No. 15-1281

In The Supreme Court of the United States

DETECTIVE JOE RYAN HARTLEY, DETECTIVE RYAN WOLFF, DETECTIVE MIKE DUFFY, DETECTIVE HEATHER MYKES, and INVESTIGATOR MICHAEL DICKSON, in their individual capacities,

Petitioners,

v.

TYLER SANCHEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether individual detectives and an investigator are entitled to qualified immunity from a 42 U.S.C. § 1983 claim for malicious prosecution based on allegations they knew or should have known the criminal suspect had cognitive limitations making his confession to a crime untrustworthy and not appropriately relied upon by law enforcement to support his arrest? This question raises the important and undecided issues of malicious prosecution and its place, if any, in Fourth Amendment seizure analysis, and if it has a place whether Circuit precedent can, for purposes of qualified immunity, establish clearly established law when the Circuits are divided.

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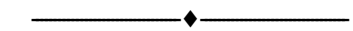
REPLY CONCERNING RESPONDENT'S STATEMENT OF THE CASE

Respondent attempts to re-frame the issue before this Court as a purportedly straightforward application of the Fourth Amendment rule that an individual law enforcement officer may not knowingly provide false or incomplete information in an arrest warrant or supporting affidavit. In reality, however, this case presents the altogether different and compelling question of whether individual law enforcement officers are entitled to qualified immunity from a Fourth Amendment malicious prosecution claim premised on allegations law enforcement knew a criminal suspect's multiple confessions were inaccurate based on his cognitive limitations, rendering the confessions not appropriately used to support probable cause for his arrest and prosecution. Any review of the Respondent's allegations demonstrates Respondent's cognitive ability to confess to criminal activity provides the gravamen of the Respondent's Fourth Amendment malicious prosecution claim against the Petitioners regardless of Respondent's effort to re-frame the allegations otherwise before this Court. Connected to this question is the Fourth Amendment's place (or not) in malicious prosecution jurisprudence and whether divided Circuit precedent may establish, for purposes of qualified immunity analyses, clearly established law.



REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT AND UNDECIDED ISSUES REGARDING MALICIOUS PROSECUTION AND ITS PLACE (OR NOT) IN THE FOURTH AMENDMENT

Respondent acknowledges the Circuit split on whether the Fourth Amendment supports a claim labeled as or analogized to malicious prosecution[1] and, if it does, the contours of such claim.[2] Respondent downplays the Circuit split on whether the Fourth Amendment supports a malicious prosecution claim, arguing the split is "represented by just one much criticized outlier decision" from the Seventh Circuit and that this issue will and can be better addressed by this Court in *Manuel v. City of Joliet*, 590 F. App'x 641 (7th Cir. 2015), *cert. granted*, 136 S. Ct. 890 (2016).[3] Regarding the additional Circuit split on the contours of a potential Fourth Amendment malicious prosecution claim, Respondent argues the differences have "limited substantive impact" and even if significant, the issue was not adequately raised below and, based on the factual allegations in his Complaint, a Fourth Amendment

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[1] Brief in Opposition (hereinafter "R. Br.") at 7 ("it is true that there is a split in the Circuits regarding whether the Fourth Amendment provides for a malicious prosecution claim").

[2] R. Br. at 9 ("three circuits require a plaintiff pleading a Fourth Amendment malicious prosecution claim to satisfy the common law elements of the claim in addition to proving a constitutional violation . . . [and] four other circuits . . . concentrate on whether a constitutional violation exists").

[3] R. Br. at 7-8.

malicious prosecution claim would be supported under any of the various Circuits' approaches.[4]

Contrary to Respondent's argument, the Circuit split on whether the Fourth Amendment supports a malicious prosecution claim is not limited to a single Seventh Circuit "outlier" opinion or just the Seventh Circuit. The Seventh Circuit has a long history of rejecting Fourth Amendment malicious prosecution claims,[5] and Respondent wholly ignored the series of Eighth Circuit cases addressed in the Petition which demonstrate the Eighth Circuit has waffled between disavowing Fourth Amendment malicious prosecution claims and stating it has not yet taken a position on the question.[6]

Respondent does address whether the Fifth Circuit rejected a Fourth Amendment malicious prosecution claim in *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (*en banc*), arguing that *Castellano* recognized a Fourth Amendment malicious prosecution claim.[7] While the *en banc* decision in *Castellano* might be subject to some interpretive difference of opinion (of

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[4] R. Br. at 9-10.

[5] *Manuel v. City of Joliet*, *supra*; *Welton v. Anderson*, 770 F.3d 670, 673 (7th Cir. 2014); *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013); *Ray v. City of Chicago*, 629 F.3d 660, 664 (7th Cir. 2011); *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

[6] *See* Petition for Certiorari at 7 n.2 *citing Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001); *Harrington v. City of Council Bluffs, Iowa*, 678 F.3d 676, 679-680 (8th Cir. 2012); *Joseph v. Allen*, 712 F.3d 1222, 1228 (8th Cir. 2013).

[7] R. Br. at 8 n.5.

the 15-member Fifth Circuit judges who voted, seven concurred only in part but also dissented with a variety of conflicting views on the proper disposition of the case), the court expressly disavowed a Fourth Amendment foothold for a malicious prosecution claim. Noting the confused state of the law on this issue,[8] the Fifth Circuit agreed that "[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection – the Fourth Amendment if the accused is seized and arrested, for example, *or other constitutionally secured rights* if a case is further pursued." *Id.* at 953 (emphasis added). The court identified Fourteenth Amendment procedural due process as the *other* constitutionally secured right. *Id.* at 955. As noted in the Petition, several of the judges in *Castellano* applauded the demise in the Circuit of a constitutional malicious prosecution claim. *See also*, F. Simpson, *Fifth Circuit Says Nobody has Constitutional Rights to be Free from Malicious Prosecution*, 41 Hous. Law 51, 51-52 (May/June 2004). Respondent's assertion *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013), held "that *Castellano* recognized a Fourth Amendment malicious prosecution claim"[9] simply misreads *Hernandez-Cuevas*, as is borne out by reference to the citation

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[8] "With hindsight, our precedent governing § 1983 malicious prosecution claims is a mix of misstatements and omissions [which has led to] inconsistencies and difficulties . . . . Other circuits have traveled uneven paths as well, and numerous approaches have developed after *Albright*." *Castellano*, 352 F.3d at 949.

[9] R. Br. at 8 n.5.

set out in the Brief in Opposition. It is also worth noting *Hernandez-Cuevas* expressly observed "the existence and contours of [a Fourth Amendment malicious prosecution claim is] the subject of considerable discord among the Courts of Appeals." *Id*. at 93-94.[10]

Respondent suggests commentators who have opined that "Fourth Amendment malicious prosecution jurisprudence is confused and inconsistent" are historically out of touch with the current "broad consensus" on the issue. R. Br. at 7 n.4. Such argument fails even the most cursory examination of the relevant literature. *See, e.g.*, L. Kossis, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 Va. L. Rev. 1635, 1636-1637, 1671 (2013) (describing the area of constitutional malicious prosecution as a "minefield of conflict and confusion" and noting that the Circuits "continue to be deeply divided on the issue."); S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, §§ 3:66-3:67 (4th ed. 2015) (discussing *Albright* and post-*Albright* conflict in the Circuits).

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[10] In a more candid assessment of the confused stated of Fourth Amendment jurisprudence in this area, Respondent's counsel post on their web page that prior to the Tenth Circuit's holding in this case "the scope and contours of a Fourth Amendment malicious prosecution claim were *highly uncertain*." The post goes on to state that the Tenth Circuit decision here clarifies the "*expansive scope of this claim*." *See* Web Posting, Benezra & Culver, P.C., Firm Prevails on Precedent Setting Appeal, Posted Jan. 11, 2016, https://denveremploymentlawyer.com/firm-prevails-on-precedent-setting-appeal/ (emphasis added).

Respondent's argument that this case is not appropriate for certiorari as the issue is better addressed in *Manuel v. City of Joliet*, *supra*, at least impliedly concedes the question of the constitutional place of malicious prosecution deserves consideration by this Court. While Petitioners acknowledge *Manuel* presents an opportunity for this Court to provide guidance on the place (or not) of malicious prosecution claims in § 1983 litigation, this case is independently worthy of certiorari as it comes to this Court in the context of a denial of Petitioners' qualified immunity on claims that they knew or should have known of Respondent's cognitive limitations, making his otherwise constitutionally obtained confession untrustworthy. Even accepting Respondent's argument, this Court should at the very least hold the petition pending the decision in *Manuel v. City of Joliet* and then dispose of this case in light of that decision.

As to the Circuits' discord on the contours of a Fourth Amendment malicious prosecution claim, Respondent's argument that the issue was not raised below is easily countered by reference to the briefing in the Tenth Circuit. Indeed, the question of the contours of a Fourth Amendment malicious prosecution claim was the subject of Section I.B of the Opening and Reply Briefs of Petitioners which reads: "To the extent the Fourth Amendment does support a claim for malicious prosecution, the contours of such claim were

not clearly established at the relevant time."[11] The question of the contours of such claim is more than academic – both for this case and broader significance – as the answer drives not only the basis of the claim but also defenses – such as when the claim accrues for purposes of limitations of actions and the impact of adequate state remedies.

II. THIS CASE PRESENTS AN IMPORTANT AND UNDECIDED ISSUE OF WHETHER CIRCUIT PRECEDENT CAN, FOR PURPOSES OF QUALIFIED IMMUNITY, ESTABLISH CLEARLY ESTABLISHED LAW WHEN THE CIRCUITS ARE DIVIDED

Respondent argues there is no Circuit split on this issue, it was not raised below, and this case is not an appropriate vehicle to analyze the issue.[12] Whether there is a Circuit split is not controlling as the issue is independently reviewable on certiorari under Sup. Ct. R. 10(c) as "an important question of federal law that

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[11] Tenth Circuit Opening Brief at 13; Reply Brief at 5. Argument as to the contours of such purported claim and its constitutional underpinnings spanned over 16 pages of briefing before the Tenth Circuit. This focused on the fundamental nature of the rights bestowed by the Fourth Amendment and what had, prior to this case, appeared to be the Tenth Circuit's position that the institution of legal process cuts off Fourth Amendment consideration and triggers Fourteenth Amendment consideration. *See Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008).

[12] R. Br. at 12-13.

has not been, but should be, settled by this Court." Respondent does not dispute this Court, in *Taylor v. Barkes*, ___ U.S. ___, 135 S. Ct. 2042, 2045, 192 L. Ed. 2d 78 (2015), left open the question of whether any court, other than this Court, can for purposes of qualified immunity create clearly established law – particularly where the Circuits disagree. Indeed, *Taylor* is not the first case where this Court observed the unanswered nature of this issue.[13] Further, Petitioners expressly raised this issue in the Tenth Circuit.[14]

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[13] *See Reichle v. Howards*, ___ U.S.___, 132 S. Ct. 2088, 2094, 182 L. Ed. 2d 985 (2012); *Carroll v. Carman*, ___ U.S. ___, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311 (2014) (*per curiam*); *City and County of San Francisco v. Sheehan*, ___ U.S. ___, 135 S. Ct. 1765, 1776, 191 L. Ed. 2d 856 (2015). Circuit courts have also observed this is an open question. *See, e.g.*, *Hinojosa v. Livingston*, 807 F.3d 657, 681 (5th Cir. 2015); *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 639 (3d Cir. 2015), *cert. denied sub nom. Spady v. Rodgers*, ___ U.S. ___, 136 S. Ct. 1162, 194 L. Ed. 2d 175 (2016).

[14] Opening Brief at 26 and at 26 n.9 (In arguing absence of clearly established right, Petitioners, *citing Carroll v. Carman*, *supra*, argued in part that "it is unclear whether controlling precedent – in light of the divergence of opinions nationwide – would render a constitutional proposition clearly established. . . .").

III. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT BY ANALYZING THE CLEARLY ESTABLISHED PRONG OF QUALIFIED IMMUNITY AT TOO HIGH A LEVEL OF GENERALITY

Respondent suggests the Tenth Circuit appropriately analyzed the clearly established prong of qualified immunity, *citing Anderson v. Creighton*, 483 U.S. 635 (1987). R. Br. at 13-14. However, *Anderson* itself does not support Respondent's point. *See Anderson*, *supra*, at 639 ("The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. . . . But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*."). Contrary to Respondent's assertion, the Tenth Circuit's approach relying on *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), for the general proposition a violation of the Fourth Amendment occurred when an individual officer knowingly or with reckless disregard for the truth provided false evidence or omitted relevant evidence in support of an arrest warrant is also fundamentally inconsistent with this Court's precedent.[15] The Tenth Circuit's approach is the equivalent of the conclusion that

[15] Notably, the facts in *Gilchrist* involved a wrongful conviction for rape based on a forensic analysis of hair samples alleged to be false and without scientific basis. *Gilchrist*, *supra*, at 1282. The facts here are obviously far afield from *Gilchrist*. Nothing

because the Fourth Amendment protects against inappropriate searches and seizures or excessive force, such general propositions clearly establish the law for qualified immunity purposes. Yet this Court has consistently rejected such a notion. *Compare Sheehan*, 135 S. Ct. at 1766 ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."), *with Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004) ("We therefore turn to ask whether, at the time of Brosseau's actions, it was 'clearly established' in this more 'particularized' sense that she was violating Haugen's Fourth Amendment right. The parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." (citations omitted)).[16] Just as the clearly established analysis required a closer factual examination in *Sheehan* and *Brosseau*, it does so here

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about the facts of *Gilchrist* would have provided any foreknowledge to Petitioners their actions here violated Respondent's Fourth Amendment rights. *Anderson*, *supra*, at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

[16] Respondent's reliance on Tenth Circuit law from 1987 and 1999 concerning the factual correspondence necessary for the clearly established inquiry is perplexing. R. Br. at 13-14 n.8. These precedents are not consistent with this Court's most recent pronouncements on this issue. *See, e.g.*, *Mullinex v. Luna*, 136 S. Ct. 305, 311, 193 L. Ed. 2d 255 (2015); *Sheehan*, 135 S. Ct. at 1775-76.

as well. Neither the Court of Appeals, the District Court, nor the Respondent has cited any precedent from this Court or the Tenth Circuit arising from any analogous factual circumstance involving confessions or interrogations of individuals with cognitive disabilities. Accordingly, none of the Petitioners could conceivably have had the "fair warning" their actions concerning Respondent violated clearly established constitutional law. *Compare Tolan v. Cotton*, ___ U.S. ___, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895, 900 (2014), *with Hope v. Pelzer*, 536 U.S. 730, 740 n.10 (2002).

Respondent also criticizes Petitioners for allegedly mischaracterizing the clearly established right at issue. R. Br. at 15. However, it is Respondent and the Tenth Circuit below, who mischaracterize the issue as merely one involving the presentation of false or inaccurate evidence in an arrest warrant. Respondent does so to argue the Fourth Amendment right at issue was clearly established for qualified immunity purposes. Petitioners have pointed to Respondent's actual allegations regarding the propriety of Petitioners relying on his confessions due to his alleged cognitive infirmities because doing so represents the only meaningful way to analyze the qualified immunity issue here in any particularized sense. *Compare Reichle v. Howards*, *supra*, at 2094, *with Anderson*, *supra*, at 639-40.

CONCLUSION

Respondent's opposition should not give this Court pause as to whether the Petition should be granted.

Respectfully submitted,

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