No. 17-1185

IN THE

Supreme Court of the United States

MAYOR AND CITY COUNCIL OF THE CITY OF BALTIMORE, MARYLAND, ET AL.,
Petitioners,

v.

MARLOW HUMBERT,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ADAM R. PULVER
EDWARD TAHIR DUCKETT
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

CHARLES H. EDWARDS IV
Counsel of Record
LAW OFFICE OF BARRY GLAZER, LLP
1010 Light Street
Baltimore, MD 21230
(410) 547-8568
charles.edwards@robinhoodlawyers.com

Attorneys for respondent

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QUESTION PRESENTED

Whether the Fourth Circuit erred in denying qualified immunity to petitioners and reinstating a jury verdict finding them liable for unlawful arrest and wrongful prosecution based on the specific facts of the case, viewed in the light most favorable to the non-moving party and as found by the jury.

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INTRODUCTION

Petitioners seek review of a decision of the Fourth Circuit reinstating a jury verdict in favor of respondent Marlow Humbert on a claim of unlawful arrest and wrongful prosecution. Petitioners do not suggest that the decision below conflicts with a decision of any court of appeals, and they do not identify any standard applied by the Fourth Circuit that is inconsistent with this Court's case law. Rather, they argue that the Fourth Circuit—and the jury—got the facts wrong or, at most, that the Fourth Circuit misapplied the correct legal standards to the facts of this case. Even then, they address only the issue of probable cause at the time of arrest—not the Fourth Circuit's separate discussion as to petitioners' liability for Mr. Humbert's post-arrest, pre-trial detention in solitary confinement for fifteen months. In doing so, they cherry-pick among evidence before the jury, contrary to the relevant standard of review.

Under Supreme Court Rule 10, petitioners' fact disputes do not warrant review. Moreover, this case—in which the sole witness testified she was shown a photo resembling Mr. Humbert in advance of the photo array and told it was a photo of her attacker, the arrest was based on a subsequent photo identification that the witness immediately stated she was not sure about, the witness reiterated that she could not positively identify him after his arrest, and exculpatory DNA analysis was withheld from prosecutors for a year—is a poor candidate for deviation from the Court's usual practice.

Finally, contrary to petitioners' suggestion, this Court's recent decision in *District of Columbia v. Wesby*, 583 U.S. __, 138 S. Ct. 577 (2018), does not

necessitate a second look at this case. *Wesby* reinforces the longstanding probable cause jurisprudence applied by the Fourth Circuit below.

For each of these reasons, the petition should be denied.

STATEMENT

A. Factual Background

In April 2008, a man raped a woman at her apartment building in Baltimore, Maryland. Pet. App. 95a. Petitioners Detectives Dominick Griffin and Caprice Smith and Sergeant Chris Jones conducted the resulting investigation. *Id.* at 95a–96a.

The victim gave a generic description of her attacker, describing him as a 5'7" to 5'9", well-spoken black man in his early to mid-30s. *Id.* at 95a. The victim's clothing was analyzed for DNA evidence, *id.* at 98a; no other relevant physical evidence was recovered, and police were unable to locate any other witnesses to the crime. The victim testified that petitioner Sergeant Jones repeatedly asked her whether the assailant was homeless and that she responded that she had no way of knowing. *Id.* at 95a.

The victim worked with a police sketch artist to create a drawing of her attacker. *Id.* She testified that, at some point, either while working with a sketch artist or shortly afterwards, Sergeant Jones showed her a photo of a man that he asserted was her attacker; the photo was of either Mr. Humbert or a man who looked very much like him. *Id.* at 51a, 96a; 4th Cir. App. A507.

On May 7, 2008, eight days after the crime, an officer stopped Mr. Humbert (who was then homeless) near the victim's home and took a picture of him

purportedly because he resembled the wanted poster generated off of the sketch. Pet. App. 96a. The next day, Jones contacted the victim to ask her to view photographs of potential suspects. *Id.* Officers Smith and Griffin drove to the victim's home to show her a photo array, which included Mr. Humbert's picture. *Id.*; *see also* 4th Cir. App. A348-393 (photo book). The victim testified that she was told to "choose the person that looks most like [her] attacker," and that she "had to pick one or more people out of" the array, 4th Cir. App. A534–35. The victim's reaction to Mr. Humbert's photo was disputed: Although petitioners testified that the victim said "that's him," the victim testified only that she got emotional when she saw the photo because it had some facial features similar to those of her attacker and resembled the photo that Jones had shown her on his phone. Pet. App. 96a–97a, 108a. She testified that she immediately informed the officers that "she could not positively identify [Mr. Humbert] as her attacker" based on the photo array. *Id.* at 97a, 102a, 108a. To do so, she said, she needed to see him in a physical lineup and hear his voice. *Id.* at 97a; 4th Cir. App. A539–40, 542.

Notwithstanding the victim's statement, Smith applied for a warrant for Mr. Humbert's arrest, based on a sworn statement that the victim had "positively identified" Mr. Humbert as her attacker. Pet. App. 97a, 107a. Both Jones and Griffin contributed to the warrant application. *Id.* Griffin testified that he knew at the time that the application was based solely on the victim's "identification" of Mr. Humbert and the generic description of her attacker. 4th Cir. App. A566. The warrant application did not reference the victim's statement that she could not positively iden-

tify Mr. Humbert without seeing him in person or hearing his voice. Pet. App. 107a–108a. A court commissioner issued the warrant, and Mr. Humbert was arrested. *Id.* at 97a.

When the victim learned of the arrest, she contacted Jones to again tell him that she could not positively identify Mr. Humbert as the attacker. *Id.* at 98a. At Mr. Humbert's arraignment, she did not recognize him. *Id.* She yet again informed Jones that she could not positively identify Mr. Humbert. *Id.* Because, however, Jones assured her that the officers had DNA evidence linking Mr. Humbert to the crime, she agreed to testify. *Id.*

Throughout the next year, the victim repeatedly told the officers that she would testify only so long as there was DNA evidence linking Mr. Humbert to the crime. *Id.* Despite their assurances to the victim, the officers did not have such DNA evidence. To the contrary, a June 2008 report based on laboratory analysis of DNA found on the victim and her clothing *excluded* Mr. Humbert as the source of the DNA. *Id.*

The officers failed to deliver the DNA report to the prosecution for *nearly one year*, until May 2009, despite a formal request from the prosecutor's office. *Id.* Throughout this time, Mr. Humbert languished in pretrial solitary confinement. *Id.* at 94a. When the prosecutor received the exculpatory June 2008 report and the final report that the officers had received on December 15, 2008, he spoke with the victim, who repeated that she could not positively identify Mr. Humbert and would not testify without DNA evidence. *Id.* at 98a–99a. Given the victim's inability to make an identification and the DNA analysis exclud-

ing Mr. Humbert, the prosecution entered a *nolle prosequi*.

Fifteen months after his arrest, Mr. Humbert was released. *Id.* at 99a.

B. District Court Proceedings

On February 17, 2011, Humbert filed suit against petitioners Jones, Smith, and Griffin, as well as several other state and local officials and entities, alleging violations of state law and the Fourth and Fourteenth Amendments. The district court bifurcated the case and stayed discovery on all claims except those asserted against the individual police officer defendants. The parties later proceeded to trial on claims based on both the Fourth Amendment and Maryland law.

The jury reached a verdict in Mr. Humbert's favor on the federal and state constitutional claims. The jury found that each of the petitioner officers wrongfully caused him to be criminally prosecuted. Pet. App. 126a–149a (verdict sheets). The jury specifically found that the victim told the officers, both before and after Mr. Humbert's arrest, that she could not positively identify him as her attacker. *Id.* at 102a (citing verdict sheet). Further, the jury found that, at the time of the arrest, "based on the totality of the circumstances known when the arrest warrant was issued, a reasonable officer in [each officer's] place would not have believed that Mr. Humbert was responsible for the rape of the victim." *Id.*

After the jury rendered its verdict, the individual petitioners filed a post-trial motion for judgment as a matter of law. The district court granted the motion, finding that a corrected arrest warrant including the victim's statement that she could not positively iden-

tify Mr. Humbert would have still met the probable cause requirement, and that there was probable cause to arrest Mr. Humbert based solely on his resemblance to the composite sketch and his presence near the crime scene eight days after the crime occurred. The court also held that the officers were entitled to qualified immunity. The court set aside the jury verdict and damages award and then granted the municipal petitioners' motion for judgment as a matter of law based on its finding of no constitutional violation. *See id.* at 48a–90a.

C. Proceedings on Appeal

A unanimous panel of the Fourth Circuit reversed. The court applied the familiar two-step qualified inquiry set out in *Saucier v. Katz*, 533 U.S. 194, 194–95 (2001), first asking whether the facts in the record supported the jury's conclusion that the officers violated Mr. Humbert's right to be free from unreasonable seizures, and then asking whether the right was clearly established at the time of the event such that "a reasonable official would have understood that what he is doing violates that right." Pet. App. 104a. The court of appeals took a "'totality-of-the-circumstances' approach" to the probable cause inquiry, applying "an objective standard of probability that reasonable and prudent persons apply in everyday life." *Id.* at 106a (quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983), and *United States v. Gray*, 137 F.3d 765, 769 (4th Cir. 1998)).

Although the arresting officers had obtained a warrant, the court of appeals noted that a warrant itself does not suffice to demonstrate probable cause where the officers deliberately or recklessly made materially false statements, or misleadingly omitted

material facts in the warrant application. *Id.* at 106a (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990)). Applying this standard, and taking all evidence in the light most favorable to Mr. Humbert, the court of appeals held that the jury's factual findings and the trial evidence "clearly support[ed]" the conclusion that the statement in the warrant application that "the victim positively identified him as her attacker" was false. *Id.* at 108a (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)), 109a. The court stated that "the inclusion of this false statement" in the warrant application "amounts at least to recklessness." *Id.* at 109a. As for the officers' contention that the victim's initial response to Mr. Humbert's photo in the photobook independently established probable cause, the court reasoned:

> But had the application shown that Jones partially caused the victim's initial response by displaying Humbert's photo at the beginning of the investigation and identifying him as the attacker and shown that the victim was ultimately unable to positively identify Humbert, that identification—the sole basis of probable cause—would have been negated. Thus the Officers' failure to mention these facts was reckless.

Id. at 110a.

Furthermore, because the probable cause supporting the warrant application "was based primarily, if not entirely, on the false assertion that the victim positively identified Humbert," *id.*, the court concluded that a corrected warrant based solely on Mr.

Humbert's resemblance to a composite sketch and presence in the neighborhood "would not have provided probable cause, in light of all the evidence, to arrest Humbert." *Id.* at 110a–111a (citation and internal quotation marks omitted). The "untainted facts" would not "warrant a prudent person, or one of reasonable caution, in the believing, in the circumstances shown," that Humbert attacked the victim. *Id.* at 112a (quoting *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015)), 113a.

The Fourth Circuit next considered whether the officers had "adequate knowledge independent of the warrant to constitute probable cause" to arrest, and later to initiate and maintain criminal proceedings against, Mr. Humbert. *Id.* at 113a (citing *United States v. White*, 342 F.2d 379, 381 (4th Cir. 1965)). After reviewing all of the evidence, it concluded they did not. The only evidence the petitioners presented was inadequate; the court explained that Mr. Humbert's resemblance to a generic looking composite sketch of an African-American male and his being stopped in the vicinity "more than a week" after the assault was "scant evidence [that] barely meets the threshold of 'mere suspicion,'" let alone probable cause. *Id.* at 116a.

With respect to the continued prosecution of Mr. Humbert, the court noted that the officers "never obtained any evidence" linking Mr. Humbert to the crime, "before or after his arraignment," and that "the victim continuously informed them that she could not identify Humbert." *Id.* at 117a–118a. In addition, the officers failed to provide the exculpatory DNA reports to the prosecution for nearly a year—despite an explicit request. *Id.* at 118a. "Drawing all inferences in Humbert's favor, the Officers failed to

promptly give the reports to [the prosecutor] because the victim only agreed to testify against Humbert based on their assurances that DNA evidence supported Humbert's guilt. Further, they never notified [the prosecutor] of the victim's inability to identify Humbert." *Id.* Looking at all the facts together, the court concluded that "the Officers caused legal process to be instituted and maintained against [Mr. Humbert] without probable cause to believe that he committed a crime." *Id.* (citing *Manuel v. City of Joliet*, 580 U.S. __, 137 S. Ct. 911, 918 (2017)).

As to the "clearly established" element of the qualified immunity analysis, the court first recognized that it was clearly established that "arresting and initiating legal process against a person without probable cause" violates the Fourth Amendment. *Id.* at 119a (citing *Lambert v. Williams*, 223 F.3d 257, 261–62 (4th Cir. 2000)). Then, more specifically, the court found that it was clearly established that the Constitution does not "permit a police officer deliberately, or with reckless disregard for the truth, to make material misrepresentations or omissions to seek a warrant that would otherwise be without probable cause." *Id.* at 119a–120a (quoting *Miller v. Prince George's Cnty., Md.*, 475 F.3d 621, 631-32 (4th Cir. 2007)). Accordingly, the court held that the submission of a warrant omitting the "victim's subsequent statement that she could not identify Humbert," combined with an "irrational reliance" on the victim's initial reaction to a photo that resembled the one improperly shown to her by Jones days prior, was not reasonable. *Id.* at 121a. To the contrary, the court found that any reasonable officer would have doubted the reliability of the initial "strong reaction" to the photo array, given that Officer Jones had pre-

viously shown her a photo of the same or similar individual and advised her that it was her attacker, and because the victim immediately (and repeatedly thereafter) advised all three officers she could *not* positively identify Mr. Humbert as her attacker. *Id.*

The Fourth Circuit thus reinstated the jury verdict against the individual defendants, and it vacated the judgment as a matter of law in favor of the municipal defendants and remanded those claims for further proceedings in the district court. *Id.* at 121a–122a.

Petitioners filed three separate petitions for rehearing and rehearing en banc. No judge requested that the court be polled on whether to rehear the case, and the court denied the petitions. *Id.* at 125a; 4th Cir. Dkt. Nos. 92, 93.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit Correctly Analyzed the Probable Cause Question.

A. The Fourth Circuit properly stated the applicable legal standard.

Petitioners do not suggest that the legal standard applied by the Fourth Circuit conflicts with the decision of any other court of appeals or with opinions from state courts of last resort. Nor could they, as the standard applied by the Fourth Circuit followed this Court's well-established precedent.

The Fourth Circuit defined probable cause as "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed … an offense." Pet. App. 105a–106a (citing

Michigan v. DeFillippo, 443 U.S. 31, 37 (1979)). The court noted that, "[w]hile probable cause requires more than bare suspicion, it requires less than that evidence necessary to convict," *id.* at 106a (citing *United States v. Gray*, 137 F.3d 765, 769 (4th Cir. 1998)), and that a "totality-of-the-circumstances" approach is required to determine whether an officer had probable cause to arrest, *id.* (quoting *Gates*, 462 U.S. at 230). Petitioners do not disagree with the court's statement of the standard. And they do not disagree that the standard stated by the court was consistent with, and required by, this Court's precedents, which direct courts to "examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

The Court recently reaffirmed this standard in *Wesby*, 138 S. Ct. at 586-67. The principle underlying *Wesby*, and *Gates* before it, is that the totality of the circumstances inquiry does not allow courts to cherry-pick one fact and ignore all other facts in officers' knowledge. Here, petitioners focus on one fact—the victim's tentative initial identification of Mr. Humbert—in isolation from the victim's continual insistence that she could not positively identify Mr. Humbert, Sergeant Jones' suggestive behavior, and the lack of physical evidence. In contrast, the Fourth Circuit both recited the totality-of-the-circumstances standard and applied it, looking to "the whole picture." *Wesby*, 138 S. Ct. at 588. Far from suggesting a basis for this Court's review, *Wesby* supports the decision below.

B. The Fourth Circuit correctly concluded that the officers lacked probable cause to arrest Mr. Humbert.

Based on the jury's findings and the testimony that supported them, the Fourth Circuit held that Mr. Humbert's Fourth Amendment rights were violated when the officers arrested Mr. Humbert without probable cause. Pet. App. 117a. This conclusion was well-supported by the record and is consistent with applicable case law. In short, the fact-intensive decision below is correct.[1]

Based on a review of all of the evidence known to the officers at the time of the arrest, including evidence omitted from the warrant application, the court concluded that the officers lacked probable cause.[2] In reaching this conclusion, the court of appeals looked to a long list of Supreme Court and court of appeals cases, which support its decision. *Id.* at 111a–112a (citing *Chambers v. Maroney*, 399 U.S. 42, 46 (1975); *Smith v. Munday*, 848 F.3d 248, 254 (4th Cir. 2017); *United States v. Quinn*, 812 F.3d 694,

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[1] The Fourth Circuit also held that the officers were responsible for Mr. Humbert's continued detention, without probable cause, Pet. App. 117a–119a—a conclusion not only well supported by the record and governing case law, but not addressed in the Petition and thus waived. *See* Rule 14.1(a); pp. 16–17, *infra*.

[2] Given the procedural posture of the case, this review was properly limited to the evidence before the jury. Thus, petitioners' several references to a "serial rapist," *see, e.g.*, Pet. at 5, are improper because the district court concluded any mention of serial rape was far more prejudicial than probative and barred reference to "serial" rape. *See, e.g.*, Trial Trans. at T-1-6 (court instructing counsel not to reference serial rape); 4th Cir. App. A434–435 (same).

698 (8th Cir. 2016); *United States v. Goodrich*, 450 F.3d 552, 562 (3d Cir. 2006); *Pasiewicz v. Lake Cty. Forest Pres. Dist.*, 270 F.3d 520, 524 (7th Cir. 2001); *Shriner v. Wainwright*, 715 F.2d 1452, 2454 (11th Cir. 1983)).

In support of probable cause, the warrant application cited only the victim's initial identification—which she stated at the time was uncertain—and Mr. Humbert's resemblance to a "generic" composite sketch. Pet. App. 107a. In determining that this "scant" evidence was outweighed by other evidence in the record, the Fourth Circuit did not engage in an impermissible "piecemeal evaluation" of the record, Pet. 20, but a comprehensive one based on the totality of the circumstances, as required by *Wesby,* 138 S. Ct. at 588, and other cases.

For instance, the court looked to the jury's explicit finding that the victim told *each* of the officers' *before* Humbert's arrest that "she could not positively identify him as her attacker." Pet. App. 108a (citing Pet. App. 130a, 138a, 146a). Although petitioners question this finding, "[t]he jury's factual determinations as a general rule are final." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991); *see also Lavender v. Kurn*, 327 U.S. 645, 652–53 (1946) ("[I]t would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.").

In addition, the court of appeals noted that Sergeant Jones repeatedly asked the victim whether her attacker was homeless, and improperly showed a photo to the victim of a man who "looked very much

like" Mr. Humbert and stated that he was her attacker, thereby impermissibly tainting the photo array identification in a way that "undoubtedly undercut the Officer's ability to rely on the victim's initial reaction to Humbert's photo as a positive identification." Pet. App. 108a–109a. As the court properly stated, this suggestive conduct undermined the reliability of the identification—particularly when combined with the victim's explicit statements about her inability to identify Mr. Humbert. *Id.* As recognized by this Court fifty years ago, a witness "is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent … identification." *Simmons v. United States*, 390 U.S 377, 383-84 (1968). *See also United States v. Saunders*, 501 F.3d 384 (4th Cir. 2007) (quoting cited language from *Simmons* and finding photo identification procedure conducted by Baltimore City Police Department unduly suggestive). This evidence contributed to the "whole picture," *Wesby*, 138 S. Ct. at 588, that supported the jury's conclusion that "based on the totality of the circumstances known when the arrest warrant was issued, a reasonable officer in [each officer's] place would not have believed that Mr. Humbert was responsible for the rape of the victim." Pet. App. 130a, 138a, 146a.

Petitioners' argument that evidence of Sergeant Jones's suggestive conduct should not be considered because the jury found that Mr. Humbert failed to prove that the victim did not identify him "without prompting" miscomprehends the import of that jury finding. The jury found that the officers did not "prompt" the victim's identification of Mr. Humbert "upon seeing his photo in the photo book." Pet. App.

129a, 137a, 145a. It did *not* find that *prior* conduct by the officers did not influence the victim's identification; petitioners are not free to re-write the special interrogatory to their liking. And on appeal from a decision on a motion under Federal Rule of Civil Procedure 50, an appellate court is required to "give credence" to all evidence in the record that could support the jury's findings in favor of the non-moving party, and must disregard any contrary evidence. *See Reeves*, 530 U.S. at 151; *see also* 9B Charles A. Wright & Arthur R. Miller, 9B Fed. Prac. & Proc. § 2529 (3d ed. 2017 update). Here, petitioners ask the Court to do the opposite. But evidence of Sergeant Jones's suggestive conduct is properly considered in support of the jury's finding that for the officers to believe Mr. Humbert was the rapist would have been unreasonable.

As to the other bases for probable cause asserted by the officers, the court of appeals correctly explained that Mr. Humbert's purported resemblance to a "generic" sketch and general description of a 5'7" African-American male in his late 30s or early 40s did little to bolster probable cause, particularly because several other men in the array also resembled the "generic" sketch. Pet. App. 112a. *See also Jenkins v. City of New York*, 478 F.3d 76, 90 (2d Cir. 2007) (collecting cases, including *Wong Sun v. United States*, 371 U.S. 471, 481 (1963), "It has long been established … that when that description could have applied to any number of persons and does not single out the person arrested, probable cause does not exist.")). Generic resemblance carries little weight when the only eyewitness—the one whose description the sketch was based on—makes plain that she cannot positively identify her attacker based on the ar-

ray. Similarly, the court properly observed that the fact that Mr. Humbert was seen in the neighborhood *eight days* after the crime was of little to no value to petitioners. Pet. App. 112a.

Petitioner also takes issue with the court of appeals' reliance on the "later-acquired DNA evidence" to negate probable cause for the arrest. Pet. 32. But the Fourth Circuit did no such thing: The court's discussion of the DNA evidence did not relate to the lack of probable cause for the arrest, but to the lack of probable cause for the continued prosecution of Mr. Humbert. Pet. App. 117a–119a (citing *Manuel*, 137 S. Ct. at 918). Such consideration was appropriate under *Manuel*, which affirmed the "broad consensus among the circuits," including the Fourth Circuit, that officers can be liable for Fourth Amendment violations where they caused continued pre-trial detention without probable cause. 137 S. Ct. at 917 (quoting *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013)); *id.* at 918–19; *see also Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012). Moreover, this issue is not fairly encompassed by the questions presented in the petition, which are limited to whether the officers had "probable cause to apply for an arrest warrant," Pet. i–iii, and is not addressed in the petition. Thus, there is no basis for the Court to consider it. *See* Rule 14.1(a); *Glover v. United States*, 531 U.S. 198, 205 (2001) ("As a general rule … we do not decide issues outside the questions presented by the petition for certiorari.).

The Fourth Circuit's conclusion that the officers lacked probable cause to arrest Mr. Humbert is consistent with decisions of other courts of appeals. In *Andrews v. Scuilli*, 853 F.3d 690, 704–05 (3d Cir. 2017), for example, the Third Circuit found that an

officer's "omissions and misleading assertions" about the sole eyewitness's investigation could support a jury finding that the officer lacked probable cause. And in *Wesley v. Campbell*, 779 F.3d 421, 429–30 (6th Cir. 2015), the Sixth Circuit held that a single eyewitness identification cannot provide probable cause where the officer has reason to believe that the identification was unreliable.

Probable cause requires more than "bare suspicion." *Brinegar v. United States*, 338 U.S. 160, 174 (1949). "In dealing with probable cause … we deal with probabilities. These are … the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Gates*, 462 U.S. at 231; *id.* at 231–32 (noting that probable cause is informed by "practical people formulat[ing] certain common-sense conclusions about human behavior" and that "jurors as factfinders are permitted to do the same"). Here, the jury found that a reasonable officer would not have believed that Mr. Humbert was responsible for the rape at the time the officers applied for the arrest warrant. The Fourth Circuit's decision upholding that verdict was correct.

II. The Fourth Circuit Properly Analyzed the Qualified Immunity Question.

More than thirty years ago, this Court held that an officer is not entitled to qualified immunity where he lacks "an objectively reasonable basis for believing that the facts alleged in his affidavit are sufficient to establish probable cause." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). The Fourth Circuit properly stated and applied this standard.

A. The Fourth Circuit properly found that each officer violated Mr. Humbert's rights.

Petitioners quibble with the Fourth Circuit's attribution of knowledge of Sergeant Jones' improper influence over the array to Detectives Smith and Griffin, and of Smith and Griffin's knowledge of the victim's insistence that she could not positively identify Humbert to Jones. Pet. 32–33. This argument relies on a strained reading of the Fourth Circuit's opinion, which, appropriately, was based on the totality of the circumstances—not any one fact.

In their principal brief in the Fourth Circuit,p made no argument that any of the individual officers lacked knowledge of the others' conduct—indeed, they did not distinguish between the individual officers at all and only referred to their knowledge as "the detectives" or "the detective Appellees" as a group. *See* 4th Cir. Dkt. No. 56. It is thus waived. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 413 (2012); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Even if it were properly considered, the argument is not supported by the record; there was evidence that each of three officers had reason to know the identification the warrant was based on was unreliable. As the court of appeals recognized, the jury explicitly found that the victim told *each* of Sergeant Jones, Detective Smith, and Detective Griffin that she could not positively identify Humbert as her attacker, both before and after the arrest. Pet. App. 102a. Petitioners' argument that Jones did not know that the victim could not positively identify Mr. Humbert, Pet. 33, is contrary to a specific jury find-

ing, Pet. App. 146a, which was supported by trial testimony, *see, e.g.*, 4th Cir. App. A523.

Beyond this specific fact finding, the court of appeals relied on the jury's finding that no reasonable officer in the position of each of Sergeant Jones, Detective Smith, or Detective Griffin would have believed that Mr. Humbert was responsible for the rape of the victim at the time of the arrest, based on the totality of the circumstances. Pet. App. 102a. This Court does not generally grant certiorari to second-guess jury findings of fact. *See, e.g.*, *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840 (1996); *see also Reeves*, 530 U.S. at 150.

B. The law was clearly established at a sufficient level of particularity.

Petitioners argue that the Fourth Circuit was required to cite precedent that more closely matched the specific factual situation faced by the officers here in order to meet the "clearly established" standard. Although this Court has counseled against findings at too high a level of generality, it has also made clear that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 270-71 (1997)).

Here, the Fourth Circuit correctly held that it was well-established in the Fourth Circuit (if not nationwide) "that the Constitution did not permit a police officer deliberately, or with reckless disregard for the truth, to make material misrepresentations or omissions to seek a warrant that would otherwise be

without probable cause." Pet. App. 119a–120 (discussing *Smith v. Reddy*, 101 F.3d 351, 355 (4th Cir. 1996), and quoting *Miller v. Prince George's Cty., Md.*, 475 F.3d 621, 629 (4th Cir. 2007)). This holding is consistent with the holdings of circuits across the country, which have found that, under this Court's holding in *Franks*, 438 U.S. 154, it is clearly-established that material omissions and misrepresentations in an arrest warrant affidavit violate the Fourth Amendment. *See, e.g.*, *Wesley*, 779 F.3d at 428–29; *Pines v. Bailey*, 563 F. App'x 814, 816 (2d Cir. 2014); *Martinez-Rodriguez v. Guevara*, 597 F.3d 414, 420 (1st Cir. 2010); *Byers v. City of Eunice*, 157 F. App'x 680, 683 (5th Cir. 2005); *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004); *Knox v. Smith*, 342 F.3d 651, 658 (7th Cir. 2003); *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1295 (9th Cir. 1999); *Kelly v. Curtis*, 21 F.3d 1544, 1554-55 (11th Cir. 1994); *Moody v. St. Charles Cty.*, 23 F.3d 1410, 1412 (8th Cir. 1994); *Lippay v. Christos*, 996 F.2d 1490, 1504 (3d Cir. 1993).

Again, the jury found that, prior to Mr. Humbert's arrest, the victim told each officer that she could not positively identify him as her attacker. The officers omitted this information from their arrest warrant application, which was based solely on a tainted "identification." As the Sixth Circuit put it in *Wesley*, withholding information that goes to the reliability of an identification is always material, and "any reasonable officer would have known [such information] would be the kind of thing the judge would wish to know." 779 F.3d at 433.

Consistent with the jury verdict and well-established precedent, the Fourth Circuit correctly

denied qualified immunity and reinstated the jury's determination that the officers violated the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ADAM R. PULVER
EDWARD TAHIR DUCKETT
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

CHARLES H. EDWARDS IV
Counsel of Record
LAW OFFICE OF BARRY GLAZER, LLP
1010 Light Street
Baltimore, MD 21230
(410) 547-8568
charles.edwards@robinhoodlawyers.com

Attorneys for respondent

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