No. _____

In the Supreme Court of the United States

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; SHEILA DIXON, former Mayor of the City of Baltimore, in her individual capacity; BALTIMORE CITY POLICE DEPARTMENT; FREDERICK BEALEFELD, Police Commissioner Individually and as Police Commissioner, Baltimore City Police Department; MICHAEL BRASSELL, Police Officer Individually and as Police Officer, Baltimore City Police Department; CHRIS JONES, Detective Sergeant Individually and as Police Officer, Baltimore City Police Department; CAPRICE SMITH, Detective Individually and as Police Officer, Baltimore City Police Department; DOMINICK GRIFFIN, Detective Individually and as Police Officer, Baltimore City Police Department; JOHN AND JANE DOES 1-20, Individually and as currently unknown Police Officers, Baltimore City Police Department; RICHARD AND JANE ROES 1-20, Individually and as currently unknown Baltimore City Police Department Supervisors,

***Petitioners*,**

v.

MARLOW HUMBERT,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether each officer investigating a rape had probable cause to apply for an arrest warrant when substantial facts weighed toward probable cause, and some facts known only to one or two but not all three of the officers pointed away from probable cause?

2. Whether officers investigating a rape had probable cause to apply for an arrest warrant where:

   a. the victim was a trained artist who

      i. saw the rapist's face;

      ii. drew a sketch of him the evening of the attack;

      iii. provided a detailed physical description to the police the day of the attack;

      iv. helped the police create a composite sketch the next day;

      v. altered the composite sketch to look more like her attacker; and

      vi. approved the sketch after her alteration; and

   b. a nonparty officer

      i. saw respondent a week after the attack only a couple of blocks from the victim's home;

      ii. located respondent in an area in which the police were investigating attacks by a serial rapist;

iii. confronted respondent while respondent was wearing a woman's stocking on his head;

iv. recognized respondent because respondent looked strikingly similar to the composite sketch approved by the victim, a resemblance the respondent at trial admitted;

v. recognized respondent as matching the victim's verbal description of her attacker as a medium build African-American male, clean shaven and short haircut, 5'7" tall, late 30-early 40s, well-spoken; and

vi. took a photograph of respondent; and

c. the victim, upon viewing the photograph of respondent in a photo array

i. immediately had an emphatic and emotional repugnance, began to weep, jabbed at his photograph without prompting, and said "that's him," as she pushed the photograph away from herself; and

ii. wrote "that's him" on the back of the photograph and signed her name;

but also where the (d) victim told two of the three officers with whom she spoke that she needed to see respondent in a lineup and to hear his voice to be "positive"; (e) said the third officer had showed a photograph on his cellphone of a man the officer identified as her attacker; (f) though the officer did so after she had produced her own sketch, had provided a verbal description of respondent, and probably after she had approved the police

composite sketch; and (g) though the two officers present at the photo array did not know she had been shown a single photo and she told them nothing about the partial cause of her emotional reaction to respondent's photograph?

3. Whether for purposes of qualified immunity, the court of appeals improperly attributed knowledge possessed by one officer to other officer defendants who did not have that knowledge?

4. Whether for purposes of qualified immunity, the court of appeals applied the law at too high a level of generality, without focusing sufficiently on the facts the officers actually knew?

PARTIES TO THE PROCEEDING

Petitioners are the Mayor and City Council of Baltimore City; Sheila Dixon, former Mayor of the City of Baltimore, in her individual capacity; the Baltimore City Police Department ("BPD"); Chris Jones, Detective Sergeant, individually and as a BPD Officer; Caprice Smith, Detective, individually and as a BPD Officer; Dominick Griffin, Detective, individually and as a BPD Officer. Detectives Caprice Smith and Dominick Griffith (the "Detectives") and their supervisor, Sergeant Chris Jones ("Sergeant Jones")(all three collectively, "the Officers") were the appellees below.

Respondent, who was the appellant below, is Marlow Humbert.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Humbert v. Mayor and City Council of Baltimore City*, 866 F.3d 546 (CA4 2017). A. 91a. The decision of the United States District Court for the District of Maryland granting petitioners' motion for judgment notwithstanding the verdict and granting petitioners qualified immunity, appears at Civil No. WDQ-11-0440 2015, WL 4042327 (D. Md. June 22, 2015) A. 48a. The decision of the United States District Court for the District of Maryland granting in part and denying in part petitioners' motion for summary judgment, which respondent did not appeal, appears at 2014 WL 1266673 (D. Md. March 25, 2014). A. 1a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion August 7, 2017 (as amended August 22, 2017). The court of appeals denied appellees' timely petition for panel rehearing or rehearing en banc September 5, 2017. On November 30, 2017, the Chief Justice extended the time for filing this petition for a writ of certiorari to January 3, 2018, and granted a second extension to February 2, 2018. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent brought this action under 42 U.S.C. § 1983 alleging that his arrest and pretrial detention were without probable cause in violation

of the Fourth Amendment to the United States Constitution. The Fourth Amendment states, in relevant part:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause."

Section 1983 states, in relevant part:

> "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."

STATEMENT OF THE CASE

This case raises important and recurring issues similar to those the Court addressed this Term in *District of Columbia v. Wesby*, No. 15-1485 (Jan. 22, 2018). *Wesby* held that where the arresting officers knew facts weighing both for and against probable cause, the court of appeals erred by "view[ing] each fact in isolation, rather than as a factor in the totality of the circumstances," and by giving too much weight to "any circumstances that were susceptible of innocent explanation." *Id.,* slip op. at 9 (citation and internal quotation marks omitted). Here, too, the court of appeals went astray by

parsing the facts "one by one," employing the type of "divide-and-conquer analysis" that "[t]he totality of circumstances test" to determine probable cause "precludes." *Id.* (citations and internal quotation marks omitted). The officers who arrested respondent here possessed facts that strongly implicated him as the rapist in the case they were investigating, even though they also knew some facts that tended to negate his involvement. As in *Wesby*, the court of appeals applied a probable cause standard that gave short shrift to facts known to the Officers supporting probable cause, while giving controlling weight to facts pointing in the other direction. It also tried to bolster its conclusions by making factual findings unsupported by the record evidence. In so doing, the court of appeals here, just as in *Wesby,* erred in its probable cause analysis, as well as in the application of qualified immunity.

A. FACTUAL BACKGROUND

The BPD arrested respondent for rape in 2008. The arresting Officers based the arrest on the victim's emphatic identification of respondent, respondent's close resemblance to an accurate composite sketch and the victim's physical description of her attacker, and on respondent's presence in the victim's neighborhood (where police were investigating a number of similar rapes) a few days after the rape while wearing a woman's stocking on his head. When the victim later told the prosecution that she would not testify against respondent, the State entered a plea of *nolle prosequi*. Respondent spent some fifteen months in jail.

Respondent then sued petitioners and former Commissioner of the BPD Bealefeld (not a

petitioner) in the United States District Court for the District of Maryland for malicious prosecution under 42 U.S.C. § 1983 and the constitution and common law of Maryland.[1] The jury returned a verdict against the individual Officers, awarding respondent $2.3 million, including $1.5 million in punitive damages. The district court set that verdict aside, drawing all reasonable inferences in favor of respondent, finding that the jury's answers to special interrogatories established that the Officers had probable cause to arrest respondent, and that they therefore were entitled to qualified immunity. It also held that respondent had failed to make out his state law claims. A.103a.[2]

A unanimous panel of the court of appeals reversed. It held that the Officers did not have probable cause when they arrested respondent for rape, and that the jury thus properly had held them liable under 42 U.S.C. § 1983 and Maryland law for malicious prosecution. It also concluded that no reasonable officers in their position could have believed that probable cause existed, so that the Officers were not entitled to qualified immunity. A. 120a-121a. The court of appeals accordingly

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[1] The district court stayed all proceedings as to Petitioners Mayor and City Council, the BPD, and former Mayor Dixon, as well as to Bealefeld, until it resolved the claims against the Officers. A. 99a n.3.

[2] After resolving the claims against the Detectives and Sergeant Jones, the district court granted the motion of the other petitioners for judgment as a matter of law, finding that respondent's claims against those petitioners could not survive "because the Officers did not commit a constitutional violation," and declining to exercise supplemental jurisdiction as to a remaining state-law claim against Bealefeld. A. 103a.

reinstated the jury verdict against the Officers and remanded the case for further proceedings consistent with its opinion. A. 121a.

1. The Basis for the Arrest Warrant

On April 30, 2008, a graduate student at the Maryland Institute, College of Art in Baltimore, Maryland was returning to her apartment in the Charles Village neighborhood when a man followed her through the doorway. She greeted him, and got a clear look at his face. The man then donned a mask, pulled out a gun, and forced the woman into her apartment. He raped her. In addition to the mask, the man wore gloves and a condom. The BPD Sex Offense Unit responded to the 911 call. They had been investigating a serial rapist plaguing Charles Village that spring, who followed women home, gained entry to their residences, and then raped them. CM/ECF No. 1, p. 16 para. 45. The BPD assigned the investigation to Sex Offense Unit members Petitioner Detectives Griffin and Smith, with Petitioner Sergeant Jones as supervisor. A. 172a-173a.

In her interview with police immediately after the attack, the victim described her attacker to the Officers as an African-American male, in his late 30s to early 40s, standing 5'7" to 5'9", clean cut, with short hair and of medium build. A. 95a. The victim later testified that Sergeant Jones asked her repeatedly whether her attacker was homeless. A. 95a.

The victim was an accomplished portrait artist, and had seen her attacker's face before he donned the mask. Later on the evening of the attack, she drew a sketch of her attacker's face. A. 95a. Because BPD regulations required a BPD sketch

artist to make the official composite sketch, the next day Detective Griffin took the victim to a police sketch artist to assist in creating the composite. The BPD artist worked with the victim to create a sketch from the victim's description. A. 95a. The victim, as she said at trial, was initially unhappy with the sketch the BPD artist made, finding it too "generic," A. 95a, so she worked with [the sketch artist] to redraw parts of it so that it looked as close to her attacker as possible, A. 50a, in particular by drawing the nose, A. 50a, which she said was "one of [her attacker's] distinctive features." A. 50a. "The [v]ictim testified that she had been satisfied with the composite sketch" once she had made it more accurate. A. 50a-51a.

The BPD reproduced the composite sketch on fliers that also contained the victim's description of her attacker. The victim said that she recognized the sketch that she helped to draw "as the composite sketch on the wanted flyer." A. 51a. The BPD distributed the flyer throughout the area near the victim's home. Eight days after the attack, another BPD officer, who was never a party to this case, stopped respondent on a street near the victim's home. When stopped, respondent was wearing a woman's stocking on his head. A. 61a. The officer stopped respondent because he matched the composite sketch and the victim's description of her rapist, and because of respondent's geographic proximity to the location of the attack. A. 52a. The

officer showed respondent the composite drawing, and photographed him. A. 52a.[3]

This photograph was placed in a photo array book, which also contained the photographs of sex offenders recently released from custody and of other potential suspects. Detectives Smith and Griffin showed the photo array book to the victim on May 9. The Officers had previously showed the victim two other groups of photos of potential suspects, one a six pack and the second a photo array book. A. 96a. The victim made an emotional and emphatic identification of respondent as her attacker as soon as she saw his photograph in the third photo array. She jabbed his photograph with her finger, exclaimed "That's him," pushed the book out of her sight, and began crying. Detective Smith asked her to finish reviewing the entire book, and after she had done so, she returned to the photograph of respondent and wrote "that's him" on the back and signed her name. A. 53a, 96a-97a. Only then did the victim tell Detectives Smith and Griffin that she wanted to see respondent in a line up and to hear his voice to be positive of her identification. A. 55a, 97a.

Detectives Smith and Griffin informed Sergeant Jones of the victim's emotional identification of respondent, A.168a, but there was no evidence that they ever informed him of her request for a line-up. The only evidence that Sergeant Jones knew of the victim had any uncertainty was his testimony that

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[3] During his testimony at the civil damages trial, respondent admitted that the composite sketch looked so much like him that he did not know whether it was a black and white photograph of him or a drawing, but agreed it was him. A. 56a n.19.

she told him only ***after*** respondent had been arrested that "she was unsure about the identification but would testify against him if they had DNA evidence. A. 56a-57a.

Later that same May 9, Detective Smith swore out an arrest warrant application for respondent's arrest, to which Detective Griffin gave input and which Sergeant Jones reviewed and approved. Thus, the evidence in this case (when viewed most favorably for respondent) is that when Detective Smith submitted the arrest warrant, the Officers knew the following:

1. that the victim was a trained artist who had observed her attacker's face;
2. that the victim had given Detectives Smith and Griffin a description of the face and physical characteristics of her attacker, and drawn a sketch of him, on the day of the attack;
3. that the next day, the victim helped the BPD artist draw the composite sketch of her attacker, altered that composite to make it less generic and more like her attacker, especially as regards the distinctive characteristic of the attacker's nose, and then approved that sketch as accurate;
4. that BPD had circulated among its officers a flier containing both the sketch the victim had approved as well as the victim's description of her attacker;
5. that respondent "closely matched" the victim's description of her attacker as "a 5'7" [medium build], African-American male in his late 30s

to early 40s who was fairly well-spoken." A. 114a;

6. that eight days after the attack, a BPD officer armed with the composite sketch and the victim's description stopped respondent on the street because he so closely resembled both;

7. that the BPD officer stopped and photographed respondent "within blocks of the victim's home" A. 114a, in the neighborhood where the serial rapes were occurring, and that respondent had a woman's stocking on his head;

8. that when shown respondent's photograph in a photograph array, the victim immediately and emphatically identified respondent as her attacker, crying and pushing the array away, as she repeatedly said, "that's him;" and

9. she then wrote "that's him" and signed her name on the back of respondent's photograph.

Detectives Smith and Griffin also knew that ***after*** the victim had emphatically and emotionally identified the photograph of respondent as her attacker, she had said that she wanted to see respondent in a physical lineup and hear his voice to be sure of her identification. A. 56a-57a The Detectives knew that BPD procedure did not provide for such a physical lineup before arrest because taking a person into custody for such a lineup itself required probable cause to arrest, and that BPD did not have any facilities to conduct such lineups. A. 55a n.17, 97a.

When Sergeant Jones approved the arrest warrant, he knew all of the above, except he did *not*

know that the victim had told Detectives Smith and Griffin that she wanted to see respondent in a physical lineup and hear his voice to be sure of her identification. The victim testified that only after the arrest of respondent did she tell Sergeant Jones that she wanted to see the respondent in a physical lineup and hear his voice in order to be sure of her identification. A. 55a, 97a.

There was no evidence that any of the Officers knew what respondent later testified to at his civil damages trial, that the BPD officer who stopped and photographed respondent did so near the homeless shelter where respondent was staying at the time, only a couple of miles away from where respondent's family members lived. A. 114a.

Based upon all this, each of the Officers believed he or she possessed sufficient facts to constitute probable cause to arrest respondent. Finding probable cause to support the application, a court commissioner issued the arrest warrant, and the BPD arrested respondent. Respondent spent the next fifteen months in jail awaiting trial. Multiple postponements were secured, some initiated by the defense, and some by the assigned prosecutor, Assistant States Attorney Joakim Tan ("Prosecutor Tan"), sometimes to accommodate the victim's travel schedule. A. 162a. When Prosecutor Tan informed the victim that no DNA from her rape kit matched respondent, the victim told him she was no longer willing to testify against respondent. Prosecutor Tan then entered a *nolle prosequi*, and respondent was released from custody.

2. Pre-Trial Proceedings on Respondent's Civil Damages Claim

Respondent filed suit claiming ten million dollars in damages under 42 U.S.C. § 1983 as well under various state law claims. The defendants who remained in the case after the court decided a motion to dismiss filed a summary judgment motion, CM/ECF No. 74, which the court granted in part and denied in part. A. 47a. The court granted summary judgment on respondent's claim that the Officers violated his Fourteenth Amendment rights by failing to disclose the DNA lab results excluding respondent as a contributor to the victim's rape kit. A. 31a-34a. Citing *Taylor v. Waters,* 81 F.3d 429 (CA4 1996), the court held that since respondent was never tried, his right to a fair trial had not been compromised and he was limited to Fourth Amendment protections. A. 32a. The court noted "the transcript of the arraignment shows that Tan knew the [DNA] results on June 23, 2008—a little over a month from the date of [respondent's] arrest and within a few weeks after the results were obtained." A. 34a n.45. Respondent did not appeal this ruling.

Concerning DNA evidence, the district court also found:

> "Another victim—who had been raped on March 30, 2008 on Bolton Street in Baltimore [near Charles Village]—had told officers that her attacker used a Trojan Magnum condom in a gold foil wrapper during the rape. On March 31, 2008, [police] discovered a condom wrapper matching that description near [that] victim's home, and she confirmed that it was the same type her attacker had used. On May

> 14, 2008, she viewed [respondent's] picture in a photo array and said he looked 30%-80% like her attacker. In a report dated June 10, 2008, [respondent's] DNA was identified on the condom wrapper, along with the DNA of two other unknown individuals." A. 9a-10a (internal citations and footnote omitted).

In denying the motion for summary judgment in part, the court found that genuine issues of material fact existed as to "the reasonableness of Detective Smith's and Griffin's and Sergeant Jones's beliefs that probable cause existed" and regarding "whether these officers are entitled to qualified public immunity." A. 47a.

3. The Civil Damages Trial Outcome

At the jury trial, the victim testified that Sergeant Jones had shown her a single photo of a suspect on his cell phone that might have been respondent, at some point during the investigation, telling her this was her assailant. A. 51a, 95a-96a. Jones emphatically denied ever doing so in the testimony quoted below:

"REDIRECT EXAMINATION:

"Q. Okay. And, when you were being asked about the book of 45 photos, you started to say the key thing about the photos is, and then counsel stopped you. Do you remember – do you remember that?

"A. Yes.

"Q. Would you finish that answer.

"A. Ultimately your goal is not to be overly prejudicial, or really prejudicial in any

> way, so you wouldn't want to show a single photo and say, 'Is this the guy?' The average person would think that's who you want them to pick.
>
> * * *
>
> "[U]ltimately the goal is not to prejudice the person. It's to show them something so that they have no idea – I'm sorry – it's to show them something so they have no idea who you're looking for them to identify."

* * *

"RECROSS EXAMINATION:

"Q. I believe you stated a few minutes ago that you don't want to show someone just one guy, because then you'll know that someone wants [sic] to select them, correct?

"A. Correct.

"Q. And isn't that exactly what Ms. Doe testified that you did – showed her the picture of one guy?

"A. That's what she said.

"Q. And the probable effect of that, based on your testimony, is that she would know who you wanted her to select; is that correct?

"A. Say that again.

"Q. The probable effect of you showing her one person's photo would be that she knew who you wanted her to select; is that correct?

"A. The probable effect of that –

"Q. Yes or no?

"Q. No, I don't agree with that. I'm trying to explain to you why I don't agree with it. No, I don't agree with that.

"Q. Is that not what you just testified to?

"A. Can I give you more than a 'yes' or 'no' answer?

"THE COURT: If you need to.

"THE WITNESS: So, Your Honor, if -- if that, in fact, was true, it would have been telling her the features that she should describe to the sketch artist.

"Is that the same thing that you're saying? It wouldn't have been telling her who to pick out. It would have been telling her – she was there to do a composite. So it would have been to tell her what features to have drawn on the composite.

"BY [PLAINTIFF'S COUNSEL]:

"Q. It doesn't – does it matter, Detective, whether or not you were trying to signal to her what to draw on the composite, or what to select, or who to select if you did show her a photograph?

"[COUNSEL FOR DEFENDANTS]: Objection.

"THE WITNESS: I didn't.

"[COUNSEL FOR DEFENDANTS]: He didn't. Okay.

"BY [PLAINTIFF'S COUNSEL]:

"Q. If you showed her a photograph, is it your testimony that it wouldn't have contaminated her moving forward?

"[COUNSEL FOR DEFENDANTS]: Objection.

"THE COURT: Sustained." A. 169a-171a.

The jury returned a verdict which included answers to 18 special interrogatories for each Officer. A. 126a-149a. The jury's general verdict awarded respondent a total of $2.3 million on the Section 1983 malicious prosecution claim, and nominal damages on his state negligence claim. Although $1.5 million of the total damages award was for punitive damages against the Officers, the jury found that none of the Officers acted with actual malice. A. 132a, 140a, 148a.

The special interrogatories probed whether the warrant application contained sufficient true factual material to justify a finding of probable cause. The jury's answers to the relevant interrogatories included the following:

"[Question] A. Has [respondent] proven, that a reasonable officer, in [each of the Officer's] place, would not have believed that he closely matched the description of her attacker given by the victim?

"[Answer:] NO

"[Question] B. Has [respondent] proven that a reasonable officer, in [each of the Officer's] place, would not have believed that he closely resembled the composite sketch completed by the victim?

"[Answer:] NO

[Question] C. Has [respondent] proven that when he was stopped by an officer he was not within blocks of the location where the victim's assault took place?

"[Answer:] NO

. . .

"[Question] E. Has [respondent] proven that [each of the Officers] reasonably believed that when [respondent] was stopped by an officer he was not wearing a stocking cap made from a woman's stocking?

"[Answer:] NO

"[Question] F. Has [respondent] proven that his record did not indicate that he was 5'7"?

"[Answer:] NO.

"[Question] G. Has [respondent] proven that his record did not indicate that he weighed 180 pounds?

"[Answer:] NO

"[Question] H. Has [respondent] proven that when he was stopped by an officer he did not have a short haircut?

"[Answer:] NO

"[Question] I. Has [respondent] proven that upon seeing his photo in the photo book, the victim did not have a strong emotional reaction?

"[Answer:] NO

"[Question] J. Has [respondent] proven that upon seeing his photo in the photo book, the victim did not jab at the photo?

"[Answer:] NO

"[Question] K. Has [respondent] proven that upon seeing his photo in the photo book, the victim did not say "that's him" without prompting?

"[Answer:] NO

"[Question] L. Has [respondent] proven that upon seeing his photo in the photo book, the victim did not attempt to push it away from herself?

"[Answer:] NO

"[Question] M. Has [respondent] proven that upon seeing [respondent's] photo, the victim did not sign her name above [respondent's] picture?

"[Answer:] NO

"[Question] N. Has [respondent] proven that upon seeing [respondent's] photo, the victim did not sign her name on the back of [respondent's] picture?

"[Answer:] NO

"[Question] O. Has [respondent] proven that upon seeing [respondent's] photo, the victim did not write 'that's him' on the back of [respondent's] picture?

"[Answer:] NO

"[Question] P. Has [respondent] proven that the victim, was threatened, promised something or

> otherwise coerced into writing 'that's him' on the back of [respondent's] picture?
>
> "[Answer:] NO
>
> "[Question] Q. Has [respondent] proven that the victim stated to [the Officers] before [respondent's] arrest, that she could not positively identify him as her attacker?
>
> "[Answer:] YES
>
> "[Question] R. Has [respondent] proven that the victim told [the Officers] after [respondent] was arrested that she could not positively identify him as her attacker?
>
> "Answer: YES." A. 126a-1149a.

In its verdict on the Section 1983 claim, the jury answered "YES" to the question whether respondent had "proven that, based on the totality of the circumstances known when the arrest warrant was issued, a reasonable officer in [each of the Officer's] place[s] would not have believed that [respondent] was responsible for the rape of the victim." A. 130a, 138a, 146a. On that claim, the jury awarded respondent $400,000 in compensatory and $750,000 in punitive damages against Sergeant Jones, A. 131a; $300,000 in compensatory and $500,000 in punitive damages against Detective Smith, A. 139a; and $100,000 in compensatory and $250,000 in punitive damages against Detective Griffin. A. 147a. The jury also awarded respondent $10 in nominal damages against each Officer on respondent's negligence claim. A. 133a, 141a, 149a.

The Officers moved for judgment as a matter of law on all claims, arguing that the jury's responses to the special interrogatories were not consistent

with its Section 1983 verdict, and that the jury's fact findings constituted probable cause to arrest respondent as a matter of law. CM/ECF No. 203.

The district court granted that motion. A. 48a. The opinion stated that based on the evidence presented and the jury's factual findings, as a matter of law the warrant application, even when corrected to account for the failure to mention the victim's desire for an in person identification, was supported by probable cause. A. 83a. Given the presence of probable cause, the court found that there was no constitutional violation and that the Officers were therefore entitled to qualified immunity on the Section 1983 claims. A. 85a. The district court struck the general verdict providing damages for negligence, and granted the Officers' request for judgment as a matter of law on those claims as well. A. 89-90a.

4. The Court of Appeals

The court of appeals reversed the judgment of the district court and remanded with instructions to reinstate the $2.3 million jury verdict. A. 121a-122a. The court based its reversal on two findings of fact that it made.

First, taking the evidence in the light most favorable to respondent, it found that the evidence showed that Sergeant Jones had improperly influenced the victim's identification of the respondent both by asking "the victim multiple times whether her assailant was homeless, and it is undisputed that [respondent] was homeless at the time he was stopped," A. 116a, and by showing the victim a photograph of respondent and identifying him as her attacker, "a day after the assault

occurred, either during or after she completed [*sic*] the composite sketch and only a few days before she saw his photo in the photobook." *Id.* Based on these findings, the court of appeals concluded that "the ***Officers*** improperly influenced the investigation from its inception," *id.* (emphasis added), rendering the warrant invalid and requiring a finding that the Officers lacked probable cause to arrest respondent.

Second, the court of appeals concluded that the evidence showed that the Officers withheld from the prosecution a post-arrest report showing that DNA obtained from the victim shortly after the attack did not match respondent's DNA, and that they did so because the victim had said she would not testify against respondent unless there existed DNA evidence implicating him in the attack. These facts, the court said, meant that the "criminal proceedings and pretrial detention also violated [respondent's] Fourth Amendment rights." A. 118a.

Based on these findings, the court of appeals further concluded that "the Officers had no reasonable basis to believe probable cause existed to seek the warrant or initiate criminal proceedings against [respondent]," because "[n]o reasonable officer could have believed that the Fourth Amendment permitted Jones's conduct" in showing her the photograph and telling her it was her assailant. A. 120a-121a. Therefore, the court said, none of the three Officers was entitled to qualified immunity.

REASONS FOR GRANTING THE PETITION

The court of appeals' piecemeal evaluation of the various facts relating to probable cause constituted the very type of "divide-and-conquer analysis" that

this Court in *Wesby* found improper. *Wesby,* No. 15-1465, slip op. at 10. Not only did the court of appeals view facts in isolation and then parse those isolated facts to support its probable cause analysis, it tried to bolster its analysis with "findings" of fact that have no support in the record. Only by refusing to view the totality of the circumstances presented in the record evidence could the court of appeals have reached its conclusion that the evidence did not constitute probable cause, and that qualified immunity was not available to these Officers.

The current climate of Baltimore City underscores the necessity for this Court's review of this judgment. After the death of Freddie Gray, the ensuing riots, and the unsuccessful criminal trials of his arresting officers, Baltimore continues to experience unprecedented violent crime, coupled with concerns that police are reluctant to enforce the law for fear of personal consequences. Now more than ever, the courts must stick to this Court's rule that an officer's decision regarding probable cause to arrest must be evaluated in the totality of the circumstances, without undue emphasis on facts that might tend to negate probable cause, when ample other evidence exists to support it. And where appropriate, officers are entitled to qualified immunity for actions that do not run counter to clearly established authority, even if ultimately their actions are found to have been mistaken. *Id.* at 13-16. *E.g., Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987) (damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties).

I. THE COURT OF APPEALS FLOUTED THIS COURT'S PROBABLE CAUSE JURISPRUDENCE

When the Officers arrested respondent, they possessed facts that strongly implicated him as the rapist, and some facts that tended to negate his involvement. As in *Wesby*, the court of appeals in this case applied a heightened probable cause standard that in effect negated the facts known to the Officers supporting probable cause, and gave controlling weight to facts pointing in the other direction. The court of appeals compounded its error by adding its own questionable factual findings, unsupported by record evidence, to prop up its shaky probable cause analysis.

A. Totality of the Circumstances

Detectives Smith and Griffin knew the victim had requested to see respondent in a lineup and to hear his voice, but they also knew that the victim's request came only after her immediate, emphatic, and emotional identification of respondent as her rapist. Her additional request did not erase the weight of her identification for purposes of determining probable cause. Probable cause "is not a high bar." *Kaley v. United States,* 134 S. Ct. 1090, 1103 (2014) (citations omitted). It does not require a *prima facie* showing of criminal activity. *Ill. v. Gates*, 462 U.S. 213, 235 (1983). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 243 n.13. Probable cause is "a practical and common-sensical standard" that "look[s] to the totality of the circumstances" and "reject[s] rigid rules, bright-line tests, and mechanistic inquiries." *Fla. v. Harris*, 568 U.S. 237, 243 (2013).

Instead, probable cause requires a fluid, "flexible, all-things-considered approach." *Id.*

Most important, probable cause "depends on the totality of the circumstances." *Wesby*, slip op. at 6 (citation and internal quotation marks omitted). In considering all the circumstances, courts must "follow two basic and well-established principles of law." *Id.* at 9. First, they must not view facts "in isolation," but must "consider the whole picture," recognizing "that the whole is often greater than the sum of its parts–especially when the parts are viewed in isolation." *Id.* (citations and internal quotation marks omitted).

Second, courts must not require officers to exclude from their consideration any facts "susceptible of innocent interpretation" in making their probable cause determination. *Id.* (citation and internal quotation marks omitted). "[P]robable cause does not require the officers to rule out a suspect's innocent explanation for suspicious acts." *Id.* Rather, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* (citation and internal quotation marks omitted).

Accordingly in our case, as in *Wesby*, "the panel majority should have asked whether a reasonable officer could conclude–considering all of the surrounding circumstances"–that there existed "a substantial chance" that respondent raped the victim in this case, *id.* (citation and internal quotation marks omitted), and not whether certain isolated facts considered alone cut against a finding of probable cause.

Probable cause may be established by the victim's reliable identification of the perpetrator. *Torchinsky v. Siwinski*, 942 F.2d 257, 262 (CA4 1991); *Curley v. Village of Suffern,* 268 F.3d 65, 70 (CA2 2001). The law does not require one hundred percent certainty before it will accord a victim's identification substantial weight in the probable cause determination. *E.g., Braxton v. State*, 720 A.2d 27, 49-50 (Md. Ct. Spec. App. 1998) (victim's statement, "this is the individual. Looks very close to the guy who robbed me," qualified as a "positive identification"); *Ramos v. Sedgwick County Sheriff's Dep't*, 785 F. Supp. 1457, 1461 (S.D. Fla. 1991) (rape victim's photo array identification weighed toward probable cause despite her reservation of "some doubt in her mind" and request to see the suspect "face-to-face with a hat on") (internal quotation marks omitted); *United States v. Waxman*, 572 F. Supp. 1136, 1140-42 (E.D. Pa. 1983), *aff'd*, 745 F.2d 49 (CA3 1984) ("While absolute certainty of an identification is ideal, it is unnecessary during the investigative stage."). And officers may decline to comply with a victim's request for a lineup or a voice exemplar, and still rely upon the victim's identification if the totality of the circumstances, interpreted in light of the experience and training of the officers, would allow a reasonable officer to conclude that the identification was probably substantially correct. *E.g., United States v. Arvizu*, 534 U.S. 266, 273 (2002) (officers "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.")(citations omitted); *McKinney v. Richland County Sheriff's Dep't*, 431 F.3d 415, 418-19 (CA4 2005) (failure to conduct a more thorough

investigation before seeking an arrest warrant does not negate probable cause established by victim identification).

The jury here found that Detectives Smith and Griffin witnessed the victim make what amounts to a textbook positive identification, despite her subsequent qualification that she needed to see respondent in a lineup and hear his voice to be "positive." A. 56a-57a. The jury found that the victim made her emphatic identification "without prompting." A. 129a, 137a, 145a.

The Officers also knew all of the facts weighing to probable cause delineated *supra* at pages 8-10. These facts strongly establish probable cause.

Weighed against this substantial evidence the jury found but one fact that cuts against probable cause to arrest respondent, that the victim told Detectives Smith and Griffin that she could not "positively identify" respondent prior to his arrest. A. 130a, 138a, 146a.

Despite the totality of these circumstances, the court of appeals concluded "that the statement that the victim positively identified Humbert as her attacker was false." A. 109a. The court placed great weight on the victim's request for an in-person identification and voice exemplar immediately following her emphatic photo identification. There is no evidence in the record that the victim ever recanted her identification, either before or after respondent's arrest, or that she ever stated that respondent was not her attacker. In fact, according to Prosecutor Tan's affidavit, the victim "expressed certainty" that respondent was her attacker even after the arrest. A. 162a. As the court of appeals

noted, in the victim's monthly meetings with Prosecutor Tan, she was always willing to testify so long as there was DNA evidence. A. 98a. The court of appeals nevertheless relied on the sole fact that the victim had requested a lineup as sufficient to overcome all the other circumstances pointing to respondent as the rapist. In so doing, the court of appeals accorded almost no weight to the victim's repeated and emphatic identification of respondent as her attacker.

This is precisely the sort of "excessively technical dissection of the factors supporting probable cause" that this Court rejected in *Wesby*. Slip op. at 11 (internal quotation marks omitted). The court of appeals took this one fact "in isolation, rather than as a factor in the totality of the circumstances." *Id.* (internal quotation marks omitted). It ignored this Court's repeated admonition "that the whole is often greater than the sum of its parts–especially when the parts are viewed in isolation." *Id.* (internal quotation marks omitted). In this, the court of appeals erred.

B. Sergeant Jones's Suggestive Conduct

The court of appeals also placed great weight on what it called Sergeant Jones's "suggestive conduct" to negate probable cause to arrest. To do so the court of appeals effectively overrode jury findings concerning Jones's conduct, and substituted its own unsupported findings.

The court of appeals stated that "[t]hough Jones testified to the contrary, the procedural posture of this case requires that we credit the victim's testimony in [respondent's] favor and disregard Jones's contradicted testimony as the jury was not required to believe it." A. 108a (citation omitted).

This conclusion is astounding: the jury here expressly rejected the contention that Sergeant Jones prompted the victim's identification in its answer to Special Interrogatory K. That interrogatory asked, "Has [respondent] proven that upon seeing his photo in the photo book, the victim did not say 'that's him' ***without prompting***?" (emphasis added). The jury said no. A. 129a, 137a, 145a.[4] The court of appeals erred in substituting its finding for that of the jury.

Worse, the court misapprehended the evidence on this point. In her trial testimony, the victim could not specify when Sergeant Jones showed her a photo on his cell phone of someone she said was either respondent or someone who "looked very much like" respondent. A. 108a. At one point, she testified that Jones had done so while she was working on the composite sketch. Later, she testified he did it after the sketch was complete. Finally, she testified that she could not say when the Sergeant had done so. Because she was so uncertain on this point, the district court found that no basis existed in the evidence to "infer that Jones showed her the picture before the sketch had been completed." A. 72a n.46. The district court went on to state, "[i]ndeed, there is no evidence that [respondent] had been a suspect until he was stopped on the basis of his resemblance to the composite sketch," *id.,* which occurred after

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[4] When a court enters a judgment as a matter of law, the evidence is viewed in the light most favorable to the non-moving party. But that standard does not allow courts to ignore the jury's factual findings contained in special interrogatories when record evidence supports those findings. *E.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

she said Sergeant Jones had shown her a photograph. The officer who stopped respondent on the basis of that sketch took his photo**,** and that photograph is the only photo of respondent in evidence that could have been shown to the victim.

The court of appeals nevertheless somehow reached the conclusion that a corrected warrant application would have included facts that "an officer showed [respondent's] photo to the victim and identified him as the attacker" before a sketch was completed and circulated in the community. A. 109a-110a. From this, the court of appeals concluded "that Jones inappropriately affected the victim's ability to complete the composite sketch and identify her attacker," A. 116a, and that he had "unquestionably nullified the Officers' ability to rely on the victim's initial reaction to [respondent's] photo." *Id.*

The court of appeals timing is critical. If no one showed the victim the photograph until ***after*** the sketch had been completed, the photograph could not have tainted the sketch. So, too, the photograph could not possibly have contaminated the victim's verbal description of the attacker or her own sketch, because she gave that description and drew that sketch the day before she said anyone showed her any photographs.

Worse still, the court of appeals misapprehended Sergeant Jones's testimony about allegedly showing the victim a photograph. The court of appeals said that Sergeant Jones had "testified that he did not show 'anybody a photo of anything,'" A. 96a, but went on to conclude that Jones had "later stated that if he had shown her a photo, 'it would have been to tell her what features to have drawn on the composite.'" *Id.*

No rational reading of Sergeant Jones's testimony can support the court of appeals' characterization of it in this regard. Indeed, Sergeant Jones testified precisely the opposite: he said he never showed the victim a photograph, and would not have done so, because doing so would have been tantamount "to tell[ing] her what features to draw on the composite," A. 170a, and that was exactly what he was trying to avoid. *See supra* pp. 12-15.

The court of appeals misconstrued other evidence as well. The court cited the victim's testimony that, when shown the photograph of respondent in the photobook, she had "reacted emotionally to seeing [respondent's] photo because his photo looked like the one Jones showed her the day after her attack and Jones indicated that he was her assailant." A. 121a. But the court of appeals ignored the district court's finding that there exists "no evidence that the [v]ictim communicated the apparent partial source of her distress to Smith or Griffin." A. 78a. Despite this, the court of appeals repeatedly taxed those Detectives with knowledge that the victim had reacted to the photo of respondent, and identified him as her assailant, in part because Sergeant Jones had shown her a photograph and identified it as a photo of her assailant. If those Detectives did not know that Jones had done so, their probable cause determination cannot be undermined by him having done so, assuming he ever did.

Pursuant to *Torchinsky*, each of the Officers had probable cause to arrest respondent based on the totality of the facts known to each. The court of appeals erred in concluding otherwise.

C. DNA

Despite respondent's failure to appeal the district court's grant of summary judgment that after-acquired DNA evidence had no bearing on his Fourth Amendment claim, the court of appeals ruled on this issue without briefing. It held the Officers violated respondent's Fourth Amendment rights by failing to produce the DNA results during respondent's pretrial detention. The court of appeals discussed this failure at length, going so far as to make an unsupported inference that the Officers intentionally withheld the evidence because they believed the victim would not testify against respondent if she knew the DNA did not match. The evidence does not support this inference, because the jury found that none of the Officers acted with malice. A. 132a, 140a, 148a.

In any case, an officer's knowledge regarding the presence or absence of DNA *post-arrest* does not have any effect on probable cause to support an arrest. In 2008, in the Fourth Circuit, the law was clear that an officer's failure to act upon allegedly exculpatory evidence "does not render the continuing pretrial seizure of a criminal suspect unreasonable under the Fourth Amendment." *Taylor v. Waters*, 81 F.3d 429, 437 (CA4 1996) (footnote omitted). *See also Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017)("facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant"); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184-185 (CA4 1996). The DNA results from the victim's rape kit were not available until weeks after the arrest, and

cannot negate probable cause to arrest in the first place.

The court of appeals also misapprehended the evidence regarding DNA. As noted, the court of appeals found that the Officers withheld the lab reports concluding that the DNA from the victim's kit did not match respondent's DNA. A. 118a. But the uncontroverted evidence at trial showed that at respondent's arraignment on June 23, 2008, the prosecutor informed the court that he had already learned that the DNA results did not match respondent's DNA, though he added that he had to confirm that result. A. 34a n.45, 152a. In addition, the Officers testified that prosecutors generally obtain DNA reports directly from the state crime lab, and that their general practice was to provide any reports they obtained to the prosecutor. Thus, the evidence showed the prosecutor knew of the DNA results and was able to get access to them, if he in fact had not in the course of routine procedures already done so, less than two months into respondent's detention.

Second, after respondent was arrested, Sergeant Jones truthfully told the victim there existed DNA evidence against respondent. During their ongoing investigation of the serial rapist in Charles Village, the Sex Crimes Unit had recovered DNA matching respondent on a condom wrapper found outside the residence of a woman raped a month before the attack on the victim in this case. A. 9a-10a. Counsel for the Officers presented this evidence at summary judgment, and later also sought to present it at the trial, where the court excluded it in limine, subject to respondent opening the door at trial. *See, e.g.,* A. 158a-160a.

Sergeant Jones's assurance to the victim that DNA evidence against respondent existed was true. Moreover, no legal rule clearly established that this evidence would be excluded from any criminal trial or from the respondent's civil damages trial. The admissibility of respondent's DNA evidence required briefing at summary judgment and argument again at trial before the district court excluded it, subject to reopening. Police officers are not required to predict how a court might rule on complex and unpredictable trial evidentiary issues.

The court of appeals' reliance on the later-acquired DNA evidence to negate probable cause for the arrest was thus factually inaccurate, and legally flawed.

For these reasons, this Court should grant certiorari.

II. QUALIFIED IMMUNITY

The court of appeals decided the qualified immunity question in contravention of this Court's precedents in two important ways. First, the court of appeals incorrectly attributed what one of the Officers knew to the other two Officers, even though there existed no evidence those other two Officers possessed that knowledge. Second, in deciding whether the law was clearly established, the court discussed only broad, axiomatic legal principles and did not cite any precedent dealing with the specific issues the Officers faced.

A. Incorrect Imputation of Knowledge

Even though the evidence showed that neither Detective Griffin nor Detective Smith had any idea that Sergeant Jones had shown any photographs to

the victim or made any statement to her about the person in any photographs, the court of appeals denied them qualified immunity on the ground that they possessed such knowledge. So, too, the court attributed to all three Officers knowledge of the victim's statement that she reacted so strongly to the photo of respondent in the photobook because Jones had previously shown her the photograph, even though there is no evidence she ever told anyone that was the reason, and there was no evidence that the Officers knew anything about her feeling in this regard. Likewise, there was no evidence that Sergeant Jones knew that the victim had asked Griffin and Smith for a lineup and voice exemplar so she could be "positive" about her identification. Yet the court attributed knowledge of that statement to Jones.

Whether an individual officer is entitled to qualified immunity must be analyzed based only on the facts known to that particular officer. *White v. Pauly*, 137 S. Ct. 548, 550 (2017). In addition, an officer is not required to "second-guess the earlier steps already taken by his or her fellow officers. . . ." *Id.* at 552.

The court of appeals' qualified immunity analysis hinges on its un supported conclusion that Sergeant Jones showed the victim a photograph of respondent prior to the completion of the sketch and prior to the photo array. The court of appeals then imputed knowledge of Sergeant Jones's conduct to the other Officers. *See, e.g.*, A. 121a ("No reasonable officer could have believed that the Fourth Amendment permitted Jones's conduct"); A. 116a (the "Officers improperly influenced the investigation from its inception."). The jury did not find that Jones acted

suggestively or showed the victim a photograph. But even if it had, there was no evidence in the record to suggest that Detective Griffin or Smith knew he had done so. *See* A. 78a (The district court found, "[T]he [v]ictim testified that she became upset when she saw [respondent's] photograph because he looked like Jones's cell phone picture *and* because he looked like the person who had raped her. Crucially, however, there is no evidence that the [v]ictim communicated the apparent partial source of her distress to Smith or Griffin.").

B. The Required Specificity

The court of appeals contravened this Court's precedent by discussing only broad, axiomatic legal principles in denying each of the Officer's qualified immunity. In *Ashcroft v. al-Kidd,* 563 U.S. 731, 742 (2011), this Court declared, "[w]e have repeatedly told courts . . . not to define clearly established law" at such "high level[s] of generality" because doing so provides "little help in determining whether the violative nature of particular conduct is clearly established." *Id.* (citations omitted).

The Court reiterated this principle in *White v. Pauly*, where it held that the clearly established analysis requires the court "to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." 137 S. Ct. at 552; *accord Safar v. Tingle*, 859 F.3d 241, 246 (CA4 2017).

Although there does not have to be a case directly on point, *see Hope v. Pelzer*, 536 U.S. 730, 739 (2002), there must be a close match. *E.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2381-83 (2014) (precedent must be "beyond debate" to be clearly-established); *Plumhoff*

v. Rickard, 134 S. Ct. 2012, 2023-24 (2014); *Wood v. Moss*, 134 S. Ct. 2056, 2066-70 (2014). As *Wesby* stated,

> "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that every reasonable official would know."

Slip op. at 11 (citations and internal quotation marks omitted).

Yet defining the law at a high level of generality is precisely what the court of appeals did here. It referred in the most general terms to the "Fourth Amendment right to be seized only on probable cause," A. 119a, but did not get down to specifics from cases like the one before it. In this case, the Officers had a number of reliable facts weighing toward probable cause, including the victim's emotional and emphatic identification. The court of appeals cited no cases that demonstrate that the law was clearly established that a witness's emphatic identification is negated entirely by a following qualification.

Similarly, the court of appeals cited no case to establish that the law was clear that Sergeant Jones did not possess probable cause when, as the jury found by special interrogatory, he knew respondent

was found in the vicinity of the crime (where a serial rapist was on the loose) a week after it occurred, respondent closely matched both the victim's physical description and composite sketch, and respondent was wearing a woman's stocking on his head. Even assuming (what the evidence does not show) that Jones tainted the victim's photo identification by showing the victim a single photo of someone who looked like respondent, he still possessed sufficient facts weighing toward probable cause such that he was entitled to qualified immunity.

CONCLUSION

The Court should grant the petition for a writ of certiorari to review the judgment of the court of appeals. In the alternative, the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to the Court of Appeals for the Fourth Circuit for reconsideration in light of the Court's decision in *District of Columbia v. Wesby*.

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