No. 17-1641

IN THE

Supreme Court of the United States

BARBARA ANN THOMAS, JOHN THOMAS

Petitioners,

v.

J. J. WILLIAMS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Officer J. J. Williams prepared a probable cause affidavit based on a confidential informant's statement regarding an apartment where drugs were being sold illegally. Based on that affidavit a judge signed a search warrant, which Officer Williams executed. After entering the apartment, however, he determined this was not the correct apartment. He apologized to Ms. Thomas and asked her some questions to determine if another person could have been using her apartment to sell drugs. Later he returned to the complex with the C.I. who realized that he or she had made a mistake in describing the apartment's location and number to Officer Williams.

Question: Did Petitioners meet their burden to overcome Officer Williams' entitlement to qualified immunity?

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INTRODUCTION

"[T]his Court is not usually in the business of error correction," and it has done so very sparingly. *Trevino v. Davis*, 138 S .Ct. 1793, 1794 (2018) (Mem) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari). On one such occasion in 2014, this Court held: "In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 572 U.S. 650, 134 S. Ct. 1861, 1863 (2014) (per curiam) (internal brackets and quotation marks omitted) (vacating and remanding).

Accompanying that instance of error correction was this statement of concern:

> that the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. *See, e.g.,* this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller,

> T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari").
>
> In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment. The present case falls into that very large category. There is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here. See 713 F.3d 299, 304 (C.A.5 2013). Thus, the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party. In the courts of appeals, cases presenting this question are utterly routine. There is no question that this case is important for the parties, but the same is true for a great many other cases that fall into the same category.

Id. at 1868-69 (Alito, J., joined by Scalia, J., concurring). In recent years, at least four justices have participated in either dissenting or concurring opinions noting the principle, practice, and, indeed, this Court's own rule that petitions will only "rarely [be] granted when the asserted error consists of erroneous factual findings or

the misapplication of a properly stated rule of law." *Id.*; *cf. Trevino*, 138 S. Ct. at 1794.

Yet Petitioners assert only an erroneous statement of facts or a misapplication of the summary judgment standard. (Petitioner does not suggest that there is a circuit split for this Court to resolve.) Respondent, Officer Williams, does not concede that either the district court or the Fifth Circuit erred. But even if that were so, this is not a case presenting "compelling reasons" for this Court once again to step "outside the mainstream of the Court's functions" and engage in error correction. *Tolan*, 134 S. Ct. at 1868-69 (Alito, J., joined by Scalia, J., concurring).

STATEMENT OF THE CASE

Statutory and legal context

Petitioners, Barbara Ann Thomas and John Thomas, brought this suit brought under 42 U.S.C. § 1983 asserting that Officer J. J. Williams violated her rights against unreasonable search and seizure under the Fourth Amendment to the U.S. Constitution.

"Qualified immunity promotes the necessary, effective, and efficient performance of governmental duties by shielding from suit all but the plainly incompetent or those who knowingly violate the law." *Tolan v. Cotton*, 713 F.3d 299, 304 (5th Cir. 2013), *rev'd on other grounds*, 134 S. Ct. 1861 (2014). Qualified immunity involves a two-prong test to determine whether an official is entitled to a qualified immunity defense. *Thompson v. Johnson*, 348 Fed. App'x 919, 922 (5th Cir. 2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). First, the court must determine

if the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right. *Id*. Second, if a constitutional right has been violated, the court must ask whether the right was clearly established. *Id*. The inquiry into whether the individual officers are entitled to qualified immunity turns on the objective reasonableness of their actions in light of the legal rules clearly established at the time. *Pearson v. Callahan*, 555 U.S. 223, 243 (2009). If the conduct did not violate a constitutional right, there is no need to address the second prong of the qualified immunity analysis. *Id*. at 922. Once a defendant invokes qualified immunity, the burden shifts to the plaintiff to rebut its applicability. *Tolan*, 713 F.3d at 304.

This Court has held that when resolving the questions of qualified immunity at the summary judgment stage, the District Court need not view facts favorable to the plaintiff when the record as a whole cannot lead a rational trier of fact to find for the non-moving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380.

Petitioners argue that Officer Williams violated their Fourth Amendment rights because the probable cause affidavit allegedly contained knowingly, deliberately, or recklessly made material false statements to the judge who authorized the search warrant. ROA.642.

An officer may be liable for swearing to false information in an affidavit in support of a search warrant if (1) the affiant knew the information was false, or would have known it was false except for a reckless disregard for the truth and (2) the affidavit was necessary to establish probable cause for the warrant. *Franks v. Del.*, 438 U.S. 154, 171 (1978). Where a warrant is secured on the basis of false statements or misleading omissions made to the magistrate by the police officer, there is a cause of action only where the false or withheld information is material to the probable cause determination. Negligent or mistaken errors in an affidavit are not sufficient to establish liability for false statements. *Id.* A high degree of awareness of probable falsity in making the affidavit is required to meet the test, which is reckless disregard for the truth. *Garrison v. La.*, 379 U.S. 64, 74 (1964).

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Where the burden of proof at trial is on the non-moving party, the movant satisfies its initial burden by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). The nonmovant must then identify specific evidence in the record and articulate how that evidence supports the party's claim. *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007).

Conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments are not an adequate substitute for specific facts showing a genuine issue for

trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Although factual controversies are to be resolved in the nonmovant's favor, that is "only when … both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075. The plaintiff is not entitled to go to trial on allegations, and must come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex*, 477 U.S. at 323.

Factual Context

The district court accurately recited the undisputed material facts of this case, some of which will be repeated here.

Petitioners, Barbara Ann Thomas and her son, John Thomas, reside at 5816 Hirsch Road, in Houston, Texas. ROA.529-530. Respondent, Officer Williams, is a peace officer employed by the Houston Police Department ("HPD"). ROA.530. According to Williams' affidavit, the relevant investigation began in April of 2014, because complaints had been submitted to HPD about marijuana and drug dealer activity on the 5800 Hirsch Road block. ROA.751. One complaint stated the address as "5814 1/," without providing a final digit, and another complaint stated that activity was occurring at 5814 Hirsch Road. ROA.751.

On May 7, 2014, Officers Williams and Caldwell took a confidential informant (the "C.I.") to the location to attempt to make a narcotics purchase. ROA.752. During this attempted buy the officers "maintained distant and

rolling surveillance, so not to be 'picked off' by any 'look-outs,'" which had happened before with other attempted narcotics purchases in the complex. ROA.752. The C.I. was sent to look for the apartment numbered 5814 ½, and returned having successfully purchased 0.27 grams of crack cocaine from a "black male on the porch." ROA.752.

Williams explains in his affidavit that this is referred to as a "dirty buy," and "a search warrant cannot be generated under these circumstances because there is no proof the crack came out of the apartment." ROA.752. Therefore, the officers continued investigating, and identified a suspect named "Nash" as the seller. ROA.752. Williams continued to survey the area and the suspect, but never saw him enter or leave a specific apartment; Williams "always noticed suspect Nash to be in the common areas of the complex or the parking lot of an adjacent corner store." ROA.753. During this continued investigation Williams also used hcad.org attempt to "verify the addresses within the complex," but "found there is only 5812 and 5820 listed for the six buildings and twelve apartments." ROA.752. Williams also used Google Earth to obtain a satellite photo of the complex. ROA.752.

On May 20, 2014, Williams and Caldwell returned to the complex with the same C.I. ROA.753. Williams stated in his affidavit, "Keeping true to what proved to be successful tactics in the prior purchase, we maintained a distant and rolling surveillance, careful not to stay too long in one place and be 'picked off'. In doing so, we were not able to see every aspect of the purchase and had to verify what we had seen and what had transpired during the drug buy with what the C.I. told us when they reported back afterward." ROA.753. The C.I. returned with 0.19

grams of crack cocaine, and told the officers that he or she observed Nash come out of his apartment, numbered 5818. ROA.753-754. To confirm which door Nash used, Williams verified with the C.I. that Nash used the right door, "as far in the corner of the complex as you can go." ROA.754. Williams was hesitant to walk through the complex to identify the numbers himself, "[k]nowing the dealers in and around the complex were organized with look-outs," and could not see the numbers from across the street. ROA.754. However, Williams was confident in the information supplied by the C.I., and prepared a probable cause affidavit and search warrant for 5818 Hirsch Road. ROA.754-755.

Williams and other officers executed this search warrant on May 24, 2014. ROA.756. Williams stated that:

> As we approached the door of the far right apartment described by the C.I., I observed the last digit of the address of that apartment was a "6" instead of an "8", so it read "5816".
>
> I recognized the difference in the address in the probable cause affidavit and search warrant to that over the door of the subject apartment, [. . .] But, based on past experiences, and the facts I have referenced above, I knew that address numbers can be misread for many reasons, and in fact it is not uncommon to encounter drug-related premises without an address.

ROA.756-757. The officers then pried open the burglar bars and "[a]lmost simultaneously, Ms. Thomas opened

her door and stepped back." ROA.757. The team then conducted a security sweep of the apartment, "which took approximately 30 to 45 seconds," but "[a] search for narcotics was never started or attempted. During the safety sweep, it became apparent that the apartment did not give an indication as one being used to store or sell illegal drugs." ROA.757-758.

Williams then apologized to Ms. Thomas, and asked her various questions to determine if another person was using her apartment to sell drugs. ROA.758. Later, Williams returned to the complex with the C.I. who realized that he or she had made a mistake, because "the brick wall that runs partially between the two apartments blocked their view of Ms. Thomas' door." ROA.759.

In their Second Amended Complaint, Petitioners describe the search as follows. The officers:

> r. forcibly entered Plaintiffs' locked front door at approximately 6:30 p.m.;
>
> s. found Plaintiffs therein huddled together in fear on the couch;
>
> t. seized Plaintiffs at gunpoint (at least three Defendants);
>
> u. admitted to Plaintiff Barbara Thomas that they were in the wrong house within approximately five minutes;
>
> v. detained Plaintiffs for approximately half an hour;

w. accused Plaintiffs of having drugs in their home;

x. performed an extensive search of Plaintiffs' home (at least two Defendants);

y. caused damage to Plaintiffs' personal property in their home; and

z. rendered the locking mechanism on Plaintiffs' front door completely inoperable

ROA.532-533. Petitioners allege that each officer "violated their clearly established rights under the Fourth and Fourteenth Amendments to the United States Constitution to remain free from unreasonable searches of their home" and to "remain free from unreasonable seizures." ROA.536, 541. Petitioners also allege that Williams "acquired a warrant to enter their home by swearing out an affidavit with materially false statements either knowingly or in reckless disregard for the truth." ROA.543.

REASONS FOR DENYING THE PETITION

I. There is no triable material fact issue regarding Officer Williams' entitlement to summary judgment on grounds of qualified immunity.

A. The probable cause affidavit and search warrant were objectively reasonable.

Petitioners argue that Officer Williams violated their Fourth Amendment rights because the probable cause affidavit allegedly contained knowingly, deliberately, or

recklessly made material false statements to the judge who authorized the search warrant. ROA.642.

As noted above, an officer may be liable for swearing to false information in an affidavit in support of a search warrant if (1) the affiant knew the information was false, or would have known it was false except for a reckless disregard for the truth and (2) the affidavit was necessary to establish probable cause for the warrant. *Franks v. Del.*, 438 U.S. at 171. Where a warrant is secured on the basis of false statements or misleading omissions made to the magistrate by the police officer, there is a cause of action only where the false or withheld information is material to the probable cause determination. Negligent or mistaken errors in an affidavit are not sufficient to establish liability for false statements. *Id.* A high degree of awareness of probable falsity in making the affidavit is required to meet the test, which is reckless disregard for the truth. *Garrison v. La.*, 379 U.S. at 74.

There is no evidence that Williams made any deliberate or reckless misstatements to the judge regarding the location of the residence to be searched. The evidence is exactly the opposite. ROA.732-738 (especially ROA.737); ROA.739-748 (especially ROA.747-748); ROA.749-761 (especially ROA.758-760); ROA.768-769, 773, 777-778, 779, 780-781, 789, 791.

Petitioners focus on a single address number discrepancy: 5816 vs. 5818 Hirsh Road. ROA.107, 109, 113, 114, 116; Thomas Br. at 5, 6, 7, & passim. However, there is no strict liability standard for evaluating an officer's execution of a search warrant. With indicia pointing to Petitioners' residence as the location of the drug buy, the

fact that their residence was not the correct location does not create a civil rights violation. "Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *Ill. v. Gates*, 462 U.S. 213, 236-37 (1983). "[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Ventresca*, 380 U.S. at 109.

Petitioners emphasize address numbers without considering the physical location described in the affidavit and search warrant. They also do not allow for the existence of reasonable reliance on a reliable and credible C.I., coupled with additional investigational information.

Officer Williams was diligent in attempting to identify and confirm the correct physical location and address number of the subject drug dealer. He and his confidential informant ran two drug buys on May 7, 2014 and May 20, 2014 from a suspect known as "Nash" operating out of the complex in which he lived, as well as Petitioners. ROA.742-743, 752-753.

Williams used HCAD.ORG to attempt to identify the addresses or physical locations for the various apartments in the subject complex in the 5000 block of Hirsch Rd. ROA.752. He also used Google Earth's satellite webpage to further attempt to identify the physical locations or address of each of the apartments and buildings in the complex. ROA.752.

Williams conducted surveillance of the complex between May 7, 2014 and May 20, 2014, and repeatedly saw suspect Nash in the common area of the complex. ROA.753.

He relied on a long-time dependable and credible C.I. for specific information about the location of suspect Nash's apartment. The C.I. informed Williams that they directly saw suspect Nash exiting, then entering and then exiting again from the apartment physically located and described in Williams' Affidavit. The suspect Nash sold drugs to the C.I. after came out of the describe building and what the C.I. took to be the farthest apartment door in that building located in the farthest Southeast corner of the complex. The C.I. stood nearby the suspect Nash's apartment as all these events occurred. ROA.752-755.

Williams drew a diagram of the complex, including the subject building in the far Southeast corner, the location where the C.I. was standing on May 20, 2014 when the second drug buy was made, and where the drug/money exchange was made. ROA.754. Before executing the search warrant, Williams took the additional precaution of calling the C.I. to re-confirm the exact location of the apartment door where the C.I. saw suspect Nash exit and enter, and the C.I. did confirm it. ROA.754.

1. It was objectively reasonable for Officer Williams to rely on the Confidential Informant.

Williams utilized a C.I. who had on numerous occasions provided officers with information which has proven to be true and correct. The C.I. had in the past provided officers with honest and reliable information. ROA.754-755, 780-781. Courts have repeatedly recognized that such reliable, proven, and credible C.I.s can provide probable cause to support a probable cause affidavit and search warrant and to execute a search on that warrant. *United States v. Jeffers*, 163 Fed. App'x 250, 251 (5th Cir.2005)

(citing *United States v. Cherna*, 184 F.3d 403, 407 (5th Cir. 1999). The bases on which Williams determined the reliability, trustworthiness, and credibility are set out in his probable cause affidavit, ROA.780-781, which was presented and reviewed by the judge who made an independent determination of probable cause, and signed the search warrant.

"[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular contexts—not readily or even usefully reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. In *Gates*, the Court adopted a totality of circumstances test in evaluating an informer's tip where such factors as the veracity of an informant and his basis of knowledge were not independently scrutinized, but reviewed in a mix. *Id.* at 238-39. Following *Gates*, this Court has recognized that in the absence of specific reasons for police to doubt his or her truthfulness, an ordinary citizen who provides information to police may be presumed credible without subsequent corroboration. *United States v. Blount*, 123 F.3d 831, 835 (5th Cir. 1997).

Williams' probable cause affidavit gave the magistrate a substantial basis for determining probable cause for the physical location that Williams, in good faith, thought was the apartment of the drug dealer sought by HPD. Williams' Affidavit reads in part as it pertains to the C.I. as follows:

> Affiant has probable cause for said belief by reason of the following facts and circumstances: Within the past forty eight hours, your Affiant utilized the assistance of a confidential informant (C. I.), who will remain anonymous

> for safety reasons. This informant has on numerous occasions provided officers with information which has been proven to be true and correct. This informant has in the past provided officers with honest and reliable information. Your Affiant met with the C.I. at an undisclosed location to brief this information.
>
> After developing a tactical plan the officers with the C.I. proceeded to 5818 Hirsch. Prior to doing so, your affiant checked the C.I. for any contraband, after none were found, supplied the C. I. with an amount of city buy money. The C. I. was then directed to the listed location to purchase an amount of Crack Cocaine. Your affiant observed the C. I. go to, and return directly from, the listed location. The C.I. upon returning, handed your affiant an amount of Crack Cocaine. The C. I. is a past user of Crack Cocaine and can readily identify it by sight. The C. I. advised your affiant that while the C. I. was at the residence, the C.I. purchased the Cocaine from the listed suspect. The C. L was advised to come back anytime to purchase more Cocaine. Your affiant checked the C.L for any contraband, after none were found, dismissed the C. I. and returned to the office. Your affiant later determined the purchased crack to test positive for cocaine content.

ROA.781.

The probable cause affidavit, which was reviewed and approved by the magistrate provided a substantial basis

for determining probable cause. ROA.732-738 (Report of Officer Williams' expert, Mr. L. E. Wilson); ROA.739-748 (Affidavit of Lieutenant Michael Waterwall); ROA.749-761 (Affidavit of Officer J.J. Williams). Regardless of other things that Officer Williams might have included in the affidavit, the controlling question is whether the information that he provided gave the magistrate a substantial basis for determining probable cause. And his affidavit meets that standard.

2. Mistake or error in the address does not overcome the reasonableness of Officer Williams' actions, and does not give rise to a constitutional claim.

Negligent conduct of a state official cannot cause a deprivation of a due process interest. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). "[W]here a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required." *Davidson v. Cannon*, 474 U.S. 344, 347 (1986). William's alleged conduct leading up to execution of the search warrant simply goes to an alleged lack of care on his part that resulted in this incident in a mistaken entry into Petitioners' home and their subsequent temporary detainment. Any such negligent conduct or mistakes are not a basis for a due process violation.

Petitioners characterize Officer Williams' deposition testimony and his affidavit in a way to imply that he stated he saw the C.I. go into suspect Nash's apartment. Nowhere did Williams state or imply that he saw the C.I. go into suspect Nash's apartment or that the C.I. was inside when the drug buy took place. Instead, Williams

states in his affidavit that "the C.I. was then directed to the listed location." ROA.781. Williams "observed the C.I. go to, and return directly from, the listed location." ROA.781. And "while the C.I. was at the residence" the C.I. purchased Cocaine from the listed suspect." ROA.781. Williams' descriptions and observations are well within the customary and accepted language and descriptions used in probable cause affidavits and search warrants, ROA733-734, 737-738, and do not by themselves carry the meanings ascribed to them by Petitioners.

Petitioners allege that Officer Williams deliberately entered their apartment knowing it was the wrong physical location. ROA.104,106-110. But Petitioners have not created a material fact issue on this point. First, as set forth in his deposition, affidavit, and undisputed evidence, Officer Williams believed the information provided to him by the CI, who was known by Officer Williams and others to be reliable, trustworthy, and dependable for many, many years. The CI repeatedly informed Officer Williams that the correct location from which the CI saw the drug dealer exiting was the farthest apartment to the right in that same building that was described in Williams' affidavit and deposition testimony. ROA.753-756. Petitioners' theories do not change Officer Williams' information and independent perception and understanding of the proper physical location in the midst of unfolding events.

The Fourth Amendment protects the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. Not every alleged tort or wrong constitutes a violation of a civil right. *Baker v. McCollan*, 443 U.S. 137, 142, 144, 146 (1979). A person is not entitled

to an error free investigation. *Id.* at 145-46; *Sanchez v. Swyden*, 139 F.3d 464, 468 (5th Cir. 1998). There is no cause of action for every contact between a citizen and a police officer. *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273 (5th Cir. 1994).

In *Maryland v. Garrison*, 480 U.S. 79, 80 (1987), Baltimore Police Officers executed a search warrant for a third floor apartment only finding out after the search that the premises contained two apartments instead of one. The Supreme Court upheld the search of the erroneous apartment on the basis that the officers' mistake was reasonable in light of the information available to them at the time of the search. *Id.* at 88-89. The Court stated that once the officers realize their mistake, they are required to discontinue their search. *Id.* at 87. In upholding the mistaken search, the Court "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Id.* The mistaken execution of a valid search warrant on the wrong premises does not violate the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 396, (1989) (citing *Maryland*, 480 U.S. at 107); *see also Pray v. City of Sandusky*, 49 F.3d 1154, 1159 (6th Cir. 1995) (holding officers' entry into wrong house in execution of search warrant was reasonable).

Williams' affidavit, ROA.749-761, attests to the difficult realities of identifying the proper physical location of a suspect premises when there sometimes is no address number, incomplete address numbers, out of date address numbers. That is why the physical location is as important or more important that an address number.

B. Williams' conduct after realizing the mistaken address did not violate Petitioners' rights.

Petitioners argue that Williams violated their civil rights by staying too long in their apartment after it was determined to be the wrong apartment. Officers are "required to discontinue the search … as soon as they … [are] put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant." *Garrison*, 480 U.S. at 87. *See also Simmons v. City of Paris, Tex.*, 378 F.3d 476, 479-80 (5th Cir. 2004) ("[W]hen law enforcement officers are executing a search warrant and discover that they have entered the wrong residence, they should immediately terminate their search."). Williams testified that there was no search of Petitioners' apartment—ROA.757-758, 1059-1060, 1086—only a safety sweep that took less than 1 minute. For the next 10 minutes, he was sitting with Ms. Thomas on her couch asking her questions to determine if others might be using her apartment unbeknownst to her while she was away. ROA.758, 1059-1060. The total time searching was zero. The total time in Ms. Thomas' apartment was about 11 minutes. ROA.758, 1059-1060, 1076-1077.

When determining an officer's entitlement to qualified immunity, reviewing courts must judge the officer's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. at 396. "[W]e must judge the constitutionality of their conduct in light of the information available to them at the time they acted." *Maryland*, 480 U.S. at 85-86. Even if Officer Williams mistakenly believed the CI's description, he is still entitled to qualified immunity because the reasonable reliable information

available to him pointed to the farthest duplex to the right in that particular building.

1. Petitioners presented no evidence that Officer Williams violated a clearly established constitutional right.

An alleged constitutional violation must be evaluated in light of the specific factual context. Whether a right was clearly established is an inquiry which "must be undertaken in light of the case's specific context, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. at 201-02. If the law did not put the officer on notice his conduct would be clearly unlawful, dismissal based on qualified immunity is appropriate. *Id.* at 202; *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000). "Clearly established for qualified immunity purposes means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wilson v. Layne*, 526 U.S. 603, 615; (1999); *Sanchez v. Swyden*, 139 F.3d 464, 466 (5th Cir. 1998).

The right the official is alleged to have violated must, therefore, be clearly established in a particularized sense. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A court's analysis of clearly established law "focuses not only on the state of the law at the time of the complained of conduct, but also on the particulars of the challenged conduct and/or factual setting in which it took place." *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997). Petitioners do not cite any case that suggests reliance by an officer on a proven reliable, trustworthy, and dependable CI is against clearly

established law in the 5th Circuit. They have failed to show any other clearly-established right that was violated by Williams under the factual circumstances of this matter, including those related to Williams' affidavit and his entry into Petitioners' apartment.

2. Petitioners showed no genuine issue of material fact regarding the objective reasonableness of Officer Williams' actions.

To overcome qualified immunity, a plaintiff must prove that no reasonable government official could have believed the accused officials' alleged conduct was lawful in light of the information he possessed and clearly established law. *Mendenhall*, 213 F.3d at 231; *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). In the context of probable cause affidavits submitted to a magistrate, a "[d]efendant will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). *See Hunter v. Bryant*, 502 U.S. 224 (1991) ("[T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . .").

Petitioners have not shown that no reasonable officer would have prepared and submitted a probable cause affidavit such as those presented by Officer Williams. When determining whether a violation of Petitioners' constitutional rights occurred in the context of the

issuance and execution of a search warrant, under the "first prong of the qualified immunity test," the relevant standard is "so long as the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Gates*, 462 U.S. at 237. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost." *Malley*, 475 U.S. at 344-45.

The test is whether the alleged material misstatements and omissions in the warrant affidavit are of "such character that no reasonable official would have submitted it to a magistrate." *Morin v. Caire*, 77 F.3d 116, 122 (5th Cir. 1996). Any such specific omitted or mistaken facts must be "clearly critical" to a finding of probable cause. *Id*. Petitioners have the burden to prove that the alleged omissions and alleged misstatements would have prevented the magistrate from finding probable cause. Petitioners' summary judgment evidence does not carry this burden. To the contrary, Williams' summary judgment evidence, coupled with controlling law, demonstrates that he acted reasonably, and that an objective reasonable Officer could have believed that his actions leading up to submitting the affidavit to the judge, and the language in it, were reasonable and did not violate Petitioners' civil rights. ROA.732-738, 739-748, 749-761.

II. The judge's determination precludes finding of Constitutional violation as a matter of law.

Officer Williams' intent in presenting the affidavit to the judge is irrelevant. "[E]ven an officer who acted with malice in procuring the warrant or the indictment

will not be liable if the facts supporting the warrant or indictment 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." *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982); *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988).

Petitioners' also argue that it was impossible for the judge to make a decision free and independent of the allegedly tainted affidavit. But if the judge needed additional information, such as clarifications, before making a determination about probable cause, she would or could have refused the search warrant. Regardless of what Petitioners think Officer Williams should have included or attached to the affidavit, the information actually available to the judge was sufficient to support the existence of probable cause based on information reasonably obtained and relied upon by Officer Williams.

III. There is no split of authority.

Petitioners have not argued that there is any split of authority on their question presented. Petitioners only claim that the courts below were wrong. The courts below did not misinterpret the evidence or misapply the law. Even if they had, it would not be a compelling reason for this Court to take the rare step of correcting an alleged error. Without a split of authority, Petitioners have not shown an issue of national interest.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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