*, 523 U.S. at 591. This Court, accordingly, squarely rejected the contention that an officer should receive immunity if his acts are objectively justified, calling that an “unprecedented proposal.” *Id.* at 593–94. Because “improper intent” defines the constitutional right and violation, officers alleged to have acted with such intent cannot be “immunize[d]” while “the merits of a claim that [he] knowingly violated the law are being resolved.” *Id.*

In *Morse v. S. F. Bay Area Rapid Transit (BART)*, 2014 U.S. Dist. LEXIS 17369 (9th Cir. 2014), this Court stated: “In this Circuit, an individual has a right ‘to be free from police action motivated by retaliatory animus but for which there was probable cause.’” *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013); *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006). To establish a claim of retaliation in violation of the *First Amendment*, a Petitioner must demonstrate that the officer's conduct “would chill a person of ordinary firmness from future *First Amendment* activity.” *Id.* In addition, the evidence must enable a Petitioner ultimately to prove that the officer's desire to chill his speech was a but-for cause of the officer's allegedly unlawful conduct. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916-17 (9th Cir. 2012) (en banc).

A right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances.

Karl v. City of Mountlake Terrace, 678 F.3d 1062, 1073 (9th Cir. 2012). "The relevant inquiry is whether, at the time of the officers' action, the state of the law gave the officers fair warning that their conduct was unconstitutional." *Ford*, 706 F.3d at 1195.

In *Morse v. S. F. Bay Area Rapid Transit (BART)*, *supra*, this Court stated, "In this Circuit, '[p]olice officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech.'" *Ford*, 706 F.3d at 1195. "Moreover, [the Ninth Circuit's] 2006 decision in *Skoog* established that an individual has a right to be free from retaliatory police action, *even if probable cause existed for that action*." *Id.* at 1195-96 (emphasis by the *Morse* decision). This Court determined that the issue of whether Off. Hartwig retaliated against Petitioner Morse for Morse's protected speech is a question of disputed fact, qualified immunity is inapplicable, even if probable cause existed for Morse's arrest.

In *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013), this Court stated that "In this Circuit, an individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.'" *Skoog*, 469 F.3d at 1235. That right was violated when the officers booked and jailed Ford in retaliation for his protected speech, even though probable cause existed for his initial arrest. That is remarkably similar to 's circumstances.

This Court held that Ford's criticism of police for what he perceived to be an unlawful and racially motivated traffic stop falls "squarely within the protective umbrella of the *First Amendment* and any action to punish or deter such speech . . . is categorically prohibited by the Constitution." *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990).

Dietrich v. John Ascuaga's Nugget, 548 F.3d 892, 901 (9th Cir. 2008) held that the issue of

probable cause is not dispositive of ordinary retaliation claims, though it still has "high probative force" and that determination should be left to the trier of fact once evidence is produced that Respondent's conduct was motivated by retaliatory animus. The video provides adequate evidence of Respondent's animus. Respondent admitted to his own animus when he told Petitioner the reason for the arrest. The pretense of Petitioner's drug or alcohol impairment backfired when

The Ninth Court explained in 2007, law in this Circuit gave fair notice that it would be unlawful to jail Ford in retaliation for his *First Amendment* activity. It further explained that police officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech. That is exactly what Respondent did, and he even bragged to and taunted him that this is what he was doing. This Court cited *Duran*, 904 F.2d at 1375-78 (holding that a police officer's traffic stop and subsequent arrest of an individual who directed obscene gestures and words toward that officer was unlawful because it was well-established that police officers may not exercise their authority for personal motives, especially in response to an individual's criticism or insults); *see also Beck v. City of Upland*, 527 F.3d 853, 871 (9th Cir. 2008) (holding that *Duran* clearly established that police officers couldn't use their power to retaliate against an individual for his free speech). The 2006 decision in *Skoog*, 6 years before Petitioner's arrest, established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action. 469 F.3d 1235. In that case, *Skoog* claimed that a police officer seized his property to retaliate against his filing a lawsuit against another officer. *Id.* at 1227. That court held that although the officer's search and seizure was supported by probable cause, it was unlawful because the officer's primary motivation was to

retaliate against Skoog's exercise of his *1st Amendment* rights. *Id.* at 1235.

Long before Respondent arrested Petitioner the Ninth Circuit held that *Duran* clearly established that police officers may not use their authority to punish anyone for exercising his *1st Amendment* rights, while *Skoog* clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action. That court, relying upon its previous decision that *Duran* clearly established that police officers may not use their authority to punish an individual for exercising his *1st Amendment* rights, while *Skoog* clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action. The officers' conduct in *Ford* falls squarely within the prohibitions of *Duran* and *Skoog*.

That court went on to hold that a reasonable police officer would have understood that he could not exercise his discretion to book an individual in retaliation for *1st Amendment* activity. *Ford* as should be done in Petitioner's case, cited the officer's own statements to show that he was well aware of his discretion to book an individual he arrested: "I have the freedom to take you to jail . . . we have discretion whether we can book or release you." He was aware that his discretion was subject to constitutional limits. Because the law concerning the right in question was clearly established at the time of Ford's arrest, the officers are not entitled to qualified immunity. This is very similar to Respondent's actions and to what Respondent had said to Petitioner. It appears that these two officers attended the same police academy at the same time.

That court held that because Ford established facts sufficient to allege violation of his clearly established *1st Amendment* right to be free from police action motivated by retaliatory animus,

even if probable cause existed for that action, that the officers are unentitled to qualified immunity, and Ford's claims should proceed to trial. That court reversed the district court's grant of summary judgment, as this Court should do in Petitioner's case.

In *Ford*, the court specifically applied *Skoog*'s holding to a post-*Reichle* case in confirming that since 2006 it has been clearly established in the Ninth Circuit that retaliatory police conduct is actionable even if the officer's conduct was supported by probable cause. That means that even if Respondent had probable cause, which he did not, he could not arrest for a retaliatory reason, such as not telling him his destination. Although "[t]he Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury," in the 9th Circuit, the inquiry begins by looking to see "[i]f the right is clearly established by decisional authority of the Supreme Court *or* this Circuit." *Boyd v. Benton Cnty.*, 374 F.3d 773, 781 (9th Cir. 2004). If it is, "[the] inquiry should come to an end." *Id.* *Morse* held that "while the particular right at issue here has not been clearly established by the Supreme Court, it has been clearly established by the Ninth Circuit in *Skoog*, which ends the inquiry." As *Morse v. S.F. Bay Area Rapid Transit* explained above, *Skoog* is binding precedent that since 2006 it has been clearly established in this Circuit that a person has a right to be free from a retaliatory arrest even if supported by probable cause. It is as clear as clear can be.

The court continued to rely on *Skoog*'s holding. *Martin v. Naval Criminal Investigative Serv.* 539 Fed. Appx. 830 (9th Cir. 2013) (unpub'd) which stated that "Our precedent has long provided notice to law enforcement officers 'that it is unlawful to use their authority to retaliate against individuals for their protected speech,' *Ford*, 706 F.3d at 1195, 'even if probable cause exists for'

the challenged law enforcement conduct, *Skoog*, 469 F.3d at 1235.” Respondent didn’t need notice taped to his forehead to tell him that retaliating against Petitioner for asserting his constitutional right not to divulge his destination, to not make any statements that could be used against him “in a court of law”, Respondent knew, or should have known, that he could not retaliate by arresting Petitioner. Respondent admitted on video that he intentionally retaliated for the reasons that any reasonable person knew that Respondent could not do. In Petitioner’s case that was the ONLY line of questioning. Petitioner was not obligated to answer.

Officers are under no constitutional obligation to inform those who have been arrested of the reason for their arrest. See, e.g., *Calusinski v. Kruger*, 24 F.3d 931, 936 n.6 (7th Cir. 1994) (“at the time of arrest an arrestee does not have a Fourth Amendment or Sixth Amendment right to be informed of the reason for the arrest”); *Williams v. Schario*, 93 F.3d 527, 529 (8th Cir. 1996) (per curiam) Many jurisdictions and the federal government do not require officers making warrantless arrests to inform arrestees of the basis for arrest. Yet, Respondent informed Petitioner the reason for his arrest. Respondent became disengaged from his official obligations and replied to in a personal manner, similar to how a young child in the schoolyard would taunt his classmate at recess that he gained revenge and accomplished a meaningful retaliation.

Respondent can’t “justify what from the outset may have been actually sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid.” *Bingham v. City of Manhattan Beach*, 341 F.3d 939 (9th Cir. 2003); *Gassner v. City of Garland*, 864 F.2d 394, 398 (5th Cir. 1989); *Simpson v. White*, 52 F.3d 326 (6th Cir., 1995).

[T]he prohibition against retaliatory punishment is 'clearly established law' in the 9th Circuit,

for qualified immunity purposes." *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (quoting *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995)).

The issue is whether Caldwell diligently pursued a means of investigation that was likely to confirm or dispel his alleged suspicions of impairment quickly, during which time it was necessary to detain the Respondent. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1577, quoting *Sharpe, supra*, at p. 686.) The video shows that Respondent was really punishing Petitioner for not telling Respondent what he wanted to know, but had no constitutional right to know.

In *People v. Daugherty* (1996) 50 Cal. App. 4th 275; 57 Cal. Rptr. 2d 666; the appeals court cited and relied upon *United States v. Sokolow* (1989) 490 U.S. 1 [104 L. Ed. 2d 1, 109 S.Ct. 1581] which stated that the destination of the Respondent alone is not enough to constitute reasonable suspicion compels reversal. The court stated that "We agree a traveler's destination alone is not enough to constitute reasonable suspicion to justify a detention." Totally disregarding *Daugherty*, Respondent used Petitioner's refusal to provide a destination to make an arrest based upon an impairment that the video proves was not justified.

Where the Constitution is violated if Caldwell acts for forbidden reasons, qualified immunity ordinarily would not shield him from liability; there is no "unfairness [in] holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the Petitioner." *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998).

Where Supreme Court and 9th Circuit precedents clearly establish the unconstitutionality of acting based on a specific motive ... retaliation for protected speech, see *Wayte v. United States*, 470 U.S. 598, 608 (1985) —there is ordinarily no place for qualified immunity, and certainly not

by reference to the objective validity of the conduct. Because the officer is alleged to have acted with a prohibited motive, he cannot claim to have acted “reasonably.” As *Crawford-El* explained, Petitioners who claim retaliation are alleg[ing] misconduct that was plainly unlawful,” and there is thus no “obvious unfairness in imposing liability; the officer “knew, or should have known,” that acting on such motives “violated the constitutional rights of the Petitioner.” *Crawford-El*, 523 US. at 591. The Supreme Court squarely rejected the contention that an officer should receive immunity if his acts are objectively justified, calling that an “unprecedented proposal.” *Id.* at 593-94. Because “improper intent” defines the constitutional right and violation, officers alleged to have acted with such intent cannot be “immunize[d]” while “the merits of a claim that [he] knowingly violated the law are being resolved.” *Id.*

CONCLUSION

Based upon the reasons stated above and the applicable authorities, Petitioner respectfully submits that this Peitition for Writ of Certiorai should be granted. The Court may wish to consider reversal of the decision of the Ninth Circuit Court of Appeals.

Dated: February ____, 2018

Respectfully submitted,

Matthew Neidermeyer
Petitioner, pro se
635 Baker Street Apt. J-206
Costa Mesa, CA 92626
Ph. 949- 423-8571