No. _____

IN THE

Supreme Court of the United States

DAVID HUESTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether a *Franks* violation occurred, whether a reviewing court may place substantial evidentiary weight on an officer-affiant's consultation with a prosecuting attorney before seeking and obtaining a search warrant?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Hueston, 21-cr-00037-HAB-SLC, United States District Court for the Northern District of Indiana. Judgment entered January 5, 2023.

United States v. Hueston, Appeal No. 23-1057, United States Court of Appeals for the Seventh Circuit. Judgement entered January 12, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Hueston respectfully petitions for a writ of certiorari from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. pp. 1a-12a) is reported at 90 F.4th 897. The district court's opinion and order (App. pp. 13a-26a) is unreported but available at 2021 WL 5231734.

JURISDICTION

The court of appeals entered judgment on January 12, 2024. App. p. 27a. This petition, accordingly, is timely under Supreme Court Rule 13.3. This Court exercises jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

INTRODUCTION

The exclusionary rule has substantial social costs; so too are the social costs great when law enforcement intentionally misleads or is reckless with the truth in obtaining a search warrant. Among those social costs, is the damage done to the peoples' justifiable belief and expectation that their constitutional rights are respected by law enforcement and, when relief is denied, that their constitutional interests were worthy of protection by the judiciary.

This petition presents an important question of law that has not been resolved, but should be, by this Court. That is, whether an officer-affiant's consultation with a prosecuting attorney before a warrant is sought and obtained is an appropriate factor for a reviewing court to weigh in a *Franks* challenge, and a basis to find law enforcement committed no *Franks* violation.

In *Messerschmidt v. Millender*, this Court held that an officer-affiant was entitled to qualified immunity based, in part, on the officer's act of presenting a search warrant application to a supervising officer and a deputy district attorney for review *before* seeking the warrant from a magistrate judge. 132 S. Ct. 1235, 1250 (2012). In *Messerschmidt*, this Court found that the officer-affiant's consultation informed whether reliance on the issued warrant was objectively unreasonable under the qualified immunity standard. *See id.* at 1246-47.

Mr. Hueston's petition asks whether the fact that an officer-affiant consulted with a prosecuting attorney before seeking a search warrant should be used by a reviewing court to find the officer-affiant committed no *Franks* violation. Certainly,

a prosecuting attorney's review of a warrant affidavit may be useful in determining reasonable reliance on probable cause – because an attorney's competence in evaluating questions of law are high. However, the review has no utility in determining whether the officer-affiant intentionally mislead or was reckless in representing the truth – a question of fact. Mr. Hueston's petition presents an ideal opportunity for this Court to resolve this important question and to clarify the scope and extent of *Messerschmidt*.

STATEMENT OF THE CASE

This petition stems from the Marion, Indiana Police Department's late-night February 12, 2021, search of Petitioner David Hueston's residence and the warrant issued purportedly authorizing the search. App. p. 14a.

The warrant was based on information obtained by the Marion Police the previous day, from a tipster, that Mr. Hueston had been distributing controlled substances from his residence, an upper apartment in a duplex complex. App. p. 2a. The tipster told officers that Mr. Hueston kept firearms in his residence, had visible quantities of controlled substances in the residence, and that Mr. Hueston owned a green Mini Cooper parked outside of his residence. *Id.* Law enforcement reviewed the tipster's criminal background, and found that he had a 2015 theft arrest. App. pp. 2a-3a.

The day after meeting with the tipster, February 12, 2021, Marion Police began a brief visual and electronic surveillance of Mr. Hueston's residence. App. p. 3a. Excluding a break, the surveillance lasted 3-4 hours. During that surveillance,

officers observed a black truck park outside and the driver enter the duplex complex from the common exterior door. App. p. 3a. The driver, a male, was not observed entering Mr. Hueston's apartment – the officers, positioned outside, could only see the front entry door leading to the downstairs apartment. *Id.* After the man left the complex in the parked black truck, officers pulled the vehicle over and found a quantity of controlled substances. *Id.* The person driving the black truck was not Mr. Hueston. *Id.* Officers conducted the traffic stop of the black truck at approximately 8:45 p.m.

Later that evening, the officer-affiant applied for the warrant and executed the warrant. App. p. 4a. Before applying, the officer-affiant had discussed the case with a local prosecutor before drafting the warrant and received the prosecutor's approval of the written affidavit before submitting the warrant application. App. p. 4a. Given the minimal period between when the warrant was drafted and executed – all after 8:45 p.m. on the same evening – whatever consultation with the prosecuting attorney occurred, can be inferred as hasty.

The affidavit filed included no information regarding the tipster's identity, that the interview with the tipster had been recorded, and that the tipster's identity had been known to the police (was not an anonymous source). *Id.* The affidavit did not mention the tipster's drug addiction and arrest history, and did not indicate whether the tipster had firsthand knowledge of Mr. Hueston's alleged illegal conduct. App. p. 4a. The affidavit failed to disclose that the green Mini Cooper was not registered to Mr. Hueston (a fact known to the officer-affiant when the warrant

was drafted and sought), that Mr. Hueston was not seen driving the Mini Cooper, and that, in fact, a female had been observed driving the Mini Cooper. *Id.* The affidavit falsely stated the driver of the black truck was observed by officers walking out of Mr. Hueston's residence – on the contrary, officers did not observe the driver enter or exit Mr. Hueston's residence, the upper flat. *Id.* That was a direct misrepresentation.

In April 2021, the government indicted Mr. Hueston in the Northern District of Indiana with assorted federal controlled substance offenses and firearm offenses. App. p. 5a. In September 2021, Mr. Hueston moved to suppress evidence seized from his residence, arguing the warrant authorizing the search failed to establish probable cause. *Id.* Mr. Hueston, additionally, sought a *Franks* hearing. *Id.* The district court granted Mr. Hueston's *Franks* hearing request, noting the affidavit filed was "troubling." *Id.*

At the *Franks* hearing, the government called the officer-affiant and another officer who had participated in the brief surveillance of Mr. Hueston's residence. *Id.* After the hearing, the district court found 12 omissions in the affidavit and one misrepresentation. App. pp. 16a-17a. As to the omissions, notably, the tipster was not anonymous as originally understood by the government, but was acting somewhere between a tipster and informant, and the officer-affiant had offered the tipster money when the tipster provided the information. App. p. 16a. In addition, the officer-affiant failed to include that Mr. Hueston was not actually observed at the duplex and that the green Mini Cooper was registered to a female. App. p. 17a.

Further, officers had not reviewed the surveillance footage before applying for the warrant nor did the officer-affiant disclose that the person they pulled over in the black truck, again not Mr. Hueston, was a known drug user and purveyor. *Id.*

As to direct misrepresentations, the officer-affiant admitted on examination that he had not observed the driver of the black truck arrive at the duplex and go into "the left entry door" where Mr. Hueston purportedly resided. *Id.* The officer-affiant admitted this statement in the affidavit was "wrong." *Id.*

The district court found no *Franks* violation. App. p. 18a. The district court stated that Mr. Hueston had not shown the officer-affiant's misrepresentation and several omissions were made with reckless or intentional disregard for the truth. *Id.* And, the district court stated that the omitted and misstated information would not have altered the probable cause determination. *Id.* However, the district court made no specific probable cause determination. App. pp. 23a-24a.

Instead, the district court held that the good-faith exception to the exclusionary rule applied because no *Franks* violation had occurred and the issued warrant was not so deficient that a reasonably trained officer would have known that the affidavit failed to establish probable cause. App. p. 25a. The district court noted that the officer-affiant enhanced his showing of good-faith through his decision to consult the prosecuting county attorney. *Id.* The district court cited circuit precedent, *United States v. Matthews*, 12 F.4th 647, 653 (7th Cir. 2021), which in turn cited *Messerschmidt*, standing for the proposition that an officer-affiant's decision to consult with a prosecuting attorney acts as persuasive evidence

of good-faith. *Id.* Mr. Hueston pleaded guilty to violations under 21 U.S.C. § 841 and 18 U.S.C. § 924(c), and reserved his right to appeal the district court's denial of his suppression motion. App. p. 6a.

The Seventh Circuit Court of Appeals affirmed. The circuit court agreed with the district court that the affidavit lacked critical information. App. p. 8a. For example, the circuit court found that the affidavit should have included information relating to the tipster's identity, and the Mini Cooper's registration. *Id.* In addition, the circuit court noted that the affidavit failed to provide a complete picture of the investigation (which would include that Mr. Hueston was never observed at the duplex), fell short of what the court would expect from an investigating officer, and the affidavit's manifold misstatements and omissions "were unwise—even sloppy— . . . ." *Id.* The circuit court, however, found that the record did not demonstrate the district court clearly erred in finding that the officer-affiant committed no *Franks* violation. *Id.*

In finding no *Franks* violation, the circuit court stated that "[a]s further evidence of good intent" the officer-affiant "also consulted with the prosecutor before and after drafting the affidavit." App. pp. 8a-9a. The circuit court concluded its *Franks* review with: "Considering the helpful information the detectives omitted from the affidavit *and [the officer-affiant's] consultation with the prosecutor both before and after the drafting the affidavit*" the district court did not clearly error in ruling the officer-affiant "did not intend to mislead the issuing judge." App. p. 10a (emphasis added).

REASONS FOR GRANTING THE PETITION

This case involves an important question of federal law that should be settled by this Court—and that is, does an officer-affiant's act of consulting with a prosecuting attorney provide a reviewing court with persuasive evidence that the officer-affiant committed no *Franks* violation. Mr. Hueston avers that an officer-affiant's consultation with a prosecuting attorney should play no, or at most a minimal, role in a reviewing court's determination of whether the officer-affiant intentionally mislead or acted with reckless disregard for the truth – the gravamen of a *Franks* violation.

In *Messerschmidt*, this Court held that the officer-affiant's act of seeking approval of the warrant draft by a superior officer and a prosecuting attorney was not "irrelevant to the objective reasonableness of the officer's determination that the warrant was valid." 132 S. Ct. at 1250. This Court reasoned that the "fact that officers secured these approvals [from a reviewing prosecutor was] certainly pertinent in assessing whether [the officer-affiant] could have held a reasonable belief that the warrant was supported by probable cause." *Id.*

Messerschmidt can be viewed as a continuation of this Court's qualified immunity jurisprudence. In *Malley v. Briggs*, this Court held that an officer's act of seeking a warrant does not insulate the officer or presumptively provide qualified immunity from a finding of civil liability under 42 U.S.C. § 1983. 106 S. Ct. 1092, 1098 (1986). In *Messerschmidt*, this Court clarified the parameters, in a qualified

immunity claim, of how a reviewing court should consider an officer-affiant's consultation with a reviewing prosecuting attorney. 132 S. Ct. at 1250. This Court noted that because "the officer's superior and the deputy district attorney are part of the prosecution team, their review cannot be considered dispositive" but the consultation nonetheless was a substantial factor in assessing and deciding the reasonableness of the officer's reliance on the magistrate judge's probable cause finding. *Id.* at 1249.

Mr. Hueston's challenge, by contrast, is in the *Franks* Fourth Amendment suppression context. A *Franks* violation and whether a *Franks* violation occurred is a distinct analysis and separate in kind from the qualified immunity defense raised in *Messerschmidt*. The *Franks* standard hinges not on whether the officers reasonably relied on the issued warrant's probable cause determination, but whether the officer-affiant intentionally mislead or acted with reckless disregard in drafting the affidavit. The distinction between qualified immunity in *Messerschmidt* and Mr. Hueston's *Franks* challenge is substantial as a reviewing prosecutor, not part of the on-the-ground-investigation, would not know whether the officer-affiant was recklessly including facts in the affidavit or was intentionally misleading. An officer-affiant's act of reviewing an affidavit draft with a prosecuting attorney may be useful in establishing reasonable reliance on the warrant, but it does not provide probative evidence as to the officer-affiant's subjective state of mind. An officer-affiant can just as readily mislead a reviewing prosecuting attorney as he could a magistrate judge with distorted facts in the affidavit. Conceptually, the same

concerns that undergird *Franks* – intentional acts of dishonesty or recklessness in obtaining a search warrant– in seeking judicial approval of the warrant apply to prosecutor review. A prosecutor likely did not conduct or participate in the direct investigation and would have no way of assessing the veracity of the affidavit's representations. As helpful and probative as prosecutor review of an affidavit may be in deciding the reasonableness of the officer's reliance on the issued warrant, the same review lacks utility in a *Franks* setting where the question is one of truthfulness. Indeed, this case illustrates that point as a prosecutor reviewed the affidavit, but he could not catch the veritable mound of omissions and misrepresentations included in the affidavit. The prosecutor's review served no truth-seeking, factual function. Even with prosecutorial review, the affidavit at issue was replete with misrepresentations. Mr. Hueston's petition allows this Court to clarify and potentially cabin the Seventh Circuit Court of Appeals' extension of *Messerschmidt*'s prosecuting attorney consultation factor into the *Franks* violation suppression context.

I. Whether a reviewing court may place substantial evidentiary weight on an officer-affiant's consultation with a prosecuting attorney in a *Franks* challenge raises an important question of federal law.

In *Franks v. Delaware*, this Court held that:

> [W]here the defendant makes a substantial preliminary showing that a false [statement] knowing and intentionally, or with reckless disregard for the truth, was included by the officer-affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the

> defendant by a preponderance of the evidence, and with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

98 S. Ct. 2674, 2676 (1978).

If a reviewing court finds a *Franks* violation, this Court has held that the good-faith exception to the exclusionary rule cannot apply. *See*, *e.g.*, *United States v. Leon*, 104 S. Ct. 3405, 3421 (1984) (internal citation omitted) (holding that "[s]uppression . . . remains an appropriate remedy if the magistrate [judge] . . . in issuing a warrant was misled by information in an affidavit that the officer-affiant knew was false or would have known was false except for his reckless disregard of the truth."). In *Leon*, this Court concluded that a *Franks* violation was one of effectively four exceptions to the good-faith exception. *See id.* at 3421. The other good-faith exceptions outlined by this Court in *Leon* being when "the issuing magistrate judge wholly abandoned his judicial role in the manner condemned" in *Lo-Ji Sales, Inc. v. New York*, 99 S. Ct. 2139 (1979); when "an affidavit [is] so lacking indicia of probable cause" as set forth in *Brown v. Illinois,* 95 S. Ct. 2254, 2265-66 (1975); and when "a warrant [is] so facially deficient—i.e., failing to particularize the place to be searched or the things to be seized." 104 S. Ct. at 3420-21. In such circumstances, an officer "will have no reasonable grounds for believing that the warrant was properly issued." *Id.* at 3420.

In *Messerschmidt*, this Court analyzed the relationship between the qualified immunity standard and one specific *Leon* good-faith exception, that is, whether no

reasonable officer should have relied on the issued warrant's probable cause determination. 132 S. Ct. at 1245. Under the qualified immunity standard, "'[t]he shield of immunity' otherwise conferred by the warrant, will be lost, for example, where the warrant was 'based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* (citing *Leon*, 104 S. Ct. 3405). This Court concluded that the officer-affiant's consultation with the prosecuting attorney supported the government's argument that the officer-affiant's "judgment that the scope of the warrant was supported by probable cause . . . was not 'plainly incompetent.'" *Id.* at 1249 (citing *Malley*, 106 S. Ct. at 1092). In essence, in *Messerschmidt*, although a qualified immunity analysis, this Court's reasoning regarding the officer-affiant's consultation with the prosecuting attorney could also be interpreted to apply to the specific *Leon* exception regarding whether the officer-affiant "held a reasonable belief that the warrant was supported by probable cause" and the officer-affiant acted objectively reasonably in concluding "the warrant was valid." 132 S. Ct. at 1250.

The Seventh Circuit Court of Appeals has since applied the *Messerschmidt* framework to the *Leon*, good-faith analysis when the issue raised was whether the officer reasonably, objectively relied on the issued warrant's probable cause finding. *See Matthews*, 12 F.4th at 655. In *Matthews*, the circuit court noted that the officer-affiant's objective good faith was bolstered "by his decision to consult with the State's Attorney before preparing the complaint for a search warrant. . . . [And,] [c]onsulting with the State's Attorney . . . is one step a responsible and diligent

officer can take, and such consultation is . . . exactly what *Leon's* good-faith exception expects of law enforcement." *Id.* at 656 (internal citations omitted). The circuit court further noted that this Court "has held that attorney (and magistrate [judge]) approval of a warrant is not 'dispositive,'" but approval and consultation is "'certainly pertinent in assessing whether [an officer] could have held a reasonable belief that the warrant was supported by probable cause.'" *Id.* (quoting *Messerschmidt*, 132 S. Ct. at 1235) (parenthesis in the original).

Outside of the Seventh Circuit Court of Appeals, reviewing courts have applied *Messerschmidt*'s prosecuting attorney review criteria in the *Leon* reasonableness context in qualified immunity and criminal suppression settings. *See Opalenik v. LaBrie*, 945 F. Supp. 2d 168, 186 (D. Mass. 2013) (qualified immunity); *Blanchard-Diagle v. Geers*, 6:17-CV-00078, 2017 WL 10841298, at *7 (W.D. Tex. July 15, 2017) (qualified immunity); *Garcia v. Village of Lake Delton*, 20-cv-988-bbc, 2022 WL 203474, at *4 (E.D. Wisc. Jan. 24, 2022) (noting the officers review of the search warrant material with the codefendant prosecutor supported a finding of qualified immunity because the civil plaintiff did "not argue that the complaint . . . falsely represents what" was represented in the affidavit); *Long v. Boucher*, Case No. 1:19-cv-56, 2020 WL 6899496, at *8 (D. Utah Nov. 24, 2020) (qualified immunity); *Peffer v. Stephens*, 880 F.3d 256, 263 (6th Cir. 2018) (qualified immunity); *United States v. Lyles*, 910 F.3d 787, 796 (4th Cir. 2018) (quoting *Riley v. California*, 132 S. Ct. 2473, 2482 (2014)) (criminal suppression challenge,

declining to find the good-faith exception applied to the officer's reliance on the issued warrant despite the officer's consultation with a state prosecutor).

In affirming the district court's denial here, however, the circuit court did not limit *Messerschmidt's* reach to the appropriate *Leon* good-faith exception – reasonable reliance. Rather, the circuit court extended *Messerschmidt's* attorney-consultation factor to a *Franks* violation analysis. App. p. 10a. Specifically, in analyzing whether the district court erred in its *Franks* review, the reviewing circuit court stated that the officer-affiant's "consultation with the prosecutor both before and after drafting the affidavit," supported the district court's evidentiary finding that the officer-affiant "did not intend to mislead the issuing judge." *Id.* The question for resolution in Mr. Hueston's petition is whether the circuit court's weight placed on the officer-affiant's consultation with the prosecuting attorney was proper in the *Franks* context? Stated differently, as Mr. Hueston contends, should *Messerschmidt* only apply to *Leon* reasonable reliance determinations?

In the qualified immunity context, reviewing courts have concluded that an officer-affiant's consultation with, and approval by, a prosecuting attorney cannot save a warrant under a *Franks* challenge. *See*, *e.g.*, *Monteiro v. Comier*, No. 1-21-cv-00046-MSM-LDA, 2023 WL 6314658, at *17 (D. R.I. Sept. 28, 2023) (noting that when "the magistrate [judge] was intentionally or recklessly mislead[]. . .: if that were true, [the officer-affiant] cannot rely on the approval of it by others who were oblivious to the facts."); *compare with Wynn v. City of Griffin, Georgia*, No. 19-10479, 2021 WL 4848075, at *7, *8 (11th Cir. 2021) (internal citation omitted) (no

allegation of reckless disregard for the truth raised) (holding that because the warrant challenger did not allege the officer-affiant proffered false or omitted information in the affidavit and the officer-affiant consulted with his supervisors and the assistant district attorney, the record showed the officer-affiant had a good-faith belief that his affidavit was truthful.). This Court's review will clarify how the *Messerschmidt* attorney-consultation standard should apply in a criminal *Franks* setting and whether the circuit court's application of *Messerschmidt* was appropriate in Mr. Hueston's case. Or alternatively, whether this Court intended *Messerschmidt* to function only as a framework for assessing reasonable reliance on the issued warrant.

Furthermore, in the qualified immunity context, a circuit court has expressed skepticism that *Messerschmidt's* reviewing attorney principle applies when the warrant challenger raises a *Franks* violation. *See, e.g.*, *Wheeler v. City of Searcy, Arkansas*, 14 F.4th 843, 854 (8th Cir. 2021) (declining to extend *Messerschmidt* and the attorney-review principle to the facts of a qualified immunity defense because, in part, *Messerschmidt* "did not involve a claim that officers obtained a warrant based on a misleading affidavit, its discussion of the officers' reliance on the prosecuting attorney's advice is inapplicable to the present case" which *did* include a claim that the officer-affiant either lied or was reckless with the truth under the *Franks* standard.). *But see Stonecipher v. Valles*, 759 F.3d 1134, 1143-44 (10th Cir. 2014) (in a qualified immunity defense on a claim of an unlawful search and seizure, the Tenth Circuit Court of Appeals held that the investigating officer-

affiant's consultation with a prosecutor regarding probable cause demonstrated the officer-affiant did not act with reckless disregard for the truth in preparing the search warrant). Review of Mr. Hueston's petition will clarify *Messerschmidt's* patently divergent treatment by the lower courts in the *Franks* context.

The Eighth Circuit Court of Appeals' skepticism that *Messerschmidt's* attorney consultation principle should apply to an alleged *Franks* violation should be extended by this Court. Certainly, multiple actors, including an attorney, reviewing a warrant and concluding there is no probable cause defect supports a showing by the government that the officer-affiant acted in good-faith. Typically, an officer-affiant is not an attorney, and his reliance on a conclusion of law made by a person trained in the law would not be unreasonable. But, the same principle cannot apply in a *Franks* factual context. Namely, because the reviewing attorney, though legally trained, is not part of the investigation on the ground, and may not know whether the proffered material in the affidavit is intentionally false or included recklessly. A reviewing attorney's task is to find whether the proffered facts establish probable cause under the totality of the circumstances, not whether the officer misled.

As the Eighth Circuit Court of Appeals noted in *Wheeler*, because "*Messerschmidt* did not involve an allegation that the officers who applied for a search warrant intentionally or recklessly provided false information to a neutral magistrate" any mistake in the officer's reliance in that case on the issued warrant would relate to officer's competence in evaluating probable cause, not veracity. 14

F.4th at 853-54; *see also Messerschmidt*, 132 S. Ct. at 1234, n.2 (this Court noting that "[t]here is no contention before us that the affidavit was misleading in omitting any of the facts."). The same cannot be said of a *Franks* violation. Indeed, many such prosecuting attorney reviews, such as in Mr. Hueston's case, are done hastily, without a total understanding of the facts of the investigation, and without an attending ability by the attorney to assess the officer-affiant's and the affidavit's veracity. Because a prosecutor has no way of assessing the officer-affiant's credibility, an officer-affiant's consultation with the prosecutor provides no utility to the *Franks* factual analysis.

This Court's review would clarify the scope of *Messerschmidt* in the *Franks* violation context and resolve the apparent split between the Seventh Circuit Court of Appeals' treatment of the *Messerschmidt* in Mr. Hueston's case, and the Eighth Circuit Court of Appeals' treatment of *Messerschmidt* in *Wheeler*. Cf. *Taliancich v. Lucio*, No. B-12-CV-111, 2014 WL 5426434, at *3, *15 (S.D. Tex. Oct. 23, 2014) (finding that the civil defendant was entitled to qualified immunity and had committed no *Franks* violation where the assistant district attorney had reviewed the arrest warrant application). Indeed, under *Franks*, an officer-affiant cannot rely on a magistrate judge's finding of probable cause, a question of law, to cure his knowing proffer of materially false statements or statements made in reckless disregard for the truth in the affidavit, a question of fact. 98 S. Ct. at 2681. Similarly, a reviewing court should not resort to a prosecutor's review for probable cause as evidence to determine whether the officer-affiant acted with the requisite

prohibited mental state under *Franks*. *See*, *e.g.*, *Marvaso v. Sanchez*, 971 F.3d 599, 610 (6th Cir. 2020) (concluding that the *Leon* objective good-faith reliance standard does not control when the warrant challenger raises a *Franks* violation). If judicial branch review of a warrant affidavit cannot weigh on whether the affiant committed a *Franks* violation, neither should executive branch review of the same be factored as evidence in a *Franks* challenge. The Seventh Circuit Court of Appeals' use of *Messerschmidt's* attorney review principle was improper in a *Franks* violation challenge, and Mr. Hueston's petition allows this Court to resolve *Messerschmidt's* application.

II. This case is an ideal vehicle for the question presented.

This case squarely presents the issue of whether a reviewing court may place substantial evidentiary emphasis on an officer-affiant's consultation with a prosecuting attorney before obtaining a search warrant as probative indicia the officer-affiant committed no *Franks* violation; specifically, that the officer-affiant did not intentionally mislead or act with reckless disregard for the truth. Whether the officer-affiant committed a *Franks* violation was the primary question presented before the district court and the circuit court. And, the circuit court placed substantial evidentiary weight in affirming the district court's *Franks* violation denial on the officer-affiant's consultation with a prosecuting attorney before drafting and obtaining the search warrant of Mr. Hueston's residence. This case presents an ideal vehicle for the question presented and resolution of the Seventh Circuit Court of Appeals' erred treatment of *Messerschmidt* in a *Franks* claim.

As noted above, reviewing courts are considering under *Messerschmidt*, whether the officer-affiant's consultation with a prosecuting attorney supports the reasonability of the officer-affiant's objective reliance on the issued warrant. *See Armstrong v. Asselin*, 734 F.3d 984, 987 (9th Cir. 2013) (finding qualified immunity attached because under *Messerschmidt* the officers' consultation with a state prosecutor demonstrated their objectively reasonable belief that the issued warrant was valid under *Leon*); *United States v. Grant*, 682 F.3d 827, 841 (9th Cir. 2012) (applying *Messerschmidt* and finding that the good-faith exception did not save the defective warrant because no reasonable officer would have objectively relied on the issued warrant and there was no independent review by a prosecutor); *see also United States v. Underwood*, 725 F.3d 1076, 1081-82 (9th Cir. 2013) (finding suppression appropriate where the affidavit failed to establish probable cause and the officer "did not have a supervisor or anyone else review, let alone, approve his affidavit."). Accordingly, *Messerschmidt* established prosecutor-review as a relevant consideration in one good-faith exception, and Mr. Hueston's petition presents an ideal chance for this Court to offer guidance on whether *Messerschmidt* should apply in another good-faith exception; in the distinct setting of a *Franks* challenge.

CONCLUSION

Mr. Hueston's petition for a writ of certiorari should be granted.

Dated this 10th day of April, 2024.

Respectfully submitted,
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