No. 17-1185

In the Supreme Court of the United States

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *ET AL.*,
***Petitioners*,**

v.

MARLOW HUMBERT,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. Whether the Court of Appeals Erroneously Found Petitioners Liable for Respondent's Continued Detention Is Fairly Included in the Petition's Questions Presented.

Respondent argues that Petitioners have waived the issue whether the court of appeals properly found that Petitioners were liable for the continued wrongful detention of Respondent after his arrest by suppressing the lack of DNA evidence linking Respondent to the rape of the specific victim in this case. Respondent's Brief in Opposition, at 16-17; *id.* at 12 n.1. The questions presented by the Petition For Writ Of Certiorari comprise this subsidiary issue as "fairly included therein," SUP. CT. RULE 14(a), and so this Court may properly consider it.

Respondent brought (insofar as is here pertinent) claims under 42 U.S.C. § 1983 that Petitioners seized him in violation of the Fourth and Fourteenth Amendments. Part of the evidence he presented at trial related to Petitioners' alleged failure to release him after they had learned that no DNA evidence linked Respondent to the rape of this specific victim. Respondent argues that because the questions presented in the Petition For Writ Of Certiorari did not specifically address this issue, this Court cannot consider this aspect of the case in deciding whether to grant the writ.

Respondent's argument confuses evidence supporting a claim with a substantive claim for relief. The Petition in this case presented questions concerning whether the court of appeals erred in overturning the district court's decision that the

evidence did not support a jury finding that Petitioners had arrested Respondent in violation of the Fourth Amendment. Petitioners' argument that the court of appeals erroneously relied on DNA evidence to negate probable cause, Pet. 30a-32a, related to the constitutional violation at issue—that is, in the court of appeals' words, whether "the [Petitioners] caused legal process to be instituted and maintained against [Respondent] without probable cause to believe that he committed a crime." Pet. 118a. That issue did not constitute a separate claim for relief, as the court of appeals itself recognized. Pet. 105a. And because, as the district court found, the Petitioners had probable cause to arrest Respondent for the rape, that probable cause did not evaporate when, at a later date, it became clear that no DNA linking Respondent to this specific rape had been found.[1]

This Court has stressed the distinction between an argument in support of a claim for relief, and a separate claim. *Yee v. Escondido*, 503 U.S. 519 (1992), for example, arose in the related context of whether the petitioners' failure to raise an issue in the trial court barred this Court from hearing that issue. The petitioners had pleaded a claim of an unconstitutional

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[1] The court of appeals purported to reinstate "the jury's verdict in favor of Humbert's Section 1983 malicious prosecution claim," Pet. 119a, holding that the Petitioners withheld the DNA evidence from the prosecutor so that he would continue to detain and prosecute Respondent. Pet. 118a. The verdict sheet, however, asked only whether the jury found Section 1983 liability for lack of probable cause to ***arrest*** Respondent. *E.g.*, Pet. 130a. The verdict sheet, to which Respondent did not object, did not ask the jury whether Petitioners were liable for continuing Respondent's detention after his arrest. There was no jury verdict on this point to be reinstated.

taking in the trial court. In this Court, the respondent argued that petitioners had not presented to the trial court the issue whether the arguably-unconstitutional practices constituted a regulatory, as opposed to a physical, taking. This Court found it unclear whether petitioners had raised that argument in the trial court, but nevertheless held that any failure to do so did not bar the argument before this Court. This Court said:

> Once of federal claim is properly presented, a party can make any argument in support of that claim: parties are not limited to the precise arguments they made below. . . . Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim–that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

Id. at 534-535 (citations omitted) (emphasis in original); *accord, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000).

Likewise, here the continued detention of Respondent after the lack of DNA evidence became clear does not constitute a separate claim for relief: it forms a part of the evidential basis for Respondent's Fourth Amendment claim. As such, this issue is fairly included in the questions presented by the Petition For Writ Of Certiorari.

Beyond this, it is also clear that when an issue is arguably an "essential, or at least an advisable, predicate to an intelligent resolution" of the issue before the Court, it may find that issue to be "fairly comprised" in the specific question upon which the party sought a writ of certiorari. *See Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). In that case, the Secretary of State sought review of the sole question whether the statute governing renunciation of citizenship was "unconstitutional under the Citizenship Clause of the Fourteenth Amendment," but "did not present separately the question whether proof of a specific intent to relinquish is essential to expatriation." *Id.* Finding that the issue was "arguably. . . fairly comprised in the question presented," and because it was "important," the Court held that it had the authority under Rule 15 to hear it. *Id.* at 258 n.5 & 270.

This Court regularly reviews issues not stated in the precise questions in a petition for a writ of certiorari so long as they are "a necessary predicate to the resolution of" those questions. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). In *Procunier v. Navarette*, 434 U.S. 555 (1978), for example, the Court had granted the petition limited to the sole question whether "negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under Section 1983." *Procunier,* 434 U.S. at 559 n.6. "In their submissions on the merits," however, "the parties deal[t] with this issue as subsuming the questions whether at the time of the occurrence of the relevant events the Federal Constitution had been construed to protect Navarette's mailing privileges and whether petitioners knew or should have known that their alleged conduct violated Navarette's

constitutional rights." *Id.* Because it found "consideration of these issues is essential to analysis of the Court of Appeals' reversal of summary judgment on" the Section 1983 claim, the Court "treat[ed] these questions as subsidiary issues 'fairly comprised' by the question presented." *Id.* (quoting then-current version of Rule 14(a)); *accord, e.g., United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 370-371 n.4 (1967) (Court addressed issue neither raised below nor expressly stated in jurisdictional statement "because the request for the substance of the relief was embraced in the question presented").

After the court of appeals' decision, the DNA issue has become part of the evidential basis for Respondent's Fourth Amendment claim that he was detained without probable cause. The district court had granted partial summary judgment to Petitioners on this point, holding that after-acquired DNA evidence had no bearing on his Fourth Amendment claim, Pet. 33a-34a; Respondent did not appeal that ruling. Nevertheless, the opinion of the court of appeals addressed this precise point as part of its "focus on the existence of probable cause to institute ***and maintain*** the criminal proceedings against Humbert." Pet. 105a (emphasis added). As part of the evidence relating to Respondent's Fourth Amendment claim, the DNA issue thus is "fairly included" in the questions presented by the Petition.

"In any event, consideration of issues not present in the . . . petition for certiorari . . . is not beyond [this Court's] power, and in appropriate circumstances [this Court] ha[s] addressed them." *Vance v. Terrazas*, 444 U.S. at 258 n.5. The more so where, as here, there can be no prejudice to the Respondent if the Court does so: if the Court grants the writ, Respondent will

have a full and fair opportunity to brief the issue, either in this Court or on remand in the court of appeals.

II. The Legal Issue Concerning Probable Cause to Arrest Includes the Question Whether the Court of Appeals Erroneously Attributed Knowledge of All Facts Weighing Against Probable Cause to All Petitioners, Though the Evidence Showed That Each Petitioner Lacked Certain Knowledge.

Respondent again argues that Petitioners have waived and cannot raise an important issue in their Petition: that the court of appeals erred in attributing to each Petitioner certain knowledge possessed only by the other Petitioners, in the absence of any evidence they shared that knowledge. Respondent's Brief in Opposition, at 18. Because Petitioners did not argue this precise issue to the court of appeals except when petitioning for panel rehearing and *en banc* review,[2] Respondent contends Petitioners have waived this argument.

Again, Respondent confuses claims with evidence. The question before the trial court, before the court of appeals, and before this Court is whether the evidence supported a finding that a reasonable officer would have been warranted in concluding that Respondent raped the victim. The evidential issue as to what each Petitioner knew at what time relates to that legal question. It is arguably subsumed in that legal question, and that legal question cannot be decided

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[2] Each Petitioner argued this issue with the court of appeals in separate petitions. *E.g.,* Court of Appeals, Dkt. No. 83 (Appellee Detective Dominick Griffin's Petition for Panel Rehearing and Rehearing *En Banc*).

without considering the evidence on this point. Petitioners have not waived it.

III. Respondent Misrepresents the Record In His Attempt to Negate Facts Weighing in Favor of Probable Cause and to Bolster Facts Against Probable Cause, When *Wesby* Requires Weighing the Totality of the Actual Facts Known to Each Officer.

Respondent argues that the rape victim's emotional identification of him as the man who raped her when she viewed his photograph in the third photo array book was "disputed." He argued:

> 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.

Respondent's Brief in Opposition, at 3.

No dispute on this point exists. The jury expressly found that Respondent had ***not*** fulfilled his burden of proving that, "upon seeing the [Respondent's] photo in the photo book, the victim did not say 'that's him' without prompting. . . [and] did not write 'that's him' on the back of the picture. . . [and did not] sign her name on the back of his picture." Pet. 129a (verdict sheet as to Sergeant Jones); 137a (verdict sheet as to Detective Smith); 145a (verdict sheet as to Detective Griffin). Moreover, the trial court found as facts that (1) the victim never told the Petitioners her emotional reaction to Respondent's photo in the photo book was in part because he looked like the photo that she said

Sergeant Jones had showed her, and (2) the Petitioners knew nothing about her feelings on this point when each made his or her probable cause determination. Pet. 78a.

Like the court of appeals, Respondent makes much of Petitioner Sergeant Jones's "suggestive conduct" in this regard. Respondent argues that his conduct taints and negates both the evidence that Respondent was the spitting image of the composite sketch the victim helped to prepare, as well as her reaction to his photo, which had been placed in the array after an unrelated officer noticed Respondent's likeness to the wanted poster (and physical description) and took Respondent's photo. Respondent's Brief in Opposition, at 13-15. But neither the jury nor the judge made any finding of such asserted "suggestive conduct," and the record evidence does not support it.

The district court judge found that the victim was so "unsure" when Sergeant Jones showed her a photo on his cell phone that no trier of fact could properly infer that Jones showed her any photo before the sketch was completed. Pet. 72a n.46. The district court concluded that for that reason, the sketch was clearly not tainted or negated as evidence tending to establish probable cause. The jury found explicitly that Respondent "closely resembled the composite sketch produced by the victim," *e.g.,* Pet. 127a, and Respondent himself admitted "that's me" when shown the sketch. Pet. 56a n.19. In addition, the trial court found at the close of trial, "there is ***no evidence*** that [Respondent] had been a suspect until he was stopped on the basis of his resemblance to the composite sketch." Pet. 72a n.46 (emphasis added).

Respondent's assertion that his undisputed likeness to the sketch, which caused him to become a suspect, could not be weighed by the Petitioners when determining probable cause is erroneous. So is Respondent's assertion that the victim's emotional and emphatic reaction upon seeing Respondent's photo–jabbing at it, and exclaiming "that's him" –could not weigh in the probable cause determination that Petitioner Detectives Griffin and Smith each made. The more so, since there was no evidence at all that those Petitioners knew of Petitioner Sergeant Jones's alleged cellphone photo.

What is more, the jury's finding that the victim's identification was "unprompted" undercuts Respondent's assertion that Jones had tainted her identification by showing her a single photo that looked like her assailant. Pet. 129a (Jones verdict sheet); 137a (Smith verdict sheet); 145a (Griffin verdict sheet). Had Sergeant Jones done so, his action would have constituted just such "prompting." Sergeant Jones emphatically denied showing her any photo–testifying "who would I have known to show her?" Court of Appeals, Dkt. No. 27-2, p. 399a. It was undisputed (as the trial judge found) that Respondent was not a suspect until he was spotted by the unrelated officer who had the composite sketch in hand. Pet. 72a n.46. That composite sketch was the one the victim herself had approved, after changing it to make it more accurate. Respondent thus misrepresents the testimony on this point.

* * *

The Court should grant the Petition For 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*, 583 U.S. __ (2018).

Respectfully Submitted,

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