

No. 19-541

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**In The  
Supreme Court of the United States**

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MICHAEL LAMBERT,

*Petitioner,*

v.

ESTATE OF KEVIN BROWN,  
by its Successor in Interest Rebecca Brown, et al.,

*Respondents.*

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

—◆—  
**REPLY BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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## I. Introduction

This case, while involving a unique set of facts, also involves an important federal question that should be settled by this Court: should the reviewing court, in a case such as this, as in every other qualified immunity case, evaluate the objective reasonableness of the officer's actions in light of the specific context of the case? Although this Court has repeatedly held that government officials performing discretionary functions are entitled to qualified immunity from civil damages liability as long as their actions are objectively reasonable (see, e.g., *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)), it has not provided guidance as to how this objectively reasonable standard is to be applied in the context of a civil rights lawsuit where judicial deception has been alleged.

Brown, and the Ninth Circuit, contend that so long as there has been a showing of “judicial deception,” i.e., alleged misrepresentations or omissions in the affidavit, the officer's conduct cannot be objectively reasonable and the qualified immunity analysis ends there.

Yet, this Court has stated time and time again, that central to the qualified immunity analysis is whether a reasonable officer would know that his conduct is unlawful in the situation with which he is confronted. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

Here, the Ninth Circuit failed to address whether Lambert acted reasonably when he decided what to include or not include in the affidavit. Instead, it

determined that the issue before the court was “whether the affidavit, once corrected and supplemented, would provide a magistrate with a substantial basis for concluding that probable cause existed.” Even then, its cursory analysis determined the alleged misstatements and omissions would have had an effect on the issuing of the warrant without considering whether the materiality of those misstatements or omissions would have been clear to Lambert when he decided what to include in, and what to exclude from, the affidavit.

The Ninth Circuit should have asked whether clear lines have been drawn for when alleged misrepresentations or omissions regarding DNA evidence (e.g., stating that contamination “is not possible” instead of “unlikely . . . barring an incredible breach in protocol”), are material so that a reasonable officer in Lambert’s position could have failed to recognize that the facts he decided not to disclose would have an effect on the probable cause determination. It was error to not do so. Summary reversal is appropriate on this point.

In addition, the Ninth Circuit failed to address whether Brown made a substantial showing of deliberate falsehood or reckless disregard by Lambert. Brown argues this was a question of fact not properly addressed to the Court of Appeal. (Brief in Opposition 36.) Brown misunderstands: the burden was on her, as the party resisting summary judgment, to make a substantial showing of a deliberate falsehood or reckless disregard for the truth by Lambert, and that the

misrepresentation or omission was material. *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995). Whether she made that substantial showing and whether the alleged misrepresentations or omissions were material, are questions of law for the court. *Id.* at 789-90. Only if Brown makes this required showing does the question of intent or recklessness then go to the trier of fact for determination.

The Ninth Circuit failed to review the evidence to determine whether Brown made the required substantial showing of material falsehood or omissions. This Court should therefore grant the Petition and reverse the decision below.

## **II. The Petition Does Not Violate Supreme Court Rule 14(1)(g)**

Brown claims the Petition omits “the factual basis for the lower courts’ denial of qualified immunity, i.e., [Lambert’s] extensive misrepresentations and omissions,” in violation of Supreme Court Rule 14(1)(g). This case, however, turns on legal, not factual, errors. Nevertheless, on the very first page of the Petition, under “Questions Presented,” Lambert states that “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.” The Petition also includes, in the Appendix, the Ninth Circuit’s Memorandum Opinion and the District Court’s Second Amended Order. The District Court’s

order, in particular, extensively addresses the alleged misrepresentations and omissions.

Brown's contention that Lambert "deliberately lied" to the magistrate is a hotly disputed fact that is not properly before this court. Indeed, the District Court specifically stated that "Plaintiffs will have to convince a jury that Lambert deliberately or recklessly omitted the foregoing facts and included the misleading statements in the affidavit. . . . That is a factual determination for the trier of fact." (Appendix 26a.)

What *is* before this court is whether the lower courts erred by failing to determine whether a reasonable officer in Lambert's position would have known that his conduct was unlawful under the circumstances. This is "a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). An extensive recitation of facts is therefore not necessary to this Court's consideration of this Petition. In any case, any relevant facts are contained in the Appendix. Brown's claim that the Petition violates Rule 14(1)(g), justifying denial of this Petition, should be rejected.

### **III. Lambert Is Not Making a New Claim and Did Not Forfeit His Right to Present the Arguments in this Petition**

Lambert, at every stage of these proceedings, has claimed that he is entitled to qualified immunity. He has also claimed, as admitted by Brown, that the district court erred when it denied him qualified immunity because a reasonable officer in his position could

have failed to recognize the effect of his actions on the probable cause determination. (Br. in Opp. 24.) In fact, Lambert argued in his Opening brief in the Ninth Circuit, Case No. 17-55930, ECF No. 9-1, at 43, that: “Plaintiffs and the District Court failed to point to any instance where omissions or misrepresentations of information regarding possible contamination of DNA has led to a *Franks* violation thereby vitiating probable cause.” Likewise, at 59, he stated: “There is no precedent that put Lambert on clear notice that investigating Kevin Brown in these particular circumstances violated Kevin or Rebecca Brown’s constitutional rights.” These are not new claims; they are not even new arguments.

Claims, not arguments, are waived by a party’s failure to present an issue to the court below. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Therefore, even if the arguments in this Petition had not been made in the lower courts, which they were, they would not be forfeited here.

#### **IV. Lambert is Entitled to Qualified Immunity**

Brown’s Brief in Opposition only serves to highlight the need for the Court to grant certiorari in this case. Brown cites to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *U.S. v. Leon*, 468 U.S. 897 (1984), acknowledging this Court’s adoption of “an objectively reasonable standard for determining qualified immunity,” and that “where officers act in objective good faith, suppression is not warranted.” (Br. in Opp. 30.) Yet, she

disregards this objectively reasonableness standard. Instead of examining whether Lambert acted reasonably in deciding what to include or not include in the affidavit, she incorrectly argues that if there was a substantial showing of deliberate or reckless misstatements or omissions, Lambert could not have acted reasonably. Brown misses the point.

Reasonableness is measured in objective terms by looking to the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). The dispositive question is whether the particular conduct violates clearly established law; this inquiry must be undertaken “in light of the specific context of the case, not as a broad general proposition.” *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015). In other words, the proper inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronting him. *Graves v. City of Coeur d’Alene*, 339 F.3d 828, 846 (9th Cir. 2003).

As a result, this Court has repeatedly required that the right the official is alleged to have violated must have been clearly established “in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson*, 483 U.S. at 640. Moreover, Brown, not Lambert, bears the burden of showing that the right at issue was clearly established. *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011).

In this case, however, as in other civil rights cases where judicial deception is alleged, the Ninth Circuit has disregarded the established law on qualified immunity. It has admittedly “intertwined” and “merged” the required objective reasonableness analysis with the subjective deliberate or reckless disregard analysis, going so far as to say that “an officer is per se acting unreasonably if he obtains a warrant via judicial deception,” and that “government employees are not entitled to qualified immunity on judicial deception claims.” *Chism v. Washington State*, 661 F.3d 380, 393 (2011), citing *Butler v. Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002).

In doing so, the Ninth Circuit ignores the fact, recognized by this Court, “that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present,” and “that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable.” *Anderson v. Creighton*, 483 U.S. at 641.

This issue is particularly salient in this case. Lambert was investigating a vicious murder that had taken place nearly 30 years earlier. He conducted an extensive investigation, interviewing more than a dozen witnesses, reviewing reports and evidence, and performing on-line research. (App. 51a-91a.) He conferred with other detectives, police officers, and lab personnel. The affidavit was forty-five pages long and was thorough and detailed. (App. 46a-91a.) At the time, Lambert had been a detective for 19 years. (App. 50a.)

However, he was not a lawyer, he was not a DNA expert, he was not a medical professional or a scientist. He relied on the experts, he put the information he gathered from the experts in the affidavit.

How, then, should these principles be applied in a civil rights action such as this where judicial deception has been alleged? Lambert submits that the analysis conducted by the Ninth Circuit in *Lombardi v. City of El Cajon*, 117 F.3d 1117 (9th Cir. 1997) (“*Lombardi*”), before the Ninth Circuit essentially abandoned the objective reasonableness test in such cases, should be adopted by this Court.

In *Lombardi*, the court of appeals summarized the circuit’s test for a claim of qualified immunity in a *Franks*-type case on summary judgment: a plaintiff must establish both (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. *Lombardi*, 117 F.3d at 1124.

*Lombardi* then noted that “*Hervey* controls how the analysis must proceed,” and that “*Hervey* itself turned on objective reasonableness, as do all issues of qualified immunity.” *Lombardi*, 117 F.3d at 1125. The court concluded that “it is only objectively unreasonable for a law enforcement officer deliberately or recklessly to make material omissions.” *Id.* at 1126. Except in the most outrageous cases, e.g., where evidence is fabricated, “materiality may not have been clear at the time the officer decided what to include in and what to

exclude from, the affidavit. In such cases, 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.” *Ibid.*

Applying this analysis to the facts before it, the *Lombardi* court determined that the plaintiff had made a substantial showing that the officer had intentionally omitted facts. However, whether those facts were “material” was “a much more difficult question.” *Lombardi*, 117 F.3d at 1126. “Looking to the legal rules that were clearly established when the application was made,” the court could not say that a magistrate would not have issued the warrant if he had been given all the information the officer knew about the informants. *Ibid.*

It then held that “[b]ecause we have not 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, a reasonable officer in Shakowski’s position could have failed to recognize that the facts he decided not to disclose would have an effect on the probable cause determination. It is not objectively unreasonable to omit facts that aren’t material. Therefore, we leave standing the district court’s partial summary judgment in Shakowski’s favor on the omissions.” *Lombardi*, 117 F.3d at 1127.

Here, the lower courts should have identified a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. *Lombardi*, 117 F.3d at 1121. They did not do so, nor could they have. Lambert is unaware of a similar case, and Brown has not identified such a case. Because there is no clearly established law on point, materiality may not have been clear to Lambert when he decided what to include or exclude from the affidavit. He should have been granted qualified immunity because a reasonably trained officer would not have known that the alleged misstatements or omissions would have any effect on issuing the warrant. The Ninth Circuit panel manifestly erred by denying it. Summary reversal is appropriate.

**V. The Ninth Circuit Should Have Reviewed the District Court's Determination that Brown Made a Substantial Showing of Judicial Deception**

The Ninth Circuit should have reviewed de novo the district court's conclusion that Brown made a substantial showing of judicial deception and that the alleged misstatements and omissions in the affidavit were material. *United States v. Hernandez*, 80 F.3d 1253, 1260 (9th Cir. 1996). These were questions of law for the court. *Hervey*, 65 F.3d at 789-90.

Brown claims that this Petition takes issue with the Ninth Circuit's refusal to review disputed issues of

fact. She misconstrues the Petition just as the Ninth Circuit misconstrued the law.

To defeat summary judgment, Brown was required to make a substantial showing of Lambert's deliberate falsehood or reckless disregard for the truth. *Hervey*, 65 F.3d at 789. The reviewing court must accept as true the facts as she alleged them. *Liston v. Cty. of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997). However, whether Brown made a substantial showing of judicial deception, and whether the alleged misstatements and omissions in the affidavit were material, are questions of law. *Hervey*, 65 F.3d at 789-90. Indeed, the question of qualified immunity itself is normally one for the court. *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991).

Here, the Ninth Circuit failed to review the district court's determination that Brown made the requisite substantial showing of deliberate falsehood or reckless disregard even though it was required to do so. This re-affirms the need for this Court to provide direction to the lower courts on how to address claims of qualified immunity in civil rights cases where judicial deception is alleged.

## **VI. Conclusion**

An officer such as Lambert cannot be expected, and is not required, to include in a search warrant affidavit every piece of information gathered in the course of an investigation. The district court and Ninth Circuit panel should have analyzed whether a reasonably well-trained officer in 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. There was, however, no clearly established law to guide Lambert in his determination. As a result, Lambert should have been granted qualified immunity, summary judgment should have been granted, and this Petition should be granted.

Dated: January 9, 2020

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