No. 11-1328

In The Supreme Court of the United States

BENJAMIN CUNNINGHAM,

Petitioner,

—v.—

DUSM SEAN McCLUSKEY, DUSM THOMAS BALLARD, DUSM NICHOLAS RICIGLIANO, DUSM MANNY PURL, DUSM JERRY SANSEVERINO, and NYPD DETECTIVE MARY HALPIN,

Respondents,

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL A. EIGERMAN
Counsel of Record for the Petitioner
260 Madison Avenue, 16th Floor
New York, New York 10016
(212) 213-6866

May 2, 2012

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028

QUESTIONS PRESENTED

1. Defendant United States marshals, seeking a drug fugitive, invaded the petitioner's home without warrant, consent, or exigent circumstance, in violation of plain established constitutional law. When petitioner brought a *Bivens* action, they sought qualified immunity. The objective reasonableness required for that defense depended on information from an unidentified tipster. The content of this information, however, was disputed, and much about the tipster was unresolved. The court granted the defendants summary judgment in light of their belief about the fugitive's whereabouts, but the court did not examine or determine whether the belief was objectively reasonable. When, in a Fourth Amendment case, qualified immunity is granted without a finding that the defendants' underlying belief was objectively reasonable, is the balance the Court created through *Harlow v. Fitzgerald* undone and is the citizen's right to civil remedy vitiated?

2. Where summary judgment of qualified immunity from liability for hardcore Fourth Amendment violations is granted on the basis of dubiously admissible and contradictory reports, are the barriers to summary judgment so lowered in favor of law enforcement as to endanger citizen rights and call for this Court's intervention to reassert the standard?

3. Where the plaintiff appeals from a grant of immunity from liability for serious constitutional violations and seeks, on appeal, the very result that was recommended in district court by the Magistrate Judge, does the dismissal of such an appeal as "frivolous" without expository decision and without allowing briefs or argument from either party, meet the standards of review that this Court has established for the courts of appeal?

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BASIS OF SUPREME COURT JURISDICTION

The Court of Appeals for the Second Circuit entered its order dismissing the appeal on January 13, 2012. Appellant served and filed his motion to reconsider on January 27, 2012. The Court of Appeals entered its order denying the motion to reconsider on February 2, 2012. The time to appeal began to run from denial of the motion to reconsider, *U.S. v. Ibarra*, 502 U.S. 1, 4 & Fn. 2 (1991); *Communist Party v. Whitcomb*, 414 U.S. 417, 445-46 (1973), and this petition is timely under Rule 13. Supreme Court jurisdiction rests 28 U.S.C. § 1254 (1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment 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 seize.

U.S. CONST. amend. IV.

The summary judgment rule is, in pertinent part:

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

. . . .

(c) Procedures.

(1) *Supporting Factual Positions.* A party asserting that that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular part of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purpose of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or

presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact is Not Supported by Admissible *Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

- - - -

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

. . . .

28 U.S.C. A. Fed. R. Civ. P. 56 (Supp. 2011) (amendments effective December 1, 2010).

STATEMENT OF THE CASE

A citizen's exercise of the right to private civil action for unabashed central Fourth Amendment violations is defeated by a decision that elides the objective reasonableness requirement for the

qualified immunity defense and disrupts the structure this Court created to protect both citizens and law enforcement. The decision is dangerous, too, in its seeming assumption that the strictures of summary judgment may be softened in the policy interest of affording qualified immunity determination before trial. As Fourth Amendment rights are of utmost value, these errors warrant review in this Court.

Jurisdiction Below

The court of first instance is the United States District Court for the Southern District of New York. That court had original and supplemental jurisdiction of the action pursuant to 28 U.S.C. §§ 1331 and 1367 in that the claims arose under the Constitution and laws of the United States and, in particular, the Fourth Amendment to the United States Constitution and the doctrine of *Bivens v. Six Unknown Fed. Narcotic Agents,* 403 U.S. 388 (1971). (1a-7a)

The substantive opinion below is reported as *Cunningham v. McCluskey,* 2011 WL 3478312 (S.D.N.Y. Aug. 8, 2011) and is reproduced at 62a-71a here.

Background

Petitioner Benjamin Cunningham owns a three-family house in the Borough of the Bronx, in New York City, where he lives with his wife and small daughter in the ground-floor apartment. In the early morning of November 29, 2005 the defendant

United States marshals invaded his home, searching for a narcotics fugitive, Terrance Cunningham, petitioner's brother. They had a North Carolina arrest warrant for the fugitive, which they did not show the petitioner. (28a ¶ 3) There was no search warrant. There was no emergency. There was no consent.

The defendants' route to the petitioner's home remains murky. They had just searched his mother's apartment elsewhere in the Bronx. DUSM O'Callaghan swore that the mother telephoned petitioner. The marshals "surmised" that she "likely called Benjamin Cunningham that we were at her apartment looking for Terrance Cunningham." Most of the marshals left for petitioner's home to see whether the fugitive was there. (12 ¶¶ 8-9) DUSM Ricigliano declared under penalty of perjury that defendants went to Petitioner's home because they determined that the fugitive was not with the mother; he did not mention a telephone call. (29a ¶ 6-7) Several marshals were already guarding petitioner's house on information from a confidential source whom defendant Ricigliano could not identify. The failure to identify the informant, to indicate his (or her) reliability, or determine what information he (or she) actually gave is a crucial defect in the result below.

When the defendants announced their presence, the petitioner opened the door in his underwear. Defendants had their guns out and pointing. One of them grabbed the petitioner by his undershirt and yanked him out through his door. Defendants held him in front of his house clothed in

his underwear, while they rushed in to search the premises. They pulled open drawers, rifled papers, pulled out the pockets of hanging clothes, examined his absent wife's clothes and underclothes, and logged on to his computer. Mr. Cunningham demanded they stop and leave. Defendant Ricigliano stted that the petitioner tried to "interfere" with the defendants' search by "repeatedly ordering us to leave. (31a ¶ 13) One of the defendants punched petitioner in the stomach and handcuffed him behind his back. Defendant Ricigliano stated they handcuffed him because he might impede the search and because they thought he might be the fugitive. (29a ¶ 13) Plaintiff fled, still in his underwear and handcuffed, and collided with a bus. The bus passengers were transit police officers. Defendant Federal Marshals told them Mr. Cunningham was a federal prisoner in custody and physically carried him back to the house by his bare feet and handcuffs. Defendants finished their search and left without comment. New York City Police and EMS personnel took Plaintiff to the hospital. (15a-20a)

In January 2006, the fugitive, Terrence Cunningham, was apprehended in the State of Maryland. There is no claim of any communication at any relevant time between petitioner Benjamin Cunningham and the fugitive.

The Informant

Defendant Ricigliano attributes to an unidentified informant information that Terrance Cunningham might be living in the Bronx with his mother but also information that he might be living

with either his mother or his brother, the petitioner, and that he was seeking dialysis in emergency rooms. Defendant Ricigliano visited a Bronx hospital and was told of a black dialysis patient who left when his identity was challenged. (26a-27a)

There is no claim that any defendant personally had communication from the informant. There was no evidence that any defendant knew who he (or she) was. Defendants gave no indication why he (or she) might be deemed reliable.

On July 29, 2010 Chief Magistrate Judge Fox ordered the defendants to produce documents "pertaining to the 'reliable confidential source,' as well as the arrest warrant, including any affidavit(s) or other document(s) submitted when the application was made." (14a-16a) No documents pertaining to the informant were produced then or later. The Magistrate repeated the order on November 12, 2010 (33a-34a) and orally in three telephone conferences. The defendants never made responsive production and never identified any informant.

There is no claim that any defendant personally had communication from the informant. In defendant Ricigliano's declaration under penalties of perjury supporting defendants' motion for summary judgment the informant is not identified or even located and the declarant does not know to whom the confidential informant communicated: it was certainly not DUSM Ricigliano.

Proceedings Below

Benjamin Cunningham commenced the litigation with the aid of legal counsel. The complaint, alleging unreasonable search and seizure in violation of the fourth amendment, was served in 2005. (3a-9a) In 2007 the case was dismissed on the ground of plaintiff's counsel's noncompliance with procedural orders and the Judge's rules. After the dismissal was vacated, Mr. Cunningham separated from his counsel and thereafter conducted motion practice and discovery in the lower Court on a pro se basis.

On September 8, 2010 the defendants moved under Rule 12(b)(6) to dismiss the complaint. Mr. Cunningham's answering papers included a Federal Tort Claims cause and an affidavit of his brother, from prison. The brother swore that he had not told anyone that he had resided with Mr. Cunningham and had not told anyone Mr. Cunningham's address. (35a) Where the confidential tipster, if any, got his information does not appear in the record.

DUSM Ricigliano's section 1746 declaration was in support of the motion. (23a-28a) He had been "co-leader" of the task force pursuing Terrance Cunningham. (29a ¶2) Notable in Ricigliano's account is that defendants went to petitioner's house because of the confidential informant and their determination that the fugitive was not with the mother — not because of the mother's telephone call, which he does not mention. Nor does he mention a reason to believe the fugitive was within petitioner's home at the time.

The Court converted the motion to one under Rule 56. On June 22, 2011 the magistrate recommended partial summary judgment. The pro se plaintiff having omitted the predicate notice, his Federal Tort Claims Act count was stricken. His Bivens claim, however, required trial. The magistrate found it undisputed that the defendant marshals had entered the petitioner's home without consent or warrant. There was no claim of exigent circumstances. Only if the defendants had a reasonable belief that the fugitive resided with petitioner could they merit qualified immunity.

The only basis, however, for such belief was the tip of the unidentified informant. In one report, that tip was merely that the fugitive lived with the mother, not petitioner. Under the Ricigliano declaration, in contrast, the informant had advised the Service that Terrance lived with either of them. On this inconsistent evidence the magistrate found material questions of fact that compelled denial of summary judgment. (9-10)

On August 8, 2011, the district judge adopted the report as to factual findings, with augmentations, but modified the magistrate's legal conclusions. She granted summary judgment on the qualified immunity defense. The court deemed it

> undisputed that Defendants believed the fugitive . . . was living in the Bronx with a member of his family. It is further undisputed that Defendants or other members of the fugitive task force conducted a search of Plaintiff's mother's house. . . . During that

> search, Plaintiff's mother made a telephone call to Plaintiff to inform him that Defendants were searching for the fugitive. . . . When Defendants arrived at Plaintiff's house they found him peering out between the blinds, cell phone in hand, apparently awaiting their arrival.

(68a)

Therefore, the district court held, a jury "could conclude" that reasonable, professional law enforcement officers "could disagree (1) whether it was objectively reasonable to believe that the fugitive resided with the Plaintiff and was on the premises and (2) whether a search of Plaintiff's home was therefore constitutionally permissible." (10) On this view of the qualified immunity standard, and of the summary judgment standard, the district court on August 11, 2011 entered summary judgment dismissing petitioner's Fourth Amendment case. 68a

Mr. Cunningham made a timely appeal, but immediately that his appellate counsel filed his notice of appearance, the Second Circuit dismissed the appeal as frivolous. There had been no brief from any party. There had been no oral argument. No appendix had been filed. Apart from citing one categorically abusive immigration matter for the proposition that the court may dismiss a frivolous appeal, there was no opinion. Plaintiff-petitioner moved for reconsideration, urging that undisputed home-invasion fourth amendment violations could not be frivolous and, further, that it could not be

frivolous to ask for a result already reached by a United States magistrate judge.

That motion was denied on February 2, 2012 in one sentence.

REASONS TO GRANT THE WRIT OF CERTIORARI

I

Scanting the Objective Reasonableness Requirement for Qualified Immunity Will Radically Unbalance the Concept and May Leave Citizens Without Enforceable Four Amendment Protection

This lawsuit is a citizen's attempt to vindicate his constitutional rights. His right to be secure in his home, at issue here, is one of the most cherished

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1970), this Court assured citizens a remedy in damages for federal violations of their Fourth Amendment rights. The Court noted the great capacity for harm of an "agent acting — albeit unconstitutionally — in the name of the United States" and recognized that "the Fourth Amendment operates as a limitation on the exercise of federal power." Id. at 392. "It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority." Id. Accordingly, this Court held that persons injured by a federal officer's violation of the Fourth Amendment has a right of action for money damages against the agent. Id. at 397. Justice Harlan noted in his

frequently cited concurrence that "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." Id. at 407.

"[P]hysical entry of the home is the chief evil against which the wording of he Fourth Amendment is directed." *Wilson v. Layne*, 526 U.S. 603, 610 (1999), quoting, United States v. District Court, 407 U.S. 297, 313 (1976). Therefore "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States,* 533 U.S. 27, 31 (2001).

This Court has summarized its decisions:

> Because the right of a man to retreat into his own home and there be free from unreasonable government intrusion stands at the very core of the Fourth Amendment . . . our cases have firmly established the basic principle of Fourth Amendment law that searches and seizures inside the home without a warrant are presumptively unreasonable.

Groh v. Ramirez, 540 U.S. 551, 559 (2004) (citations and internal quotation marks omitted).

To be sure, the citizen does not have private rights only. Citizens have rights collectively as well, including the right to effective law enforcement. This interest is protected in Bivens litigation, and litigation under section 1983, by the defense of

qualified immunity. *Camreta v. Greene*, 131 S. Ct. 2020, 2030-31 (2011).

The qualified immunity defense turns on objective reasonableness. The criterion of objective reasonableness is meant to spare officials, especially law enforcement officers, not just from unmerited damages but also the unwarranted demands of a drawn-out lawsuit.

> We . . . hold that government officials performing discretionary functions, generally 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. . . .
>
> . . . .
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excess disruption of government and permit the resolution of many insubstantial claims on summary judgment. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. . . .
>
> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by

> a test that focuses on the objective legal reasonableness of an officials' acts.

Harlow v. Fitzgerald, 457 U.S, 800, 818-19 (1981).

Salient in the qualified immunity defense that Harlow lays out is whether the law defendants violated was so well established that they should have known it and whether, if they believed their acts were constitutional, that belief had an objectively reasonable basis.

> An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment. . . . This inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.

Pearson v. Callahan, 555 U.S. 223, 243-44 (2009).

A very recent Tenth Circuit decision focused the familiar rule:

> [T]o avoid judgment for the defendant based on qualified immunity, the plaintiff must show that the defendant's actions violated a specific statutory or constitutional right, and that the constitutional or statutory rights the defendant allegedly violated ere clearly established at the time of the conduct at issue.

Toev v. Reid, 2012 WL 1085802 (Apr. 2, 2012) at *3.

In Benjamin Cunningham's case, the defendants' actions obviously violated specific constitutional rights — Benjamin Cunningham's Fourth Amendment, and ancient common law, rights to be secure in his home. The rights they assaulted had been well established for centuries, and the defendant marshals must be held objectively to know them. The marshals knew, too, that they did not have a warrant to search the home and that Mr. Cunningham had not consented to their entry. They physically held him outside. When he was allowed back inside, the defendants handcuffed him. Nor did they claim exigent circumstances for their entry. See *Payton v. New York*, 445 U.S. 573, 583 (1979)

A singularly relevant district court decision, *United States v. Lucky*, 701 F. Supp. 2d 464 (S.D.N.Y. 2009), underscores the defendants' knowledge of the subject rights. *Luckey* arose from a fugitive hunt analogous to the one here. Id. at 465. There, as here, the marshals had a warrant for the fugitive but not for the third party occupant and, as here, did not have a search warrant. Id. at 469. There, unlike here, the marshals actually found evidence for criminal prosecution of an apartment resident. Id. But there, unlike here, Fourth Amendment rights were upheld — in that instance by evidence suppression. Id. at 469–70. DUSM Ricigliano, co-team leader in the invasion of Benjamin Cunningham's home and declarant-proponent of the motion for summary judgment in this case, was the officer conducting the search in Luckey. He has to have known that his evidence was suppressed, and the prosecution dismissed, on account of his Fourth Amendment violations.

In Benjamin Cunningham's case the magistrate to whom the court delegated review of the summary judgment motion would have applied the Harlow criteria. He noted that the invasion of petitioner's home violated the Fourth Amendment. (appx) He noted that the Fourth Amendment rights were long established. He noted that the defendant marshals must know that their conduct violated those rights.

If they were to have qualified immunity, it must rest on an objectively reasonable belief that the circumstances legitimatized their invasion of Benjamin Cunningham's house. Such a belief could be objectively reasonable if, but only if, it was objectively reasonable for them to believe that the fugitive resided in Benjamin Cunningham's home. But on this crux of qualified immunity, the reasonableness of defendants' belief, there could not be summary judgment. Specifically, it could not be resolved whether the "confidential informant" had advised that the fugitive resided with petitioner or his mother, or only with the mother. If he (or she) gave the second advice, the supposed belief was not objectively reasonable. The fundamental element belonged to the jury, and summary judgment would have to be denied.

The district judge did not straightforwardly address this application of the Harlow criteria, much less rebuke it. Instead, she simply stated that it was "undisputed" that the marshals reasonably believed that Terrance Cunningham lived in the petitioner. The court further stated that during the defendants' search of the mother's apartment, the mother

telephoned the petitioner to inform him that they were searching for the fugitive, and when they reached the petitioner's house, he was peering at them, cell phone in hand. The district court held that this was enough to authorize a jury to conclude that reasonable law enforcement officers "could disagree (1) whether it was objectively reasonable to believe that the fugitive resided with the Plaintiff and was on the premises and (2) whether the search of Plaintiff's was therefore constitutionally permissible." (appx at 10) The court granted summary judgment.

The district court's decision rambles from the factual record and, most seriously to the attention of this Court, guts the objective reasonableness criterion that numerous consistent decisions have made vital to qualified immunity. The court's finding as what it was "undisputed" that the marshals believed does not answer the criterion. The question is what it was objectively reasonable for them to believe. This, the court did not treat at all. The limits of qualified immunity are defined "essentially in objective terms." Harlow v. Fitzgerald, supra, 457 U.S. at 818. By not examining and resolving the objectively reasonable basis of this belief, the court risked granting a "license to lawless conduct." Cf. i.

The Magistrate had determined that objective reasonableness of such belief could not be found on summary judgment. That determination, not explicitly rejected by the court — because, it is respectfully submitted, it could not be explicitly rejected — had to be allowed to stand. On that crux, summary judgment should have been to be denied.

The court's allusion to the mother's telephone call is not better. It contributes nothing to summary judgment. DUSM O'Callaghan swore that unspecified marshals "surmised" that she had called Petitioner to warn him. There is no statement of fact. And DUSM Ricigliano does not evidence the mother's telephoning at all. On his evidence, the marshals went to Petitioner's house, or those already surrounding it presented themselves, for the sole reason that they had determined that the fugitive was not with at the mother's apartment.

"No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Groh v. Ramirez*, 540 U.S. 551, 564 (2004).

No undisputed factual basis for an objectively reasonable belief that invading Benjamin Cunningham's home was constitutional undergirded this grant of summary judgment. Such grant where the fundamental criterion of qualified immunity has not been proved to the exclusion of factual dispute suggests a policy decision on behalf of law enforcement. If so, it is not the qualified immunity contouring of the Bivens right of action; it is not even the rule of law.

The United States Supreme Court is implored take this case to determine whether the true, serious, factual element of objective reasonableness needs to be restored to qualified immunity

jurisprudence so that citizens may continue fairly to assert and defend their Fourth Amendment rights.

II

The Lower Court's Easy Summary Judgment Standard in Favor of Law Enforcement Would Effectively Negate the Citizen's Right to Redress Under Bivens and Section 1983

Tightly entwined with the objectivity standard for qualified immunity are the stringent requirements for summary judgment. To be sure, the Court expressly contemplated law enforcement officers' interposing the defense on summary judgment. When merited, the procedure would avoid, beyond wrongful damages, possibly inhibiting litigation burdens. *Harlow v. Fitzgerald*, supra, 457 at 818.To this end, it is a declared goal of the Harlow formulation to afford government defendants a procedurally early opportunity, on its objective criteria, for summary judgment.

Nonetheless, the Court did not contemplate in Harlow, and there is nothing in its progeny to suggest, a lowering of the requirements for summary judgment.

Thus, it is fundamental that on a motion for summary judgment dismissing a Bivens or section 1983 lawsuit on the defense of qualified immunity, that each element of qualified immunity is material and each must be proved beyond factual dispute. This is the forceful instruction of *Anderson v. Liberty Lobby,* 477 U.S. 242 (1985). That case was a

defamation action subject to the clear and convincing evidence standard of *New York Times v. Sullivan*. Id. at 245. Did that standard govern on summary judgment as at trial? In holding that it did, id. at 255, the Court declared that all material elements of the underlying substantive law are to be treated on summary judgment, pursuant to such substantive law itself, and require resolution. If they cannot be, and specifically cannot be resolved in favor of the movant, summary judgment is denied. Id. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. The Court did not "suggest that trial courts should act other with caution in granting summary judgment[.]" Id.

On the motion of the defendants-respondents here for summary judgment dismissing the petitioner's complaint, the substantive law was that of qualified immunity as handed down by this Court. It is substantive law that the marshals could not believe that their invasion of Petitioner's home without search warrant, consent, or exigent circumstances was reasonable. *Groh v. Ramirez*, supra, 540 U.S. at 564. Whether a belief that the fugitive resided with Benjamin Cunningham was objectively reasonable would be a question of fact.

The movant marshals could prevail on that aspect by presenting evidence sufficient to eliminate factual dispute as to the objective reasonableness of their supposed belief. Fed. R. Civ. P. 56(a). In failing to do so they merely failed to do the impossible. The only basis for such reasonable belief, as the Magistrate pointed out, resting his conclusion on the

record, had to be the tip of the unidentified informant. The evidence as to what the supposed tip conveyed was self-contradictory and required a determination that only a jury could make. Denial of summary judgment had to follow.

In supervising discovery the Magistrate had again and again ordered production of all document pertaining to the "confidential source." Defendants moved for summary judgment despite never complying. It was the motion opponent, petitioner Benjamin Cunningham, who put forth admissible evidence, an affidavit of the fugitive himself that he had never told anyone he lived with the petitioner. It was up to the defendants-movants to reply with some kind of alternative informational source for their putative tipster. Nothing was forthcoming.

No declarant or affiant on the defendants-movants' behalf knew so much of the informant as his (or her) name or when or to whom this informant communicated. Defendant Ricigliano's declaration was not made on personal knowledge as to this all-important issue. Fed. R. Civ. P. 56(c)(4). His assertions about the supposed informant were second- or third-level hearsay — a deficiency itself enough to deny summary judgment. Rule 56(c)(2).

The weight of the admissible evidence on this motion favored, if either party, the individual citizen seeking a remedy in damages for the uncontested flagrant violations of his most basic Fourth Amendment rights. The respondents' motion should have been denied, as the Magistrate recommended,

for the reason he stated, as well for the inadmissibility of defendants' evidence.

Dismissal of the case on the defense of qualified immunity was an unauthorized modification of summary judgment law and an extension of credibility to law enforcement that is not foreseen the Court's design for qualified immunity and not acceptable to the Constitution. The protection of citizen rights would vitally benefit if this Court were to rule explicitly that there is no exceptional standard, or pro-government presumption, where Fourth Amendment defendants interpose a claim of qualified immunity and move for summary judgment.

CONLUSION

Because of the vital and fundamental Fourth Amendment concerns at stake for the numerous citizens who find themselves in the situation of this petitioner, the United States Supreme Court should accept this case for review and grant its writ of certiorari.

Daniel A. Eigerman
Attorney for the Petitioner
260 Madison Avenue
16th Floor
New York, New York 10016
(212) 213-6866

May 2, 2012

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of February, two thousand and twelve,

Present: Ralph K. Winter,
Peter W. Hall,
Denny Chin,

Circuit Judges.

Benjamin Cunningham,

Plaintiff - Appellant,

v.

John Does, #1-#12, Thomas Ballard, DUSM, Mary Halpin, NYPD Detective, Sean McCluskey, DUSM, Manny Puri, DUSM, Nicholas Ricigliano, DUSM, Jerry Sanseverino, DUSM,

Defendants - Appellees,

United States Marshals Services, Timothy J. O'Callaghan,

Defendants.
