No. _____

In The
Supreme Court of the United States

———— ♦ ————

EDWARD MICHAEL NERO, GARRETT EDWARD MILLER, BRIAN SCOTT RICE, ALICIA WHITE, AND WILLIAM PORTER,
Petitioners,

v.

MARILYN MOSBY,
Respondent.

———— ♦ ————

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

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PETITION FOR WRIT OF CERTIORARI

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Dated: October 4, 2018

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QUESTIONS PRESENTED

Whether a prosecutor is acting as an "advocate" and is entitled to absolute immunity when the prosecutor performs an investigation and provides those investigatory materials to a law enforcement officer.

Whether a prosecutor is entitled to absolute immunity when the prosecutor provides legal advice, including legal advice as to the existence of probable cause, to a law enforcement officer.

PARTIES TO THE PROCEEDING

Petitioners Edward Michael Nero, Garrett Edward Miller, Brian Scott Rice, Alicia White and William Porter were the plaintiffs in the district court and appellees in the Fourth Circuit.

Respondent Marilyn Mosby was a defendant in the district court and the appellant in the Fourth Circuit.

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The opinion of the Fourth Circuit is reported at 890 F.2d 106 (4th Cir. 2018) and reproduced at Petition Appendix ("Pet. App.") 1a. The district court's order granting in part, and denying in part, Mosby's motion to dismiss is reported at 233 F. Supp. 3d 463 (D. Md. 2017) and is reproduced at Pet. App. 45a.

JURISDICTION

The Fourth Circuit issued its opinion on May 7, 2018. On July 31, Chief Justice Roberts extended the time for filing a petition for certiorari to and including October 4, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983.

PROCEDURAL HISTORY

The Petitioners are Baltimore City Police Department officers, who were involved in varying degrees in the April 12, 2015 arrest and transportation of Freddie Carlos Gray, Jr. ("Mr. Gray"). Mr. Gray was injured while in transit to the Baltimore City Police Department's Western District. Mr. Gray died on April 19, 2015.

Following Mr. Gray's death, the Baltimore City State's Attorney, Marilyn Mosby ("Ms. Mosby") led an independent investigation into the cause of Mr. Gray's death conducted by the Baltimore City State's Attorney's Office ("SAO") police integrity unit. On May 1, 2015, the SAO provided incomplete and misleading information to a Baltimore City Deputy Sheriff, Major Samuel Cogen ("Major Cogen"), who filed applications for charges that led to the Petitioners' arrests. Ms. Mosby also held a press conference on May 1, 2015 that contained false and defamatory statements.

After each of the criminal proceedings resulted in either acquittals or requests for *nolle prosequis* in

favor the each of the Petitioners, the Petitioners brought actions in the United States District Court for the District of Maryland (the "District Court") against Ms. Mosby and Major Cogen, under 42 U.S.C. § 1983 and the Maryland state constitution and common law. Ms. Mosby and Major Cogen moved to dismiss the actions, which had been consolidated by the District Court. The District Court denied, in part, Ms. Mosby and Major Cogen's motions to dismiss, and rejected Ms. Mosby's efforts to assert absolute prosecutorial immunity and qualified immunity. Ms. Mosby appealed to the Fourth Circuit. Major Cogen did not appeal.

The Fourth Circuit reversed and dismissed all of the Petitioners' claims against Ms. Mosby, holding that Ms. Mosby was entitled to absolute prosecutorial immunity. Because the Fourth Circuit ruled in favor of Ms. Mosby on prosecutorial immunity, the Fourth Circuit did not address the question of qualified immunity.

INTRODUCTION

1. The Arrest And Transport Of Mr. Gray.

On the morning of April 12, 2015, Baltimore City Police Officers Edward Nero ("Nero"), Garrett Miller ("Miller") and Lieutenant Brian Rice ("Lt. Rice") were on bicycle patrol on North Avenue. Fourth Circuit Joint Appendix ("J.A.") 211 (¶13). Lt. Rice was ahead of Nero and Miller on his bicycle when he began pursuing two suspects and announced the pursuit over his police radio. J.A. 211 (¶14-15). Nero and Miller responded. J.A. 211 (¶16). Officer Miller apprehended one of the suspects, Freddie Carlos

Gray, Jr. ("Mr. Gray"). J.A. 211 (¶18). Prior to joining the Baltimore City Police Department, Officer Nero was an Emergency Medical Technician in New Jersey. J.A. 211-212 (¶20). Given his medical training, Officer Nero monitored Mr. Gray during the encounter and did not observe Mr. Gray exhibiting symptoms of a medical emergency at any time during his interaction with Mr. Gray. J.A. 211-212 (¶20).

After detaining and handcuffing Mr. Gray "for officer safety reasons," Miller found "a spring-assisted knife" on Mr. Gray's person. J.A. 212 (¶21). This knife was illegal under Article 19, Section 59-22 of the Baltimore City Code, which states "[i]t shall be unlawful for any person to sell, carry, or possess any knife with an automatic spring or other device for opening and/or closing the blade, commonly known as a switch-blade knife." J.A. 212 (¶22). Miller arrested Mr. Gray for possession of the knife. J.A. 212 (¶22).

During his arrest, Mr. Gray "became physically and verbally combative," causing a crowd to form around the Officers and Mr. Gray. J.A. 212 (¶22). A police wagon was summoned and arrived driven by Officer Caesar Goodson ("Goodson"). J.A. 35. Mr. Gray refused to walk to the police wagon. J.A. 212 (¶23). Therefore, Nero and another Officer carried Mr. Gray to the wagon. J.A. 212 (¶24).

Mr. Gray stood on the back step of the wagon as Nero conducted a second search for weapons and then was placed inside the wagon. J.A. 167 (¶21). During this search, Mr. Gray was standing under his own power. J.A. 167 (¶21).

Once Mr. Gray was fully inside the police wagon, he began banging and slamming himself against the inside of the wagon causing the wagon to visibly shake. J.A. 213 (¶27). Due to Mr. Gray's continuous screaming and yelling, a larger crowd of citizens had formed around Nero, Miller and the other officers. J.A. 213 (¶28). In the interest of officer safety, Lt. Rice directed Officer Miller to tell the police wagon driver to take the wagon approximately one block south in order to complete the paperwork for Mr. Gray's arrest and then to proceed directly to Baltimore City's Central Booking Intake Center. J.A. 213 (¶28). During this time, Mr. Gray continued to be uncooperative. J.A. 213 (¶30). Mr. Gray was alert and responsive and continued to yell and scream. J.A. 213 (¶30). Another crowd of citizens began to crowd around the police wagon. J.A. 213 (¶30). The citizens were yelling and shouting at the officers. J.A. 213 (¶30). At this stop, Miller and Rice removed Mr. Gray from the wagon, switched his handcuffs for flex cuffs, and placed leg shackles on Mr. Gray because he was "thrashing" around the wagon. J.A. 213 (¶29). Once Mr. Gray had been placed in leg shackles and flex cuffs, he was placed back into the wagon. J.A. 213 (¶31). At this time, he continued to bang the inside of the wagon, causing the wagon to violently shake back and forth. J.A. 213 (¶31). After completing the arrest paperwork for Mr. Gray, Officers Nero and Miller returned to their assigned patrol duties. J.A. 213 (¶32).

Goodson made a second stop near Baker and Mount Streets. J.A. 171 (¶49). After hearing radio communication indicating a request for an additional unit at that location, Officer William Porter ("Porter") pulled his patrol vehicle within approximately 20 feet

of the location of the wagon. J.A. 171 (¶49). At that location, Officer Porter observed more loud and continuous interjecting by neighborhood residents. J.A. 171 (¶50). At that time, Officer Porter observed the arrested individual banging and slamming himself against the inside of the wagon. J.A. 171 (¶51). At this time, Officer Porter was advised that the individual inside the transport wagon was Mr. Gray. J.A. 171 (¶51). The transport wagon left the area. J.A. 171 (¶51).

Goodson stopped at the intersection of Druid Hill Avenue and Dolphin Street. J.A. 171-172 (¶52). Goodson requested an additional officer to respond to the area. J.A. 172 (¶52). Officer Porter responded and observed Mr. Gray lying prone on the floor of the vehicle. J.A. 172 (¶55). Mr. Gray asked Porter for "help." J.A. 172 (¶56). Porter asked Mr. Gray, "what do you mean help?" and Mr. Gray asked for help in getting off the floor. J.A. 172 (¶56). Porter raised Mr. Gray by his arms to a sitting position on the bench. J.A. 172 (¶56). Porter could not fit in the wagon compartment while Mr. Gray was inside. J.A. 172 (¶56). Mr. Gray did not appear to need medical assistance, but Porter asked him if he wanted medical help. J.A. 172-173 (¶57). Mr. Gray replied that he did, and Porter advised Goodson to take Mr. Gray to the hospital. J.A. 173 (¶¶57-58). Porter "observed no exigent medical need, and observed Mr. Gray to be able to sit upright, breathe and communicate." J.A. 173 (¶¶57-58). Porter knew that "many detainees are trying to avoid being transported to the detention facility" by requesting medical assistance. J.A. 173 (¶¶57-58).

Subsequently, Nero and Miller arrested a second man and called for a police wagon to respond to their current location. J.A. 213 (¶¶32-33). The police wagon still containing Mr. Gray responded to the scene on North Avenue to collect the second arrestee. J.A. 213 (¶33). There was a call for back-up, to which Porter and Officer Alicia White ("White") responded separately. J.A. 168 (¶31); J.A. 173 (¶60). When Porter arrived, he observed Mr. Gray kneeling on the vehicle floor and leaning against the bench. J.A. 173 (¶61). Porter spoke to Mr. Gray and confirmed that Mr. Gray still wanted to go to the hospital. J.A. 173 (¶61). Porter told this to another officer at the scene. J.A. 173 (¶61). When White arrived, she approached Mr. Gray in the wagon and attempted to speak with him. J.A. 169 (¶35). She saw him breathing and heard him making noises, but Mr. Gray would not answer her, which White concluded was a sign of his non-compliant behavior. J.A. 169 (¶35). White states that Mr. Gray did not appear to be in medical distress. J.A. 169 (¶35). No one told her that a medic was needed. J.A. 169 (¶37). Both White and Porter left to go to the Western District station. J.A. 169 (¶39); J.A. 174 (¶63). At this point, the second arrestee was placed into the wagon. J.A. 45-46. The wagon then departed North Avenue. J.A. 45-46. Upon departing North Avenue, Rice, Nero, and Miller had no further interactions with Mr. Gray. J.A. 214 (¶35); J.A. 217 (¶57); J.A. 243 (¶26).

The police wagon arrived at the Western District Station with Mr. Gray inside. J.A. 174 (¶¶62-63). When Porter reached the station and approached the wagon, he saw that Mr. Gray was unresponsive. J.A. 174 (¶63). Porter tapped Mr. Gray, but Mr. Gray did not respond. J.A. 174 (¶64). Another officer began

emergency aid while Porter called a medic. J.A. 174 (¶64). When White arrived at the station, she saw officers removing Mr. Gray from the wagon and was told, for the first time, to call a medic. J.A. 169 (¶¶39-40). Another officer told White a medic had already been called, but White called to confirm it was *en route*. J.A. 169 (¶41).

2. Freddie Gray's Death

A medical unit took Mr. Gray from the Western District Station to the University of Maryland Shock Trauma Unit where he underwent surgery. J.A. 174 (¶¶66-67). On April 19, 2015, Mr. Gray died from a spinal cord injury. J.A. 174 (¶67).

3. The Investigation And Charges

Following Mr. Gray's death, Ms. Mosby led an independent investigation into the cause of Mr. Gray's death conducted by the State's Attorney's Office ("SAO") police integrity unit. J.A. 176 (¶78); J.A. 180 (¶88).

The investigatory materials that Ms. Mosby provided to Major Cogen for review were false, misleading, and incomplete.

Ms. Mosby stated that the knife recovered from Mr. Gray was "not a switchblade; and [was] lawful under Maryland law." J.A. 175 (¶75). This information was misleading because, regardless of whether the knife was, or was not legal, under Maryland law, the knife recovered from Mr. Gray was spring-assisted and was, therefore, illegal under Article 19, Section 59-22 of the Baltimore City Code.

J.A. 175 (¶75). Ms. Mosby had served as an Assistant State's Attorney for Baltimore City from 2005-2012 and knew that spring-assisted knives were illegal in Baltimore City. J.A. 175 (¶75). The Baltimore City Police Department also informed Ms. Mosby that the knife was illegal, and Ms. Mosby knew that the SAO "had several cases pending against persons charged under Article 19, Section 59-22 of the Baltimore City Code for possession of spring-assisted knives." J.A. 219 (¶¶69-70). As part of her investigation, Ms. Mosby also would have been aware that, on April 12, 2015, Mr. Gray had been charged, after a finding of probable cause by a local magistrate, with possession of a switchblade knife. See J.A. 219. None of this investigatory information was provided to Major Cogen.

Ms. Mosby also provided other erroneous, misleading or incomplete information to Major Cogen -- including that the Officers observed Mr. Gray unresponsive on the floor of the wagon -- which was not true. Indeed, Ms. Mosby omitted that the Officers specifically stated that they did not observe that Mr. Gray was in any distress (until the final stop at the Western District); that, when Mr. Gray did not respond, [White] did nothing further despite the fact that she was advised that he needed a medic"; and that, despite Mr. Gray's seriously deteriorating medical condition, no medical assistance was rendered or summoned for Mr. Gray. This information was incorrect; however, since there was no evidence that Mr. Gray was in medical distress at any point or that any Officer had any further interaction with Mr. Gray until Officer White called for medical assistance at the van's final stop. J.A. 179-189 (¶87).

The information provided to Major Cogen also omitted that a first-hand witness, Donta Allen, who was in the van with Freddie Gray, noted that not only was Freddie Gray conscious during much of the ride, but was banging his head against the wall, indicating that he was not in a serious state for much of the ride. J.A. 180 (¶89). Ms. Mosby omitted that another witness, Mark Gladhill, saw Mr. Gray in the van and observed that he was in a "praying position," not that he was in any medical distress. J.A. 180 (¶90). Ms. Mosby omitted that the medics who came onto the scene and examined Mr. Gray after White called them not once, but twice determined that Mr. Gray's neck was "Normal" and that other "significant physical exam findings" stated that "client was arrested for suspected drug possession so possible drug ingestion or overdose was treated as well as trauma etiology." J.A. 180 (¶91). Indeed, Ms. Mosby withheld that not even the medical professionals that arrived on the scene were able to determine that Mr. Gray had suffered any serious physical trauma. J.A. 181 (¶92).

Ms. Mosby also provided erroneous legal advice to Major Cogen that the initial arrest of Mr. Gray was unlawful and without probable cause and that the Officers were under a legal duty to restrain Mr. Gray in a seatbelt.

On May 1, 2015, charges were filed against the Officers and the driver, Goodson, pursuant to an Application for Statement of Charges submitted by Major Samuel Cogen. J.A. 174 (¶68); J.A. 217 (¶61); J.A. 244 (¶68).

On May 1, 2015, Ms. Mosby also held a press conference regarding the charges against the Officers.

Criminal proceedings against each of the Officers resulted in either acquittals or requests for *nolle prosequis*.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT OPINION IS ERRONEOUS BECAUSE MS. MOSBY DID NOT ACT AS A PROSECUTOR WHEN UNDERTAKING AN INVESTIGATION AND PROVIDING HER INVESTIGATORY MATERIALS TO A LAW ENFORCEMENT OFFICER

This Court held in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) that "[i]n determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, we have applied a 'functional approach,' *see, e.g., Burns [v. Reed*], 500 U.S. [478] at 486, 111 S. Ct. 1934 at 1939 [(1991)], which looks to 'the nature of the function performed, not the identity of the actor who performed it,' *Forrester v. White*, 484 U.S. [219] at 229, 108 S. Ct. [538] at 545 [(1988)]." *Buckley*, 509 U.S. at 269.

Prosecutors do not enjoy absolute immunity when acting in an investigatory capacity as this Court noted in *Buckley:*

> [A]s the function test of *Imbler* [*v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976)] recognizes, the actions of a prosecutor are not absolutely immune merely because they are

> performed by a prosecutor. Qualified immunity "'represents the norm'" for executive officers, *Malley v. Briggs*, 475 U.S. [335], at 340, 106 S. Ct. [1092] at 1095 [(1986)], *quoting Harlow v. Fitzgerald*, 457 U.S. [800] at 807, 102 S. Ct. [2727], at 2732 [(1982)], so when a prosecutor "functions as an administrator rather than as an officer of the court" he is entitled only to qualified immunity. *Imbler*, 424 U.S., at 431, n. 33, 96 S. Ct. at 995, n. 33. There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Buckley, 509 U.S. at 273. Accordingly, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274. The Fourth Circuit erroneously applied absolute immunity to Ms. Mosby's actions even while conceding that Ms. Mosby "apparently began investigating before she had probable cause." Pet. App. at 17a.

Ms. Mosby and her office undertook an independent investigation, separate from the police investigation. J.A. 177.

> Over the course of our independent investigation, in the untimely death of Mr. Gray, my team worked around the clock: 12 and 14 hour days to canvass and interview dozens of witnesses: view numerous hours of video taped statements: surveyed the route: reviewed voluminous medical records; and we leveraged the information made available to us by the police department, the community, and the family of Mr. Gray.

J.A. 177 (¶81a). Ms. Mosby stated that she "sent [her] investigator out to the scene" and "have a working collaboration and are working with the Baltimore Sheriff's Department, who has police powers and, again independent from the Baltimore City Police Department." J.A. 178 (¶81i). Like the Baltimore City Police Department, Ms. Mosby "put all of [the State's Attorney's Office's] resources to make sure that *we were pursuing where the facts took us in this case*." J.A. 178 (¶ 81f) (emphasis added).

In conducting an investigation and relaying that investigation (however incomplete and misleading) to Major Cogen, Ms. Mosby was not acting in the role of an advocate, but was "perform[ing] the investigative functions normally performed by a detective or police officer." *Buckley*, 509 U.S. at 273.

The Fourth Circuit erred in not applying the Court's decision in *Buckley* to Ms. Mosby's investigation and to her providing her investigatory materials to Major Cogen. The Fourth Circuit contends that "[t]o the extent the Officers ask us to create a new rule that participation in an investigation deprives a prosecutor's subsequent acts of absolute immunity, we balk at the proposition." Pet. App. 17a. That statement, however, misunderstands the Petitioners' argument. The Petitioners do not contend that Ms. Mosby's mere participation in an investigation affects her later actions; rather the Petitioners contend—consistent with *Buckley*—that when a prosecutor undertakes an investigation and then provides the results of that investigation to a law enforcement officer (Major Cogen) for evaluation, the prosecutor acts not as a prosecutor, but as a person whose actions are indistinguishable from those of a law enforcement officer. *See Buckley*, 509 U.S. at 274 n. 5 (noting that '[e]ven after [a] determination [of probable cause]…a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity."). The Fourth Circuit's ruling upends the required "functional analysis" and focuses on Ms. Mosby's status as a prosecutor and not on the actual investigation done by Ms. Mosby and her providing that incomplete and misleading investigation to Major Cogen.

II. THE FOURTH CIRCUIT MISTAKENLY APPLIED *KALINA V. FLETCHER*, 522 U.S. 118, 129 (1997) TO A PROSECUTOR GIVING LEGAL ADVICE TO A LAW ENFORCEMENT OFFICER

The Fourth Circuit erred in concluding that Ms. Mosby's providing "legal advice" as to whether probable cause existed was protected by absolute immunity.

In *Burns*, this Court noted that the "[d]ecisions in later cases are consistent with the functional approach to immunity employed in *Imbler*." *Burns*, 500 U.S. at 486. This Court held in *Burns* that "[t]he prosecutor's actions at issue here-appearing before a judge and presenting evidence in support of a motion for a search warrant-clearly involve the prosecutor's 'role as advocate for the State,' rather than his role as 'administrator or investigative officer,' the protection for which we reserved judgment in *Imbler*, were protected by absolute immunity." *Id.* at 478. However, this Court reached a different conclusion when evaluating the prosecutor's "legal advice to the police regarding the use of hypnosis and the existence of probable cause to arrest petitioner." *Id.* at 478.

> The next factor to be considered-risk of vexatious litigation-also does not support absolute immunity for giving legal advice. The Court of Appeals asserted that absolute immunity was justified because "a prosecutor's risk of becoming entangled in litigation based on his or her role as a legal advisor

> to police officer is as likely as the risks associated with initiating and prosecuting a case." We disagree. In the first place, a suspect or defendant is not likely to be as aware of a prosecutor's role in giving advice as a prosecutor's role in initiating and conducting a prosecution. But even if a prosecutor's role in giving advice to the police does carry with it some risk of burdensome litigation, the concern with litigation in our immunity cases is not merely a generalized concern with interference with an official's duties, but rather is a concern with interference with the conduct closely related to the judicial process. Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.

Burns, 500 U.S. at 494. "[I]t is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." *Id*.

The Fourth Circuit nonetheless concluded that Ms. Mosby's giving of legal advice to Major Cogen was controlled by *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997). Pet. App. 15a-16a. *Kalina*, however, did not involve a prosecutor giving legal advice to law

enforcement officers. The prosecutor in *Kalina* was entitled to absolute immunity only with respect to the presentation of an information charging the defendant with burglary and motion for an arrest warrant that the prosecutor herself filed with the court. *Kalina*, 522 U.S. at 129. All of the actions analyzed in *Kalina* were performed only by a prosecutor. *Kalina* did not modify this Court's holding in *Burns* that a prosecutor is not entitled to absolute immunity when giving legal advice (including legal advice as to probable cause) to law enforcement officers. The Fourth Circuit's reliance on *Kalina* is in error.

III. THE FOURTH CIRCUIT'S HOLDING THAT A PROSECUTOR IS ENTITLED TO ABSOLUTE IMMUNITY WHEN GIVING LEGAL ADVICE TO AN LAW ENFORCEMENT OFFICER CONFLICTS WITH NUMEROUS OTHER CIRCUIT COURT DECISIONS

Relying on an erroneous interpretation of *Kalina* and its own decision in *Springmen v. Williams*, 122 F.3d 211 (4th Cir. 1997), the Fourth Circuit held that Ms. Mosby was entitled to absolute immunity when she gave legal advice on probable cause to Major Cogen. Pet. App. at 15a ("And, in *Springmen*, we held that a Maryland Assistant State's Attorney enjoyed absolute immunity for reviewing an application for Statement of Charges prepared by a police officer and for advising the officer that the facts were sufficiently strong to proceed with filing the application.")

The Fourth Circuit's holdings conflict with decisions in several other Circuit Courts that have held that absolute immunity does not apply to a prosecutor giving legal advice as to probable cause to other officials. *See Ewing v. City of Stockton*, 588 F.3d 1218, 1233–34 (9th Cir. 2009) ("Although the *Burns* Court sometimes characterized the prosecutor's role as "investigative," it clearly held that with respect to advising police that they had probable cause to arrest, the prosecutor was not entitled to absolute immunity."); *Loupe v. O'Bannon*, 824 F.3d 534, 540 (5th Cir. 2016) ("In *Burns*, the Supreme Court held that giving legal advice to police, including advice as to whether there is probable cause to arrest a suspect, is not a function protected by absolute immunity."); *Spiess v. Pocono Mountain Reg'l Police Dept.*, 580 Fed. Appx. 116, 120 (3d Cir. 2014) ("Such investigative functions include giving legal advice to the police as to the existence of probable cause."); *Holden v. Sticher*, 427 Fed. Appx. 749, 751 (11th Cir. 2011) ("Prosecutors do not receive absolute immunity for giving legal advice to police where a prosecutor guides police rather than where a prosecutor prepares his or her own case.") (*citing Burns*); *Prince v. Hicks*, 198 F.3d 607, 614–15 (6th Cir. 1999).

Review by this Court is appropriate to resolve this conflict among these Circuit Courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 4th day of October 2018.

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