No. 05-1240

IN THE

Supreme Court of the United States

ANDRE WALLACE,

Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO and EUGENE ROY,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Circuit split on the question when a Fourth Amendment claim for false arrest accrues should be reviewed by this Court.

2. Whether petitioner has waived, many times over, the second question presented by the petition, and whether that issue is premature in this case in any event.

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STATEMENT

On January 17, 1994, John Herbert Handy ("Handy") was murdered in a house located at 825 North Lawndale Avenue in the City of Chicago. R. 31 ¶ 7. On January 19, 1994, respondents, Chicago Police Detectives Kristen Kato and Eugene Roy, were assigned to investigate the murder. *Id.* ¶ 5.[1] As part of their investigation, on the evening of January

[1] The caption of the petition contains a typographical error of some sort. The caption of the court of appeals's opinion incorrectly indicates that the City of Chicago was a party to the appeal. Petitioner omitted the City as a defendant when he filed his amended complaint. R. 25; see Brief of Defendants-Appellees at 3, *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (No. 04-3949).

19, 1994, Detectives Kato and Roy approached petitioner, Andre Wallace, and brought him to the police station for questioning, where he informed the detectives that he was seventeen years old. *Id.* ¶¶ 18-20, 23-24, Exh. 1 ¶ 5. After questioning petitioner over the course of the evening, and after following up on leads stemming from the interview of petitioner and others, Detectives Kato and Roy confronted petitioner with the statements of other interviewees. *Id.* ¶¶ 24, 26-31, 33. He then informed the detectives that he was fifteen years old, after which they called in a youth officer and an assistant state's attorney. *Id.* ¶¶ 34-35. The assistant state's attorney prepared a handwritten statement, which petitioner signed, admitting to Handy's murder. *Id.* ¶¶ 35-36.

As part of the pretrial proceedings in petitioner's prosecution for murder, he filed two motions to suppress—a motion to quash arrest and suppress evidence, and a motion to suppress statements. R. 33 ¶ 45; R. 37, Exhs. D1 & D2. The motion to quash arrest and suppress evidence contended that his inculpatory statements were inadmissible as the fruit of an unlawful arrest. R. 37, Exh. D2. The motion to suppress statements contended that Detective Kato had employed physical and psychological coercion to obtain petitioner's confession. *Id.* Exh. D1. The Circuit Court of Cook County conducted several days of hearings on the motions and then heard arguments. R. 33 ¶¶ 46-54. The court denied both motions, as well as petitioner's request for reconsideration. *Id.* ¶¶ 55-56.

Petitioner was then tried to the bench. During his trial, he did not argue that he was innocent. Pet. App. 32, 39. Rather, in argument through counsel, petitioner admitted shooting Handy, claiming that he shot Handy in self-defense or, alternatively, in mutual combat, and therefore should be found guilty of only second-degree murder. R. 11, Exh. C ¶ 4; R. 33 ¶ 57; Pet. App. 32, 39. Petitioner was convicted of first-degree murder. R. 11, Exh. C ¶ 4; R. 33 ¶ 57.

On appeal, the Illinois Appellate Court held that at some point after arriving at the police station and before giving his confession, petitioner was involuntarily seized. R. 11, Exh. A; R. 33 ¶ 58. The court remanded for a hearing on whether petitioner's confession was sufficiently attenuated from the unlawful seizure to be admissible. R. 11, Exh. A; R. 33 ¶ 59. Petitioner had not argued that his confession was the product of police coercion, and, accordingly, the appellate court did not review the circuit court's finding that it was not. R. 33 ¶ 59. After an attenuation hearing, the circuit court held that petitioner's confession was admissible, but the appellate court again reversed. R. 11, Exh. B; R. 16 ¶¶ 41-42. The court held that the confession was insufficiently attenuated from the unlawful seizure, and remanded for a new trial without the confession. R. 11, Exh. B. The prosecution then moved to *nolle prosequi* the case against petitioner on April 10, 2002. R. 11, Exh. C ¶ 6; R. 16 ¶ 43.

On April 2, 2003, petitioner filed suit against respondents, and the City of Chicago, alleging a deprivation of his rights under the Fourth and Fourteenth Amendments to the Constitution and seeking redress under 42 U.S.C. 1983. R. 1-1. The complaint also alleged that the detectives had committed the state-law torts of false imprisonment and malicious prosecution. *Ibid.* The district court granted summary judgment in favor of respondents on all claims except for what petitioner called a "federal denial of a fair trial claim." Pet. App. 33-35. That ruling reflected petitioner's concession that his other section 1983 claims were time barred and that his malicious prosecution claim was flawed and should be dismissed with prejudice. *Id.* at 33-34. The court further determined that petitioner's state-law false imprisonment claim was barred by the statute of limitations. *Id.* at 34-35. Because the contours of the fair trial claim were "not readily apparent from the complaint," the court denied the summary judgment motion with respect to that claim without prejudice. *Id.* at 35, 36.

Petitioner then filed an amended complaint against only Detectives Kato and Roy, alleging that they had violated his Fourth and Fourteenth Amendment rights by unlawfully arresting him and coercing a false confession. R. 25. The district court entered summary judgment in favor of the detectives on all claims. Pet. App. 52. The court found that petitioner's Fourth Amendment false arrest claim was waived and time barred, that his coerced confession claim was barred by collateral estoppel because the state court had found his confession to be voluntary, and that his denial of a fair trial claim was not cognizable. *Id.* at 48-52.

The court of appeals affirmed. Pet. App. 2. With respect to petitioner's Fourth Amendment false arrest claim, the court held that the claim accrued at the time of petitioner's arrest and was therefore time barred. *Id.* at 2, 12-14. In so doing, the court overruled inconsistent Seventh Circuit precedent. *Id.* at 2 & n.*, 13. With respect to petitioner's Fourth Amendment coerced confession claim, the court rejected the existence of a "stand-alone 'false confession' claim based on the Fourth Amendment, rather than the Fifth Amendment or the due process clauses." *Id.* at 16-17. Finally, the court rejected petitioner's claim asserting that his allegedly false confession violated his Fourteenth Amendment right to a fair trial. *Id.* at 17-18. Because the opinion overruled an earlier Seventh Circuit decision, the panel circulated it among all active judges of the court, and the majority voted not to hear the case en banc. *Id.* at 2 n.*. One judge dissented from the denial of rehearing en banc. *Id.* at 18-28.

ARGUMENT

Certiorari should be granted on one of the two issues set forth in the first question presented by the petition. It should be denied altogether on petitioner's second question. That question is convoluted, raises issues not decided by the courts below, and is plagued by waiver problems.

1. The first question presented by the petition, which petitioner copies from the dissenting opinion below, raises two separate issues—when a Fourth Amendment claim based on a false arrest accrues and when a Fifth Amendment claim based on a coerced confession accrues. The first issue was litigated by the parties to this case and decided by the courts below. As petitioner represents, the issue has divided the courts of appeals for years. Although we believe the Seventh Circuit reached the correct result, and we do not count up the division among the Circuits the way petitioner does, nevertheless we do agree that the conflict among the Circuits on this recurring issue should be reviewed by this Court.

By contrast, the second issue set forth in the first question was neither litigated nor decided in the courts below. The district court did not rule on the timeliness of petitioner's coerced confession claim, and respondents did not defend the district court's judgment on this basis on appeal. And the court of appeals held that petitioner's coerced confession claim did not exist under the Fourteenth Amendment, but instead was merely an attempt to repackage a time-barred Fourth Amendment claim. Pet. App. 17-18. Accordingly, the assertion in the dissent that the decision below creates a conflict in the Circuits on the accrual of a Fifth Amendment coerced confession claim is incorrect, and petitioner's reliance on the dissent is similarly inappropriate. Respondents therefore urge the Court to reject petitioner's attempt to litigate in this case the issue of the accrual of Fifth Amendment coerced confession claims.

The only issue properly presented in this case is whether a Fourth Amendment claim of unlawful seizure arises at the time of the seizure or later, when the criminal proceedings against the civil rights plaintiff are terminated or a conviction is overturned. Respondents acquiesce in petitioner's request for review of that Fourth Amendment issue, although we will, of course, urge affirmance of the judgment if the Court grants review on that issue.

2. With respect to the second question that petitioner presents in the petition, our position is quite the contrary. Petitioner challenges a point of law that the courts below did not decide, and had no reason to decide—namely, whether a section 1983 litigant alleging a false arrest under the Fourth Amendment may hold police officers liable in damages only for the period of time of their active involvement, from arrest to arraignment, or instead for the entirety of the period from the arrest until the charges were dismissed. Neither the court of appeals nor the district court reached this question. Both courts held that petitioner's Fourth Amendment false arrest claim was time barred, and the measure of damages that would pertain in the event of a successful claim was therefore not presented. This Court typically declines to pass upon questions that the courts below did not resolve. See, *e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001). That rule should be enforced in this case. Indeed, even if the Court grants review on the issue of when Fourth Amendment claims accrue and, further, overturns the Seventh Circuit's accrual holding, the issue of damages still will not be properly presented in this case. As we now explain, petitioner waived the issue, and, moreover, this Court's review would be premature.

a.i. Instead of challenging a damages rule announced by the court of appeals in this case, petitioner challenges earlier rulings of the Seventh Circuit. In *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003), after holding that the plaintiff's Fourth Amendment false arrest claim was timely, the Seventh Circuit determined that his "damages will be limited to the harm that he incurred from the false arrest before he was charged." *Id.* at 363. The court reaffirmed that determination in *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir.), cert. denied, 543 U.S. 819 (2004), holding that "[t]he scope of [the plaintiff's Fourth Amendment false arrest] claim, should [the plaintiff] prevail on its merits, is limited to the time from his arrest until he was charged." *Id.* at 998. Review of this issue is

waived. Petitioner said not a word about the holdings of *Gauger* and *Wiley* regarding the scope of damages available for Fourth Amendment violations in any of his briefs to the courts below. This Court has made clear its reluctance to review questions that the litigants did not raise in the courts below (see, *e.g.*, *Glover*, 531 U.S. at 205), and that rule as well should be enforced in this case.

Nor did the court of appeals decide this issue, in spite of petitioner's waiver. The court referenced the damages holdings of *Gauger* and *Wiley* only in the context of discussing when a Fourth Amendment claim accrues (Pet. App. 7); but, as we explain, it did not decide, and did not need to decide, whether the damages rule applied to petitioner's case because of its holding that petitioner did not have a timely claim. Petitioner thus may not complain about these holdings now.

ii. And that is not petitioner's only waiver problem. Petitioner explicitly stated in the court below that the theory of his case was not any theory of "continuing seizure," which the court had previously rejected in earlier cases. As the Seventh Circuit explained in *Gauger*, a civil rights plaintiff bringing a Fourth Amendment claim may not recover damages from a police officer for the period subsequent to the bringing of official charges because "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." 349 F.3d at 363. See also *Wiley*, 361 F.3d at 998 ("'[T]he interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects.'") (quoting *Gauger*, 349 F.3d at 363). And in *Wiley*, the court specifically rejected the contention, based upon Justice Ginsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994), that a Fourth Amendment violation continues "'so long as [the plaintiff] is bound to appear in court and answer the state's charges.'" *Wiley*, 361 F.3d at 998 (quoting *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring)). In the face of this precedent, petitioner told the

court of appeals that "[t]he continuing Fourth Amendment violation advanced in this case is somewhat different from the 'continuing seizure' theory discussed by Justice Ginsburg in her concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994)." Brief and Short Appendix of Plaintiff-Appellant at 16, *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (No. 04-3949) [hereafter "CA7 Wallace Br."]. See also Pet. App. 16 (noting that "Wallace tries to distinguish [his claim] from the 'continuing seizure' theory discussed in Justice Ginsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994)"). Instead, according to petitioner, the Fourth Amendment theory that he pressed upon the court of appeals was a "second approach" found in Justice Ginsburg's concurrence that would permit liability on a Fourth Amendment theory based upon a police officer's post-arrest conduct, not upon the initial wrongful seizure. CA7 Wallace Br. 17. Leaving aside whether petitioner is correct in his characterization of Justice Ginsburg's concurrence as containing two different "approaches," he specifically disavowed reliance on her endorsement of "the continuing seizure theory" by explicitly distancing himself from that theory below. Nor did petitioner ask the court of appeals to overrule *Gauger* and *Wiley*. Accordingly, any challenge to the holdings of *Gauger* and *Wiley* on the scope of damages and any argument premised on Justice Ginsburg's continuing seizure theory are unquestionably waived.

iii. Petitioner may not have waived review of what he describes as Justice Ginsburg's "second approach" (CA7 Wallace Br. 17) by failing to present it to the court of appeals, but he has surely waived it in the petition to this Court. Neither the second question nor the accompanying discussion presents that issue any longer.

In the court of appeals, as we explain above, petitioner contended he had an actionable Fourth Amendment claim based on a "second approach" that he also attributed to Justice Ginsburg. CA7 Wallace Br. 17. According to peti-

tioner, his Fourth Amendment claim for unlawful arrest "present[ed] a question that was identified, but not ruled on, in *Gauger*," namely:

> "[Petitioner's] incarceration resulted from the combination of a false arrest with (if his testimony is believed) a false account of his interrogation. If his testimony is believed, therefore, the seizure of his person was from the beginning to the end of his incarceration unreasonable, and shouldn't that bring the allegedly fraudulent account of his interrogation under the Fourth Amendment?"

Id. at 15 (quoting *Gauger*, 349 F.3d at 360). According to petitioner, under the "second approach set out by Justice Ginsburg in her concurring opinion in *Albright*," a police officer is liable for post-arrest conduct that perpetuates a Fourth Amendment violation. *Id.* at 17-18. Thus, in petitioner's view, "the entirety of [his] detention, based as it was on the false confession that was obtained by exploiting the unlawful arrest, was unreasonable under the Fourth Amendment." *Id.* at 15. The court of appeals rejected the existence of a claim based on this theory of the Fourth Amendment. Pet. App. 16-17.

Petitioner abandons review of this aspect of the court of appeals's decision by failing to present it in his petition. It is settled that, as a general matter, this Court will not consider issues not fairly encompassed by the questions presented in the petition. See, *e.g.*, *Glover*, 531 U.S. at 205. See also Sup. Ct. R. 14.1(a). Yet, petitioner's second question asks only for what period of time damages may be recovered "in an action brought under 42 U.S.C. § 1983 for [an] unlawful seizure." The question does not raise the possibility of liability under the Fourth Amendment for a police officer's post-seizure conduct.

At best, the reference in the preamble to the second question to "a confession . . . secured by exploiting the unlawful arrest" seems to presume that such liability exists, but that

does not properly raise the issue for review by this Court. Rather, petitioner confirms that he did not present any question of liability under the Fourth Amendment for post-arrest conduct by his citation to *Brown v. Illinois*, 422 U.S. 590 (1975). That case did not involve post-arrest conduct, but only whether the confession was sufficiently attenuated from the illegal arrest to be admissible as evidence. See *id.* at 602-04. The legality of the methods employed to obtain the confession after the wrongful arrest was not at issue. Thus, petitioner's second question does not raise his "second approach" theory for this Court's review.

Nothing in petitioner's discussion of the second question cures this waiver by suggesting that he is seeking review of his "second approach" theory. Instead, every paragraph in the first several pages of this discussion concerns what petitioner perceives as the unfair "limitation on damages" obtainable in a suit "arising from an unlawful arrest" (*e.g.*, Pet. 11; see also *id.* at 12-14)—not whether a Fourth Amendment claim premised on post-arrest conduct actually exists. Although petitioner then switches gears entirely and raises the issue of the availability of "malicious prosecution damages" (*id.* at 15) on a Fourth Amendment theory, which he defines as "'damages for confinement imposed pursuant to legal process'" (*id.* at 13, 16 (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994))), this, too, is not the same as whether a police officer may be liable for violating the Fourth Amendment based on his post-arrest conduct.

iv. Perhaps petitioner includes the discussion of malicious prosecution solely to take advantage of what he claims to be a Circuit split on the availability of a section 1983 claim for malicious prosecution under the Fourth Amendment. Pet. 13-14. But leaving aside the accuracy of petitioner's characterization of the holdings of the Circuits, this issue is also waived. Petitioner never forwarded a section 1983 Fourth Amendment malicious prosecution claim in this litigation. He did bring a state-law malicious prosecution claim in his

original complaint (R. 1-1 ¶ 9), but then conceded in his response to respondents' first motion for summary judgment in the district court that he could not state a claim for malicious prosecution because he could not show a favorable termination, as required under that state-law cause of action (R. 17 at 3 & n.4, 7 n.8).[2] The district court accepted this admission and entered summary judgment in favor of respondents on petitioner's malicious prosecution claim. Pet. App. 33-34. He did not re-plead that claim in his amended complaint. Instead, in his response to respondents' second motion for summary judgment, he again conceded that he did "not have a state court malicious prosecution action, because the prosecutor has averred that [petitioner's] case was not dismissed on grounds of innocence." R. 30 at 10. Thus, petitioner has waived any claim for damages based on a malicious prosecution theory.

b.i. Even if the issue of the damages available for a Fourth Amendment violation were not waived, this Court's review is premature. At the outset, of course, the portion of petitioner's confinement for which he can hold the police officers who arrested him liable would be important only in the event that the accrual rule that the court of appeals applied is changed in a manner that renders petitioner's Fourth Amendment claims timely. Otherwise, petitioner has no entitlement to damages at all, and the determination what measure of damages is appropriate for timely Fourth Amendment claims would be wholly advisory and of no benefit to petitioner whatsoever. Beyond that, both of petitioner's Fourth Amendment claims depend, at bottom, on proof that he was falsely arrested. Thus, even if this Court were to change the accrual rule in a manner that favored petitioner, a determination of the applicable measure of damages would still be premature be-

[2] The prosecutor moved to *nolle prosequi* the case after the Illinois Appellate Court barred the use of petitioner's confession, but not because of any indication that petitioner was innocent. R. 11, Exh. C ¶¶ 6-7.

cause petitioner will not be entitled to damages for either a false arrest or false confession until he succeeds in proving to a fact-finder that he was in fact the victim of a false arrest. Only then will the period for which he is entitled to collect damages become relevant. This Court should save its review of this issue for a case in which it is actually presented.

ii. And petitioner's "second approach" "false confession" theory has yet a third strike against review in this case. This theory is premised on the notion that it is unlawful under the Fourth Amendment for a police officer to exploit an unlawful arrest to coerce a false confession, rendering the entirety of the plaintiff's custody unreasonable under the Fourth Amendment. See CA7 Wallace Br. 15. But in this case there has already been a judicial determination that respondents did not coerce petitioner's confession and that the confession in fact was voluntary. In the state-court criminal proceedings, petitioner moved to suppress the confession relying upon the same allegations of coercion he pleads in his amended complaint in this action. R. 37, Exh. D1; see also R. 25 (petitioner's amended complaint). After conducting extensive hearings, the circuit court denied his motion. R. 33 ¶¶ 46-56. Petitioner did not appeal this determination. *Id.* ¶ 59. Collateral estoppel consequently bars the re-litigation of the voluntariness of his confession in a subsequent action. See Brief of Defendants-Appellees at 35-43, *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (No. 04-3949). With the extant judicial determination that petitioner's confession was voluntary, he should not be heard on any claim that respondents wrongfully obtained his confession.

c. Finally, even if petitioner had not waived a section 1983 Fourth Amendment malicious prosecution claim, his admission that he cannot prove that the criminal proceedings terminated in his favor is fatal to that claim under the view of virtually every Circuit that recognizes such a claim. See, *e.g.*, *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir.

2004); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1244 (10th Cir. 2003); *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003); *Uboh v. Reno*, 141 F.3d 1000, 1004 (11th Cir. 1998); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996).[3] There is little doubt that this Court, too, would view favorable termination as crucial to the existence of any section 1983 Fourth Amendment malicious prosecution claim. See *Heck*, 512 U.S. at 484 ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior

[3] The Eighth Circuit has not set forth the elements of a section 1983 malicious prosecution claim. See *Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001) (stating malicious prosecution would not be actionable under section 1983 unless plaintiff also alleges constitutional injury, but not specifying any other required elements of claim). But there is no reason to believe that it, too, would not require favorable termination. Most, if not all, of the state courts in the Eighth Circuit require favorable termination for malicious prosecution claims. See, *e.g.*, *Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 861 n.3 (8th Cir. 2002) (applying Missouri law); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (applying Minnesota law); *Dean v. Olibas*, 129 F.3d 1001, 1004 (8th Cir. 1997) (applying Arkansas law); *Heib v. Lehrkamp*, 704 N.W.2d 875, 884 n.8 (S.D. 2005); *Holmes v. Crossroads Joint Venture*, 629 N.W.2d 511, 526 (Neb. 2001); *Richmond v. Haney*, 480 N.W.2d 751, 755 (N.D. 1992). See also *Whalen v. Connelly*, 621 N.W.2d 681, 687-88 (Iowa 2001) (requiring termination of proceeding by acquittal or discharge) (as amended on denial of rehearing).

The Sixth Circuit's cases have not been uniform on the issue whether the cause of action exists. See, *e.g.*, *Thacker v. City of Columbus*, 328 F.3d 244, 258-59 (6th Cir. 2003). The cases recognizing the claim have not fully set forth all the required elements based on their finding that the existence of probable cause alone bars the claim. See, *e.g.*, *id.* at 259. Yet, like the Eighth Circuit, the states within the Sixth Circuit include favorable termination among the elements of a malicious prosecution claim. See, *e.g.*, *Parrish v. Marquis*, 172 S.W.3d 526, 530 (Tenn. 2005); *Matthews v. Blue Cross & Blue Shield of Michigan*, 572 N.W.2d 603, 609-10 (Mich. 1998); *Trussell v. General Motors Corp.*, 559 N.E.2d 732, 734-35 (Ohio 1990); *Farmers Deposit Bank v. Ripato*, 760 S.W.2d 396, 399 (Ky. 1988).

criminal proceeding in favor of the accused."). Given petitioner's concession that he cannot establish favorable termination, a Circuit split on the availability of a Fourth Amendment malicious prosecution claim, assuming *arguendo* that such a split exists, is utterly irrelevant to petitioner's case. Even if the Court were to recognize a section 1983 Fourth Amendment malicious prosecution claim, that cause of action would be of no use to him; and that issue should not form the basis for this Court's decision to grant the petition.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be granted limited to an issue embraced within question one of the petition, namely whether a Fourth Amendment claim of unlawful seizure arises at the time of the seizure or later, when the criminal proceedings against the civil rights plaintiff are terminated or a conviction is overturned. The petition should be denied with respect to question two presented in the petition.

Respectfully submitted,

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May 18, 2006