No. 19-

IN THE

Supreme Court of the United States

LENARD JOHNSON,

Petitioner,

v.

MEGAN WINFREY,

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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QUESTION PRESENTED FOR REVIEW

When a claim is brought under *Franks v. Delaware*,[1] does the Fourth Amendment alone fully define the dimensions of a law enforcement officer's qualified immunity or must a reviewing court evaluate clearly established law in accordance with this Court's established procedure governing immunity analysis?

1. 438 U.S. 154, 98 S.Ct. 2674 (1978).

RELATED CASE

United States Court of Appeals for the Fifth Circuit: Docket No. 18-20022, *Megan Winfrey v. Lenard Johnson*, judgment entered March 26, 2019, petition for rehearing denied April 30, 2019.

United States Supreme Court: Docket No. 18-1024, *Lenard Johnson v. Richard Winfrey, Jr.*, judgment entered April 15, 2019.

United States Court of Appeals for the Fifth Circuit: Docket No. 16-20702, *Richard Winfrey, Jr. v. Lacy Rogers, Former San Jacinto County Sheriff; Lenard Johnson, Former San Jacinto County Sheriff's Department Deputy*, judgment entered August 20, 2018, petition for rehearing denied September 28, 2018.

United States District Court of the Southern District of Texas, Houston Division: Docket No. 4:14-cv-00448, *Megan Winfrey v. Keith Pikett, et al.*, judgment entered December 26, 2017.

United States Court of Appeals for the Fifth Circuit: Docket No. 16-20728; *Megan Winfrey v. Keith Pikett*, judgment entered September 29, 2017.

United States District Court for the Southern District of Texas, Houston Division: Docket No. H-14-448; *Richard Winfrey, Jr. v. Keith Pikett, et al.*, judgment entered October 4, 2016.

Court of Criminal Appeals of Texas: Docket No. PD-0943-11, *Megan Winfrey, aka Megan Winfrey Hammond*

v. The State of Texas, judgment entered February 27, 2013, petition for rehearing denied April 17, 2013.

United States Court of Appeals for the Fifth Circuit: Docket No. 11-20555, *Richard Winfrey, Jr. v. San Jacinto County, et al.*, judgment entered July 27, 2012.

Court of Appeals of Texas, Ninth District, Beaumont: Docket No. 09-09-00043-CR, *Megan Winfrey a/k/a Megan Winfrey Hammond v. The State of Texas*, judgment entered April 6, 2011, petition for discretionary review granted November 16, 2011.

United States District Court of the Southern District of Texas, Houston Division: Docket No. H:10-cv-01896, *Richard Winfrey, Jr. v. San Jacinto County, et al.*, judgment entered July 9, 2011.

In the District Court of San Jacinto County, Texas, 411th Judicial District: Docket No. 9751; *The State of Texas vs. Richard Lynn Winfrey, Jr.*, judgment entered June 12, 2009.

In the District Court of San Jacinto County, Texas, 411th Judicial District: Docket No. 9750, *The State of Texas v. Megan Winfrey*, judgment entered October 6, 2008.

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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit filed on March 26, 2019, *Megan Winfrey v. Lenard Rogers*, 766 Fed. Appx. 66 (5th Cir. 2019), is set forth in Appendix A.

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 B.

The order denying rehearing in the United States Court of Appeals for the Fifth Circuit filed on April 30, 2019, is set forth in Appendix C.

JURISDICTIONAL STATEMENT

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

On April 30, 2018, the United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for rehearing *en banc*. (App. C).

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 because within 90 days after the United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for rehearing *en banc*, Petitioner timely filed this petition for a writ of certiorari by July 29, 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

Respondent Megan Winfrey[1] claims Petitioner Deputy Lenard Johnson violated the Fourth Amendment based upon this Court's decision in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978), by allegedly including false information necessary to establish probable cause in an affidavit Deputy Johnson presented to a magistrate that precipitated a warrant for Winfrey's arrest. (App.5a-6a). Winfrey's allegation stems, in part, from a misstatement Deputy Johnson made in a warrant application. During the investigation, Texas Ranger Grover Huff made an error documenting the use of Winfrey's boyfriend Christopher Hammond's scent during a drop trail procedure used with tracking dogs. (App.28a). Although written reports documented Ranger Huff's mistake, there is no evidence anyone informed Deputy Johnson of the scent mix-up[2]

1. Megan Winfrey will be referred to as "Winfrey," Richard Winfrey, Sr. referred to as "Richard Sr.," and Richard Winfrey Jr. is referred to as "Richard Jr."

2. All claims brought against Ranger Huff were dismissed based on his qualified immunity. *Winfrey*, 481 Fed. Appx. 969, 976 (5th Cir. 2012).

and Deputy Johnson testified he was not aware of Ranger Huff's error. (ROA.1458-1463, 1468-1476, 1502-1507, 1516-1521). Ranger Huff's error later appeared in the warrant application Deputy Johnson presented to a magistrate.

Deputy Johnson moved for summary judgment on the grounds he did not violate the Fourth Amendment and, *arguendo* even if had, he is nonetheless entitled to summary judgment based on qualified immunity. (7a); *Winfrey v. Rogers*, 901 F.3d 483, 488 (5th Cir. 2018), pet. for writ of cert denied, 139 S.Ct. 1549 (2019). The district court performed a thorough analysis of the evidence and found that regardless of whether Deputy Johnson recklessly misrepresented, or omitted, relevant facts in the warrant application, a reasonable magistrate could conclude the affidavit supported probable cause. (App.38a). The Fifth Circuit, however, disagreed with the district court. (App.7a). The Fifth Circuit denied immunity to Deputy Johnson based on its opinion the warrant affidavit he presented violated the Fourth Amendment under *Franks supra*, and that constitutional violation alone divested Deputy Johnson of immunity. *Winfrey*, 901 F.3d at 496. Deputy Johnson petitioned the Fifth Circuit to rehear *en banc Megan Winfrey v. Lenard Rogers*, 766 Fed. Appx. 66 (5th Cir. 2019), (App.1a), but the Fifth Circuit declined to do so. (App.51a).

Winfrey's brother, Richard Jr., also filed suit with essentially the same allegations. (App.3a). The district court also granted summary judgment in his case. (App.3a). Richard Jr.'s appeal preceded Winfrey's and a panel of the Fifth Circuit issued an opinion vacating the district court judgment on the premise Deputy "Johnson has not established that a corrected affidavit would show

probable cause to arrest Junior." *Winfrey v. Rogers*, 882 F.3d 187, 200 (5th Cir. 2018). After Deputy Johnson petitioned the Fifth Circuit to reconsider his immunity, the panel withdrew *Winfrey*, 882 F.3d 187, and substituted *Winfrey*, 901 F.3d 483, wherein the panel corrected factual errors in its former opinion and excised a portion, but not all, of its initial opinion that expressly stated the panel had misplaced the burden of establishing immunity upon Deputy Johnson. The substituted opinion, however, still denied immunity to Deputy Johnson based solely on the opined constitutional violation under *Franks*, *supra*, without the panel analyzing immunity beyond the Fourth Amendment question. *See id.* The Fifth Circuit denied Deputy's Johnsons petition for rehearing en banc. *Id.*

Due to the Fifth Circuit's rule of orderliness, the panel that later decided the instant case,(App.2a, 9a), opined it could not overrule *Winfrey*, 901 F.3d at 483 because it was decided earlier. (App.9a). Therefore, Deputy Johnson petitions this Court to grant Deputy Johnson's Petition for a Writ of Certiorari, correct the Fifth Circuit opinion that conflicts with the decisions of this Court, and render judgment in Deputy Johnson's favor.

B. Relevant Facts

Criminals murdered Murray Burr, (App.2a).[3] (App.17a). Texas Ranger Huff, Ranger Ronald Duff, Deputy Johnson, and Sheriff Lacy Rogers, investigated the murder under the guidance of District Attorney Bill Burnett. (App.17a).

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3. For both lawsuits, the Fifth Circuit expressly adopted the factual recitations in *Winfrey*, 901 F.3d at 488-90. (App.2a).

Winfrey attended the high school where Burr was employed, and socialized with Burr at his home. *Id.* Winfrey had asked Burr if she could move in with him. *Id.* A teacher observed Winfrey arm in arm with Burr and the teacher heard Winfrey ask Burr if he was going to take her out and spend some of the money he had hidden in his house on her. *Id.* A different teacher observed and overheard a verbal dispute between Burr and Winfrey, after which Winfrey exclaimed someone should beat the shit out of Burr. *Id.* Yet another teacher reported that Winfrey had acted violently toward the teacher. (App.17a, 19a, 47a-49a).

During the investigation, Winfrey's father Richard Sr. was jailed on charges unrelated to Burr's murder when Richard Sr.'s cellmate David Campbell contacted Deputy Johnson and reported that Richard Sr. had made statements implicating Richard Sr. and Winfrey in Burr's murder. (App.2a). The Fifth Circuit panel found no evidence any investigator coached Campbell or manipulated his statements. (App.14a). A different jail inmate, Keith Mujica, similarly reported that, while in jail, Winfrey Sr. confessed to committing the Burr murder. (ROA.2445-2523). Campbell also informed investigators that Richard Sr. said he took two guns from Burr's home at the time of the murder and investigators later independently corroborated that two guns were taken from Burr's home. (App.19a-20a). Investigators did not know this information before learning Richard Sr. said it. *Id.* Investigators also found a location on a Winfrey family property that matched the location Richard Sr. told his cellmate the murder weapon was placed at one point in time. (App.19a-20a, 47a-49a).

Two and one-half years after Burr's murder, District Attorney Bill Burnett summoned Ranger Huff, Deputy Johnson, and other investigators to a conference on February 2, 2007, (ROA.4415, 1470-1474), at which the District Attorney announced he had concluded that sufficient evidence existed to arrest Winfrey, Richard Sr., and Richard Jr. and charge them with committing Burr's murder. (ROA.1450-1463, 1481-1482, 1524-1526, 1544-1547, 1575-1581). During the conference, Ranger Huff expressed his opinion that it may be difficult to convict Winfrey (ROA.1577-1578), but District Attorney Burnett assured Ranger Huff that the District Attorney believed sufficient evidence existed to convict. (ROA.1578-1579). Although he questioned whether a jury would convict Winfrey, Ranger Huff agreed probable cause existed to file charges and arrest Winfrey. (ROA.1479-1482, 1511-1512, 1522-1527).

At District Attorney Burnett's direction on the same day Burnett called the meeting, Deputy Johnson submitted a warrant affidavit to San Jacinto County magistrate Greg Magee who issued a warrant authorizing Winfrey's arrest. (App.21a). The federal district court specifically analyzed the content of Deputy Johnson's affidavit, including Winfrey's complaints about it. (App.16a-49a). Deputy Johnson's affidavit included all of the information detailed *supra*. *Id*. Also on the day of the conference, District Attorney Burnett directed an investigator from his office, James Kirk, and the Rangers to handle all further aspects of the case after Deputy Johnson submitted the warrant application. (App.10a). The Rangers and Investigator Kirk performed all investigative activities from that point, including follow-up interviews with Campbell and other grand jury and trial witnesses. (App.10a). After obtaining the warrant authorizing Winfrey's arrest, Deputy

Johnson had no further involvement in the investigation, subsequent prosecution, or trial of Winfrey or Richard Jr. (App.10a).

After District Attorney Burnett, Ranger Huff, and the judge who issued the arrest warrant each independently concluded on February 2, 2007, that probable cause existed to arrest and charge Winfrey, San Jacinto County district court Judge Robert Trapp presided over an evidentiary hearing six weeks later after which Judge Trapp issued an order expressly finding probable cause to charge and detain Winfrey for murdering Burr. (App.9a). The following month, a San Jacinto County grand jury returned indictments against Winfrey, Richard Sr., and Richard Jr. based on Burr's murder. (ROA.2447, 2470); *State v.Winfrey*, 323 S.W.3d 875, 876 n.1 (Tex. Crim. App. 2010). Deputy Johnson did not appear before the grand jury and there is no evidence that his affidavit or anything else he prepared in the investigation was presented to the grand jury. (App.10a). Nine months later, a separate San Jacinto County grand jury again found probable cause to indict Winfrey on the charge of capital murder without any testimony from Deputy Johnson. (App.10a).

Juries convicted both Winfrey and Richard Sr. of murdering Burr. (App.3a; ROA.1403). Texas Courts of Appeal affirmed both convictions. *See Winfrey v. State*, 338 S.W.3d 687 (Tex. App. – Beaumont 2011), pet. for discretionary review granted, *In re Winfrey*, 2011 Tex. Crim. App., 2013) (Megan Winfrey), and *Winfrey v. State*, 291 S.W.3d 68 (Tex. App. – Beaumont 2009), pet. for discretionary review granted by, *In re Winfrey*, 2009 Tex. Crim. App. LEXIS 1593 (Tex. Crim. App., 2009) (Richard Sr.). The Texas Court of Criminal Appeals

ultimately reversed the convictions finding the evidence did not prove guilt beyond a reasonable doubt. *See Winfrey v. State*, 393 S.W.3d 763 (Tex. Crim. App., 2013) (Megan); and *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App., 2010) (Richard Sr.). Two judges dissented and Judge Keller filed a dissenting opinion analyzing the facts and explaining why he found the evidence against Winfrey proved her guilt beyond a reasonable doubt. *See Winfrey*, 393 S.W.3d at 774-80. The content of the opinions from the Texas courts of appeal and Texas Courts of Criminal Appeals, as well as the evidentiary record in this civil appeal, show that the Texas courts with jurisdiction over the criminal cases were aware of the information which forms the basis of Winfrey's civil claims against Deputy Johnson. (ROA.1394-1398, 2445-2523, 2599-3101, 3246-3821); *Winfrey*, 393 S.W.3d at 764-774; *Winfrey*, 338 S.W.3d at 689-699; Winfrey, 323 S.W.3d at 876-885. Information from the criminal cases, and arguments made in the criminal courts resurfaced as allegations in the two Winfrey civil complaints. (App.2a, 10a, 14a, 23a); *see also Winfrey*, 901 F.3d at 487.

In the course of the litigation, Sheriff Rogers and Federal Bureau of Investigation Special Agent Mark Young testified they each concluded the evidence Deputy Johnson submitted to Magistrate Magee established probable cause for Winfrey's arrest and prosecution. (ROA.1450, 1624).

SUMMARY OF THE ARGUMENT

In *Franks,* 438 U.S. at 155, 98 S.Ct. 2674, this Court considered whether "a defendant in a criminal proceeding ever ha[s] the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant." The Court decided "that where the 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, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.* at 155-156, 98 S.Ct. 2674 (emphasis added).

In an unprecedented expansion of *Franks*, the Fifth Circuit has construed the phrase "false statement" to include information that is not in a warrant affidavit the Fifth Circuit opines should have been included in the affidavit. This Court has not so extended *Franks*, *supra*, but has held that claims brought under *Franks* are properly analyzed under this Court's qualified immunity jurisprudence. In the context of a situation where an officer has applied for a warrant, this Court has held that evaluation of whether the officer's affidavit supports probable cause is appropriate for determining whether the officer violated the Fourth Amendment, but not whether the officer is protected by qualified immunity. This Court has consistently analyzed the probable cause component of the Fourth Amendment separately from the distinct qualified immunity issue of whether an officer's action violated clearly established law. Qualified immunity

recognizes that to require officers to perform their duties perfectly or face personal liability could dampen the ardor of even the most dedicated public servants. Therefore, it serves the public interest to allow officers a reasonable range within which to perform their duties. Additionally, immunity recognizes the fundamental unfairness of subjecting an officer to damages unless the officer knew when he acted that his conduct was unlawful. Therefore, officers are generally immune unless they violate clearly established law.

For longer than 35 years this Court has recognized that reasonable minds often differ in their opinions of whether particular facts establish probable cause for an arrest. These decisions demonstrate that even judicial authorities may reasonably have differing views regarding probable cause. When even judges cannot agree about probable cause, it is patently unfair to expect a law enforcement officer to make that legal judgment better than judicial officers. But the issue in this case extends beyond the differences objective people may have assessing probable cause. This Court has defined the immunity available to an officer beyond mere probable cause. Relevant authorities reveal that an officer who requests a warrant or arrests a person suspected of committing a crime is immune from suit and unwarranted burdens of litigation if a reasonable officer *could have believed* probable cause existed. The Fifth Circuit erred because it failed to apply that controlling standard to the evidence in this case.

This Court's precedents also inform officers that, absent unusual circumstances, the general rule is that a plaintiff must identify a body of relevant case law wherein

officers were found to have violated the Fourth Amendment when they acted as did a police defendant. Furthermore, for an officer to have fair warning his particular conduct was clearly unlawful, this Court requires identification of the right an officer infringed at a meaningful level of particularity such that every officer would know when the officer acted that his actions were forbidden in the factual circumstances the officer encountered.

Neither Winfrey nor the Fifth Circuit has satisfied these standards. The Fifth Circuit did not consider, evaluate, or decide whether every reasonable officer could have believed the affidavit Deputy Johnson presented established probable cause. The Fifth Circuit did not even identify any standard a reasonable officer could have learned from in 2007 which would have taught him to anticipate the facts the Fifth Circuit would focus its interest on or foresee the opinion the Fifth Circuit would reach. No objective officer could have learned, through any objective standard, that he must have assessed the facts in this case as did the Fifth Circuit because its opinion is based on a subjective weighing of unusual facts, specific to this case, that Deputy Johnson had no way of predicting when he requested the warrant. The Fifth Circuit denied immunity to Deputy Johnson without providing him with any of the protections immunity offers.

Deputy Johnson petitions this Court because the Fourth Amendment alone does not define the dimensions of a law enforcement officer's immunity. No reasonable officer had fair warning when Deputy Johnson requested a warrant for Winfrey's arrest that the Fifth Circuit would decide immunity based on a *de novo* examination of probable cause a decade after Deputy Johnson presented

his affidavit to a magistrate. The Fifth Circuit, therefore, erred so Deputy Johnson asks this Court to correct the error. Since the Fifth Circuit 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. No reasonable law enforcement officer had fair warning when Deputy Johnson requested a warrant for Winfrey's arrest that the Fifth Circuit would decide qualified immunity based on a *de novo* examination of probable cause a decade after Deputy Johnson presented his affidavit to a Texas magistrate.

Under this Court's firmly settled precedents, the bedrock of qualified immunity is **fair notice** to a law enforcement officer when he acts warning him that his particular conduct is then clearly unlawful in the specific circumstance the officer is encountering. *See Brosseau v. Haugen*, 543 U.S. 194, 205, 125 S.Ct. 596 (2004) (per curiam). "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 v. Creighton*, 483 U.S. 635, 646, 107 S.Ct. 3034 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012 (1984)). Therefore, "[a] plaintiff who seeks damages for violation

of constitutional or statutory rights may overcome the defendant office[er]'s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." *Davis*, 468 U.S. at 197, 104 S.Ct. 3012; *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S.Ct. 1937 (2009). "The requirement that the law be clearly established is designed to ensure that officers have fair notice of what conduct is proscribed." *Brosseau*, 543 U.S. at 205, 125 S.Ct. 596. "To be clearly established, a right must be sufficiently clear that every reasonable offic[er] would [have understood] that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088 (2012) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074 (2011) (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034)).

Franks, supra, provided Deputy Johnson no warning that following the District Attorney's direction to submit the warrant application to a magistrate was so clearly illegal as to divest Deputy Johnson of immunity even if, *arguendo*, his affidavit violated Winfrey's Fourth Amendment right. *Franks,* 438 U.S. at 155-156, 98 S.Ct. 2674, 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 defendant's request." (emphasis added). "Allegations of negligence or innocent mistake are insufficient" under *Franks*. *Id*. at 171, 98 S.Ct. 2674.

In *Franks*, a detective who prepared a warrant application wrote he had directly spoken to individuals who provided information, despite the fact the detective actually received the information third-hand through another officer. The *Franks* court did not analyze whether the detective's conduct was unconstitutional, but only set out a general procedure for determining the validity of a warrant in these general circumstances. *Id.* at 164, 98 S.Ct. 2674. The *Franks* court expressed its unwillingness to extend the reach of its exclusionary rule decision to "civil" proceedings. *Id.* at 171, 98 S.Ct. 2674. Accordingly, the *Franks* opinion certainly could not have informed any officer, under the vastly different circumstances thrust upon Deputy Johnson in responding to the District Attorney's direction, that Deputy Johnson's conduct was clearly illegal.

Malley v. Briggs, 475 U.S. 335, 344, 106 S.Ct. 1092 (1986), incorporated *Franks, supra*, into a 42 U.S.C. § 1983 lawsuit holding "the same standard of objective reasonableness that [this Court] applied in the context of a suppression hearing in [*United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984)], defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest."

Necessarily distinct from the Fourth Amendment probable cause inquiry, the different question of immunity "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, 106 S.Ct. 1092 (emphasis added).

The question presented in *Malley* was identification:

> of the degree of immunity accorded a defendant police officer in a damages action under 42 U.S.C. § 1983 when it is alleged that the officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and a supporting **affidavit which failed to establish probable cause**.

Malley, 475 U.S. at 337, 106 S.Ct. 1092 (emphasis added).

In 1986, this Court answered that question. When "officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* at 341, 106 S.Ct. 1092. *Malley*, *supra*, demonstrates the Fifth Circuit erred when it opined Deputy Johnson's immunity depended on whether probable cause supported Winfrey's arrest. Whether an officer violated clearly established law must be assessed based on information every officer knew when the officer requested the warrant. *Malley* shows an officer's immunity does not remain indeterminate until after the last judicial authority opines in whether probable cause supported the warrant.

This Court has "previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment." *Anderson*, 483 U.S. at 643, 107 S.Ct. 3034. The Court has "frequently observed, and [its] many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson*, 483 U.S. at 644, 107 S.Ct. 3034. "Law enforcement officers whose judgments are objectively legally reasonable should no more be held personally liable in damages than

should officials making analogous determinations in other areas of law." *Id.* "[T]he doctrine of qualified immunity reflects a balance that has been struck 'across the board.'" *Anderson*, 483 U.S. at 642, 107 S.Ct. 3034 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 821, 102 S.Ct. 2727 (1982).

In *Anderson*, 483 U.S. at 636, 107 S.Ct. 3034, the Court answered the question of "whether a [] law enforcement officer who participates in a search that violates the Fourth Amendment may be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment." Creighton accused FBI Agent Anderson of performing a search not supported by probable cause. *Id.* The Eighth Circuit denied immunity to Agent Anderson based on the opinion "the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances – was clearly established." *Anderson*, 483 U.S. at 638, 107 S.Ct. at 3034.

"But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow, supra*." *Anderson*, 483 U.S. at 639, 107 S.Ct. 3034. "Plaintiffs would be able to convert the rule of qualified immunity that [this Court's decisions] plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639, 107 S.Ct. 3034.

> Such an approach, in sum, would destroy "the balance [this Court's] cases strike between the interests in vindication of citizens" constitutional rights and in public officials' effective performance of their duties, by

> making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Anderson, 483 U.S. at 639-40, 107 S.Ct. 3034 (quoting *Davis*, 468 U.S. at 197, 104 S.Ct. 3012).

The Fifth Circuit repeated the Eighth Circuit's error by denying immunity to Deputy Johnson on a general claimed right "to be free from police arrest without a good faith showing of probable cause." *Winfrey*, 901 F.3d at 494. Even if the Fifth Circuit had accurately stated a broad right, the Fifth Circuit certainly did not identify a relevant clearly established constitutional right under *Anderson*, *supra*. "It should not be surprising, therefore, that [this Court's] cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be **sufficiently clear** that **a reasonable official would understand** that **what he is doing violates that right**." *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3034 (emphasis added).

Deputy Johnson could not have known *what he was doing* was clearly unlawful based only on the general understanding that Winfrey had a right "to be free from police arrest without a good faith showing of probable cause." *Winfrey*, 901 F.3d at 494. "It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause violate the Fourth Amendment that [Agent] Anderson's search was objectively legally unreasonable." *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3034. The same is true of Deputy Johnson's conduct, he had no notice or warning his action was clearly unlawful.

This Court has "recognized that it is inevitable that law enforcement office[er]s will in some cases reasonably but mistakenly conclude that probable cause is present, and [the Court has] indicated that in such cases those office[er]s – like other officials who act in ways they reasonably believe to be lawful – should not be personally liable." *Anderson*, 483 U.S. at 641, 107 S.Ct. 3034. "The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] search to be lawful, in light of clearly established law and the information the searching officers possessed." *Anderson*, 483 U.S. at 641, 107 S.Ct. 3034 (emphasis added).

The Fifth Circuit never addressed the question this Court's precedent explains governs Deputy Johnson's immunity: whether an objective officer could have reasonably believed the warrant affidavit was lawful. The controlling clearly established legal standard the Fifth Circuit failed to apply to determine Deputy Johnson's immunity is 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 (1991) (per curiam). Instead, the Fifth Circuit rejected this settled legal principle when it errantly merged the probable cause component of the Fourth Amendment with the separate issue of whether Deputy Johnson is immune because an objective officer could have reasonably believed the affidavit supported probable cause.[4]

4. Compare the Fourth and Ninth circuit courts similar error merging the Fourth Amendment question with immunity and automatically denying immunity on claims under *Franks* based

Another decision that demonstrates the error below is *Hunter*, 502 U.S. at 226, 112 S.Ct. 534, wherein Bryant accused secret service agents of violating the Fourth Amendment after agents arrested Bryant and charged him with making threats against the President. The Fifth Circuit's error in the case now before the Court is akin to that the Ninth Circuit made which this Court corrected in *Hunter, supra,* after the Ninth Circuit disagreed with the law enforcement officers' and magistrate's assessments of probable cause. The Ninth Circuit opined secret service 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 here, the Ninth Circuit provided its purported *more reasonable interpretation* of the facts. *Hunter*, 502 U.S. at 227, 112 S.Ct. 534. Like the Fifth Circuit in the case at bar, the Ninth Circuit ignored this Court's immunity decisions and applied a "wrong" legal standard by misplacing immunity in the hands of a jury and failing to answer the necessary 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, 112 S.Ct. 534. "Even if [this Court] assumed, *arguendo*, that [the agents] (*and* the magistrate) erred in concluding that probable cause existed to arrest Bryant,

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on a Fourth Amendment violation alone. *See Miller v. Prince George's Cty.*, 475 F.3d 621, 631-632 (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). Although the legal error is the same, these cases are not factually analogous to Deputy Johnson's circumstances.

the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." *Hunter*, 502 U.S. at 228-29, 112 S.Ct. at 534.

Malley, *Anderson*, and *Hunter* plainly illustrate the error in failing to assess Deputy Johnson's immunity under a clearly established legal standard separate from the question of whether there is evidence of a lack of probable cause. The Fifth Circuit not only failed to consider, evaluate, or decide whether every reasonable officer would have known the warrant affidavit Deputy Johnson presented was clearly deficient, the Fifth Circuit did not even identify any standard a reasonable officer could have learned from in 2007 to have enabled him to predict either the manner the Fifth Circuit utilized, or the after-the-fact opinion regarding probable cause the Fifth Circuit reached, regarding the lawfulness of Deputy Johnson's action.

The sole authority the Fifth Circuit cited as support for its subjective opinion is that the purported constitutional right "to be free from police arrest without a good faith showing of probable cause" has been clearly established since this Court decided *Franks, supra*. However, this Court's decisions do not support that Fifth Circuit opinion of controlling law. *Malley*, *Anderson*, and *Hunter* demonstrate, otherwise, that the Fifth Circuit opinion failed to utilize a valid measure of Deputy Johnson's compliance with clearly established legal authorities. "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. *City and County of San Francisco v. Sheehan*, __ U.S. __, 135 S.Ct. 1765, 1777 (2015).

To the contrary, an objective officer relying on *Malley*, *Anderson*, and *Hunter* would have reasonably believed in 2007, and thereafter, that every officer's immunity would be judged by assessing whether the officer had fair warning when he acted that his specific action was then clearly unlawful in the particular circumstances the officer encountered. This Court identifies clearly established law, *Reichle*, 566 U.S. at 665-666, 132 S.Ct. 2088 (2012), and has never held an officer's immunity in abeyance like the Fifth Circuit has until the last court with an opportunity to consider probable cause renders its opinion about that Fourth Amendment question. *Id.* "Without that 'fair notice' an officer is entitled to qualified immunity." *Sheehan*, 135 S.Ct. at 1777. The Fifth Circuit procedure of subjectively weighing information Deputy Johnson included in his affidavit against information that was not in his affidavit to reach a new opinion regarding probable cause that no prior criminal justice professional or judicial authority had reached based on the same information, deprived Deputy Johnson of protections provided by immunity. No reasonable officer could have known the Fifth Circuit would judge Deputy Johnson's immunity in this unsound manner, or could have foretold the Fifth Circuit would opine probable cause was lacking without applying any identifiable standard supporting that bald opinion.

B. The Fourth Amendment question of whether Deputy Johnson's affidavit supported probable cause is not the test of his immunity.

"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," *Sheehan*, 135 S.Ct. at 1776, but this is precisely the manner by which

the Fifth Circuit denied Deputy Johnson's immunity. The Fourth Amendment question of probable cause is not the proper measure of an officer's immunity. Rather, whether an officer violated the Fourth Amendment is distinct from whether the officer is immune. Proper analysis of these two issues entails different elements that appropriately demand separate evaluations. Compare, *Anderson*, 483 U.S. at 641, 107 S.Ct. 3034; and *Pierson v. Ray*, 386 U.S. 547, 556-557, 87 S.Ct. 1213 (1967); with *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). In the years following *Anderson*, some courts improperly merged analyses of immunity with evaluation of the objective reasonableness of an officer's use of force under the Fourth Amendment, leading this Court to invoke its authority in 2001 to correct that erroneous practice by expressly rejecting the invalid procedure of merging the underlying constitutional question with the discrete immunity issue. *See, Saucier v. Katz*, 533 U.S. 194, 197, 121 S.Ct. 2151, 2154 (2001).

Last year, this Court reaffirmed this long-standing distinction when it separately analyzed probable cause and immunity in a case in which the D.C. Circuit had opined arrests were not supported by probable cause and violated clearly established law. *District of Columbia v. Wesby*, __ U.S. __, 138 S.Ct. 577, 582 (2018). District of Columbia officers responded to a rowdy party inside a house neighbors told police was vacant. Officers found 21 people inside the house who did not live there but no resident. Partygoers claimed they were invited to a party at the house but no one with legal authority had granted any partygoer the right to enter the house. Officers arrested the partiers and charged them with unlawfully entering the house.

The district court and D.C. Circuit opined officers lacked probable cause to make the arrests because partygoers denied knowing they entered the house without the owner's authorization and, according to the D.C. Circuit, this claimed excuse vitiated the necessary culpable mental intent to commit the crime. *Wesby*, 138 S.Ct. at 583-84. "On the question of qualified immunity, the [D.C. Circuit] panel majority determined that it was 'perfectly clear' that a person with 'a good purpose and bona fide belief of her right to enter' lacks the necessary intent for unlawful entry." *Wesby*, 138 S.Ct. at 585.

This Court "granted certiorari to resolve **two questions**: whether the officers had probable cause to arrest the partygoers, and whether the officers were entitled to qualified immunity." *Id.* (emphasis added). The*Wesby* decision accentuates the errors in the *Winfrey* cases because the D.C. Circuit made similar errors in analyzing probable cause that no reasonable officer could have reasonably anticipated. Appropriately evaluated, "[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 (2014)). "It 'requires only a probability or substantial chance of criminal activity.' [*Illinois v.*] *Gates*, 462 U.S. [213,] 243-244, n.13, [103 S.Ct. 2317 (1983)]." *Id.* at 585.

Wesby demonstrates that, in weighing probable cause, both the Fifth Circuit and D.C. Circuit improperly viewed facts in isolation, rather than in context of all the facts, and "mistakenly believed that [they] could dismiss outright any circumstances that were 'susceptible of innocent explanation.'" *Id.* at 588 (quoting *United States v. Arvizu*, 534 U.S. 266, 277, 122 S.Ct. 744 (2002)). Both circuit courts

also failed to recognize "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Id.* The D.C. Circuit erred in its analysis of the Fourth Amendment probable cause issue, as did the Fifth Circuit, because both courts "should have asked whether a reasonable officer could conclude – considering all of the surrounding circumstances, including the plausibility of the explanation itself – that there was a 'substantial chance of criminal activity.'" *Id.* (quoting *Gates*, 462 U.S. at 244, 103 S.Ct. 2317).

While the Fifth Circuit only evanescently mentioned the information Deputy Johnson included in his affidavit, the district court specifically analyzed both the content of the affidavit and Winfrey's challenges to it. After having reported the information in his affidavit, no objective officer could have known when Deputy Johnson requested the warrant that a decade later the Fifth Circuit would opine that Richard Sr.'s later statement that his cousin aided Richard Sr. in entering Burr's home would nullify Richard Sr.'s earlier statement that Winfrey facilitated the entry into Burr's home to murder him. Those two statements do not necessarily conflict, and Richard Sr. only mentioned his cousin after Richard Sr. knew officers were investigating Winfrey's and Richard Jr.'s suspected involvement in the crime. Most importantly, however, the Fifth Circuit did not identify any source Deputy Johnson, or any other reasonable officer, could have referred to that would have informed Deputy Johnson that every officer was obligated to view this information crucial to establishing probable cause.

Likewise, the Fifth Circuit did not identify any authority from which every officer knew that Deputy

Johnson was required to point out in his affidavit that Richard Sr. said he stabbed and shot Burr, when the evidence showed that Burr was only stabbed, or that the failure to include this detail in the affidavit eliminated probable cause. The district court's analysis shows the same is true of other details the Fifth Circuit opined Deputy Johnson should have put in his warrant application. (App.47a-49a).

Notably, the Fifth Circuit acknowledged that none of this additional information not in the affidavit "considered independently, would necessarily have been fatal to the affidavit – because [Richard Sr.] could have told Campbell anything…" *Winfrey*, 901 F.3d at 496. Certainly, an objective officer could have viewed the alleged discrepancies upon which the Fifth Circuit focused differently than did the Fifth Circuit. Most importantly, however, there is no way any officer could have foreseen *clearly established* law in 2007 required Deputy Johnson to weigh details as did the Fifth Circuit, when the Fifth Circuit determined the details, on their own, did not refute probable cause. *See id.* The methodology the Fifth Circuit utilized conflicts with *Wesby's* dictates, and the Fifth Circuit procedure certainly did not provide notice to any reasonable officer of conduct that was clearly unlawful. As did the D.C. Circuit, the Fifth Circuit, merely announced a conclusory opinion about probable cause without identifying any standard or methodology that reliably linked the evidence to the entirely subjective opinion. This procedure is not susceptible to application of this Court's immunity authorities.

While the Fifth Circuit had authority to opine *de novo* on probable cause, the Fifth Circuit cannot – consistent

with this Court's authorities – deny immunity to Deputy Johnson on that basis alone. The Fifth Circuit did not identify, let alone apply, any discernible standard to show existing case decisions in 2007 fairly warned a reasonable officer that Deputy Johnson's action was clearly unlawful. Deputy Johnson's alleged transgressions are unlike any other case wherein this Court, or any court of appeals, has denied immunity. Deputy Johnson did not prematurely rush to judgment or action. He participated in the investigation from its inception until the arrest warrant was issued after a lengthy investigation by the Sheriff, two Rangers, a district attorney's investigator, and the District Attorney. Witness interviews were recorded and written reports documented all of the information upon which Winfrey's claim is based. All of this information was provided to District Attorney Burnett, who made the decision to direct Deputy Johnson to request the warrant for Winfrey's arrest. The record unequivocally evidences – through the complete records from three criminal trials and preliminary criminal proceedings – that the prosecutor, criminal trial judge, and criminal defense counsel were all aware of the information upon which Winfrey's claim is based, and the criminal courts evaluated and ruled on these issues independent of any input from Deputy Johnson. Regardless of how this Court ultimately decides whether, or to what extent, information *not included in the affidavit* should properly be analyzed in this context, Deputy Johnson could not have reasonably anticipated the answer in 2007.

Under *Wesby*, this Court could decide *de novo* probable cause either way in the Winfrey case, but, regardless of how the last court that considers probable cause decides that Fourth Amendment question, the

Fifth Circuit should have properly applied this Court's immunity jurisprudence to uphold immunity because the record does not establish that every reasonable officer would have known the affidavit Deputy Johnson submitted failed to support probable cause. Because the Fifth Circuit method of assessing Deputy Johnson's immunity is insupportable under this Court's precedent, the Court has "discretion to correct [circuit court] errors at each step." *Wesby*, 138 S.Ct. at 589 (quoting *al-Kidd*, 563 U.S. at 735, 131 S.Ct. 2074 (2011)). The *Winfrey* opinion begs for this Court's discretionary review because, if this Court does not correct the Fifth Circuit procedure, when repeated it will "undermine the values qualified immunity seeks to promote." *Id.* (quoting *al-Kidd,* 563 U.S. at 735, 131 S.Ct. 2074).

"Under [this Court's] precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *Id.* (quoting *Reichle*, 566 U.S. at 664, 132 S.Ct. 2088). "'Clearly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear' that every 'reasonable office[er] would understand that what he is doing' is unlawful." *Id.* (quoting *al-Kidd,* 563 U.S. at 741, 131 S.Ct. 2074 (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034)). "In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Id.* (quoting *al-Kidd,* 563 U.S. at 741, 131 S.Ct. 2074). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley*, 475 U.S. at 341, 106 S.Ct. 1092)).

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *Id.* "The rule must be 'settled law,' *Hunter*, 502 U.S. at 228, 112 S.Ct. 534, which means it is dictated by 'controlling authority' or a 'robust consensus of cases of persuasive authority,'" *Wesby*, 138 S.Ct. at 590 (quoting *al-Kidd,* 563 U.S. at 741-742, 131 S.Ct. 2074 (quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692 (1999)). "The precedent must be clear enough that every reasonable offic[er] would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* "Otherwise, the rule is not one that 'every reasonable office[er]' would know." *Id.* "[T]he 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Id.* "The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* (quoting *Saucier,* 533 U.S. at 197, 121 S.Ct. 2151).

"This requires a high 'degree of specificity.'" *Id.* (quoting *Mullenix v. Luna*, 577 U.S. __, 136 S.Ct. 305, 309 (2015) (per curiam). This Court has "repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the office[er] acted reasonably in the particular circumstances that he or she faced.'" *Id.* (quoting *Plumhoff v. Rickard*, 572 U.S. __, 134 S.Ct. 2012, 2023 (2014)). "A rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that [the rule] was firmly established." *Id.* (quoting *Anderson*, 483 U.S. at 641, 107 S.Ct. 3034). This Court has "stressed that the 'specificity' of the rule is 'especially important in the Fourth Amendment context.'"

Id. (quoting *Mullenix*, 577 U.S. at __, 136 S.Ct. at 308). "Probable cause 'turn[s] on the assessment of probabilities in particular factual contexts' and cannot be 'reduced to a neat set of legal rules.'" *Id.* (quoting *Gates*, 462 U.S. at 232, 103 S.Ct. 2317). Probable cause "is 'incapable of precise definition or quantification into percentages.'" *Id.* (quoting *Pringle*, 540 U.S. at 371, 124 S.Ct. 795). "Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in 'the precise situation encountered.'" *Id.* (quoting *Ziglar v. Abbasi*, 582 U.S. __, __, 137 S.Ct. 1843, 1866 (2017)).

Since settled rules are the essence of immunity, this inherent ambiguity is the primary reason probable cause is a poor standard for assessing an officer's conformity with clearly established law. This fact is prominently highlighted in *Wesby*, wherein first officers opined probable cause existed, thereafter the district and D.C. Circuit opined probable cause was absent, and this Court ultimately agreed with the officers' assessment of probable cause. *Id.* If probable cause was the test of immunity, no officer could know, when he made his probable cause assessment, the standard under which his decision would be measured until after the last judicial authority issued its opinion about probable cause. This procedure disserves the purpose of immunity, assuring an officer is forewarned when he acts that his conduct is clearly unlawful.

This Court has "stressed the need to 'identify a case where an **officer acting under similar circumstances** …was held to have violated the Fourth Amendment.'" *Id.* (quoting *White v. Pauly*, 580 U.S. __, __, 137 S.Ct. 548, 552 (2017) (per curiam)) (emphasis added). The court below clearly failed to do so. The Court does not require "a case

directly on point," but "existing precedent must place the lawfulness of the particular arrest 'beyond debate.'" *Id.* (quoting *al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2074). "[T]he rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances" can exist, "[b]ut 'a body of relevant case law' is usually necessary to 'clearly establish' the answer with respect to probable cause." *Id.* (quoting *Brosseau*, 543 U.S. at 199, 125 S.Ct. 596).

The decision in *United States v. Lanier*, 520 U.S. 259, 270-271, 117 S.Ct. 1219 (1997) provides insight into the rare "obvious" case." Although "[t]here has never been a § 1983 case accusing welfare officials of selling foster children into slavery, it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." *Id.* at 271, 117 S.Ct. 1219 (internal quotations omitted). Nothing about Deputy Johnson's conduct suggests the rare obvious case exception applies in his circumstances, so the usual body of relevant case law as of 2007 is necessary to disprove his immunity. *See* Wesby, 138 S.Ct. at 590-591. Thus, "[e]ven assuming [Deputy Johnson] lacked actual probable cause to arrest [Winfrey], [Deputy Johnson is] entitled to qualified immunity [provided he] 'reasonably but mistakenly conclude[d] that probable cause [wa]s present.'" *Wesby*, 138 S.Ct. at 591 (quoting *Anderson*, 483 U.S. at 641, 107 S.Ct. 3034).

Like the D.C. Circuit in *Wesby*, the Fifth Circuit has not "identified a single precedent – much less a controlling case or robust consensus of cases – finding a Fourth Amendment violation 'under similar circumstances.'" *Wesby*, 138 S.Ct. at 591. As in *Wesby*, the Fifth Circuit did not base its opinion on settled law. *See Wesby*, 138 S.Ct. at

591. Settled law, demonstrated through *Malley*, *Anderson*, *Hunter*, and *Wesby*, shows, instead, that the Fifth Circuit erred when it denied immunity to Deputy Johnson based on the opinion his affidavit, as the Fifth Circuit opined it should have been written, failed to support probable cause.

"[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.* The courts' disagreement in this case regarding probable cause, and its analysis, 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).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 (1999); *Compare Stanton v. Sims*, 571 U.S. 3, 134 S.Ct. 3 (2013). The record indisputably proves that lack of probable cause is not "beyond dispute," so Deputy Johnson is immune. The Fifth Circuit erred in opining otherwise, and Deputy Johnson petitions this Court to exercise its discretion to correct the Fifth Circuit judgment.

CONCLUSION

This Court should correctly decide the important federal issues the Fifth Circuit decided in a way that conflicts with relevant decisions of this Court and other circuit courts, 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. Deputy Johnson asks the Court to grant Petitioner's Petition for a Writ of Certiorari, correct the Fifth Circuit 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 MARCH 26, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20022

MEGAN WINFREY,

Plaintiff-Appellant,

v.

LENARD JOHNSON, FORMER SAN JACINTO COUNTY SHERIFF'S DEPUTY CHIEF,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-448.

March 26, 2019, Filed

Before JONES, HAYNES, and OLDHAM, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

After her murder conviction was overturned, Megan Winfrey sought damages under § 1983 and has appealed the district court's grant of partial summary judgment dismissing her Fourth and Fourteenth Amendment claims. Because a panel of this court has already addressed the same issues in her brother's case, this panel is bound by precedent to reverse and remand on Winfrey's Fourth Amendment claim. The district court's dismissal of Winfrey's Fourteenth Amendment claims was proper, however, and this court declines to address as untimely her arguments concerning her expert witness. Accordingly, the district court's partial summary judgment order is REVERSED in part and AFFIRMED in part, and the case is REMANDED.

I. BACKGROUND

Megan Winfrey ("Megan") was convicted of capital murder but her conviction was overturned on appeal after six years imprisonment. *Winfrey v. Texas*, 393 S.W.3d 763, 774 (Tex. Crim. App. 2013) ("*Winfrey I*"). Lenard Johnson, the Appellant, is a former deputy at the San Jacinto County Sheriff's Office who drafted and signed the arrest warrants for Megan, her father Richard Winfrey, Sr. ("Senior"), and her brother Richard Winfrey, Jr. ("Junior"). He also took witness testimony from David Campbell, a jailhouse informant who implicated the Winfreys in the murder of school janitor Murray Wayne Burr. The facts underlying this appeal need not be repeated as they have been set forth in Junior's case. *See Winfrey v. Rogers*, 901 F.3d 483, 488-90 (5th Cir. 2018) ("*Winfrey II*").

Appendix A

This appeal arises from the district court's opinion disposing of both siblings' cases. Megan's Fourth Amendment claim is nearly identical to that brought by Junior, with a few factual distinctions. First, while Junior was tried and acquitted after sitting in jail for two years, Megan was convicted by a jury and exonerated by the Texas Court of Criminal Appeals. Second, pertinent to her arrest warrant, deputies collected additional statements about Megan from teachers, including a statement by a teacher that Megan walked up to Burr in the school hallway, put her arm in his, and asked him when he was going to spend some money on her and take her out; a statement that after a fight with him Megan said she wished someone should "beat the shit" out of Burr; and another teacher's statement that Megan had "assaulted her in some way" and threatened her. Johnson contends these statements add support to his urging of probable cause to arrest her. Third, the arrest warrant mistakenly indicated that the bloodhound drop-trail scent used Junior's scent, when it in fact used the scent of Winfrey's boyfriend Chris Hammond. But there was no such error as to the dogs' alert on Megan's scent.

Winfrey was arrested on or about March 15, 2007 and detained pending trial. She was reindicted for capital murder and conspiracy to commit murder on December 13, 2007, tried in October 2008, convicted on October 9, 2008, and sentenced to life imprisonment. On February 27, 2013, the Texas Court of Criminal Appeals found the evidence legally insufficient to support Winfrey's conviction and rendered a judgment of acquittal for each offense. *Winfrey I*, 393 S.W.3d at 774.

Winfrey filed a § 1983 lawsuit, originally alleging that Johnson, Rogers, San Jacinto County's then-Sheriff Clark, and Pikett violated her constitutional rights by using fabricated evidence in connection with the investigation, arrest and prosecution. She also pursued state law malicious prosecution claims against Johnson, Rogers, and Pikett. After a collection of dismissals, substitutions, settlements, and summary judgments, including dismissals under the Texas Tort Claims Act ("TTCA") or due to immunity, only Johnson remains as a defendant, and the district court granted summary judgment for Johnson on all claims. At a hearing about expert reports, the district court also *sua sponte* decided against allowing one of Winfrey's experts, Dr. Marshall, from testifying.

Winfrey presents four arguments on appeal. First, she argues that her Fourth Amendment claim that Johnson knowingly or recklessly made false statements in his arrest-warrant affidavit should go to trial. Second, she asserts a Fourteenth Amendment claim of malicious prosecution under procedural due process. Third, she presents a due process claim that Johnson fabricated Campbell's trial testimony, violating her right to a fair trial. Fourth, Winfrey argues that the district court abused its discretion in excluding her damages expert from testifying at trial.

II. STANDARD OF REVIEW

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.* "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)). The court 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.*

"A qualified immunity defense alters the usual summary judgment burden of proof . . . Once an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law. The plaintiff bears the burden of negating qualified immunity, but all inferences are drawn in his favor." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010) (quoting *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir.2005)). Finally, 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).

III. DISCUSSION

1. Fourth Amendment

Megan argues that Johnson's conduct violated her Fourth Amendment right to be free from arrest without a good-faith showing of probable cause and his duty not

to knowingly, intentionally, or recklessly make false statements in an arrest warrant affidavit. The substance of her claims is that Johnson's arrest-warrant affidavit contained material misstatements and, even if corrected, lacked probable cause. Megan relies on this court's decision in *Winfrey II*.[1] Johnson contends that he is entitled to qualified immunity, Megan never actually pled a Fourth Amendment violation arising from the arrest warrant, the statute of limitations has run on Megan's claim, and independent intermediaries blocked any causal chain running from the arrest warrant to Megan's incarceration.[2]

In *Winfrey II*, the panel analyzed the affidavits for Megan and Senior in making its legal determinations. *Winfrey II*, 901 F.3d at 489 n.1. It held that the affidavits contained material misrepresentations and omissions,[3]

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1. Because of the timing of their briefs, the parties cite *Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. 2018), but that decision was withdrawn and superseded on denial of rehearing by *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018). The opinions are identical in substance and outcome except for the analysis of qualified immunity.

2. Megan's lawsuit is timely. Since the *Winfrey II* panel concluded that Megan's § 1983 claim more closely resembles the tort of malicious prosecution, focused as it is on the wrongful institution of legal process, *see Winfrey II*, 901 F.3d at 492-93, the statute of limitations on that claim did not begin to run until "the prosecution ends in the plaintiff's favor." *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc). In Megan's case, that would be February 27, 2013, the date her conviction was overturned.

3. The court found that "Junior provides evidence that Johnson made false statements in his affidavit by (1) omitting

and that a "corrected" affidavit would not have satisfied the probable-cause requirement. *Id.* at 496. Thus, the panel vacated the district court's judgment and remanded for trial "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." *Id.* at 488. Because the panel in *Winfrey II* rejected most of the same objections Johnson now raises, Johnson is precluded from relitigating these issues. Johnson offers only two new reasons why this panel is not bound by a panel decision interpreting the sufficiency of the same warrant, but those, too, are unavailing.

First, Johnson contends that additional facts here support probable cause as to Megan. He argues that the mistaken drop-trail scent — which identified the scent as Junior's when it was in fact that of Megan's boyfriend — was not a mistake as to Megan. But the irrelevance of this misstatement does not add probable cause against Megan. Additionally, he argues that the warrant affidavit included statements from teachers about Megan, her relationship with Burr, and a possible propensity for violence. But, as the district court noted, these statements, eyebrow-raising

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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." *Winfrey II*, 901 F.3d at 494.

though they might be, do not link Megan to murder. When weighed against the misstatements detailed in fn. 2 above, these factual distinctions do not detract from the *Winfrey II* panel's conclusion 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." *Id.* at 496.

Second, Johnson contends that the independent intermediary doctrine applies here because, unlike in *Winfrey II*, and indeed noted by that panel, there was an additional proceeding before a state judge which Johnson argues acted as an independent intermediary. 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)). But this doctrine only applies "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." *Cuadra*, 626 F.3d at 813. The panel in *Winfrey II* rejected Johnson's independent-intermediary argument as to the grand jury because it was "unclear" whether Johnson presented all the facts to the grand jury. *Winfrey II*, 901 F.3d at 497.

Johnson attempts to distinguish *Winfrey II* because here, unlike there, a state judge *also* determined there was probable cause to arrest Megan. That is a fair point because the *Winfrey II* panel itself recognized the distinction and distinguished Junior's case — where "[n]one of these hearings addressed . . . whether there was probable cause to arrest Junior" — from Megan's case, where there was at least one hearing where the judge "determined that there was probable cause to arrest Megan." *Id.* But the exception to the independent-intermediary doctrine applies with equal force because, under *Winfrey II*, it is Johnson's burden to prove the omitted material information was presented to the judge. He has not done so. And again, since the panel in *Winfrey II* analyzed the very same affidavit, this court is bound by its rejection of the independent-intermediary doctrine. After *Winfrey II*, we have no leeway to conclude otherwise.

The only remaining question is the extent of Megan's potential damages. Based on *Winfrey II*, the misstatements in Johnson's arrest-warrant affidavit meant it lacked probable cause. The Supreme Court has made clear that pretrial seizures, even if they follow legal process, can violate the Fourth Amendment if the initial seizure occurred without probable cause and nothing later remedied the lack of probable cause. *See Manuel v. City of Joliet*, 137 S. Ct. at 918-19 ("If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment."). That is the case here — the material misstatements and omissions in the arrest-warrant affidavit led to Winfrey's unlawful arrest and pretrial detainment.

But that is not the end of this story, because Megan was reindicted and tried on evidence obtained after further investigation of her case. Megan does not contradict the record evidence that Deputy Johnson's involvement in her investigation ceased following the issuance of the arrest warrant in February 2007, at which point the investigation was taken over by the Texas Rangers and the District Attorney's investigator, James Kirk. The further investigation included follow-up interviews with Campbell and other witnesses. At trial, new and potentially incriminating testimony about an alibi attempt and evidence tampering were offered by her ex-husband Hammond and her boyfriend at the time of the killing, Jason King. *See Winfrey I*, 393 S.W.3d at 766. Consequently, at the time of reindictment, the initial lack of probable cause ceased being the cause of Winfrey's detention and damages ceased accruing from Johnson's Fourth Amendment violation.

Additionally, although the Texas Court of Criminal Appeals ultimately reversed Winfrey's conviction, that court's painstaking review of the totality of the circumstantial evidence underlying her conviction undermines Megan's argument that the initial lack of probable cause supporting her arrest persisted through reindictment, trial, and incarceration, and continued to taint the case against her. In concluding that the evidence was insufficient to prove Megan's guilt beyond a reasonable doubt, the court nowhere suggested that there was no probable cause to indict or try her for murder. In fact, the majority found that the evidence did indeed raise a suspicion of her guilt. The court's analysis further

supports the conclusion that the initial lack of probable cause ceased with Megan's reindictment and so did the damages.

2. Fourteenth Amendment

In addition to her Fourth Amendment claims, Megan presses two claims under the Fourteenth Amendment: a malicious prosecution claim and a claim resulting from the Johnson's alleged use of fabricated evidence at trial. The malicious prosecution argument fails because Megan has failed to show that Johnson violated clearly established law. The fabrication of evidence argument fails because no reasonable jury could conclude on the facts before us that Johnson fabricated evidence.

a. Malicious Prosecution

Megan argues that because her liberty was constrained beyond her initial arrest, and because Texas law provides an insufficient state tort law remedy, she may press a § 1983 federal malicious prosecution claim under procedural due process. She acknowledges, however, that the Supreme Court did not approve a substantive due process claim arising from malicious prosecution, *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), and no subsequent decision of that Court or this court has rendered such a claim cognizable, much less "clearly established." *See, e.g., Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc). Even if this court accepted Megan's invitation to break new legal ground, which we do not, Johnson would be entitled to qualified

immunity. The district court's dismissal of the malicious prosecution claim was correct.

b. Fabrication of Evidence

Megan's second Fourteenth Amendment claim concerns Johnson's interaction with jailhouse informant David Campbell. Megan contends that a reasonable jury could decide Johnson fabricated Campbell's testimony because Campbell's pre-arrest interviews yielded conflicting facts at odds with the forensic evidence; Campbell himself believed that Johnson was trying to "stage" something against Megan; and Campbell testified to his suspicions at trial. These facts do not support a claim of fabricated evidence.

All of the Supreme Court and other cases on which Megan relies deal with manufactured evidence or perjured witnesses. In *Mooney*, for example, the court found a due process violation where there was a "deliberate deception of court and jury by the presentation of testimony known to be perjured" by *prosecutors. Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791 (1935); *see also Pyle v. Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942). *Brown v. Mississippi*, 297 U.S. 278, 286, 56 S. Ct. 461, 465, 80 L. Ed. 682 (1936) involved the coercion of confessions by use of physical violence. *Napue v. People of State of Ill.*, 360 U.S. 264, 270, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959) involved the use of false testimony by a witness to curry favor with a prosecutor who might provide favors to the witness. In *Miller v. Pate*, 386 U.S. 1, 6, 87 S. Ct. 785, 788, 17 L. Ed. 2d 690 (1967), "[t]he

prosecution deliberately misrepresented the truth" by "consistent and repeated misrepresentation" that shorts stained with paint were actually stained with blood. The lone precedential Fifth Circuit case Megan cites, *Boyd v. Driver*, 579 F.3d 513 (5th Cir. 2009) (per curiam), involved the claim that prison employees gave perjured testimony at a criminal trial and destroyed and tampered with video evidence. These cases all involve a motivated person who undertook to create or destroy evidence presented at trial in support of convictions.

The facts of this case are quite different. Johnson took statements from Campbell on two occasions before he swore out the warrant affidavit. Megan has no basis for asserting that Johnson had any involvement in Campbell's testimony at trial; his connection to the case terminated with her arrest and Johnson did not even testify at her trial. The prosecutors alone were responsible for Campbell's trial testimony. Moreover, Campbell testified according to his own free will, never admitted any falsehoods in his trial testimony, and indeed truthfully related his own misgivings about any improper influence Johnson may have been asserting. Thus, Megan offers no evidence that Johnson inappropriately influenced Campbell's testimony. According to Megan, the most damning piece of evidence is Campbell's suggestion that Johnson was "trying to make a story," but this opinion criticizes Johnson's conduct *prior* to the arrest, in Johnson's first interview with Campbell, and there is no indication that Johnson *influenced* Campbell's later testimony at trial. Additionally, the mere fact that Campbell presented one of the two versions that he had previously related regarding Senior's story — that Megan

and Junior, not the cousins, were present with Senior in the house when Burr was murdered — would not allow a reasonable jury to conclude that Johnson fabricated Campbell's testimony. There is thus no genuine issue of material fact supporting Johnson's fabrication of evidence.

3. Exclusion of Damages Expert

Winfrey's final claim is that the district court abused its discretion by *sua sponte* excluding her damages expert in violation of the Federal Rules of Evidence. Johnson asserts that because none of the orders from which Megan has appealed involved the expert, and since this case did not go to trial, the district court's statements were merely an "interlocutory statement of opinion." This court is inclined to agree. Megan's arguments are largely a disagreement with the district court about how to apply federal evidentiary rules. Moreover, the district court has wide discretion in such cases: "with respect to expert testimony offered in the summary judgment context, the trial court has broad discretion to rule on the admissibility of the expert's evidence and its ruling must be sustained unless manifestly erroneous." *Hathaway v. Bazany*, 507 F.3d 312, 317 (5th Cir. 2007) (citation and internal quotation marks omitted). In any event, there is no formal order to review, and based on this opinion, any prognostication by this court on expert evidence that Megan may offer in the future is premature.

CONCLUSION

The district court's judgment is **REVERSED** as to the Fourth Amendment claim, **AFFIRMED** as to the Fourteenth Amendment claims, and the case is **REMANDED** for further proceedings consistent herewith.

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

UNITED STATES DISTRICT COURT FOR
THE 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

I. *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.

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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.

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.

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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 B

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.

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.

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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).

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]

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.

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4. *Id.* at 486-87.

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

6. *Id.* at 484.

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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.

Even if Rogers violated Megan's rights, he is protected by qualified immunity if the search was objectively

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

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

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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).

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(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.

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

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

(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.

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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]

(I). *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.

II. *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 B

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 B

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 B

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 B

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 B

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 C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 30, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20022

MEGAN WINFREY,

Plaintiff-Appellant,

v.

LENARD JOHNSON, FORMER SAN JACINTO COUNTY SHERIFF'S DEPUTY CHIEF,

Defendant-Appellee.

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

ON PETITION FOR REHEARING *EN BANC*

(Opinion March 26, 2019, 5 Cir., _____, _____F.3d _____)

Before JONES, HAYNES, and OLDHAM, Circuit Judges.

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