No. 25-1175

In the
Supreme Court of the United States

ARCHIE WILLIAMS,

Petitioner,

v.

CITY OF BATON ROUGE; ALFRED CHARLES MONDRICK; MARJORIE GROHT; STEVEN WOODRING; FORMER LOUISIANA STATE POLICE FORENSIC SCIENTIST PATRICK LANE, FINGERPRINT EXAMINER SYBIL GUIDRY, SEROLOGIST NACE "JERRY" MILLER,

Respondents.

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 13, 2026

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QUESTIONS PRESENTED

I. Whether the two-prong qualified immunity analysis remains the same regardless of the implicated right.

II. Whether the U.S. Fifth Circuit properly rejected immaterial, irrelevant, and speculative information in determining that summary judgment was appropriate based upon the qualified immunity defense and the lack of a genuine issue of material fact.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, City of Baton Rouge/Parish of East Baton Rouge discloses the following. As a political subdivision of the State of Louisiana and a local governmental entity, there is no parent or publicly held company owning 10% stock or more.

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STATEMENT OF THE CASE

I. Factual Background

This case arises from Petitioner's conviction for crimes relating to the stabbing and rape of victim, Anne Eaton. The City of Baton Rouge/Parish of East Baton Rouge ("City/Parish"), through its Baton Rouge Police Department ("BRPD") detectives Alfred Charles Mondrick and Marjorie Groht, with assistance from detective Steven Woodring, performed an investigation that led to Petitioner's arrest. The investigation took place for roughly five weeks between December 1982 and January 1983. The detectives showed the victim multiple arrays of photographic lineups on five separate occasions over the course of four days. Each photograph lineup consisted of a "six-pack of photographs of Black men of the same general age and physical features and characteristics. After identifying Petitioner in a photograph lineup, the victim positively identified Petitioner as her attacker during an in-person lineup.

Importantly, DNA forensics had not yet been invented and was not available to police during its 1982-1983 criminal investigation. Rather, officers had to rely on witness accounts, criminal informants, and recollections to further their investigative efforts. The detectives timely furnished all information, whether deemed pertinent or not, to the prosecution and criminal defense teams prior to Petitioner's criminal trial.

At the close of Petitioner's criminal trial, a jury found Petitioner guilty of aggravated burglary, aggravated rape, and attempted murder. Petitioner served over thirty-six years in prison until 2019 when newly-available forensic evidence implicated another person as the perpetrator.

II. Procedural Background

On March 17, 2020, Petitioner brought this lawsuit under 42 U.S.C. § 1983 against the City/Parish; retired BRPD detectives Alfred Charles Mondrick, Marjorie Groht, and Steven Woodring (collectively referred to as the "City/Parish Respondents"); and former Louisiana State Police Forensic Scientist Patrick Lane, Fingerprint Examiner Sybil Guidry, and Serologist Nace "Jerry" Miller (collectively referred to as "State Police Respondents").

Petitioner alleged that the City/Parish Respondents violated his Fourteenth Amendment right to due process by using impermissibly suggestive photograph lineups during the investigation. Petitioner also alleged a Fourteenth Amendment violation against the State Police Respondents for suppressing exculpatory crime scene evidence. Petitioner also brought various state law claims including malicious prosecution, spoliation of evidence, intentional infliction of emotional distress, and negligence.

The district court granted summary judgment in favor of the City/Parish Respondents as well as the State Police Respondents, finding qualified immunity

applied to each actor's involvement in the criminal investigation. Petitioner appealed to the Fifth Circuit, whose panel affirmed the district court's decision. In pertinent part, the Fifth Circuit concluded that Petitioner failed to prove that the photograph lineups violated Petitioner's constitutional or statutory rights and that there were no genuine issues of material fact to preclude summary judgment.

Petitioner now files this *Petition for Writ of Certiorari* asserting a case of first impression limited to the application of qualified immunity in favor of the City/Parish Respondents. Petitioner does not challenge the State Police Respondents' affirmed dismissal.

SUMMARY OF THE ARGUMENT

Petitioner's arguments offer no compelling reasons to grant writ, and must be denied, accordingly. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. S. Ct. Rule 10.

The Supreme Court has repeatedly held that "government officials performing discretionary functions [enjoy] qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). Stated more pointedly, qualified immunity generally protects "all but the plainly incompetent or

those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

As an initial matter, this is not a case of first impression. Petitioner's suggestion that a different approach to the second prong of the qualified immunity analysis is misguided. The structure of the second prong is inherently fluid. The rights and facts surrounding a purported rights violation follow the appropriate application of law on a case-by-case basis without altering the second prong itself. Petitioner's [Procedural] Due Process claim under the Fourteenth Amendment regarding impermissibly suggestive photographic lineups receives the same qualified immunity analysis applied to any other purported rights violation. Under Petitioner's rationale, the application of qualified immunity to any non-Fourth Amendment rights violation claim would constitute a case of first impression in contradiction to the instruction provided by *Anderson,* 483 U.S. at 640 (1987). See also *Malley*, 475 U.S. at 341.

Second, the Fifth Circuit did not weigh evidence in favor of the City/Parish Respondents. Instead, the Fifth Circuit properly disregarded immaterial, irrelevant, and speculative information for its summary judgment review. Petitioner provided irrelevant theories, speculation, and contradicted opinions rather than an appropriate factual basis to establish a genuine issue of material fact. As a result, the courts correctly held the City/Parish Respondents were entitled to qualified immunity and that Petitioner failed to demonstrate a clearly established

rights violation. For these reasons, this Honorable Court must deny the petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

There is no compelling reason for review in this matter. S. Ct. R. 10 provides in pertinent part that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and will only be granted for "compelling reasons." A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. S. Ct. R. 10. Petitioner's attempt to create a compelling reason by suggestion of a need for a different approach to the qualified immunity analysis fails. Thus, the rules of the Court indicate a denial of the petition is the only appropriate decision.

First, the "clearly established" prong of the qualified immunity analysis does not create a case of first impression simply because Petitioner's claim is one of procedural due process under the Fourteenth Amendment and photograph lineups.

Second, the undisputed material facts support qualified immunity and summary judgment. Petitioner's attempt to disguise immaterial, irrelevant, and speculative information as material facts failed at the lower courts and should fail here as well. Without a compelling reason, there is no basis upon which Petitioner's request should be granted.

I. No different approach to qualified immunity for Petitioner's case.

Petitioner's suggestion that the qualified immunity analysis should change for his case is not supported by binding precedent. For qualified immunity purposes, courts must determine (1) whether the facts a plaintiff has alleged make out a violation of a constitutional right, and (2) whether the right was "clearly established" at the time of the defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). This Court has performed the two-pronged qualified immunity analysis extensively. While either prong may be addressed first, the two-prong approach remains the same.

The doctrine of qualified immunity shields officials from civil liability so long as their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards,* 566 U.S. 658, 664 (2012) (internal quotation marks and alteration omitted). ***"We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."*** *Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011). Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly

violate the law." *Malley,* 475 U.S. at 341. (Emphasis added). *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

a. Totality of circumstances confirm a permissible identification process.

Petitioner contends that most qualified immunity cases are limited to Fourth Amendment claims. Therefore, the application of qualified immunity to Fourteenth Amendment Due Process involves a different qualified immunity analysis. This logic is misdirected. Contrary to Petitioner's argument, the second prong of the qualified immunity analysis does not fundamentally change dependent upon the rights violation in question.

Rather, the analysis merely affords different results on a case-by-case basis. Namely, the question of impermissible suggestiveness involves the totality of circumstances factors. Each case should be "considered on its own facts." *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972)(citing *Simmons v. U.S.*, 390 U.S. 377, 384 (1968)). Even if a photograph lineup was found to be impermissibly suggestive, courts must look at the "totality of the circumstances" and determine whether the identification was "nonetheless reliable." *Neil*, 409 U.S. at 199. This Court set forth five factors that courts should consider in assessing the likelihood of misidentification or reliability:

> (1) the opportunity to view the criminal at the time of the crime;
> (2) the witness's degree of attention;
> (3) the accuracy of the witness's prior description of the criminal;
> (4) the level of certainty demonstrated by the witness at the confrontation; and
> (5) the length of time between the crime and the confrontation. *Id*. at 199–200.

These factors do not alter the qualified immunity analysis. They simply lend themselves to the "clearly established" right (second) prong of the qualified immunity inquiry. Accordingly, this is not a case of first impression.

Established precedent exists for police officers and their bounds of reasonable and lawful photographic lineup procedures – i.e., manipulating a photograph to procure a false identification in retaliation for an informant's failure to cooperate in an unrelated criminal investigation. *I.e., Good v. Curtis*, 601 F.3d 393 (5th Cir. 2010).

Unlike *Good*, Petitioner offers no suggestion or argument that the City/Parish Respondents performed some overt and malicious act to "frame" or retaliate against Petitioner. Such action is undoubtably precluded from the benefit of qualified immunity. Likewise, Petitioner did not contend that the City/Parish Respondents manipulated or altered the lighting of the photographs to change skin tone depicted in the photographs prior to presentation to the victim.

Instead, Petitioner simply believes his photograph being used in three lineups is impermissibly suggestive. Yet, the totality of circumstances factors does not support Petitioner's belief.

First, the victim was the only person to have seen her attacker in the house during the intimate and substantial attack time giving the greatest weight of credibility to her account as opposed to other witnesses. Notably, the victim previously saw her attacker at her door in advance of the attack.

Second and third, the victim's degree of attention and accuracy was high as she recalled a scar on her attacker's left shoulder, which coincidentally, Petitioner also had. Petitioner's scar was revealed to the jury during the criminal trial. Conversely, Stephanie Alexander's witness account was far less reliable, contradictory at times, and only based upon a short period of time.

Fourth, the victim's level of certainty was great when she made the in-person identification such that the City/Parish Respondents noticed the hair standing up on the back of the victim's neck and arms. The victim was excitedly emotional upon seeing Petitioner in a way that the City/Parish Respondents took as genuine and unmanufactured.

Lastly, the victim's identification of Petitioner was merely five weeks after the attack. In comparison to other cases where an identification is made many

months or something years after an attack, the victim's identification of Petitioner was extremely favorable toward accurate recollection. Each of the totality of circumstances factors lie heavily in the City/Parish Respondents' favor, and the analysis does not create a different approach to qualified immunity.

b. Jurisprudence of the time shows no "clearly established" right against nonsuggestive lineups.

When looking at precedent or existing law under the "clearly established" prong, courts must consider the precedent or existing law at the time of the officer's conduct. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). At the time of the 1982-83 criminal investigation, the High Court condoned the use of photograph lineups, recognized flaws in its process, and afforded ways to remedy those flaws so that lineups could be maintained as a legitimate and reliable method of investigation. Referring to *Simmons*, 390 U.S. at 383-84; *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967)(abrogated on unrelated criminal procedure issue regarding judgments of conviction);

Prior to Petitioner's arrest, the Court scrutinized due process protections deriving from suggestive identification procedures. I.e., *Stovall*, 388 U.S. 293 (1967); *Simmons,* 390 U.S. 377 (1968); *Foster v. California*, 394 U.S. 440 (1969); and *Coleman v. Alabama*, 399 U.S. 1 (1970). Each of these cases pre-dated the Petitioner's arrest, and each supports the

reasonableness of the City/Parish Respondent's identification process.

In *Stovall*, the Supreme Court held that a defendant was not deprived of due process by virtue of the fact that he was brought to the victim's hospital room for identification where the victim was not physically able to visit jail in which defendant was confined, whose husband had been killed by same attacker, and who was required to be hospitalized for major surgery in effort to save her life. *Stovall v. Denno*, 388 U.S. 293 (1967). The Court reasoned:

> The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. (Footnote citations omitted). However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative. The Court of Appeals, *en banc*, stated, 355 F.2d at 735:
>
> > 'Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the

> attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, ***the police followed the only feasible procedure and took Stovall to the hospital room***. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.' (Emphasis added). *Stovall*, 388 U.S. at 302.

Stovall lends itself against writ consideration here. Despite the attempted murder stab wound injury the victim suffered, the City/Parish Respondents only offered unaltered photograph lineup six-packs, and an in-person lineup of six men to the victim. Petitioner was never singled-out for an individual viewing to the victim whether by photograph or in person. Much like the Stovall officers, the City/Parish Respondents explained in detail during their depositions that they were merely following the path provided by the victim.

In *Simmons*, officers procured group snapshots of the three suspects of an armed robbery event from the suspects' family members. *Simmons,* 390 U.S. at 380. The snapshots were shown separately to five bank employees, who witnessed the robbery. *Id*. Inevitably, all three suspects were identified through the photographs. *Id*. at 380-81. At trial, the photographs were not admitted into evidence. *Id*. at 381. Instead, the five employees positively identified Simmons in court during the criminal trial. *Id*.

Simmons challenged the process of his identification as being unconstitutional, and the Supreme Court disagreed:

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. ***The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error.*** We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This

> standard accords with our resolution of a similar issue in *Stovall v. Denno*, 388 U.S. 293, 301-02, and with decisions of other courts on the question of identification by photograph. See e.g., *People v. Evans*, 39 Cal.2d 242 (1952). (Emphasis added). *Simmons,* 390 U.S. at 383-84.

Simmons and its rationale offer no awareness of a violation of Petitioner's rights through the City/Parish Respondents' investigative measures. "Group snapshots" of the suspect procured through the suspect's family is a factual matter wholly unrelated to this matter as the City/Parish Respondents only utilized frontal "mug shot" and profile "mug shot" photographs for the six-pack lineups leading to Petitioner's arrest. In fact, Petitioner received a complete criminal jury trial replete with cross examination of all the State's witnesses, including the victim and Respondent Groht. *Simmons* does not support Petitioner's arguments.

In *Foster*, the lone eyewitness to a robbery viewed a three-man, in-person lineup including two men at 5'5" and 5'6" in height, respectively, while the third, and eventual arrestee, was near 6'0" wearing a leather jacket similar to that worn by the robber. *Foster*, 394 U.S. at 441. After no identification was made from the first lineup, the witness asked to speak with the tall suspect. *Id.* After speaking with him, still no identification was made. *Id.* Seven to ten days later, police arranged for a second lineup involving

five people. *Id.* The tall suspect was the only person repeated in the second lineup from the first lineup. *Id.* at 441-42. Only after the second lineup did the victim make a positive identification. *Id.* at 442.

Conversely, the victim in this matter made a startling and excited reaction in seeing Petitioner the first and only time she viewed an in-person lineup of six men. Prior thereto, the victim asked officers for a side or profile view photograph of Petitioner, whom she pointed out in one six-pack photograph lineup. Officers responded with a six-pack of profile views including that of Petitioner without their indication of which was Petitioner. Across this process, the victim did not receive any information from the City/Parish Respondents about Petitioner or his placement within the lineup. At the criminal trial, the victim even testified of her frustration with the lack of communication by the officers during the identification process. Further contrasted from *Foster*, Petitioner was not distinguishable from other men in the photograph or in-person lineups based upon clothing or physical features. Suggestiveness occurs, among other ways, when an individual is in "some way emphasized" or the police indicate that "one of the persons pictured committed the crime." *Id.* Equally, Petitioner and his photograph were never presented to the victim singly or else in any manner other than along with five other photographs or people with similar features and characteristics. Considering these facts, there was no perceived suggestiveness in the lineups or else "coaching" by the City/Parish Respondents that align this matter with *Foster*.

In *Coleman*, a man was shot by three attackers while changing a flat tire on the side of the road. *Coleman*, 399 U.S. at 4. The victim was unable to identify his attackers from mug shot photographs. *Id.* at 5. But the victim identified two individuals believed to be involved in the attack via six-man, in-person lineup two years after the attack. *Id.* at 4. Despite the questions of reliability of the identifications based upon the defendants' lack of counsel,[1] the Supreme Court recognized that the victim's identifications were not at all induced by the conduct of the lineup. *Id.* at 5-6. In fact, the record was "utterly devoid of evidence" that anything the police said or did prompted the victim's identifications. *Id.* at 6.

Likewise, the City/Parish Respondents did not prompt the victim's identification of Petitioner. Again, the victim testified before the criminal trial jury of her frustration with the stoic and reticent manner of the City/Parish Respondents during their presentation of lineups.

Taking these cases into consideration, there is nothing indicative of the City/Parish Respondents' behavior that resembles an impermissibly suggestive identification process. While cases do not have to be "directly on point," the "existing precedent must have placed the statutory or constitutional question beyond debate." *Taylor v. Barkes*, 575 U.S. 822, 825 (2015)(quoting *Ashcroft,* 563 U.S. at 741). At

[1] Lack of counsel is not an issue here, nor has it been raised in this matter.

minimum, much debate remains against Petitioner's position.

Petitioner concludes with the suggestion that the five-factor totality of circumstances test does not require factually similar cases to nevertheless satisfy the second prong of the qualified immunity analysis. Referring to Petition for Writ of Certiorari at 20-21 (referencing *Neil v. Biggers*, 409 U.S. 188 (1972); *Manson v. Brathwaite*, 432 U.S. 98 (1977). Yet, Petitioner does not reconcile his theory with the inherent spirit of the "clearly established" prong. At this granular level, the application of instructive jurisprudential guidance affords the roadmap to a proper determination of "clearly established" Due Process rights during a criminal identification process. This guidance was in place during Petitioner's 1982-83 investigation. The qualified immunity analysis remains complete and unchanged for Petitioner's claims now. Without a compelling reason to grant Petitioner's request for writ of certiorari, this Court must deny said request.

II. Irrelevant, immaterial, and speculative information was not weighed.

Petitioner alleges that the Fifth Circuit improperly weighed facts in a light unfavorable to the Petitioner. However, the courts did not weigh facts at all. The City/Parish Respondents' undisputed material facts were not impacted by Petitioner's unsupported arguments. Petitioner supplied only immaterial information, irrelevant opinions, and speculation to challenge summary judgment. The effort failed.

To defeat summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts …. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris,* 550 U.S. 372, 380 (2007) (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (footnote omitted)).

Here, Petitioner only raises an abstract doubt against the material facts. None of the information Petitioner alleges is material to Petitioner's classification as a person of interest in the investigation or otherwise relevant to the City/Parish Respondent's investigative efforts. Therefore, the Fifth Circuit determined with all reasonable inferences in favor of the nonmovant that a rational factfinder could determine there existed a genuine issue of material fact against summary judgment.

a. Immaterial facts neutral in nature do not assist the summary judgment analysis.

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. Rule 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material if "its resolution in favor of one party might affect the outcome of the lawsuit under

governing law." *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Courts must view facts in the light most favorable to the nonmoving party but only if there is a "genuine" dispute as to those facts. *Scott*, 550 U.S. at 380. An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Hamilton*, 232 F.3d at 477. The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment" since the actual requirement is that "there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

Here, Petitioner reurges nine purported facts he contends exonerated or otherwise excluded him from the criminal investigation. See *Petition for Writ of Certiorari* at 17. However, the contention falls short of its proposition. The first four "facts" reflect an absence of specific things at the scene of the crime: (1) no physical evidence connecting Petitioner to the scene, (2) no fingerprints from the scene matched Petitioner, (3) no clothing of Petitioner was at the scene, and (4) no blood or serological material of Petitioner was at the scene. Each of these four points are immaterial and neutral because there was no physical evidence, fingerprints, clothing, or blood/serological material found matching anyone during the investigation. Eyewitness evidence and criminal informant information were the only remaining tools investigating officers had available to them. Petitioner's facts are immaterial because they

are neutral facts that equally incriminate and exonerate no one.

Petitioner's fifth and sixth points regarding Stephanie Alexander's witness account to the investigation are exaggerated and immaterial. Namely, Alexander's observations were drastically minimal in time and substance compared to the victim's encounter, at times conflicted with the victim's account or else was contradictory in itself. Alexander's accuracy and credibility were not strong. The City/Parish Respondents were reasonable in their investigative steps to weigh Alexander's credibility unfavorably in comparison to the victim as the investigation wore on.

Petitioner's seventh and eighth points involve attention to Petitioner despite the photographs of two individuals within the series of lineups having been called out by the victim. However, the City/Parish Respondents described and contrasted the victim's statements about those other two photographs in contrast to what the victim said about the photograph of Petitioner. Specifically, the victim indicated that each of those other two photographs depicted a *singular* feature (i.e., nose, lips) similar to her attacker, but not the person as a whole within the photograph. The comparison was effectively described as a continuation of the Identi-Kit created at the inception of the investigation. Conversely, only the photograph of Petitioner was pointed out as wholistically looking like the person that attacked her but-for a different hair style.

Lastly, Petitioner takes issue with the victim's use of a piece of paper to cover hair of the photograph where she told officers the hair was different. Now, for the first time, Petitioner raises a question as to who utilized the piece of paper to cover the hair. See Petition for Writ of Certiorari at 18. The police report undisputedly indicates the victim utilized a piece of paper to cover the hair. Nothing contradicts that undisputed fact, and no issue has been raised on that fact until now. If the suggestion is that the City/Parish Respondents utilized the paper in a way to manipulate the photographs to orchestrate a false identification, the argument fails for two reasons. First, there is no evidence of any investigating officer doing so. Second, even if it could be speculated as true, such an act is not the physical manipulation of photographs that the jurisprudence calls out as being impermissibly suggestive. The manipulation of photographs is limited to digital or electronic altering and editing of a photograph. Nevertheless, the evidence reflects the victim initiated the idea and the implementation of covering hair styles.

Each of these nine points are immaterial to the facts that led to Petitioner's arrest. Likewise, none of the nine points create a genuine issue of material fact that the identification process was somehow impermissibly suggestive. Without more, Petitioner offers neither material facts or erroneous factual findings by the courts. Summary judgment was and remains appropriate.

b. Irrelevant and speculative opinions do not assist the factfinder.

There must be sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson*, 477 U.S. at 249 (citing *First National Bank of Arizona v. Cities Service* Co., 391 U.S. 253, 288-89 (1968)). The evidence cannot be "merely colorable" and must be significantly probative. *Anderson,* 477 U.S. at 249-50 (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (per curiam) and *Cities Service*, *supra*, at 290). Here, Petitioner provided a surface-level assertion that the photograph lineup methodology was flawed, without providing any useful evidence to support the assertion.

Petitioner provided opinions from Gary Wells regarding the identification process. Wells' opinions focused on the "repeated suspect effect" and speculation that the identification process was flawed *if* officers said anything to the victim during the lineups to suggest Petitioner as the attacker. No evidence was presented to support any investigating officers said or did anything suggestive toward the victim throughout the investigation.

The theory of "repeated-suspect effect" was not established, studied, or applied in police investigations in 1982-83. Petitioner, through Wells, offered no specific genesis for the theory, but Wells' singular reference to a 2021 publication demonstrates the irrelevance of the theory's application to the City/Parish Respondents' investigative steps or intent

nearly forty years prior thereto. The mere concept of such hindsight analysis would have been unduly prejudicial and far outweighing any probative value, if any.

Most importantly, the study relied upon by Wells in forming his opinion was published in 2021, *thirty-eight years* after the detectives' investigation concluded. This type of hindsight information was correctly determined to be irrelevant and immaterial, which further supports that there was not enough sufficient information at the time of the investigation to put the City/Parish Respondents on notice that the photograph lineups could have violated Petitioner's rights.

Additionally, Wells failed to acknowledge that the victim requested a profile photograph, but he did implant information that was not supported by factual evidence. For example, Wells opined that the request for a profile photograph was not "totally [the victim's] idea." There is no document, witness, or other form of evidence to support the conclusory contention. In fact, the victim's testimony memorialized within the criminal trial transcript directly contradicts such a notion. The transcript was made an exhibit to the Motion for Summary Judgment.

Lastly, the Fifth Circuit did not make any credibility determinations in its summary judgment review. Petitioner asserts that the Fifth Circuit made a credibility determination regarding the Petitioner's scar described by the victim and shown at trial.

Petition for Writ of Certiorari at 19. However, this assertion is inaccurate. The Fifth Circuit did not weigh credibility on that point. Any credibility assessment on that point was solely the jury's determination. Rather, the undisputed fact remains that Petitioner revealed a shoulder scar in open court after the victim described what she said she observed while she was being raped. It is further undisputed that the jury subsequently found Petitioner guilty of the criminal charges brought against him. Therefore, the Fifth Circuit did not weigh credibility, but merely followed the undisputed facts that arrive at qualified immunity and the absence of a clearly established right under the totality of circumstances of the criminal investigation.

For the above reasons, Petitioner could not overcome the burden for qualified immunity so as to defeat summary judgment as the facts and evidence did not point to any genuine issues of material fact or any constitutional or statutory violations. As a result, the Fifth Circuit was correct in affirming summary judgment in favor of the City/Parish Respondents and that decision should not be disturbed.

CONCLUSION

For the foregoing reasons, this Honorable Court should deny the petition for writ of certiorari.

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