No.

IN THE

Supreme Court of the United States

MICHAEL LAMBERT, AN INDIVIDUAL, PETITIONER,

v.

ESTATE OF KEVIN BROWN, BY ITS SUCCESSOR IN INTEREST REBECCA BROWN; REBECCA BROWN, SUCCESSOR IN INTEREST TO THE ESTATE OF KEVIN BROWN

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

San Diego Police Detective Michael Lambert was investigating a 26-year old cold case involving the brutal mutilation and murder of a 14-year old girl. DNA evidence linked a career criminal, Ronald Tatro, and a retired SDPD Criminalist, Kevin Brown, to the murder. Lambert drafted a 39-page search warrant affidavit, and submitted it to a judge who signed the warrant. (Appendix 46-97a.) Nine months after the search, while the investigation was still pending, Kevin Brown committed suicide by hanging himself from a tree. He did not leave a suicide note.

His wife, Respondent Rebecca Brown, filed this lawsuit claiming Mr. Brown killed himself because his property was seized and, until the property was returned, he feared he would be arrested for the murder, wrongly convicted and abused in prison. No admissible evidence supports this theory. Mrs. Brown also alleged that Lambert misrepresented and omitted DNA evidence that suggested the presence of Kevin Brown's sperm DNA on a vaginal swab taken from the murdered girl was the result of contamination.

Lambert sought summary judgment based on qualified immunity, contending his actions were objectively reasonable and that he did not make any material misrepresentations or omissions relating to the DNA evidence. The District Court denied the motion; Lambert appealed to the Ninth Circuit. More than eight months after the matter was argued and submitted, the Ninth Circuit affirmed, with no analysis and little elaboration. This petition presents the following questions:

1. Did the Ninth Circuit err by failing to address whether a reasonable officer in Detective

Lambert's position would have objectively believed his conduct, in deciding what information to include or not to include in the affidavit, was lawful in light of clearly established law?

2. Did the Ninth Circuit err by failing to address whether Plaintiffs made a substantial showing of deliberate falsehood or reckless disregard for the truth by Detective Lambert?

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PETITION FOR WRIT OF CERTIORARI

Petitioner San Diego Police Detective Michael Lambert respectfully petitions for a writ of certiorari to review the unpublished Memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Ninth Circuit announced its decision on July 24, 2019.

OPINIONS BELOW

The Ninth Circuit panel's Memorandum opinion was not published but is available at 773 Fed.Appx. 999. (Appendix 1a.)

The Second Amended Order of the United States District Court for the Southern District of California granting in part and denying in part Defendants' motion for summary judgment, and granting in part and denying in part Plaintiffs' motion for partial summary judgment, was not published. It is available at 2017 WL 2812618. (App. 6a.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion on July 24, 2019. (App. 1a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents allege that Detective Lambert violated Kevin Brown's civil rights under the Fourth

Amendment to the United States Constitution, which 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.

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> 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.

INTRODUCTION

The state of the law on qualified immunity in the Ninth Circuit puts police officers in the untenable position of enforcing the laws without knowing whether their particular conduct is constitutional. This Circuit has repeatedly been admonished to respect the concept of qualified immunity but, yet again, ignores the clear direction of this Court, making this Petition necessary.

The Ninth Circuit appears to be confused as to the standard to apply to an alleged *Franks v. Delaware* violation in the context of qualified immunity under U.S.C. section 1983. It did not, as it was required to do, address whether Rebecca Brown made a substantial showing that Lambert had intentionally or recklessly misrepresented or omitted material facts from the affidavit. *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995).

In addition, both the District Court and Ninth Circuit failed to address whether Lambert's conduct was objectively reasonable in light of clearly established law at the time he submitted the affidavit, a question which this Court has repeatedly held to be a necessary part of the qualified immunity analysis.

In fact, the Ninth Circuit skipped the "objectively reasonable" question altogether. Instead, with no analysis, it cited to its prior decision in *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997). But in *Liston*, the court held that where a claim of judicial deception is made, an officer who submits an "affidavit that contained statements he knew to be false or would have known to be false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, ... cannot be said to have acted in a

reasonable manner,' and the shield of qualified immunity is lost." *Liston v. County of Riverside*, 120 F.3d at 972.

What the Ninth Circuit has done is "put the cart before the horse." Instead of examining whether it was objectively reasonable for an officer, in light of clearly established law, to omit or misstate information, the court determined whether the misstatements or omissions were deliberate or reckless. If they were, the court then concludes that the officer could not have acted reasonably and denies qualified immunity.

However, "[o]missions or misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause." *United States v. Smith*, 588 F.2d 737, 740 (9th Cir. 1978). Nor may a claim of judicial deception be based on an officer's erroneous assumptions about the evidence he has received. *Id.* at 739–40. Thus, a reviewing court *must* evaluate the objective reasonableness of the officer's conduct when he or she decided what to include, or leave out, of an affidavit.

As a result, the correct question in this case, as in any other qualified immunity context, is whether the law, under the facts particular to the case, was clearly established so that a reasonable officer would know that his or her conduct was unlawful. In this matter, the circuit court panel made no effort to harmonize the underlying circumstances of this matter with the facts of any other legal precedent. It did not do so, and cannot do so, because the facts are not comparable to any known legal precedent.

To evaluate an officer's conduct in light of clearly established law, this Court has repeatedly instructed the Circuit Courts, and in particular, the Ninth Circuit,

to avoid defining clearly established law at a high level of generality. *Kisela v. Hughes*, 584 U.S.__ , 138 S.Ct. 1148, 1152 (2018). In the context of a *Franks*-type qualified immunity case, however, the circuit panel below, and the Ninth Circuit in general, have either ignored the "clearly established law" analysis or defined it at such a high level of generality that it is meaningless.

The Ninth Circuit admitted as much in *Butler v. Elle*, 281 F.3d 1014 (2002), where it said "our cases effectively intertwine" the qualified immunity question of whether a reasonable officer should have known that he acted in violation of a plaintiff's constitutional rights with the substantive recklessness or dishonesty question. *Id.* at 1024. The *Butler* court found "this merger ultimately appropriate," because no reasonable officer could believe that it is constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant." *Butler*, at 1024. But the only "clearly established law" that was violated was a generalized prohibition against making dishonest or reckless statements or omissions. This is contrary to this Court's direction.

Since deciding *Liston*, the Ninth Circuit has departed even further from this Court's precedent and, more recently, held that "government employees are not entitled to qualified immunity on judicial deception claims." *Chism v. Washington State*, 661 F.3d 380, 393 (9th Cir. 2011).

Here, the circuit panel determined that the affidavit, after correcting the alleged misrepresentations and supplementing it with the alleged omissions, would not support a finding of probable cause. But, as it did in its prior decisions, the court erred when it failed to address whether a

reasonable officer in Lambert's position should have recognized that the facts he allegedly misrepresented or omitted would have an effect on the probable cause determination.

Here, Lambert is an experienced detective who relied on his expertise in assessing information provided to him. He had twenty-four years as a police officer, including nineteen years as a detective investigating homicides. (Excerpts of Record, Volume V, 1100.) His investigation was thorough. Yet, Lambert is not a DNA expert, he is not a medical professional or a scientist. He was not required to "include all of the information in [his] possession to obtain a search warrant." *Ewing v. City of Stockton*, 588 F.3d 1218, 1226 (9th Cir. 2009). Nor was he required to include all potentially exculpatory evidence in the affidavit. *Id.* at 1226-1227.

When it is not plain that a neutral magistrate would not have issued the warrant, the shield of qualified immunity should not be lost, because a reasonably well-trained officer would not have known that the misstatement or omission would have any effect on issuing the warrant." *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1126 (9th Cir. 1997). Thus, "[i]n doubtful cases, preference should be given to the validity of the warrant." *United States v. McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986).

Lambert relied on the experts and he put the information he gathered from those experts in the affidavit. With no clearly established law to provide guidance, he used his best judgment to decide what DNA-related information to include, or not to include, in the affidavit. The Ninth Circuit should have evaluated the objective reasonableness of his actions in light of clearly established law, or the lack thereof. Had

it done so, he would have been granted qualified immunity.

STATEMENT OF THE CASE

I. Facts

In 1984, a fourteen-year-old girl, Claire Hough (Hough), was brutally murdered on North Torrey Pines Beach in San Diego. (VI ER 1458.) Hough's throat was cut, there was blunt force trauma to her face, her mouth was stuffed with sand, there was a laceration to her vagina, and her left breast was cut off. (*Id.* at ¶¶ 139, 141-142.) M.A. Clark, M.D., the pathologist with the San Diego County Coroner's Office, concluded that the case of death was strangulation. (*Id.* at ¶ 141.)

Dr. Clark performed an autopsy on Hough the day after her body was found. (VI ER 1459.) Physical evidence was obtained during the autopsy, including oral, anal and vaginal swabs. (VI ER 1459.) One set of swabs was given to San Diego Police Department ("SDPD") lab technician, Randy Gibson, and one set of swabs was retained by the coroner's office. (VI ER 1461; V ER 1088.)

Although some testing of the swabs was conducted at the time, no suspects were identified and the case remained unsolved for years. (V ER 1105.) In 2012, the case was reopened by the San Diego Police Department's (SDPD's) Cold Case Homicide Team, which included Lambert. (VI ER 1439, 1441.) With the advantage of new and better scientific tools, SDPD analyst David Cornacchia discovered that blood stains on Hough's jeans contained DNA matching that of a registered sex offender, Ronald Clyde Tatro. (VI ER 1441-1442.) In addition, sperm DNA taken from the

vaginal swabs was found to be a match with Kevin Brown. (VI ER 1441.)

Kevin Brown was a criminalist with the SDPD crime lab from 1982 to 2002. (VI ER 1438.) In 1992, the lab began performing DNA testing. (VI ER 1455.) Kevin Brown, along with the other criminalists, provided their own DNA, from mouth swabs, for uploading into the Combined DNA Index System, known as CODIS. (VI ER 1455.) CODIS is a local, State, and National database that contains DNA profiles from criminal offenders, crime scenes, and missing persons. (V ER 1108.) The criminalists' DNA samples are called "control samples." The purpose of providing control samples was to determine whether a DNA test was the result of contamination in the lab. (VI ER 1455.) In 2012, when Kevin Brown's sperm DNA was matched to evidence from the crime scene, he had already retired from the SDPD. (VI ER 1438.)

Lambert investigated the case, interviewed witnesses (VI ER 484), and eventually, in January 2014, wrote and signed a search warrant affidavit that was then signed by a judge. (App. 46a.)(See also, VI ER 1463; V ER 1095 - 1133) The search warrant was executed on January 9, 2014. (VI ER 1475.) The search included the home and cars belonging to Kevin Brown and his wife, Rebecca Brown. (VI ER 1463.) Numerous items were seized by the officers. Defendant Maura Mekenas-Parga was tasked with documenting the seized items. (V ER 138 – 1139; 1141 – 1145.)

After the search was concluded, Lambert continued his investigation. He spoke with Kevin Brown several times, as well as numerous witnesses, and obtained recorded statements from them. (V ER 1147.)

On October 20, 2014, while the investigation was still pending, Kevin Brown hung himself from a tree at Cuyamaca State Park. (VI ER 1480.) Rebecca Brown claims he did so because of "an irresistible impulse triggered by anxiety, depression and pain engendered by" the alleged conduct of Lambert. (VI ER 1488.) Brown did not leave a suicide note. (V ER 1182.)

II. Proceedings

A. District Court

1. The Underlying Action

Rebecca Brown, in her individual capacity and as the successor in interest to the Estate of Kevin Brown, sued the City of San Diego and Detective Lambert. The City of San Diego was later dismissed as a defendant. (App. 17a.) The Third Amended Complaint alleges six causes of action against Lambert and added Mekenas-Parga as a defendant. (App. 17a.) Brown asserted claims for relief in their Third Amended Complaint as follows:

a. First Cause of Action: Execution of a Warrant Obtained in Violation of *Franks v. Delaware* (42 USC section 1983), against Lambert;
b. Second Cause of Action: Execution of an Overbroad Warrant (42 USC section 1983), against Lambert and Mekenas-Parga;
c. Third Cause of Action: Seizure of Property Beyond the Scope of the Warrant (42 USC section 1983), against Lambert and Mekenas-Parga;

d. Fourth Cause of Action: Wrongful Detention of, and Refusal to Return, Seized Property (42 USC section 1983), against Lambert;
e. Fifth Cause of Action: Wrongful Death (42 USC section 1983), against Lambert; and
f. Sixth Cause of Action: Deprivation of Right of Familial Association (42 USC section 1983), against Lambert.

(App. 17a.)

2. The District Court Denied Defendants' Motion for Summary Judgment and Granted in Part Plaintiffs' Motion

Lambert and Mekenas-Parga filed a motion for summary judgment or, in the alternative, partial summary judgment as to each cause of action in the Third Amended Complaint. The motion was based, in part, on the defense of qualified immunity. (App. 17a-18a.) Brown filed her own motion for partial summary judgment as to the Third and Fourth Causes of Action only. (*Ibid.*)

The District Court initially denied the motion by Lambert and Mekenas-Parga in its entirety, and granted Brown's motion as to the Third Cause of Action, finding that Lambert and Mekenas-Parga seized property outside the scope of the warrant. (App. 8a.)

Lambert and Mekenas-Parga filed a timely Notice of Interlocutory Appeal. (App. 8a.) The appeal was based on the District Court's denial of qualified immunity to Lambert and Mekenas-Parga. (*Ibid.*)

The next day, Plaintiffs filed an ex-parte motion to certify the appeal as frivolous. The District Court held a hearing on that motion on June 9, 2017. (App. 8a.) The court heard argument and set a further briefing schedule on the motion. (*Ibid.*) After submission of the additional briefing by the parties, the court held another hearing during which Lambert and Mekenas-Parga agreed to withdraw their Notice of Appeal to permit the District Court to address the issues raised by Plaintiffs' motion, by the supplemental briefing, and at the hearings. (*Ibid.*)

After the second hearing, and after the Notice of Appeal was withdrawn, the District Court issued its Second Amended Order (1) Granting in Part and Denying in Part Defendants' Motion for Summary Judgment and (2) Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment. (App. 6a.)

In the Second Amended Order, the District Court denied qualified immunity to Lambert and Mekenas-Parga on each of the causes of action except the Fourth Cause of Action for wrongful retention of the seized property alleged against Lambert. As to that cause of action, the Court granted summary judgment to Lambert. (App. 41a.) The Court also confirmed its grant of partial summary judgment to Plaintiffs on the Third Cause of Action against Lambert and Mekenas-Parga for the alleged seizure of property outside the scope of the warrant. (App. 41a.) In addition, the Court stated that, should Defendants appeal, as he expected they would, and Plaintiffs filed another motion to certify the appeal as frivolous, the Court "would be inclined to deny that motion." (App. 45a.)

A timely interlocutory appeal by Lambert and Mekenas-Parga followed. (App. 1a.)

B. Ninth Circuit Court of Appeals

On November 8, 2019, the Ninth Circuit heard argument on the appeal by Lambert and Mekenas-Parga. (App. 1a.) More than eight months later, on July 24, 2019, the court issued its three and a half page Memorandum decision affirming the District Court's denial of qualified immunity on the judicial deception (*Franks*) claim, the overbroad warrant claim as to Lambert, and the overbroad seizure claim as to Lambert and Mekenas-Parga. (*Ibid.*) The court reversed the District Court's partial summary judgment as to the overbroad warrant claim against Mekenas-Parga. (App. 4a.)

The circuit panel's entire opinion affirming the denial of qualified immunity to Lambert on the *Franks* claim is as follows:

> 1. The district court properly found that Officer Lambert is not entitled to qualified immunity on the deception claim. The affidavit he submitted in support of the application for the warrant accurately represented that Brown's DNA was found during the crime laboratory's review of the murder victim's vaginal swab. But, it inaccurately stated that contamination was "not possible;" in fact, Lambert had been expressly warned by crime laboratory employees that contamination was likely because analysts at the time of the murder often used their own semen as a control when testing forensic evidence.
>
> The district court found a genuine issue of disputed fact existed whether Officer Lambert

deliberately or recklessly omitted this information from the affidavit submitted in support of the issuance of the warrant. Lambert claims that there is no such dispute, but we cannot review the district court's finding in this interlocutory appeal. See *Eng v. Cooley*, 552 F.3d 1062, 1067 (9th Cir. 2009)("A district court's determination that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal."). Rather, "for purposes of determining whether the alleged conduct violates clearly established law of which a reasonable person would have known, we assume the version of the material facts asserted by the non-moving party to be correct." *Schwenk v. Hartford*, 204 F.3d 1187, 1195 (9th Cir. 2000).

2. The issue properly before us on the deceptive affidavit claim is whether "the affidavit, once corrected and supplemented, would provide a magistrate with a substantial basis for concluding that probable cause existed." *United States v. Stanert*, 762 F.2d 775, 782 (9th Cir. 1985). A corrected affidavit would have informed the magistrate that the DNA evidence cited was unreliable and most likely present because of the testing regimen. Because probable cause to search Brown's home "depended entirely on the strength of [that] evidence," a corrected affidavit would not support a finding of probable cause. *Liston v. Cty. of Riverside*, 120 F.3d 965, 973–74 (9th Cir. 1997).

(App. 2-3a.)

The opinion did not determine whether Brown made a substantial showing of deliberate or reckless falsehood or omission by Lambert when he drafted the affidavit. The opinion also did not address whether Lambert's alleged conduct violated clearly established law. (App. 2-5a.)

REASONS FOR GRANTING THE WRIT

I. The Panel Opinion Improperly Denied Qualified Immunity Without Addressing Whether a Reasonable Officer in Lambert's Position Would Objectively Believe His Conduct Was Lawful in Light of Clearly Established Law

The Ninth Circuit's panel opinion fails to heed this Court's clear and repeated precedent that "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 584 U.S.__, 138 S.Ct. at 1152, quoting *White v. Pauly*, 580 U.S.__, 137 S.Ct. 548, 551 (2017). The focus for the court is on whether the officer had fair notice that his or her conduct was unlawful. *Kisela v. Hughes*, 138 S.Ct. at 1152. Reasonableness is therefore "judged against the backdrop of the law at the time of the conduct." *Id.*, quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). While this Court's law does not require a case directly on point for a right to be clearly established, existing

precedent must have placed the statutory or constitutional question beyond debate." *Kisela*, at 1152 quoting *White, v. Pauly*, 580 U.S.__, 137 S.Ct. at 551 (internal quotation marks omitted).

In *Ashcroft v. al-Kdd*, 563 U.S. 731 (2011), this Court explained that the qualified immunity standard requires "every 'reasonable official … [to] underst[an]d that what he is doing violates that right.'" *Id.* at 741, quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thus, qualified immunity turns on the objective reasonableness of the law enforcement officer's conduct in light of clearly established law. *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1121 (1997). In other words, officers are shielded from civil damages liability as long as their actions can reasonably be thought consistent with the rights they have allegedly violated. *Ibid.* Qualified immunity, therefore, protects "all but the plainly incompetent or those who knowingly violate the law." *Id.*, citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

A court denying qualified immunity must effectively "identify a case where an officer acting under similar circumstances as [the defendant officer] was held to have violated the Fourth Amendment." *Lombardi v. City of El Cajon*, 117 F.3d at 1121. "This exacting standard gives government officials breathing room to make reasonable but mistaken judgments…." *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 (2015)(citations omitted).

The Ninth Circuit's panel opinion, however, not only failed to follow this Court's precedent, it failed to make this analysis at all. Indeed, completely absent from the opinion is any consideration or determination of whether there was clearly established law as to what

a police officer must or should include in an affidavit based on DNA evidence in a twenty-six-year old cold case. As a result, the court did not address whether Lambert had fair notice that his conduct was unlawful.

Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Lombardi v. City of El Cajon*, 117 F.3d at 1122, quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), and *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This is true in a *Franks*-type suit, such as this, "as in any other." *Lombardi v. City of El Cajon*, *supra*, 117 F.3d at 1122. Since *Lombardi*, the Ninth Circuit has either ignored the "objective reasonableness in light of clearly established law" standard, or circumvented it altogether by applying the circuit's own standard that "government employees are not entitled to qualified immunity on judicial deception claims." *Chism v. Washington State, 661 F.3d* at 393.

In *Lombardi*, the Ninth Circuit correctly held that, in cases where it is not obvious whether a magistrate would have issued a warrant with false information redacted, or supplemented with omitted information, "the shield of qualified immunity should not be lost, because a reasonably well-trained officer would not have known that the misstatement or omission would have any effect on issuing the warrant." *Lombardi v. City of El Cajon*, *supra*, 117 F.3d at p. 1126. This is particularly true where omissions are involved "because materiality may not have been clear at the time the officer decided what to include in, and what to exclude from, the affidavit." *Ibid.*

The *Lombardi* court conducted a qualified immunity analysis in the context of a *Franks* claim, recognizing that all issues of qualified immunity turn on

objective reasonableness. *Lombardi v. City of El Cajon,* 117 F.3d at 1125. First, the court determined whether the officer had intentionally omitted facts from the affidavit in support of a search warrant. Next, the court determined whether the omitted facts were material to the determination of probable cause. And finally, the court looked at whether the Ninth Circuit had "drawn clear lines for when omissions are material, and information about ulterior motives and biases of informants has not inevitably (or even frequently) led to a *Franks* violation for vitiating probable cause." *Lombardi*, *supra*, at 1127. Finding that no clear lines had been drawn, it concluded that "a reasonable officer in [the defendant's] position could have failed to recognize that the facts he decided not to disclose would have an effect on the probable cause determination." *Ibid.*

In *Hervey v. Estes*, 65 F.3d 784 (9th Cir. 1995), which *Lombardi* relied on, the court set forth what it asserted to be "the standard" in a *Franks* case: that it is objectively unreasonable for a law enforcement officer to deliberately or recklessly misstate facts material to the probable cause determination. *Hervey v. Estes*, 65 F.3d at 789. The court then looked to the affidavit and excised false information, which consisted of "unproven, uncorroborated and unreliable information" that was entitled to no weight in Washington state, where the conduct occurred, based on the *Aguilar-Spinelli* test for determining the reliability and credibility of informant information. *Hervey v. Estes*, 65 F.3d at 790. As a result, the *Hervey* court held that a neutral magistrate would not have issued the warrant because it lacked probable cause. *Ibid.* Qualified immunity was denied to the officer because her conduct in preparing the affidavit was objectionably unreasonable. *Id.* at 791.

In *Liston v. County of Riverside*, 120 F.3d 965, *supra*, the Ninth Circuit piggybacked on its prior rulings in *Hervey* and *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991), and set forth its standard to be applied in a civil rights case where a claim of judicial deception is made:

> [I]f an officer submitted an affidavit that contained statements he knew to be false or would have known to be false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, … he cannot be said to have acted in a reasonable manner, and the shield of qualified immunity is lost.

Liston, at 972, quoting *Branch v. Tunnell*, 937 F.2d at 1387. Thus, the Ninth Circuit noted the existence of the reasonableness issue, but appears to have subsumed the objective reasonableness test into the materiality analysis.

The Ninth Circuit thereafter reformulated its standard on a judicial deception claim. In *Butler v. Elle*, 281 F.3d 1014 (2002), the Ninth Circuit considered a Fourth Amendment case alleging judicial deception in the procurement of a search warrant. *Butler v. Elle*, 281 F.3d at 1024. It noted that "our cases effectively intertwine the qualified immunity question (1) whether a reasonable officer should have known that he acted in violation of a plaintiff's constitutional rights with (2) the substantive recklessness or dishonesty question." *Ibid.* The court noted that the "merger was ultimately appropriate because as *Branch* and *Hervey* recognize, no reasonable officer could believe that it is

constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant." *Ibid.*

And more recently, in *Chism v. Washington State*, *supra*, the Ninth Circuit acknowledged that qualified immunity turns on whether there is a sufficient showing of a constitutional violation and whether the constitutional rights at issue were clearly established at the time the officer submitted her affidavit. *Chism v. Washington State*, 661 F.3d at 392.

In *Chism*, the court initially asked the right question: "whether the contours of the Chisms' rights were so clear that every reasonable official would have understood that what he is doing violates that right." *Ibid.* (internal citations omitted). But then the court once again departed from the objectively reasonable test, noting that its "analysis of this prong is brief because we have already held that government employees are not entitled to qualified immunity on judicial deception claims." *Chism v. Washington State*, *supra*, at 393. In fact, it made no analysis at all. Instead, it denied the officers qualified immunity because, "in light of *Branch*, *Liston*, and *Hervey*, we conclude that every reasonable official would have understood that the Chisms had a constitutional right to not be searched and arrested as a result of judicial deception." *Chism*, at 393, citing *Ashcroft v. al–Kidd*, 563 U.S. at 741 (internal quotation marks omitted).

In this case, the Ninth Circuit, in keeping with its earlier decisions and its new "standard" in *Franks*-type cases, did not address whether Lambert violated clearly established law when he decided what DNA-related information to include in the affidavit. This was error.

The Ninth Circuit should have identified a case where an officer in similar circumstances was held to have violated a clearly established right. *District of Columbia v. Wesby*, 583 U.S. __, 138 S.Ct. 577, 589 (2018). This clearly established right must be defined with specificity. "This Court has repeatedly told courts … not to define clearly established law at a high level of generality." *Kisela v. Hughes*, *supra*, 584 U.S. __, 138 S.Ct. at 1151. Thus, it was not sufficient in *Kisela* for the Ninth Circuit to define the clearly established law to be "the right to be free of excessive force." *Ibid.* Instead, the court "should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances." *Ibid.*

Similarly, in this case, the Ninth Circuit should have asked whether there is any clearly established law that sets forth the parameters for what DNA-related evidence (including information regarding the reliability of that evidence and possible contamination), must or should be included in an affidavit by a reasonable officer to avoid the risk that a *Franks* violation will vitiate probable cause. See, *Lombardi v. City of El Cajon*, *supra*, 117 F.3d at 1127.

The answer to this question, of course, is no—there is no such clearly established law. Absent such precedent, a reasonable officer in Lambert's position could have failed to recognize that the DNA-related information he decided to include, or not to include, in the affidavit would have an effect on the probable cause determination. *Ibid.*

This objective reasonableness test is a "necessary part of the qualified immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way." *Kisela v.*

Hughes, *supra*, 584 U.S. __, 138 S.Ct. at 1153. The Ninth Circuit's decision should be reversed and the case remanded to the Ninth Circuit to conduct the analysis required by this Court's precedents with respect to whether Detective Lambert is entitled to qualified immunity. See, *City of Escondido v. Emmons*, 139 S.Ct. at 503.

II. The Ninth Circuit Failed to Address Whether Rebecca Brown Made a Substantial Showing of Deliberate Falsehood or Reckless Disregard for the Truth by Detective Lambert

To support a 42 U.S.C. section 1983 claim of judicial deception, a plaintiff must show that the defendant deliberately or recklessly made false statements or omissions that were material to the finding of probable cause. *Pacific Marine Center, Inc. v. Silva*, 809 F.Supp.2d 1266, 1276 (E.D. Cal. 2011). This showing of deliberate falsehood or reckless disregard for the truth must be substantial. *Ewing v. City of Stockton*, 588 F.3d at 1224. "'Omissions or misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause.' (citation omitted.) Nor may a claim of judicial deception be based on an officer's erroneous assumptions about the evidence he has received." *Ibid.*, quoting *United States v. Smith*, 588 F.2d 737, 740 (9th Cir. 1978).

Thus, a *Franks*-type judicial deception claim can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can establish: (1) a substantial showing of a deliberate falsehood or reckless disregard, and (2) that, without the dishonestly

included or omitted information, the magistrate would not have issued the warrant. *Hervey v. Estes*, 65 F.3d at 789. "Put another way, the plaintiff must establish that the remaining information in the affidavit is insufficient to establish probable cause." *Ibid.*

This heightened proof requirement applies to misrepresentations and omissions. *Lombardi v. City of El Cajon*, *supra*, 117 F.3d at 1124. Additionally, whether the plaintiff has made a substantial showing of actionable deception and whether the alleged misrepresentations or omissions were material, are reserved for the court. See, e.g., *Butler v. Elle*, 281 F.3d 1014, 1025-26; *Hervey v. Estes, supra*, at 789-90.

If a plaintiff makes the required substantial showing, the question of intent or recklessness is a factual determination for the trier of fact. *Liston v. County of Riverside*, 120 F.3d at 974.

In this case, the Ninth Circuit erred when it completely failed to address whether Brown made a substantial showing of deliberate falsity or reckless disregard of the truth by Detective Lambert. It appears the court was confused as to the proper standard to apply. It cited the District Court's order that "Plaintiffs will have to convince a jury that Detective Lambert deliberately or recklessly omitted" material facts from the affidavit. (App. 26a.) This is true, if the case proceeds to trial. However, for purposes of a motion for summary judgment, *the court* must determine whether Brown made a substantial showing of deliberate falsehood or reckless disregard for the truth.

The District Court made this determination. (App. 24a.) The Ninth Circuit was required to do the same. It should have reviewed the evidence to determine whether Brown made the required

substantial showing that Detective Lambert intentionally or recklessly omitted or misrepresented information in the affidavit. *Chism v. Washington State*, 661 F.3d at 387; *Liston v. County of Riverside*, 120 F.3d at 973. It failed to do so; this failure was error.

CONCLUSION

The Ninth Circuit has again refused to comply with decades of this Court's clearly established precedent on qualified immunity. The Court of Appeals made no effort to explain how or what clearly established law prohibited Detective Lambert's conduct in this case. It also failed to determine whether Brown made a substantial showing of deliberate falsehood or reckless disregard for the truth by Detective Lambert in light of that clearly established law.

As stated above, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Detective Lambert was not incompetent and he did not knowingly violate the law. The Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals denying qualified immunity to Detective Lambert.

Respectfully submitted,

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