No. __________

IN THE
SUPREME COURT OF THE UNITED STATES

JIMMY RENEE CRUZ, JR.,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court left open the question of whether conducting a retaliatory police investigation, with a view to promote a prosecution, is a constitutional tort. In that case, the Court did not address whether the expense and other adverse consequences of a retaliatory investigation would justify recognizing such an investigation as a distinct constitutional violation.

The case at hand gives the Court the opportunity to address this lingering question:

Whether a retaliatory investigation presents a distinct constitutional violation.

It also gives the Court the opportunity to flesh out this jurisprudence and address the question of:

Whether a retaliatory police investigation gives rise to application of the fruit-of-the-poisonous-tree doctrine and suppression of all evidence seized under a warrant that stemmed from the retaliatory investigation and was based on a fabricated tip the retaliating officer alleged he had received.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jimmy Renee Cruz, Jr., requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on October 6, 2017, affirming the judgment of the United States District Court for the Western District of Michigan, Southern Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not recommended for full-text publication and is attached at **Appendix A**.

The relevant orders and the judgment of the United States District Court for the Western District of Michigan, Southern Division, are unpublished and are attached at **Appendix B**.

JURISDICTION

The United States Court of Appeals decided this case on October 6, 2017. Mr. Cruz did not seek rehearing or rehearing en banc in the Sixth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Mr. Cruz has provided notice of this petition to the government, in accordance with this Court's Rule 29.4(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the application of the Fourth Amendment to the United States Constitution, providing that: "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."

STATEMENT OF THE CASE

A. Factual Background.

This case involves a set of circumstances that the Sixth Circuit described as "troubling." *United States v. Cruz*, No. 16-2575, slip op. at 2 (6th Cir. Oct. 6, 2017) (unpublished). Sergeant Derrick Turner, an officer involved in the investigation of the case against Mr. Cruz, was intimately involved with a woman who was also romantically involved with Mr. Cruz. *See id.* Mr. Cruz and Sergeant Turner had both had relationships with this woman, whose name is Desiree Downey. Ms. Downey had been working as an exotic dancer. *See id.*; *see also* RE. 45: Motion for Reconsideration, PageID 173. Sergeant Turner met Ms. Downey a few years before the investigation that led to Mr. Cruz's arrest and had what Ms. Downey described as an "obsessive" relationship with her. (RE. 45: Motion for Reconsideration, PageID 173.) This relationship involved buying things for Ms. Downey, including jewelry engraved with Sergeant Turner's name. (RE. 45 & 45-2: Motion for Reconsideration & Exhibit B, PageID 174, 218.) Sergeant Turner co-signed for a car loan for Ms. Downey. (RE. 45: Motion for Reconsideration, PageID 173.) Sergeant Turner's pursuit of Ms. Downey continued even after the events leading to Mr. Cruz's arrest (described below), the search at issue, and the arrest of Mr. Cruz. (RE. 45: Motion for Reconsideration, PageID 174.)

Sergeant Turner had a history of "targeting" men who showed an interest in Ms. Downey. (RE. 45: Motion for Reconsideration, PageID 174.) This history included arresting a man called "Nutty," who spent money on Downey at the exotic-dance club, and retaliating against other men in similar manners. (RE. 45: Motion for Reconsideration, PageID 174.) This retaliation ultimately reached Mr. Cruz, with his relationship with Ms. Downey.

Sergeant Turner began following Mr. Cruz, sitting and watching Mr. Cruz do things like get his hair cut. (RE. 45: Motion for Reconsideration, PageID 179.) Sergeant Turner told another officer (ultimately, the affiant for the search-warrant affidavit) that he, Sergeant Turner, had received a tip that Mr. Cruz was staying at a Red Roof Inn in Kalamazoo, Michigan, in room number 229,[1] and that "heavy drug trafficking" was occurring in that room. (RE. 22-2: Affidavit for Search Warrant, PageID 55.) No additional details on the alleged tip appeared in the affidavit or elsewhere. (*See* RE. 22-2: Affidavit for Search Warrant, PageID 55.) Sergeant Turner also alleged he had seen, on March 19, 2015, and then lost sight of, Mr. Cruz driving within a mile of the Red Roof Inn. (RE. 22-2: Affidavit for Search Warrant, PageID 55.)

On the evening of March 19, 2015, the affiant officer went to the Red Roof Inn and talked to an employee there who allegedly confirmed that Mr. Cruz was staying at the motel (this interaction became the subject of an argument on suppression in the district court, but the details of it do not bear on the issues presented in this

[1] Discrepancies in the room number abounded in the record. Later, the room is given as 129.

petition). (*See* RE. 22-2: Affidavit for Search Warrant, PageID 55; RE. 45: Motion for Reconsideration, PageID 179.) The affiant alleged he saw, at the motel, a vehicle that Sergeant Turner had described as associated with Mr. Cruz. (*See* RE. 22-2: Affidavit for Search Warrant, PageID 55.) The affidavit then described some interactions between officers and Mr. Cruz at the motel and other investigatory details: an officer seeing Mr. Cruz leave a motel room and get in the vehicle; officers approaching the vehicle and attempting to open the door and Mr. Cruz accelerating away; a K9 "indicating" outside the motel room; an officer detecting the odor of marijuana outside the room; and Mr. Cruz's open warrants, criminal history, and alleged prior "involvement" with controlled substances. (RE. 22-2: Affidavit for Search Warrant, PageID 55-56.)

Police obtained a warrant for the room and searched it on March 19, 2015. (*See* RE. 45: Motion for Reconsideration, PageID 171.) Authorities found controlled substances, a firearm, and currency in the room. (RE. 23: Gov. Resp. to Motion to Suppress, PageID 59.)

B. Indictment of Mr. Cruz.

The search of the room yielded sufficient evidence against Mr. Cruz to result in a grand jury indictment against Mr. Cruz, which the government filed on August 4, 2015, charging him with three counts: possession with intent to distribute heroin (in violation of 21 U.S.C. § 841(a)(1)), possession of a firearm in furtherance of drug trafficking (in violation of 18 U.S.C. § 924(c)(1)(A)(i)), and being a felon in possession of a firearm (in violation of 18 U.S.C. § 922(g)(1)). (RE. 1: Indictment, PageID 1-3.)

The U.S. District Court for the Western District of Michigan exercised jurisdiction over the matter in accordance with 18 U.S.C. § 3231. ATF agents arrested Mr. Cruz on August 19, 2015. In accordance with 21 U.S.C. § 851, the government filed notice of prior convictions and sought sentencing enhancements against Mr. Cruz. (*See* RE. 13: Amended Information and Notice of Prior Drug Conviction, PageID 20-21.)

C. District Court Proceedings.

Mr. Cruz filed his first motion to suppress evidence on February 2, 2016. (RE. 22: First Motion to Suppress, PageID 42-44.) The district court denied this motion on February 18, 2016. (RE. 25: Order Denying Motion to Suppress, PageID 74-78.) On March 11, 2016, the district court appointed new counsel for Mr. Cruz. Undersigned counsel took over the case, and filed a motion to reconsider the denial of the motion to suppress. (*See* RE. 55: Order Denying Motion to Reconsider, PageID 297.) The district court denied this motion to reconsider on May 26, 2016. (RE. 55: Order Denying Motion to Reconsider, PageID 300.)

The suppression arguments revolved around Sergeant Turner's relationship with Mr. Cruz through Ms. Downey, and Sergeant Turner's role in the investigation against Mr. Cruz. Mr. Cruz presented evidence confirming the above-described history of Sergeant Turner targeting men for investigation when those men made overtures toward Ms. Downey. (*See, e.g.*, RE. 45: Motion for Reconsideration, PageID 174.) He argued that Sergeant Turner fabricated the tip against him and that Sergeant Turner's co-workers, including the affiant who filed the affidavit in support of the search warrant, knew of the tumultuous relationship between Sergeant Turner and Ms. Downey. (RE. 45: Motion for Reconsideration, PageID 176-78.)

Mr. Cruz pointed out his Fifth Amendment due-process rights related to sexual liberty. (RE. 45: Motion for Reconsideration, PageID 176.) In this context, he cited this Court's conclusions in *United States v. Windsor*, 133 S. Ct. 2675 (2013), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Loving v. Virginia*, 388 U.S. 1, 12 (1967). (RE. 45: Motion for Reconsideration, PageID 176.) He requested a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). (RE. 45: Motion for Reconsideration, PageID 175.) Mr. Cruz argued that the other averments in the affidavit in support of the search warrant flowed from the poisonous tree of the false tip and Sergeant Turner's vendetta and retaliatory investigation against him. (RE. 45: Motion for Reconsideration, PageID 175.)

In denying the motion to reconsider, the district court upheld the search. (RE. 55: Order Denying Motion for Reconsideration, PageID 300.) The court stated that it had previously concluded that Mr. Cruz was not entitled to a *Franks* hearing "because, even if the confidential tip was excluded, the warrant affidavit contained sufficient facts to support probable cause." (RE. 55: Order Denying Motion for Reconsideration, PageID 299.) Then, the court discussed how Mr. Cruz took "issue with this conclusion, arguing that everything discussed in the affidavit was discovered as a result of the tip from Turner, and that it therefore constitutes fruit of the poisonous tree and cannot be used to support probable cause." (RE. 55: Order Denying Motion for Reconsideration, PageID 299.) In denying the motion to reconsider, the district court stated that Mr. Cruz had "failed to demonstrate that there was any unconstitutional action, as would be required to trigger the fruit of the poisonous tree doctrine." (RE. 55: Order Denying Motion for Reconsideration, PageID 299.)

In entering a conditional guilty plea on June 15, 2016, Mr. Cruz preserved his right to appeal the suppression ruling. (*See* RE. 61: Plea Agreement, PageID 326; RE. 63: Plea Minutes, PageID 335.) The district court sentenced Mr. Cruz on November 2, 2016, imposing a sentence of 123 months (63 months on count one, the drug count, and a consecutive 60 months on count two, the firearm-in-furtherance-of-drug-trafficking count). (RE. 73: Sentencing Minutes, PageID 429.)

Mr. Cruz appealed the suppression ruling and his sentence. The Sixth Circuit Court of Appeals affirmed the district court's decisions on October 6, 2017. *United States v. Cruz*, No. 16-2575 (6th Cir. Oct. 6, 2017) (unpublished). Mr. Cruz did not seek rehearing or rehearing en banc in the Sixth Circuit.

D. Sixth Circuit's Consideration of the Matter.

In considering Mr. Cruz's appeal, the Sixth Circuit framed Mr. Cruz's argument as arguing "that he was entitled to a *Franks* hearing because he made a substantial showing that the affidavit in support of the warrant at issue included a false statement, made knowingly or intentionally, or with reckless disregard for the truth." *Cruz*, No. 16-2575, slip op. at 4. The appellate court believed that Mr. Cruz viewed the information provided by the alleged confidential informant as lacking probative value because nothing established the alleged informant's veracity or past reliability. *Id.* And, as the court explained, "Sergeant Turner's own objectivity was suspect because of his alleged involvement with Ms. Downing [sic]." *Id.*

The Sixth Circuit framed the district court's denial of the motion to suppress as a conclusion that Mr. Cruz failed to satisfy the threshold requirement of making a substantial preliminary showing that the search-warrant affidavit included a false statement. *Id.* The appellate court cited the district court as saying that Mr. Cruz provided no basis for an assertion that Sergeant Turner had fabricated the alleged tip from the confidential informant. *Id.* Also, according to the appellate court's reading of the district court's conclusion, even if Sergeant Turner "was involved in a 'love triangle' as Cruz asserts, that fact alone is not enough to show that Turner fabricated any information." *Id.* The district court had emphasized that Officer Wolbrink, not Sergeant Turner, "filed the affidavit with the state-court judge" and had concluded that "[e]ven if Turner lied about the confidential tip, there is no basis to believe that Wolbrink knew or should have known that the information was false." *Id.*

The district court had found "that a *Franks* hearing was not needed because 'there was sufficient information in the affidavit to support probable cause apart from any allegedly false information.'" *Id.* (citation omitted). The Sixth Circuit agreed "with the district court's reasoning, particularly its finding that probable cause had been sufficiently established without the information provided by the anonymous informant." *Id.* The appellate court reviewed assertions Officer Wolbrink included in his search-warrant affidavit, which the panel characterized as "untainted information." *Id.* The panel cited the following assertions from the affidavit: "officers confirmed that defendant was staying in Room 129; they knew of his outstanding arrest warrants and the fact that he had absconded from parole; he fled the scene when approached; and a drug detection dog alerted outside Room 129." *Id.* The appellate court stated these factors "definitively establish[ed] probable cause particularly given the deference that we accord the magistrate's determination." *Id.* at 4-5. The court affirmed the district court.

REASONS FOR GRANTING THE PETITION

In *Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006), this Court left open the question of whether conducting a retaliatory police investigation, with a view to promote a prosecution, is a constitutional tort. In *Hartman*, this Court did not address whether the expense and other adverse consequences of a retaliatory investigation would justify recognizing such an investigation as a distinct constitutional violation. *Hartman*, 547 U.S. at 262 n.9. Mr. Cruz's case gives this Court the opportunity to address this critical question.

This case also gives the Court the opportunity to address the issue of retaliatory arrests in this broader, investigatory context. The Sixth Circuit's decision in Mr. Cruz's case represents a conflict with analogous precedent from this Court, and it presents a conflict with this Court's and the circuit courts' precedent on issues of retaliatory arrests in various contexts. This Court should review Mr. Cruz's case to clarify that retaliatory police action will taint an investigation arising out of such action and give rise to application of the exclusionary rule, specifically that a retaliatory police investigation will give rise to application of the fruit-of-the-poisonous-tree doctrine and suppression of evidence seized under a warrant stemming from a retaliatory investigation with fabricated evidence such as a fabricated tip.

The Fourth Amendment, of course, protects people from unreasonable searches and seizures. *See, e.g.*, *Whren v. United States*, 517 U.S. 806 (1996). And in the Fourth Amendment context, this Court has "dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification" when officers conduct a search. *Id.* at 812. Under *Whren*, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. The problem in Mr. Cruz's case, however, arises not because of an exercise under a showing of objective probable cause to support issuance of a search warrant but because police animus led to fabrication of a tip against Mr. Cruz and gave rise to an investigation based on this personal animus and fabricated tip. Mr. Cruz contended in the lower courts—and continues to contend—that the fruits of this retaliatory investigation and fabricated tip, including any potential allegations establishing probable case—must be suppressed.

In the exclusionary-rule context, this Honorable Court has long suggested that police motive may be relevant when deciding whether or not to apply the exclusionary rule. *See, e.g.*, *Scott v. United States*, 436 U.S. 128, 139 n.13 (1978) (preceding *United States v. Leon*, 468 U.S. 897 (1984)). In *United States v. Leon*, 468 U.S. 897, 900-01, 913 (1984), of course, the Court directly addressed police "good faith," a possible "good-faith exception" to the exclusionary rule, and "the tension between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'" The Fourth Amendment itself includes no provision for addressing the use of evidence obtained in violation of it. *Id.* at 906. Over the course of time, this Court has stepped in to fill the void, and in *Leon* clarified that exclusion is appropriate when evidence is seized in violation of the Fourth Amendment and no "good-faith exception" applies to save the evidence from suppression. *See id.* at 913.

With this good-faith exception to the exclusionary rule came a role for police good faith, or lack of it, in Fourth Amendment jurisprudence. The exclusionary rule seeks to deter police misconduct, and the *Leon* Court confirmed that considering the flagrancy of police misconduct constitutes an important analytical step in the exclusion calculus. *Id.* at 911, 919. The analysis of good faith then falters a bit when it reaches the "fruit of the poisonous tree" and the idea of attenuation of taint because attenuation can be a hard thing to grade. Regardless, as an overarching principle, this Court long ago drew a line in the sand: "In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, . . . this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (citations omitted). The Court made clear that "[t]he exclusionary prohibition extends as well to the *indirect* as the direct products of such invasions." *Id.* (emphasis added).

Evidence that carries the "primary taint" of procurement through illegal police conduct falls under the exclusionary rule. *See id.* at 486-87. As this Court has stated it, the relevant question in cases of police illegality "is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 488 (citation omitted). When evidence is "'come at by the exploitation of that illegality' . . . [it] may not be used against" a defendant. *Id.*

As this Court well knows, "ferreting out crime" is often a "competitive enterprise." *See id.* at 498 (Douglas, J., concurring). For this reason, the Fourth Amendment requires "neutral and detached" magistrates—rather than the officers engaged in the ferreting—to make the calls regarding search warrants. *Id.* In Mr. Cruz's case, the competitive drive and haste of "ferreting out" crime stands compounded and convoluted by the mix of an officer's involvement in a love triangle with a stripper and the man who became the object of the officer's investigation and romantic acrimony. The issue of "taint" becomes paramount.

Very recently, this Court considered the parallel issue of proximate causation in the Fourth Amendment context. *See Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1544 (2017). In *Mendez*, the Court looked at the Fourth Amendment and excessive force—and in so doing shed additional light on the idea of the fruits of a poisonous

Fourth-Amendment-violation tree. *See id.* The Court considered whether a Fourth Amendment violation can turn a *later use* of reasonable force into an unreasonable seizure; the Court concluded that without an unreasonable use of force (as analyzed under the standard framework), an earlier Fourth Amendment violation will not create an unreasonable-force claim. *Id.* at 1544. An earlier Fourth Amendment violation must be analyzed separately if no unreasonable use of force occurred. *Id.* at 1547.

In rebuffing the Ninth Circuit's rule, which provided for excessive-force claims based not on unreasonable uses of force but on earlier Fourth Amendment violations, this Court pointed out problems of causation. *Id.* at 1548. The Ninth Circuit's rule used "a vague causal standard." *Id.* This vague causation standard applied "when a prior constitutional violation 'created a situation which led to' the use of force." *Id.* The rule did "not incorporate the familiar proximate cause standard"—it was not clear what causal standard applied under the Ninth Circuit's rule. *Id.* With *Mendez*, the Court emphasized the importance of observing recognized proximate-causation standards, standards that can help explain the extent to which evidence is tainted by a retaliatory investigation, as in Mr. Cruz's case.

Also relevant to the inquiry at hand is the fact that the Ninth Circuit's rule examined in *Mendez* suffered because "the reasonableness of a search or seizure is almost always based on objective factors" and the Ninth Circuit's rule looked "to the subjective intent of the officers who carried out the seizure." *Id.* Under the latter rule, "a prior Fourth Amendment violation may be held to have provoked a later, reasonable use of force only if the prior violation was intentional or reckless." *Id.* This Court declined to "confuse" the harms caused by two distinct injuries: that of the earlier Fourth Amendment violation and that of a potential excessive use of force. *Id.* Harms may overlap, but courts should not confuse them. *Id.*

The Court emphasized that its reasoning would *not* disturb one's ability to recover for damages proximately caused by an earlier Fourth Amendment violation—such as that of a warrantless entry. *Id.* In remanding, the Court urged the Ninth Circuit to "revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset." *Id.* at 1549.

Taking this emphasis on proximate cause and placing it in the context of attenuation and purging of taint, as presented in *Wong Sun*, it seems clear that this Court sees police liability in conduct that violates the constitution and proximately causes injury, and that this liability may give rise to application of the exclusionary rule in the criminal context. In Mr. Cruz's case, where the investigation against him flowed directly from an unconstitutional infringement on his due-process rights, suppression was the proper course for the evidence springing from that investigation.

Mr. Cruz's contention that the evidence should have been suppressed as the fruit of the poisonous investigation is also supported by precedent and reasoning in the analogous context of retaliatory investigations and arrests, a context this Court is currently considering. Now before this Court is the issue of retaliatory arrests in the First Amendment context and whether the presence of probable cause to support such an arrest will defeat a retaliatory-arrest claim. *See Lozman v. City of Riviera Beach*, No. 17-21 (petitioner reply filed Oct. 18, 2017). The petitioner in *Lozman* filed his petition for a writ of certiorari on June 28, 2017, presenting the question of whether the presence of probable cause will defeat a First Amendment retaliatory-arrest claim as a matter of law. *Lozman*, No. 17-21, Pet. i. Two amici curiae filed briefs in the case. Initially, the respondent waived its right to respond, but on August 10, 2017, this Court requested a response. The respondent filed its response on October 11, 2017. The Court distributed the case materials for the conference of November 3, 2017, and then for that of November 9, 2017. On November 13, 2017, the Court granted the petition for a writ of certiorari.

Mr. Cruz's petition presents an analogous issue that would allow the Court to consider the effects of probable cause in the criminal context where evidence reveals the retaliatory nature of the initial criminal investigation. This array of precedent on good faith, attenuation of taint, and causation, and the pending issues revolving around retaliatory arrests give this Court several reasons to grant review in Mr. Cruz's case.

I. THE COURT SHOULD GRANT CERTIORARI IN MR. CRUZ'S CASE TO ADDRESS THE ISSUE OF RETALIATORY POLICE INVESTIGATION AND FIND THAT SUCH INVESTIGATIONS GIVE RISE TO INDEPENDENT CONSTITUTIONAL VIOLATIONS AND APPLICATION OF THE FRUIT-OF-THE-POISONOUS-TREE DOCTRINE.

"The exclusionary rule exists to deter police misconduct." *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016). Beyond the exclusionary rule in the criminal context, civil retaliatory-arrest claims can stem such misconduct. These claims thus present an analogous area of law that can inform the criminal analysis, as will be explored.

Mr. Cruz's case presents an example of police misconduct warranting a judicial remedy, namely exclusion of evidence. His case gives the Court the opportunity to address the issue of whether a retaliatory police investigation gives rise to a need to suppress evidence seized under a search warrant when evidence demonstrates that the investigation was conducted in retaliation for an exercise of due-process rights to engage in an intimate relationship. In this case, evidence also suggests that the warrant rested on a fabricated tip, with the retaliating officer alleging he received the tip but providing no proof of it. All other alleged probable cause to support the warrant flowed from this supposed tip and the retaliating officer's allegations. The case thus presents a fully developed example of a retaliatory investigation.

As discussed above, the question of whether conducting a retaliatory police investigation, with a view to promote a prosecution, is a constitutional tort remains open. In *Hartman*, this Court did not address whether the expense and other adverse consequences of a retaliatory investigation would justify recognizing such an investigation as a distinct constitutional violation. *Hartman*, 547 U.S. at 262 n.9. As with these *Hartman* questions related to retaliatory *investigations*, this Court has also left open the question of whether the existence of probable cause will vitiate a retaliatory-*arrest* claim. *See Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). As already suggested, retaliatory-arrest jurisprudence provides an analogous background for considering retaliatory investigations.

A circuit split exits over the role of probable cause in retaliatory-arrest cases. This Court has granted review in *Lozman* to consider the issue. In circuits like the Ninth, a plaintiff can bring a civil retaliatory-arrest claim regardless of the existence of probable cause to support an arrest. A person in that circuit "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) (citation omitted). For example, the Ninth Circuit found a violation of that right when police booked and jailed a plaintiff "in retaliation for his protected speech, even though probable cause existed for his initial arrest." *Id.* at 1193. That Circuit has also found it "well-established that police officers may not exercise their authority for personal motives." *Id.* at 1195. In circuits like the Eighth, in contrast, probable cause for an arrest will vitiate a claim. A lack of probable cause to support the challenged arrest constitutes a "necessary element" of a retaliatory-arrest claim. *See, e.g.*, *Galarnyk v. Fraser*, 687 F.3d 1070, 1076 (8th Cir. 2012).

The jurisprudence and scholarship that has arisen around this circuit split, which Mr. Cruz will explore further below, brings to light issues akin to those in Mr. Cruz's case and sheds light on the critical issue at hand, namely the issue of whether a remedy should exist for parties arrested based on police animus, even if a legal arrest *could* have occurred given the probable cause of the circumstances. In the criminal context of Mr. Cruz's case, the answer is yes and exists in the frame of suppressing evidence that constitutes the fruit of the poisonous tree, as contemplated by *Wong Sun* and its progeny. *See, e.g.*, *Strieff*, 136 S. Ct. at 2061, & 2065 (Sotomayor, J., dissenting).

As Justice Sotomayor said in her dissent in *Strieff*, "[i]t is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer." *Id.* at 2065 (Sotomayor, J., dissenting). As she put it, "after all, his instincts, although unconstitutional, were correct." *Id.* A fundamental principle lies at the heart of the Fourth Amendment, however: "Two wrongs don't make a right." *Id.* When "lawless police conduct" produces "evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence." *Id.* As an example, Justice Sotomayor pointed out, "if an officer breaks into a home and finds a forged check lying around, that check may not be used to prosecute the homeowner for bank fraud. We would describe the check as 'fruit of the poisonous tree.'" *Id.* Such fruit must be cast aside and includes not just evidence directly found through an illegal search but also evidence come at by exploitation of the illegality. *Id.*

The exclusionary rule removes the incentive for officers to conduct searches without proper justification and keeps courts from being parties to "lawless invasions of the constitutional rights of citizens," which would happen if courts permitted unhindered governmental use of the fruits of such invasions. *Id.* The fruit-of-the-poisonous-tree doctrine extends the reach of the exclusionary rule: long have courts recognized that the doctrine "excludes evidence obtained from or *as a consequence of* lawless official acts." *Costello v. United States*, 365 U.S. 265, 280 (1961) (emphasis added). Though it does not exclude "evidence obtained from an 'independent source,'" it applies to exclude evidence police misconduct caused to come to light. *See id.*

In Mr. Cruz's case, police lawlessness—Sergeant Turner's use of his position to target Mr. Cruz and interfere with Mr. Cruz's due-process rights—brought about the officer's allegations of a tip, which appeared fabricated and rested on no evidentiary support. This lawlessness produced the investigation against Mr. Cruz. The lawlessness caused the investigation; circumstances indicate that the investigation would not have occurred without Sergeant Turner's vendetta against Mr. Cruz. No neutral cause for the investigation existed.

This Court considered the issue of neutral explanations for government action in *Texas v. Lesage*, 528 U.S. 18 (1999). In that case, which provides a useful analogy to the civil context, the Court stated: "Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983." *Lesage*, 528 U.S. at 21. This conclusion in *Lesage* militates in favor of finding that the investigation of Mr. Cruz, which stemmed from the tip Sergeant Turner's retaliatory investigation supposedly produced, was the fruit of the poisonous tree. Without Sergeant Turner's involvement and the tip he alleged he received, the course of events in the case suggests that no investigation would have occurred.

The affidavit in support of the search warrant demonstrates that the tip initiated the investigation. The allegation that Sergeant Turner received a tip appears as the second averment in the affidavit, appearing right after the affiant's discussion of his training and experience. (*See* RE. 22-2: Exhibit 2 to First Motion to Suppress, Affidavit for Search Warrant, PageID 55.) It is the tip that makes the investigation "recent," and Sergeant Turner is the investigator who allegedly saw Mr. Cruz near the Red Roof Inn. (*See* RE. 22-2: Exhibit 2 to First Motion to Suppress, Affidavit for Search Warrant, PageID 55.) Without this involvement from Sergeant Turner, the investigation would not have happened. The remainder of the averments in the affidavit demonstrate that the investigation hinged on Sergeant Turner's involvement and allegations; the affidavit suggests that nothing would have happened with regard to Mr. Cruz, with or without the outstanding warrants, without the impetus of Sergeant Turner and, in turn, his retaliatory motives.

Mr. Cruz is not arguing that an officer's subjective motive invalidated objectively justifiable action under the Fourth Amendment. *Cf. Whren*, 517 U.S. at 812. He is not arguing that an ulterior motive stripped investigators of their *legal* justification. *See id.* The issue here is that an ulterior motive led investigators to an *illegal* excuse—evidence suggests that Sergeant Turner fabricated the tip. Probable cause did not justify a search and seizure here. *See id.* at 819. The circumstances undergirding the search and seizure did not involve probable cause—rather a fabricated tip to serve a personally retaliatory motive drove the investigation. Any actual probable cause flowing from that retaliatory fabricated tip was tainted and the fruit of the poisonous tree.

When this Court has upheld searches and/or seizures in the face of potentially pretextual police action, it has done so because of objective probable cause unrelated to the officer's questioned motives. *See id.* at 813. The question is complicated, and this Court has recognized that "the Constitution prohibits selective enforcement of the law based on considerations such as race," and it has acknowledged "[i]t is of course true that in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors." *Id.* at 813, 817. But in most cases, "the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Id.* In cases in which doubt arises, it likely springs from the need for an "actual 'balancing' analysis" and involves "police intrusion *without the probable cause that is its traditional justification*." *See id.*

That lack of "traditional justification," of actual probable cause, sits at the heart of Mr. Cruz's case. No probable cause existed against Mr. Cruz—or at least presented itself to investigating officers—until Sergeant Turner fabricated a tip and pursued Mr. Cruz out of personal retaliation. For constitutional purposes, actions of an individual law-enforcement officer constitute "the action of the State itself," of course. *Delaware v. Prouse*, 440 U.S. 648, 667 (1979) (Rehnquist, J., dissenting). And while "state acts are accompanied by a presumption of validity until shown otherwise," it is hard to imagine such a presumption surviving a showing that the state had fabricated evidence against a person to further an investigation for personal ends. *See id.*

The Fourth Amendment's proscriptions impose a standard of reasonableness on the exercise of discretion by government officials, including law-enforcement officers, to safeguard people's privacy and security against arbitrary invasions. *Prouse*, 440 U.S. at 653-54. Courts judge the permissibility of a particular law-enforcement practice "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654. In this regard, "the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement," and this measurement occurs against an objective standard: whether of probable cause or some less stringent standard like reasonable suspicion. *Id.* In "situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Id.* at 654-55 (footnote omitted). Such discretion carries with it a "grave danger" of abuse. *See id.* at 662.

The Fourth Amendment stands between individuals and arbitrary police action. Mr. Cruz's case presents the opportunity to reaffirm this basic principle and clarify that retaliatory investigation is its own constitutional violation and that evidence against a person that comes to police attention because of arbitrary and personal police animus and unconstitutional interference in a person's intimate relationships must be suppressed as the fruit of the poisonous tree. Tainted probable cause—allegations arising based on such police action and retaliatory investigation and police misconduct in the form of things like fabrication of a tip against a person—should also give rise to excision of any probable cause based on that action and stated in a search-warrant affidavit.

II. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO EXTEND ITS REASONING ON PROXIMATE CAUSATION, AS RECENTLY CONSIDERED IN *CITY OF LOS ANGELES V. MENDEZ*, AND REFINE THE FRUIT-OF-THE-POISONOUS-TREE DOCTRINE TO EXPLICITLY ENCOMPASS THE FRUITS OF TAINTED INVESTIGATIONS.

In Mr. Cruz's case, the district court failed to recognize the pernicious nature of the police misconduct. In denying Mr. Cruz's motion for reconsideration of the denial of the motion to suppress, the district court framed the question as: "Cruz asserts that Turner was jealous of his relationship with Downey, and interfered with Cruz's constitutional right to engage in a sexual relationship by following him and fabricating a trip." (RE. 55: Order Denying Motion to Reconsider, PageID 299.) The district court concluded that "[t]his argument is not supported by case law or common sense" because "Cruz was a convicted felon and fugitive, and he did not have a constitutional right to be ignored by police, even if those police acted out of jealousy. Because there was no constitutional violation, the fruit of the poisonous tree doctrine is not implicated in this case." (RE. 55: Order Denying Motion to Reconsider, PageID 299.)

This reasoning ignores the fact that a government agent, a law-enforcement officer, violated Mr. Cruz's due-process rights and that the agent used his position as a government agent and law-enforcement officer to grind a personal axe, to launch an investigation involving a fabricated tip to retaliate against Mr. Cruz. The officer's retaliatory actions proximately caused the investigation against Mr. Cruz—that investigation flowed directly from the officer's personal, retaliatory animus and fabricated tip. In seeking suppression of the evidence seized in this case, Mr. Cruz did not ask to be ignored by the police—he asked that the officer who used his official position to grind a personal axe be held accountable for fabricating a tip and launching an investigation against Mr. Cruz to effect a personal vendetta.

As commentators have stated it: "there is no causal gap; the retaliatory arrest [wa]s caused by the arresting officer's own retaliatory motive." Linda Zhang, Comment: *Retaliatory Arrests and the First Amendment: The Chilling Effects of Hartman v. Moore on the Freedom of Speech in the Age of Civilian Vigilance*, 64 U.C.L.A. L. Rev. 1328, 1349 (2017); *cf. Price v. City of Philadelphia*, 239 F. Supp. 3d 876, 890 (E.D. Penn. 2017) (requiring plaintiff to show defendant officers knew of the constitutionally protected conduct because if the officers did not know of that conduct it could not be the motivation for an alleged retaliatory arrest—there would be a lack of "causal connection"). In conjunction with this reasoning on causation and retaliatory motive, and as this Court explained in *City of Los Angeles v. Mendez*, proximate cause still governs the analysis: officers should be held responsible for the harms they proximately cause. *See Mendez*, 137 S. Ct. at 1548.

Earlier this year, in *Mendez*, the Court considered the scope of causation and how far a Fourth Amendment violation could extend: namely, could an initial Fourth Amendment violation turn a later, reasonable seizure into an unreasonable/excessive use of force? *Id.* at 1543-44. In rejecting a rule that did not incorporate "the familiar proximate cause standard," this Court rejected a muddied view of causation. *Id.* at 1548. This adherence to the proximate-cause standard aligns with traditional fruit-of-the-poisonous-tree jurisprudence. The idea of "attenuation of the taint," as a factor that can bar suppression of evidence sufficiently attenuated from police illegality, and the idea of the independent-source doctrine, simply rephrase the idea of proximate causation, requiring a close "causal" nexus between the illegality and the evidence if the evidence is to be suppressed. *See, e.g.*, *Strieff*, 136 S. Ct. at 2062. Intervening circumstances will attenuate taint—break the chain of proximate causation. *Id.* Courts have long recognized these causation principles in this context. *See, e.g.*, *Costello*, 365 U.S. at 280.

In Mr. Cruz's case, no attenuation occurred. The investigation, the false tip, and ultimately the warrant all flowed from the officer's retaliatory conduct, so the case gives the Court the opportunity to affirm the need to suppress evidence when that evidence's discovery was proximately caused by police misconduct. In *Franks v. Delaware*, 438 U.S. 154 (1978), under which Mr. Cruz requested a hearing in the district court, this Court explained that false statements in an affidavit in support of a search warrant would be excised and the sufficiency of the affidavit considered without those statements. *Franks*, 438 U.S. at 171-72. Again, it comes down to causation: if the false statements were not the *proximate cause* of the search warrant's issuance—if legitimate statements had as great a role in causing the warrant to issue—the warrant can stand. If, however, the false statements *did* function as the major cause of the warrant's issuance, the warrant cannot stand without them and the evidence derived from them must be suppressed. *See id.*

The circumstances in Mr. Cruz's case simply magnify the causation issue and magnify *Franks*: the entire affidavit rested on aversions stemming from police misconduct and a retaliatory investigation. The retaliatory investigation *proximately caused* the fabrication of the tip and the subsequent production of probable cause against Mr. Cruz to include in the affidavit. As this Court found in *Franks*, courts may inquire into the "integrity" of a search-warrant affidavit. *Id.* at 171.

This line of reasoning holding police responsible for the legal violations they cause makes extending the fruit-of-the-poisonous-tree doctrine easy in circumstances like those in Mr. Cruz's case. As Justice Sotomayor said in *Strieff*, two wrongs don't make a right, and while it's tempting to forgive the officer his or her illegalities because they produced evidence of civilian illegality, such forgiveness only provides an incentive for further police illegality. *Strieff*, 136 S. Ct. at 2065 (Sotomayor, J., dissenting).

III. REDRESS FOR POLICE MISCONDUCT OF THIS NATURE, IN THE CRIMINAL CONTEXT, SHOULD INCLUDE MORE THAN THE AVAILABLE CIVIL-SUIT OPTIONS.

Civil remedies, of course, exist to address police misconduct. *See, e.g.*, Zhang, Comment: *Retaliatory Arrests and the First Amendment: The Chilling Effects of Hartman v. Moore on the Freedom of Speech in the Age of Civilian Vigilance*, 64 U.C.L.A. L. Rev. at 1331-32. For example, a plaintiff can bring a retaliation claim by establishing three elements (as generally articulated, with some variation by jurisdiction): 1) Engagement in a constitutionally protected activity; 2) injury (the government actor caused the plaintiff an injury that would chill a person of ordinary firmness from continuing to engage in the constitutionally protected activity); and 3) causation—the government actor's adverse actions were substantially motivated by the plaintiff's exercise of constitutionally protected conduct. *Id.* at 1335-36 & 1336 n.30. The defendant may rebut the claim by showing, by a preponderance of the evidence, that he or she would have acted without the protected activity. *Id.* at 1336.

Issues of qualified immunity, burdens of proofs, and other legal considerations, however, and practical considerations of finding representation for and financing a civil suit, make such options for redress beyond pursuit for many people. Some option for redress beyond the civil realm must address the issue of police retaliation and prevent rewarding retaliatory actions with convictions when retaliatory investigations produce evidence against a targeted individual.

When this Court decided *Hartman v. Moore*, civil remedies diminished further, as the Court declared that "want of probable cause must be alleged and proven" in First Amendment retaliatory-prosecution cases. *Hartman*, 547 U.S. 250, 252. The circuits, of course, fell into line with this precedent. In the Sixth Circuit, for example, a plaintiff bringing a malicious-prosecution claim must show, "at a minimum," that no probable cause justified arrest and prosecution. *Barnes v. Wright*, 449 F.3d 709, 716 (6th Cir. 2006).

Before *Hartman*, the question of probable cause had opened a circuit split. *See id.* at 719 (pointing to Tenth and D.C. Circuits as *not* requiring a showing of a lack of probable cause in a retaliatory-prosecution case, and citing Second, Fifth, and Eleventh Circuit cases that required a plaintiff to show a lack of probable cause); *see also Hartman*, at 547 U.S. at 255. Post-*Hartman*, the "wiggle room" vanished, and courts apply the rule that requires a showing of no probable cause. *See, e.g.*, *Thayer v. Chiczewski*, 705 F.3d 237, 246, 251, 253 (7th Cir. 2012) (requiring a showing of no probable cause to prevail on a false-arrest claim and on a malicious-prosecution claim, and considering *Hartman* in the context of First Amendment retaliatory-arrest claims).

With *Hartman* and the new rule requiring a showing of no probable cause, civil remedies are even harder to obtain. The requirement makes it impossible for a person illicitly targeted by a police officer to prevail in a retaliatory-prosecution case when an officer fabricates a tip that ultimately leads to real evidence giving rise to probable cause, as in this case. Such a plaintiff, who *must* show that no probable cause supported the prosecution against them, simply cannot obtain civil redress for police misconduct like the misconduct at hand. *See, e.g.*, *Barnes*, 449 F.3d at 716. While this denial of civil redress may rest on reasoning recognized as prudent in the civil retaliatory-prosecution context, countenancing retaliatory investigations and arrests (themselves less than prosecution) in the criminal context would make the courts complicit in police misconduct through the introduction of illicitly seized evidence. *See Strieff*, 136 S. Ct. at 2065 (Sotomayor, J., dissenting). Applying the exclusionary rule in such circumstances would obviate such complicity and protect the courts from becoming showcases for evidence come at through police misconduct.

Mr. Cruz understands the concern about the potential for frivolous claims in the retaliatory-prosecution context. *See Hartman*, 547 U.S. at 357-58. As this Court has found, however, the problem is overstated: "Over the past 25 years fewer than two dozen damages actions for retaliatory prosecution under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) or 42 U.S.C. § 1983 have come squarely before the Federal Courts of Appeals, and there is no disproportion of those cases in Circuits that do not require showing an absence of probable cause. *Id.* at 258-59. And such concerns evaporate in the criminal context where any redress would be limited to the motion context, rather than a separate judicial action.

Likewise, Mr. Cruz understands the potential availability of civil remedies that may not require a showing of a lack of probable cause, such as suits for something like common-law abuse of process (with no requirement to show a lack of probable cause). *See id.* at 258. These hypothetical remedies, however, present the same barriers of representation, financing, duration, and other blocks presented by other civil-suit remedies. And limiting redress to such civil suits would, again, make criminal courts complicit in police misconduct with the presentation of the misappropriated evidence.

If there is no mechanism for redress of retaliatory investigations, a rogue police actor will escape responsibility for violating a defendant's constitutional rights. While suppressing evidence may not directly affect a retaliating police actor, it can indirectly affect them by leading to negative professional consequences, and it can protect the justice system from abusive influences. As has been said so many times, the Fourth Amendment requires balancing of the competing needs of preventing police misconduct and presenting all evidence against an accused. *See, e.g.*, *Leon*, 468 U.S. at 900-01.

It bears noting that an important distinction exists in the case at hand in that Mr. Cruz is not seeking to challenge the entire prosecution against him in this context. *Cf. id.* at 263. He only challenges the means by which evidence was discovered and seized—he challenges the issuance of the search warrant, which arose out of the retaliatory police action. The government could continue its prosecution of him without the evidence at issue without running afoul of the Fourth Amendment. It is simply the use of the tainted evidence, produced through a police officer's abuse of Mr. Cruz's due-process rights and that officer's retaliatory investigation, that offends the constitution here and cries out for redress.

IV. THIS PETITION GIVES THE COURT THE OPPORTUNITY TO EXPAND CONSIDERATION OF THE ISSUES PRESENTED IN *LOZMAN V. CITY OF RIVIERA BEACH*, WHICH THIS COURT IS CURRENTLY REVIEWING.

This Court is currently considering the case of *Lozman v. City of Riviera Beach*, in which the Court has granted a writ of certiorari. *Lozman*, No. 17-21 (Nov. 13, 2017). In *Lozman*, the issue is whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law. *Lozman*, No. 17-21, Pet. i. The petition in that case explores the circuit split on the issue and discusses how allowing a finding of probable cause to defeat such a claim would undermine First Amendment values. *Lozman*, No. 17-21, Pet. 10-11, 30.

Exploring the issue of retaliatory *investigation*, as presented in Mr. Cruz's case, would allow the Court to clarify further these interrelated issues. Much of the case law related to Mr. Cruz's claim relates analogously to the retaliatory-arrest context. And resolving only the First Amendment retaliatory-arrest issue would leave open a gaping hole: retaliatory investigations. It is these investigations that often give rise to retaliatory arrests. Addressing Mr. Cruz's case in tandem with *Lozman* would allow the Court to flesh out the matters fully.

As commentators have suggested, without a ruling from this Court on the issue of whether a plaintiff must establish that no probable cause supported a retaliatory arrest, "lower courts are left to decide when to apply this strict standard allowing probable cause to bar a plaintiff's retaliatory arrest claim." *See, e.g.*, Zhang, Comment: *Retaliatory Arrests and the First Amendment: The Chilling Effects of* Hartman v. Moore *on the Freedom of Speech in the Age of Civilian Vigilance*, 64 U.C.L.A. L. Rev. at 1347. In such circumstances, "plaintiffs are at risk of not having a mechanism to seek redress if these officers are arresting them in violation of their individual rights." *Id.* In the related vein at hand, if this Court does not extend the fruit-of-the-poisonous-tree doctrine to bar the use of evidence obtained through a retaliatory investigation, involving false allegations, criminal defendants will be left without redress and courts will be countenancing police misconduct by allowing such conduct to produce admissible evidence.

CONCLUSION

For these reasons, Mr. Cruz asks this Honorable Court to grant this Petition for a Writ of Certiorari and reverse the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,
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