No. 10-430

In The

Supreme Court of the United States

SHANNA WERNER, an individual,
and JAMES BRYANT, an individual,

Petitioners,

v.

PEAK ALARM COMPANY, INC., a Utah Corporation,
JERRY D. HOWE, an individual, and
MICHAEL JEFFREY HOWE, an individual,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Utah

PETITION FOR WRIT OF CERTIORARI

J. WESLEY ROBINSON*
Senior Salt Lake City Attorney
**Counsel of Record*
P.O. Box 145478
Salt Lake City, UT 84114-5478
Telephone: (801) 535-7788
J.Robinson@slcgov.com

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTIONS PRESENTED

On a daily basis, peace officers across the nation are confronted with suspects who claim innocence, or assert their subjective belief that they have committed no crime. Lacking mind-reading capabilities, a suspect's mind is incapable of divination by another. Peace officers need not rule out all innocent explanations for a suspicious set of facts to have probable cause to seize an individual. *Illinois v. Gates*, 462 U.S. 213 (1983). Rather, officers need only a "reasonable ground for belief of guilt," *Maryland v. Pringle*, 540 U.S. 366, 370 (2003), a "probability, and not a prima facie showing, of criminal activity," *Gates*, 462 U.S. at 235. An officer may draw "inferences based on his own experience in deciding whether probable cause exists," *Ornelas v. United States*, 517 U.S. 690, 700 (1996), including inferences "that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411 (1981). Qualified immunity gives "ample room for mistaken judgments" as to the existence of probable cause, protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986). The questions presented are:

1.

Does a police officer lack probable cause to momentarily seize a person in order to issue him a citation merely because the cited person subjectively believed that he did not commit any crime?

QUESTIONS PRESENTED – Continued

2.

Assuming that Petitioners were mistaken in their belief that probable cause existed, were they nevertheless improperly denied qualified immunity solely because they did not believe the cited person's claims of innocence, his alleged subjective beliefs, or his self-serving construction of the known facts?

3.

Did the Utah Supreme Court err when it speculated as to the cited person's subjective belief, failed to examine all of the facts and circumstances known to Petitioners, failed to analyze whether Petitioners could have reasonably believed that probable cause existed under the circumstances, and speculatively constructed what it determined could be a more reasonable construction of the events seven years after the fact?

PARTIES TO THE PROCEEDING

1. **Petitioners** (defendants/appellees below): **SHANNA WERNER** and **JAMES BRYANT** in their individual capacities.

2. **Respondents** (plaintiffs/appellants below): **PEAK ALARM COMPANY, INC.**, a Utah corporation; **JERRY D. HOWE**, an individual; and **JEFFREY HOWE**, an individual.

3. **Additional defendants/appellees below** (not parties to this Petition): **SALT LAKE CITY CORPORATION**, a Utah municipal corporation; **CHARLES "RICK" DINSE**, an individual; **SCOTT ATKINSON**, an individual.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Blank Page

PETITION FOR WRIT OF CERTIORARI

Petitioners Shanna Werner and James Bryant (referred to collectively as "Petitioners") respectfully petition the Court for a writ of certiorari to review the judgment of the Supreme Court of Utah.

OPINIONS BELOW

The Utah Supreme Court's opinion dated April 16, 2010 is reported at 2010 UT 22, and is reproduced at App. 1-59.

The Utah Supreme Court's denial of Petitioner's Petition for Rehearing dated June 28, 2010 is not reported, and is reproduced at App. 60-100.

The ruling of the Third District Court, Salt Lake County, State of Utah, granting summary judgment in favor of Petitioners, filed October 6, 2008, is not reported. It is reproduced at App. 101-102.

JURISDICTION

1. The decision sought to be reviewed was entered on April 16, 2010 by the Utah Supreme Court.

2. Petitioners timely filed a Petition for Rehearing, which was denied by the Utah Supreme Court on June 28, 2010.

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Section 1983 of Title 42 of the United States Code provides:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's

> judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

Utah Code Annotated § 76-9-105 (2002), "Making a False Alarm," provides:

> (1) A person is guilty of making a false alarm if he initiates or circulates a report or warning of any fire, impending bombing, or other crime or catastrophe, knowing that the report or warning is false or baseless and is likely to cause evacuation of any building, place of assembly, or facility of public transport, to cause public inconvenience or alarm or action of any sort by any official or volunteer agency organized to deal with emergencies.
>
> (2)(a) Making a false alarm relating to a weapon of mass destruction as defined in Section 76-10-401 is a second degree felony.
>
> (b) Making a false alarm other than under Subsection (2)(a) is a class B misdemeanor.
>
> (3) In addition to any other penalty authorized by law, a court shall order any person convicted of a felony violation of this section to reimburse any federal, state, or local unit of government, or any private business, organization, individual, or entity for all

> expenses and losses incurred in responding to the violation, unless the court states on the record the reasons why the reimbursement would be inappropriate.

STATEMENT OF THE CASE

This case begins with a citation issued to Respondent Michael Jeffrey Howe ("Howe"), Peak Alarm Company's Central Station Manager, for allegedly making a false alarm on June 27, 2003, in violation of Utah Code Ann. § 76-9-105 (2002). Mr. Howe reported to police dispatch that there were burglar alarms going off at West High School in Salt Lake City, Utah. App. 6. When dispatch informed him that the police department does not respond to alarms, he changed his story, falsely reporting it was "an actual burglary in progress," that it was verified by a security guard on scene, that his guard was "asking for police assistance," and that the male guard was in uniform and would meet the responding officers in front of the school. App. 6-7, 18-19. In reality, it was a female school cafeteria employee who reported that two girls came into the school and set off the alarms. App. 5. There was no male security guard in uniform to meet responding officers at the front of the school. App. 7-8, 69.

In response to Howe's call, seven Salt Lake City Police officers responded to the school. App. 69. The first officer to arrive at the scene, Officer Shaun Wihongi, was the lead investigator. Officer Wihongi

found no evidence of any crime at the school. He interviewed the cafeteria worker and spoke with Howe twice regarding the false information he provided to police dispatch. App. 7-8, 69. Howe told Officer Wihongi that he made assumptions that turned out to be false, and that he was not happy that the police refused to respond to the burglar alarm. *Id.* When asked why he made those statements to police, Howe told Officer Wihongi, "[W]hatever it takes, I thought this was a panic alarm." *Id.* Officer Wihongi interpreted this statement to mean that Howe was willing to say whatever it took to get a police response, and that Howe manipulated the Police Department with false information. App. 71.

Based on his investigation of the call, Officer Wihongi concluded that Howe intentionally misled the Police Department by providing false information in order to initiate a police response he could not otherwise obtain. *Id.* Officer Wihongi prepared a police report and communicated his conclusions to his supervisor, Sergeant James Bryant. *Id.* Sgt. Bryant consulted with a city prosecutor to informally screen the facts of this incident and determine whether any statute had been violated.

Relying on Officer Wihongi's conclusions and the prosecutor's legal advice, Sgt. Bryant concluded that probable cause existed to believe that Howe violated

the false alarm statute.[1] He and another officer issued a citation to Howe on July 21, 2003. App. 9. Howe was tried in the Salt Lake City Justice Court on April 12, 2004, and won a directed verdict in his favor because the prosecution failed to present any evidence that Howe "knowingly or intentionally made . . . a false alarm." App. 9-10.

Howe brought suit against Petitioners alleging, among other claims not relevant to these proceedings, that Petitioners violated his Fourth Amendment rights because they lacked probable cause to cite him and have him prosecuted for making a false alarm. Both parties moved for summary judgment. Petitioners asserted that probable cause existed to believe that Howe may have violated the false alarm statute, and that they were entitled to qualified immunity. Howe argued that Petitioners had no evidence to prove that he knew his report to dispatch was false or baseless, and therefore they lacked probable cause. The District Court rejected Howe's argument, finding that Respondents failed to demonstrate a lack of

[1] Shanna Werner, Salt Lake City's Alarm Coordinator, is not a peace officer and has no law enforcement authority of any kind. She is neither a lawyer nor a prosecutor. It is undisputed that she did not make any probable cause determination regarding Jeffrey Howe. By his own admission, Sgt. Bryant alone made that determination. However, Werner is a Petitioner because summary judgment in her favor was reversed by the Utah Supreme Court. Therefore, to the extent Werner remains a defendant in this action, she is entitled to the same relief as that sought herein by Sgt. Bryant. For the sake of simplicity, only Sgt. Bryant's name is used in the argument herein.

probable cause, and Petitioners were entitled to qualified immunity. App. 70-71, 76, 86. The District Court further found that there were no issues of material fact in dispute regarding the existence of probable cause. App. 85-86.

Respondents appealed, and the Utah Supreme Court affirmed in part, and reversed in part. In affirming the District Court's rejection of Respondents' partial summary judgment motion, the Court properly recognized that Utah's treatment of probable cause mirrors federal Fourth Amendment jurisprudence, and correctly set forth the probable cause standard applied by federal courts. App. 17-18, 33-34. The only fact in Howe's favor cited by the Court was his subjective belief, at the time he made his report to dispatch, that a burglary in fact occurred at West High School, and that a male, uniformed guard was on-scene to verify the alleged crime. App. 18-19. On Petitioners' side, the Court found the following:

> Mr. Howe told police dispatch that a security guard had verified the burglary. He knew that police would not otherwise respond. From his lobbying activities, Mr. Howe knew the content of the Salt Lake City ordinance. And Mr. Howe's own employee had been told by a police dispatcher, minutes earlier, that police would not respond to unverified burglar alarms by an alarm company. Additionally, Mr. Howe's own "whatever-it-takes" statement could be interpreted by a prudent officer as meaning that Mr. Howe would say anything necessary to persuade police to

> respond to a mere burglary alarm regardless of whether he believed an actual burglary had occurred. Finally, there are inconsistencies in Mr. Howe's initial statement. Mr. Howe told police dispatch that there was a burglary in progress. By the time Mr. Howe was interviewed by police, he claimed he was reporting a "panic alarm" based on a theory that "someone's life could potentially be in danger."

App. 19-20.

The Court concluded that the District Court did not err in rejecting Howe's motion for partial summary judgment: "Given these facts, we cannot conclude as a matter of law that a prudent officer would not have been justified in concluding Mr. Howe reported a crime while knowing it was false." App. 20.

However, in reversing the District Court's grant of summary judgment in Petitioners' favor, the Court discounted all of these factors and relied solely on Howe's claims of subjective belief and incorrect assumption. App. 34-37. In taking the burden imposed by Utah and Federal Rule 56 to an extreme, the Court failed to properly analyze the probable cause standard as applied to the totality of the facts and circumstances presented in this case. The Court held that Sgt. Bryant lacked probable cause to "seize" Howe because, taking the facts presented by Howe as true, the Court speculated that the facts "tend to show that [Howe] believed a burglary was occurring at West High School." App. 36. Because Sgt. Bryant

and Ms. Werner "simply disregarded [Howe's] construction of the facts known to them," the Court concluded that the facts alleged by Howe "raise at least a jury question on the lack of probable cause and, therefore, make out a constitutional violation of Mr. Howe's right to be free from unreasonable seizure sufficient to survive qualified immunity." App. 36-37.

The Court's decision contained no analysis of whether a reasonable officer, operating under the facts known to Sgt. Bryant, including any reasonable inferences drawn therefrom, could have justified his belief that Howe committed a crime, and that probable cause existed to detain and cite him. In light of the total absence of any case law interpreting the false alarm statute, Bryant's interpretation and conclusions needed only be reasonable. Further, while the Court felt compelled to accept Howe's construction of the circumstances as reasonable in opposition to summary judgment, it was not the *only* reasonable explanation that could have been reached. It was, however, the only construction given any weight by the Court.

Regarding the second prong of the qualified immunity analysis, the Court found that the federal jurisprudence was clearly established that a government official must have probable cause to arrest an individual. App. 37-38. Because Sgt. Bryant detained Howe without probable cause, the seizure was a violation of a clearly established constitutional right. *Id.*

The Utah Supreme Court denied Petitioners' Petition for Rehearing on June 28, 2010. App. 101-102.

REASONS THE PETITION SHOULD BE GRANTED

In holding that (1) a police officer lacks probable cause to momentarily seize a person in order to issue him a citation merely because the cited person subjectively believed that he did not commit any crime, and (2) denying qualified immunity to an officer who "disregarded" a suspect's construction of the facts and circumstances known to the officer, without regard to the officer's reasonableness under totality of the circumstances, the Utah Supreme Court has decided an important federal question in a way that significantly conflicts with this Court's well-established precedent regarding probable cause and qualified immunity.

To make matters worse, it places law enforcement in an impossible predicament. Lacking mind-reading capabilities, law enforcement officers are powerless to prove, or disprove, a suspect's subjective knowledge, intent or state of mind. That determination must be left to a jury. This is particularly true where, as here, officers are deprived of the surrounding facts and circumstances known to them, and the reasonable inferences drawn from their interactions, observations, interpretations and contextual

relationships in order to demonstrate the reasonableness of their determination whether or not probable cause exists. The standard announced by the Utah Supreme Court ignores the factual and practical considerations of everyday life and the fundamental nature of law enforcement operations. The "Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

The very essence of this Court's probable cause and qualified immunity precedent is the recognition that law enforcement officers may err, and it is better to risk some error and possible injury, as long as the error is reasonable under the totality of the circumstances, than not to decide or act at all. *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974).

Clarification of the boundaries of legitimate law enforcement action under the Constitution is ultimately the responsibility of this Court. Certiorari should be granted.

I. THE UTAH SUPREME COURT'S PROBABLE CAUSE ANALYSIS CONFLICTS WITH THIS COURT'S FOURTH AMENDMENT PRECEDENT, FAILS TO ADDRESS THE REASONABLENESS OF SGT. BRYANT'S BELIEF THAT PROBABLE CAUSE EXISTED, AND SETS AN IMPOSSIBLE STANDARD FOR ANY LAW ENFORCEMENT OFFICER TO MEET.

To succeed in his claims, Howe had the burden to prove that Sgt. Bryant lacked probable cause to cite him. *Hartman v. Moore*, 547 U.S. 250, 258, 265-66 (2006) ("In an action for malicious prosecution after an acquittal, a plaintiff must show that the criminal action was begun without probable cause for charging the crime in the first place."); *Wilder v. Turner*, 490 F.3d 810, 813-14 (10th Cir. 2007) (plaintiff must prove lack of probable cause in § 1983 action for unlawful arrest).

As the Utah Supreme Court properly recognized, the probable cause standard requires the Court to determine whether the facts known to Sgt. Bryant, along with any fair inferences that may be derived from them, would lead a reasonable and prudent person in the officer's position to be justified in believing that Howe committed a criminal offense. App. 17-20, 33-37. The probable cause standard is a "practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal

technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (internal quotation marks omitted).

The probable cause standard is incapable of precise definition or reduction to a neat set of rules because it deals with the assessment of probabilities in particular factual contexts, and depends on the totality of the circumstances. *Gates*, 462 U.S. at 230, 232. All that is required is simply "a reasonable ground for belief of guilt," *Pringle*, 540 U.S. at 371, a "probability, and not a prima facie showing, of criminal activity," *Gates*, 462 U.S. at 235 (*quoting Spinelli v. United States*, 393 U.S. 410, 419 (1969)); *see also Massachusetts v. Upton*, 466 U.S. 727, 734 (1984) (recognizing that "probable cause does not demand the certainty we associate with formal trials"); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) ("the validity of the arrest does not depend on whether the suspect actually committed a crime."). "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists," *Ornelas v. United States*, 517 U.S. 690, 700 (1996), including inferences "that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411, 418 (1981). Measuring the degree of suspicion that attaches to a set of facts requires this Court to view the evidence through the lens of those "versed in the field of law enforcement," not applying the "library analysis" employed by constitutional "scholars." *Texas v. Brown*, 460 U.S. 730, 742 (1983).

A police officer is not required to eliminate all innocent explanations for a suspicious set of facts to

have probable cause to make an arrest. As this Court explained in *Gates*, "[i]n making a determination of probable cause 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." *Gates*, 462 U.S. at 243, n. 13. To require otherwise, as the Utah Supreme Court has done here, "would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands." *Id.*

Here, the Utah Supreme Court's decision ignores the import of the foregoing precedent of this Court. First, it wholly failed to address the reasonableness of Sgt. Bryant's probable cause determination. Instead, the Court focused its analysis solely on the "much closer question" of whether *Howe* had *subjective knowledge* of the falsity of his report. App. 35-36. The correct issue here is not whether Howe actually violated the law, but whether Sgt. Bryant had a reasonable belief that there existed a probability of criminal activity.

Factors recognized by the Court in favor of probable cause were:

- Howe falsely told dispatch that a security guard had verified a burglary in progress.

- One of Howe's own employees had been told by police dispatch just minutes earlier that police would not respond to an unverified alarm.

> – In reporting a "burglary in progress," Howe knew that police would not otherwise respond.
>
> – Howe's "whatever it takes" comment could be interpreted by a prudent officer as meaning that he would say anything necessary to obtain a police response, regardless of whether he believed an actual burglary had occurred.
>
> – Howe gave inconsistent statements to dispatch and the investigating officer, first reporting a burglary alarm, then a burglary in progress, and later claiming it was a panic alarm.
>
> – Howe stated to the investigating officer that it would be fine if he was fined.

App. 7-8, 19-20.

These undisputed facts establish that Sgt. Bryant had probable cause to believe Howe committed the crime of making a false alarm. Indeed, in affirming the District Court's denial of Respondents' Motion for Partial Summary Judgment, the Utah Supreme Court held: "we cannot conclude as a matter of law that a prudent officer would not have been justified in concluding Mr. Howe reported a crime while knowing it was false." App. 20.

Curiously, in reversing the District Court's grant of summary judgment in favor of Petitioners, the Court felt compelled to ignore all of the foregoing facts, abandoned the foregoing conclusion, and

focused solely on Howe's construction of the circumstances. Taking all of the facts alleged by Mr. Howe as true, the Court speculated that the facts "tend to show [Howe] believed a burglary was occurring at West High School," and faulted Petitioners for disregarding Howe's construction of the facts. App. 36-37. While the Court was free to adopt Howe's construction of the facts as the most reasonable under the circumstances (in its opinion), it was *not* free to adopt it as the *only* acceptable construction. This Court's precedent merely requires *a* reasonable conclusion. The Court should have focused its attention on whether Sgt. Bryant's conclusions were reasonable under the circumstances, not whether another reasonable, or more reasonable, interpretation of the events could be constructed seven years after the fact.

For officers faced with charging decisions involving crimes requiring a subjective knowledge element, the probable cause standard announced by the Utah Supreme Court in this case is impossible for any law enforcement officer to meet. "Unless the court is somehow able to open the mind of the defendant to examine his motivations, intent is of necessity proven by circumstantial evidence." *State v. James*, 819 P.2d 781, 789 (Utah 1991). No court or law enforcement officer has the capability of conclusively determining a suspect's subjective knowledge or intent. In these cases, an officer need only a reasonable basis to believe that a crime has occurred in order to make a charging decision, while a suspect's *actual* subjective knowledge or intent is for a jury to decide.

In Utah, to show probable cause for intent, "the State must only prove that its theory of intent is reasonable." *State v. Ingram*, 2006 UT App 237, 139 P.3d 286 (additional citations omitted). "Knowledge or intent is a state of mind generally to be inferred from the person's conduct viewed in light of all the accompanying circumstances." *Id.* (*citing State v. Kihlstrom*, 1999 UT App 289, ¶ 10, 988 P.2d 949); *see also State v. Wallace*, 2006 UT App 232, ¶ 23, 138 P.3d 599 ("The Utah Supreme Court 'ha[s] held that intent to commit a crime may be inferred from the actions of the defendant or from surrounding circumstances.'" (alteration in original) (*quoting State v. Colwell*, 2000 UT 8, ¶ 43, 994 P.2d 177)). "So long as there is some evidence including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." *Id.* (*citing State v. Hall*, 946 P.2d 712, 724 (Utah Ct. App. 1997)). Significantly, the evidentiary standard necessary to "support a reasonable belief that an offense has been committed and that the defendant committed it" is "relatively low." *State v. Clark*, 2001 UT 9, ¶¶ 10, 16, 20 P.3d 300.

Howe's protests of innocence do not affect the probable cause determination, particularly where it hinges on his *subjective* knowledge or intent. "Once Defendants concluded that the initially discovered facts established probable cause, they were under no obligation to forego arresting Plaintiff or release him merely because he said he was innocent." *Romero v. Fay*, 45 F.3d 1472, 1481 (10th Cir. 1995).

Here, the question before the Court is *not* whether Howe was guilty of a crime beyond a reasonable doubt, but whether the facts and circumstances within Sgt. Bryant's knowledge were sufficient to warrant a prudent officer in believing that a criminal offense may have been committed. This Court should not turn a blind eye on a state supreme court decision that seriously undermines this Court's Fourth Amendment jurisprudence on an issue of such great importance.

II. THE COURT'S QUALIFIED IMMUNITY ANALYSIS CONFLICTS WITH FEDERAL PRECEDENT.

"Law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Again, whether Howe actually committed a crime is not dispositive. This Court has recognized that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Id.* Qualified immunity leaves "ample room for mistaken judgments," protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

This accommodation for reasonable error exists because the probable cause standard is so ill-defined, and "officials should not err always on the side of caution" simply because they fear getting sued. *Davis v. Scherer*, 468 U.S. 183, 196 (1984). "Therefore, when a warrantless arrest or seizure is the subject of a § 1983 action, the defendant is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff." *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007).

Here, even if Sgt. Bryant was mistaken in his belief that probable cause existed, his decision was reasonable. The Utah Supreme Court acknowledged that whether Howe knew his report to police dispatch was false or baseless is a "close[ ] question." App. 35. Parsing the false alarm statute's plain language (a matter of first impression in Utah), the Court determined that the "linchpin to criminal culpability under Utah Code section 76-9-105 is the caller's subjective knowledge that the report is false or baseless as to the existence of a crime." App. 36. Based on the circumstances presented to Sgt. Bryant, his admitted inability to read minds, the lack of any reported Utah case interpreting the false alarm statute, and the "close question" of Howe's subjective knowledge, Howe cannot demonstrate as a matter of law that Sgt. Bryant was plainly incompetent or knowingly violated the law.

The error in the Utah Supreme Court's analysis is further apparent from its statement that "[w]e

believe the facts alleged by Mr. Howe raise at least a jury question on the lack of probable cause and, therefore, make out a constitutional violation of Mr. Howe's right to be free from unreasonable seizure sufficient to survive qualified immunity." App. 37. This legal conclusion is wrong for three reasons. First, it places the question of qualified immunity in the hands of the jury, contrary to this Court's clear instruction that immunity should be decided by the court long before trial. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Second, Petitioners cannot, and do not, dispute Howe's claim regarding his subjective knowledge. This is not a jury issue. Sgt. Bryant's probable cause conclusion was made based on other circumstances wholly unrelated to Howe's claimed subjective knowledge, circumstances that were not considered by the Utah Supreme Court in its analysis. Finally, as already stated, the Court should have focused its attention on whether Sgt. Bryant's conclusions were reasonable under the circumstances, not whether another reasonable, or even more hypothetically reasonable, interpretation of the events could be constructed seven years after the fact.

Finally, the Utah Supreme Court's ruling on the second prong of the qualified immunity analysis conflates the separate and distinct inquiries for probable cause and qualified immunity into one general proposition: since it is clearly established that officers must have probable cause to arrest, and any reasonable and prudent officer must know this, then Sgt. Bryant violated Howe's clearly established rights

when he detained Howe without probable cause. This Court's precedents require that this question be "undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Because officers routinely perform their duties with considerable uncertainty as to whether their decisions and actions comport with the Fourth Amendment,

> [t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, [here probable cause], will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a [probable cause determination] is legal in those circumstances. If the officer's mistake is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205 (addressing excessive force, probable cause substituted in brackets). The *Saucier* Court went on to observe:

> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth

> Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.

Id. at 206. The Utah Supreme Court's analysis below was clearly insufficient and contrary to this Court's Fourth Amendment jurisprudence.

Here, the facts and circumstances known to Sgt. Bryant, without regard to Howe's subjective knowledge or belief, disclosed substantial grounds for him to conclude that probable cause existed to cite Howe with a criminal violation. Assuming he was incorrect, this Court must allow Sgt. Bryant ample room to reach even a mistaken, albeit reasonable, judgment in determining whether probable cause existed to support the citation or any claimed "seizure" of Howe. Well-established, long-standing federal precedent requires that this Court grant qualified immunity to any prudent officer who acts reasonably in making probable cause determinations, unless the Court finds as a matter of law that the officer was plainly incompetent or knowingly violated the law. Being neither, Sgt. Bryant is entitled to qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the Utah Supreme Court's decision manifestly contravenes this Court's Fourth Amendment precedent, the Court should consider summary reversal.

Respectfully submitted,

J. WESLEY ROBINSON*
Senior Salt Lake City Attorney
*Counsel of Record
P.O. Box 145478
Salt Lake City, UT 84114-5478
Telephone: (801) 535-7788
J.Robinson@slcgov.com

Attorney for Petitioners

September 27, 2010

Blank Page