No. 19-541

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; and REBECCA BROWN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE IREDALE
Counsel of Record
JULIA YOO
GRACE JUN
IREDALE AND YOO, APC
105 West F St., Fourth Floor
San Diego, CA 92101
Tel: (619) 233-1525
egiredale@iredalelaw.com

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

On January 3, 2014, San Diego Police Department (SDPD) homicide detective Michael Lambert submitted an affidavit to search the home of Kevin and Rebecca Brown for evidence related to the murder of Claire Hough in 1984. Kevin Brown had worked as an analyst at the SDPD Crime Lab in 1984. His workstation was near the analyst who first examined evidence in the Claire Hough investigation. Lambert knew the SDPD Lab's examination of the single vaginal swab from Claire Hough in 1984 found no sperm.

Lambert swore in his affidavit that Jennifer Shen, manager of the SDPD Crime Lab, had done a "thorough inspection" of the Lab's records, had determined Kevin Brown "had no access to the evidence in the HOUGH matter" and stated "cross DNA contamination is not possible." (App. 69a) (emphasis in original). Shen, in fact, had never stated cross contamination was not possible in this case or as a general matter. Before Lambert submitted his affidavit, SDPD Lab analyst David Cornacchia, who found Kevin Brown's DNA from a mixture of two swabs in 2012, told Lambert that it was standard practice for lab analysts to use their own semen samples in testing procedures. Lambert never informed the magistrate of this common practice.

The questions presented are as follows:

1. Lambert contends review by the Court is warranted because the Court of Appeals established a

QUESTIONS PRESENTED – Continued

"new standard" for determining qualified immunity in 42 U.S.C. § 1983 claims made under *Franks v. Delaware*, 438 U.S. 154 (1978), that fails to conform to this Court's precedent. Did Lambert forfeit this argument by failing to raise it in any court below, thereby depriving those courts of an opportunity to address this newly formulated claim?

2. Every Circuit has held that a plaintiff may bring a 42 U.S.C. § 1983 claim pursuant to *Franks*. On January 3, 2014, at the time Lambert submitted his affidavit, did clearly established law give Lambert fair notice that he could not lie to the magistrate or knowingly omit facts material to probable cause?

3. On interlocutory appeal, Lambert challenged the district court's determination that disputed issues of fact precluded the grant of qualified immunity. The Court of Appeals held it did not have jurisdiction on interlocutory appeal to review the district court's findings of disputed fact. Does the holding of *Johnson v. Jones*, 515 U.S. 304, 313 (1995), that issues of disputed fact cannot be reviewed on a qualified immunity interlocutory appeal, refute Lambert's claim?

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INTRODUCTION

Michael Lambert seeks this Court's review without once informing the Court of his misrepresentations and omissions that underlie Plaintiffs' case. Lambert does not, for example, mention the district court determined Lambert made a material misrepresentation when he swore "cross DNA contamination *is not* possible[,]" a statement Lambert falsely attributed to SDPD Lab Manager Jennifer Shen. (App. 21) (emphasis in original). As Shen had denied making the statement and Plaintiffs had presented "several documented instances of cross contamination by the Crime Lab," the district court found the "statement that cross contamination is not possible is demonstrably false." (*Id*.).

Supreme Court Rule 14(1)(g) requires a petitioner to set out "facts material to consideration of the questions presented." Lambert never addressed the misrepresentations and omissions the district court and Ninth Circuit considered in denying qualified immunity. Lambert's petition provides a truncated factual recitation which avoids any mention of his multiple material misrepresentations and omissions. Lambert then claims review is warranted because "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" to avoid a *Franks* violation. (Pet. 20).

This misstates the Constitutional violation claimed by Plaintiffs. Plaintiffs never claimed Lambert failed to provide enough information regarding DNA evidence in his affidavit or challenged the accuracy of that scientific evidence. Rather, Plaintiffs contended that Lambert had violated Plaintiffs' Fourth Amendment rights by deliberately lying to the magistrate. Lambert swore that "cross DNA contamination *is not* possible," a statement Lambert knew was false because: (1) the witness to whom Lambert attributed that statement, Jennifer Shen, denied making it; and (2), as the Court of Appeals noted, "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." (App. 2a).

The qualified immunity analysis conducted below focused on whether Lambert lied to the magistrate and misled the magistrate about the existence of probable cause. *Franks* itself involved an affiant who was alleged to have misrepresented statements of witnesses. 438 U.S. at 158. Given this Court's precedent, had Lambert fairly recited the facts of this case, he would be hard pressed to make the argument that clearly established law did not give him fair notice of the illegality of his conduct.

By failing to provide the material facts considered and relied upon by both the Ninth Circuit and district court in denying Lambert qualified immunity, Lambert frames this case as one where he "relied on the experts" and simply recited information provided by these

"experts," using "his best judgment to decide what DNA-related information to include, or not to include, in the affidavit." (Pet. 6). This contention is belied by the factual record. Current and retired employees at the SDPD Lab, all experts, had told Lambert of the practice of male analysts using their own semen samples at the Lab to test evidence. These experts advised Lambert to investigate this practice in context of discovery of Kevin Brown's DNA.

Supreme Court Rule 14(4) states, "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Lambert's omission of the factual basis for the lower courts' denial of qualified immunity, *i.e.*, his extensive misrepresentations and omissions to the magistrate, violates Rule 14(4) and justifies denial of his petition.

STATEMENT OF THE CASE

A. Factual Background

1. In 1984, the SDPD Lab's examination of one (1) vaginal swab taken from Claire Hough found no sperm.

On August 24, 1984, a passerby found 14-year-old Claire Hough's body at a San Diego beach. SDPD Crime Lab technician Randy Gibson went to photograph the victim and collect evidence. At the Coroner's office, a pathologist took deep swabs of the mouth,

vagina, and rectum of the victim for analysis. From the Coroner, Gibson documented collecting the following items of evidence to take to the Crime Lab: "Item #23: One (1) oral swab; Item #24: One (1) anal swab; Item #25: One (1) vaginal swab." (Brief of Appellees-Plaintiffs at 5, Estate of Kevin Brown v. Michael Lambert, No. 17-55930 (9th Cir. July 12, 2018)) (hereinafter "Brown Answering Brief").[1]

At this time, Kevin Brown worked as a forensic analyst in the Serology Division of the SDPD Crime Lab. Kevin worked in Serology from 1982 to 1985, analyzing bodily fluids, such as blood, semen, and saliva. (*Id*.).

Evidence collected by Gibson was turned over to John Simms at the Crime Lab for examination and analysis. Simms worked with Kevin Brown. His examination table was close to Kevin's table. On August 27, 1984, Simms began analyzing samples of the vaginal swab taken from Claire Hough. He conducted two tests: the acid phosphatase test and microscopic viewing to determine the presence of sperm. The acid phosphatase test is a presumptive color test used to determine the presence of semen. It detects acid phosphatase, an enzyme found in both men and women, but particularly concentrated in seminal fluid. Microscopic

[1] All record citations are to Plaintiffs' answering brief in the Ninth Circuit, Case No. 17-55930, ECF no. 30, which, on interlocutory appeal after denial of summary judgment, presented facts in the light most favorable to Plaintiffs.

viewing is the second, confirmatory step to establish the presence of sperm. (*Id*. at 5-6, 8-9, 11-12).

The acid phosphatase tests produced a "weak" and "weak negative" result. Simms then used two different forms of microscopic analysis. There were no sperm cells. The Coroner's microscopic examination of "oral, anal, and vaginal smears" taken from Claire Hough likewise found no spermatozoa. The Coroner's autopsy report found a single deep vaginal laceration. It made no mention of any sexual assault. (*Id*. 12-13).

2. Because DNA technology did not exist in 1984, male SDPD Lab analysts used their own semen to test evidence without any precautions to guard against cross contamination.

The acid phosphatase test used by Simms to test the vaginal swab from Claire Hough requires a positive control – a sample known to contain semen. In the 1980s, male analysts at the SDPD Crime Lab, including Kevin Brown, typically used their own semen as a positive control when conducting acid phosphatase tests. Jim Stam, Kevin Brown's former supervisor who worked at the Lab in the 1980s, testified that analysts commonly used each other's semen standards. Stam testified it was a common practice and "never an issue" if an analyst said, "I don't have the standard. Can I borrow yours?" Occasionally, if he ran out of his own sample, Stam would borrow semen samples from Kevin Brown or other analysts. Bill Loznycky, another SDPD

Lab analyst who worked with Kevin Brown in the 1980s, testified that he was asked on occasion to share his semen sample with colleagues. (*Id*. 8-10).

Female analysts would bring in a boyfriend's or husband's semen sample, or borrow known samples from male colleagues. Mary Pierson, a former SDPD lab analyst, testified that between 1983 and 1985, she obtained semen samples from her male colleagues at the lab. (*Id*. 9).

Analysts' semen samples were generally placed on pieces of white cloth or cotton swatches that were stored at the analyst's desk or at their workstation table. Because semen can become dry and crusty, "flaking" may lead to contamination. Semen can "flake off" onto a table during handling or cutting of the standard. If a flake or dust particle of semen from a sample becomes airborne, it can travel from one spot and land on a piece of evidence resulting in contamination. To avoid possible contamination through airborne travel of "flakes" of DNA material, modern labs prohibit exposing a vaginal swab in the open air to dry it out. (*Id*. 10-11).

In the mid-1980s, DNA was not "on the radar screen" for crime lab analysts. It was not until 1986 or 1987 that analysts became aware of DNA technology. The first court case involving DNA evidence did not occur until 1987. SDPD Lab employees in the 1980s dried biological evidence in the open air, a practice prohibited by modern labs. The Lab had a common practice of drying wet swabs of bodily fluids at the analysts'

examination tables in a test tube rack without a cover. The swabs would be exposed to the open air in the lab for a few hours and sometimes left overnight. (*Id*. 11).

Given the absence of DNA technology, lab analysts in 1984 did not employ the strict precautions used to guard against contamination that are in place today. Jim Stam testified the way analysts handled evidence in the 1980s "would lead to serious contamination today." Stam testified "we didn't have the same concerns over, you know, obviously, touch and handling of evidence as we do today." SDPD analysts in the 1980s did not use masks and did not generally wear gloves when examining evidence. To detect semen stains on evidence, analysts would touch evidence with their bare fingertips to feel for crusty material. They did not use gloves as they would not be able to feel the semen stain. (*Id*. 6-7).

3. Kevin Brown's DNA is discovered on a mixture taken from *two* swabs.

In November 2012, SDPD analyst Cornacchia conducted DNA testing on samples derived from *two* swabs in the Claire Hough matter. A "database hit" identified Kevin Brown's DNA profile. Because Kevin worked as an analyst at the Crime Lab, his DNA profile had been uploaded into the CODIS database for the purpose of identifying potential contamination issues. Cornacchia's DNA analysis in November 2012 identified three DNA profiles: that of Claire Hough; Kevin Brown; and a third, low-level contributor whom the

Lab did not identify. The third contributor remains unidentified. (*Id*. 14-16).

Although the November 2012 DNA test result that implicated Kevin Brown came from samples derived from *two* swabs, in 1984, SDPD criminalist Randy Gibson had reported collecting only one vaginal swab. Gibson wrote in his report that on August 24, 1984, he had collected "Item #25: One (1) vaginal swab." Gibson testified at his deposition that his convention when writing reports was to identify the number of pieces of evidence collected by writing out a number (*e.g.*, "o-n-e") then placing the number in parentheses (*e.g.*, "(1)") before the description of the evidence. Based on the report he made at the time, Gibson testified he collected only one (1) vaginal swab as evidence. When Simms microscopically analyzed this swab in 1984, he did not find sperm cells. (*Id*. 12, 17-18).

Fifteen years later, in 1999, SDPD lab records inexplicably showed the emergence of a second swab. In 1999, analyst Mary Jane Flowers tested Item #25, which she described as "two (2) tan swabs (stuck together)." Under microscopic viewing, Flowers discerned a total of 15 sperm cells and two "possible" sperm cells. (*Id*. 13, 17).

Cornacchia, who had conducted the DNA analysis finding Kevin Brown's DNA, testified he was not aware, until his deposition, that Gibson's 1984 report had shown receipt of only one (1) vaginal swab from the Coroner's office. (*Id*. 17).

In contrast, Lambert's affidavit indicates his awareness that only one (1) vaginal swab was collected. His affidavit states that Randy Gibson, during the autopsy, took custody of "(1) Vaginal swab[.]" (App. at 55a). But later, Lambert references DNA testing of Claire Hough's "Vaginal Swabs" (*id*. at 62a) and described Kevin Brown's DNA being found on "*sperm* fractions[2] on the vaginal swabs[.]" (*Id*. 69a) (emphasis in original). His affidavit provides no explanation for this discrepancy.

4. The SDPD Lab discovers the DNA of convicted rapist Ronald Tatro on multiple pieces of evidence.

In November 2012, Cornacchia identified another DNA profile on multiple pieces of evidence taken from Claire Hough. Cornacchia uploaded the DNA profile to the California Combined DNA Index System (CODIS) for comparison and found a match – Ronald Tatro, a convicted rapist with a history of kidnapping and assaulting women. Cornacchia tested the torn zipper area of Claire Hough's jeans; red stains found on the jeans; and red stains on her underwear for DNA evidence. Ronald Tatro's DNA was found in eight blood stains on Claire Hough's jeans; on the torn zipper flap of Hough's jeans; and in the three red/brown stains on Claire Hough's underwear. Kevin Brown's DNA was not found in any of these stains. (*Id*. 18-29).

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[2] A "sperm fraction" is an evidentiary sample that is confirmed to have sperm cells through microscopic visualization. (Brown Answering Brief at 9).

Tatro died in Tennessee on August 24, 2011, on the 27th anniversary of Claire Hough's death in 1984. (*Id*. 18).

5. Cornacchia tells Lambert about the practice of male SDPD Lab analysts using their own semen to test evidence.

Within two to three months of November 1, 2012, the date when Cornacchia discovered Kevin Brown's DNA, Cornacchia told Lambert about the common practice of analysts using their own semen samples in the lab. Even in 2012, analysts at the lab used their own semen for forensic testing. Cornacchia testified he would utilize his co-workers' semen standards at times. (*Id*. at 9 n.2; 20).

In response to this information, Lambert asked Cornacchia if Kevin Brown had kept his own semen standard in the lab. Cornacchia did not know. Cornacchia told Lambert there was no way to tell as there was no log of analysts' semen samples used in the lab in the 1980s. Lambert asked Cornacchia about specific lab practices in the 1980s. Cornacchia did not know so he told Lambert to ask people who had worked in the lab in the 1980s. (*Id*. 20-21).

6. Lambert interviews lab analysts who worked with Kevin Brown in the 1980s.

Lambert then spoke with several witnesses who worked at the San Diego Crime Lab with Kevin Brown in the 1980s. Lambert's affidavit states that he spoke

with analysts Eugene La Chimia, Bill Loznycky, and Annette Peer. Lambert omitted that he spoke with Lab analysts Jim Stam and John Simms, who had both worked with Kevin Brown. Neither Jim Stam nor John Simms is listed in the witness list for Lambert's homicide investigation, though La Chimia, Loznycky, and Peer are listed. Lambert did not record or document the interview of either Stam or Simms, though he did for the other witnesses. (*Id*. at 21).

Jim Stam testified that he told Lambert that contamination was most likely the explanation for the presence of Kevin's DNA. Because of the way evidence was handled in the 1980s, Stam believed contamination explained the presence of Kevin's DNA and that it should be made a priority in Lambert's investigation. Stam told Lambert that "you need to look at the contamination first. That needs to be the No. 1 thing. You need to eliminate that 100 percent and then maybe go on with the rest of it." (*Id.* at 21-22).

During his interview with Lambert, John Simms expressed his concern that something he had done during his analysis of the Claire Hough evidence could have resulted in contamination: "I told him (Lambert) that it is a possibility of something that I could have done working on the evidence that might have resulted in possible contamination, that there was a possibility." Simms was "mortified" when he discovered he was the criminalist who had done the initial forensic testing in the Claire Hough case. He told Lambert he had "concerns about a breach of protocol that I may have

committed that might have led to possible contamination." (*Id*. at 22).

7. Lambert applies for a search warrant by swearing that "cross DNA contamination is not possible."

On January 3, 2014, Lambert submitted his affidavit seeking a warrant to search Kevin Brown's home. Lambert swore that, during a meeting, SDPD Crime Lab Manager Jennifer Shen stated, "cross DNA contamination *is not* possible." (*Id*.) (emphasis in original). Shen testified at her deposition that she never stated cross contamination was not possible in this case or as a general matter.[3] (*Id*. 27).

Lambert further swore that after the discovery of Kevin Brown's DNA, Shen did a "thorough" inspection of the lab case files and records pertaining to the Claire Hough case. According to Lambert, Shen determined that Kevin had no "known contact with the evidence relating to this case and was never assigned to work with any evidence relating to this investigation." But Shen testified that supervisory lab officials ultimately determined not to conduct a quality assurance

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[3] Plaintiffs' DNA expert conducted a review of SDPD Lab records and found incidences of contamination from Lab staff in 41 cases. She reviewed documented incidences of cross contamination where sperm fractions from evidence in one case had been discovered in an entirely different case. At her deposition, Lab Manager Jennifer Shen testified to numerous reviews of contamination incidences in which staff members' DNA appeared on evidentiary items being tested. (Brown Answering Brief at 24-27).

investigation after the discovery of Kevin Brown's DNA on evidence in the Hough matter. As Shen explained, "we couldn't really investigate what might have happened prior to any of us – we couldn't really investigate what happened in 1980-something. There wasn't really any way to do that." (*Id*. 27-28).

After misrepresenting that "cross DNA contamination *is not* possible," Lambert omitted information indicating that contamination was the likely explanation for the presence of Kevin Brown's DNA. Cornacchia had told Lambert about the common practice of lab analysts using their own semen samples approximately two to three months after November 1, 2012. Despite his awareness of this practice, on January 3, 2014, Lambert did not inform the magistrate that analysts had used their own semen samples in the lab. Lambert did not mention the statements of Simms and Stam. Lambert did not explain the discrepancy between the one vaginal swab collected in 1984 and the 2012 DNA result that came from *two* swabs. (App. 69a) (emphasis added).

Lambert swore, "I believe the sexual intercourse Brown had with Claire HOUGH was not consensual and appears to be contemporaneous to the murder." (App. 87a). He averred that the presence of Kevin Brown's DNA on vaginal "swabs" and the violent manner in which Claire Hough's jeans were torn indicated Kevin Brown had raped Claire Hough. (App. 84a; 87a). Lambert then omitted information that showed Kevin Brown had not raped Claire Hough. Lambert omitted results from 1984 that neither the SDPD Lab nor the

Coroner's Office had detected any sperm on any vaginal swab taken from Claire Hough. Lambert did not inform the magistrate the Coroner's 1984 autopsy report made no finding of rape or sexual assault. He omitted evidence that showed Kevin Brown's DNA was not found on eight blood stains on Claire Hough's jeans, three blood stains on her underwear, and the torn zipper flap – all places where Ronald Tatro's DNA had been discovered.

8. SDPD officers seize massive quantities of Plaintiffs' property beyond the scope of the warrant.

On January 9, 2014, San Diego police officers executed the search warrant at the home of Kevin and Rebecca Brown. Defendants' conduct evidenced a flagrant disregard for Fourth Amendment constraints in several different ways. Lambert instructed detectives to seize every videotape and any photographic evidence. Lambert told detectives to seize all computers, all floppy discs, all hard discs, any address books, journals, or diaries. Maura Mekenas-Parga was the official in charge of executing the warrant and made decisions as to what to seize at the Brown home with Lambert's advice. (*Id.* 29-30).

Mekenas-Parga made the decision to seize entire boxes of photographs because the warrant authorized the seizure of some photographs. The warrant authorized seizure of photos depicting or related to "teenage or preteen pornography, rape, bondage, and

sadomasochism" and photos of Claire Hough, Ronald Tatro, James Alt, or Barbara Nantais. Despite this, Mekenas-Parga asserted that the warrant authorized seizure of any photo in the home, no matter who appeared in it. Mekenas-Parga asked Lambert whether all the photo albums should be taken, and he responded affirmatively. Mekenas-Parga told detectives to seize "any photographic evidence." (*Id*. 30).

Officers seized a cookbook of family recipes; educational material belonging to Rebecca Brown (a teacher at a Catholic school), including her copy of the Declaration of Independence, which she used to teach AP government. Defendants seized documents entitled "tongue twisters," "speech practice sheets," "tongue twister database," and "midcourse test." According to Mekenas-Parga, such documents fell within the scope of the warrant because they included handwritten notes. (The search warrant permitted seizure of "[a]ddress books, diaries/journals, handwritten in nature."). Mekenas-Parga believed the search warrant permitted officers to seize any document with handwritten notes on it.[4] (*Id*. 32).

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[4] At his deposition, Lambert admitted a number of items seized which were not within the scope of the warrant, including the following: (1) Rebecca Brown's international driving permit; (2) English Language Services music folder with a Broadmoor Song Book including songs such as 'Sweet Rosy O'Grady,' 'Smile, Smile, Smile,' and 'New York, New York'; (3) Kevin Brown's mother's 2000 tax return; (4) a note from Ronald and Nancy Reagan; (5) a coaster from the Black Angus in Wiesbaden, Germany; (6) a copy of the Magna Carta; (7) a copy of the U.S. Constitution; (8) a copy of the Declaration of Independence; (9) a booklet entitled, "Fatima

Lambert reviewed all evidence seized from the Brown family home. He did not find *any evidence* related to Claire Hough or *any evidence* that Kevin Brown was guilty. Lambert determined that none of the items seized from Plaintiffs were material to his investigation, or probative of wrongdoing by Kevin Brown. Yet, he retained Plaintiffs' property for six months after he completed his review. (*Id*. 35-36).

B. Procedural History

Rebecca Brown, on behalf of herself and as the successor in interest to the Estate of Kevin Brown, filed an action against Lambert and Mekenas-Parga alleging: (1) execution of a search warrant obtained in violation of *Franks v. Delaware* (against Lambert); (2) execution of an overbroad warrant (as to both Lambert and Mekenas-Parga); (3) seizure of property beyond the scope of the warrant (against both Lambert and Mekenas-Parga); (4) wrongful detention of, and refusal to return, seized property (as to Lambert); (5) wrongful death under 42 U.S.C. § 1983 (against Lambert); and (6) deprivation of the right of familial association (against Lambert). (App. 17a). Both parties sought summary judgment. Plaintiffs sought summary judgment on claims 3 and 4 only. (*Id*.).

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from the Mother of Christ Crusade"; (10) Rebecca Brown's report cards; (11) Rebecca Brown's 1969 Minnesota driving permit; (12) the music to the Star Spangled Banner; and (13) a recipe for fudge. (Brown Answering Brief at 34). This was a limited illustration of the thousands of items seized beyond the scope of the warrant.

The district court granted Lambert qualified immunity on Plaintiffs' fourth claim for wrongful detention of, and refusal to return, seized property. (*Id*. 37a). Plaintiffs had contended that Lambert had an obligation to return their property to them after he reviewed all the evidence seized from their home and determined the items had no probative value. But the district court concluded Lambert was entitled to qualified immunity because no established law gave Lambert "clear notice" that his continued detention of Plaintiffs' property under these circumstances violated the Fourth Amendment. (*Id*. 37a).

As to the third claim for seizure beyond the scope of the warrant, the district court determined there was no dispute that Lambert and Mekenas-Parga had seized "14 boxes of documents, four large trash bags containing Plaintiffs' property, and a suitcase" that contained "thousands of photographs and other items[.]" (*Id*. at 32a-33a). The district court found "[t]here is no dispute these items were not subject to seizure pursuant to the warrant." (*Id*. 33a). The court, surveying the law of this Court and the Circuit Courts of Appeals, found it was clearly established that officers may not seize property beyond the scope of the warrant.[5] (*Id*. 29a-32a; 34a-35a).

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[5] Regarding the wrongful death causes of action, the district court determined a reasonable jury could find Kevin Brown's death was a harm caused by the Fourth Amendment violations. (*Id*. 40a-41a). The district court found "numerous triable issues of material fact on the element of causation, which preclude entry of summary judgment." (*Id*. 40a).

On the *Franks* claim, the only claim on which Lambert seeks this Court's review, the district court found Lambert was not entitled to qualified immunity because "Plaintiffs have made 'a substantial showing of a deliberate falsehood or reckless disregard' for the truth." (*Id*. 22a) (internal citations omitted). The district court found:

> In the affidavit, Lambert stated Brown was a former employee of the SDPD Crime Lab, but he failed to inform the judge of the male lab employees' practice of using their own semen samples or samples from their coworkers in testing reagents in the Lab. Rather than raising the possibility that the vaginal swab may have been contaminated in the Lab by Brown's semen sample, Lambert stated Jennifer Shen, then the manager of the Lab, stated, "BROWN had no access to the evidence in the HOUGH murder" and "that cross contamination is not possible." This statement was made despite numerous documented instances of contamination in the Crime Lab. Lambert also failed to disclose to the judge that the autopsy analysis of the vaginal swab in 1984 was negative for sperm.

(App. 12a) (internal citations omitted).

It noted, "[d]espite failing to find any evidence linking Tatro and Brown, the affidavit identified Brown as a suspect in Claire's murder, together with Tatro." (*Id*. 12a-13a) (footnote omitted). "Defendants admit Lambert omitted that, despite a lengthy investigation, there was no evidence of any connection between Brown

and Tatro." (*Id*. 20a-21a). The district court listed Defendants' other concessions: Defendants "admit Lambert omitted the autopsy report" which concluded " 'No spermatazoa noted' in the oral, anal and vaginal smears taken from the victim[;]" Defendants "do not deny Lambert failed to disclose" that Simms had, "consistent with the autopsy results, found no evidence of sperm[;]" and "Defendants also do not deny that Lambert failed to disclose the information he received from Cornacchia that male analysts working in the SDPD crime lab, like Brown, used their own semen samples when testing reagents for acid phosphatase." (*Id*. 20a). Lambert had omitted the warning from former Lab staff who had worked with Kevin Brown of the possibility of cross contamination. (*Id*.).

The district court, in construing the evidence in the light most favorable to Plaintiffs, found these misrepresentations in Lambert's affidavit: (1) the statement that cross contamination was not possible; (2) the statement that Brown had no access to the evidence in the Hough case; and (3) the statement that Brown had sexual intercourse with the victim, Claire Hough. (*Id*. 21a). The district court found the first statement to be a misrepresentation because the witness had denied making it and because there had been several documented incidences of cross contamination by the SDPD Crime Lab. (*Id*.). The second statement was misleading because of evidence "that lab employees' semen was present in the Lab and available for testing reagents even if the employee was not otherwise involved or participating in the particular investigation." (*Id*.). The

third statement that "Kevin BROWN had sexual intercourse with 14 year old Claire HOUGH" was problematic because "it is couched in absolute terms when the evidentiary foundation for the statement is questionable." (*Id*. 22a). Because the autopsy report had not made any finding as to whether Hough had been raped or engaged in sexual intercourse before her death, and as cross contamination had not been ruled out, the district court found the statement "misleading because it failed to inform the magistrate about the possibility that Brown's DNA was linked to the case due to cross contamination." (*Id*.)

The district court determined Plaintiffs had "made a 'substantial showing of a deliberate falsehood or reckless disregard' for the truth." (*Id*. 22a) (internal citation omitted). It then analyzed whether the affidavit, with the misrepresentations corrected and supplemented with the omissions, established probable cause. The court stated, "'[i]f probable cause remains after amendment, then no constitutional error has occurred.'" (*Id*. 25a) (internal citation omitted). The district court determined the "affidavit, once corrected and supplemented, lacks probable cause to search Brown's home." (*Id*.).

The Court of Appeals affirmed. (App. 2a). Because the "district court found a genuine issue of disputed fact existed" as to whether Lambert had acted "deliberately or recklessly[,]" the appellate court did not have jurisdiction to review a district court's factual findings on interlocutory appeal. (*Id*. 3a). "'[F]or 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.'" (*Id*.) (internal citation omitted). The Court of Appeals found that it could properly determine the materiality of the misrepresentations and omissions. (*Id.*). It then determined that the affidavit, once corrected, "would have informed the magistrate that the DNA evidence cited was unreliable and most likely present because of the testing regime."[6] (*Id*.). The appellate court remanded the case to the district court where trial is scheduled to begin on February 3, 2020.

REASONS FOR DENYING THE PETITION

A police officer violates the Fourth Amendment when he misleads a magistrate by providing an affidavit the officer "knew was false or would have known was false except for his reckless disregard of the truth." *United States v. Leon*, 468 U.S. 897, 923 (1984), *citing Franks*, 438 U.S. 154. Lambert concedes, as he must, that "clearly established law" prohibits an officer from "making dishonest or reckless statements or omissions." (Pet. at 5). But Lambert contends review by this Court is warranted because "[i]n the context of a *Franks*-type qualified immunity case," the Court of Appeals has "either ignored the 'clearly established

[6] Although Lambert seeks review of the Ninth Circuit's denial of qualified immunity, he does not challenge the conclusion of materiality, or otherwise dispute the corrected affidavit did not establish probable cause.

law' analysis or defined it at such a high level of generality that it is meaningless." (*Id.*). Lambert specifically challenges a line of Ninth Circuit cases related to *Franks* deception claims in the § 1983 context, including *Butler v. Elle*, 281 F.3d 1014 (9th Cir. 2002), and *Chism v. Washington*, 661 F.3d 380 (9th Cir. 2011), *cert. denied*, 566 U.S. 938 (2012), arguing that these cases establish a "new 'standard'" in *Franks* § 1983 cases that does not conform to the objectively reasonable standard for qualified immunity. (Pet. at 19).

Review should be denied for three reasons. First, Lambert forfeited his argument by failing to raise it below. Second, the Ninth Circuit's standard for determining qualified immunity in a *Franks* claim is consistent with this Court's jurisprudence and is the same standard uniformly adopted by the Circuit Courts of Appeals. Third, the appellate court properly declined to review the district court's finding of disputed factual findings because it did not have jurisdiction to do so on interlocutory appeal.

A. Lambert Has Forfeited His Claim that Review Is Warranted Because of a Purportedly "New Standard" in *Franks* § 1983 Claims.

Before the Court of Appeals, Lambert never argued that any "new standard" for determining qualified immunity in *Franks* § 1983 claims, purportedly set forth in *Butler* and *Chism*, violated this Court's objectively reasonable standard for qualified immunity. (*See* Pet. 3, 19). Although Lambert now claims that *Chism*

"departed even further from this Court's precedent" (Pet. 5), Lambert never asked the Circuit Court to reconsider its prior precedent in *Chism*. Because he never raised it, the Court of Appeals had no occasion to consider or address the argument.

"If an error is not properly preserved, appellate court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed." *Puckett v. United States*, 556 U.S. 129, 134 (2009). This limitation on a reviewing court's authority "prevents a litigant from 'sandbagging' the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Id*. (internal citation omitted). Permitting a petitioner to present new claims never considered by the lower courts would force this Court to "engage in unduly weighty and cumbersome decision-making without a decent record" from the lower courts. *Keepseagle v. Perdue*, 856 F.3d 1039, 1054 (D.C. Cir. 2017), *cert. denied sub nom.* 138 S. Ct. 1326 (2018).

In the Court of Appeals, Lambert argued that the district court erred when it found that Plaintiffs made a substantial showing that Lambert engaged in deliberate or reckless misrepresentations and omissions in his affidavit. Lambert made factual arguments on his omissions of the autopsy's finding that no spermatozoa were present in the Coroner's swabs taken from the victim's vagina, mouth and anus; the finding by Simms that there was no sperm on microscopic examination of the lab's vaginal swab; the information from Cornacchia that analysts like Brown used their own semen

samples when testing reagents for acid phosphatase; and the finding that there was never any evidence of any association or connection between Kevin Brown and Tatro. (Opening Brief 17-22). Lambert made factual arguments that the district court erred regarding his misrepresentations including, *inter alia*, the assertion that contamination was impossible in this case. (*Id*. 22-27). Finally, Lambert contended that the district court erred when it denied qualified immunity because a reasonable officer in Lambert's position "could have failed to recognize the effect of his actions on the probable cause determination." (*Id*. 37-38).

At no point did Lambert fairly raise the issue he presents for the first time in his petition for *certiorari*. Lambert asks this Court to decide a "novel legal issue[ ] in the first instance[,]" *Keepseagle*, 856 F.3d at 1054, without the "robust record necessary to properly evaluate the substance of these arguments." *Id*. at 1055. Lambert may not raise his argument for the first time in a petition for a writ of *certiorari*.

B. A Robust Consensus of Authority Clearly Prohibits an Affiant's Deliberate Misrepresentations and Omissions, or Conduct in Reckless Disregard of the Truth.

1. Ninth Circuit's standard for determining qualified immunity in a *Franks* § 1983 action is the same standard as employed by all Circuit Courts of Appeals.

Although Lambert claims the Ninth Circuit's jurisprudence in *Franks* § 1983 claims has deviated from this Court's precedent (Pet. 19), a robust consensus of authority supports the Ninth Circuit's adoption of *Franks*' two-prong standard for suppression to the § 1983 qualified immunity analysis. In *Franks*, this Court held criminal defendants challenging the veracity of statements in an affidavit for a search warrant are entitled to a suppression hearing when the defendant: (1) makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth" was made in the affidavit; and (2) the false statements are material, *i.e.*, "necessary to the finding of probable cause[.]" 438 U.S. 155-56. Suppression is warranted after the hearing if the defendant establishes "the allegation of perjury or reckless disregard" by a "preponderance of the evidence" and the affidavit, once corrected by the removal of false material, is "insufficient to establish probable cause." *Id*.

The Ninth Circuit, following the Tenth Circuit's holding in *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991), adopted

Franks' two-prong standard for a suppression hearing to its analysis of qualified immunity on summary judgment in a civil § 1983 case.[7] *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995). "In sum, a plaintiff can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can *both* establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant." *Id*. (emphasis in original). "The showing necessary to get to a jury in a section 1983 action is the same as the showing necessary to get an evidentiary hearing under *Franks.*" *Id*., *citing Snell*, 920 F.2d at 698. *Accord Hindman v. City of Paris, Tex.*, 746 F.2d 1063, 1067 (5th Cir. 1984) (because

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[7] The Courts of Appeals have recognized that *Franks* applies to material omissions in § 1983 actions. *See*, *e.g.*, *Burke v. Town of Walpole*, 405 F.3d 66, 88 (1st Cir. 2005) (recognizing the "clearly established prohibition on material omissions by officers central to an investigation from an arrest warrant application"); *Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir. 1991) ("Intentional or reckless omissions of material information, like false statements, may serve as the basis for a *Franks* challenge."); *Hale v. Fish*, 899 F.2d 390, 400 (5th Cir. 1990) (in § 1983 action finding material omissions in affidavit "especially effective in negating probable cause"); *Olson v. Tyler*, 771 F.2d 277, 281 n.5 (7th Cir. 1985) ("The *Franks* rationale applies with equal force where police officers secure a warrant through the intentional or reckless *omission* of material facts."); *Stewart v. Donges*, 915 F.2d 572, 582-83 (10th Cir. 1990) ("we hold that at the time defendant submitted his affidavit and arrested plaintiff, it was a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause.").

"issue of the officers' truthfulness and intent at the time they applied for the warrant is one of fact" in § 1983 suit, jury should be "the primary factfinder."); *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989) ("While the Court is necessarily the factfinder in a *Franks* suppression hearing preliminary to a criminal trial, in a § 1983 action factfinding under the *Franks* standard is the province of the jury.").

All Circuits have adopted *Franks'* two-prong standard for suppression to § 1983 claims alleging deception in procurement of a warrant. *See*, *e.g.*, *Burke v. Town of Walpole*, 405 F.3d 66, 82 (1st Cir. 2005); *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991) ("The *Franks* standard, established with respect to suppression hearings in criminal proceedings, also defines the scope of qualified immunity in civil rights actions."); *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000); *Miller v. Prince George's Cty., MD*, 475 F.3d 621, 629, 631-32 (4th Cir. 2007); *Hale v. Fish*, 899 F.2d 390, 400 (5th Cir. 1990); *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003); *Beauchamp v. City of Noblesville, Ind.*, 320 F.3d 733, 742-43 (7th Cir. 2003); *Bagby v. Brondhaver*, 98 F.3d 1096, 1098-99 (8th Cir. 1996); *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996); and *Holmes v. Kucynda*, 321 F.3d 1069, 1083-84 (11th Cir. 2003).

The Courts of Appeals have uniformly held the Constitution prohibits a police officer from deliberately, or with reckless disregard, making materially false statements in an affidavit for a search warrant. "It has long been clearly established that the Fourth Amendment's warrant requirement is violated when 'a

false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit' if the false statement is necessary to a finding of probable cause." *Clanton v. Cooper*, 129 F.3d 1147, 1154-55 (10th Cir. 1997) (internal citation omitted), *overruled on other grounds by Becker v. Kroll*, 494 F.3d 904, 917-19 (10th Cir. 2007). The Fourth Circuit expressly observed in *Miller* in 2007:

> The law was unquestionably clearly established at the time of the events at issue here. Det. Dougans had "fair warning" that the Constitution did not permit a police officer deliberately, or with reckless disregard for the truth, to make material misrepresentations or omissions to seek a warrant that would otherwise be without probable cause. No reasonable police officer in Det. Dougans's position could believe that the Fourth Amendment permitted such conduct.

Miller, 475 F.3d at 632 (internal citation omitted). *Accord Burke*, 405 F.3d at 88; *Soares v. State of Conn.*, 8 F.3d 917, 920 (2d Cir. 1993); *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985); *Moody v. St. Charles Cty.*, 23 F.3d 1410, 1412 (8th Cir. 1994); *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) ("No one could doubt that the prohibition on falsification or omission of evidence, knowingly or with reckless disregard for the truth, was firmly established as of 1986, in the context of information supplied to support a warrant for arrest."); *Holmes*, 321 F.3d at 1084 ("[T]he law was clearly established in [1998] that the Constitution prohibits a

police officer from knowingly making false statements in an arrest affidavit about the probable cause for an arrest.") (internal citation omitted); *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994) ("Kelly contends that Gibson thereby violated a clearly established duty not to seek a warrant on the basis of perjured testimony. We agree.").

Nonetheless, Lambert contends "[w]ith no clearly established law to provide guidance, he used his best judgment to decide what DNA-related information to include, or not include, in the affidavit." (Pet. 6). This is not the unconstitutional conduct alleged by Plaintiff. It obfuscates the relevant qualified immunity analysis. Plaintiffs contend Lambert lied when he averred to the magistrate that "cross DNA contamination *is not* possible." This case is more straightforward – may a detective deceive a magistrate about the presence of probable cause? A robust consensus of authority among the Courts of Appeals establishes that the Fourth Amendment clearly prohibits an officer from intentionally, or with reckless disregard for the truth, making materially false statements or omissions in his sworn affidavit.

2. The Circuit Courts of Appeals' application of *Franks*' two-prong standard for suppression to the § 1983 qualified immunity analysis is consistent with this Court's instruction in *Malley v. Briggs*.

Although Lambert claims the Ninth Circuit has violated this Court's precedent, the Ninth Circuit's adoption of the *Franks*' standard for suppression to a civil § 1983 claim is consistent with the Court's instruction in *Malley v. Briggs*, 475 U.S. 335, 344 (1986) (applying *Leon* to § 1983 cases). This Court's jurisprudence in the Fourth Amendment warrant context has drawn from both civil and criminal opinions with the civil standard for liability frequently mirroring the criminal standard for suppression.

For example, in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court adopted an objectively reasonable standard for determining qualified immunity. Qualified immunity will only be lost when an officer's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. The Court adopted *Harlow*'s objectively reasonable standard in *Leon* to hold that where officers act in objective good faith, suppression is not warranted. 468 U.S. at 920-21.

Thereafter, to determine § 1983 liability in a case where an officer misled a magistrate to obtain a warrant, the First Circuit adopted the "parallel fourth amendment analysis of the Supreme Court" in *Leon*. *Briggs v. Malley*, 748 F.2d 715, 720 (1st Cir. 1984), *aff'd*

and remanded, 475 U.S. 335 (1986). "The Court's adoption of the *Harlow* standard for suppression appears to mean that 'in all cases in which its "good faith" exception to the exclusionary rule would operate, there will also be immunity from civil damages.'" *Id*., *quoting Leon*, 104 S.Ct. at 3456 n.35 (Stevens, J., dissenting). In other words, if suppression is appropriate "where the obtaining officer should have known there was no probable cause, liability of the obtaining officer will also be appropriate." *Briggs*, 748 F.2d at 720.

The Court agreed: "we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*, *supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley v. Briggs*, 475 U.S. 335, 344 (1986).[8] In *Malley*, the Court noted, it would be "incongruous" to subject police officers to *Leon*'s suppression standard in the criminal context, but exempt police officers from scrutiny in a § 1983 civil action. *Id*. at 344.

Likewise, in § 1983 *Franks* claims alleging deception in the warrant affidavit, "[a]ppellate courts have consistently held that the *Franks* standard for suppression of evidence informs the scope of qualified immunity in a civil damages suit against officers who allegedly procure a warrant based on an untruthful

[8] Though *Malley* involved an officer's affidavit for an arrest warrant, the Court noted "the distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant." *Id*. at 344 n.6.

application." *Burke*, 405 F.3d at 82. The Seventh Circuit used *Franks*' suppression standard to satisfy the "clearly established" prong of qualified immunity in a § 1983 action. *Olson*, 771 F.2d at 281. "An officer's conduct in preparing a warrant affidavit that contains only inaccurate statements that are untruthful as that term is defined in *Franks* violates the arrestee's fourth amendment rights. In such a case, a reasonably well-trained police officer would have known that the arrest was illegal." *Id*. In a criminal case, "suppression would be warranted because an officer was dishonest or reckless in preparing a warrant affidavit[;]" likewise, in the civil context, an officer "would not enjoy good faith immunity for civil damages." *Id*. at 282.

Although Lambert's misrepresentation that "cross DNA contamination *is not* possible" would subject him to a suppression hearing in a criminal case, he claims that he is entitled to immunity in a civil case because the "only 'clearly established law' that was violated was a generalized prohibition against making dishonest or reckless statements or omissions." (Pet. 5). This, Lambert claims, is "contrary to the Court's direction." (*Id*.). Lambert's argument, though not exactly clear, appears to be that, although he knows he cannot lie to a magistrate to obtain a search warrant, he is still entitled to qualified immunity because no specific case held that he could not tell *this particular lie* to the magistrate. A competent officer would not believe it was lawful to tell any lie. The approach urged by Lambert would subject officers to more scrutiny in criminal cases while exempting officers from liability in civil

cases – an approach the Court expressly rejected in *Malley* when it adopted *Leon*'s standard to determine the scope of immunity in a § 1983 case. 475 U.S. at 344.

As the Court recognized in *Malley*, while the "exclusionary rule serves a necessary purpose, it obviously does so at a considerable cost to society as a whole, because it excludes evidence probative of guilt." *Id*. In contrast, in a civil § 1983 action, "a damages remedy for an arrest following an objectively unreasonable request for a warrant imposes a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering a criminal prosecution." *Id*. There is a greater likelihood that plaintiffs in a § 1983 action will benefit from this remedy because they are the "most deserving of a remedy – the person who in fact has done no wrong[.]" *Id*.

3. *Leon* established that lying to a magistrate is objectively unreasonable conduct.

According to Lambert, "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 his affidavit[.]" (Pet. 3). But as this Court discussed in *Leon*, lying to a magistrate is objectively unreasonable conduct that is not subject to *Leon*'s "good faith" rule. 468 U.S. at 922-23. *Leon* expressly excluded acts of deception from objective good faith, making it clear "that in some circumstances the officer will have no reasonable grounds for believing the warrant was properly

issued." *Id*. Therefore, suppression "remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information . . . that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Id*. at 923.

Franks and *Leon* establish the proposition that Lambert claims is not clearly established: it is not objectively reasonable for an officer to obtain a warrant through material misrepresentations. "If an officer submitted an affidavit that contained statements he knew to be false or would have known were 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 an objectively reasonable manner." *Olson*, 771 F.2d at 281. *Accord Burk v. Beene*, 948 F.2d 489, 494 (8th Cir. 1991).

For this reason, in a *Franks* claim, the inquiry as to objective reasonableness is embedded in the underlying state-of-mind issue – if an officer acts with "deliberate falsehood or reckless disregard for the truth" then he acts unreasonably. *Butler*, 281 F.3d at 1024. In a civil § 1983 *Franks* claim, the Ninth Circuit "effectively intertwine[s] 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." *Id*. This merger is "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." *Id*. Although Lambert criticizes *Butler*, his reasons are not entirely clear. (*See* Pet. 19). *Butler* merely reiterates the principle from both *Franks* and *Leon* – that it is not objectively reasonable for an officer dishonestly or recklessly to mislead a magistrate as to the existence of probable case.

To the extent Lambert objects to the Ninth Circuit's inquiry into an officer's state-of-mind in a § 1983 *Franks* claim because qualified immunity is an objectively reasonable standard, the Court of Appeals previously examined this precise issue in *Branch v. Tunnell*, 937 F.2d 1382, 1385 (9th Cir. 1991), *overruled on other grounds by Calbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). *Branch* examined *Harlow*'s objectively reasonable standard for qualified immunity in the context of a *Franks* warrant claim. It noted the "tension" between "*Harlow's* emphasis on 'objective reasonableness' and cases in which the 'clearly established law' at issue contains a subjective element, such as motive or intent." *Branch*, 937 F.2d at 1385. But the Ninth Circuit cited to its sister circuits that "have held that *Harlow* does not preclude consideration of subjective factors (unrelated to knowledge of the law) in assessing a defendant's entitlement to qualified immunity." *Id*. 1385-86. The court chose to follow the standard set by the D.C. Circuit. *Id*. at 1386.

As then Circuit Judge Scalia, writing for the D.C. Circuit, explained, whether conduct violates clearly established law can depend on the intent motivating such conduct: "it is impossible to place '[r]eliance on the objective reasonableness of an official's conduct, as

measured by reference to clearly established law,' when clearly established law makes the conduct legal or illegal depending upon the intent with which it is performed." *Halperin v. Kissinger*, 807 F.2d 180, 184 (D.C. Cir. 1986) (internal citation omitted). *Harlow*'s prohibition of judicial inquiry into an official's state of mind pertained to judicial examination of the defendant's knowledge of the state of the law. *Id.* at 186. To read *Harlow* as prohibiting inquiry into a defendant's intent, unrelated to knowledge of the law, would foreclose a vast scope of cases where a defendant knows he is acting unlawfully. *Id*. "The lower courts have been unwilling to rest such a massive expansion of official immunity upon the language of *Harlow* and later cases, without more specific indication that that was intended." *Id*.

Because an officer's conduct in dishonestly or recklessly misleading a magistrate as to the existence of probable cause is objectively unreasonable, and *Harlow* does not prohibit inquiry into an officer's intent in this § 1983 context, Lambert's request for review by this Court is not warranted.

C. The Court of Appeals Properly Declined Lambert's Request to Review the District Court's Finding of Disputed Issues of Fact on Interlocutory Appeal.

Lambert seeks the Court's review because the appellate court purportedly erred in failing to address whether Plaintiffs made a substantial showing that

Lambert acted with deliberate falsity or reckless disregard for the truth. This is contradicted by Lambert's earlier statement in his petition when he claims appellate court error because "[i]nstead 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." (Pet. 4).

Lambert misconstrues the appellate court's order, which affirmed the district court's denial of qualified immunity because of substantial inaccuracies in the affidavit. Lambert had urged the Ninth Circuit to find that there was no genuine issue of disputed fact as to whether Lambert had deliberately or recklessly misrepresented or omitted information from his affidavit. The Court of Appeals declined because it had no jurisdiction to do so on a qualified immunity interlocutory appeal. (App. 2a-3a).

In *Johnson v. Jones*, 515 U.S. 304, 313 (1995), the Court held that a district court's determination that issues of disputed fact precluded the grant of summary judgment was not subject to review on interlocutory appeal, even in a qualified immunity context. The Court limited interlocutory appeals of qualified immunity to "abstract issues of law." *Id*. at 317. The Ninth Circuit has adhered to *Johnson*'s precedent, reiterating that on interlocutory appeal, its jurisdiction is "limited to questions of law; it does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact." *Schwenk v.*

Hartford, 204 F.3d 1187, 1195 (9th Cir. 2000). To determine whether the alleged conduct violates clearly established law, "we assume the version of the material facts asserted by the nonmoving party[.]" *Id*., *citing Behrens v. Pelletier*, 516 U.S. 299, 312 (1996). There was no error.

CONCLUSION

Lambert's conduct violated this Court's clearly established *Franks'* prohibition on judicial deception. Review should be denied.

Respectfully submitted,

EUGENE IREDALE
Counsel of Record
JULIA YOO
GRACE JUN
IREDALE AND YOO, APC
105 West F St., Fourth Floor
San Diego, CA 92101
Tel: (619) 233-1525
egiredale@iredalelaw.com

Counsel for Respondents