No. 18-

IN THE

Supreme Court of the United States

LENARD JOHNSON,

Petitioner,

v.

RICHARD WINFREY, JR.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does *Franks v. Delaware*[1] analysis apply when a court opines information omitted from a warrant application is material to establishing probable cause, and if so, is omitted information evaluated differently than false statements an officer included in the warrant application?

II. Did the warrant application Deputy Lenard Johnson submitted inevitably violate clearly established law if an appellate court opines 11 years later the affidavit omitted information material to establishing probable cause?

III. Did Richard Winfrey, Jr.'s claim brought under *Franks v. Delaware* accrue when Winfrey was aware of the factual content of information Deputy Johnson is accused of falsely presenting in the warrant application he submitted?

1. 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676 (1978).

PARTIES

Petitioner is San Jacinto County, Texas, Deputy Sheriff Lenard Johnson.

Respondent is Richard Winfrey, Jr.[2]

2. Richard Winfrey, Jr. is the only Respondent. However, all three persons charged with the murder share the same surname so Respondent is referred to in the brief as Winfrey. Megan Winfrey is currently pursuing a separate appeal in the United States Court of Appeals of the Fifth Circuit and she is referred to as Megan. Richard Winfrey Sr. is referred to as Richard Sr.

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OPINIONS BELOW

The substituted published opinion of the United States Court of Appeals for the Fifth Circuit filed on August 20, 2018, *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018), is set forth in Appendix A.

The withdrawn published opinion of the United States Court of Appeals for the Fifth Circuit filed on February 5, 2018, *Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. 2018), is set forth in Appendix B.

The unpublished opinion of the United States District Court of the Southern District of Texas filed on October 4, 2016, *Winfrey v. Pikett*, 2016 U.S. Dist. LEXIS 137897 (S.D. Tex. 2016), is set forth in Appendix C.

The order denying rehearing in the United States Court of Appeals for the Fifth Circuit filed on September 28, 2018, is set forth in Appendix D.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit had jurisdiction, under 28 U.S.C. § 1291, over the District Court's final judgment in Petitioner's favor.

On September 28, 2018, the United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for rehearing *en banc*. (App. D).

This Court has jurisdiction over the case under 28 U.S.C. § 1254(1) and Rule 13(3) of the Rules of the Supreme Court. Within 90 days after the United States Court of Appeals for the Fifth Circuit denied Petitioner's petition

for rehearing *en banc*, and more than 10 days before the date a petition was due in this Court; on December 14, 2018, Petitioner filed a timely unopposed application to Associate Justice Samuel A. Alito, Jr., requesting an extension of time under Supreme Court Rules 13 and 22 for Petitioner to file a petition for writ of certiorari. (18A673). Associate Justice Alito granted the application and extended the deadline for Petitioner to file a petition for a writ of certiorari until January 31, 2019. Petitioner timely filed this petition for a writ of certiorari by January 31, 2019.

Petitioner seeks this Court's review under Supreme Court Rule 10 because the United States Court of Appeals for the Fifth Circuit decided important federal questions in a way that conflicts with the relevant decisions of this Court and other United States courts of appeal on the same important matter, and the Court of Appeals decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United 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.

42 United States Code § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Procedural History

Criminals murdered Murray Burr. (App. 3a). After a 2½ year investigation, at the direction of a prosecuting attorney, Petitioner Deputy Lenard Johnson presented a warrant application to a judge on February 2, 2007 (ROA. 3421-23), and the judge issued a warrant commanding officers to arrest Respondent Richard Winfrey, Jr, his father Richard Sr., and sister Megan. (App. 3a-7a). After submitting the affidavit, Deputy Johnson had no further involvement in the investigation, prosecution, or trial. (App. 6a; ROA. 3253, 3262, 3294-96). Deputy Johnson's affidavit included the following information.

Burr was found murdered on August 7, 2004, and his neighbors informed San Jacinto County Sheriff Lacy Rogers that approximately two weeks before the murder neighbors saw Winfrey and Megan at Burr's home. Burr's neighbor also informed the Sheriff that Burr told his neighbor that Winfrey and Megan wanted to move into Burr's home, but Burr told them no. After interviewing several people, the Sheriff did not identify anyone other than Winfrey and Megan who had been to Burr's home. (ROA. 3421).

A teacher informed Deputy Johnson that Megan had assaulted the teacher and Megan had said she wished she had a knife or scissors to use when assaulting the teacher. During summer school in 2004, a teacher also saw Megan run up to Burr and ask him when he was going to take her out and spend some of his money he had hidden in his house. A different teacher saw Megan talking to Burr inside the school and when Burr turned away from Megan she, with a clinched fist, stated someone needed to beat the shit out of Burr. (ROA. 3421).

On June 15, 2006, Richard Sr.'s jail cellmate David Campbell contacted Deputy Johnson and reported Richard Sr. had confessed to killing Burr. On July 14, 2006, Campbell provided a statement to Deputy Johnson and the Sheriff that included the following information. Richard Sr. admitted killing Burr in San Jacinto County. Richard Sr. entered the back of Burr's house after Winfrey & Megan let Richard Sr. inside. Burr was sitting in the front room when the killing took place. Richard Sr. beat Burr and cut his neck. Richard Sr. took two guns from Burr's house and hid the guns and a buck knife used in the crime in a hollow near the crime scene, where people run foxes or coyotes with dogs. (ROA. 3422).

On July 20, 2006, Sheriff Rogers informed Deputy Johnson of a location on property owned by Richard Sr.'s mother and another Winfrey relative where people ran foxes. Deputy Johnson inspected the location and found a hollow on that property. On July 24, 2006, Deputy Johnson asked members of Burr's family if Burr kept guns in his house and a family member informed Deputy Johnson that Burr had possessed two guns, but the guns were missing after the murder. Before Campbell disclosed information about guns being stolen, law enforcement was not aware of missing weapons from Burr's home. Deputy Johnson told Sheriff Rogers the public could not have known the killing started in the front room, that there was a hollow on Winfrey family property, and that weapons where stolen from Burr's home. (ROA. 3422-23).[3]

Based on this information in Deputy Johnson's affidavit, a San Jacinto County judge issued an arrest warrant. After trials, juries convicted Richard Sr. and Megan, two courts of appeal affirmed those convictions, but the Texas Court of Criminal Appeals reversed the convictions finding the evidence was insufficient to prove guilt beyond a reasonable doubt. There was a dissenting opinion filed in the Court of Criminal Appeals. (App. 7a); *Winfrey v. State*, 393 S.W.3d 763 (Tex. Crim. App. 2013) and *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010).

After a jury acquitted Winfrey, he filed suit on May 26, 2010 against Deputy Johnson and others. (App. 7a). Winfrey alleges the affidavit Deputy Johnson submitted

3. The affidavit also included information about a procedure performed by a tracking dog that will be separately addressed *infra*.

requesting a warrant for Winfrey's arrest recklessly misrepresented or omitted material facts, and did not establish probable cause. (App. 2a, 3a). Deputy Johnson asserted defenses, including qualified immunity and limitations. (App. 8a).

In 2011, the District Court granted summary judgment (ROA. 903), but the Court of Appeals for the Fifth Circuit reversed that judgment and remanded the case to the District Court for discovery regarding whether information in the arrest warrant affidavit was conveyed with reckless disregard for the truth. *Winfrey v. San Jacinto County*, 481 Fed. Appx. 969, 980 (5th Cir. 2012) ("*Winfrey I*"). (App. 2a, 7a).

After discovery, Deputy Johnson moved to dismiss Winfrey's claims based on limitations and for summary judgment. (App. 8a). In an appendix to its summary judgment ruling, the District Court provided a detailed explanation of its analysis of the affidavit. (App. 82a-85a). The District Court granted summary judgment based on qualified immunity concluding that, regardless of whether Deputy Johnson recklessly misrepresented or omitted material facts in the affidavit, a reasonable magistrate could conclude probable cause existed to arrest and file charges against Winfrey. (App. 19a, 72a-73a, 82a-85a).

Winfrey appealed and the Court of Appeals issued an opinion vacating the summary judgment and remanding the case for trial on the basis Deputy "Johnson has not established that a corrected affidavit would show probable cause to arrest [Winfrey]." (App. 46a). The Court of Appeals opined Deputy "Johnson has not shown that his alleged conduct is protected by qualified immunity." (App. 51a).

Deputy Johnson petitioned the Court of Appeals to consider, *en banc*, his immunity and correct the Court of Appeals' errors in *misplacing the burden of establishing immunity on* Deputy Johnson and *denying immunity* to Deputy Johnson *based on the Court of Appeals opinion probable cause was lacking.*

The Court of Appeals panel withdrew its opinion of February 15, 2018, (App. B), and substituted it with an opinion dated August 20, 2018, (App. A); wherein the Court corrected some of the errors in its factual findings and excised a portion - but not all - of the language in its initial opinion which showed that the Court committed the legal errors Deputy Johnson identified. Although the Court acknowledged at App. 2a that Deputy Johnson does not bear the burden of showing immunity applies, the Court's analysis (App. 20a) and language (App. 26a) reveal the Court still placed the burdens to establish probable cause and immunity on Deputy Johnson. The Court characterized its substitution of opinions as denying the petition for rehearing, even though the substituted opinion contains substantive factual and legal changes. (App. 2a, 20a, 26a; B).

The Court of Appeals' opinion identified one misstatement and two alleged omissions in the affidavit. (App. 19a-20a). Deputy Johnson misstated that Winfrey's scent was used in a dog scent tracking procedure, when the scent was actually from Megan's boyfriend. The Court of Appeals found this "misstatement" material because it opined this is the only "physical evidence" that connected Winfrey to Burr. (App. 19a).

However, the Court of Appeals did not find this was the only "evidence" connecting Winfrey to Burr's home. The affidavit, otherwise, contained unchallenged factual information provided by independent neighbor witnesses that, two weeks before the murder, Megan and Winfrey were at Burr's home. (ROA. 3421). Winfrey corroborated those witness reports by admitting this fact in a statement to the Sheriff. (App. 19a, n. 2; ROA. 3334). Winfrey also judicially confessed his link to Burr by alleging in his lawsuit complaint that he and Megan visited Burr on occasion. (ROA. 27). Evidence of a link between Winfrey and Burr existed, entirely independent of the scent trail.

The first omission the Court of Appeals identified was that in one of the statements Campbell made, he reported Richard Sr. said Winfrey and Megan assisted Richard Sr. in getting inside Burr's house to commit the murder. In a later statement, Campbell reported that Richard Sr. also had said his cousin facilitated Richard Sr.'s entry into Burr's home. The Court of Appeals' acknowledged that Campbell's two reports did not reduce the likelihood Richard Sr. committed the murder, but the Court opined it lessened Winfrey's connection to the crime. (App. 19a).

The second omission the Court of Appeals identified is that some information Campbell reported Richard Sr. saying was inconsistent with the physical evidence. Campbell reported Richard Sr. stated Burr was stabbed and shot, when Burr had been stabbed but not shot. Richard Sr. also claimed he had cut off Burr's genitals but that had not occurred. The Court of Appeals acknowledged that neither of these inconsistencies between the physical evidence and Campbell's reports of Richard Sr.'s statements, considered independently,

would have invalidated the affidavit. The Court opined, however, that together these inconsistencies undermined Campbell's reliability. The Court of Appeals provided no rationale for reaching that conclusion. (App. 20a).

The District Court viewed the analysis and effect of this information differently. As to the scent trail procedure, the District Court pointed out a corrected affidavit would have stated "[a] scent trail connected Burr's house to the Winfrey's house, though the scent used to trace the trail belonged to Chris Hammond, Megan's boyfriend. (ROA. 83a).

The District Court construed the affidavit as if it included a provision that "[i]n an initial interview, Campbell said that Megan and Junior let Senior in the back of the house. Campbell later said Senior was accompanied by a cousin." (ROA. 83a).

The District Court construed the affidavit as if it included the statement "Campbell thought that Richard Sr. cut off Burr's genitals and put them in Burr's mouth." (ROA. 84a).

Deputy Johnson petitions this Court to grant Petitioner's Petition for a Writ of Certiorari, correct the opinion of the Court of Appeals that is irreconcilable with this Court's precedents, and render judgment in Deputy Johnson's favor.

B. Relevant Facts

Burr was employed as a janitor at a school Winfrey and Megan attended. (ROA. 3390-3407; 4210). Winfrey

and Megan had been to Burr's home on occasions before his death. (App. 19a, n. 2; ROA. 27, 3334). Texas Ranger Grover Huff, Ranger Ronald Duff, Deputy Johnson, and Sheriff Rogers investigated the murder, ultimately under the guidance of District Attorney Bill Burnett. (App. 3a; ROA. 3251-3252, 3390-3407). Evidence technicians analyzed the crime scene and officers interviewed many people. (App. 4a, 5a; ROA. 3231-38, 3291-3407, 4226-4304).

Ranger Huff contacted FBI Agent Mike Sutton who referred Ranger Huff to Fort Bend County Deputy Keith Pikett, who had successfully assisted many agencies over several years with tracking dogs. At Ranger Huff's request, Deputy Pikett and his tracking dogs participated in the investigation. (App. 3a). One of the exercises the dogs performed was a drop scent trail procedure, but Ranger Huff made an error in noting the scent used during the procedure. (App. 4a; ROA. 3283-85). Ranger Huff recognized his mistake and documented in his written report that he had actually used Megan's boyfriend's, not Winfrey's, scent during one of the scent procedures.[4]

Deputy Johnson was not present when the scent procedure was performed and there is no evidence he was ever informed of the mix-up in scents used in the exercise. (App. 4a; ROA. 3283-88, 3300–02, 3297-3300). Deputy Johnson testified he was not aware of the Ranger's error until after Winfrey's trial. (ROA. 3239-44; 3349-57).[5]

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4. All claims against Ranger Huff were dismissed. *Winfrey*, 481 Fed. Appx. at 976.

5. The Court of Appeals opined Deputy Johnson *should have read* reports the Ranger and Deputy Pikett prepared which disclosed the Ranger's error.

Regardless of this error in a scent track procedure, an undisputed link nonetheless existed between Burr, Burr's home, and Winfrey. (App. 19a, n. 2; ROA. 27, 3334, 3580, 3716).

Richard Sr.'s jail cellmate, Campbell, contacted Deputy Johnson and reported Richard Sr. had admitted murdering Burr and also implicated Megan and Winfrey.[6] (App. 5a). Campbell asked to talk to Sheriff Rogers, who Campbell had known for many years. Sheriff Rogers tape-recorded Campbell's statement so there would be no dispute about what Campbell and investigators said. (App. 5a, 6a; ROA. 3231-38, 3399-3400, 3404, 5604). The District Court analyzed the record and found no evidence investigators "coached" Campbell or manipulated his statements. (App. 73a; ROA. 2957-2960, 3399-3400, 3404). Throughout the investigation, all the law enforcement officers informed the district attorney about the investigation and provided the district attorney copies of statements and reports. (ROA. 3265-82, 3289-3291, 3390-3407).

Two and one-half years after Burr's murder, on February 2, 2007, District Attorney Burnett decided to initiate criminal prosecutions. Burnett summoned Ranger Huff, Deputy Johnson, and other investigators to participate in a conference, (ROA. 3251-55), after which Prosecutor Burnett announced sufficient evidence existed to initiate criminal proceedings against Winfrey,

6. Another inmate, Keith Mujica, similarly reported Richard Sr. confessed to the crime while in jail. Mujica reported Richard Sr. claimed to have mutilated Burr and accused Burr of inappropriate sexual activity with Winfrey and Megan. Mujica's report of March 2005 significantly corroborates Campbell's later-reports a year later. (ROA. 4226-4304).

his father, and sister. (ROA. 3262, 3231-38, 3239-44, 3305-07, 3325-28, 3358-62). During the conference, prosecutor Burnett informed the officers that Johnson would submit an affidavit requesting a warrant authorizing Winfrey's arrest. (ROA. 3256-58). Deputy Johnson relied on District Attorney Burnett to determine if, and when, it was appropriate to seek an arrest warrant, and regarding the information to include in the warrant request. With Prosecutor Burnett's guidance, Deputy Johnson submitted an affidavit to a judge who issued a warrant authorizing Winfrey's arrest. (ROA. 3421-23, 3262, 3231-44, 3325-28, 3358, 3362).

Ranger Huff expressed his opinion to District Attorney Burnett that it would likely be difficult to prove Winfrey committed the murder beyond a reasonable doubt, (ROA. 3258-59), but District Attorney Burnett assured Ranger Huff that Burnett believed sufficient evidence existed to convict Winfrey. (ROA. 3259-60). Although Ranger Huff questioned whether a jury would find Winfrey guilty beyond a reasonable doubt, Ranger Huff agreed probable cause existed to arrest and prosecute Winfrey. (ROA. 3260-61, 3263, 3292-93, 3303-08).[7]

Deputy Johnson had no further involvement in the investigation or Winfrey's prosecution after Deputy Johnson submitted his affidavit on February 2, 2007.[8]

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7. The Court of Appeals did not mention, or apparently analyze, this undisputed evidence.

8. The only testimony Deputy Johnson provided in any of the three prosecutions was during Richard Senior's trial when he provided only limited chain-of-custody testimony regarding State's exhibit 62, a buccal swab from Swenson. Deputy Johnson testified

Burnett directed the investigator from his office and the Rangers to handle all aspects of the case from the point Deputy Johnson submitted the affidavit. (App. 6a; ROA. 3253, 3262, 3294, 3296). The Rangers' reports and uncontroverted testimony prove that Rangers and D.A. Investigator James Kirk performed all investigative activities after Winfrey's arrest, including follow-up interviews with Campbell and other Grand Jury and trial witnesses. (ROA. 3253, 4226-4304).

Two Texas district judges presided over separate hearings and trials wherein all the arguments Winfrey asserts in this civil case were made. Neither judge, nor the prosecuting attorney, dismissed the criminal prosecution for want of probable cause. (ROA. 3171, 3188, 4128-29, 4305). The trial judge denied Winfrey's motion for directed verdict, on the reasonable doubt standard, after the state's presentation of its case. (ROA. 4128-29). Sheriff Rogers and retired FBI Agent Mark Young testified they, as professional investigators, agreed the evidence would suggest to an objectively reasonable officer the existence of probable cause for Winfrey's arrest. (ROA. 3231, 3405).

SUMMARY OF THE ARGUMENT

A reasonable officer in 2007 who, at the direction of a prosecuting attorney, submitted the affidavit Deputy Johnson presented could not have known requesting the warrant was clearly illegal. No identifiable case opinion containing analogous facts existed in 2007 or now, and *only* the Court of Appeals for the Fifth Circuit has opined the

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he obtained the swab and sent it to the lab for analysis. (ROA. 1459, 2529-30, 2797-98, 2809-13).

affidavit failed to establish probable cause. No reasonable officer could have known in 2007, that years later a Court of Appeals would disagree about probable cause with a federal District Court and every law enforcement and prosecutorial professional who examined the issue. Also, no reasonable officer could have known in 2007, that the Court of Appeals responsible for judging Deputy Johnson's immunity would reach a conclusion regarding probable cause that is not based on any identifiable standard, or that the Court of Appeals would fail to perform the analysis this Court has determined is necessary to properly analyze immunity. Since Deputy Johnson could not have known what he was doing in 2007 was clearly unlawful, he is immune and the Court of Appeals erred when it vacated the District Court judgment and remanded the case for trial.

Deputy Johnson did not violate clearly established law in 2007 when he submitted the affidavit the Court of Appeals opined in 2018 should have included additional information regarding equivocal matters. Cellmate Campbell reported Richard Sr.'s various statements, which consistently implicated Richard Sr. and members of his family in Burr's murder. Richard Sr. initially stated Winfrey and Megan provided Richard Sr. access inside Burr's home, and subsequently – when attempting to exculpate Winfrey and Megan while investigative steps were underway including obtaining pubic hair samples from Megan – Richard Sr. later stated his cousin assisted him. There was no other evidence implicating this cousin and details of his alleged involvement are vague. Additionally, the suspicious timing of this information surfacing while investigative steps were underway involving Megan, suggests the information is less reliable than the initial

statement which was made under substantially different circumstances that was corroborated in several aspects. Therefore, this variation in Winfrey Sr.'s statements is not information a reasonable officer would necessarily find obviously missing from the affidavit.

Similarly, a reasonable officer would not necessarily conclude that all of Campbell's reports were unreliable and should be ignored simply because Winfrey Sr. overstated the brutality of his actions by claiming he mutilated and shot Burr. Winfrey Sr. told Campbell that a knife and two guns were taken from the murder scene, facts officers did not know and corroborate until after Campbell conveyed it, so Winfrey Sr.'s statements regarding use of the knife and guns would not necessarily suggest Winfrey's innocence or support the inference the Court of Appeals attributed to them. The Court of Appeals expressed that neither of these facts, considered independently, would have invalidated the affidavit, so a reasonable officer could not possibly have known settled law required him to analyze these facts—as did the Court of Appeals—and conclude that together these inconsistencies undermined Campbell's reliability. (App. 20a). This Court has never applied immunity in such a manner. The Court of Appeals' subjective views reflect hindsight from an irrelevant perspective, this Court has consistently eschewed.

This Court has not applied *Franks* to judicially identified omissions in an affidavit. It has applied *Franks* to "false statements" necessary to establish probable cause. The only statement in the affidavit that could arguably be construed as "false," is the misstatement Winfrey's scent was used in one scent trail when it was Megan's boyfriend's instead. This misstatement regarding

cumulative information certainly does not control the probable cause determination. The Court of Appeals held, instead, that the alleged omissions it based its decision on were **material to probable cause**. Deputy Johnson's lone misstatement does not even amount to a Fourth Amendment violation; much less show he violated clearly established law.

Moreover, whether an affidavit establishes probable cause is a Fourth Amendment question, not a litmus test for judging immunity. Determining probable cause is an entirely different issue from the immunity question of whether a reasonable officer could have believed an affidavit supported probable cause. Stating the immunity standard slightly differently, as several courts of appeal customarily do, the test is whether an affidavit *arguably* supported probable cause. Regardless of the terminology utilized, immunity does not depend on whether probable cause actually existed, but instead on whether a reasonable officer *could have believed* probable cause existed. By failing to separately evaluate probable cause and immunity, the Court of Appeals erroneously deprived Deputy Johnson of immunity.

The Court of Appeals further erred when it failed to identify clearly established law at a meaningful level of particularity for the circumstances. This error unreasonably narrowed the protections of immunity and reversed the burden of establishing immunity to Deputy Johnson. The Court of Appeals opinion that probable cause is lacking, like the information the Court of Appeals opines is missing from the affidavit, is information Deputy Johnson could not have known in 2007, so he could not then have been on notice his actions were clearly unlawful.

In order to reliably demonstrate that no reasonable officer could have believed the affidavit established probable cause, the Court of Appeals' opinion was required to have identified and applied a standard that fairly warned every reasonable officer in 2007 that Deputy Johnson's probable cause analysis was clearly unlawful. The Court of Appeals applied no identifiable standard in reaching its purely subjective after-the-fact opinion regarding probable cause, and its opinion is premised on information Deputy Johnson did not include in his affidavit.

This Court has explained that determining probable cause is an elusive judgment which requires balancing fluid factual and legal issues without obvious legal rules for doing so. Therefore, the most obvious evidence of error in the Court of Appeals opinion is its failure to recognize the significance of its disagreement with the District Court's conclusion, which shows that reasonable minds could differ on the probable cause analysis.

Lastly, Winfrey's claim under *Franks* accrued, at the latest, when he became aware of the information Deputy Johnson was accused of falsely representing in the affidavit, so Winfrey's claim is untimely.

Since the Court of Appeals incorrectly decided important federal questions in a way that conflicts with relevant decisions of this Court and other courts of appeal, and entered an opinion that so far departs from the accepted and usual course of judicial proceedings, this Court should exercise its supervisory power to protect Deputy Johnson's immunity and preserve judicial precedent.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals erred when it denied qualified immunity to Deputy Johnson based on the rationale he violated clearly established law in 2007 by submitting a warrant application that allegedly omitted information the Court of Appeals opined in 2018 was material to establishing probable cause.

1. This Court has never held that an officer is divested of immunity if he violates the Fourth Amendment by omitting information material to probable cause from a warrant application.

Deputy Johnson did not violate clearly established law in 2007, even if he omitted the information the Court of Appeals opined should have been included in his affidavit, so the Court of Appeals erroneously denied immunity based on the rationale Deputy Johnson did not establish that a corrected warrant affidavit would show probable cause to arrest Winfrey. *Winfrey*, 901 F.3d at 493-96, 98.

This Court has not applied *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676 (1978), to analyze an affidavit that merely omits information. *Franks* is a rule of "limited scope" "that [applies], where [a criminal] defendant makes a **substantial preliminary showing** that a **false statement** knowing and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, if the allegedly **false statement** is **necessary to the finding of probable cause**, [and when these stringent conditions are satisfied] the Fourth Amendment requires that a hearing be held at the [criminal] defendant's request." (emphasis added).

"Allegations of negligence or innocent mistake [like those Deputy Johnson are accused of committing] are insufficient." *Id.* at 171.

Probable cause is "a fluid concept… not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 323, 103 S. Ct. 2317 (1983). "The process does not deal with hard certainties, but with probabilities…" *Id.* at 231. Facts must be "weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* at 232. Therefore,"[r]easonable minds frequently may differ on the question [of] whether a particular affidavit establishes probable cause…" *United States v. Leon*, 468 U.S. 897, 914, 104 S. Ct. 3405 (1984).

Leon applied the exclusionary rule based on a warrant that failed to support probable cause and explained that "when [] **officers** have **acted in objective good faith** or **their transgressions have been minor**, the magnitude of the benefit conferred on [criminal] defendants offends basic concepts of the criminal justice system." *Leon*, 468 U.S. at 908 (emphasis added). Suppression under the exclusionary rule "is **not an automatic consequence of a Fourth Amendment violation**." *Herring v. United States*, 555 U.S. 135, 137, 129 S. Ct. 695, 698 (2009) (emphasis added). "'[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule," even when probable cause does not exist. *Id.* at 143 (quoting *Leon*, 468 U.S. at 911).

Malley v. Briggs, 475 U.S. 335, 344, 106 S. Ct. 1092, 1098 (1986), applied *Franks* to a suit under 42 U.S.C. § 1983 holding "the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*, *supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." The immunity question "is **whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant**." *Malley*, 475 U.S. at 345 (emphasis added).

The Court of Appeals failed to consider, much less analyze or decide, Deputy Johnson's immunity in this manner. Instead, the Court vacated summary judgment and remanded this case for trial based on the sole conclusion probable cause was lacking, and reaching that opinion based on information Deputy Johnson did not include in his affidavit. This impermissibly merged the Fourth Amendment analysis with the qualified immunity question.

"Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, *Leon*, *supra*, at 923, will the shield of immunity be lost." *Id.* at 344-45. When "officers of reasonable competence could disagree on this issue [of whether a reasonable officer could have believed a warrant should issue], immunity should be recognized." *Malley*, 475 U.S. at 1096. "[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and [this Court has] indicated that in such cases those officials – like

other officials who act in ways they reasonably believe to be lawful – should not be personally liable." *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040 (1987). If *a reasonable officer could have believed* his assessment of probable cause comported with the Fourth Amendment, the officer is immune. *Id.*

Franks addressed an affiant's "false statements" made in a warrant affidavit, not information allegedly omitted from an affidavit, and the *only* arguably false statement the Court of Appeals found in the affidavit was "misstating that Pikett's drop-trail from Burr's house to the Winfrey house used Junior's scent, when the drop-trail actually used Hammond's scent." *Winfrey*, 901 F.3d at 494.

This misstatement was not even significant, much less critical, to establishing probable cause. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The *additional* link between Burr and Winfrey—the scent test—was merely cumulative to other independent evidence that irrefutably established this link Winfrey admitted in his complaint. (App. 19a, n. 2; ROA. 27, 3334, 3580, 3716). This "misstatement" is a relatively insignificant component of the opinion probable cause was lacking. The Court of Appeals identified alleged omissions as **material to probable cause** and its analysis principally focused on purported omissions in the affidavit, not any "false statement." *Winfrey*, 901 F.3d at 495-96.

This Court identifies clearly established law, *Reichle v. Howards*, 566 U.S. 658, 665-66, 132 S. Ct. 2088, 2093 (2012), and this Court has never equated omissions from an affidavit with "false statements," and it has never construed *Franks* to preclude immunity if a warrant application fails to establish probable cause.

Assuming *arguendo* this Court now finds it appropriate to consider alleged omissions in the affidavit, Deputy Johnson had no means of knowing, when he presented the affidavit that the Court of Appeals would, 11 years later, find indispensable the omissions upon which the Court of Appeals decision rests. No case opinion containing analogous facts existed, no reasonable officer or judge suggested the affidavit must contain these embellishments, and the only court to opine Deputy Johnson's affidavit failed to support probable cause was the Court of Appeals ruling on the issue *de novo* years after Deputy Johnson presented the affidavit. Even the District Judge evaluating the summary judgment evidence concluded a reasonable magistrate could have found probable cause existed for Winfrey's arrest. (19a, 82a-85a). This disagreement substantiates Deputy Johnson's immunity.

"**The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages**.'" *Anderson* at 646 (emphasis added) (quoting *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012 (1984)). Contrary to this principle, the Court of Appeals denied immunity based on its after-the-fact consideration of information not in the affidavit, which the Court opined **should have been** in the affidavit. The Court of Appeals' analysis and opinion conflicts with the primary rationale for immunity, fair warning that Deputy Johnson's specific conduct was clearly unlawful **when he acted**. *See Anderson*, 483 U.S. at 646.

The Court of Appeals for the Seventh Circuit addressed the distinction in analyzing "lies," actual "false statements" from omissions in an affidavit. *Rainsberger*

v. Benner, 2019 U.S. App. LEXIS 1325 *30-31 (7th Cir. 2019). "An officer sued for failing to include materially exculpatory facts in a probable cause affidavit is differently situated." *Id*. at *30.

> [W]hile a competent officer would not ask whether the Fourth Amendment permits him to tell a particular lie, a competent officer would – indeed, must – consider whether the Fourth Amendment obligates him to disclose particular evidence. Because an officer acting in good faith could make a reasonable mistake about his disclosure obligation, **the materiality of omitted facts, is properly part of the qualified-immunity analysis**.

Id. at *31 (emphasis added).

The Sixth Circuit similarly recognized the distinction between alleged omissions and false statements. *See Hale v. Kart*, 396 F.3d 721, 726-27 (6th Cir. 2005) and *Mays v. City of Dayton*, 134 F.3d 809, 815-16 (6th Cir. 1998). That Court requires a heightened showing of "*intention to mislead*" before analyzing omissions in an affidavit. *Id.*

Deputy Johnson could not have *reasonably anticipated* the Court of Appeals method would be used to determine his 2007 conduct was clearly unlawful. Instead, Deputy Johnson would have reasonably believed that "[e]ven law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536 (1991) (*per curiam*) (quoting *Anderson*, 483 U.S. at 641). This Court's consistent method of analyzing and

applying immunity demonstrates that denying immunity, without evaluating the objective legal reasonableness of an objective officer's beliefs under the particular circumstances Deputy Johnson encountered, is untenable.

2. Whether probable cause existed is a Fourth Amendment question, not a litmus test for immunity.

Regardless of whether it was appropriate to consider omissions in the affidavit as false statements, probable cause and immunity are distinct issues, with different elements, that require separate evaluations. *Pierson v. Ray*, 386 U.S. 547, 556-57, 87 S. Ct. 1213, 1219 (1967); *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). The Court of Appeals errantly merged the question of probable cause with the separate question of immunity, and its denial of immunity based on lack of probable cause is irreconcilable with this Court's precedents. *See, Saucier v. Katz*, 533 U.S. 194, 197, 121 S. Ct. 2151, 2154 (2001); *Anderson*, and *Malley*, *supra*.[9]

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9. The Fourth and Ninth Circuit Courts, likewise, merge the Fourth Amendment question with immunity and automatically deny immunity on claims under *Franks* based on a constitutional violation alone. *See Miller v. Prince George's County*, 475 F.3d 621, 631-32 (4th Cir. 2007) and *Chism v. Washington*, 661 F.3d 380, 393 (9th Cir. 2011). The Eighth Circuit merges the analysis only when probable cause is based solely on false information. *Myers v. Morris*, 810 F.2d 1437, 1457 (8th Cir. 1987). These cases are not factually analogous to the particular circumstances Deputy Johnson encountered, but the courts similarly denied immunity based the Fourth Amendment question.

The Fifth Circuit Court's error is like that of the Ninth Circuit Court which this Court corrected in *Hunter, supra.* The Ninth Circuit Court opined officers "failed to sustain the burden of establishing qualified immunity because their reason for arresting Bryant [] was not the most reasonable" interpretation of the facts. Like the Fifth Circuit Court here, the Ninth Circuit Court had provided its purported "*more reasonable interpretation*" of the facts. *Hunter*, 502 U.S. at 227.

Finding the Ninth Circuit Court ignored this Court's immunity decisions and had applied a "wrong" legal standard, when it misplaced immunity in the hands of a jury and failed to answer the question of "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 five years after the fact." *Hunter*, 502 U.S. at 228. "Even if [this Court] assumed, *arguendo*, that [the agents] (*and* the magistrate) erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." *Hunter*, 502 U.S. at 228-29.

"[Q]ualified immunity claims raise legal issues quite different from any purely factual issues that might be confronted at trial," which a jury need decide. *Plumhoff v. Rickard*, 572 U. S. 765, 771, 134 S. Ct. 2012, 2019 (2014). Deputy Johnson, therefore, asks the Court to exercise its supervisory power to correct the Court of Appeals' opinion that far departs from the accepted and usual course of judicial proceedings in this Court and the majority of circuit courts. *Compare* the consensus of circuit court authority requiring analysis beyond mere probable cause

demonstrated in *Cox v. Hainey*, 391 F.3d 25, 32-33 (1st Cir. 2004); *Escalera*, 361 F.3d at 743-44; *Reedy v. Evanson*, 615 F.3d 197, 223-24 (3d Cir. 2010); *Hale*, 396 F.3d at 721; *Rainsberger*, 2019 U.S. App. LEXIS 1325; *Hunter v. Namanny*, 219 F.3d 825, 831 8th Cir. 2010); *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014); and *Gates v. Khokhar*, 884 F.3d 1290, 1298 (11th Cir. 2018).

3. The Court of Appeals failed to identify clearly established law at a meaningful level of particularity for the circumstances.

The Court of Appeals again committed the same error this Court has consistently directed courts not to repeat when the Court of Appeals incorrectly identified clearly established law as the right "to be free from police arrest without a good faith showing of probable cause." (App. 16a). The Court of Appeals opined this right had been clearly established since 1978 when this Court decided *Franks*. (App. 16a).[10] The *Franks* opinion, however, set out only a *broad*, *general* constitutional principle that could not have fairly warned Deputy Johnson, or any other reasonable officer, of clearly established law under which Deputy Johnson's immunity could be denied. The *Franks* opinion did not inform Deputy Johnson he must analyze the allegedly omitted information as did the Court of Appeals.

Franks was a criminal case involving the exclusionary rule. This Court identified limited circumstances in which a criminal defendant may challenge "false statements" in an affidavit. Unlike the claimed omissions and lone

10. This error is also evident in *Miller*, 475 F.3d at 631-32.

"misstatement" Deputy Johnson is accused of making, the detective in *Franks* wrote that he had spoken to individuals he had not spoken to. The detective included a "false statement" in his affidavit, but this court did not substantively analyze whether the detective's conduct was unconstitutional. The Court only announced a general standard.

When initially decided, *Franks* expressed its unwillingness to extend the reach of its decision to "civil" proceedings. *Franks*, 438 U.S. at 171. Therefore, *Franks* was not an immunity case and did not even decide whether the detective's conduct violated the Fourth Amendment. Neither *Franks* nor its progeny could have fairly warned Deputy Johnson his alleged omissions were clearly necessary to establish probable cause.

By failing to identify clearly established law for the circumstances of this case at a meaningful level of particularity, and by failing to identify a valid source of that clearly established law, the Court of Appeals' opinion is founded on hollow ground. Qualified immunity is no immunity at all if clearly established law can simply be defined as the right to be free from unreasonable searches and seizures." *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015).

> To be clearly established, a legal principle must have a sufficiently **clear foundation in then-existing precedent**. The rule must be "**settled law**," *Hunter*, 502 U.S. at 228, which means it is dictated by "**controlling authority**" or "a **robust 'consensus of cases of persuasive authority**,'" *Ashcroft v. al-Kidd*, 563 U.S. 731,

> 741-42, 131 S. Ct. 2074 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

Wesby, 138 S. Ct. at 589-90 (emphasis added).

"The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Reichle*, 566 U.S. at 666. This Court "has stressed that the 'specificity' of the rule is 'especially important in the Fourth Amendment context.'" *Wesby*, 138 S. Ct. at 590 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). "'**[A] body of relevant case law' is usually necessary to 'clearly establish the answer' with respect to probable cause**." *Wesby*, 138 S. Ct. at 590 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596 (2004)(*per curiam*)) (emphasis added).

This Court has "**repeatedly told courts … not to define clearly established law at a high level of generality**." *Mullenix*, 136 S. Ct. at 308 (emphasis added) (quoting *al-Kidd*, 563 U.S. at 741). "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**." *Mullenix*, 136 S. Ct. at 308 (emphasis added). Supreme Court decisions from *alKidd supra* through *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), demonstrate the Court of Appeals' error in failing to analyze Deputy Johnson's immunity at the level of *specificity* and *particularity* required.

Contrary to the Court of Appeals' opinion,

> an officer who has arrested someone without probable cause might still be entitled to

> immunity. This is so because the "**clearly established" inquiry does not ask whether there was probable cause in actuality**. Instead, **it asks whether the pre-existing law was so clear** that, **given the specific facts facing a particular officer**, one must say that "**every reasonable official would have understood that what he is doing** violates" the Constitutional right at issue.

Gates, 884 F.3d at 1302 (quoting *al-Kidd*, 563 U.S. at 741).

The bedrock of immunity is *fair warning* to an officer that his particular conduct is clearly unlawful in the specific circumstance the officer encountered. *Hope v. Pelzer*, 536 U. S. 730, 739, 122 S. Ct. 2508 (2002).

Deputy Johnson is immune under this Court's immunity decisions unless Winfrey "can identify a **case [opinion] where an officer acting under similar circumstances** … was held to have violated the Fourth Amendment." *White v. Pauly*, 137 S. Ct. 548, 551 (2017)(*per curiam*) (emphasis added). But no court has interpreted *Franks* to divest an officer of immunity in factual circumstances similar to those Deputy Johnson encountered, or based on actions comparable to Deputy Johnson's. "No matter how carefully a reasonable officer read [*Franks*], …beforehand, that officer could not know that" submitting the affidavit Deputy Johnson presented was clearly unlawful in 2007. *Sheehan*, 135 S. Ct. at 1777.

4. The Court of Appeals failed to determine, or even consider, whether a reasonable officer could have believed submitting the affidavit Deputy Johnson presented, at the direction of a prosecuting attorney, supported Winfrey's arrest.

In addition to failing to meaningfully identify the pertinent clear legal standard at issue, the Court of Appeals also failed to determine, analyze, or even consider whether a reasonable officer *could have believed* submitting the affidavit Deputy Johnson presented, at the direction of a prosecuting attorney, supported Winfrey's arrest in 2007. This vital question is the core of immunity application.

Like in *Brosseau*, 543 U.S. at 199, "[t]he Court of Appeals acknowledged this statement of the law, but then proceeded to find fair warning in [a] general test[]." The Court of Appeals opinion recites the relevant legal standards, but nonetheless failed to apply them and actually decide immunity.

Evaluated under this Court's precedents, "[p]robable cause 'is not a high bar,'" *Wesby*, 138 S. Ct. at 586 (quoting *Kaley v. United States*, 571 U.S. 320, 338, 134 S. Ct. 1090, 1103 (2014)), and assuming *arguendo* - without conceding - the Court of Appeals correctly concluded the affidavit failed to establish probable cause to arrest Winfrey; Deputy Johnson is, nonetheless, "entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest [Winfrey]." *Hunter*, 502 U.S. at 228. Various courts of appeal have characterized this Court's standard for determining whether a reasonable officer

could have believed probable cause supported an arrest as whether "arguable probable cause" existed. Compare *Cox*, 391 F.3d at 32-33; *Escalera*, 361 F.3d at 744; *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000); *Greene v. Barber*, 310 F.3d 889, 898 n. 2 (6th Cir. 2002); *Rainsberger supra*; *Hunter*, 219 F.3d at 831; *Blackenhorn v. City of Orange*, 485 F.3d 463, 475 (9th Cir. 2007); *Stonecipher*, 759 F.3d at 1141; *Gates*, 884 F.3d at 1298; and *Moore v. Hartman*, 644 F.3d 415, 422 (D.C. Cir.), vacated on other grounds, 567 U.S. 901, 132 S. Ct. 2740 (2012).

The Court of Appeals opinion conspicuously omitted any analysis, or mention, of undisputed evidence which demonstrates that an objective officer could have reasonably believed the affidavit supported Winfrey's arrest. After an investigation spanning 2½ years, District Attorney Burnett concluded probable cause existed. The prosecutor and Ranger who headed the investigation agreed probable cause existed. Deputy Johnson submitted his affidavit in reasonable reliance on the prosecutor's assessment of probable cause.

This Court's decisions show "it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to prosecute." *Rehberg v. Paulk*, 566 U.S. 356, 372, 132 S. Ct. 1497, 1508 (2012); Compare *Wallace v. Kato*, 549 U.S. 384, 391, 127 S. Ct. 1091, 1097 (2007) (tort chargeable to a defendant other than a police officer); *Albright v. Oliver*, 510 U.S. 266, 279 n. 5, 114 S. Ct. 807 (1994) (Ginsburg, J., concurring); and *Malley*, 475 U.S. at 341-43. The fact Deputy Johnson requested the warrant at the direction of the prosecutor "is certainly pertinent in assessing whether [Deputy Johnson] could have held a reasonable belief that the warrant was supported by

probable cause." *Messerschmidt v. Millender*, 565 U.S. 535, 555, 132 S. Ct. 1235, 1250 (2012). While Deputy Johnson was obligated to submit an affidavit that arguably supported probable cause, the prominent involvement of the prosecutor is a factor supporting the reasonableness of Deputy Johnson's belief probable cause existed. *See Cox*, 391 F.3d at 34-35 and *Stonecipher*, 759 F.3d at 1139, 1144-45.

Additionally, two Texas district judges presided over hearings and trials wherein the arguments Winfrey makes regarding the alleged omissions and misstatement in the affidavit were fully addressed. Neither judge, nor the prosecuting attorney, dismissed the criminal prosecution for want of probable cause, a legal requisite for any criminal prosecution. The trial judge even denied Winfrey's motion for directed verdict, on the reasonable doubt standard, after the state's presentation of its case.

The Court of Appeals opinion is silent regarding the significance of testimony by Sheriff Rogers and Federal Bureau of Investigation Special Agent Mark Young that they, as investigators who had analyzed the case, found the evidence sufficient for any reasonable officer to believe probable cause for Winfrey's arrest existed. (App. A). This testimony evidences how "viewed from the standpoint of an objectively reasonable police officer" without the 20/20 vision of judicial hindsight, an objective officer could reasonably have evaluated Deputy Johnson's conduct. *See Wesby*, 138 S. Ct. at 586-90.

While the Court of Appeals had authority to decide probable cause *de novo*, the Court of Appeals cannot – consistent with this Court's authorities – deny immunity on that basis alone without evaluating judicial authority

or the relevant evidence regarding whether a reasonable officer could have believed probable cause existed. The Court of Appeals neither identified, nor applied, any discernible standard that would have fairly warned a reasonable officer in 2007 that Deputy Johnson's action was clearly unlawful, and the Court of Appeals opinion does not provide useful guidance to officers in 2019. The Court of Appeals' opinion suggests, instead, that any officer who requests a warrant remains in peril of having his immunity stripped from him until the last court weighs in on the existence of probable cause. This is not useful for encouraging appropriate law enforcement action or for informing officers of legitimate limits on their authority.

5. The Courts' disagreement about analysis of probable cause evidences an arguable basis for Winfrey's arrest.

Furthermore, the courts' disagreement regarding probable cause in this case demonstrates that reasonable minds can differ, so immunity is appropriate. "[I]t 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." *Melton v. Phillips*, 875 F.3d 256, 268 (5th Cir. 2017) (*en banc*) (Gregg Costa, Circuit Judge concurring in the judgment).

The District Court concluded a reasonable magistrate could find probable cause from Deputy Johnson's affidavit. The Court of Appeals opined that probable cause is lacking. This Court could reasonably decide the probable cause issue either way. This conflict regarding a close legal question reveals that reasonable minds could differ about whether the affidavit actually shows probable cause, which establishes arguable probable cause supporting immunity.

"[I]n holding our law enforcement personnel to an objective standard of behavior, [] judgment must be tempered with reason," *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982), and a court "cannot expect our police officers to [possess] a legal scholar's expertise in constitutional law." *Id.* This Court has explained that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 1701 (1999); *Compare Stanton v. Sims*, 571 U.S. 3, 134 S. Ct. 3, 7 (2013).

B. Winfrey's claim accrued, at the latest, when he was aware of the content of information Deputy Johnson is accused of falsely presenting in his affidavit.

"[T]he standard rule [is] that [claim accrual occurs] when the plaintiff has 'a complete and present cause of action.'" *Wallace,* 549 U.S. at 388 (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal.*, 522 U.S. 192, 201, 118 S. Ct. 542 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98, 61 S. Ct. 473 (1941)). A plaintiff has a complete and present cause of action when "the plaintiff can file suit and obtain relief." *Bay Area Laundry*, *supra*, at 201, 118 S. Ct. 542. An individual subjected to an alleged arrest without probable cause could file "suit as soon as the allegedly wrongful arrest occurred." *Wallace,* 549 U.S. at 388.

Winfrey could have filed suit within limitations, but chose not to. *Wallace* discussed the impropriety of allowing a plaintiff to choose the date of accrual of a claim "only after a plaintiff became satisfied that he had been

harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief." *Wallace,* 549 U.S. at 391. Winfrey's suit, like *Albright* and *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), illustrates untimely Fourth Amendment claims mischaracterized as malicious prosecutions under § 1983 to avoid limitation bars.

Since rejecting malicious prosecutions under the 14th Amendment in *Albright supra*, this Court has never approved a malicious prosecution claim under 42 U.S.C. § 1983, nor has the Court identified the elements of such a claim or decided when such a claim would accrue if adopted. *See Albright*, 510 U.S. at 269 n.4; *Manuel*, 137 S. Ct. at 921-922 (2017); *Rehberg*, 132 S. Ct. at 1508; and *Wallace,* 549 U.S. at 390 n. 2.

To the contrary, this Court held in 2017,

> that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process – **does not exhaust the disputed legal issues in this case**. It addresses only the threshold inquiry in a § 1983 suit, which requires courts to "identify the specific constitutional right" at issue. *Albright*, 510 U.S. at 271. After pinpointing that right, **courts still must determine the elements of, and rules associated with, an action** seeking damages for its violation. *See*, *e.g.*, *Carey v. Piphus*, 435 U.S. 247, 257-58, 98 S. Ct. 1042 (1978).

Manuel, 137 S. Ct. at 920 (emphasis added).

Wallace demonstrates the proper measure of accrual for such a claim based on an arrest warrant is when a plaintiff can file suit and obtain relief, not when a plaintiff's claimed harm concludes. This is not only a question of limitations, but also a question of whether a malicious prosecution claim exists under § 1983 and, if so, its dimensions.

After Deputy Johnson submitted the affidavit, he had no further involvement in the investigation or Winfrey's prosecution. The records from three trials and preliminary criminal proceedings show that the prosecutor, judge, and criminal defense counsel were aware of the information upon which Winfrey's claim under *Franks* is based, and the criminal justice system evaluated and ruled on these issues, before Winfrey's trial. Deputy Johnson did not withhold information from Winfrey that was necessary for his claim to accrue and Winfrey was never convicted of committing any crime so the favorable determination bar from *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994) never arose.

No basis exists for Winfrey's claim to accrue after his criminal trial, because the Fourth Amendment claim brought under *Franks* accrued, at the latest, when Winfrey became aware of the information Deputy Johnson was accused of falsely representing in the affidavit, which was beyond the limitations period to bring suit.

Furthermore, even if this Court were to create a malicious prosecution claim through § 1983, Deputy Johnson would be immune because he did not have fair notice of such a claim in 2007. *See Brosseau*, 543 U.S. at 200.

CONCLUSION

This Court should correctly decide the important federal issues the Court of Appeals decided in a way that conflicts with relevant decisions of this Court and other circuit courts, and that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Petitioner asks the Court to grant Petitioner's Petition for a Writ of Certiorari, correct the Court of Appeals decision, and render judgment in Petitioner's favor.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 20, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20702

RICHARD WINFREY, JR.,

Plaintiff - Appellant,

v.

LACY ROGERS, FORMER SAN JACINTO COUNTY SHERIFF; LENARD JOHNSON, FORMER SAN JACINTO COUNTY SHERIFF'S DEPARTMENT DEPUTY,

Defendants - Appellees.

August 20, 2018, Decided

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

ON PETITION FOR REHEARING

Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, District Judge.*

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* District Judge of the Western District of Texas, sitting by designation.

Appendix A

E. GRADY JOLLY, Circuit Judge:

Treating Defendant-Appellee Lenard Johnson's petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The petition for rehearing en banc is also DENIED. The prior opinion, *Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. 2018), is withdrawn, and the following opinion is substituted. The modifications to the original opinion are minor and do not affect the substance or outcome of the earlier opinion, except in Part III.A, which now holds that Johnson's omission of the fact that the blood and hair found at the crime scene did not match Richard Winfrey Jr. ("Junior") or Megan Winfrey was not a "material" omission, and which reflects that it is Junior's burden to overcome qualified immunity, not Johnson's burden to show that qualified immunity applies.

Junior was arrested and charged with murder after a botched investigation and various alleged violations of Junior's Fourth Amendment rights. The State tried him on murder charges. The jury acquitted him in twenty-nine minutes, but only after he had served some 16 months in prison. He brought this 42 U.S.C. § 1983 action against various officers of San Jacinto County, Texas. After some seven years of litigation—including one appearance before this Court, *see Winfrey v. San Jacinto Cty.*, 481 F. App'x 969 (5th Cir. 2012) (*Winfrey I*)—defendants have come and gone, leaving only the defendant Deputy Sheriff Lenard Johnson to answer for Junior's charges of constitutional violations. Junior claims that Deputy Johnson violated his rights by signing an arrest-warrant affidavit that

lacked probable cause by omitting and misstating key facts. This unconstitutional warrant, he alleged, resulted in his unlawful arrest and imprisonment. Johnson moved for summary judgment on the basis of qualified immunity. The district court granted Johnson's motion, and Junior appeals.

We VACATE the district court's judgment and REMAND for trial essentially on the factual issue of whether Johnson acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for Junior. Because this litigation has continued for over seven years, including two appeals before this Court, we emphasize that this case must go to trial without further delay.

I.

Murray Wayne Burr was found murdered in his home in San Jacinto County, Texas, in August 2004. The San Jacinto County Sheriff's Office—including Sheriff Lacy Rogers and Deputy Johnson—and the Texas Rangers focused their investigation on three suspects: then-seventeen-year-old Junior; his then-sixteen-year-old sister, Megan Winfrey; and their father, Richard Winfrey, Sr. ("Senior").

Several weeks after the murder, the investigative blunders began. Texas Ranger Grover Huff requested that Keith Pikett, a deputy from a nearby law enforcement agency, assist the investigation by running "scent lineups."

This dubious adventure required Pikett to call upon two of his pet bloodhounds and to acquire scents from four suspects—Megan; Junior; Megan's boyfriend, Chris Hammond; and Hammond's friend, Adam Szarf. Huff, then, following the procedure that Pikett established, gathered scents from the suspects—by asking each person to rub a piece of gauze on his or her skin and put that gauze in a paper bag—and from the victim—by rubbing gauze against Burr's clothes. Pikett, rather "unscientifically," also carried around in a duffel bag filler scents which he had gathered from prisoners at the Fort Bend County Jail. He placed this bag in his SUV, in which his dogs rode daily.

Pikett proceeded to conduct a "drop-trail" exercise with his dogs. That exercise was conducted at the crime scene where Huff provided the hounds with a scent sample. Huff thought he had provided the scent for Junior, but he mistakenly scented the dogs for Hammond instead. Huff notified Pikett and the other investigators about the mistake after the test, and both Huff and Pikett mentioned it in their formal police reports.

Meanwhile, Junior and Megan allowed investigators to collect their DNA to compare with DNA found in blood discovered at Burr's home. The laboratory reported that the blood did not belong to either. The investigators also wanted to compare Megan's hair to hair found at the murder scene. Sheriff Rogers wrote a search-warrant affidavit to obtain Megan's hair, but he failed to mention the lab report showing her blood was not at the scene. He also misstated that the drop-trail was conducted using Junior's scent pad instead of Hammond's. Further, he

did not acknowledge the incidental fact that all forensic evidence from the crime scene did not match the Winfreys. Perhaps recognizing the fumbles in the process, the investigation was put on hold.

After stalling for a year, the investigation restarted when a jailhouse informant, Campbell, came forward with a story incriminating the Winfreys in Burr's murder. Campbell said that while he and Senior were in the same jail cell, Senior confessed to murdering Burr. Johnson visited and interviewed Campbell. There, Campbell told him: (1) Megan and Junior helped Senior get into Burr's house, (2) Senior severely beat up Burr and cut his neck, (3) Senior cut off Burr's genitals and stuck them in Burr's mouth, (4) Junior and Megan were in Burr's house the whole time, and (5) Senior had wanted to kill Burr because Burr's neighbor told Senior that Burr had touched one of Senior's kids. Johnson wrote a report of Campbell's story and noted that the details of the injuries were generally accurate in relation to the physical evidence, except that Burr's genitals were not cut off and put in his mouth.

Johnson visited Campbell a month later, taking Rogers with him. Campbell's story changed. First, Campbell added that Burr was killed in his living room, which Johnson said was not known to the public at that time. Second, he said that Senior stabbed and shot Burr, though there was no evidence that Burr was shot. Third, Campbell now claimed that one of Senior's cousins, not Junior or Megan, was the accomplice to the murder. Finally, Campbell said that Senior confessed to stealing a pistol and long gun from Burr's house and that he put

these guns in a nearby "hollow." Investigators found a hollow matching the description, but no weapons were there. Johnson said the public did not know about the stolen weapons.

Pikett, undeterred by earlier failures, conducted a second scent lineup using Senior's scent. The bloodhounds alerted each time on Senior's scent.

Deputy Sheriff Johnson signed two affidavits to obtain search warrants to obtain Junior's and Senior's hair from each of them to compare with the hair found in Burr's home. Each affidavit omitted any reference to: (1) the inconsistencies between Campbell's two interviews, (2) the inconsistencies between Campbell's statements and the other evidence, (3) Junior's and Megan's blood not being found at the scene, and (4) the hair found at the scene not matching Burr or Megan. The judge issued both warrants to Johnson, but the hair obtained from Burr's home did not match the hair of either Junior or Senior.

Nevertheless, Johnson signed affidavits for arrest warrants for Megan, Junior, and Senior.[1] The arrest-

1. The record contains only the arrest-warrant affidavits for Senior and Megan. Johnson argues that the arrest-warrant affidavit for Senior cannot be used as a replacement for Junior's arrest affidavit, which is not in the record due to Junior's alleged intentional spoliation. But this issue was already resolved in *Winfrey I*, 481 F. App'x 969. There, we concluded that we would look to the affidavits for Megan and Senior because: (1) they "suggest that . . . the same affidavit language [was used] for all three Winfreys"; (2) "investigation reports indicate that warrants were obtained for [Junior] on the same day Johnson executed an arrest-warrant

warrant affidavits also omitted the same inconsistencies as the search-warrant affidavits, and additionally omitted the fact that the hairs at the crime scene did not belong either to the Winfreys or Burr.

Junior was thus charged with capital murder and sat in jail for two years before his case was tried in June 2009. On June 12, he was found not guilty after twenty-nine minutes of jury deliberation.

On May 26, 2010, Junior filed this § 1983 lawsuit against every police investigator involved in his murder case. At this point in this lengthy litigation, only his claim against Deputy Sheriff Johnson remains. Junior says that Johnson violated his constitutional rights by using false information to secure arrest and search warrants and by failing to disclose exculpatory evidence.

This case has visited us before. *See generally Winfrey I*, 481 F. App'x 969. There, we vacated the district court's grant of summary judgment in favor of Johnson and remanded for additional discovery on whether Johnson violated the Fourth Amendment by acting with reckless disregard for the truth, as opposed to merely carelessness

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affidavit for Megan"; and (3) "Rogers indicated that the drop-trail evidence and Campbell's 'jailhouse snitching' established probable cause to obtain 'a search warrant for the hairs of my *suspects*.'" *Id.* at 978. Because of the law-of-the-case doctrine, we find that the prior panel's decision "should continue to govern" this case. *See Musacchio v. United States*, 136 S.Ct. 709, 716, 193 L. Ed. 2d 639 (2016) (quoting *Pepper v. United States*, 562 U.S. 476, 506, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011)).

or negligence, when he included a material falsehood and omitted material information in his warrant affidavits. *Id.* at 979-81.

On remand, the district court held a hearing related to multiple *Daubert* motions. Junior contends that, at that hearing, the district court barred Junior's expert, David Kunkle, from testifying at trial.

After discovery concluded, Johnson again moved for summary judgment. First, Johnson argued that Junior's claim against Johnson was time-barred. But the district court ruled that it was not barred because the statute of limitations period began when Junior was acquitted, and he filed his lawsuit within a year of his acquittal. Second, the court examined whether Johnson violated Junior's Fourth Amendment rights by recklessly omitting and misstating certain facts in his search- and arrest-warrant affidavits. The court found that one omission was not reckless: omitting Campbell's statements that were inconsistent with each other. But it found that others were reckless: omitting Campbell's statements that were contradicted by the physical evidence and omitting the DNA and hair evidence that did not link the Winfreys to the scene, which could show that someone other than the Winfreys had to have been present in Burr's house. The court did not say whether Johnson's inclusion of the statement that "the drop-trail from the crime scene to the Winfrey house used [Junior]'s scent" was reckless. Third, the court decided that Johnson nevertheless was protected by qualified immunity, even though he violated Junior's rights, because a reasonable magistrate, reviewing a

corrected affidavit, would have found probable cause to search and arrest Junior.

Junior timely appealed. He contends: (1) his arrest-warrant claim is not time-barred; (2) Johnson is not entitled to qualified immunity; (3) the district court abused its discretion in excluding his expert; and (4) if the Court reverses and remands, it should remand this matter to a different judge.

II.

A.

The first issue we address is whether Junior has a valid Fourth Amendment claim. We conclude that he does.

Junior's complaint never alleges in magic words that Johnson violated his rights under the Fourth Amendment. Nevertheless, although the parties have argued this case in a confusing manner from the start, both sides have argued, at times, that the case involves a Fourth Amendment federal malicious-prosecution claim; at other times, they have argued whether the claim involves a Fourteenth Amendment due process claim. In any event, as the case is presented before us now, there is a proper Fourth Amendment claim because of the law-of-the-case doctrine. In *Winfrey I*, this Court decided that this case presented a Fourth Amendment claim, concluding that Johnson was not entitled to qualified immunity on summary judgment because Junior alleged that Johnson violated the Fourth Amendment by signing objectively

unreasonable arrest-warrant affidavits. 481 F. App'x at 979. Additionally, on remand, both sides argued the Fourth Amendment malicious-prosecution issue, and the district court decided the case as a Fourth Amendment case.

"The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Musacchio*, 136 S.Ct. at 716 (quoting *Pepper*, 562 U.S. at 506). The doctrine is meant to promote judicial efficiency so that appellate courts do not continually have to reexamine subsequent proceedings in the same case. *See Chapman v. Nat'l Aeronautics & Space Admin.*, 736 F.2d 238, 241 (5th Cir. 1984). It forecloses reexamination on a subsequent appeal. *Pegues v. Morehouse Par. Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). But the law-of-the-case doctrine does not apply when "(1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such cases, or (3) the decision was clearly erroneous and would work manifest injustice." *Lyons v. Fisher*, 888 F.2d 1071, 1075 (5th Cir. 1989). Here, none of the exceptions apply, because the relevant precedent was decided before the suit was filed in 2011, the evidence has remained the same throughout, and the decision was not clearly erroneous and did not risk manifest injustice.

Furthermore, we agree that a Fourth Amendment claim is cognizable under the facts here. This Court has held that although there is no "freestanding constitutional right to be free from malicious prosecution," "[t]he

initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example." *Castellano v. Fragozo*, 352 F.3d 939, 945, 953 (5th Cir. 2003) (en banc). In *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1998), a plurality of the Supreme Court said that malicious-prosecution claims must be based on the Fourth Amendment, rather than on "the more generalized notion of 'substantive due process,'" because the Fourth Amendment is the explicit textual source against this type of government behavior. *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). And recently, in *Manuel v. City of Joliet*, 137 S.Ct. 911, 197 L. Ed. 2d 312 (2017), the Supreme Court considered whether a plaintiff had stated a Fourth Amendment claim when he was arrested and charged with unlawful possession of a controlled substance based upon false reports written by a police officer and an evidence technician. *Id.* at 915. There, the Court said the plaintiff's "claim fits the Fourth Amendment, and the Fourth Amendment fits [the plaintiff's] claim, as hand in glove." *Id.* at 917. And it held "that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." *Id.* at 920.

These cases fully support a finding that the Fourth Amendment is the appropriate constitutional basis for Junior's claim that he was wrongfully arrested due to the knowing or reckless misstatements and omissions in Johnson's affidavits. We, therefore, hold that a Fourth Amendment claim is presented, and we will decide the remainder of the issues based upon this legal conclusion.

B.

Johnson argues that Junior's claim is time-barred. Junior was arrested on February 8, 2007. His prosecution began in June 2009, and he was acquitted on June 12. He filed this suit on May 26, 2010.

Section 1983 provides a federal cause of action, but federal courts look to state's statute of limitations for personal-injury torts to decide when § 1983 claims toll. *See Wallace v. Kato*, 549 U.S. 384, 387, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007); *see also Piotrowski v. City of Hou.*, 237 F.3d 567, 576 (5th Cir. 2001) ("The statute of limitations for a suit brought under § 1983 is determined by the general statute of limitations governing personal injuries in the forum state."). "In Texas, the applicable limitations period is two years." *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993); *see* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) ("[A] person must bring suit . . . not later than two years after the day the cause of action accrues."). But "the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388. "In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts." *Manuel*, 137 S.Ct. at 920.

The accrual date depends on whether Junior's claim more closely resembles one for false imprisonment or one for malicious prosecution. *See id.* at 921-22 (remanding the case to the Seventh Circuit to consider whether the claim was more like a false imprisonment or a malicious

prosecution). A false-imprisonment claim is based upon "detention without legal process." *Wallace*, 549 U.S. at 389. It "begins to run at the time the claimant becomes detained pursuant to legal process." *Id.* at 397. A malicious-prosecution claim is based upon "detention accompanied . . . by *wrongful institution* of legal process." *Id.* at 390. It "does not accrue until the prosecution ends in the plaintiff's favor." *Castellano*, 352 F.3d at 953.

Johnson urges us to find that this case fits within *Wallace v. Kato*. There, the Supreme Court found that the plaintiff's unlawful warrantless-arrest Fourth Amendment claim resembled a false-imprisonment claim, because the constitutional violation occurred when the plaintiff was arrested without a warrant instead of when the conviction was later set aside. 549 U.S. at 397. Law enforcement officers transported the fifteen-year-old plaintiff to a police station—without a warrant or probable cause to arrest him—and interrogated him into the early morning. *Id.* at 386, 389. So, the Court found that the plaintiff's claim accrued when he was initially arrested. *Id.* at 397.

Here, we find that Junior's claim is more like the tort of malicious prosecution, because Junior was arrested through the wrongful institution of legal process: an arrest pursuant to a warrant, issued through the normal legal process, that is alleged to contain numerous material omissions and misstatements. Junior thus alleges a wrongful institution of legal process—an unlawful arrest *pursuant to* a warrant—instead of a detention with no legal process. Because Junior's claim suggests malicious

prosecution rather than false imprisonment, his claim accrued when his criminal proceedings ended in his favor on June 12, 2009. He filed his suit well within the two-year limitations period on May 26, 2010. So Junior's claim survives the time bar.

III.

A.

Even if the claim is not time-barred, Johnson argues, this case must not proceed further because he is entitled to qualified immunity.

This court reviews the district court's grant of summary judgment de novo. *Brewer v. Hayne*, 860 F.3d 819, 822 (5th Cir. 2017). Summary judgment is appropriate when the movant is entitled to judgment as a matter of law and there is no genuine dispute of material fact. *Id.* We must draw all reasonable inferences in the non-movant's favor and view the evidence in the light most favorable to the non-movant. *Id.* "To survive summary judgment, the non-movant must supply evidence 'such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

When resolving qualified immunity on summary judgment, courts determine (1) whether the facts, taken in the light most favorable to the party asserting the injury, show the officer violated a federal right and (2) whether the right was "clearly established" when the

violation occurred. *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1865-66, 188 L. Ed. 2d 895 (2014). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). The Court does not need "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* The Court uses a standard of "objective reasonableness" to define "the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley v. Briggs*, 475 U.S. 335, 344, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). And it "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 136 S.Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (quoting *Malley*, 475 U.S. at 341).

Clearly established law is not determined "at a high level of generality." *Ashcroft*, 563 U.S. at 742. Instead "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 136 S.Ct. at 308 (quoting *Ashcroft*, 563 U.S. at 742). The inquiry must look at the specific context of the case. *Id.*

Here, the clearly established constitutional right asserted by Junior is to be free from police arrest without a good faith showing of probable cause. Since *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), it has been clearly established that a defendant's Fourth Amendment rights are violated if (1) the affiant, in support of the warrant, includes "a false statement knowingly and intentionally, or with reckless disregard for the truth" and (2) "the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155-56. In *Franks*, the Supreme Court observed that the warrant requirement is meant "to allow the magistrate to make an independent evaluation of the matter." *Id.* at 165. It requires affiants to "set forth particular facts and circumstances underlying the existence of probable cause," including those that concern the reliability of the information and the credibility of the source to avoid "deliberately or reckless false statement[s]." *Id.*

Still, "negligence alone will not defeat qualified immunity." *Brewer*, 860 F.3d at 825. "[A] proven misstatement can vitiate an affidavit only if it is established that the misstatement was the product 'of deliberate falsehood or of reckless disregard for the truth.'" *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (quoting *Franks*, 438 U.S. at 171). Recklessness requires proof that the defendant "'in fact entertained serious doubts as to the truth' of the statement." *Hart v. O'Brien*, 127 F.3d 424, 449 (5th Cir. 1997) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)), *abrogation on other grounds recognized by Spivey v. Robertson*, 197 F.3d 772, 775 (5th Cir. 1999).

Here, we conclude that Junior alleges a clearly established constitutional violation. Under the first prong of *Franks*, Junior must present evidence that Johnson, through material omissions or otherwise, made "a false statement knowingly and intentionally, or with reckless disregard for the truth." 438 U.S. at 155. Junior provides evidence that Johnson made false statements in his affidavit by (1) omitting Campbell's statements that were contradicted by the physical evidence; (2) misstating that Pikett's drop-trail from Burr's house to the Winfrey house used Junior's scent, when the drop-trail actually used Hammond's scent; and (3) omitting Campbell's inconsistencies between his statements, that is, between Campbell's first statement—which was related in the affidavit—that said that Megan and Junior helped Senior to murder Burr and Campbell's inconsistent later statement that Senior's cousin was the accomplice. We find that this showing is also sufficient to demonstrate that there is an issue of material fact as to whether Johnson acted intentionally, knowingly, or recklessly, because Junior alleges that Johnson either knew or should have known that these material omissions and false statements could lead to an arrest of Junior without probable cause. In short, the evidence presented is sufficient to support a finding that his conduct was unreasonable in the light of the well-established principle requiring probable cause for the issuance of an arrest warrant.

Yet, we must proceed further to the second prong of *Franks* in order to resolve whether "the allegedly false statement is necessary to the finding of probable cause," as required by the *Franks* analysis. 438 U.S. at 156. To

determine whether the false statement was necessary for this finding, *Franks* requires us to consider the faulty affidavit as if those errors and omissions were removed. We then must examine the "corrected affidavit" and determine whether probable cause for the issuance of the warrant survives the deleted false statements and material omissions. *See Franks*, 438 U.S. at 156 (saying that courts must excise false statements); *United States v. Bankston*, 182 F.3d 296, 305-06 (5th Cir. 1999) (applying *Franks* to omissions and using a corrected affidavit that "contain[ed] the allegedly exculpatory conversation" to determine whether that affidavit would establish probable cause to authorize electronic surveillance), *overruled on other grounds by Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000). The warrant will be valid only if the corrected affidavit establishes probable cause for Junior's arrest.

This Court reviews the district court's probable-cause determination de novo. *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). Probable cause requires only "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Probable cause is a "practical and common-sensical standard." *Florida v. Harris*, 568 U.S. 237, 244, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013). It looks to the "totality of the circumstances" to determine whether the magistrate with "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief'" to find that the suspect committed the crime for which he is being arrested. *See id.* at 243 (alterations in original)

(quoting *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (plurality opinion)).

So we turn to review the "corrected" affidavit to determine whether probable cause was established that Junior murdered Murray Wayne Burr. Examining the totality of the circumstances, we find that the corrected affidavit does not contain sufficient information to satisfy the probable-cause requirement.[2] A corrected affidavit would contain the following facts, which were omitted from Johnson's affidavit. First, a corrected affidavit would include reference to the material fact that Pikett used the scent of Christopher Hammond, Megan's boyfriend, instead of Junior's. This omitted information was necessary for the state-trial judge to consider, because it seriously affects whether Junior was present at the scene of Burr's murder. There was no other physical evidence that connected Junior to the murder scene besides the scent lineup. Second, a corrected affidavit would have referred to Campbell's statement that Senior's cousin—not Megan and Junior, like he had said earlier—let Senior into Burr's house to kill Burr. Although this fact would not have mattered as to an arrest warrant for Senior, it certainly was material for Junior, because in one scenario, he was connected to the murder, and in the other, he may not have been present at the scene. Third, a corrected affidavit

2. The district court thought there was enough information to support probable cause to arrest Junior because of: (1) a possibly romantic relationship between Burr and Megan; (2) Megan's desire for Burr's hidden money; (3) the presence of Junior's, Megan's, and Senior's scents on Burr; and (4) Campbell's statement that Senior murdered Burr with the help of Megan and Junior.

would have apprised the state-trial judge that Campbell's statements contradicted aspects of the physical evidence.[3] Campbell said that Burr was both stabbed and shot—although he was only stabbed—and that Senior had cut off Burr's body part, which was not true. Although neither of these false statements, considered independently, would necessarily have been fatal to the affidavit—because Senior could have told Campbell anything—together with Campbell's other statements, these would have served to undermine Campbell's reliability. Weighing the totality of the circumstances, we conclude that a reasonable magistrate would not have issued a warrant on the basis of this corrected affidavit, because the addition of the omitted material facts would have dissuaded the judge from issuing the warrant.

In sum, assuming all factual disputes in favor of Junior, we hold (1) there is an issue of material fact as to whether Johnson recklessly, knowingly, or intentionally made material misstatements and omitted material information and (2) a corrected affidavit would not show probable cause to arrest Junior. Thus, Junior has satisfied his burden of showing that there is an issue of material fact as to whether Johnson violated his clearly

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3. Although Junior argues that the absence of a match between Junior's and Megan's blood with evidence from the scene "suggests that someone else was involved in the murder," we do not think the record supports that any blood but Burr's was found at the scene. The best inference from the blood DNA, then, is that whoever killed Burr wore gloves or simply avoided any injury by the victim. And Junior's claim that a single female hair found at the scene—that was not Megan's—is not a "material" fact.

established rights, and he is entitled to present his case to the factfinder.

B.

Still, Johnson further contends that he is not liable to Junior because there were two independent intermediaries that intervened to break the causal chain between Johnson's alleged Fourth Amendment violation and Junior's incarceration: (1) the grand jury that indicted Junior and (2) the state judge who presided over the Winfreys' trial. We conclude that neither independent intermediary broke the causal chain between Johnson's faulty affidavit and Junior's incarceration.

Under the independent-intermediary doctrine, "'if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation' for the Fourth Amendment violation." *Jennings v. Patton*, 644 F.3d 297, 300-01 (5th Cir. 2011) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)).[4] "[E]ven an officer who acted with malice

4. Junior urges us to overrule our independent-intermediary doctrine based on *Manuel v. City of Joliet*, but we cannot do that and find it unnecessary. In *Manuel*, the Supreme Court held "that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." 137 S.Ct. at 920. The Court said that a grand jury indictment that "was entirely based on false testimony" could not expunge the plaintiff's Fourth Amendment claim. *Id.* at 920 n.8. But it did not hold that officers can never be insulated from liability based on later determinations by an intermediary when all the necessary information was placed before

. . . 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." *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016) (quoting *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988)), *cert. denied sub nom. Buehler v. Austin Police Dep't*, 137 S.Ct. 1579, 197 L. Ed. 2d 704 (2017). But the chain of causation between the officer's conduct and the unlawful arrest "is broken only where *all the facts* are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary." *Id.* (emphasis added) (quoting *Cuadra*, 626 F.3d at 813).

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that intermediary. Instead, the Court affirmed a principle that we have consistently followed: when an intermediary's proceeding is tainted by an officer's unconstitutional conduct, the independent-intermediary doctrine does not apply. *Compare id.* ("[I]f the proceeding is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights . . . ."), *with Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016), *cert. denied sub nom. Buehler v. Austin Police Dep't*, 137 S.Ct. 1579, 197 L. Ed. 2d 704 (2017) (stating that under the "taint" exception, "an independent intermediary's probable cause finding does not protect law enforcement officials whose 'malicious motive . . . lead[s] them to withhold any relevant information.'" (alteration in original) (quoting *Cuadra*, 626 F.3d at 813)).

Here, the record does not indicate that the material information, which we have noted was omitted from Johnson's affidavit, was presented either to the grand jury or the state judge. Stated differently, as far as this record is concerned, the only information before a grand jury was the information in Johnson's affidavit. Neither the plaintiff nor defendant has shown otherwise.

First, because, at best, it is not clear whether "all the facts [were] presented to the grand jury," *Cuadra*, 626 F.3d at 813, we hold that the independent-intermediary doctrine does not apply.

Second, Johnson contends that the state-trial judge found probable cause to authorize Junior's continued detention, thereby insulating Johnson from liability. But the record does not show that the judge ever ruled that there was probable cause to detain Junior. At one hearing, the judge determined that there was probable cause to arrest Megan, but nothing about Junior. And in other hearings, the judge decided whether certain evidence should be allowed at trial and whether Senior should be granted a directed verdict. None of these hearings addressed the central question today: whether there was probable cause to arrest Junior. So we have no basis to find that the subject material omitted information was presented to the state-trial judge.

IV.

We now turn from the state proceedings to the procedural errors that Junior asserts in the federal

proceeding below. Junior contends that the district court excluded the testimony of David Kunkle, a former police chief and Junior's expert witness. He contends this exclusion was an abuse of discretion. But after our examination of the record, we conclude that the district court never decided whether Kunkle could testify at trial. We are a court of appeals and errors. Inasmuch as the district court made no decision and issued no ruling, it could not have made an error or otherwise created an issue for appeal. We therefore decline to address the exclusion of David Kunkle's testimony until the district judge has expressly ruled on the issue.

Junior contends that the district judge orally ruled from the bench to exclude Kunkle from trial on October 20, 2014. But at that hearing, the judge never explicitly ruled that Kunkle could not testify. He said,

> And there is no salvageable part of the police chief's, [Kunkle,] as I recall. . . . It's simply, it's what we tried very hard to get away from back in the early 80s. And I don't remember when Daubert was, somewhere in there; but I have always believed that expert testimony had to mean something. And we got anybody with a decent resume could say anything was pretty much the rule for a long time.
>
> And the Supreme Court finally said they have to know something in particular about what is going on and it has to be cogent. There is no peer review for police chiefs. The city council,

> but they're not really peers there, something else entirely different.

Although strongly suggestive, this statement did not expressly grant or deny Johnson's motion to exclude the testimony of Kunkle. Further, the district judge indicated in his minute entry that "an order on the motion" would be entered following the hearing, but no such order was ever entered.

Furthermore, the Supreme Court has made clear that trial judges must play a "gatekeeping" role when examining the reliability of experts, and the court's inquiry must be "tied to the facts" of the particular case. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). The district court is required to make a ruling and provide articulable reasoning before we can review whether its decision was proper. Here, if the question arises on remand, the district court will need to make clear its basis for its ruling on Kunkle's testimony.

V.

Finally, Junior requests that this Court remand the matter to a different district judge. We find no basis for that request.

VI.

In this opinion, we have held that (1) Junior has alleged a valid Fourth Amendment claim against Johnson; (2) Junior's claim is not time-barred; (3) Johnson has not shown that his alleged conduct is protected by qualified immunity; (4) a corrected affidavit did not establish probable cause; (5) Johnson is not protected by the independent-intermediary doctrine; (6) because the district court did not expressly rule whether to exclude Kunkle, we do not address whether the court abused its discretion; and (7) we find no basis for remanding the matter to a different district judge. The primary question on remand appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and misstatements. This case should go to trial without delay in a manner not inconsistent with this opinion.

Accordingly, the judgment of the district court is

VACATED and REMANDED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 5, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20702

RICHARD WINFREY, JR.,

Plaintiff - Appellant,

v.

LACY ROGERS, FORMER SAN JACINTO COUNTY SHERIFF; LENARD JOHNSON, FORMER SAN JACINTO COUNTY SHERIFF'S DEPARTMENT DEPUTY,

Defendants - Appellees.

February 5, 2018, Filed

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

Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, District Judge.*

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* District Judge of the Western District of Texas, sitting by designation.

Appendix B

E. GRADY JOLLY, Circuit Judge:

Richard Winfrey Jr. ("Junior") was arrested and charged with murder after a botched investigation and various alleged violations of Junior's Fourth Amendment rights. The State tried him on murder charges. The jury acquitted him in fifteen minutes, but only after he had served some 16 months in prison. He brought this 42 U.S.C. § 1983 action against various officers of San Jacinto County, Texas. After some seven years of litigation—including one appearance before this Court, *see Winfrey v. San Jacinto Cty.*, 481 F. App'x 969 (5th Cir. 2012) (*Winfrey I*)—defendants have come and gone, leaving only the defendant Deputy Sheriff Lenard Johnson to answer for Junior's charges of constitutional violations. Junior claims that Deputy Johnson violated his rights by signing an arrest-warrant affidavit that lacked probable cause by omitting and misstating key facts. This unconstitutional warrant, he alleged, resulted in his unlawful arrest and imprisonment. Johnson moved for summary judgment on the basis of qualified immunity. The district court granted Johnson's motion, and Junior appeals.

We VACATE the district court's judgment and REMAND for trial essentially on the factual issue of whether Johnson acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for Junior. Because this litigation has continued for over seven years, including two appeals before this Court, we emphasize that this case must go to trial without further delay.

Appendix B

I.

Murray Wayne Burr was found murdered in his home in San Jacinto County, Texas, in August 2004. The San Jacinto County Sheriff's Office—including Sheriff Lacy Rogers and Deputy Johnson—and the Texas Rangers focused their investigation on three suspects: then-seventeen-year-old Junior; his then-sixteen-year-old sister, Megan Winfrey; and their father, Richard Winfrey, Sr. ("Senior").

Several weeks after the murder, the investigative blunders began. Texas Ranger Grover Huff requested that Keith Pikett, a deputy from a nearby law enforcement agency, assist the investigation by running "scent lineups." This dubious adventure required Pikett to call upon two of his pet bloodhounds and to acquire scents from four suspects—Megan; Junior; Megan's boyfriend, Chris Hammond; and Hammond's friend, Adam Szarf. Huff, then, following the procedure that Pikett established, gathered scents from the suspects—by asking each person to rub a piece of gauze on his or her skin and put that gauze in a paper bag—and from the victim—by rubbing gauze against Burr's clothes. Pikett, rather "unscientifically," also carried around in a duffel bag filler scents which he gathered from prisoners at the Fort Bend County Jail. He placed this bag in his SUV, in which his dogs rode daily.

Pikett proceeded to conduct a "drop-trail" exercise with his dogs. That exercise was conducted at the crime scene where Huff provided the hounds with a scent sample. Huff thought he had provided the scent for Junior, but he mistakenly scented the dogs for Hammond instead.

Huff notified Pikett and the other investigators about the mistake after the test, and both Huff and Pikett mentioned it in their formal police reports.

Meanwhile, Junior and Megan allowed investigators to collect their DNA to compare with DNA found in blood discovered at Burr's home. The laboratory reported that the blood did not belong to either. The investigators also wanted to compare Megan's hair to hair found at the murder scene. Sheriff Rogers wrote a search-warrant affidavit to obtain Megan's hair, but he failed to mention the lab report showing her blood was not at the scene. He also misstated that the drop-trail was conducted using Junior's scent pad instead of Hammond's. Further, he did not acknowledge the incidental fact that all forensic evidence from the crime scene excluded the Winfreys. Perhaps recognizing the fumbles in the process, the investigation was put on hold.

After stalling for a year, the investigation restarted when a jailhouse informant, Campbell, came forward with a story incriminating the Winfreys in Burr's murder. Campbell said that while he and Senior were in the same jail cell, Senior confessed to murdering Burr. Johnson visited and interviewed Campbell. There, Campbell told him: (1) Megan and Junior helped Senior get into Burr's house, (2) Senior severely beat up Burr and cut his neck, (3) Senior cut off Burr's genitals and stuck them in Burr's mouth, (4) Junior and Megan were in Burr's house the whole time, and (5) Senior had wanted to kill Burr because Burr's neighbor told Senior that Burr touched one of Senior's kids. Johnson wrote a report of Campbell's story and noted that the details of the injuries were generally

accurate in relation to the physical evidence, except that Burr's genitals were not cut off and put in his mouth.

Johnson visited Campbell a month later, taking Rogers with him. Campbell's story changed. First, Campbell added that Burr was killed in his living room, which Johnson said was not known to the public at that time. Second, he said that Senior stabbed and shot Burr, though there was no evidence that Burr was shot. Third, Campbell now claimed that one of Senior's cousins, not Junior or Megan, was the accomplice to the murder. Finally, Campbell said that Senior confessed to stealing a pistol and long gun from Burr's house, and he put these guns in a nearby "hollow." Investigators found a hollow matching the description, but no weapons were there. Johnson said the public did not know about the stolen weapons.

Pikett, undeterred by earlier failures, conducted a second scent lineup using Senior's scent. The bloodhounds alerted each time on Senior's scent.

Deputy Sheriff Johnson signed two affidavits to obtain search warrants to obtain Junior's and Senior's hair from each of them to compare with the hair found in Burr's home. Each affidavit excluded any reference to: (1) the inconsistencies between Campbell's two interviews, (2) the inconsistencies between Campbell's statements and the other evidence, (3) Junior's and Megan's blood not being found at the scene, and (4) the hair found at the scene not matching Burr or Megan. The judge issued both warrants to Johnson, but the hair obtained from Burr's home did not match the hair of either Junior or Senior.

Nevertheless, Johnson signed affidavits for arrest warrants for Megan, Junior, and Senior.[1] The arrest-warrant affidavits also excluded the same inconsistencies as the search-warrant affidavits, and additionally omitted the fact that the hairs at the crime scene did not belong either to the Winfreys or Burr.

Junior was thus charged with capital murder and sat in jail for two years before his case was tried in June 2009. On June 12, he was found not guilty after thirteen minutes of jury deliberation.

On May 26, 2010, Junior filed this § 1983 lawsuit against every police investigator involved in his murder case. At this point in this lengthy litigation, only his claim against Deputy Sheriff Johnson remains. Junior says that Johnson violated his constitutional rights by using false

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1. The record contains only the arrest-warrant affidavits for Senior and Megan. Johnson argues that the arrest-warrant affidavit for Senior cannot be used as a replacement for Junior's arrest affidavit, which is not in the record due to Junior's intentional spoliation. But this issue was already resolved in *Winfrey I*, 481 F. App'x 969. There, we concluded that we would look to the affidavits for Megan and Senior because: (1) they "suggest that . . . the same affidavit language [was used] for all three Winfreys"; (2) "investigation reports indicate that warrants were obtained for [Junior] on the same day Johnson executed an arrest-warrant affidavit for Megan"; and (3) "Rogers indicated that the drop-trail evidence and Campbell's 'jailhouse snitching' established probable cause to obtain 'a search warrant for the hairs of my *suspects*.'" *Id.* at 978. Because of the law-of-the-case doctrine, we find that the prior panel's decision "should continue to govern" this case. *See Musacchio v. United States*, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016) (quoting *Pepper v. United States*, 562 U.S. 476, 506, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011)).

information to secure arrest and search warrants and by failing to disclose exculpatory evidence.

This case has visited us before. *See generally Winfrey I*, 481 F. App'x 969. There, we vacated the district court's grant of summary judgment in favor of Johnson and remanded for additional discovery on whether Johnson violated the Fourth Amendment by acting with reckless disregard for the truth, as opposed to merely carelessness or negligence, when he included a material falsehood and omitted material information in his warrant affidavits. *Id.* at 979-81.

On remand, the district court held a hearing relating to multiple *Daubert* motions. Junior contends that, at that hearing, the district court barred Junior's expert, David Kunkle, from testifying at trial.

After discovery concluded, Johnson again moved for summary judgment. First, Johnson argued that Junior's claim against Johnson was time-barred. But the district court ruled that it was not barred because the statute of limitations period began when Junior was acquitted, and he filed his lawsuit within a year of his acquittal. Second, the court examined whether Johnson violated Junior's Fourth Amendment rights by recklessly omitting and misstating certain facts in his search-and arrest-warrant affidavits. The court found that one omission was not reckless: excluding Campbell's statements that were inconsistent with each other. But it found that others were reckless: excluding Campbell's statements that were contradicted by the physical evidence and omitting the

DNA and hair evidence that did not link the Winfreys to the scene, which could show that someone other than the Winfreys had to have been present in Burr's house. The court did not say whether Johnson's inclusion of the statement that "the drop-trail from the crime scene to the Winfrey house used [Junior]'s scent" was reckless. Third, the court decided that Johnson nevertheless was protected by qualified immunity, even though he violated Junior's rights, because a reasonable magistrate, reviewing a corrected affidavit, would have found probable cause to search and arrest Junior.

Junior timely appealed. He contends: (1) his arrest-warrant claim is not time-barred; (2) Johnson is not entitled to qualified immunity; (3) the district court abused its discretion in excluding his expert; and (4) if the Court reverses and remands, it should remand this matter to a different judge.

II.

A.

The first issue we address is whether Junior has a valid Fourth Amendment claim. We conclude that he does.

Junior's complaint never alleges in magic words that Johnson violated his rights under the Fourth Amendment. Nevertheless, although the parties have argued this case in a confusing manner from the start, both sides have argued, at times, that the case involves a Fourth Amendment federal malicious-prosecution claim; at other

times, they have argued whether the claim involves a Fourteenth Amendment due process claim. In any event, as the case is presented before us now, there is a proper Fourth Amendment claim because of the law-of-the-case doctrine. In *Winfrey I*, this Court decided that this case presented a Fourth Amendment claim, concluding that Johnson was not entitled to qualified immunity on summary judgment because Junior alleged that Johnson violated the Fourth Amendment by signing objectively unreasonable arrest-warrant affidavits. 481 F. App'x at 979. Additionally, on remand, both sides argued the Fourth Amendment malicious-prosecution issue, and the district court decided the case as a Fourth Amendment case.

"The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Musacchio*, 136 S. Ct. at 716 (quoting *Pepper*, 562 U.S. at 506). The doctrine is meant to promote judicial efficiency so that appellate courts do not continually have to reexamine subsequent proceedings in the same case. *See Chapman v. Nat'l Aeronautics & Space Admin.*, 736 F.2d 238, 241 (5th Cir. 1984). It forecloses reexamination on a subsequent appeal. *Pegues v. Morehouse Par. Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). But the law-of-the-case doctrine does not apply when "(1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such cases, or (3) the decision was clearly erroneous and would work manifest injustice." *Lyons v. Fisher*, 888 F.2d 1071, 1075 (5th Cir. 1989). Here, none of the exceptions apply,

because the relevant precedent was decided before the suit was filed in 2011, the evidence has remained the same throughout, and the decision was not clearly erroneous and did not risk manifest injustice.

Furthermore, we agree that a Fourth Amendment claim is cognizable under the facts here. This Court has held that although there is no "freestanding constitutional right to be free from malicious prosecution," "[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example." *Castellano v. Fragozo*, 352 F.3d 939, 945, 953 (5th Cir. 2003) (en banc). In *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1998), a plurality of the Supreme Court said that malicious-prosecution claims must be based on the Fourth Amendment, rather than on "the more generalized notion of 'substantive due process,'" because the Fourth Amendment is the explicit textual source against this type of government behavior. *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). And recently, in *Manuel v. City of Joliet*, 137 S. Ct. 911, 197 L. Ed. 2d 312 (2017), the Supreme Court considered whether a plaintiff had stated a Fourth Amendment claim when he was arrested and charged with unlawful possession of a controlled substance based upon false reports written by a police officer and an evidence technician. *Id.* at 915. There, the Court said the plaintiff's "claim fits the Fourth Amendment, and the Fourth Amendment fits [the plaintiff's] claim, as hand in glove." *Id.* at 917. And it held "that the Fourth Amendment governs

a claim for unlawful pretrial detention even beyond the start of legal process." *Id.* at 920.

These cases fully support a finding that the Fourth Amendment is the appropriate constitutional basis for Junior's claim that he was wrongfully arrested due to the knowing or reckless misstatements and omissions in Johnson's affidavits. We, therefore, hold that a Fourth Amendment claim is presented, and we will decide the remainder of the issues based upon this legal conclusion.

B.

Johnson argues that Junior's claim is time-barred. Junior was arrested on February 8, 2007. His prosecution began in June 2009, and he was acquitted on June 12. He filed this suit on May 26, 2010.

Section 1983 provides a federal cause of action, but federal courts look to state's statute of limitations for personal-injury torts to decide when § 1983 claims toll. *See Wallace v. Kato*, 549 U.S. 384, 387, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007); *see also Piotrowski v. City of Hou.*, 237 F.3d 567, 576 (5th Cir. 2001) ("The statute of limitations for a suit brought under § 1983 is determined by the general statute of limitations governing personal injuries in the forum state."). "In Texas, the applicable limitations period is two years." *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993); *see* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) ("[A] person must bring suit . . . not later than two years after the day the cause of action accrues."). But "the accrual date of a § 1983 cause of action

is a question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388. "In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts." *Manuel*, 137 S. Ct. at 920.

The accrual date depends on whether Junior's claim more closely resembles one for false imprisonment or one for malicious prosecution. *See id.* at 921-22 (remanding the case to the Seventh Circuit to consider whether the claim was more like a false imprisonment or a malicious prosecution). A false-imprisonment claim is based upon "detention without legal process." *Wallace*, 549 U.S. at 389. It "begins to run at the time the claimant becomes detained pursuant to legal process." *Id.* at 397. A malicious-prosecution claim is based upon "detention accompanied . . . by *wrongful institution* of legal process." *Id.* at 390. It "does not accrue until the prosecution ends in the plaintiff's favor." *Castellano*, 352 F.3d at 953.

Johnson urges us to find that this case fits within *Wallace v. Kato*. There, the Supreme Court found that the plaintiff's unlawful warrantless-arrest Fourth Amendment claim resembled a false-imprisonment claim, because the constitutional violation occurred when the plaintiff was arrested without a warrant instead of when the conviction was later set aside. 549 U.S. at 397. Law enforcement officers transported the fifteen-year-old plaintiff to a police station—without a warrant or probable cause to arrest him—and interrogated him into the early morning. *Id.* at 386, 389. So, the Court found that the plaintiff's claim accrued when he was initially arrested. *Id.* at 397.

Here, we find that Junior's claim is more like the tort of malicious prosecution, because Junior was arrested through the wrongful institution of legal process: an arrest pursuant to a warrant, issued through the normal legal process, that is alleged to contain numerous material omissions and misstatements. Junior thus alleges a wrongful institution of legal process—an unlawful arrest *pursuant to* a warrant—instead of a detention with no legal process. Because Junior's claim suggests malicious prosecution rather than false imprisonment, his claim accrued when his criminal proceedings ended in his favor on June 12, 2009. He filed his suit well within the two-year limitations period on May 26, 2010. So Junior's claim survives the time bar.

III.

A.

Even if the claim is not time-barred, Johnson argues, this case must not proceed further because he is entitled to qualified immunity.

This court reviews the district court's grant of summary judgment de novo. *Brewer v. Hayne*, 860 F.3d 819, 822 (5th Cir. 2017). Summary judgment is appropriate when the movant is entitled to judgment as a matter of law and there is no genuine dispute of material fact. *Id.* We must draw all reasonable inferences in the non-movant's favor and view the evidence in the light most favorable to the non-movant. *Id.* "To survive summary judgment, the nonmovant must supply evidence 'such that a reasonable

jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

When resolving qualified immunity on summary judgment, courts determine (1) whether the facts, taken in the light most favorable to the party asserting the injury, show the officer violated a federal right and (2) whether the right was "clearly established" when the violation occurred. *Tolan v. Cotton*, 134 S.Ct. 1861, 1865-66, 188 L. Ed. 2d 895 (2014). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). The Court does not need "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* The Court uses a standard of "objective reasonableness" to define "the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley v. Briggs*, 475 U.S. 335, 344, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). And it "protects 'all but the plainly incompetent or those who knowingly violate the law.'"

Mullenix v. Luna, 136 S.Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (quoting *Malley*, 475 U.S. at 341).

Clearly established law is not determined "at a high level of generality." *Ashcroft*, 563 U.S. at 742. Instead "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 136 S.Ct. at 308 (quoting *Ashcroft*, 563 U.S. at 742). The inquiry must look at the specific context of the case. *Id.*

Here, the clearly established constitutional right asserted by Junior is to be free from police arrest without a good faith showing of probable cause. Since *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), it has been clearly established that a defendant's Fourth Amendment rights are violated if (1) the affiant, in support of the warrant, includes "a false statement knowingly and intentionally, or with reckless disregard for the truth" and (2) "the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155-56. In *Franks*, the Supreme Court observed that the warrant requirement is meant "to allow the magistrate to make an independent evaluation of the matter." *Id.* at 165. It requires affiants to "set forth particular facts and circumstances underlying the existence of probable cause," including those that concern the reliability of the information and the credibility of the source to avoid "deliberately or reckless false statement[s]." *Id.*

Still, "negligence alone will not defeat qualified immunity." *Brewer*, 860 F.3d at 825. "[A] proven misstatement can vitiate an affidavit only if it is established

that the misstatement was the product 'of deliberate falsehood or of reckless disregard for the truth.'" *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (quoting *Franks*, 438 U.S. at 171). Recklessness requires proof that the defendant "'in fact entertained serious doubts as to the truth' of the statement." *Hart v. O'Brien*, 127 F.3d 424, 449 (5th Cir. 1997) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)), *abrogation on other grounds recognized by Spivey v. Robertson*, 197 F.3d 772, 775 (5th Cir. 1999).

Here, we conclude that Junior alleges a clearly established constitutional violation. Under the first prong of *Franks*, Junior must present evidence that Johnson, through material omissions or otherwise, made "a false statement knowingly and intentionally, or with reckless disregard for the truth." 438 U.S. at 155. Junior provides evidence that Johnson made false statements in his affidavit by (1) excluding Campbell's statements that were contradicted by the physical evidence; (2) excluding the fact that the DNA and hair evidence did not link the Winfreys to the scene; (3) misstating that Pikett's droptrail from Burr's house to the Winfrey house used Junior's scent, when the droptrail actually used Hammond's scent; and (4) excluding Campbell's inconsistencies between his statements, that is, between Campbell's first statement—which was related in the affidavit—that said that Megan and Junior helped Senior to murder Burr and Campbell's inconsistent later statement that Senior's cousin was the accomplice. We find that this showing is also sufficient to demonstrate that there is an issue of material fact as to whether Johnson acted intentionally, knowingly, or

recklessly, because Junior alleges that Johnson either knew or should have known that these material omissions and false statements could lead to an arrest of Junior without probable cause. In short, the evidence presented is sufficient to support a finding that his conduct was unreasonable in the light of the well-established principle requiring probable cause for the issuance of an arrest warrant.

Yet, we must proceed further to the second prong of *Franks* in order to resolve whether "the allegedly false statement is necessary to the finding of probable cause," as required by the *Franks* analysis. 438 U.S. at 156. To determine whether the false statement was necessary for this finding, *Franks* requires us to consider the faulty affidavit as if those errors and omissions were removed. We then must examine the "corrected affidavit" and determine whether probable cause for the issuance of the warrant survives the deleted false statements and material omissions. *See Franks*, 438 U.S. at 156 (saying that courts must excise false statements); *United States v. Bankston*, 182 F.3d 296, 305-06 (5th Cir. 1999) (applying *Franks* to omissions and using a corrected affidavit that "contain[ed] the allegedly exculpatory conversation" to determine whether that affidavit would establish probable cause to authorize electronic surveillance), *overruled on other grounds by Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000). The warrant will be valid only if the corrected affidavit establishes probable cause for Junior's arrest.

Appendix B

This Court reviews the district court's probable-cause determination de novo. *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). Probable cause requires only "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Probable cause is a "practical and common-sensical standard." *Florida v. Harris*, 568 U.S. 237, 244, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013). It looks to the "totality of the circumstances" to determine whether the magistrate with "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief'" to find that the suspect committed the crime for which he is being arrested. *See id.* at 243 (alterations in original) (quoting *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (plurality opinion)).

So we turn to review the "corrected" affidavit to determine whether probable cause was established that Junior murdered Murray Wayne Burr. Examining the totality of the circumstances, we find that the corrected affidavit does not contain sufficient information to satisfy the probable-cause requirement.[2] A corrected affidavit would contain the following facts, which were omitted from Johnson's affidavit. First, a corrected affidavit would include reference to the material fact that Pikett used the scent of Christopher Hammond, Megan's boyfriend,

2. The district court thought there was enough information to support probable cause to arrest Junior because of: (1) a possibly romantic relationship between Burr and Megan; (2) Megan's desire for Burr's hidden money; (3) the presence of Junior's, Megan's, and Senior's scents on Burr; and (4) Campbell's statement that Senior murdered Burr with the help of Megan and Junior.

instead of Junior's. This omitted information was necessary for the state trial judge to consider, because it seriously affects whether Junior was present at the scene of Burr's murder. There was no other physical evidence that connected Junior to the murder scene besides the scent lineup. Second, a corrected affidavit would inform the state trial judge that Megan and Junior's DNA did not match the blood at the scene and that Megan's hair did not match hair found at the scene. It is material because this physical evidence suggests that someone else was involved in the murder. Third, a corrected affidavit would have referred to Campbell's statement that Senior's cousin—not Megan and Junior, like he had said earlier—let Senior into Burr's house to kill Burr. Although this fact would not have mattered as to an arrest warrant for Senior, it certainly was material for Junior, because in one scenario, he was connected to the murder, and in the other, he may not have been present at the scene. Fourth, a corrected affidavit would have apprised the state trial judge that Campbell's statements contradicted aspects of the physical evidence. Campbell said that Burr was both stabbed and shot—although he was only stabbed—and that Senior had cut off Burr's body part, which was not true. Although neither of these false statements, considered independently, would necessarily have been fatal to the affidavit—because Senior could have told Campbell anything—together with Campbell's other statements, these would have served to undermine Campbell's reliability. Weighing the totality of the circumstances, we conclude that a reasonable magistrate would not have issued a warrant on the basis of this corrected affidavit, because the addition of the omitted material facts would have dissuaded the judge from issuing the warrant.

In sum, we hold that Johnson has not established that a corrected affidavit would show probable cause to arrest Junior. Junior is, therefore, entitled to present his case to the jury.[3]

B.

Still, Johnson further contends that he is not liable to Junior because there were two independent intermediaries that intervened to break the causal chain between Johnson's alleged Fourth Amendment violation and Junior's incarceration: (1) the grand jury that indicted Junior and (2) the state judge who presided over the Winfreys' trial. We conclude that neither independent intermediary broke the causal chain between Johnson's faulty affidavit and Junior's incarceration.

Under the independent-intermediary doctrine, "'if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation' for the Fourth Amendment violation." *Jennings v. Patton*, 644 F.3d 297, 300-01 (5th Cir. 2011) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)).[4] "[E]ven an officer who acted with malice

3. We note that this appeal is not an interlocutory appeal on the sole question of qualified immunity. Instead, it comes to us from a final decision of summary judgment for the defendant.

4. Junior urges us to overrule our independent-intermediary doctrine based on *Manuel v. City of Joliet*, but we cannot do that and find it unnecessary. In *Manuel*, the Supreme Court held "that the Fourth Amendment governs a claim for unlawful pretrial detention

. . . 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." *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016) (quoting *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988)), *cert. denied sub nom. Buehler v. Austin Police Dep't*, 137 S.Ct. 1579, 197 L. Ed. 2d 704 (2017). But the chain of causation between the officer's conduct and the unlawful arrest "is broken only where *all the facts* are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the

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even beyond the start of legal process." 137 S. Ct. at 920. The Court said that a grand jury indictment that "was entirely based on false testimony" could not expunge the plaintiff's Fourth Amendment claim. *Id.* at 920 n.8. But it did not hold that officers can never be insulated from liability based on later determinations by an intermediary when all the necessary information was placed before that intermediary. Instead, the Court affirmed a principle that we have consistently followed: when an intermediary's proceeding is tainted by an officer's unconstitutional conduct, the independent-intermediary doctrine does not apply. *Compare id.* ("[I]f the proceeding is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights . . . ."), *with Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016), *cert. denied sub nom. Buehler v. Austin Police Dep't*, 137 S.Ct. 1579, 197 L. Ed. 2d 704 (2017) (stating that under the "taint" exception, "an independent intermediary's probable cause finding does not protect law enforcement officials whose 'malicious motive . . . lead[s] them to withhold any relevant information.'" (alteration in original) (quoting *Cuadra*, 626 F.3d at 813)).

independent intermediary." *Id.* (emphasis added) (quoting *Cuadra*, 626 F.3d at 813).

Here, the record does not indicate that the material information, which we have noted was omitted from Johnson's affidavit, was presented either to the grand jury or the state judge. Stated differently, as far as this record is concerned, the only information before a grand jury was the information in Johnson's affidavit. Neither the plaintiff nor defendant has shown otherwise.

First, because, at best, it is not clear whether "all the facts [were] presented to the grand jury," *Cuadra*, 626 F.3d at 813, we hold that the independent-intermediary doctrine does not apply.

Second, Johnson contends that the state trial judge found probable cause to authorize Junior's continued detention, thereby insulating Johnson from liability. But the record does not show that the judge ever ruled that there was probable cause to detain Junior. At one hearing, the judge determined that there was probable cause to arrest Megan, but nothing about Junior. And in other hearings, the judge decided whether certain evidence should be allowed at trial and whether Senior should be granted a directed verdict. None of these hearings addressed the central question today: whether there was probable cause to arrest Junior. So we have no basis to find that the subject material omitted information was presented to the state trial judge.

Appendix B

IV.

We now turn from the state proceedings to the procedural errors that Junior asserts in the federal proceeding below. Junior contends that the district court excluded the testimony of David Kunkle, a former police chief and Junior's expert witness. He contends this exclusion was an abuse of discretion. But after our examination of the record, we conclude that the district court never decided whether Kunkle could testify at trial. We are a court of appeals and errors. Inasmuch as the district court made no decision and issued no ruling, it could not have made an error or otherwise created an issue for appeal. We therefore decline to address the exclusion of David Kunkle's testimony until the district judge has expressly ruled on the issue.

Junior contends that the district judge orally ruled from the bench to exclude Kunkle from trial on October 20, 2014. But at that hearing, the judge never explicitly ruled that Kunkle could not testify. He said,

> And there is no salvageable part of the police chief's, [Kunkle,] as I recall. . . . It's simply, it's what we tried very hard to get away from back in the early 80s. And I don't remember when Daubert was, somewhere in there; but I have always believed that expert testimony had to mean something. And we got anybody with a decent resume could say anything was pretty much the rule for a long time.

> And the Supreme Court finally said they have to know something in particular about what is going on and it has to be cogent. There is no peer review for police chiefs. The city council, but they're not really peers there, something else entirely different.
>
> Although strongly suggestive, this statement did not expressly grant or deny Johnson's motion to exclude the testimony of Kunkle. Further, the district judge indicated in his minute entry that "an order on the motion" would be entered following the hearing, but no such order was ever entered.

Furthermore, the Supreme Court has made clear that trial judges must play a "gatekeeping" role when examining the reliability of experts, and the court's inquiry must be "tied to the facts" of the particular case. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). The district court is required to make a ruling and provide articulable reasoning before we can review whether its decision was proper. Here, if the question arises on remand, the district court will need to make clear its basis for its ruling on Kunkle's testimony.

V.

Finally, Junior requests that this Court remand the matter to a different district judge. We find no basis for that request.

VI.

In this opinion, we have held that (1) Junior has alleged a valid Fourth Amendment claim against Johnson; (2) Junior's claim is not time-barred; (3) Johnson has not shown that his alleged conduct is protected by qualified immunity; (4) a corrected affidavit did not establish probable cause; (5) Johnson is not protected by the independent-intermediary doctrine; (6) because the district court did not expressly rule whether to exclude Kunkle, we do not address whether the court abused its discretion; and (7) we find no basis for remanding the matter to a different district judge. The primary question on remand appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and misstatements. This case should go to trial without delay in a manner not inconsistent with this opinion.

Accordingly, the judgment of the district court is VACATED and the case is REMANDED.

VACATED and REMANDED.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED OCTOBER 4, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Civil Action H-10-1896; H-14-448

RICHARD WINFREY, JUNIOR, *et al.*,

Plaintiffs,

versus

KEITH PIKETT, *et al.*,

Defendants.

October 4, 2016, Decided
October 4, 2016, Filed, Entered

OPINION ON PARTIAL SUMMARY JUDGMENT

1. *Introduction.*

A father, his son, and his daughter were searched, arrested, and tried for murder. All three were, eventually, acquitted. The son and daughter sue the investigators and the counties that employ them for violating their constitutional rights. The son will take nothing. The daughter will take nothing on all but one of her claims.

2. *Background.*

In August of 2004, Murray Wayne Burr was found dead in his home in Texas's San Jacinto County. Blood spatter showed that the murder started in his living room, and the body was dragged to the bedroom. The County Sheriff Lacy Rogers and Deputy Sheriff Lenard Johnson led the investigation. Texas Rangers Grover Huff and Ronald Duff assisted.

Ultimately, the investigators concluded that Richard Winfrey, Senior, and his children Richard Winfrey, Junior, and Megan Winfrey killed Burr.

A. *The Investigation Begins.*

Burr had worked as a janitor at Coldspring High School where Megan and junior were students. Some of the initial evidence indicated that they had socialized.

Burr's neighbors said that Megan and junior asked Burr to let them move in with him, but he said no. One teacher at the school saw Megan put her arm in Burr's and ask if he was going to take her out and spend some of the money he had hidden in his house on her.

A second teacher said she saw a verbal fight between Megan and Burr after which Megan muttered, "Someone should beat the shit out of him." A third teacher told of a time Megan acted violently towards her.

Appendix C

B. *Scent Evidence Gathered.*

Keith Pikett — a deputy from a nearby agency — assisted the investigation by running scent-pad line-ups. The line-up uses bloodhounds to compare a suspect's scent to the scents found on a victim's clothes. On August 24, 2004, Pikett ran the line-up using bloodhounds and scents from four suspects — Megan, Junior, Chris Hammond, and Adam Szarf. The bloodhounds alerted only on Megan's and Junior's scents.

The bloodhounds also traced a scent by following a scent trail, a method often used to find lost people or fleeing criminals. The investigators gave the hounds the scent at Burr's house. The hounds located the scent and followed it to the Winfrey house. The officers thought the scent used was Junior's; the scent actually came from Chris Hammond, Megan's boyfriend.

C. *Blood not a match.*

In September of 2004, the investigators received a report from the Houston Crime Laboratory. A lot of blood was found at Burr's house. The report compared the DNA of the blood found in Burr's house with the suspects' DNA. The report concluded that neither Megan's nor Junior's blood was at the scene. The report also concluded that all of the blood may have come from Burr but it could not conclude his blood was the only blood at the scene.

D. *Megan's hair not a match.*

The investigators found hairs on and near Burr's body that did not belong to Burr. In January of 2005, Rogers signed an affidavit and received a search warrant for Megan's hair.

In the affidavit, he included (a) the neighbor's statement that Megan socialized with Burr; (b) the teacher's statements; (c) the results of the line-up; (d) the partially erroneous results of the scent trail. He did not include that the blood at the scene may have come from someone other than Burr, Megan, or Junior. Megan's hair was not a match.

E. *An Informant Comes Forward.*

The investigation stalled for over a year. Until then, Senior had not been a suspect. David Campbell changed that.

Some time after Burr's murder, Senior was imprisoned on an unrelated matter. He was housed with Campbell. Campbell told a warden that he confessed his involvement in a murder in San Jacinto County. The warden contacted Johnson.

Johnson met with Campbell and wrote a summary of his statement. According to the report, Senior told Campbell that he committed a murder in San Jacinto County in zoos. Senior also told Campbell that: (a) Megan and Junior played across the street from Burr's house; (b)

one of Burr's neighbors told Senior that Burr had touched one of Senior's children; (c) Megan and Junior helped Senior get into Burr's house; (d) Senior severely beat Burr and cut his neck; (e) Senior cut off Burr's genitals and placed them in Burr's mouth; and (f) Megan and Junior were present the whole time. Johnson told Campbell that he would return with Rogers for more information.

Rogers and Johnson returned to question him. They videotaped the interview. Campbell elaborated on what he originally told Johnson. This time, Campbell added that (a) a cousin entered with Senior; (b) Burr was in the living room; (c) Burr was shot as well as stabbed; (d) Senior stole two guns (a pistol and a .3030 rifle) from Burr; and (e) Senior hid the guns and a knife in a hollow on Winfrey property. Those facts are missing from Johnson's report about the first interview.

After the interview, Johnson learned from one of Burr's relatives that two guns were missing from Burr's house after the murder. The relative said the missing guns were a shotgun and a .22 rifle, not a pistol and a .3030 rifle.

The investigators also found a hollow matching Campbell's description of where Senior hid the guns and knife but did not find any weapons in the hollow.

Finally, Pikett ran a line-up using Senior's scent. Senior's scent matched the scent on Burr's clothes.

Appendix C

F. *Junior's and Senior's hair not a match.*

On August 23, 2006, Johnson signed two affidavits to obtain search warrants for Junior's and Senior's hair. He wanted to compare their hairs against the hair found at the scene.

Both affidavits omitted some of the evidence favorable to Junior and Senior. Johnson excluded: (a) the inconsistencies between Campbell's two interviews; (b) the inconsistencies between Campbell's statements and the other evidence; (c) that Junior's blood and Megan's blood was not found at the scene; and (d) that the hair found at the scene did not match Burr or Megan.

Junior's and Senior's hairs did not match the hair found at the crime scene.

G. *Winfreys Arrested and Eventually Acquitted.*

On February 2, 2007, Johnson signed affidavits for arrest warrants for Megan, Junior, and Senior. The substance of Johnson's affidavits for the arrest warrants is identical to Johnson's affidavits for Junior's and Senior's search warrants.

Johnson's arrest affidavits contained the same errors as the search affidavits. There was an additional omission: the hairs recovered at the crime scene did not belong to Junior, Megan, Senior, or Burr.

In October of 2008, Megan was convicted. On June 12, 2009, Junior was acquitted. On February 27, 2013, Megan's conviction was overturned.

H. *Allegations that Campbell's Interview was Staged.*

Campbell testified at Megan's trial. He was asked about letters he sent Senior's sister, Vicki Haynes. While in prison, Campbell received a letter from Haynes. She had learned that he was going to be a witness. Campbell was worried because Haynes knew where his family lived; he feared retribution. Campbell wrote back saying that the first interview, by Johnson, was "staged." At trial, Campbell reaffirmed this and said that Johnson tried to make something up. As a result, Campbell asked to speak to someone with more authority — Rogers.

Campbell never explains what Johnson tried to add or in what way the interview was "staged." Johnson's summary of the interview is consistent with the content of both the second interview and Campbell's testimony at trial. The video shows that Campbell was not under duress or coached during the second interview.

3. *Case History.*

Senior, Megan, and Junior sued every investigator; most of the claims have been resolved.

In Junior's case, the court granted summary judgment to the defendants. The United States Court of Appeals

reversed the judgments for Johnson, Rogers, and Pikett. Pikett was dismissed by agreement of the parties.

Junior's claims against Rogers and Johnson pend. Megan's claims against Rogers, Johnson, Pikett, and San Jacinto County pend.

Junior will take nothing. Megan will take nothing from Rogers, Johnson, and the County. Megan's claims against Pikett survive.

4. *Mandate.*

The court of appeals held that on the facts then discovered, (a) Junior's claims against Pikett for fabrication of evidence could not be denied as a matter of law; and (b) Junior had made a *threshold* showing of objective unreasonableness in the preparation of the search and arrest warrant.

Megan and Junior attempt to use the court of appeals's decision. The court conducted further discover; the record has changed. The determination of whether Megan's and Junior's claims can be decided as a matter of law will be based on the facts now in evidence.

5. *Limitations.*

Megan and Junior sue Johnson and Rogers for searching and imprisoning them without due process and fabricating Campbell's testimony. Megan also sues Pikett for manufacturing the scent-pad line-ups. These are claims for damages for violations of constitutional rights.

Appendix C

Federal law authorizes some actions that stem from violations of constitutional rights. State law determines how long a person may wait before suing.[1] Under Texas law, a person must sue within two years of a violation. Accrual is determined by federal law.[2] The limitations period begins when the injury is complete, the plaintiff knows it, and knows it's cause.

A. *Illegal Searches.*

Megan and Junior seek damages for unreasonable searches — the subpoenas for their hair. The limitations period began when the search was complete because the Winfreys knew who searched them.

They say that the limitations period did not begin until they were acquitted because challenging the searches meant challenging their convictions. A claim for damages based on an illegal search does not imply unlawful imprisonment.[3] Here, for example, the searches did not produce evidence against Megan or Junior. Therefore the searches did not produce evidence that supported their imprisonment.

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1. Owens v. Okure, 488 U.S. 235, 239, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989).

2. Wallace v. Kato, 549 U.S. 384, 388, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007).

3. Heck v. Humphrey, 512 U.S. 477, 487 n.7, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

Megan was searched in 2005; her claim expired in 2007. She did not sue until May 26, 2014. Her claims for unreasonable search are untimely.

Junior was searched in 2006; his claim expired in 2008. He did not sue until May 26, 2010. His claims for unreasonable search are untimely.

B. *Illegal Arrests and Manufacture of Evidence.*

Civil claims that challenge imprisonment can be brought only once the accused has been acquitted.[4] Concerns for finality and consistency cannot abide the use of civil suits to attack convictions collaterally.

Megan and Junior say that their arrests were not supported by probable cause and that the evidence used against them was manufactured. The defendants say that the limitations period began once Megan and Junior were held pursuant to legal process.

The Winfrey's claims are not for detention without legal process;[5] rather, they are for wrongful institution of legal process. Claims about probable cause and guilt cannot be brought until the accused is acquitted.[6]

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4. Id. at 486-87.

5. Wallace, 549 U.S. at 389.

6. Id. at 484.

On June 12, 2009, a jury acquitted Junior. Less than a year later, he sued. He brought his claims for arrest without probable cause and the manufacture of evidence within the limitations period.

On February 27, 2013, the Texas Court of Criminal Appeals reversed Megan's conviction. Less than a year later, she sued. She brought her claims for arrest without probable cause and the manufacture of evidence within the limitations period.

7. *Megan and Rogers.*

Megan seeks damages from Rogers because he (a) wrote a misleading affidavit for a search warrant and (b) coerced Campbell's testimony. Though her claim for the search must be dismissed as brought after the limitations period, the court still considers its merits.

A. *Misleading Affidavit to Search.*

To recover, Megan must show that Rogers (a) violated her rights and (b) was not protected by qualified immunity.

The law requires that Rogers's affidavit include enough facts to enable the magistrate to make an independent evaluation that there was probable cause to search Megan.[7] Rogers violated Megan's Fourth Amendment rights if he recklessly included false information or excluded important information from his affidavit.

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7. Franks v. Delaware, 438 U.S. 154, 165, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Even if Rogers violated Megan's rights, he is protected by qualified immunity if the search was objectively reasonable.[8] Rogers's search was objectively reasonable if supported by probable cause.[9] Thus, Megan must show (a) Rogers's recklessness in writing a misleading affidavit and (b) that a reasonable magistrate, reviewing a corrected affidavit, would not have found probable cause.

A reasonable magistrate would find probable cause in a corrected affidavit if it contained enough facts to justify a belief that Megan murdered Burr. The belief must be more than a suspicion but far less than a preponderance of the evidence. Though a corrected affidavit must include favorable evidence, once a reasonably credible source comes forward, the investigators do not have an obligation to investigate further.[10]

The court now examines Megan's evidence that her rights were violated and compares Rogers's affidavit with a corrected affidavit to determine whether a reasonable magistrate could have found probable cause.

(1) *Claimed Rights Violations.*

Megan says that Rogers violated her Fourth Amendment rights by recklessly (a) including the evidence from the scent-pad line-up, (b) including the partially

8. Malley v. Briggs, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

9. See U.S. v. Leon, 468 U.S. 897, 922-23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); U.S. v. Perez, 484 F.3d 735, 743 (5th Cir. 2007).

10. Woods v. City of Chi., 234 F.3d 979, 997 (7th Cir. 2000).

erroneous scent trail, and (c) excluding the favorable DNA evidence.

(a). *Inclusion of Line-Up.*

Megan says that Rogers recklessly included the results of Pikett's line-up in his affidavit.

Even if Pikett's line-up is junk science that has no place in criminal investigations, Rogers did not know that when he signed the affidavit. Pikett was a police officer with a nearby agency. He worked with the Federal Bureau of Investigations. At least one Texas court had found testimony by Pikett about the results of a line-up admissible.[11] No fact suggests that Rogers erred in including Pikett's results.

(b). *Misidentification of the Scent Used on the Scent Trail.*

Huff intended to run the scent trail from Burr's house with Junior's scent; he accidentally used Chris Hammond's. Assuming that Huff told Rogers when he discovered the error, Rogers's false statement that Junior's scent was used was reckless but not important. Both Hammond and Junior are affiliated with Megan. Junior is her brother; Hammond was her boyfriend. Had the error been remedied, the value of the evidence would not have changed.

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11. Winston v. State, 78 S.W. 3d 522, 529 (TexApp.—Houston [14th Dist.] 2002, pet. ref'd).

Rogers's error about whose scent was used was reckless but not important.

(c). *Exclusion of Favorable DNA Evidence.*

Rogers recklessly excluded that Megan did not contribute to the blood in Burr's house. Rogers knew this information; the Lab sent him the report.

That Megan's blood did not match the blood at the scene was of some importance. Burr's murder was violent. The killer could have been cut and bled during the struggle. If Megan killed Burr and the killer bled during the murder, Megan's blood would have matched the blood at the scene. The DNA evidence decreases the likelihood that Megan killed Burr. Rogers recklessly excluded this evidence, violating Megan's Fourth Amendment rights.

(2). *Rogers not Protected by Qualified Immunity.*

Rogers was not protected by qualified immunity because there was not probable cause to search Megan. The investigators had evidence that (a) Megan and Junior wanted to move in with Burr, but he said no; (b) Megan was flirtatious but also fought with Burr; (c) she thought he had money in his house; (d) she was violent towards other school employees;[12] (e) her scent was on his clothes;[13] and (f) her boyfriend traveled from Burr's house to her house.

12. Propensity evidence may be used in probable cause determinations. Federal Rules of Evidence 1001(d)(3).

13. The court evaluates probable cause at the time of the search and does not consider later evidence questioning the validity of Pikett's methods.

This evidence supported a reasonable belief that there was a relationship between Megan and Burr and that she was at his house sometime before the murder. There was no evidence linking her to the murder. A trier of fact could conclude that a reasonable magistrate reviewing a corrected affidavit could not have found probable cause to search Megan.

Megan raises a fact issue about whether Rogers was protected by qualified immunity, but her claim is barred by limitations. Megan will take nothing from Rogers on this claim.

B. *Coercion of Campbell.*

Megan says that Rogers and Johnson coerced Campbell to give false information. There are no facts to support a claim that Rogers forced Campbell to incriminate Megan. The data in Johnson's report of the first interview, the video of the second interview, and Campbell's testimony at trial is consistent. Campbell was not under duress at trial.

Megan will take nothing from Rogers on her claim that he manufactured evidence against her.

8. *Megan and San Jacinto County.*

Megan could recover damages from San Jacinto County for the unconstitutional acts of its final policy maker, Rogers.

Megan's claim against Rogers for writing a flawed affidavit to search her is barred by limitations. Her claim against Rogers for coercing Campbell to give a false statement is not supported by the facts.

Because Megan takes nothing from Rogers, she will take nothing from the county.

9. *Junior and Rogers.*

Junior seeks damages from Rogers for (a) writing a misleading affidavit and (b) coercing Campbell's testimony.

Rogers did not write the affidavits used to secure warrants for Junior's search and arrest. Junior will take nothing from Rogers on this claim.

There are no facts to support Junior's claim that Campbell's testimony was coerced. Junior will take nothing from Rogers on this claim.

10. *Junior and Johnson.*

Junior seeks damages from Johnson because he (a) wrote misleading affidavits to secure warrants and (b) coerced Campbell's testimony. Though his claim for the search must be dismissed as brought after the limitations period, the court still considers its merits.

A. *Misleading Affidavit to Search.*

To recover, Junior must show that Johnson (a) violated his rights and (b) was not protected by qualified immunity.

Johnson violated Junior's Fourth Amendment rights if he recklessly included false information or excluded important information from his affidavit. Even if Johnson violated Junior's rights, he is protected by qualified immunity if the search was supported by probable cause. Thus, Junior must show (a) Johnson's recklessness in writing a misleading affidavit and (b) that a reasonable magistrate, reviewing a corrected affidavit could not have found probable cause. A reasonable magistrate could find probable cause in a corrected affidavit if it contained enough facts to justify a belief that Junior murdered Burr.

The court now examines Junior's evidence that his rights were violated and compares Johnson's affidavit with a corrected affidavit.[14]

(1). *Claimed Rights Violations.*

Junior says that Johnson violated his Fourth Amendment rights by recklessly excluding (a) the fact that Campbell made two inconsistent statements; (b) the parts of Campbell's statement contradicted by other evidence; and (c) the DNA and hair evidence.

(a). *Exclusion of Inconsistent Statements Not Reckless.*

Junior says that: (a) Campbell's two statements were inconsistent, and (b) Johnson's omission of the inconsistencies from the affidavit was reckless.

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14. An appendix compares the actual affidavit with a corrected affidavit.

The evidence does not show that the statements were inconsistent. Assuming the inconsistencies, Johnson's exclusion of them was not reckless because they are not grave enough to discount Campbell's statements.

Campbell's statements are not clearly inconsistent. The first interview was not formal. Johnson's notes were not meant to be a complete record of Campbell's statement. The notes were part of a live report that was supplemented later. Johnson told Campbell at the end of their first meeting that he would return with Rogers to take a full statement. It is likely that Campbell either told a more complete story the second time or Johnson's notes from the first time were incomplete.

Even if Campbell intended to tell a full story both times and added information the second time, Johnson's exclusion of that fact in the affidavit was not reckless. It merely evinces that Johnson either did not (a) see any inconsistencies between Campbell's two statements or (b) attach any importance to them. A jury cannot reasonably find that he should have. Johnson did not violate Junior's rights by excluding the inconsistencies.

(b). *Reckless Exclusion of Parts of Campbell's Statement.*

Junior says that (a) other evidence gathered by the investigators contradicted parts of Campbell's statement, and (b) Johnson recklessly omitted the inconsistent parts.

Johnson excluded portions of Campbell's statement that were contradicted by other evidence. Campbell

said that Burr was beaten, cut, and shot. The autopsy report showed that Burr was beaten and cut but not shot. Campbell said Senior cut off Burr's genitals and put them in Burr's mouth. There was no evidence of genital mutilation.

Campbell also said that Senior stole a pistol and a .3030 rifle. While Burr's relatives confirmed that two guns were missing, they said the guns were a shotgun and a .22 rifle. Campbell said that Senior hid the guns and a knife in a hollow on Winfrey property. The investigators found a place matching Campbell's description but did not find guns or a knife.

Johnson had either direct knowledge of these inconsistencies or chose not to read the information in the file he used to write the affidavit.

These omissions were reckless. Inconsistencies between Campbell's statement and other evidence are a reason to doubt Campbell's credibility. While the court will conclude that these inconsistencies were not grave enough to discount Campbell's credibility, that decision was not for Johnson to make. He should have presented all of the important facts. Johnson violated Junior's Fourth Amendment rights.

(c). *Reckless Exclusion of DNA and Hair Evidence.*

Johnson also omitted that the blood at the scene did not match Megan and Junior and that the hair did not match Megan.

Johnson had either direct knowledge of this evidence or chose not to read the information in the file he used to write the affidavit.

Omission of this evidence was reckless. The lack of blood from Megan and Junior at the crime scene decreased the likelihood that they killed Burr. While the court will conclude that the inclusion of this favorable evidence would not have been enough to overcome a reasonable belief that Junior and Megan were involved in the murder, that decision was not for Johnson to make. He should have presented all of the important facts. In not doing so, Johnson violated Junior's Fourth Amendment rights.

(2). *Johnson Protected by Qualified Immunity.*

Johnson was protected by qualified immunity because a reasonable magistrate, reviewing a corrected affidavit, would have found probable cause to search Junior. Johnson had evidence of: (a) the relationship, possibly romantic, between Megan and Burr; (b) her desire for his hidden money, (c) the presence of Megan's, Junior's, and Senior's scents on Burr after his death, and (d) Campbell's statement that Senior murdered Burr with the help of Megan and Junior.

Campbell was a credible source. Though he included some details that did not match other evidence, the majority of the facts he gave matched the investigators' theory of the case. He also gave one fact — about the missing guns — that was unknown at the time.

Though the lack of DNA evidence decreases the likelihood that Megan, Junior, and Senior killed Burr, it is not enough to cast doubt on the investigators' reasonable belief of the Winfreys' guilt. The investigators believed that three or four people worked together to kill Burr and that he was murdered while in his living room with people he considered to be friends. They reasonably believed that the Winfreys killed him without suffering an injury in the process.

On the facts before it, the court can decide as a matter of law that a reasonable magistrate, reviewing a corrected affidavit, could have found probable cause to search Junior. Junior will take nothing from Johnson on this claim.

B. *Misleading Affidavit to Arrest Junior.*

Junior says that Johnson recklessly wrote a misleading affidavit for his arrest and that the arrest was not supported by probable cause.

Johnson says that the court cannot consider this claim because the affidavit for Junior's arrest was destroyed at Junior's request. The four affidavits before the court are substantively identical. The content of Junior's arrest affidavit was the same as Megan's and Senior's.

Because the search affidavit violated Junior's rights, the arrest affidavit did as well. The affidavit supporting Junior's arrest contained the same errors as the search affidavit plus one additional error. The Lab reported that the hairs gathered from Junior and Senior did not match

the hair found at Burr's house. That omission is unique because it shows that someone was present in Burr's house other than Burr, Junior, Megan, and Senior.

The additional fact that someone else left hair at Burr's house does not cast enough doubt on the incriminating evidence to overcome a reasonable belief that Junior participated in Burr's murder.

One the facts before it, the court can decide as a matter of law that a reasonable magistrate, reviewing a corrected affidavit, could have found probable cause to search Junior. Junior will take nothing from Johnson on this claim.

C. *Coercion of Campbell*.

There are no facts to support Junior's claim that Campbell's testimony was coerced. Junior will take nothing from Johnson on this claim.

11. *Megan and Johnson*.

Megan seeks damages from Johnson because he (a) wrote a misleading affidavit to secure a warrant for Megan's arrest, and (b) coerced Campbell's testimony.

A. *Misleading Affidavit to Arrest Megan*.

Johnson's affidavit to arrest Megan contained the same errors as his affidavits to search and arrest Junior. Johnson violated Megan's Fourth Amendment rights by

recklessly omitting that (a) parts of Campbell's statement were inconsistent with other evidence; and (b) DNA and hair evidence did not match any of the Winfreys.

Even if Johnson had corrected those errors, a reasonable magistrate would have found probable cause to arrest Megan. The evidence still indicated: (a) a relationship, possibly romantic, between Megan and Burr; (b) her desire for his hidden money; (c) the presence of Megan's, Junior's, and Senior's scents on Burr after his death; and (d) Campbell's statement that Senior murdered Burr with the help of Megan and Junior.

On the facts before it, the court can conclude as a matter of law that a reasonable magistrate reviewing a corrected affidavit could have found probable cause to arrest Megan. Megan will take nothing from Johnson on this claim.

B. *Coercion of Campbell*.

There are no facts to support Megan's claim that Campbell's testimony was coerced. Megan will take nothing from Johnson on this claim.

12. *Megan and Pikett*.

Pikett invented and ran the scent-pad line-up that identified Megan, Junior, and Senior as contributors to the scents on Burr's clothes. The investigators used the line-up to support probable cause to search and seize Megan. Pikett testified about the line-up at Megan's trial. Megan says that Pikett manufactured the results of the line-up.

Appendix C

A. *Pikett's Background.*

Pikett bought a bloodhound as a pet and decided to train it. He attended seminars about how to use bloodhounds to track people. Based on what he learned, Pikett developed scent-pad line-ups as a tool to help police officers.

Pikett has a bachelor's degree in chemistry and a master's in sports coaching. He came up with scent-pad line-ups on his own. He did not receive training, read scientific literature, or publish peer-reviewed articles.

B. *Performing the Line-Up.*

Before meeting the lead investigators, Pikett asked them to gather (a) scents from suspects and (b) scents from the victim. Texas Ranger Grover Huff gave a piece of gauze to each suspect, asked them to rub it on their skin, and had them place the gauze in a plastic bag. Huff also rubbed a piece of gauze on Burr's clothes and put the gauze in another plastic bag.

Pikett met the investigators in a field. Pikett brought his dogs, unused paint cans, and filler scents that he took from prisoners at the Fort Bend County Jail. Pikett stores the filler scents in a duffle bag that he keeps in the back of his SUV — the same place where his dogs ride daily.

Huff put either a suspect's scent or a filler scent in each paint can. Huff then put the paint cans in the field while Pikett prepared one of his dogs. Pikett then gave the dog the victim's scent.

Pikett walked the dog next to each can to see if the dog "alerted" on any of the cans. Each dog's alert varies. Pikett has been unable to train his dogs to alert in a specific manner. Instead, he learns each dog's individual alert as he works with it. If the dog alerts on a can, Pikett concludes that the scent in the can matches the scent from the victim's clothes.

After the first dog did the line-up, Pikett did the same line-up one or two additional dogs to confirm the initial result. The position of the cans was not altered for each dog.

Both of the dogs used alerted on Megan's scent and Junior's scent as a match to the scent on Burr's clothes. All three of the dogs used alerted on Senior's scent as a match.

C. *Megan's Claims against Pikett.*

Megan sues Pikett for violating her constitutional rights by fabricating the results of the scent-pad line-up. Megan must show that Pikett (a) violated her rights and (b) was not protected by qualified immunity from damages.

If Pikett fabricated scientific evidence to help justify Megan's imprisonment, he violated her Fourteenth Amendment due process rights. His qualified immunity does not protect him from deliberately or recklessly creating a scientifically inaccurate report.[15] Pikett's

15. Brown v. Miller, 519 F.3d at 237 (5th Cir. 2008).

behavior is measured against what a reasonable police officer with his training and experience should have known about the reliability of his report.

D. *Nicely Report.*

In evaluating Megan's claim, the court considers the technician's report submitted by Megan. Pikett objects because Steven Nicely has no experience with scent-pad line-ups or training bloodhounds. Nicely has extensive experience with scent detecting dogs. No technician has experience with scent-pad line-ups other than Pikett and the people he trained. Nicely's report will be admitted and considered commensurate with his experience.

Nicely watched the video of Pikett's line-up and reviewed Pikett's deposition. Nicely found that: (a) newer scents stand out as fresher amongst older scents; (b) scents from people who live in the same place smell similarly; (c) dogs can become accustomed to scents if they are exposed to them regularly; (d) Pikett's claim that his dogs are accurate ninety-nine percent of the time is unreliable; (e) Pikett may have influenced his dogs because he kept them on a short leash and could see in the cans; and (f) the dogs may have responded to deliberate cues from Pikett.

E. *Insufficient Distractors.*

Pikett's filler scents were not useful distractors. Most of the scents were old, came from people who lived in the same place, and were stored in a location near the dogs.

Pikett kept the filler scents for as long as three years. The scents from the suspects were new. According to Nicely, newer scents stand out amongst older scents. The dogs may have alerted to Megan's scent because it was fresher than the others.

Most of the filler scents came from the Fort Bend County Jail. According to Nicely, the filler scents that came from the Jail had a common institutional scent. The dogs may have alerted on Megan's scent because it stood out amongst the scents from the same place.

Pikett also stored the filler scents in a duffle bag in the back of his SUV. The dogs rode daily in the car next to the bag. According to Nicely, the dogs may have become accustomed to the filler scents because of prolonged exposure. The dogs may have alerted on Megan's scent because it was the only one they did not recognize.

Pikett testified at Megan's trial that his dogs have an accuracy rate between ninety-nine and one hundred percent. According to Pikett, he believes his dogs are wrong only when they "identif[y] the wrong person in the line-up."

Pikett cannot check his dogs' accuracy because no other test compares scents. It is more accurate to say that his dogs have only chosen a filler scent instead of a target scent twice out of a nearly a thousand line-ups. Nicely reports that a success rate of over ninety-nine percent is highly unlikely for scent identifying dogs.

Such a high success rate is an indication not that the dogs are accurate but that the filler scents are defective as distractors.

F. *Pikett's Influence.*

Pikett's method may allow him to intentionally or subconsciously influence the outcome of the line-up. Pikett kept his dogs on a short leash and looked down while walking by each can. He used paint cans that did not have lids on them. He may have consciously or unconsciously influenced the result.

Pikett looked down while walking the line-up and did not ensure that the bags and gauze used for the suspects matched those used for his filler scents. Pikett may have been able to tell which can contained a suspect's scent by looking into the can. Also, when Pikett ran the second or third dogs, he knew which can the first dog had alerted on.

By keeping the dogs on a short leash, Pikett may have been able to cue the dogs to alert. According to Nicely, a dog may be cued intentionally or subconsciously. He also says that the dogs should have been trained to run the line-ups by themselves, with a different handler who did not train them, or at least given a longer leash with more slack to prevent cuing.

G. *Dog's Alert.*

Pikett admits that he did not successfully train his dogs to alert in a specific way. Instead, he claims that he

knows each dog's alert and can describe the alert before running the line-up. At Megan's trial, he said that anyone watching the line-up should be able to tell when the dog alerts but recently admitted that, as the handler, he is uniquely able to feel it.

According to Nicely, the video does not clearly show the dogs alerting on Megan's scent. It is also unclear whether Pikett cues the dogs or whether their reactions are caused by smelling the scents.

H. *Pikett's Culpability.*

Megan has shown that the line-ups were likely to confirm the investigators' suspicions by linking the suspects' scents to the victim's scent. This could have happened due to ineffective filler scents, Pikett's subconscious acts, or Pikett's intentional acts. Though he may not have had a motive to harm Megan individually, his methods may have been designed to help officers confirm their suspicions.

Dogs help humans in a variety of difficult jobs. Dogs reliably guide the blind, flush game, comfort the ill, locate the lost, subdue the violent, interdict contraband, intimidate intruder, herd livestock, and track the fugitive.

While using a dog to alert among scents to connect a suspect to an artifact of the crime follows the pattern of these uses, Megan has introduced enough evidence to create a question about whether Pikett recklessly or intentionally designed a flawed test. Her claims against

Pikett for fabricating evidence that was used to support her seizure, prosecution, and imprisonment survive.

13. *Conclusion.*

Megan and Junior take nothing on their claims for illegal search against Johnson and Rogers because they sued after the limitations period.

The court can conclude as a matter of law that Rogers and Johnson are protected by qualified immunity for their arrests of Megan and Junior.

The county is not liable because Rogers is not liable.

No facts support the claims that Johnson and Rogers fabricated Campbell's testimony.

The court cannot decide as a matter of law whether Pikett's use of scent-pad line-ups to produce evidence against Megan was reckless. Megan's claim against Pikett survives.

Signed on October 4, 2016, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Appendix C

Appendix

Johnson Affidavit	Corrected Affidavit
Junior and Megan visited Burr and asked to move in with him, but he said no.	Same.
A teacher saw an intimate exchange between Megan and Burr in which Megan asked Burr to spend some of the money he had hidden at his house on her.	Same.
A second teacher saw an angry exchange between Megan and Burr after which she muttered that someone should beat the shit out of him.	Same.
A third teacher said she was assaulted by Megan over a year before the murder.	Same.
The line-up established that Megan's and Junior's scents were on Burr's clothes.	Same.

Appendix C

Johnson Affidavit	Corrected Affidavit
A scent trail connected Burr's house to the Winfreys' house.	A scent trail connected Burr's house to the Winfreys house, though the scent used to trace the trail belonged to Chris Hammond, Megan's boyfriend.
Omitted.	Megan and Junior did not contribute to the blood at the scene and Megan's hair did not match hair found at the scene.
Campbell shared a prison cell with Senior who admitted to killing Burr.	Same.
Senior told Campbell that Megan and Junior let him in the back of the house.	In an initial interview, Campbell said that Megan and Junior let Senior in the back of the house. Campbell later said that Senior was accompanied by a cousin.
Campbell knew that Burr was in the living room when Burr was killed.	Campbell only revealed that he knew Burr was in the living room when he was killed in the second interview.

Appendix C

Johnson Affidavit	Corrected Affidavit
Campbell knew that Burr was badly beaten and that his neck was cut.	Though Campbell knew in both interviews that Burr was beaten and cut, in the second interview he said that Burr was also shot — a fact contradicted by the autopsy report.
Omitted.	Campbell thought that Senior cut off Burr's genitals and put them in Burr's mouth.
Senior told Campbell that he stole two guns from Burr's house. Burr's relative confirmed that two guns were missing from Burr's house after the murder — a shotgun and a .22 rifle. The investigators were not aware of the missing guns before Campbell's statements.	Senior told Campbell that he stole two guns from Burr — a pistol and a .3030 rifle. Burr's relative confirmed that two guns were missing from Burr's house after the murder — a shotgun and a .22 rifle. The investigators were not aware of the missing guns before Campbell's statement. Campbell did not mention the guns until the second interview.

Appendix C

Johnson Affidavit	Corrected Affidavit
Senior told Campbell that he hid the guns and a buck knife in a hollow on Winfrey property.	Senior told Campbell that he hid the guns and a knife in a hollow on Winfrey property. The investigators located an area that matched that description but did not find the guns or knife.

APPENDIX D — DENIAL OF REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 28, 2018

Case: 16-20702 Document: 00514660729 Page: 1
Date Filed: 09/28/2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20702

RICHARD WINFREY, JR.,

Plaintiff-Appellant,

v.

LACY ROGERS, Former San Jacinto County Sheriff;
LENARD JOHNSON, Former San Jacinto County
Sheriffs Department Deputy,

Defendants-Appellees.

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

ON PETITION FOR REHEARING *EN BANC*

(Opinion August 20, 2018, 5 Cir., _____, _____,
F.3d _____)

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* District Judge of the Western District of Texas, sitting by designation.

Appendix D

Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, District Judge.*

PER CURIAM:

(X) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing *En Banc* (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

( ) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE