No. 17-1095

In the Supreme Court of the United States

MICHAEL DAVID MELTON,
Petitioner,

v.

KELLY D. PHILLIPS,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a law enforcement officer who may have misidentified a suspect in an incident report violates the Fourth Amendment when an investigator over a year later, prepares a warrant application, when no evidence is presented that any information from the incident report was used to obtain the warrant.

2. Whether the law applying *Franks* to a non-affiant, non-contributing party to an arrest warrant, was clearly established, such that an officer who may have misidentified a suspect in an initial incident report would be in violation of clearly established law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 2a) is reported at 875 F.3d 256. The panel opinion of the court of appeals (Pet. App. 41a) is reported at 837 F.3d 502. The district court order (Pet. App. 62a) is available at 2015 WL 13173106.

JURISDICTION

The Petitioner timely filed his Petition for Writ of Certiorari within 90 days of the Fifth Circuit decision of November 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution states:

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

STATEMENT OF THE CASE

In June 2009, Deputy Kelly Phillips interviewed an alleged assault victim and filled out an incident report identifying the alleged assailant by the name "Michael David Melton." Pet. App. 3a. Melton's brief below argued that the incident report's use of the middle name "David" erroneously identified him as the assailant. *Id.* at 3a, n.1. However, the record does not

show that this information ever made its way to the judge who issued the warrant. *Id.* As Melton conceded, the record does not show that the incident report itself was presented to the judge. *Id.* Moreover, no allegedly erroneous information from the incident report was incorporated into the complaint that was presented to the judge: Melton has conceded that the sworn complaint is accurate. *Id.*

To put this matter into the pertinent time frame of events, after Deputy Phillips submitted the initial incident report, an investigator with the Sheriff's Office began investigating the assault. *Id.* at 3a. A year later, the alleged victim provided the investigator with a sworn affidavit identifying the alleged assailant as "Mike Melton." *Id.* The Hunt County Attorney's Office then filed a complaint against "Michael Melton." *Id.* The alleged assailant's first and last names are the only identifying information contained in the complaint, and their accuracy is undisputed. *Id.* at 3a-4a. Four days after the complaint was filed, a Hunt County judge issued a *capias* warrant correctly identifying the assailant as "Michael Melton." *Id.* at 4a. Two years after the judge issued the warrant, Melton was arrested on assault charges and detained for sixteen days before being released on bond. *Id.* It is undisputed that Deputy Phillips' involvement in the chain of events that led to Melton's May 2012 arrest and detention ended with the initial incident report in June 2009. *Id.*

The assault charges against Melton were ultimately dismissed for insufficient evidence, and he then sued Deputy Phillips under 42 U.S.C. § 1983 alleging that Deputy Phillips was responsible for his arrest under

Franks because Deputy Phillips included false information in his incident report. *Id.*

In his affidavit in support of his Motion for Summary Judgment in the Court below, Phillips 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. *Id.* at 5a. Melton alleged, without any direct supporting evidence, that Deputy Phillips did not obtain any identifying information from the victim other than the assailant's first and last names. *Id.* Melton relied on an affidavit by former Hunt County Patrol Lieutenant Brian Alford for his explanation of how Deputy Phillips may have 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. *Id.* 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. *Id.* Alford further stated that Melton and the true assailant have no identifying characteristics in common other than their first and last names. *Id.* 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. *Id.* Finally, 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. *Id.* However, this evidence was discredited by both Melton's 28(j) letter and Melton's admission during the *en banc* argument that Melton did not have a criminal record in Hunt County, and would not be listed in the

local P.I.D. Pet. App. 59a, n.2; Resp. App. 1-2. Respondent asserts that this admission completely discredits the Alford affidavit.

As explained by the Fifth Circuit, *en banc*, 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' conduct and Melton's arrest is too attenuated to hold the deputy liable under any law that was clearly established at the time that Deputy Phillips filled out the incident report. *Id.* at 9a.

It is undisputed that Deputy Phillips did not present or sign the complaint on the basis of which the *capias* warrant issued. *Id.* at 14a.

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"[1] an incident report will be used to obtain a warrant. *Id.* at 17a. However, as the *en banc* opinion notes, 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. *Id.* Nor, as Melton has conceded, is there record evidence suggesting that Deputy Phillips knew this specific report would be used to obtain a warrant. *Id.* Moreover, unchecked boxes at the end of the incident report show that Deputy Phillips chose not to

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[1] Deputy Phillips was not an investigator – he was a patrol deputy. Pet. App. 3a.

file the report with a justice of the peace, a county attorney, or a district attorney. *Id.* The record does not contain evidence that the information in the incident report was provided for the purpose of use in the complaint, and Deputy Phillips did not participate in preparing the complaint; nor did he assist in preparing, presenting, or signing the complaint. *Id.*

In the alternative, the Fifth Circuit's *en banc* decision also found that the fact issues identified by the district court were not material to recklessness. *Id.* at 16a, n.7. The Fifth Circuit also found that even assuming, arguendo, that Alford correctly speculated 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. *Id.* Melton has not pointed to any evidence in the record on this requirement. *Id.*

REASONS FOR DENYING THE PETITION

I. This Court should not review the Fifth Circuit's decision because the Fifth Circuit correctly applied Fourth Amendment Protections.

A. The Fifth Circuit's decision does not deepen an established circuit split.

Petitioner incorrectly asserts that the Fifth Circuit added an element to Fourth Amendment *Franks* claims against law enforcement officers who do not directly prepare, present, or sign warrant applications. *See generally Franks v. Delaware*, 438 U.S. 154 (1978). Instead, the *en banc* court applied *Franks* to the unique facts of this case, which clearly demonstrated that the officer's conduct in possibly misidentifying the suspect in an incident report was not connected to an investigator obtaining a warrant over a year later.[2] The *en banc* court correctly observed that none of its sister courts has applied *Franks* to circumstances in which an officer's connection to the plaintiff's arrest is as attenuated as in this case. Pet. App. 13a. The *en banc* court cited cases from the First, Second, Third, Seventh and Ninth Circuits, which adhered to the self-described narrow extension of liability created by *Franks*. Pet. App. 13a-14a.

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[2] Indeed, as the Fifth Circuit found in its *en banc* decision, Melton repeatedly emphasized that the facts of this case are unique. Pet. App. 19a.

1. The Fifth Circuit's ruling does not conflict with decisions in the Third, Eighth, and Ninth Circuits

a. Third Circuit.

The cases cited by Petitioner from the Third Circuit do not demonstrate a split between the Fifth and Third Circuits. The cases, as admitted by Petitioner, did not decide the issue of whether a non-affiant who did not prepare or assist in the preparation of the warrant affidavit can be held liable under *Franks*. In *United States v. Brown*, 631 F.3d 638 (3d Cir. 2011), the false information included in the warrant application was "purposely incorporated" into the warrant affidavit by the non-affiant. *Id.* at 641, 648. In *United States v. Calisto*, 838 F.2d 711 (3d Cir. 1988), the misstatements in the warrant affidavit were made by the affiant, not others, in an attempt to protect confidential sources whose original information was correct. *Id.* at 715-16. The *Calisto* case is not on point, and Petitioner's position that the court analyzed the confidential sources' conduct for *Franks* liability is not correct. The sources were simply mentioned as background in the opinion. The decision does not support Petitioner's argument of a conflicting standard in the Third Circuit.

The last Third Circuit case cited by Petitioner is *United States v. Shields*, 458 F.3d 269 (3d Cir. 2006). The court in *Shields* did not analyze the conduct of the non-affiant who supplied the false "template" to be used for the search warrant affidavit. *Id.* at 277. Instead, the court assumed the information provided was intentionally or recklessly made, and found probable cause existed without the false information. *Id.* This case is not in conflict with the decision below

because the non-affiant's conduct was creating a "template for a search warrant affidavit," or stated another way, providing information for the purpose of its use in a warrant application. *Id.* at 272.

b. Eighth Circuit.

The cases cited by Petitioner from the Eighth Circuit are also consistent with the decision of the Fifth Circuit in the instant case. In *United States v. Davis*, 471 F.3d 938 (8th Cir. 2006), a group of officers executing an arrest warrant conducted a sweep of the defendant's property, which included a house and a barn. *Id.* at 942. The officer who conducted the sweep of the house reported the facts to the officer who conducted the sweep of the barn, who in turn, relayed all of the information to the officer who signed the search warrant affidavit. *Id.* The court found that the officer who conducted the sweep on the house had reckless disregard for the truth when he reported that firearms were in plain view when, in fact, the firearms were inside a locked closet. *Id.* at 946-47. The inclusion of this fact in the affidavit violated *Franks*. *Id.* at 947. However, there is no indication in the Eighth Circuit's opinion that the information provided by the offending officer was for anything other than the warrant application, making it consistent with the present case.

Petitioner's only other Eighth Circuit case also fails to make his point regarding a conflict with the Fifth Circuit. In *United States v. Lakoskey*, 462 F.3d 965 (8th Cir. 2006), the incorrect information was directly emailed to the affiant, who continued to investigate, and drafted the warrant affidavit with the information within approximately two to three weeks of receiving the email. *Id.* at 970-71 & n.1. The court did not

analyze whether the incorrect information was for use in a warrant affidavit because it found that even without the information there was sufficient probable cause for the warrant to issue. *Id.* at 978-79. This case does not establish a conflict between the circuits.

c. Ninth Circuit.

The case of *United States v. DeLeon*, 979 F.2d 761 (9th Cir. 1992) is not in conflict with the case at bar. In *DeLeon*, the affiant was present during the investigator's calls to the witnesses, was not given all of the information given to the investigator during the phone calls, and drafted the warrant affidavit all on the same day. *Id.* at 763. Clearly, the information was provided by the interviewer for the purpose of the warrant application. *Id.* at 764.

In *Chism v. Washington State*, 661 F.3d 380 (9th Cir. 2011), the officer's false statements were made in an affidavit for the purpose of a search warrant application. Use of that same information, on the same day, for a Certification of Probable Cause by the prosecutor for an arrest warrant, was held to make the original officer responsible under *Franks. Id*. at 392. Again, no conflict exists.

2. Other circuits and state courts have not faced the same issue.

As confessed by the Petitioner, the cases cited from the First, Seventh, and Tenth Circuits, as well as the state courts of last resort, do not address the issue presented by Petitioner. However, a review of the facts of these cases reveal that the misrepresentations or omissions were for the purpose of obtaining the warrant at issue in each case, not for the purpose of an

initial incident report later independently investigated by another officer over a year later. Additionally, the Second Circuit's decision is completely consistent with *Franks*. In *United States v. Wapnick*, 60 F.3d 948 (2nd Cir. 1995), one officer was passing on information to the affiant in connection with obtaining a warrant. *Id.* at 950. This is exactly the context considered by this Court in *Franks* when this Court stated "police [can]not insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity." *Franks*, 438 U.S. at 164 n.6. Ultimately, the court in *Wapnick* ruled that a *Franks* hearing was unnecessary because there was no showing of any knowing or reckless false statements, and the remainder of the affidavit provided ample probable cause. *Wapnick*, 60 F.3d at 956.

B. The Fifth Circuit's decision is consistent with *Franks* and the policies underlying the narrowness of the *Franks* rule.

The Fifth Circuit's decision is consistent with the narrow rule created in *Franks*. This Court expressly stated that the *Franks* rule is a narrow one and that its narrowness reflects six concerns. *Id.* at 167. First, a broad Fourth Amendment rule could interfere with criminal convictions and be costly to society. *Id.* at 165-66. 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. 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 warrant proceedings. *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. 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 be properly 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.* The Fifth Circuit considered these factors and declined to adopt a broad new rule of officer liability. Pet. App. 13a.

C. The case does not present a question that is worthy of a certiorari review.

As discussed above, there is no real conflict among the circuits with respect to the application of *Franks* and the Fifth Circuit's decision below. The cases cited by Petitioner did not decide the issue presented in this case. Furthermore, the Fifth Circuit decision below dealt with unique facts and a very attenuated situation not present in any of the cases cited by Petitioner.

This case is also not worthy of review because the evidence in this case shows that no recklessness occurred. Deputy Phillips' summary judgment affidavit stated that all of the information used in the original report was based solely on what he was told by the victim. Pet. App. 59a n. 2. Apart from Melton's expert

affidavit, which was discredited by both Melton's 28(j) letter and Melton's admission during the *en banc* argument that Melton did not have a criminal record in Hunt County and would not be listed in the local P.I.D., Deputy Phillips' summary judgment affidavit is uncontroverted. *Id.* In addition to there being no recklessness on the part of Deputy Phillips, his actions were so attenuated from the warrant affidavit that the rationale behind *Franks* is inapplicable. To assume that officers would be motivated to plant false seeds, directed to no particular officer or official, to be used by an independent investigator drafting a warrant affidavit over a year later, is far fetched and not the type of conduct contemplated by *Franks*. This case is simply not a proper vehicle for addressing the issue presented by Petitioner.

II. This Court should not review the Fifth Circuit's decision applying qualified immunity.

Petitioner argues that this Court should grant review to decide the issue of qualified immunity. Petitioner first argues, despite his earlier comments regarding a "circuit split," the law was clearly established such that Deputy Phillips should be aware that his actions violated the Fourth Amendment. However, as the Court below noted, Petitioner's argument was that this case is "unique," and Petitioner conceded at oral argument that he could not identify a single case applying *Franks* to a situation in which there was no error or false statement in the complaint and no error or false statement that made its way into the warrant. Pet. App. 19a. Furthermore, as stated above, the facts disprove any recklessness on the part

of Deputy Phillips. Review is not warranted to review alleged factual disputes of this sort. *See* S. Ct. R. 10.

Petitioner next argues that this Court should review this case because of concerns over the qualified immunity doctrine as a whole. This argument is without merit since the doctrine of qualified immunity is established jurisprudence protecting government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan,* 55 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity necessarily balances two important 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*, 55 U.S. at 231. Simply because this Court has been somewhat critical of the application of the qualified immunity defense on two occasions, is not a reason to grant the Petition in the instant case.

Finally, Petitioner argues that review should be granted to broaden *Franks* to apply to this case even if the Court grants qualified immunity. Petitioner argues that without broadening *Franks*, unprincipled officers may be able to create arrests or searches that cannot be challenged. As previously mentioned, *Franks* included a detailed discussion of why its rule must be narrowly construed and the safeguards in place to protect against the scenario proffered by Petitioner. *Franks*, 438 U.S. at 165-67. This argument is without merit and the Petition should be denied.

CONCLUSION

The Fifth Circuit's Opinion is consistent with other circuits and existing precedent, and Petitioner has failed to establish any compelling reason for this Court to grant his Petition. Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX 1

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March 10, 2016

Mr. Lyle W. Cayce
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600 S. Maestri Place
New Orleans, Louisiana 70130-3408

Via Electronic Filing

RE: **Case No. 15-10604***; Michael David Melton v. Kelly D. Phillips et al*; in the In the United States District Court of Appeals for the Fifth Circuit

Dear Mr. Cayce,

This letter brief is filed under Federal Rule of Appellate Procedure 28(j) and 5th Cir. R. 28.4. After review of the audio recording of oral argument, I file this letter brief to clarify and correct a fact statement portion of my oral argument. Though 28(j) is titled Citation of Supplemental Authorities, I can find no other rule to bring this correction to the Court's attention.

During Oral Argument the Court asked if my client had a criminal record, and I answered that, no, he does not. The focus of my argument was pointed to my client's lack of criminal record in Hunt County and the lack of criminal record on the local P.I.D. system. After listing to the audio recording of oral argument, and in full candor to the Court, I believe it is necessary to inform the Court that my client, who is not from Hunt County did indeed have a criminal record, but not from Hunt County and not listed in the local P.I.D. My client's history and lack of Hunt County history is not yet part of the record in this case.

In response to the Court's inquiry at oral argument for citation that is favorable, Melton submits *Berg v. County of Allegheny*, 219 F.3d 261, 266-67 (3d Cir. 2000). In that case, the Third Circuit addressed a situation where a warrant clerk mistakenly transposed numbers in the criminal complaint number for a fugitive, resulting in the wrong name appearing on the warrant. When entered into the criminal database, retrieved different personal information, a peace officer changed the information on the warrant to match. The court found that the case against the arresting officer should survive, reasoning that "an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the circumstances." The court stated that "circumstances include, but are not limited to, other information that the officer possesses or to which he has reasonable access, and whether failing to make an immediate arrest creates a public threat or danger of flight."

Sincerely,

/s/ Jason A. Duff

Jason A. Duff

cc: Counsel of Record (by the Court's electronic filing system)