NO. 03-710

# IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,

*Petitioners*,

v.

JEROME ANTHONY ALFORD,

*Respondent*.

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

## BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED

Under the Fourth Amendment's "objective reasonableness" test, an arrest is deemed "reasonable" if, based on an objective assessment of the facts and circumstances at the time of arrest, there is probable cause to believe that a violation of law has occurred.

1. Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense articulated by the officer at the time of the arrest?

2. For purposes of qualified immunity, was the law clearly established when there was a split in the circuits regarding the application of the "closely related offense doctrine," the Ninth Circuit had no controlling authority applying the doctrine and Washington state law did not apply the doctrine?

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The opinion of the Court of Appeals is reported at *Alford v. Haner*, 333 F.3d 972 (2003). Pet. 1a-22a. The court's order denying the petition for rehearing and for rehearing en banc is unpublished. Pet. 23a. The order of the United States District Court for the Western District of Washington granting in part and denying in part Defendants' Motion for Summary Judgment is also unpublished. Pet. 28a-41a.

## JURISDICTION

The judgment of the Ninth Circuit was entered on June 23, 2003. Pet. 1a-22a. On August 8, 2003, the Court of Appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. Pet. 23a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of 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 place to be searched, and the persons or things to be seized."

Other relevant statutes are set out in the Petition. These include Washington's Privacy Act prohibition against recording a private conversation, Wash. Rev. Code § 9.73.030; (Pet. 66a-68a);

Washington's prohibition against impersonating a law enforcement officer, Wash. Rev. Code § 9A.60.040(3); (Pet. 68a-69a); and Washington's prohibition against obstructing a law enforcement officer, Wash. Rev. Code § 9A.76.020 (Pet. 69a).

## STATEMENT

The Court consistently applies the "objective reasonableness" test in evaluating whether an arrest is supported by probable cause. Under this test, probable cause exists if "at the moment of arrest" the facts and circumstances within the knowledge of the officer would warrant a reasonable officer to believe that the suspect had committed or was committing an offense (the "objective reasonableness" test). *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The principal question in this case is whether the "objective reasonableness" test is inapplicable where there is probable cause to arrest, but the arresting officer articulates an offense for which probable cause does not exist, and the articulated offense is not closely related to an offense for which probable cause does exist.

The Ninth Circuit concluded that the "objective reasonableness" test was inapplicable under these circumstances, applying instead the "closely related offense doctrine". Only if the Court determines that the Ninth Circuit was correct, need it reach the secondary question of whether the Petitioners are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194 (2001).

## A. Factual Background

### 1. Events Establishing Probable Cause To Arrest Mr. Alford For The Offense Of Impersonating An Officer

On November 22, 1997, Mr. Alford pulled behind a disabled vehicle on a dark and rural section of State Route 16, utilizing wig-wag headlights that he had installed on his vehicle. J.A. 94-99. Wig-wag headlights flash on and off in alternating fashion, and are customary on law enforcement vehicles. Washington State Patrol Trooper Joi Haner was driving the opposite direction and observed Mr. Alford's car pull in behind the disabled car. Trooper Haner wanted to see if the motorists needed assistance, so he turned around at his first opportunity and came back, pulling in behind Mr. Alford's vehicle. J.A. 94-95. As Trooper Haner approached the disabled vehicle, Mr. Alford left in a hurry. J.A. 95. Trooper Haner found Mr. Alford's urgency to leave the area unusual. In the Trooper's experience, a person who stops to help a disabled car normally will stay to talk with the trooper as the trooper contacts the persons in the disabled vehicle. J.A. 95.

Upon contacting the two motorists at the disabled vehicle, one inquired of Trooper Haner whether Mr. Alford was a cop. J.A. 96-97. Now curious, Trooper Haner inquired why they had formed that belief and "they told [Trooper Haner] that [Mr. Alford] had wig-wag headlights, and they were under the impression that [Mr. Alford] was a police officer". J.A. 96. The stranded motorists

indicated to Trooper Haner, "Yeah, we thought he was a cop". *Id*.

Trooper Haner knew that persons successfully pretending to be law enforcement officers place themselves in a position to take advantage of vulnerable people. J.A. 100. Concerned that Mr. Alford was pretending to be a police officer, Trooper Haner contacted his supervisor, Sergeant Gerald Devenpeck. After making sure the two motorists were all right, Trooper Haner then pursued and stopped Mr. Alford. J.A. 97, 101. As Trooper Haner approached Mr. Alford's car, he noticed that the license plate had a tinted cover making it unreadable. J.A. 102. He then noted that Mr. Alford had a portable police scanner on the seat next to him. J.A. 104. This caused Trooper Haner concern because, "[t]he majority of people that [he] contacted who had hand held scanners are involved in some criminal activity". J.A. 104. Mr. Alford also had installed a radio tuned to the same frequency as Trooper Haner's. J.A. 103. The radio had a microphone that allowed Mr. Alford to broadcast and receive police communications. J.A. 104. Mr. Alford also indicated that he had handcuffs. Mr. Alford initially told Trooper Haner that "he worked for the State Patrol and then he changed it to Texas, and shipyard police". J.A. 105-06, 35.

These facts, along with Mr. Alford's evasiveness in responding to questions concerning his wig-wag headlights, led Trooper Haner to believe that he had probable cause to arrest Mr. Alford for the crime of impersonating a law enforcement officer. J.A. 104-07.

### 2. Events Establishing Probable Cause To Arrest Mr. Alford For The Offense Of Obstructing A Law Enforcement Officer

Shortly after Trooper Haner stopped Mr. Alford, Sergeant Devenpeck arrived and began questioning Mr. Alford about the existence of his wig-wag headlights. Sergeant Devenpeck characterized Mr. Alford as "talking in circles". J.A. 138. Initially, Mr. Alford told Sergeant Devenpeck that he had permission from Kitsap County to have wig-wag headlights and that "he could use them as long as he wasn't impersonating". J.A. 134. Sergeant Devenpeck knew this statement was contrary to the law. J.A. 134-35. A little while later Mr. Alford told Sergeant Devenpeck that the wig-wag headlights were part of his alarm system. J.A. 137-38. When asked to activate the wig-wag headlights, Mr. Alford pushed buttons on his keychain and his emergency flasher, none of which operated the wig-wag lights. All the while, Trooper Haner could see a switch prominently located on the steering column that Mr. Alford never pressed. J.A. 108-09. As it later turned out, that switch activated the wig-wag headlights. J.A. 149. These facts were presented to the jury and supported probable cause to arrest Mr. Alford for obstructing a law enforcement officer.

### 3. Events Leading To Mr. Alford's Arrest For The Offense Of Violating Washington's Privacy Act

During the course of questioning Mr. Alford about his wig-wag headlights, Sergeant Devenpeck noticed a shiny black object on the seat next to the

driver's seat. The object had previously been hidden under a jacket next to Mr. Alford. Sergeant Devenpeck looked to see if it was a weapon and then noticed that it was a tape recorder with the play and record buttons depressed and operating. He rewound the tape and could hear that both his voice and Mr. Alford's voice had been recorded.

Sergeant Devenpeck had been trained on the Privacy Act, Wash. Rev. Code § 9.73.030; Pet. 66a-68a. Believing he had probable cause, Sergeant Devenpeck arrested Mr. Alford for violating the Privacy Act. But he wanted to make sure he "remembered the law properly as it related to making the recording". J.A. 151-52. He reviewed language in the statute which makes it unlawful to "record any [p]rivate conversation . . . without first obtaining the consent of all of the persons engaged in the conversation". He then attempted to contact a prosecuting attorney to make sure he was "on firm ground". J.A. 155-56.

Initially, Sergeant Devenpeck was unable to reach Deputy Prosecuting Attorney Mark Lindquist. A few minutes later, while Trooper Haner was transporting Mr. Alford to jail, Sergeant Devenpeck was able to reach Deputy Prosecutor Lindquist by phone. The Sergeant and deputy prosecutor discussed the Privacy Act, impersonation of an officer (Wash. Rev. Code § 9A.60.040), Pet. 68a, and possible false representations to an officer – obstructing (Wash. Rev. Code § 9A.76.020). Pet. 69a; J.A. 177-78. Sergeant Devenpeck read the Privacy Act statute to the prosecutor over the phone. Pet. 8a, 18a. Deputy Prosecutor Lindquist believed that, considering the totality of the circumstances, the officers had

probable cause to arrest Mr. Alford, and he so testified at trial. J.A. 177-79.

Due to the Washington State Patrol's policy of not stacking charges, the officers arrested and charged Mr. Alford only with violating the Privacy Act. J.A. 157.[1] The Privacy Act charge was dismissed by the state District Court based on a decision of the Washington Court of Appeals holding that conversations between law enforcement officers and motorists on public highways are not "private" conversations for purposes of the Privacy Act. See, *Washington v. Flora*, 68 Wash. App. 802, 845 P.2d 1355 (1992) (recording an arrest made by public officers on a public thoroughfare near passersby did not violate the Act because the conversation was not private) Pet. 9a-10a.

## B. Procedural History

Mr. Alford brought federal civil rights and state law claims against the two Troopers and the Washington State Patrol in the United States District Court for the Western District of Washington. Each of Mr. Alford's claims was based on an allegation that his arrest was without probable cause and therefore was unlawful. Pet. 8a.

Petitioners moved for summary judgment on two bases. First, Petitioners argued that the officers had probable cause to arrest Alford for violating the Privacy Act. In this respect, Petitioners urged that the circumstances surrounding the conversation in this case were sufficiently different from those in

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[1] Mr. Alford was also given a traffic infraction for the wig-wag headlights. *See* Wash. Rev. Code § 46.37.280(3). J.A. 24-25.

*Flora*, and rendered the conversation private and subject to the Privacy Act prohibition. Second, Petitioners argued that the officers were entitled to qualified immunity in any event.

The District Court denied Petitioners' motion for summary judgment, concluding that the facts of this case did not distinguish it from *Flora*. As to qualified immunity, the District Court determined that *Flora* had clearly established the inapplicability of the Privacy Act. Pet. 45a-46a. On the second prong of qualified immunity analysis, the District Court concluded that there was a question of fact for the jury whether the officers nonetheless reasonably believed they had probable cause to arrest Mr. Alford. J.A. 199-200.

The case then went to trial before a jury. During trial, the deputy prosecuting attorney testified that he had determined and advised the officers that probable cause existed not only for the Privacy Act violation, but also for impersonating an officer and obstructing a law enforcement officer. Specifically, at trial, Deputy Prosecuting Attorney Lindquist testified, without objection:

> Q Did you make a determination of probable cause here?
>
> A Yes, I did.
>
> Q What was that determination?
>
> A I advised Sergeant Devenpeck there was clearly probable cause.
>
> Q Okay. And what was that determination based on exactly?

> A All the things that I just listed, the big pictures. All the facts. I considered the fact that he had wig-wag lights. I considered the fact that he pulled in behind a disabled motorist using those wig-wag lights in a way that the motorist might have interpreted him to be a police officer. I looked at the fact that there were handcuffs and a police scanner in the vehicle. I also put a lot of weight on the fact that the defendant was evasive and not honest about those wig-wag lights, and I looked at the fact that that tape recorder was hidden.

J.A.179-80.

Mr. Alford did not take exception to any of the court's instructions to the jury. Jury Instruction 10 (J.A.199-200) described what each party was required to prove to prevail. It stated in pertinent part:

> On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> * * *
>
> 3. The acts or omissions of the defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.
>
> * * *

> Each defendant has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff was lawful and acted on that belief;
>
> 2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful;
>
> * * *
>
> If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

J.A. 199-200.

Jury Instruction 12 did not limit the jury's consideration of probable cause to the Privacy Act violation. Rather, it stated:

> "An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the

> suspect has committed, is committing, or was about to commit a crime."

J.A. 201.

The jury reached a unanimous verdict in favor of Petitioners. J.A. 207. Viewed most favorably to the Petitioners, there was more than adequate evidence for the jury to have found that there was probable cause for Mr. Alford's arrest and to have found that a reasonable officer would have believed that Mr. Alford's arrest was lawful.

Mr. Alford moved for a new trial which was denied. He then timely appealed to the Ninth Circuit. In his appeal, Mr. Alford did not raise the "closely related offense doctrine" and consequently, that issue was not briefed by the parties. The Ninth Circuit raised the "closely related offense doctrine" *sua sponte,* a little over two weeks prior to oral argument, when the court below directed the parties to be prepared to discuss footnote 6 on page 1428 in *Gasho v. United States,* 39 F.3d 1420 (9th Cir. 1994), *cert. denied sub nom. Ball v. Gasho,* 515 U.S. 1144 (1995) (discussing the "closely related offense doctrine"). Pet. 24a.

In a split decision, the Ninth Circuit panel invoked the "closely related offense doctrine" to rule that the District Court abused its discretion in denying Mr. Alford's motion for a new trial. The majority reasoned that there was no probable cause for arrest under the Privacy Act because "[t]ape recording officers conducting a traffic stop is not a crime in Washington". Pet. 9a.[2] The majority then

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[2] Judge Gould dissented arguing that Petitioners were entitled to qualified immunity for the Privacy Act arrest. The

rejected the alternative offenses for which probable cause to arrest Mr. Alford existed (impersonating an officer and obstructing an officer) based on the "closely related offense doctrine". Pet. 10a.

The majority below explained that, under the "closely related offense doctrine", "[p]robable cause to arrest may still exist . . . for a *closely related* offense even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested". Pet. 10a. The majority determined that the conduct underlying the additional offenses was "unrelated to Alford's tape recording" of his conversation with the officers. *Id.* "Any impersonation charge would be based on Mr. Alford's use of wig-wag headlights. An obstruction charge would be based on Alford's evasion in allegedly not turning on the wig-wag headlights . . .". Pet. 10a-11a. The majority disregarded probable cause to arrest Mr. Alford with respect to these offenses simply because the "offenses are not closely related to the crime for which [petitioners] arrested [Alford] . . . tape recording a traffic stop". Pet. 11a.

The majority below went on to deny qualified immunity to the officers, rejecting the argument that the "closely related offense doctrine" was not clearly established. Pet. 12a-13a, n.2. The Ninth Circuit concluded that the "closely related offense doctrine"

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dissent observed that the officers "read a statute before making an arrest, saw it literally covered the challenged conduct, and double checked with a prosecuting attorney". The dissent concluded that the officers "were acting reasonably, even if it turned out that the officers' belief about the law was incorrect". Pet. 22a.

was clearly established, citing *Gasho*, 39 F.3d at 1428 n.6. *Id*. In reaching its "clearly established law" conclusion, the Ninth Circuit failed to acknowledge or consider that Washington courts do not follow the doctrine (s*ee Washington v. Huff*, 64 Wash. App. 641, 826 P.2d 698, *review denied* 119 Wn.2d 1007 (1992) (an arrest will be upheld as long as probable cause objectively existed to arrest for any crime)) and summarily dismissed a conflicting circuit court decision, including *United States v. Saunders*, 476 F.2d 5, 6-7 (5th Cir. 1973). Pet. 10a. Petitioners cited both of these cases to the Ninth Circuit.

The Ninth Circuit reversed the District Court's denial of Mr. Alford's motion for a new trial. The Ninth Circuit subsequently denied Petitioners' timely petition for rehearing and rehearing en banc. Pet. 23a. Petitioners filed a timely petition for a writ of certiorari that was granted April 19, 2004.

## SUMMARY OF ARGUMENT

1. An arrest that is objectively supported by probable cause does not violate the Fourth Amendment simply because the probable cause is for a crime unrelated to the crime articulated by the arresting officer. Probable cause for arrest is measured by an "objective reasonableness" test. Under this test, probable cause for arrest exists and an arrest is reasonable under the Fourth Amendment if at the time of arrest, the totality of facts and circumstances known to the officer would lead a reasonable officer to believe that an offense has been committed. Neither the officer's subjective belief as to the existence of probable cause, nor the officer's subjective motives in making the arrest bear

on the existence of probable cause. The evaluation is purely objective.

2. The Ninth Circuit departed from the "objective reasonableness" test in evaluating probable cause for Mr. Alford's arrest, and found probable cause lacking predicated on the "closely related offense doctrine". Under this doctrine, a court evaluates probable cause for arrest based only on those facts and circumstances known to the officer at the time of arrest which are closely related to and arise from the same conduct as the offense that the officer announces at arrest. Thus, the doctrine precludes consideration of facts and circumstances that objectively establish probable cause to arrest, where the officer announces an offense(s) for which probable cause to arrest does not exist, and either subjectively fails to appreciate that probable cause exists for other unrelated offenses, or subjectively decides not to announce or "stack" other unrelated offenses in making the arrest. In each of these respects, the "closely related offense doctrine" disregards objectively existing probable cause for arrest and irreconcilably conflicts with the Court's "objective reasonableness" test for probable cause.

3. The Ninth Circuit also erred in suggesting that the "closely related offense doctrine" is necessary to avoid "sham" arrests or "later extrapolated justification" for arrest. The "objective reasonableness" test adequately safeguards against wrongful arrest by requiring probable cause to be based on facts and circumstances existing and known to the officer at the time of arrest. The Ninth Circuit's additional suggestion that the "closely related offense doctrine" somehow vindicates

objective reasonableness is refuted by the very nature of the doctrine. The doctrine excludes from the probable cause determination facts and circumstances known to the officer at the time of arrest, that objectively viewed, establish probable cause. In addition, the doctrine inappropriately intrudes on prosecutorial discretion to evaluate all of the relevant circumstances and determine the most appropriate charge to pursue.

4. Even if the "closely related offense doctrine" were sound and served to vitiate probable cause for Mr. Alford's arrest, Petitioners would be entitled to qualified immunity because the doctrine was not clearly established law. In concluding otherwise, the Ninth Circuit failed to consider all relevant precedent. Specifically, it failed to consider that Washington, other states, and other circuits follow the "objective reasonableness" test of the Court, not the "closely related offense doctrine". The Ninth Circuit also failed to recognize that its own cases discussing the doctrine did not, and still do not, clearly or consistently apply the preclusive aspect of the doctrine. Under such circumstances, the law was not clearly established and the Ninth Circuit erred in denying Petitioners qualified immunity.

The judgment of the Ninth Circuit should be reversed.

## ARGUMENT

### A. When Properly Assessed Under The "Objective Reasonableness" Standard, Mr. Alford's Arrest Was Lawful

#### 1. The Court Consistently Applies An "Objective Reasonableness" Test In Assessing The Existence Of Probable Cause To Arrest

As a seizure of a person, an arrest is subject to the reasonableness requirement of the Fourth Amendment. An "arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment". *United States v. Robinson*, 414 U.S. 218, 235 (1973). Probable cause, in turn, exists if "at the moment of arrest" the facts and circumstances within the knowledge of the officer would warrant a reasonable officer to believe that the suspect had committed or was committing an offense (the "objective reasonableness" test). *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

In analyzing Fourth Amendment claims of unlawful search and seizure, the Court consistently applies this "objective reasonableness" test. The test focuses on the facts and circumstances known to the officer at the time of arrest. *Id.; see also Illinois v. Gates*, 462 U.S. 213, 238 (1983) (applying a "totality of the circumstances" analysis to determine probable cause for search warrant); *Alabama v. White*, 496 U.S. 325, 330-31 (1990) (considering the "totality of the circumstances" in evaluating reasonable suspicion for investigatory stop).

The law enforcement officer's subjective beliefs or motives play no role in this Fourth Amendment

analysis, as demonstrated by decisions of the Court considering the validity of actions under the Fourth Amendment in several different contexts. For example, in *Florida v. Royer*, 460 U.S. 491 (1983), the Court held that if the objective probable cause test is met, it is not necessary to establish that the particular officer making the arrest or search subjectively believed that probable cause was present. The Court observed, "[t]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search". *Royer*, 460 U.S. at 507 (*citing Peters v. New York, decided with Sibron v. New York*, 392 U.S. 40, 66-67 (1968)).

The "objective reasonableness" test also applies without regard to the motives of the officers involved. For example, in *Robinson*, the Court declined to suppress evidence discovered during the search of a suspect incident to a lawful arrest. The Court rejected the suggestion that the validity of the search depended on the subjective belief of the officer with respect to the need for the search. "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that the [arrestee] was armed". *Robinson*, 414 U.S. at 236.

To the same effect, in *Scott v. United States*, 436 U.S. 128 (1978), the Court declined to suppress telephone conversations intercepted by a wiretap on the basis that the federal agents did not subjectively

intend to minimize interception of non-targeted conversations. The statute under which the wiretap was authorized contained a minimization requirement. The Court explained, "the fact that the officer does not have the state of mind . . . hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action". *Scott*, 436 U.S. at 138. In analyzing a Fourth Amendment excessive force claim, the Court similarly observed that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable [action]; nor will an officer's good intentions make an objectively unreasonable [action] constitutional". *Graham v. Connor*, 490 U.S. 386, 397 (1989).

The Court applied the same principle in the context of a traffic stop in *Whren v. United States*, 517 U.S. 806 (1996). There, the Court held that a traffic stop supported by probable cause was not invalidated because the officers' actual motivation for the stop was enforcing drug laws. The Court reiterated that ulterior motives on the part of the arresting officer will not invalidate objectively justifiable behavior. *Id.* at 812 (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 584, n.3 (1983); *United States v. Robinson*, 414 U.S. 218 (1973); and *Scott v. United States*, 436 U.S. 128 (1978)). The *Whren* Court described *Villamonte* as "flatly dismiss[ing] the idea that ulterior motive might serve to strip the agents of their legal justification" *Whren*, 517 U. S. at 812. Further, in describing its decision in *United States v. Robinson*, the *Whren* Court stated: "we held that a traffic-violation arrest

. . . would not be rendered invalid by the fact that it was a mere pretext for a narcotics search". *Whren*, 517 U.S. at 812-13. The Court subsequently applied the same principle to a traffic arrest based on probable cause in *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

Thus, the "objective reasonableness" test applies regardless of whether the officer was operating under a mistaken belief about the law, *Royer*, and regardless of the officer's motivation for the challenged action. *Robinson*; *Scott*; *Whren*. The validity of the challenged action, whether a stop, an arrest, or a search, is determined by whether the action was objectively supported by adequate cause.

In this case, then, under the "objective reasonableness" test, it should not matter that the arresting officer articulated an offense not supported by probable cause in arresting Mr. Alford, when an objective assessment of the facts and circumstances existing at the time of arrest established probable cause for his arrest. Nor should it matter that in arresting Mr. Alford, the officer did not articulate an offense closely related to one for which probable cause to arrest objectively existed. Substantial evidence of probable cause was presented to support the jury's verdict in favor of the Petitioners, and the Ninth Circuit erred in setting the verdict aside.

### 2. The "Closely Related Offense Doctrine" Irreconcilably Conflicts With The Court's Precedent And Improperly Limits The Inquiry Into Probable Cause

The "closely related offense doctrine" irreconcilably conflicts with the Court's Fourth Amendment jurisprudence. Unlike the "objective reasonableness" test, the "closely related offense doctrine" restricts the probable cause inquiry and requires a court to ignore facts and circumstances existing at the time of arrest in evaluating probable cause. Under the doctrine, only facts and circumstances "closely related" to the offense articulated by the officer, that "involves the same conduct" for which the arrest was made, may be taken into account. Pet. 10a-11a. This is plainly contrary to weighing all of the relevant facts and circumstances existing at the time of arrest, known to the arresting officer, as permitted by the "objective reasonableness" test. *Beck*, 379 U.S. at 96.

The "closely related offense doctrine" also contravenes the "objective reasonableness" test, because the doctrine requires the court to ignore probable cause based on the beliefs or motivations of the arresting officer. In this case, the "closely related offense doctrine" discarded facts and circumstances that in fact established probable cause to arrest, based on the officer's subjective misunderstanding as to the offense(s) for which probable cause existed, and the officer's subjective choice to articulate fewer than all of the offenses that justified arrest.

That the "closely related offense doctrine" irreconcilably conflicts with the Fourth Amendment

jurisprudence of the Court perhaps is most apparent when one compares this case to *Royer*. Under *Royer*, 460 U.S. at 507, if law enforcement officers do not believe they have probable cause to arrest, but actually do, the arrest is valid. In the instant case, under the "closely related offense doctrine", if law enforcement officers believe they have probable cause to arrest and in fact do, but for an offense not related to the offense they articulate, the arrest is invalid. An officer's mistaken belief about the particular offense(s) for which probable cause exists no more violates the Fourth Amendment than a mistaken belief that probable cause does not exist at all.

The Ninth Circuit erred in relying on the "closely related offense doctrine" to vitiate probable cause for Mr. Alford's arrest and to set aside the jury verdict in favor of Petitioners.

### 3. The "Closely Related Offense Doctrine" Is Ill-Suited To Achieve Its Proffered Objectives And Produces Illogical And Unjust Results

The Ninth Circuit offers two justifications for the "closely related offense doctrine". First, the majority below states that the doctrine "accounts for the possibility" of sham arrests or "later extrapolated justifications" for arrest. Pet. 13a, n.2. Second, the majority below asserts that the doctrine focuses on the "objective reasonableness" of the arrest. *Id*. Neither of these proffered justifications for the doctrine is sound.

The Ninth Circuit's use of the "closely related offense" doctrine to preclude "later extrapolated justifications" for arrest and so-called "sham arrests" reflects a fundamental failure to recognize that the "objective reasonableness" test governs the existence of probable cause. Pet. 13a, n.2. The "objective reasonableness" test is concerned only with *whether* the facts and circumstances existing and known at the time of arrest provide probable cause to arrest. Under the "objective reasonableness" test, it does not matter *when* justification for the arrest first occurs to the arresting officer, or *when* justification for the arrest first is articulated by the officer. Yet the Ninth Circuit's concern with "later extrapolated justification" for arrest is about nothing else.

Moreover, even if the "closely related offense doctrine" advanced a legitimate purpose in precluding "later extrapolated justification" for arrest, its allowance of "later extrapolated justification" for closely related offenses, lacks rationality. If a "later extrapolated justification" for arrest is evil, it is no less evil simply because the "later extrapolated justification" concerns the same conduct as the wrongly cited offense.

In addition, the majority below fails to explain how the "closely related offense doctrine" discourages sham arrests to any greater extent than the "objective reasonableness" test. There is no good reason to believe that it does. For an arrest to be valid under the "objective reasonableness" test, the facts and circumstances existing and known to the officer at the time of the arrest must establish probable cause. *Beck*, 379 U.S. at 96. The test does not allow the officer to rely on post-arrest facts or

circumstances to fill any void in probable cause. *Id*. The "objective reasonableness" test thus provides no incentive to officers to arrest persons without probable cause. To the contrary, the test plainly discourages sham arrests by precluding consideration of post-arrest facts and circumstances in evaluating the validity of the arrest. Nor is it rational to believe that the "objective reasonableness" test encourages an officer to make an arrest where the officer does not believe probable cause exists, on the slim hope that it actually does.[3]

The second rationale offered by the Ninth Circuit majority for the "closely related offense doctrine" – that it eviscerates "objective reasonableness" – simply is incorrect. Pet. 13a, n.2. The "closely related offense doctrine" does not look at the totality of the facts and circumstances existing at the time of the arrest to determine whether objectively viewed, they provide probable cause for arrest. Instead, the doctrine precludes consideration of relevant facts and circumstances simply because the officer has cited an offense for which probable cause did not exist and that offense is not "closely related" to an offense or offenses for which probable cause did exist. Thus, the doctrine turns the analysis on its head, making it one of "subjective reasonableness".

The doctrine also turns the validity of an arrest into little more than a game that the arrestee wins even where there is probable cause for arrest, simply because the officer makes a mistake in

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[3] *See* Wayne R. La Fave & Jerald H. Israel, *2 Crim. Proc.*, § 3.1(d) (2d ed. 2004) terming such an assumption "fanciful".

announcing the offense. And the arrestee wins even where, as in this case, there is absolutely no suggestion that the officers were endeavoring to make a sham arrest.[4] Such a doctrine does not advance the interests of justice.[5]

### 4. The Closely Related Offense Doctrine Intrudes On The Proper Exercise Of Prosecutorial Discretion

Typically, within the criminal justice system, the initial on-the-spot decision by a police officer of what offense to cite for the arrest is reviewed pre-filing by supervisors or, as occurred in this case, by a prosecuting attorney. *See*, 1 Wayne R. La Fave, Criminal Practice Series, *Criminal Procedure*, *The Decision to Charge* § 1.3(8) (3d ed. 1996). The

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[4] As the dissenting judge recognized:

> "The officers whom the majority would tag with liability, despite an exculpatory jury verdict . . . stopped Alford for good reason because his approach to stranded vehicles, giving an appearance that he was a police officer, was ominous to say the least. After stopping and questioning Alford . . . the real officers arrested Alford in good faith, with their judgment seconded by a public prosecutor who was consulted". Pet. 17a.

[5] Moreover, limiting consideration of probable cause to matters closely related to the articulated offense, risks encouraging officers to cite a suspect for every possible offense to avoid civil rights liability and prevent suppression of evidence. This otherwise needless "stacking" of charges could have the unfortunate consequences of higher bail and longer pre-arraignment and pretrial detention of criminal suspects. *See United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971) ("Such a clogging of the criminal process already heavily encumbered would be pointless".)

prosecutor plays an important role in the criminal justice process, including independent review and evaluation of the nature and degree of the criminal charge which will be pursued. *See generally, Imbler v. Pachtman,* 424 U.S. 409, 423 (1976) (recognizing the need to protect the independence and courage of prosecutors in, *inter alia,* charging decisions through absolute immunity). The Court has repeatedly noted that "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion". *Wayte v. United States,* 470 U.S. 598, 608 (1985) quoting *Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978). In *Wayte,* the Court also noted that this broad discretion rests largely on the recognition that decisions to prosecute are ill-suited to judicial review. *Id.*

When a prosecutor determines that a charge is not supported by a probable cause, no sound policy is served by precluding the prosecutor from amending the charge to one for which probable cause does exist. The prosecutor's discretion in this respect does not interfere with prompt judicial review of whether probable cause exists to detain the suspect, which must occur no later than 48 hours after arrest. *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991). Subsequently, a prosecutor should have authority to amend a charge as additional information is discovered. By limiting prosecutors' filing decisions, the "closely related offense doctrine" ill-serves the criminal justice system.

## B. Even If The "Closely Related Offense Doctrine" Is Valid, Petitioners Are Entitled To Qualified Immunity Because The Doctrine Was Not Clearly Established Law

As section A of this brief demonstrates, Mr. Alford's arrest did not violate the Fourth Amendment. For that reason, there is no need for any further inquiry concerning qualified immunity. *Saucier v. Katz*, 533 U.S. at 201. Even if there were, Petitioners are entitled to qualified immunity because the "closely related offense doctrine" was not clearly established.

### 1. Qualified Immunity Applies Absent Violation of Clearly Established Law

Public officers acting in their official capacities are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is defined quite broadly to provide a deferential standard under which public officers can operate. "It provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [I]f officers of reasonable competence could disagree on th[e] issue [whether or not a specific action was constitutional], immunity should be recognized". *Malley v. Briggs*, 475 U.S. 335, 341 (1986). To be considered "clearly established" for purposes of qualified immunity analysis, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is

doing violates that right". *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In determining whether the law was clearly established, a court should consider "all relevant precedents". *Elder v. Holloway*, 510 U.S. 510 (1994). In *Wilson v. Layne*, 526 U.S. 603 (1999), the Court considered whether it was clearly established that the Fourth Amendment would prohibit law enforcement officers from allowing media representatives to accompany them in executing an arrest warrant inside a private residence. The Court began with the observation that the question was "by no means open and shut" and looked to a wide range of sources before concluding that the law was not clearly established. *Id.*, at 616. The Court referenced an intermediate state appellate decision, unpublished decisions of federal District Courts and a written policy of the relevant law enforcement agency. *Id.*, at 616-617. The Court additionally observed that the plaintiffs had not identified "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that these actions were lawful". *Id.*, at 617. *See also Burgess v. Lowery*, 201 F.3d 942, 944-45 (7th Cir. 2000) (precedent from other circuits must be considered in determining whether a right was clearly established); *Richardson v. Selsky*, 5 F.3d 616, 623 (2nd Cir. 1993) (declining to hold prison officials to a standard of conduct that was subject of conflicting federal District Court decisions).

### 2. The "Closely Related Offense Doctrine" Was Not Clearly Established Law

Even assuming its validity, the "closely related offense doctrine" was not clearly established law for at least two reasons. First, the majority below failed to consider all relevant precedent when it concluded that the doctrine was clearly established law. Second, the Ninth Circuit did not consistently articulate or apply the doctrine – and still does not. When all relevant precedent is considered, including Washington law and the law of other federal circuits and states, the "closely related offense doctrine" was anything but clearly established.

#### a. The Ninth Circuit failed to consider all relevant precedent

The *Alford* majority erred by failing to consider all relevant precedent in concluding that the "closely related offense doctrine" was clearly established. First, the Ninth Circuit failed to note or take into account that Washington does not apply the "closely related offense doctrine". In a host of cases, including *Washington v. Huff*, 64 Wash. App. 641, 826 P.2d 698, *review denied*, 119 Wash.2d 1007 (1992), cited to the Ninth Circuit by Petitioners, Washington courts evaluate the validity of an arrest under the "objective reasonableness" test enunciated by the Court. *See, e.g., Washington v. Vangen,* 72 Wash. 2d 548, 433 P.2d 691 (1967); *City of Seattle v. Cadigan,* 55 Wash. App. 30, 776 P.2d 727, *review denied,* 113 Wash.2d 1025 (1989); *Washington v. Stebbins,* 47 Wash. App. 482, 735 P.2d 1353, *review denied,* 108 Wash.2d 1026 (1987); *Washington v.*

*Greene,* 75 Wash.2d 519, 521, 451 P.2d 926, 928 (1969).

In addition, as noted in the amicus brief of California in support of the petition for a writ of certiorari in this case, Washington is not the only state in the Ninth Circuit that follows the Court's Fourth Amendment jurisprudence and finds an arrest lawful as long as probable cause exists to arrest for any crime.[6] California does. *See People v. Rodriguez,* 53 Cal. App. 4th 1250, 1262 (1997); *In re Justin K.,* 98 Cal. App. 4th 695, 699 (2002). So does Alaska. *See Alaska v. Kendall,* 794 P.2d 114, 117 (1990) (requiring officers to state correct ground for arrest would cause officers to state every possible ground and exclude evidence in cases where the person arrested had not had his rights violated).[7]

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[6] The Court has never even mentioned the so called "closely related offense doctrine". In *United States v. Di Re,* 332 U.S. 581, 592 (1948), the Court assumed, without deciding: " . . . that an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable cause to believe that any felony found in the statute books had been committed . . .".

[7] Many states outside the Ninth Circuit also do not apply the "closely related offense doctrine". *See Golden v. Commonwealth of Virginia,* 30 Va. App. 618, 519 S.E.2d 378 (Va. App. 1999); *State v. Cote,* 547 So.2d 993 (Fla. App. 4 Dist., 1989); *People v. Kincy,* 435 N.E.2d 831 (Ill. App. 2 Dist., 1982); *Tennessee v. Duer,* 616 S.W.2d 614 (Tenn. Crim. App. 1981). New Hampshire, Rhode Island and Delaware statutes provide that an arrest will be upheld even if the officer charged the wrong offense. N.H. Rev. Stat., § 594:13; R.I. Stat. Gen. Laws Of R.I. Ann., 1956, Title 12. Crim. Proc., Chapter 7. Arrest; Del. Code. Ann., Title 11, § 1905. The Uniform Arrest Act contains an analogous provision. § 7 of the Uniform Arrest Act. *See,* Warner, *The Uniform Arrest Act,* 28 Va. Law Rev. 315, 346 (1942).

The law of Washington and the other states in the Ninth Circuit is particularly significant in this context, as it directly bears on the viability of a federal civil rights claim. If the prosecutor had decided to charge Mr. Alford with either of the two offenses for which probable cause existed, a permissible course under Washington law, a conviction would have precluded this challenge to the validity of his arrest. *See Wells v. Bonner,* 45 F.3d 90 (5th Cir. 1995) (existing conviction barred false arrest claim under *Heck v. Humphrey*, 512 U.S. 477 (1994); *Malladay v. Crunk,* 902 F.2d 10 (8th Cir. 1990) (applying common law rule that a plaintiff cannot recover under 28 U.S.C.§ 1983 for an arrest resulting in conviction).

The Court has recognized that the authority of state and federal courts to independently address questions of federal law will cause conflicts and frictions to occur when contrary interpretations are made. *See Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970). When these conflicts inevitably occur, and a state's highest court and federal circuit court are irreconcilably in conflict on a question of constitutional magnitude, a final resolution of the disagreement by the Court is necessary before the law is clearly established.[8] The law on qualified immunity does not require public officials to simultaneously serve two masters - choosing between

[8] By analogy, under *ADEPA*, 28 U.S.C. § 2254(d), a circuit court cannot abrogate a state decision on a constitutional issue unless it is contrary to clearly established United States Supreme Court precedent, not dicta. *Lockyer v. Andrade,* 538 U.S. 63, 71 (2003).

conflicting state and circuit court decisions - to avoid civil rights liability.

In addition, the Ninth Circuit explicitly declined to give any weight to conflicting precedent from other circuits with respect to the validity of the "closely related offense doctrine". The *Alford* majority dismissed *United States v. Saunders,* 476 F.2d at 6-7 (verbal announcement of the wrong offense does not vitiate an arrest if probable cause exists for another crime) noting only: "Whatever the rule may have been in that circuit, this is not the test applied in the Ninth Circuit". Pet. 10a.[9]

The *Alford* majority's disregard of conflicting authority is contrary to the Court's recognition that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy". *Wilson v. Layne,* 526 U.S 603 (1999). As the Court noted, "given such an undeveloped state of the law, the officers in this case cannot have been "expected to predict the future course of constitutional law". *Wilson*, 526 U.S. at 617-18, *citing Procunier v. Navarette,* 434 U.S. 555, 562 (1978). Law enforcement officials are not required to always err on the side of caution when the law is not clearly established, *See Davis v. Scherer,* 468 U.S. 183, 196 (1984), *citing Scheuer v. Rhodes,* 416 U.S. 232, 246 (1974).

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[9] Although *Saunders* has not been overruled, it apparently is no longer followed in the Fifth Circuit. *See Vance v. Nunnery,* 137 F.3d 270 (5th Cir. 1998). *Saunders* is still cited as precedent in the 11th Circuit, which was formerly part of the Fifth. *See Lee v. Ferraro,* 284 F.3d 1188, 1196 (11th Cir. 2002) quoting *Saunders,* 476 F.2d at 7.

**b. The Ninth Circuit has not consistently applied the "closely related offense doctrine"**

The majority below concluded that the decision of the Ninth Circuit in *Gasho* was controlling authority, clearly establishing the applicability of the "closely related offense doctrine" to this case. Pet. 12a-13a, n.2. Despite this statement by the Ninth Circuit, the applicability of the doctrine was not clearly established at the time this case arose, and in fact, still is not clearly established.

In *Gasho,* the question of whether the "closely related offense doctrine" restricts facts and circumstances that may be considered in evaluating probable cause for arrest to those arising from the same conduct as the articulated offense, was not at issue. That is so because the offense for which Gasho was arrested "unlawful removal of property under the control or custody of customs", 18 U.S.C. § 549, was closely related to the offenses for which probable cause actually existed, foreseeable rescue of seized property under 18 U.S.C. § 2233 or removal of property to prevent seizure, 18 U.S.C. § 2232. Thus, *Gasho* neither decided whether the doctrine precludes probable cause to arrest for unrelated offenses in evaluating the validity of an arrest, nor held that it did. For this reason, G*asho* cannot fairly be said to have clearly established the preclusive effect of the doctrine.

Additional Ninth Circuit cases make the state of the law with respect to the doctrine even less

clear. In *United States v. Patzer,* 284 F.3d 1043, 1045 n.4 (9th Cir. 2002), the Ninth Circuit, albeit in dicta, cited *United States v. Bookhardt,* 277 F.3d 558 (D.C. Cir. 2002) for the proposition that "an arrest is . . . valid if the same officer had probable cause to arrest the defendant for another offense". The Ninth Circuit termed this a "true statement of law" without intimating that the rule was restricted to probable cause to arrest for a closely related offense(s). *Id.*

In addition, while Mr. Alford's appeal was pending before the panel in this case, a different three judge panel of the Ninth Circuit issued an opinion in *Bingham v. City of Manhattan Beach,* 329 F.3d 723 (9th Cir. 2003) (*Bingham* I). In *Bingham* I, an adult driver was arrested for driving with an expired license. The governing statute authorized arrest of drivers for this offense only if they were age sixteen or younger. The driver subsequently brought a civil rights action alleging unlawful arrest.

In a split decision, the *Bingham* I panel held that the officer was entitled to qualified immunity because there was probable cause to arrest the driver to verify an outstanding warrant — the facts and circumstances of which were entirely unrelated to the articulated offense of driving with an expired license. Petitioners cited *Bingham* I to the panel still considering *Alford*, but to no avail. Pet. 59a-60a.

After the Ninth Circuit issued its opinion in this case, purporting to find the "closely related offense doctrine" well established in *Gasho,* it amended the opinion in *Bingham* I. *See Bingham v. City of Manhattan Beach,* 341 F.3d 939 (9th Cir. 2003) (*Bingham* II). *Bingham* II suggests that the court declined to apply the doctrine in that case

because the facts did not give rise to concern that the outstanding warrant was an "ex post facto" justification for the driver's arrest. *Bingham* II, 341 F.3d at 952.

In this respect, the circumstances in *Bingham* II are not different from the circumstances in this case. In neither case was there an effort to rely on facts or circumstances arising post-arrest to establish probable cause. Yet under the Ninth Circuit's "clearly established law", the doctrine applies to this case to preclude facts giving rise to probable cause for arrest, but not to the legally analogous circumstances of *Bingham* II.

Where, as here, the Ninth Circuit's precedents remain inconsistent in describing and applying the "closely related offense doctrine", neither the doctrine nor its applicability to this case was clearly established law. *Wilson v. Layne,* 526 U.S. at 616-618.

When all relevant precedent is considered, even today, the "closely related offense doctrine" is not clearly established. It hardly would be plain to all but an incompetent officer that an arrest is unlawful even where there is probable cause for arrest, if the offense articulated by the officer is not "closely related" to an offense for which probable cause to arrest exists. In light of the clear divergence of authority, state and federal, on whether a court is constitutionally required to ignore the existence of probable cause for an offense unrelated to one cited at the time of arrest, Petitioners are entitled to qualified immunity.

## CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

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