APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals,

Fifth Circuit.

Michael David MELTON, Plaintiff–Appellee,

v.

Kelly D. PHILLIPS, Defendant–Appellant.

No. 15-10604.

Nov. 13, 2017.

Before STEWART, Chief Judge, and JOLLY, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES,* GRAVES, HIGGINSON, and COSTA, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge, joined by STEWART, Chief Judge, JOLLY, JONES, SMITH, CLEMENT, PRADO, OWEN, SOUTHWICK, HAYNES,* and HIGGINSON, Circuit Judges:

Michael David Melton alleges that he was arrested in violation of the Fourth Amendment for an assault committed by another man with the same first and last names. He seeks to hold Deputy Kelly Phillips, who took the original incident report, liable for his arrest under 42 U.S.C. § 1983. Deputy Phillips moved for summary judgment in district court, asserting the

* Judge Haynes concurs in the judgment and concurs as to Parts I and II.B only.

defense of qualified immunity. The district court determined that fact issues precluded summary judgment on one of Melton's Section 1983 claims. Because Deputy Phillips is entitled to summary judgment even when construing all the facts in the light most favorable to Melton, we REVERSE the district court's order and RENDER summary judgment on Melton's remaining Section 1983 claim against Deputy Phillips.

I.

In June 2009, Deputy Phillips interviewed an alleged assault victim and filled out an incident report identifying the alleged assailant by the name "Michael David Melton."[1] After Deputy Phillips submitted the report, an investigator with the Sheriff's Office began investigating the assault. A year later, the alleged victim provided the investigator with a sworn affidavit identifying the alleged assailant as "Mike Melton." The Hunt County Attorney's Office then filed a complaint against "Michael Melton." The alleged assailant's first and last names are the only identifying

[1] Melton's briefs argued that the incident report's use of the middle name "David" erroneously identified him as the assailant. However, the record does not show that this information ever made its way to the judge who issued the warrant. As Melton has conceded, the record does not show that the incident report itself was presented to the judge. OA at 41:51–42:11. Moreover, no erroneous information from the report was incorporated into the complaint that was presented to the judge: Melton has conceded that the complaint is accurate. OA at 40:55–41:51.

information contained in the complaint, and their accuracy is undisputed. Four days after the complaint was filed, a Hunt County judge issued a *capias* warrant correctly identifying the assailant as "Michael Melton."[2] Two years after the judge issued the warrant, Melton was arrested on assault charges and detained for sixteen days before being released on bond. It is undisputed that Deputy Phillips's involvement in the chain of events that led to Melton's May 2012 arrest and detention ended with the incident report in June 2009. *Melton v. Phillips*, 837 F.3d 502, 505 (5th Cir. 2016).

The assault charges against Melton were ultimately dismissed for insufficient evidence. Melton then sued Deputy Phillips under 42 U.S.C. § 1983, alleging that Deputy Phillips was responsible for his arrest under *Franks* and *Hart* because Deputy Phillips included false information in his incident report.[3]

---

[2] The record does not contain any document labeled as a warrant application or probable cause affidavit. The warrant appears to have issued based on a complaint filed by an Assistant Hunt County Attorney. However, the briefing by both parties assumes that a complaint that leads to a *capias* warrant is the equivalent of a warrant application for purposes of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and *Hart v. O'Brien*, 127 F.3d 424 (5th Cir. 1997). We accept their assumption for purposes of deciding this case without reaching the question because the issue has not been briefed, is not disputed by the parties, and would not alter the outcome here.

[3] Melton also brought numerous state-law claims against Deputy Phillips and a variety of state-law and Section 1983 claims against Hunt County, the Hunt County Sheriff's Department,

Deputy Phillips asserted the affirmative defense of qualified immunity and provided an affidavit stating broadly that the identifying information in the incident report "would have been based solely on what I was told by [the victim]." In his affidavit, Phillips also averred, as is stated in the incident report, that the victim provided the assailant's first name, last name, gender, ethnicity, and date of birth.

Melton responded by alleging that Deputy Phillips did not obtain any identifying information from the victim other than the assailant's first and last names. Melton relied on an affidavit by former Hunt County Patrol Lieutenant Brian Alford for his explanation of how Deputy Phillips obtained the information in the incident report. According to Alford's affidavit, victims generally cannot provide the exact date of birth or driver's license number of an offender who is not a family relation. Therefore, Alford averred that Deputy Phillips must have obtained the information from a database called a P.I.D. used by the Hunt County Sheriff's Office. Alford further stated that Melton and the true assailant have no identifying characteristics in common other than their first and last names. Accordingly, Alford inferred that Deputy Phillips must have obtained the information in the incident report from the P.I.D. without asking the victim to verify any information other than first and last names. Finally,

---

and the Hunt County Sheriff. However, the only claim at issue in this interlocutory appeal based on qualified immunity is Melton's Section 1983 claim based on Franks.

Alford's affidavit averred that a reasonable officer would not rely on the P.I.D. without verifying additional information beyond first and last names.

The district court determined that Alford's affidavit created a genuine issue of material fact regarding whether Deputy Phillips obtained identifying information from the victim, whether he cross-checked that information against the P.I.D. results, whether he used the P.I.D. system at all, and whether his use of the P.I.D. system was improper. The district court reasoned that these questions were material to recklessness, which is an element of liability under *Franks*. Accordingly, the district court denied Deputy Phillips's motion for summary judgment on qualified immunity with respect to Melton's *Franks*-based Section 1983 claim.[4]

Deputy Phillips appealed the district court's denial of summary judgment. Interlocutory appeal was appropriate in this case because Deputy Phillips had raised the defense of qualified immunity, which is an immunity from suit that must be considered at the earliest possible stage of litigation. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). A divided panel of this court affirmed the district court in part and dismissed the appeal for lack of jurisdiction to the extent it challenged the genuineness of the factual dispute over recklessness. *Melton*,

[4] The district court granted Deputy Phillips's motion for summary judgment on Melton's Section 1983 claims that were based on the Fifth Amendment, and those claims are not at issue here.

837 F.3d at 510. The panel majority further held *sua sponte* that, although *Jennings v. Patton*, 644 F.3d 297 (5th Cir. 2011), and *Hampton v. Oktibbeha County Sheriff Department*, 480 F.3d 358 (5th Cir. 2007), "grant[ed] qualified immunity to government officials who neither signed nor drafted warrant applications," these opinions lacked precedential value because, in the panel majority's view, they contradicted this court's earlier decision in *Hart*. *Melton*, 837 F.3d at 509. Accordingly, the panel majority *sua sponte* overruled *Jennings* and *Hampton*. The panel majority also rejected Deputy Phillips's alternative argument that he was entitled to qualified immunity under the independent intermediary doctrine.

The dissenting opinion would have held that the requirement of participation in preparing an application for a warrant in *Jennings* and *Hampton* is consistent with *Hart*'s requirement that information be provided "for use in an affidavit in support of a warrant." *Id.* at 513 (Elrod, J., dissenting). Because there was no evidence that Deputy Phillips provided information for the purpose of having it used in obtaining a warrant, the dissenting opinion would have held that Deputy Phillips was entitled to summary judgment under *Hart*, *Hampton*, and *Jennings*. *Id.* at 511–13. Deputy Phillips petitioned for rehearing *en banc*, and we granted the petition.

II.

"The denial of a motion for summary judgment

based on qualified immunity is immediately appealable under the collateral order doctrine to the extent that it turns on an issue of law." *Flores v. City of Palacios*, 381 F.3d 391, 393 (5th Cir. 2004). "Accordingly, we lack jurisdiction to review the *genuineness* of a fact issue but have jurisdiction insofar as the interlocutory appeal challenges the *materiality* of [the] factual issues." *Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016). We review the materiality of fact issues *de novo*. *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 634 (5th Cir. 1999). Where the district court has identified a factual dispute, we ask whether the officer is entitled to summary judgment even assuming the accuracy of the plaintiff's version of the facts. *Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004) (en banc).

"A good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available." *King v. Handorf*, 821 F.3d 650, 653 (5th Cir. 2016). To satisfy this burden and overcome qualified immunity, the plaintiff must satisfy a two-prong test. *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc). First, the plaintiff must show "that the official violated a statutory or constitutional right." *Id.* Second, the plaintiff must show that "the right was 'clearly established' at the time of the challenged conduct." *Id.* To avoid summary judgment on qualified immunity, "the plaintiff need not present absolute proof, but must offer more than mere

allegations." *King*, 821 F.3d at 654. Because the plaintiff is the non-moving party, we construe all facts and inferences in the light most favorable to the plaintiff. *Mullenix v. Luna*, —— U.S. ——, 136 S.Ct. 305, 307, 193 L.Ed.2d 255 (2015); *Tolan v. Cotton*, —— U.S. ——, 134 S.Ct. 1861, 1865, 188 L.Ed.2d 895 (2014).

As explained below, Melton's claim fails under both prongs of the qualified immunity analysis because, even assuming his version of the disputed facts and construing all facts and inferences in his favor, the connection between Deputy Phillips's conduct and Melton's arrest is too attenuated to hold the deputy liable under the rule that we reaffirm today or under any law that was clearly established at the time that Deputy Phillips filled out the incident report.

A.

Melton's argument that Deputy Phillips violated his Fourth Amendment rights is based on the Supreme Court's decision in *Franks* and our subsequent application of *Franks* in *Hart*. The defendant in *Franks* was convicted of sexual assault and sentenced to life imprisonment after the district court denied his motion to suppress evidence that had been seized pursuant to a search warrant. *Franks*, 438 U.S. at 160, 98 S.Ct. 2674. The warrant affidavit in that case stated that the affiant had personally spoken with two individuals who worked at the defendant's place of employment, who had both told him that the defendant often wore clothing that matched the description offered by the victim. *Id.* at 157, 98 S.Ct. 2674. At

the suppression hearing, the defendant requested the right to call these individuals to testify that they had never spoken personally with the affiant and that if they had spoken to another police officer, any information they would have provided about the defendant would have been "somewhat different" from what was recited in the affidavit. *Id.* at 158, 98 S.Ct. 2674. The district court refused to hear testimony on this point and denied the defendant's motion to suppress. *Id.* at 160, 98 S.Ct. 2674. The Supreme Court of Delaware affirmed, holding that a defendant may never challenge the veracity of a warrant affidavit. *Id.*

The Supreme Court of the United States reversed, determining that the Fourth Amendment entitles a defendant to a hearing on the veracity of a warrant affidavit if he can make a sufficient preliminary showing that the affiant officer obtained the warrant by recklessly including material falsehoods in a warrant application. *Id.* at 171–72, 98 S.Ct. 2674. Particularly relevant to our analysis here, the Supreme Court also observed in a footnote that an officer should not be permitted to "insulate" a deliberate misstatement "merely by relaying it through an officer-affiant personally ignorant of its falsity." *Id.* at 163 n.6, 98 S.Ct. 2674.

Our decision in *Hart* applied this principle to allow Section 1983 claims against an officer who "deliberately or recklessly provides false, material information for use in an affidavit in support of [a warrant]." *Hart*, 127 F.3d at 448–49 (citing *Franks*, 438

U.S. at 163 n.6, 98 S.Ct. 2674) (holding that assistant county attorney was entitled to qualified immunity because he did not act recklessly when he erroneously told an officer who was filling out a warrant application that the person to be arrested for suspected drug offenses was the wife of a known marijuana cultivator). In *Hampton*, we clarified that the holding in *Hart* does not extend to officers who neither prepared nor presented the warrant affidavit. *Hampton*, 480 F.3d at 365 (holding that two officers who did not prepare, present, or sign a warrant affidavit were entitled to qualified immunity whereas a third officer who prepared the warrant affidavit could be liable for falsely accusing the plaintiff of resisting another individual's arrest). We reaffirmed this principle in *Jennings*, holding again that an officer enjoys qualified immunity if he does not prepare, present, or sign a warrant application. *Jennings*, 644 F.3d at 300–01 (holding that judge who allegedly fabricated corruption charges was entitled to qualified immunity because there was no evidence that he prepared or presented the warrant application and the independent intermediary doctrine shielded him from liability on other grounds).

The panel opinion treated *Jennings* and *Hampton* as in conflict with *Hart*. *Melton*, 837 F.3d at 509. However, we, like the parties in this case, interpret our precedents to be in one accord. Thus, an officer who has provided information for the purpose of its being included in a warrant application under *Hart* has as-

sisted in preparing the warrant application for purposes of *Jennings* and *Hampton* and may be liable, but an officer who has not provided information for the purpose of its being included in a warrant application may be liable only if he signed or presented the application.

The parties have not asked us to overrule *Jennings* and *Hampton* in favor of a broader rule of liability, and *Franks* counsels against such a course. The Supreme Court expressly stated that the *Franks* rule is a narrow one and that its narrowness reflects six concerns. *Franks*, 438 U.S. at 167, 98 S.Ct. 2674. First, a broad Fourth Amendment rule could interfere with criminal convictions and be costly to society. *Id.* at 165–66, 98 S.Ct. 2674. Second, a broad rule would have minimal benefit in light of "existing penalties against perjury, including criminal prosecutions, departmental discipline for misconduct, contempt of court, and civil actions." *Id.* at 166, 98 S.Ct. 2674. Third, magistrates have the ability to inquire into the accuracy of an affidavit before a warrant issues, both by questioning the affiant and by summoning others to testify at a warrant proceeding. *Id.* Fourth, "[t]he less final, and less deference paid to, the magistrate's determination of veracity, the less initiative will he use in that task," despite the fact that the magistrate's scrutiny is "the last bulwark preventing any particular invasion of privacy before it happens." *Id.* at 167, 98 S.Ct. 2674. Fifth, the proliferation of challenges to the veracity of warrant applications could

unduly burden the court system and be abused by defendants as a source of discovery. *Id.* Sixth, a broad rule would be in tension with the fact that "[a]n affidavit may properly be based on hearsay, on fleeting observations, and on tips received from unnamed informants whose identity often will be properly protected from revelation," so that "the accuracy of an affidavit in large part is beyond the control of the affiant." *Id.* Accordingly, in light of the Supreme Court's guidance, we decline to adopt a broad new rule of officer liability *sua sponte*.[5]

---

[5] We observe that none of our sister circuits has applied *Franks* to circumstances in which an officer's connection to the plaintiff's arrest is as attenuated as in this case. *See, e.g.*, *KRL v. Moore*, 384 F.3d 1105, 1118 (9th Cir. 2004) (holding that, "because he had no role in the preparation of the ... warrant," an officer who was involved at every stage of an investigation was entitled to qualified immunity for material omissions in a warrant application); *see also United States v. Brown*, 631 F.3d 638, 640–42 (3d Cir. 2011) (applying *Franks* where non-affiant helped prepare the warrant affidavit); *Burke v. Town of Walpole*, 405 F.3d 66, 86 (1st Cir. 2005) (applying *Franks* where officer who "was centrally involved in the collection of evidence to be used to secure an arrest warrant" withheld evidence from the affiant); *United States v. Wapnick*, 60 F.3d 948, 950, 955–56 (2d Cir. 1995) (applying *Franks* where non-affiant "knowingly or recklessly made false statements to [the affiant] in connection with [the affiant's] preparation of the affidavit"); *United States v. DeLeon*, 979 F.2d 761, 762–63 (9th Cir. 1992) (applying *Franks* where the affiant was present during the non-affiant investigator's telephone interviews and based same-day affidavit on those interviews); *United States v. Calisto*, 838 F.2d 711, 712–13 (3d Cir. 1988) (ap-

Because we interpret our precedents to be consistent and do not choose to announce a broad new rule of liability, we apply the requirement that an officer must have assisted in the preparation of, or otherwise presented or signed a warrant application in order to be subject to liability under *Franks*.[6] It is undisputed that Deputy Phillips did not present or sign the complaint on the basis of which the *capias* warrant issued. Thus, Deputy Phillips can be subject to liability only if he helped prepare the complaint by providing information for use in it. *See Jennings*, 644 F.3d at 300–01; *Hampton*, 480 F.3d at 365.

To the extent that *Jennings* or *Hampton* could be read to immunize the provision of information for use in preparing a warrant application, we do not read

---

plying *Franks* where non-affiant informants provided information regarding a drug investigation to a police officer who then obtained a warrant); *United States v. Pritchard*, 745 F.2d 1112, 1118–19 (7th Cir. 1984) (applying *Franks* where non-affiant provided information to affiant and noting that *Franks* applies "when one government agent deliberately or recklessly misrepresents information to a second agent, who then innocently includes the misrepresentations in an affidavit"). Moreover, *Hart* fully addresses the panel's concern that an officer might seek to insulate a misstatement "merely by relaying it through an officer-affiant personally ignorant of its falsity" because it applies *Franks* to officers who provide information for use in a warrant application. *See Hart*, 127 F.3d at 448 (citing *Franks*, 438 U.S. at 163 n.6, 98 S.Ct. 2674).

[6] As noted above, Melton has not requested a broad new rule but only asserts that Deputy Phillips is liable under our circuit's existing case law.

them that broadly. As explained above, *Franks* liability can reach not only those fully responsible for preparing a warrant application, but also those who "deliberately or recklessly provide[ ] false, material information for use in an affidavit." *Hart*, 127 F.3d at 448. Likewise, "an officer who makes knowing and intentional *omissions* that result in a warrant being issued without probable cause" is also liable under *Franks*. *Michalik v. Hermann*, 422 F.3d 252, 258 n.5 (5th Cir. 2005) (citing *Hart*, 127 F.3d at 448).

Separate from a *Franks* liability context, an officer could be held liable for a search authorized by a warrant when the affidavit presented to the magistrate was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. 335, 344, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (citing *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). The *Malley* wrong is not the presentment of false evidence, but the obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant. In this situation, we have rightly recognized that liability should attach only to the "affiant and person who actually prepared, or was fully responsible for the preparation of, the warrant application." *Michalik*, 422 F.3d at 261. That is because an officer who only provides a portion of the information included in the affidavit has no way of knowing whether the "whole picture" painted by the evidence establishes probable cause. *Id*. As discussed above, *Franks* liability—our concern here—addresses

the distinct issue of false information in a warrant application.

Here, the fact issue that the district court identified was whether Deputy Phillips used the P.I.D. in an improper way while preparing the incident report. The district court determined that this fact issue was material to recklessness and that Deputy Phillips's immunity depended on whether he was reckless because, as the district court understood it, *Franks* applies to "any government official who makes a reckless misstatement." However, even assuming *arguendo* that Deputy Phillips was reckless in completing the incident report,[7] he is still entitled to summary judgment unless there is a question of fact as to whether he assisted in the preparation of the complaint on the basis of which the *capias* warrant issued. *See Jennings*, 644 F.3d at 300–01; *Hampton*, 480 F.3d at 365.

---

[7] In the alternative, the fact issues identified by the district court are not material to recklessness as defined in *Hart*. For purposes of liability under *Franks*, *Hart* defined recklessness to require that an officer "in fact entertained serious doubts as to the truth" of the information included in the warrant application. *Hart*, 127 F.3d at 449. Even assuming *arguendo* that Alford correctly surmised that Deputy Phillips used the P.I.D. system without having the victim verify any identifying information other than first and last names and that a reasonable officer would not have relied on information so obtained, this would not satisfy the requirement that Deputy Phillips entertained serious doubts as to the truth of the information in the report. Melton has not pointed to any evidence on this requirement.

Melton seeks to create a fact issue as to whether Deputy Phillips helped prepare the complaint by providing information for use in it, asserting that "[a]ny investigator would know" an incident report will be used to obtain a warrant. However, there is no record evidence of a policy or practice at the Hunt County Sheriff's Office that would have allowed Deputy Phillips to anticipate that the incident report would be used to obtain a warrant. *See* OA at 38:25–40:40. Nor, as Melton has conceded, is there record evidence suggesting that Deputy Phillips knew this specific report would be used to obtain a warrant. OA at 38:11–38:23. Moreover, unchecked boxes at the end of the incident report show that Deputy Phillips chose not to file the report with a justice of the peace, a county attorney, or a district attorney. Because the record does not contain evidence that the information in the incident report was provided for the purpose of use in the complaint, Deputy Phillips did not participate in preparing the complaint. *See Hart*, 127 F.3d at 448–49. Accordingly, because he did not assist in preparing, present, or sign the complaint, Deputy Phillips cannot be held liable under *Franks*. *See Jennings*, 644 F.3d at 300–01; *Hampton*, 480 F.3d at 365. Accordingly, Deputy Phillips is entitled to summary judgment on this claim.

B.

Even assuming *arguendo* that Melton could demonstrate that a fact issue exists on his claim that

Deputy Phillips recklessly filled out the incident report, Melton bears the burden of demonstrating that Deputy Phillips violated his clearly established rights.[8] *See Morgan*, 659 F.3d at 371. "Abstract or general statements of legal principle untethered to analogous or near-analogous facts are not sufficient to establish a right 'clearly' in a given context; rather, the inquiry must focus on whether a right is clearly established as to the specific facts of the case." *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015); *see also Kinney*, 367 F.3d at 350. "Although a case *directly* on point is not necessary, there must be adequate authority at a sufficiently high level of specificity to put a reasonable official on notice that his conduct is definitively unlawful." *Vincent*, 805 F.3d at 547; *see also Kinney*, 367 F.3d at 350.[9] Thus, "[a]

---

[8] "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011).

[9] Although neither Melton nor Deputy Phillips has briefed this prong of the qualified immunity analysis, Deputy Phillips's good-faith assertion of qualified immunity has placed the burden on Melton to demonstrate that neither prong of the defense applies. *King*, 821 F.3d at 653. Moreover, both parties have briefed their understanding of the law that existed at the time Deputy Phillips prepared the incident report, and reaching prong two of qualified immunity does not result in unfair prejudice. It is important to consider the defense at the earliest possible stage of litigation because qualified immunity is an immunity from suit that "is effectively lost if a case is erroneously permitted to go to trial." *Pearson*, 555 U.S. at 231, 129 S.Ct. 808; *see also White v. Pauly*, —— U.S. ——, 137 S.Ct. 548, 551, 196 L.Ed.2d 463 (2017) (noting that qualified immunity is "important to society as a

clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Luna*, 136 S.Ct. at 308.

Rather than attempting to demonstrate that his rights were clearly established by cases addressing analogous or near-analogous facts, Melton has repeatedly emphasized that the facts of his case are unique. *See, e.g.*, Red Brief at 20; OA at 28:38–29:09; OA at 36:09–37:33; OA at 56:54–57:24. Moreover, Melton conceded at oral argument that he could not identify a single case applying *Franks* to a situation in which there was no error in the complaint and no false statement that made its way into the warrant. OA at 55:26–56:05. Indeed, *Franks* expressly requires a falsehood to be included in the warrant application for there to be a Fourth Amendment violation. *Franks*, 438 U.S. at 155–56, 98 S.Ct. 2674. Particularly in light of *Franks*'s detailed discussion of why its rule must be narrowly construed, we cannot say *Franks* clearly established the unconstitutionality of Deputy Phillips's conduct. *See id.* at 165–67, 98 S.Ct. 2674.

Moreover, even if Melton had attempted to satisfy his burden rather than conceding that his case is unique and that no case applies *Franks* in similar cir-

---

whole"); *Behrens v. Pelletier*, 516 U.S. 299, 305, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) (noting that qualified immunity is "too important to be denied review" on interlocutory appeal).

cumstances, Melton could not have shown that Deputy Phillips violated his clearly established rights without assisting in preparing, presenting, or signing the complaint. *Hart* and *Hampton* had been decided at the time Deputy Phillips prepared the incident report. As discussed above, *Hampton* held that an officer is entitled to qualified immunity if he does not prepare, present, or sign a warrant application. *Hampton*, 480 F.3d at 365. *Hart* held that an officer is not entitled to qualified immunity if he "deliberately or recklessly provides false, material information *for use in an affidavit in support of [a warrant]*." *Hart*, 127 F.3d at 448–49 (emphasis added). Because Melton cannot show that Deputy Phillips prepared, presented, signed, or provided information for use in the complaint, he cannot show that Deputy Phillips violated clearly established law.[10]

III.

For the reasons explained above, we REVERSE the district court's order and RENDER summary judgment for Deputy Phillips on Melton's claim of liability under *Franks*.

GREGG COSTA, Circuit Judge, concurring in the judgment:

---

[10] Because we decide the case on the grounds explained above, we do not reach Deputy Phillips's additional alternative argument that he is entitled to qualified immunity under the independent intermediary doctrine.

There are now so many strands of Fourth Amendment law that it is not surprising they sometimes get tangled. As Judge Dennis's dissent explains, that is what has happened to our caselaw addressing two different situations in which an officer can be held liable for an unlawful search even when a warrant was obtained. The first—and the one that is the claim alleged against Phillips—is when an officer provides false information to the magistrate issuing the warrant. *See Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Because the wrongful act is misleading the magistrate, our original view in this area rightly focused on whether the officer "deliberately or recklessly provides false, material information *for use in an affidavit* in support of a search warrant, regardless of whether he signs the affidavit." *Hart v. O'Brien*, 127 F.3d 424, 448–49 (5th Cir. 1997) (emphasis added). As long as the officer knows his false information will be used in an attempt to mislead a magistrate, that officer should be liable under *Franks*. *See* 438 U.S. at 164 n.6, 98 S.Ct. 2674 (explaining that officers should not be able to "insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity").

An officer can also be held liable for a search authorized by a warrant when the affidavit presented to the magistrate was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Malley v. Briggs*, 475 U.S. 335, 344, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (citing

United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). The *Malley* wrong is not the presentment of false evidence, but the obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant. In this situation, we have rightly recognized that liability should attach only to the "affiant and person who actually prepared, or was fully responsible for the preparation of, the warrant application." *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir. 2005). That is because an officer who only provides a portion of the information included in the affidavit has no way of knowing whether the "whole picture" painted by the evidence establishes probable cause. *Id*. 261.

Michalik 's sensible standard for "no probable cause" cases cross-pollinated with the *Franks* line of falsity cases in *Hampton v. Oktibbeha Cty. Sheriff Dep't.*, 480 F.3d 358 (2007). *See Leon*, 468 U.S. at 914–15, 104 S.Ct. 3405 (recognizing these as separate doctrines). *Hampton* was a falsity case, yet it readily dismissed claims against two officers who allegedly provided false information that was later presented to the magistrate because neither signed the affidavit or prepared the warrant application. 480 F.3d at 365. Importing the *Michalik* limitation into *Franks* cases and ignoring *Hart* was error. There is no principled reason why *Franks* liability should be limited to the affiant or a person "fully responsible" for preparing the warrant application. *See United States v. Calisto*, 838 F.2d 711, 714 (3d Cir. 1988) ("If we held that the

conduct of ... the affiant[ ] was the only relevant conduct for the purpose of applying the teachings of *Franks*, we would place the privacy rights protected by that case in serious jeopardy."). That requirement would preclude liability in the case of an officer who provides to a warrant affiant a doctor's inculpatory opinion about bite mark evidence while failing to disclose exculpatory DNA results. *Burke v. Town of Walpole*, 405 F.3d 66, 87 (1st Cir. 2005) (denying qualified immunity on those facts). It would also defeat a claim brought against an officer who conveyed to an affiant the inculpatory comments of one informant but not the contradictory account of another. *United States v. DeLeon*, 979 F.2d 761, 762–63 (9th Cir. 1992). In both of these scenarios, *Hart*'s "for use in an affidavit" standard would support liability.

The majority opinion tries to harmonize *Hart* with *Hampton* (and *Jennings v. Patton*, 644 F.3d 297 (5th Cir. 2011), which followed *Hampton* in a *Franks* case) by saying that "an officer who has provided information for the purpose of its being included in a warrant application under *Hart* has assisted in preparing the warrant application for purposes of *Jennings* and *Hampton* and may be liable." Maj. Op. at 262. But if *Hart* 's "for use in a warrant" requirement is sufficient, why overlay it with the additional requirements that "an officer must have assisted in the preparation of, or otherwise presented or signed a warrant application in order to be subject to liability under *Franks*"? *Id.* at 263. More problematic than the merged test being cumbersome, the *Hart* standard for

Franks liability is irreconcilable with *Hampton*'s endorsement of the requirement that the officer must have "prepared or presented the warrant or [have been] *fully responsible* for its preparation or presentation." *Hampton*, 480 F.3d at 365 (quoting *Michalik*, 422 F.3d at 261) (emphasis added); *see also Jennings*, 644 F.3d at 300 (reciting same requirement). That language was wrongly imported from the "no probable cause" caselaw and is not used by any other circuit in *Franks* cases.

The en banc court's attempt to reconcile rather than correct our caselaw, with *Hart* apparently now being a subpart of the *Hampton* standard, will continue to result in confusion. That confusion is especially problematic for a claim in which individuals can assert a qualified immunity defense as a lack of clarity in the law provides a defense. In a future *Franks* case, an officer who provided false information "for use in" an affidavit will no doubt argue he was not "fully responsible" for the warrant application and thus is immune under the *Hampton* and *Jennings* decisions that we reaffirm today.

Such a conflict in the caselaw will support an easy defense of qualified immunity as this case demonstrates. Although the "violation of clearly established law" standard is increasingly being questioned, *see Ziglar v. Abbasi*, —— U.S. ——, 137 S.Ct. 1843, 1870–72, 198 L.Ed.2d 290 (2017) (Thomas, J., concurring) (citing Baude, *Is Qualified Immunity Unlawful*?, 106

CAL. L. REV. (forthcoming 2018)), it is hard to imagine that any immunity threshold should hold law enforcement to a higher standard than judges when it comes to interpreting the law. If judges thought (and apparently still think) that the *Michalik* standard should extend to *Franks* cases, then an officer like Phillips who has neither the legal training of judges nor the time we can devote to parsing caselaw should not face civil liability for that error. So I join the majority opinion in concluding that Phillips is immune from this suit.[1]

But I would use the en banc process to recognize the dubious provenance of the "sign or prepare" requirement in our *Franks* case. *Hart* alone should provide the appropriate standard for *Franks* claims. Its "for use in" requirement is more straightforward, consistent with the law in other circuits, and fully captures *Franks*'s concern that an officer's misrepresentations to a court should not be a basis for interfering

[1] The dissent raises legitimate concerns about whether the defendant raised the "clearly established" aspect of qualified immunity as a ground for summary judgment. But even without getting to the "clearly established" question, Melton has not established a constitutional violation under the proper *Franks* inquiry. That is because he cannot show that Phillips knowingly or recklessly presented false information. Assuming the truth of Melton's theory that the inaccurate identification came from Phillips's use of a law enforcement database, there is no evidence indicating that Phillips "entertained serious doubts as to the truth" of that information on which law enforcement frequently relies. *Hart*, 127 F.3d at 449 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968)).

with citizens' privacy and liberty interests. Our failure to straighten out the strands of Fourth Amendment law that got tangled in *Hampton* means that the next time one of these cases comes along, perhaps with a stronger case for liability than this one, the important Fourth Amendment concerns that *Franks* protects might not be vindicated.

JAMES L. DENNIS, Circuit Judge, joined by GRAVES, Circuit Judge, dissenting:

The evidence of the nonmovant and the justifiable inferences drawn in his favor by the district court—which we may not second-guess at this interlocutory stage—establish a genuine dispute as to whether Officer Phillips acted with reckless disregard for the truth in falsely identifying the plaintiff as the perpetrator in his official report of a violent assault, resulting in the plaintiff's arrest without probable cause. The majority opinion errs in reversing the district court's denial of qualified immunity and summary judgment to Phillips and causes injustice to the plaintiff, who should be allowed to proceed with his claim, and to future civil plaintiffs and criminal defendants, who will be deprived of a legal remedy for similar violations of their constitutional rights. What makes this case even more significant are the legal and procedural maneuvers this court is employing in order to shield a reckless officer, bending over backwards to revive bad decisions that violated our rule of orderli-

ness and raising arguments and defenses that the appellant did not raise. I respectfully dissent.

I

In June 2009, the defendant, Kelly Phillips, then a deputy with the Hunt County, Texas, Sheriff's Office, was dispatched to a hospital in Greenville, Texas, to interview the victim of an assault. The victim told Phillips that the assailant was a man he knew named "Michael Melton." There is no dispute that the assailant was not the plaintiff, Michael David Melton, but a different man, Michael Glenn Melton, who apparently was romantically involved with the victim's estranged wife at the time of the assault. Phillips shortly thereafter prepared an offense report in which he specifically identified the plaintiff, Michael David Melton, as the assailant, and provided his middle name, age, height, hair color, and eye color. As the district court noted, Phillips did not explain how he came to identify the plaintiff, as opposed to the true assailant, as the perpetrator in his report.[1] According to the plaintiff's expert witness, the only possible way Phillips could have identified the plaintiff falsely as the assailant in his offense report was by entering the

[1] Phillips' affidavit asserts only that, "[a]s standard practice," the identity of the suspect in his report "would have been" based on what he was told by the victim, but he does not actually contend that the victim gave him the plaintiff's middle name or physical description, or that the victim even knew the plaintiff, let alone explain how or why the victim would have given Phillips the plaintiff's information instead of the information of the actual assailant, who was known to the victim.

name "Michael Melton" into a computer database, the "Personal Identification History through net data" or "PID," without conducting any investigation as to whether the PID-generated result matched the person identified by the victim.

Phillips forwarded his report to the Criminal Investigation Division of the Hunt County Sheriff's Office. In April 2010, another officer obtained a sworn affidavit from the victim, who again identified his assailant only as "Mike Melton," his estranged wife's boyfriend. In July 2010, the state prosecutor filed a criminal complaint against the plaintiff, charging him with the assault. The complaint expressly stated that it was "based upon the observations of K. Phillips, a peace officer, obtained by reviewing said officer's report," and it provided no other basis for the information contained therein. Shortly thereafter, a Hunt County judge issued a warrant for the plaintiff's arrest. The plaintiff was arrested in May 2012 and held in county jail for sixteen days before he was released on bond. In August 2012, the charge against the plaintiff was dismissed.

The plaintiff sued Phillips for violation of his Fourth Amendment rights, alleging that Phillips intentionally or with reckless disregard for the truth misidentified him as the assailant in his offense report, thereby leading to his arrest without probable cause. Phillips moved for summary judgment, asserting qualified immunity. The district court denied

summary judgment on the plaintiff's Fourth Amendment claims, finding a genuine dispute of fact regarding whether Phillips was reckless in identifying the plaintiff in his offense report.

II

A

This court has recognized two different kinds of claims against government agents for alleged Fourth Amendment violations in connection with a search or arrest warrant: (1) claims under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), for which the agent may be liable if he "makes a false statement knowingly and intentionally, or with reckless disregard for the truth that results in a warrant being issued without probable cause," *Michalik v. Hermann*, 422 F.3d 252, 258 n.5 (5th Cir. 2005) (discussing *Franks*, 438 U.S. at 155–56, 98 S.Ct. 2674); and (2) claims under *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), for which the agent may be liable if he "fil[es] an application for an arrest warrant without probable cause" and "a reasonable well-trained officer ... would have known that [the] affidavit failed to establish probable cause," *Michalik*, 422 F.3d at 259–60 (citations and internal quotation marks omitted).

As is apparent, these two kinds of claims involve very different legal theories, and our controlling caselaw properly reflects our understanding of those differences. In *Hart v. O'Brien*, 127 F.3d 424, 448–49

(5th Cir. 1997), this court considered the scope of a government agent's liability for *Franks* claims and held, "A governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in an affidavit in support of a ... warrant." And in *Michalik*, we considered the scope of a government agent's liability for *Malley* claims. We held that, in that context, only the "affiant and person who actually prepared, or was fully responsible for the preparation of, the warrant application" may be liable for seeking a warrant without probable cause. *Michalik*, 422 F.3d at 261.

These different rules make sense. A government official who merely provides information that is later included in a warrant application is not in a position to "see the whole picture" and thus to fully "assess probable cause questions" relevant to *Malley* claims of facially insufficient warrant applications. *See Michalik,* 422 F.3d at 261. By contrast, an officer who "deliberately or recklessly provides false, material information for use in an affidavit" is certainly in a position to fully assess his own conduct, which forms the entire basis for *Franks* claims of material misrepresentations in warrant applications. *See Hart*, 127 F.3d at 448–49. At issue in this case is a *Franks* claim alleging a Fourth Amendment violation resulting from material misrepresentations in a warrant affidavit; thus, as the prudent reader will easily recognize, this claim is controlled by *Hart /Franks*, and the *Michalik /Malley* rule is inapplicable.

B

In *Hampton v. Oktibbeha County Sheriff's Department*, 480 F.3d 358, 365 (5th Cir. 2007), and *Jennings v. Patton*, 644 F.3d 297, 301 (5th Cir. 2011), this court confused the two theories described above and, in conflict with our earlier holding in *Hart*, erroneously applied the *Michalik /Malley* rule to cases involving *Franks* misrepresentation claims. And it did so without ever mentioning *Franks* or *Hart*. Under our rule of orderliness, when such conflict occurs, the earlier precedent controls and subsequent, inconsistent cases are disregarded. *See, e.g.*, *United States v. Puckett*, 505 F.3d 377, 385 (5th Cir. 2007) ("A handful of this court's cases, unfortunately, are inconsistent" with earlier precedent, and they are therefore "not controlling"). The en banc court now cements our confusion and error in *Hampton* and *Jennings* into law.

In an attempt to portray *Hampton* and *Jennings* as consistent with *Hart*, the majority opinion misrepresents those cases and their holdings. Under *Hampton* and *Jennings*, a government official who deliberately provides false, material information for use in an affidavit does not violate the Fourth Amendment if she is not the affiant and does not actually prepare the warrant. *See Hampton*, 480 F.3d at 365; *Jennings*, 644 F.3d at 301. This rule is plainly inconsistent with our earlier holding in *Hart*.

In *Hampton*, the court "accepted the plaintiff's version of the facts, namely that the officers 'conspired to submit false and incomplete information in order to

secure a warrant for the arrest of [Hampton].' " 480 F.3d at 364 (alteration in original). Nevertheless, the *Hampton* court held that these officials could not be held liable because the plaintiff did not allege that either of them "was the affiant officer or the 'officer who actually prepare[d] the warrant application with knowledge that a warrant would be based solely on the document prepared.' " 480 F.3d at 365 (quoting *Michalik*, 422 F.3d at 261).

Jennings offers the same "actual preparation" requirement. In granting qualified immunity to the relevant government official there, the court quoted the following language from *Michalik*:

> Although issues of fact may exist as to the roles that [defendants] played in the investigation, *and in providing some of the information to [the affiant]*, these issues of fact are not material to the [claim for causing a warrant to be issued without probable cause] because none of the evidence suggests that [defendants] prepared or presented the warrant or were fully responsible for its preparation or presentation.

Jennings, 644 F.3d at 301 (emphasis added) (alteration in original) (quoting *Michalik*, 422 F.3d at 261). The *Jennings* court went on to cite *Hampton* and describe it as "granting qualified immunity to defendants who were neither *the affiant* nor the person who *actually prepared* the warrant application." *Jennings*, 644 F.3d at 301 (emphasis added) (citing *Hampton*, 480 F.3d at 364–65). This, too, is plainly inconsistent

with *Hart*.

There is no way to explain how the language of these two cases and their reliance on *Michalik* could be consistent with *Hart*. So the majority opinion does not quote or otherwise discuss their language and does not even mention their reliance on *Michalik*. The majority opinion's attempt to argue that *Hampton* and *Jennings* can be harmonized with *Hart* amounts to an endeavor to square the circle.

C

The majority opinion's holding that an officer who makes a deliberate or reckless misrepresentation can only be held liable if he "assisted in the preparation of, or otherwise presented or signed a warrant application" is unsound and, unsurprisingly, is not the law in any other circuit.[2] *See, e.g.*, *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997) (Fourth

[2] The majority opinion cites *KRL v. Moore*, 384 F.3d 1105, 1118 (9th Cir. 2004), as "holding that 'because he had no role in the preparation of the ... warrant,' an officer who was involved at every stage of an investigation was entitled to qualified immunity for material omissions in a warrant application." Maj. Op. at 263 n.5. This misrepresents *Moore*'s holding. In *Moore*, the plaintiffs challenged the omission of information that was known to those who drafted and signed the affidavit. 384 F.3d at 1117. Thus, the official in question, an investigator who was not involved in the preparation of the affidavit, bore no responsibility for the misleading omission of any information from the affidavit. *See id.* at 1108–09, 1118. By contrast, in the instant case, there is no dispute that Phillips was the source of the material misrepresentations provided to the affiant.

Amendment violated by false statements "made not only by the affiant but also [by] statements made by other government employees ... insofar as such statements were relied upon by the affiant in making the affidavit"); *United States v. DeLeon*, 979 F.2d 761, 764 (9th Cir. 1992) ("[W]e join the Third and Seventh Circuits in holding that misstatements or omissions of government officials which are incorporated in an affidavit for a search warrant are grounds for a *Franks* hearing."). *Cf. United States v. Leon*, 468 U.S. 897, 923 n.24, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (admonishing that in applying the good-faith exception "[i]t is necessary to consider the objective reasonableness ... of the officers who originally obtained [the warrant] or who provided information material to the probable-cause determination").

The following cases further illustrate the majority opinion's departure from the holdings of our sister circuits. In *United States v. Calisto*, 838 F.2d 711, 712 (3d Cir. 1988), an officer relayed information to a second officer at a second agency. The first officer's "reason for relaying the information to [the second officer] ... was his belief that it would aid [that officer] *in his investigation*." *Id.* (emphasis added). The first officer requested not to be revealed as the source of the information. *Id.* The second officer then relayed the information to a third officer at a third agency, who then relayed information to a fourth officer at a fourth agency, who then drafted and signed a warrant application based on the information. In applying *Franks*,

the Third Circuit considered the information provided, and omitted, by all four agents, ultimately concluding that any misrepresentation was not material. *See* 838 F.2d at 714–15 & n.2.

In *United States v. Davis*, 471 F.3d 938, 942 (8th Cir. 2006), an officer who conducted a protective sweep relayed false information to another officer who participated in the sweep, and the latter officer relayed that information to the affiant. Nothing in the facts or the court's discussion suggests that the misrepresenting officer was "involved in the preparation" of the warrant affidavit, and the court concluded that his misrepresentation was reckless. *Id.* at 946. The court stated, "The fact that the affiant ... was not aware [of the falsity] does not change the result under *Franks*, nor does the fact that [the affiant's] source of information ... was also unaware of the truth. [The recklessly misrepresenting officer's] statement cannot be insulated from a *Franks* challenge simply because it was relayed through two officers who were both unaware of the truth." *Id.* at 947 n.6.

In *United States v. Lakoskey*, 462 F.3d 965 (8th Cir. 2006), the court considered alleged misrepresentations by an Arizona-based postal inspector, Hirose, in an email to a Minnesota-based inspector, Nichols. The email informed Nichols that a Minnesota resident was apparently involved in a drug trafficking operation using the mails. *Id.* at 970. Only after this email was received, Nichols launched an investigation, which included multiple dog sniffs, and, over two

weeks later, applied for and obtained a search warrant based in part on the information relayed in the email. *Id.* at 970–71. Nothing in the facts or in the court's discussion suggests that Hirose was "involved in the preparation" of the warrant affidavit or intended for the information to be used in an affidavit. Nonetheless, the court recognized that misrepresentations by Hirose could give rise to a *Franks* claim, *see id.* at 978, though it ultimately concluded that the misrepresentations were not material, *id.*

Our sister circuits' caselaw reflects a commonsense understanding: when an officer, acting with reckless disregard for the truth, includes false, material information in an official report for further official use, leading to an unlawful search or arrest of an innocent person, there is no justification to insulate him from liability. A reasonable officer can certainly foresee that such actions could lead to an unlawful search or arrest, as information relayed in law enforcement agents' reports routinely end up as support for warrant applications even if the reports are not expressly designed exclusively for that use. *See*, *e.g.*, *Calisto*, 838 F.2d at 712; *Davis*, 471 F.3d at 942; *Lakoskey*, 462 F.3d at 970–71. Nor does the passage of time between the false report and the warrant application justify ignoring that officer's conduct. Whether the false information is used within a week or a year is not within the misrepresenting officer's control—the majority opinion offers no basis for the proposition that the existence of a constitutional violation depends on the

passage of time between the reckless misrepresentation and the resulting unlawful arrest. There is thus no justification for the anomalous shield that this court has now created.

It is important to emphasize that the majority opinion's erroneous holding that only an officer who actually participates in preparing the warrant affidavit can violate the Fourth Amendment through his reckless or intentional misrepresentations is not limited to civil cases; that narrow reading of the Fourth Amendment will limit criminal defendants' ability to challenge search warrants that are premised on fraudulent misrepresentations. Say, for example, that a patrol officer intentionally alters an assault victim's statement in his police report with the intent to lead detectives to an individual the officer believes committed the crime. And say that this misrepresentation is later included in a search warrant, leading to the recovery of evidence that this individual possessed small amounts of marijuana in his home. Under the majority opinion's holding, that individual would not be able to challenge his search warrant in his ensuing prosecution for possession of a controlled substance simply because the culprit officer did not "participate" in the preparation of the warrant affidavit, notwithstanding his intentional misrepresentation. Such a rule is untenable.

III

In addition to establishing an imprudent and un-

founded rule of law, the court makes serious procedural missteps. On appeal from the denial of a motion for summary judgment based on qualified immunity, this court "lack[s] jurisdiction to review the genuineness of a fact issue." *Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016). We have jurisdiction to review only the materiality of the factual issues. *See id.* In this case, the district court found that the plaintiff "has introduced evidence suggesting that Phillips's identification of [the plaintiff] in his incident report was reckless." The majority opinion acknowledges that recklessness is a question of fact, but in the same breath, it concludes that the facts identified by the district court are not "material" to recklessness. Maj. Op. at 264 n.7. In actuality, the majority opinion simply overrules the district court's determination that there is a genuine dispute as to whether Phillips "in fact entertained serious doubts as to the truth of the information included in the warrant application," *Hart*, 127 F.3d at 449, and by so doing exceeds this court's jurisdiction.[3]

[3] The district court's conclusion was also correct. The plaintiff's expert witness averred that Phillips simply entered the name "Michael Melton" into a computer database and used the result of his search to identify the plaintiff in his report, without making any attempt to corroborate that he was the right "Michael Melton." A reasonable juror certainly could conclude based on these facts that Phillips entertained doubts as to the truth of his report. As previously discussed, Phillips could reasonably expect his false report to be used in support of a warrant application, and his false report in fact led to the plaintiff's wrongful arrest.

The majority proceeds to absolve Phillips on the additional basis that, even if he did violate the plaintiff's constitutional rights, those rights were not "clearly established." Phillips never made such an argument—not before the district court, not in his brief on appeal, and not in his supplemental en banc brief. The majority opinion states that Phillips's assertion of qualified immunity below "placed the burden on Melton to demonstrate that neither prong of the defense applies." Maj. Op. at 265 n.9. But it is the appellant's burden to show that the district court erred. *See Santillana v. Williams*, 599 F.2d 634, 635 (5th Cir. 1979) ("The burden of appellant on appeal is to persuade the appellate court that the trial judge committed an error of law."); *Vetter v. Frosch*, 599 F.2d 630, 633 (5th Cir. 1979) ("The appellant has the burden of persuading the appellate court that the district court erred."); *Murphy v. St. Paul Fire & Marine Ins. Co.*, 314 F.2d 30, 31 (5th Cir. 1963) ("It is elementary instead that the burden is on the appellants to show error."). It is not appropriate for the court to attempt to shoulder this burden on Phillips's behalf.

The majority opinion proceeds to assert on Phillips's behalf that the complaint contained no false information, Maj. Op. at 265–66, even though Phillips never argued before the district court or before the panel on appeal that his false identification of the plaintiff as the assailant in his report did not result

---

In my view, this is sufficient to establish a genuine dispute as to whether Phillips violated the plaintiff's constitutional rights.

in the plaintiff's wrongful arrest or that the complaint did not falsely identify the plaintiff as the suspected assailant based on his report. Phillips has therefore forfeited these arguments that the majority opinion attempts to raise for him. *See, e.g.*, *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 626 (5th Cir. 2017) (citing *In re Paige*, 610 F.3d 865, 871 (5th Cir. 2010)) ("[T]his court generally does not consider arguments raised for the first time on appeal."); *United States v. Brace*, 145 F.3d 247, 261 (5th Cir. 1998) (en banc) (holding that the en banc court cannot address an issue that was not presented to the panel on appeal and stating, "It bears repeating—indeed, cannot be overemphasized—that we do not address issues not presented to us.").

Pro se litigants could only dream of receiving the judicial help that the en banc court is giving an officer represented by a highly competent attorney. *See, e.g.*, *Mapes v. Bishop*, 541 F.3d 582, 584 (5th Cir. 2008) ("Although pro se briefs are afforded liberal construction, even pro se litigants must brief arguments in order to preserve them." (citation omitted)). This court's zeal to protect officers from the prospect of chilling liability cannot justify abandoning our rules and reversing the district court's judgment on the basis of arguments that the appellant has not made.

*

Because I believe that the majority opinion errs in reversing the district court's denial of qualified immunity, I respectfully dissent.

APPENDIX B

837 F.3d 502

United States Court of Appeals,

Fifth Circuit.

Michael David MELTON, Plaintiff–Appellee

v.

Kelly D. PHILLIPS, Defendant–Appellant

No. 15–10604

|

Filed September 14, 2016

Before DENNIS, ELROD, and GRAVES, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:

The plaintiff, Michael David Melton, spent sixteen days in county jail in connection with an assault he did not commit. The only thing that linked him to this assault was the fact that he has the same first and last name as the person identified by the victim as the actual assailant. After his release, the plaintiff filed a lawsuit under 42 U.S.C. § 1983 against Kelly Phillips, a sheriff's office deputy, alleging that Phillips intentionally or recklessly misidentified him as the assailant in an offense report that he prepared, thereby leading to the plaintiff's arrest without probable

cause in violation of the Fourth Amendment. The district court denied Phillips's qualified immunity-based motion for summary judgment, and Phillips now appeals, principally arguing that he cannot be liable for a Fourth Amendment violation because he neither prepared nor signed the affidavit in support of an arrest warrant. After carefully considering the parties' arguments, we affirm the district court's order in part and dismiss the appeal in part.

I

In June 2009, Phillips, then a deputy with the Hunt County Sheriff's Office, interviewed the victim of an assault. The victim identified the attacker as his wife's boyfriend at the time, a man named Michael Melton, apparently without providing the assailant's middle name.[1] Phillips then prepared an offense report and submitted it to the Sheriff's Office. The report specifically identified the plaintiff, Michael David Melton, as the suspected assailant.[2] After he submitted his report, Phillips had no further involvement with the case.

In July 2010, the state prosecutor filed a criminal complaint against the plaintiff, charging him with the assault. The complaint expressly stated that it was based upon Phillips's offense report and provided no

[1] According to the plaintiff, the assailant's full name is Michael Glenn Melton.

[2] Besides his full name, Phillips's report identified the plaintiff by his address, driver's license number, age, height, and other characteristics.

other basis for the information contained therein. Shortly thereafter, a Hunt County judge issued a warrant for the plaintiff's arrest, identifying him by his first and last name and by his address, which was included in Phillips's report. The plaintiff was arrested in May 2012 and held in county jail for sixteen days before he was released on bond. In August 2012, the charge against the plaintiff was dismissed. The plaintiff filed the instant suit in state court against multiple defendants, asserting, *inter alia*, Fourth Amendment violations, and the suit was subsequently removed to federal court. As to Phillips, the plaintiff alleged that he intentionally or recklessly misidentified him as the assailant in the offense report, thereby leading to his arrest without probable cause.

In support of his allegations, the plaintiff submitted an affidavit from a former Sheriff's Office employee, Brian Alford, who opined that Phillips likely used a computer database, the "Personal Identification History through net data" or "PID," to identify the plaintiff as the suspected assailant. Specifically, Alford concluded that Phillips likely entered the name "Michael Melton" into the database and conducted no further investigation as to whether the PID-generated result matched the person identified by the victim.

Phillips moved for summary judgment, asserting qualified immunity. Relevant to the instant appeal, the district court denied summary judgment on the

plaintiff's Fourth Amendment claims. First, the district court cited *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and *Hart v. O'Brien*, 127 F.3d 424 (5th Cir. 1997), in rejecting Phillips's argument that he cannot be liable for the claimed Fourth Amendment violations because he neither signed nor drafted the affidavit in support of a warrant. Second, the district court found a genuine dispute of fact regarding whether Phillips was reckless in identifying the plaintiff in his offense report.

On appeal, Phillips contends that the district court should have followed another Fifth Circuit case, *Michalik v. Hermann*, 422 F.3d 252 (5th Cir. 2005), and subsequent cases that applied *Michalik*. Pursuant to those cases, Phillips claims, an officer who neither signed nor prepared the affidavit is not liable for Fourth Amendment violations. In the alternative, Phillips argues that the district court erred in finding a genuine issue of fact regarding his alleged recklessness. Finally, he argues that the independent intermediary doctrine forecloses the plaintiff's claims.

II

"The denial of a motion for summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine to the extent that it turns on an issue of law." *Lytle v. Bexar Cnty.*, 560 F.3d 404, 408 (5th Cir. 2009) (citation and internal quotation marks omitted). "Accordingly, we lack jurisdiction to review the genuineness of a fact issue

but have jurisdiction insofar as the interlocutory appeal challenges the materiality of the factual issues." *Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016) (citation and internal quotation marks omitted). We review the district court's conclusions regarding the materiality of the facts de novo, *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 634 (5th Cir. 1999), "consider[ing] only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment," *Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004) (en banc). "Where factual disputes exist ... we accept the plaintiffs' version of the facts as true." *Id.*

III

A

Phillips argues that, under our precedent, an officer like him, who neither signed nor prepared the affidavit in support of a warrant, is not liable for Fourth Amendment violations. Because this claim turns on an issue of law, we have jurisdiction to consider it. *See Lytle*, 560 F.3d at 408.

In *Franks v. Delaware*, the Supreme Court considered whether criminal defendants ever have a right to challenge the veracity of factual statements made in an affidavit supporting a search warrant. 438 U.S. 154, 155, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Answering affirmatively, the Court held that the exclusionary rule mandates the exclusion of evidence that

was seized pursuant to a search warrant if the defendant establishes that the affiant, "knowingly and intentionally, or with reckless disregard for the truth," included a false statement in the warrant affidavit that was necessary to the finding of probable cause. *Id.* at 155–56, 98 S.Ct. 2674. While *Franks* dealt with the suppression of evidence in criminal proceedings, we have read it to establish, in the context of § 1983 claims asserting Fourth Amendment violations, "that an officer is liable for swearing to false information in an affidavit in support of a search warrant, provided that: (1) the affiant knew the information was false or [acted with] reckless disregard for the truth; and (2) the warrant would not establish probable cause without the false information." *Hart v. O'Brien*, 127 F.3d 424, 442 (5th Cir. 1997) (citing *Franks*, 438 U.S. at 171, 98 S.Ct. 2674 (1978)). Taken at face value, *Franks* would suggest that only officers who sign a warrant affidavit or otherwise request a warrant under oath may be liable for Fourth Amendment violations due to their deliberate or reckless misrepresentations. *Hart*, 127 F.3d at 448 (citing *Franks*, 438 U.S. at 171, 98 S.Ct. 2674).

However, in *Hart v. O'Brien*, we held that *Franks* liability may extend to government officials who are not the affiants. *Hart*, 127 F.3d at 448–49. Relevant to the instant appeal, Hart sued an assistant county attorney, Starnes, for Fourth Amendment violations under § 1983. *Id.* at 434. Starnes, along with a state officer, drafted an affidavit in support of a search and

arrest warrant relating to Hart. *Id.* at 432. Hart alleged that Starnes inserted false statements into the affidavit, either intentionally or with reckless disregard for the truth. *Id.* Rejecting any contention that Starnes could not be liable for Fourth Amendment violations because he did not sign the affidavit, we explained that *Franks* "left open the possibility that a search or arrest violates the Fourth Amendment where the affiant relies in good faith on deliberate or reckless misstatements by another government official." *Id.* at 448 (citing *Franks*, 438 U.S. at 164 n.6, 98 S.Ct. 2674). After considering several sister circuits' holdings that deliberate or reckless misrepresentations by non-affiant government officials may form the basis for *Franks* claims, we concluded:

> We agree with the reasoning of these circuit courts.... The Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants. A governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in an affidavit in support of a search warrant, regardless of whether he signs the affidavit.

Id. at 449.

While *Hart* involved a government official who actually participated in drafting the affidavit, *see* 127 F.3d at 432, its holding was not so confined. Rather than say that an officer violates the Fourth Amendment when he recklessly drafts or signs an affidavit

that includes false information, we held that a "governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in [the] affidavit." *Hart*, 127 F.3d at 448; *accord United States v. Brown*, 298 F.3d 392, 408 & n.9 (5th Cir. 2002) (Dennis, J., concurring) ("[A] defendant is entitled to a *Franks* hearing upon making a ... showing that a governmental official deliberately or recklessly caused facts that preclude a finding of probable cause to be omitted from a warrant affidavit."). Indeed, we expressly relied upon the Supreme Court's statement in *Franks* that police cannot " 'insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity.' " *Hart*, 127 F.3d at 448 (quoting *Franks*, 438 U.S. at 164 n.6, 98 S.Ct. 2674). It would therefore have made very little sense for us to sanction the insulation of officer misstatements merely by having another officer draft an affidavit that includes those misstatements.

Moreover, our holding in *Hart* relied on several cases in which our sister circuits applied *Franks* to government officials who neither signed nor drafted the affidavits. *See Hart*, 127 F.3d at 448 (citing *United States v. DeLeon*, 979 F.2d 761, 764 (9th Cir. 1992) (*Franks* applies to actions of investigator who neither signed nor drafted the affidavit); *United States v. Wapnick*, 60 F.3d 948, 956 (2d Cir. 1995) (deliberate or reckless omission by informant-government agent can serve as grounds for *Franks* suppression); *United States v. Calisto*, 838 F.2d 711, 714 (3d Cir. 1988)

(same); *United States v. Pritchard*, 745 F.2d 1112, 1118 (7th Cir. 1984) (*Franks* applies to "government agent [who] deliberately or recklessly misrepresents information to a second agent, who then innocently includes the misrepresentations in an affidavit")). Notably, we also cited *Hale v. Fish*, in which this court applied the *Franks* test to an officer "who did not sign or draft the affidavit but whose presence at [the] time of [the] warrant tended to influence [the] judge issuing [the] warrant." *Hart*, 127 F.3d at 448 (citing *Hale v. Fish*, 899 F.2d 390, 401 (5th Cir. 1990)). In this light, it is clear that, under *Hart*, the fact that a government official did not sign or draft the affidavit in support of a warrant does not preclude his or her liability for *Franks* violations.

Phillips points to other cases in which, he claims, we have held that officers are not liable for Fourth Amendment violations under *Franks* if they neither sign nor draft the affidavit in support of a warrant. First and foremost, he relies on *Michalik v. Hermann*, 422 F.3d 252 (5th Cir. 2005). In *Michalik*, we reversed a district court's denial of qualified immunity as to two officers who were involved in procuring a warrant but did not sign or prepare the affidavit in support thereof. *Id.* at 261. The plaintiffs there brought claims under *Malley v. Briggs*, which concerns warrant applications that, on their face, "fail[ ] to establish probable cause." 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *see Michalik*, 422 F.3d at 258. Notably, we expressly stated that those plaintiffs did not

have a claim under *Franks* because they had not alleged any false statement in the warrant application attributable to the defendants. *Michalik*, 422 F.3d at 258. Accordingly, while noting the *Franks*/*Hart* rule that an officer may be liable for making false statements resulting in the issuance of a warrant without probable cause "regardless of whether he signed the application or was present before the judge," *see id*. at 258 n.5, we moved on to analyze whether *Malley* liability also extends to non-affiant officers. *See id.* at 258–61. In reversing the district court's denial of qualified immunity, we held that liability under *Malley* is limited to "the affiant and person who actually prepared, or was fully responsible for the preparation of, the warrant application," *Michalik*, 422 F.3d at 262, explaining that an officer who "actually prepares the warrant application with knowledge that a warrant would be based solely on the document prepared ... is in a position to see the whole picture ... and thus fully to assess probable cause questions." *Id.* at 261.

Michalik is plainly inapplicable here; it did not involve *Franks* claims, and its own distinction between *Franks* and *Malley* and its separate analysis for the scope of *Malley* liability establish that its holding does not encompass *Franks* claims. *See Michalik,* 422 F.3d at 258–61 & n.5. Moreover, the reasoning supporting *Michalik*'s holding as to *Malley* liability does not apply to *Franks* claims. A government official who merely provides information that leads police to seek a warrant is not necessarily in a position to "fully assess probable cause questions" and therefore he or she

does not bear liability under *Malley*. *See Michalik*, 422 F.3d at 261. In contrast, an officer who deliberately or recklessly provides false or misleading information for use in an affidavit in support of a warrant is certainly in a position to fully assess his own conduct, which forms the entire basis for the *Franks* claim.

Conceding that *Michalik*'s holding did not encompass *Franks* claims, Phillips points to *Hampton v. Oktibbeha County Sheriff Department*, 480 F.3d 358, 365 (5th Cir. 2007) and *Jennings v. Patton*, 644 F.3d 297, 298–99 (5th Cir. 2011). He contends that these cases have extended *Michalik*'s holding to *Franks* claims. Indeed, those two cases involved *Franks*-type misrepresentation claims and applied *Michalik* in granting qualified immunity to government officials who neither signed nor drafted warrant applications.[3] *See*

[3] In *Hampton*, a plaintiff sued four officers for Fourth Amendment violations under § 1983, claiming that the officers conspired to submit false information to obtain a warrant for his arrest. 480 F.3d at 362. The *Hampton* court denied qualified immunity to the single officer who actually prepared the affidavit in support of a warrant and presented it to the judge. *Id.* at 364. However, citing *Michalik*, the court granted qualified immunity to the other officers because they neither signed the affidavit nor prepared the warrant application. *Hampton*, 480 F.3d at 365 (citing *Michalik*, 422 F.3d at 261).

In *Jennings*, a county judge contacted the district attorney's office to report what he considered was a bribery attempt by the plaintiff. 644 F.3d at 298–99. Criminal charges were subsequently brought against the plaintiff but were ultimately dismissed. *Id.* at 299. The plaintiff sued the judge under § 1983,

Hampton, 480 F.3d at 365; *Jennings*, 644 F.3d at 298-99.

While we agree with Phillips's construction of *Hampton* and *Jennings*, these cases' additional limitation of the scope of *Franks* liability conflicts with *Hart*'s clear holding that officers may be liable for Fourth Amendment violations if they "provide false information for use in [the] affidavit." *Hart*, 127 F.3d at 448. Neither *Hampton* nor *Jennings* even mentions *Franks* or *Hart* let alone attempts to distinguish *Hart* or construe its holding narrowly. *See Hampton*, 480 F.3d at 364–65; *Jennings*, 644 F.3d at 298–99. Where, as here, our prior decisions conflict, we must follow the earlier opinion. *See EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 695 (5th Cir. 2014). Because *Hart* predates both *Hampton* and *Jennings*, *Hart*'s holding applies: a government official who intentionally or recklessly provides false, material information for use in an affidavit in support of a warrant may be liable under *Franks*. *See Hart*, 127 F.3d at 448. Accordingly, we affirm the district court's ruling that, under these circumstances, Phillips may be liable for Fourth Amendment violations under *Franks* even though he neither

---

claiming that the judge violated his Fourth Amendment rights by intentionally misrepresenting his conduct, thus amounting to the initiation of criminal charges without probable cause. *Id.* Similar to *Hampton*, the *Jennings* court applied *Michalik* to conclude that the judge was entitled to qualified immunity because he neither signed the affidavit in support of an arrest warrant nor testified before the grand jury. *Jennings*, 644 F.3d at 301.

signed nor drafted the affidavit in support of the warrant for the plaintiff's arrest.

B

In denying Phillips's motion for summary judgment, the district court found that there was a genuine dispute of fact as to whether Phillips was reckless in identifying the plaintiff as the suspected assailant. On appeal, Phillips argues that the plaintiff provided no evidence that he acted with reckless disregard for the truth.

"To prove reckless disregard for the truth, [a plaintiff] must present evidence that [the defendant] 'in fact entertained serious doubts as to the truth' of the [relevant] statement." *Hart*, 127 F.3d at 449 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968)). Whether a defendant in fact entertained serious doubts as to the truth is necessarily a fact question. *Cf. Smith v. Brenoettsy*, 158 F.3d 908, 913 (5th Cir. 1998) (whether a prison official actually drew the inference that there was a substantial risk of serious harm to the plaintiff is "a factual question that a court of appeals lacks jurisdiction to hear on interlocutory appeal").

As discussed above, in reviewing an interlocutory appeal from the denial of a motion for summary judgment qualified immunity, we lack jurisdiction to review the genuineness of a fact issue. *Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016). Accordingly, we lack jurisdiction to review the district court's finding

of a genuine fact dispute as to Phillips's recklessness. *See id.*

C

Finally, Phillips argues that the independent intermediary doctrine precludes his liability in this case. Under the independent intermediary doctrine, "even an officer who acted with malice in procuring the warrant ... will not be liable if the facts supporting the warrant ... are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party." *Thomas v. Sams*, 734 F.2d 185, 191 (5th Cir. 1984) (citing *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982)). However, this doctrine applies only when all of the facts are presented and the intermediary's decision is truly independent of the wrongfulness of the defendant's conduct: "Any misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior." *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988).

Phillips claims that the Hunt County judge's decision to issue a warrant for the plaintiff's arrest breaks the chain of causation between Phillips's actions and the alleged constitutional violation. He also asserts that a negligent act is not sufficient to taint the deliberations of the intermediary. Phillips's arguments ignore the plaintiff's contention that Phillips misrepresented the facts, intentionally or recklessly, by falsely identifying the plaintiff as the suspected assailant

and thus tainted the county judge's decision. Indeed, the district court found a genuine fact dispute regarding this factual contention. Assuming the plaintiff's factual assertions are true—and we must so assume, *see Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004) (en banc)—the independent intermediary doctrine does not apply to shield Phillips from liability, *see Hand*, 838 F.2d at 1428.

IV

For the forgoing reasons, we dismiss Phillips's appeal to the extent he challenges the district court's finding of genuine disputes of fact. We affirm in all other respects.

JENNIFER WALKER ELROD, Circuit Judge, dissenting:

The majority opinion holds—contrary to our binding precedent—that a law enforcement officer who did not participate in the preparation or the execution of a warrant can be liable under 42 U.S.C. § 1983 when the wrong person is arrested. I respectfully dissent.

I.

In June 2009, Deputy Kelly Phillips interviewed an assault victim and wrote a report identifying the assailant as "Michael David Melton." The report also contained what Deputy Phillips believed to be the assailant's address, driver's license number, age, and physical characteristics. This was Deputy Phillips's

sole involvement in the chain of events leading to Melton's May 2012 arrest and detention. After Deputy Phillips submitted his report, Investigator Jeff Haines began investigating the assault. A year later, Haines obtained a sworn affidavit from the victim identifying his assailant as "Mike Melton." The Hunt County Attorney's Office then brought charges against "Michael Melton." The assailant's first and last names are the only identifying information contained in the complaint, and their accuracy is undisputed. Four days after the complaint was filed, a Hunt County judge issued a capias warrant for the arrest of "Michael Melton." This warrant contained additional identifying information, including a social security number that did not appear in Deputy Phillips's report. Two years after the judge issued the warrant, Plaintiff Michael David Melton was arrested and detained. It is undisputed that Deputy Phillips had nothing to do with any of these actions by Haines, the victim, the Hunt County Attorney's Office, or the Hunt County judge.

II.

The majority opinion relies exclusively on *Hart v. O'Brien*, 127 F.3d 424 (5th Cir. 1997), *abrogated on other grounds by Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997), and specifically disavows two other published opinions to reach its conclusion that Deputy Phillips is not entitled to qualified immunity. In so doing, the majority opinion stretches *Hart* to the point of breaking it and thereby

unnecessarily concludes that it conflicts with other on-point, binding precedent. *Hart* is simply inapplicable on these facts. We stated in *Hart* that, notwithstanding the doctrine of qualified immunity, "[a] governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in an affidavit in support of a search warrant, regardless of whether he signs the affidavit." *Id.* at 448–49. Thus, *Hart* denies qualified immunity to an officer who provides false information if: (1) the information is provided for use in an affidavit in support of a warrant; (2) the officer acted deliberately or recklessly with regard to the truth or falsity of the information; and (3) the information is material. This case does not meet any of these requirements and does not fall within the scope of *Hart*.

To begin, Deputy Phillips's actions in this case are not subject to liability under *Hart* because Deputy Phillips's identification of the assailant as "Michael David Melton" was not information provided "for use in an affidavit in support of a [ ] warrant." *Id.* The incorrect information in *Hart* was provided by a prosecutor as he assisted in drafting the affidavit. *Id.* at 433. The incorrect information in this case was provided by Deputy Phillips a year before additional investigation by Haines, a sworn statement by the victim, and a decision to press charges by the Hunt County Attorney's Office led to the drafting of a complaint that contained only accurate identifying information. In light of the attenuated connection between Deputy Phillips's identification of the assailant and

the application for a warrant, Deputy Phillips's statement was not a statement provided for use in an affidavit in support of a warrant and therefore is not within the scope of *Hart*.

Moreover, the record in this case contains no actual evidence that Deputy Phillips acted recklessly in identifying the assailant as "Michael David Melton."[1] Recklessness in this context requires proof that the defendant " 'in fact entertained serious doubts as to the truth' of the statement." *Id.* at 449 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968)). The district court's finding of a dispute regarding recklessness relied on an affidavit by a peace officer who, without personal knowledge of the matter, speculated that Deputy Phillips used the middle name "David" in his report because he found it in a local police database using the first and last names of the assailant without any other identifiers. The affidavit does not raise a fact issue as to whether Deputy Phillips himself entertained serious doubts as to the truth of his report. Thus, the affidavit is not evidence of recklessness as defined in this context. Moreover, Melton's counsel in a 28(j) letter acknowledged that Melton did not have a criminal record in the local police database discussed in the affidavit, undermining any evidentiary value the affidavit may

[1] Nor does the record provide any support for a finding that Deputy Phillips deliberately misidentified the assailant.

have had on this point.[2]

Even assuming *arguendo* that the affidavit is some evidence that Deputy Phillips acted recklessly by including the middle name "David" in his report, reliance on *Hart* is misplaced because the incorrect information that Deputy Phillips provided was not material to a determination of probable cause. In *Hart*, officers saw vehicles registered to Peggy Hart on a property being used to grow marijuana, incorrectly assumed that this was the same Peggy Hart who was the wife of a known marijuana cultivator, and obtained a warrant for her arrest using an affidavit that identified her as such. *Id.* at 432–33. Whether the Peggy Hart who is to be arrested for cultivating marijuana has been correctly identified as the wife of a known marijuana cultivator is material to an evaluation of probable cause. But whether the Michael Melton who is to be arrested for assault has been correctly identified as having the middle name of David is not material. If Deputy Phillips had omitted the name "David" from his report, the judge would have been no less likely to have issued the arrest warrant. Thus, this case fails to meet the requirements of *Hart*.[3]

---

[2] Deputy Phillips has provided an affidavit stating that the identification of Melton in his report was "based solely on what I was told by [the victim]." Apart from the affidavit that is discredited by Melton's 28(j) letter, Deputy Phillips's affidavit is uncontroverted.

[3] Moreover, *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990) is inapposite. That decision held that an officer who was present at the warrant hearing and lent credibility to the affidavit due to the

III.

Importantly, the majority opinion specifically disclaims published Fifth Circuit case law in reaching its contrary conclusion. In *Michalik v. Hermann*, 422 F.3d 252 (5th Cir. 2005), we expressly refused to abrogate the qualified immunity of law enforcement officers whose misstatements led to arrest and detention except in the case of officers who either signed or drafted a warrant application. *Id.* at 254–55 ("We hold that [appellants] are entitled to qualified immunity for claims based on the procurement of the warrant because neither prepared, presented, nor signed the application for the search warrant."). We used this rule as a limit on *Franks*[4] liability in *Hampton v. Oktibbeha County Sheriff Department*, 480 F.3d 358, 365 (5th Cir. 2007) (reversing district court's denial of qualified immunity for three officers who may have conspired to submit incorrect information in a warrant application because they did not sign or draft the application) and *Jennings v. Patton*, 644 F.3d 297, 301 (5th Cir. 2011) (reversing district court's denial of qualified immunity for a judge assumed on summary judgment to have caused a man to be arrested for bribery by misrepresenting settlement discussions to a district attorney's office). Because Melton's claim is

---

officer's "prior working relationship" with the presiding judge could be held liable as a "conspirator." *Id.* at 401.

[4] *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

based on *Franks* liability, *Hampton* and *Jennings* control. As the majority opinion itself recognizes, these cases, if controlling, preclude the result reached by the majority opinion because it is undisputed that Deputy Phillips did not sign or draft the warrant application in this case.

The majority opinion invokes the rule of orderliness to avoid the conclusion that *Hampton* and *Jennings* control. It argues that *Hart* conflicts with and predates *Hampton* and *Jennings*. However, these cases do not conflict. As discussed above, *Hart* held that a governmental official could be liable under *Franks* when he helped to draft an affidavit in support of a warrant and provided incorrect information for use in that affidavit. *Hampton* and *Jennings* held that a governmental official could not be liable under *Franks* when he neither signed nor drafted an affidavit in support of a warrant. Thus, all three cases agree that, as *Hart* puts it, an officer cannot be liable under *Franks* without providing incorrect information "for use in an affidavit in support of a [ ] warrant." 127 F.3d at 448–49. The rule of orderliness is not offended by either *Hampton* or *Jennings*.

IV.

Because our published, existing case law provides that a law enforcement officer is entitled to qualified immunity where he did not prepare or assist in the preparation of an erroneous arrest warrant, I respectfully dissent.

APPENDIX C

United States District Court,

N.D. Texas,

Dallas Division.

Michael David MELTON, Plaintiff,

v.

HUNT COUNTY, et al., Defendants.

Civil Action No. 3:14-CV-2202-N

Signed 06/04/2015

ORDER

David C. GODBEY, United States District Judge.

This Order addresses Defendants Hunt County (the "County"), Hunt County Sheriff's Office (the "Sheriff's Office"), Randy Meeks, and Kelly D. Phillips's motion for summary judgment on the issue of qualified immunity [11]. The Court grants the motion in part and denies it in part.

I. ORIGIN OF THE PARTIES' DISPUTE

This is a civil rights action that arises out of Plaintiff Michael David Melton's mistaken arrest for an assault he did not commit.[1] On June 28, 2009, Defendant Phillips, then employed as a deputy with the Sheriff's Office, was dispatched to a hospital in Greenville, Texas to investigate a reported assault. Defs.'

[1] The facts in this section are drawn from Melton's original petition [1-3], the parties' briefs, and the summary judgment evidence before the Court.

App. 001 [13]. At the hospital, the victim, Richard Griffeth, told Phillips that a man named Michael Melton had assaulted him. *Id.* Griffeth explained the circumstances surrounding the assault, and Phillips generated a written report and took photographs of Griffeth's injuries. *Id.* at 002. Phillips submitted his report to the Criminal Investigation Division (the "CID") for the Sheriff's Office. *Id.* Meeks, the Hunt County Sheriff, was not involved in Phillips's investigation or his decision to further the report to the CID. *Id.*

Phillips's report specifically identified Michael David Melton (hereinafter, "Melton"), the Plaintiff, as the suspect in the assault. *See* Pl.'s App. 006 [17]. Phillips does not explain how he came to identify Melton, as opposed to the true assailant Michael Glenn Melton, as the suspect in his report. To fill this gap, Melton submits the affidavit of Brian Alford, a former lieutenant in the Sheriff's Office. *See id.* at 003–004. Alford explains that the Sheriff's Office maintains an existing contact database known as "Personal Identification History through net data" ("PID"). *Id.* at 003. Although how PID operates is not entirely clear, it appears that an officer can enter data, such as a name, into the system and the system will identify known individuals matching the provided data. *See id.* Alford concludes, based on his experience, that Phillips's identification of Melton as the suspect in his report resulted from him entering only Melton's first and last name, and then failing to cross-check the result with any further identifying characteristics. *Id.* at

004.

On July 14, 2009, Jeff Haines, an investigator with the Sheriff's Office, made contact with Griffeth regarding the assault. Defs.' App. 004. Griffeth told Haines that he would contact the CID to make an appointment to provide a sworn affidavit concerning the assault. *Id.* Haines next heard from Griffeth in March of 2010, when Griffeth called to inquire about the case. *Id.* After Haines told Griffeth that he had never provided a sworn affidavit, Griffeth provided an affidavit to the Sheriff's Office regarding the assault on April 6, 2010. *Id.* at 004–005.

On July 29, 2010, the Hunt County Attorney's Office charged "Michael Melton" with the assault of Griffeth. *Id.* at 006. The complaint against Melton was based on Phillips's incident report. *Id.* A Hunt County Court at Law judge issued a writ of capias for the arrest of "Michael Melton." *Id.* at 007–008. In May 2012, Melton was arrested on the 2010 writ of capias. *Id.* at 009. Melton was held in jail for sixteen days. Orig. Pet. ¶ 16. When the Hunt County Attorney's Office apparently discovered Melton was not the Michael Melton who had assaulted Griffeth, it dropped the charges against Melton on August 16, 2012. *Id.* at 010.

Melton brought suit in state court asserting both federal and state causes of action. Melton brought claims under 42 U.S.C. § 1983 against Meeks and Phillips (collectively, the "Individual Defendants") in

their individual capacities for unlawful arrest and detention in violation of the Fourth and Fifth Amendments. Melton also sued the County and the Sheriff's Office under section 1983 for municipal liability based on official policy and failure to train. Finally, Melton raised state law claims for false imprisonment, intentional infliction of emotional distress, assault and battery, negligence and gross negligence, and negligent hiring, supervision, and training. Defendants removed the action to this Court on June 16, 2014. The Court entered a qualified immunity scheduling order [9], and Melton filed his Rule 7(a) reply to Defendants' assertion of qualified immunity. Defendants now move for summary judgment.

II. THE LEGAL STANDARDS

A. Summary Judgment

Courts "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." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When a party bears the burden of proof on an issue, "he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). When the nonmovant bears the burden of proof, the movant may demonstrate entitlement to summary judgment either by (1) submitting evidence that negates the existence of an essential element of the nonmovant's claim or affirmative defense, or (2) arguing that there is no evidence to support an essential element of the nonmovant's claim or affirmative defense. *Celotex*, 477 U.S. at 322–25. Once the movant has made this showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact so that a reasonable jury might return a verdict in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). Moreover, "[c]onclusory allegations, speculation, and unsubstantiated assertions" will not suffice to satisfy the nonmovant's burden. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Indeed, factual controversies are resolved in favor of the nonmoving party " 'only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts.' " *Olabisiomotosho v. City of Hous.*, 185 F.3d 521, 525 (5th Cir. 1999) (quoting *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995)).

B. Qualified Immunity

"Qualified immunity is a defense available to public officials performing discretionary functions '... insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person should have known.' " *Noyola v. Texas Dep't of Human Res.*, 846 F.2d 1021, 1024 (5th Cir. 1988) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The doctrine of qualified immunity balances two interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Because "qualified immunity is designed to shield from civil liability 'all but the plainly incompetent or those who knowingly violate the law,' " denial of qualified immunity is appropriate only in rare circumstances. *Brady v. Fort Bend Cnty.*, 58 F.3d 173, 173–74 (5th Cir. 1995) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

To resolve a public official's qualified immunity claim, a court considers two questions. First, has the plaintiff shown a violation of a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). And, second, was the right "clearly established" at the time of the public official's alleged misconduct? *Id.* The second inquiry is critical: unless the official violated a clearly established constitutional right, qualified immunity applies. *Pearson*, 555 U.S. at 231. "The judges of the district courts ... [may] exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 235. "But under either prong, courts may not resolve genuine disputes of fact in favor of the

party seeking summary judgment." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

III. MELTON'S SECTION 1983 CLAIMS

A. Melton's Fourth Amendment Claims

An individual has an established right under the Fourth Amendment to be free from arrest without probable cause. *E.g.*, *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 206 (5th Cir. 2009). Defendants contend that *Michalik v. Hermann*, 422 F.3d 252 (5th Cir. 2005), controls this case. *Michalik* was a section 1983 case in which plaintiffs alleged the police had wrongly secured and executed a search warrant that was based on stale information. *Id.* at 254. The Court held that liability based on *Malley v. Briggs*, 475 U.S. 335 (1986), and *Bennett v. City of Grand Prarie*, 883 F.2d 400 (5th Cir. 1989), for procurement of a defective warrant is limited to the warrant's affiant and any officer who prepares the warrant application with knowledge that a warrant would be based solely on the document prepared. *Michalik*, 422 F.3d at 261; *accord Hampton v. Oktibbeha Cnty. Sheriff Dep't*, 480 F.3d 358, 364–65 (5th Cir. 2007). Based on this precedent, Defendants contend neither Phillips nor Meeks may be held liable for a Fourth Amendment violation because neither is alleged to have procured Melton's arrest warrant or prepared the warrant application.

However, *Michalik* is not the only applicable case when a section 1983 plaintiff alleges false arrest. *Franks v. Delaware*, 438 U.S. 154 (1978), established

that it is a Fourth Amendment violation where police procure a warrant through "deliberate falsehood or ... *reckless disregard for the truth* ...." 438 U.S. at 171 (emphasis added).[2] The Fifth Circuit has confirmed that *Franks* liability extends beyond a warrant's affiant to any government official who makes a reckless misstatement. *See Hart v. O'Brien*, 127 F.3d 424, 448–49 (5th Cir. 1997) ("[A] deliberate or reckless misstatement may form the basis for a *Franks* claim against a government official who is not the affiant."), *abrogated on other grounds by Kalina v. Fletcher*, 522 U.S. 118 (1997); *accord United States v. Brown*, 298 F.3d 392, 408 & n.9 (5th Cir. 2002) (Dennis, J., concurring). Here, because Melton alleges Phillips made what amounts to a reckless misstatement in identifying Melton as the suspect in Griffeth's assault, *Franks*, not *Michalik*, is the governing case.

The Court concludes that, as to Phillips, questions of fact preclude summary judgment based on qualified immunity. Melton has introduced evidence suggesting that Phillips's identification of Melton in his incident report was reckless. For instance, Brian Alford surmises that Phillips identified Melton as the assailant merely by entering the assailant's first and last name into the PID system. Pls.' App. 003–004. Alford suggests it was improper to use the PID system

[2] *Michalik expressly found that there was no Franks* claim because the plaintiff had not alleged a false statement in the warrant application attributable to defendants. 422 F.3d at 258.

without further knowledge of the assailant's characteristics. *Id.* The mechanics of the PID system remain unclear. It also remains unclear the extent to which Phillips obtained identifying information of the assailant from Griffeth, and whether any of that information was cross-checked against the PID results. These open questions preclude qualified immunity because their resolution in Melton's favor could support a finding that Phillips was reckless in identifying Melton as the assailant, satisfying the requirements for a valid *Franks* claim. Accordingly, the Court concludes Phillips is not entitled to qualified immunity on Melton's Fourth Amendment claim.

The Court comes to the opposite conclusion as to Melton's Fourth Amendment claim against Meeks. Melton presents no evidence that Meeks was involved in the investigation in any way. His only connection to this case appears to be that he was Sheriff. Thus, whether under *Michalik* or *Franks*, there is no basis for holding Meeks liable for Melton's false arrest. The Court grants summary judgment to Meeks on Melton's Fourth Amendment claim.

B. Melton's Fifth Amendment Claims

Defendants argue Melton's Fifth Amendment claim fails because the Fifth Amendment applies only to violations by federal actors. *See* Br. Supp. Defs.' Mot. Summ. J. 23 [12] (citing *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996)). Defendants are correct that the Fifth Amendment's due process clause applies only to federal actors, *see, e.g.*, *Martinez-Rivera v.*

Sanchez Ramos, 498 F.3d 3, 8 (citing *Morin*, 77 F.3d at 120), and to the extent Melton asserts due process claims based on the Fifth Amendment, the Court grants Meeks and Phillips summary judgment on those claims. However, other provisions of the Fifth Amendment, such as the prohibitions against self-incrimination and double jeopardy, have been applied to the states through the Fourth Amendment. *See id.* n.6. Nevertheless, Melton has neither alleged nor presented any evidence of conduct that would support a section 1983 Fifth Amendment claim. Accordingly, the Court grants summary judgment to Meeks and Phillips on Melton's section 1983 Fifth Amendment claims.

IV. MELTON'S STATE LAW CLAIMS

In addition to his section 1983 claims, Melton bring claims under Texas state law for civil conspiracy, false imprisonment, intentional infliction of emotional distress, assault and battery, negligence and gross negligence, and negligent hiring, supervision and training.[3]

A. Texas Official Immunity

The Texas doctrine of official immunity insulates government employees "from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the

[3] Melton does not assert negligent hiring, supervision, and training claims against Phillips.

scope of their authority." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Unlike the defense of qualified immunity, a state actor claiming official immunity bears the burden of establishing the elements of the defense. *Id.* The doctrine's good faith requirement is substantially similar to the test of reasonableness included within the federal qualified immunity doctrine. *See id.* at 656. Thus, the defendant must show "a reasonably prudent officer, under the same or similar circumstances," could have acted in the same manner. *Id.* To controvert an officer's showing of good faith, "the plaintiff must show that 'no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts.' " *Id.* at 657 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993)). Melton does not argue that Individual Defendants were acting outside the scope of their authority or that they were not performing discretionary duties at all times relevant to his suit. The only question is therefore whether Individual Defendants were acting in good faith.

To demonstrate good faith, Defendants refer the Court to their arguments on the issue of qualified immunity. In crafting the "good faith" standard, the Texas Supreme Court stressed that the standard was "derived substantially" from the federal qualified immunity standard, which asks whether a reasonable officer could have believed his conduct to be proper under clearly established law. *Chambers*, 883 S.W.2d at 656 (citing *Swint v. City of Wadley*, 5 F.3d 1435,

1441–42 (11th Cir. 1993)). Here, the Court's determination that Phillips was not entitled to qualified immunity also controls its analysis of official immunity under Texas law.[4] As discussed above, Melton has raised a question of fact as to whether Phillips acted recklessly in identifying Melton as Griffeth's assailant. Thus, there remains a question of fact as to whether a reasonable officer in Phillips's position could have believed his conduct leading to the identification of Melton was reasonable. The Court denies Defendants' motion for summary judgment as to state law claims arising from Melton's arrest based on Texas official immunity.[5]

B. Melton's Remaining Claims

---

[4] Even had the Court determined that Phillips was entitled to qualified immunity on Melton's Fourth Amendment claim, Phillips would not necessarily be entitled to official immunity. The *Chambers* court emphasized that the official immunity test "is somewhat less likely to be resolved at the summary judgment stage than is the federal test." 883 S.W.2d at 657. The *Chambers* court explained this was partially due to the requirement that a section 1983 plaintiff demonstrate violation of a *clearly established* constitutional right, and partially due to the relative procedural ease with which summary judgment may be granted in federal court. *Id.* Thus, where qualified immunity is based on a failure to show violation of a clearly established constitutional right, official immunity is not necessarily triggered.

[5] Defendants do not discuss the extent to which Meeks, as Sheriff, may be held vicariously liable for Phillips's state torts. Thus, the Court also denies summary judgment for Meeks on Melton's state law claims arising out of his arrest.

Finally, Defendants seek summary judgment as to Melton's claims for assault and battery and negligent hiring, supervision, and training, and civil conspiracy. However, Defendants' asserted grounds for judgment on these claims are not based on qualified or official immunity, but on the lack of evidence to support these claims on the merits. Rule 56 generally assumes the parties have conducted discovery on the claims for which they seek judgment. *See F.D.I.C. v. Shrader & York*, 991 F.2d 216, 220 (5th Cir. 1993) ("Summary judgment is appropriate if, *after discovery*, there is no genuine dispute over any material fact." (emphasis added)). Here, Melton has not been permitted to conduct any discovery except as it pertains to Defendants' qualified immunity defense. The Court accordingly declines to grant summary judgment based on arguments unrelated to qualified immunity and official immunity.

CONCLUSION

The Court grants summary judgment in favor of Meeks on Melton's section 1983 claims against him in his individual capacity. The Court grants summary judgment in favor of Phillips on Melton's section 1983 Fifth Amendment claim against him in his individual capacity. The Court denies summary judgment as to Melton's section 1983 Fourth Amendment claim against Phillips in his individual capacity. The Court also denies Defendants' motion for summary judgment as to all state law claims.

APPENDIX D

United States Court of Appeals

Fifth Circuit

No. 15-10604

MICHAEL DAVID MELTON, Plaintiff – Appellee,

versus

KELLY D. PHILLIPS, Defendant – Appellant.

Appeal from the United States District Court for the Northern District of Texas

February 15, 2017

ON PETITION FOR REHEARING EN BANC

BEFORE: STEWART, Chief Judge, JOLLY, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.